

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

**NEVADA YELLOW CAB CORPORATION, NEVADA  
CHECKER CAB CORPORATION, and NEVADA  
STAR CAB CORPORATION, a Single Employer**

**and**

**Case**

**28-CA-218477**

**INDUSTRIAL TECHNICAL & PROFESSIONAL  
EMPLOYEES UNION, OPEIU LOCAL 4873, AFL-CIO**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**COUNSEL FOR THE GENERAL COUNSEL’S BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**I. INTRODUCTION**

In a decision issued on December 27, 2018, Administrative Law Judge Arthur J. Amchan (the ALJ), dismissed the Complaint in this matter in its entirety. The Complaint alleged that Respondent,<sup>1</sup> dating back to January of 2018, violated Sections, 8(a)(1), (3) and (5) of the Act. See JD(D.C.)-84-18. Counsel for the General Counsel (CGC) respectfully excepts to the ALJ’s failure to find that Respondent failed and/or refused to pay its employees a bargained-for \$250 ratification bonus in violation of Sections 8(a)(1), (3), and (5) of the Act. CGC also respectfully excepts to the ALJ’s failure to find Respondent unilaterally changed the parties’ grievance processing practice by refusing to provide the Union with a written response after Step II grievance meetings and by informing the Union it no longer had to provide such a response in violation of Section 8(a)(1) and (5) of the Act. CGC also respectfully excepts to the ALJ’s failure to find Respondent unilaterally changed the parties’ grievance processing practice by ceasing its practice of advancing grievances to Step III where the Union’s appeal to Step III was

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<sup>1</sup> Respondent Nevada Yellow Cab Corporation (Yellow), Respondent Nevada Checker Cab Corporation (Checker), and Respondent Nevada Star Cab Corporation (Star) entered into a Joint Stipulation with the General Counsel and the Charging Party acknowledging that Yellow, Star and Checker operate as a single Employer for the purposes of the National Labor Relations Act. JTX 1, paragraph 1. Yellow, Checker and Star are referred to throughout this brief as Respondent.

filed within 10 days after the Union received the Respondent's written response to the Step II grievance in violation of Section 8(a)(1) and (5) of the Act. In relation to CGC's exceptions concerning the changes Respondent made to the parties' grievance processing practices, CGC respectfully excepts to the ALJ's failure to draw an adverse inference against Respondent based on its failure to produce subpoenaed documents related to the processing of grievances.

## **II. STATEMENT OF THE CASE<sup>2</sup>**

On July 23, 2018, the Regional Director for Region 28 issued a Complaint and Notice of Hearing (the Complaint) in this matter.<sup>3</sup> On August 7, 2018, Respondent filed an answer to the Complaint (the Answer).<sup>4</sup> The ALJ conducted a hearing concerning the allegations of the Complaint on October 23, 2018 through October 25, 2018. On December 27, 2018, the ALJ issued a Decision and Recommended Order dismissing the Complaint in its entirety including, but not limited to, the allegations that are the subject of these exceptions.<sup>5</sup> CGC hereby respectfully submits this Brief in Support of the General Counsel's Exceptions to the ALJ's Decision and Recommended Order.

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<sup>2</sup> GCX\_\_\_ refers to General Counsel's Exhibit followed by the exhibit number; RX\_\_\_ refers to Respondent's Exhibit followed by exhibit number; JTX\_\_\_ refers to Joint Exhibit followed by the exhibit number; "Tr. \_:\_\_\_" refers to transcript page followed by line or lines of the unfair labor practice hearing; JD\_\_\_ refers to the page number of the Decision of the Administrative Law Judge dated December 27, 2018.

<sup>3</sup> GCX 1(f).

<sup>4</sup> GCX 1(h).

<sup>5</sup> JD 1.

### **III. SPECIFICATION OF THE QUESTIONS INVOLVED AND TO BE ARGUED**

- A. Whether the ALJ erred in failing to find Respondent failed and/or refused to pay its employees their \$250 ratification bonus in violation of Sections 8(a)(1), (3), and (5) of the Act. (Exceptions 1 through 4 and 19)**
- B. Whether the ALJ erred in failing to find Respondent unilaterally changed the parties' grievance processing practice by refusing to provide the Union with a written response after Step II grievance meetings and informing the Union it no longer had to provide such a response. (Exceptions 5 through 15, 17, and 19)**
- C. Whether the ALJ erred in failing to find Respondent unilaterally changed the parties' grievance processing practice by ceasing its practice of advancing grievances to Step III of the grievance procedure where the Union's appeal to Step III was filed within 10 days after the Union received the Respondent's written response to the Step II grievance. (Exceptions 5 through 14, 16, 18, and 19)**
- D. Whether the ALJ erred in failing to draw an adverse inference based on Respondent's failure to produce grievance records requested by the CGC in subpoena duces tecum B-1-12UWMVX. (Exception 6)**

### **IV. STATEMENT OF FACTS**

#### **A. Collective Bargaining Negotiations and the Ratification Bonus for Drivers**

Negotiations for the 2018-2022 collective bargaining agreement (CBA) took place throughout 2017. There were ten (10) bargaining sessions.<sup>6</sup> The first session was on June 7, 2017, and the last session was on December 6, 2017.<sup>7</sup> The Union's chief negotiator was Paul Bohelski (Bohelski), a retired senior international representative for the Office and Professional Employees International Union (OPEIU). Dennis Arrington (Arrington), President of the Industrial Technical and Professional Employees Union, Local 4873 (the Union), which is the

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<sup>6</sup> Tr. 227:11-14. Bargaining sessions occurred on the following dates: June 7, 2017; August 22 and 23, 2017; September 26 and 27, 2017; October 10 and 11, 2017; November 8 and 9, 2017; and December 6, 2017. RX 2.

<sup>7</sup> Tr. 227:15-20. JD at 2.

OPEIU's second largest local,<sup>8</sup> assisted and provided support to Bohelski.<sup>9</sup> Respondent's chief negotiator was Jonathan Schwartz (Schwartz), a board member and director for Respondent.<sup>10</sup> The final December 6, 2018, bargaining session ended with Schwartz giving the Union Respondent's last, best and final offer.<sup>11</sup>

About one week later, Bohelski and Arrington had a phone conversation with Schwartz about Respondent's last, best and final offer.<sup>12</sup> Bohelski and Arrington made the phone call to see if there was some way to get a signing or ratification bonus for their bargaining unit members, taxi drivers employed by Respondent, in exchange for a Respondent's proposed waiver of the minimum wage.<sup>13</sup> During the phone call, Bohelski told Schwartz that the contract was not going to pass with the minimum wage waiver, and the only way they could get the CBA ratified was if Respondent was willing to give drivers something they would feel they got in return for waiving the minimum wage.<sup>14</sup> Bohelski and Arrington suggested a \$1,000 signing bonus for the minimum wage.<sup>15</sup> Schwartz told Bohelski and Arrington he would have to talk with his partners about it.

Around December 19, 2017, Bohelski, Arrington and Schwartz had a second conversation over the phone about the ratification bonus.<sup>16</sup> Schwartz said the Respondent could offer \$500. The Union countered with \$750, but it was turned down, and the parties agreed to the \$500.<sup>17</sup> The parties' agreement was memorialized in an e-mail from Jere McBride

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<sup>8</sup> Tr. 226:1 to 4.

<sup>9</sup> Tr. 227:25 to 228:2.

<sup>10</sup> Tr. 45:25 to 47:6.

<sup>11</sup> Tr. 273:12-22.

<sup>12</sup> Tr. 276:19 to 277:8; Tr. 341:2-16.

<sup>13</sup> Tr. 277:10-20; Tr. 342:24 to 325:3.

<sup>14</sup> Tr. 277:22 to 278:7. JD 6.

<sup>15</sup> Tr. 278:8-14. JD 6.

<sup>16</sup> Tr. 279:1-7. JD 6.

<sup>17</sup> Tr. 279:17-20. JD 6.

(McBride), Respondent's Director of Technology and Senior Litigation Paralegal,<sup>18</sup> to Arrington and Bohelski dated December 22, 2017, attaching the last, best and final offer, the alternative to the last best and final offer, and a cover letter signed by Schwartz explaining the parties' agreement for ratification bonus payments.<sup>19</sup> The cover letter stated, in part, the ratification bonus would be paid as follows:

- 1) All drivers with seniority of five years or more actively employed as of 12/31/17 shall receive a signing bonus of \$500 per driver to be paid within one week of the executed LBF CBA provided there is no work action of any kind;
- 2) All drivers with seniority of less than five years actively employed as of 12/31/17 shall receive a signing bonus of \$250 per driver to be paid within one week of the executed LBF CBA provided there is no work action of any kind;
- 3) Ninety days after execution of the LBF CBA, all drivers with seniority of less than five years actively employed as of 12/31/17 shall receive an additional signing bonus of \$250 provided there is no work action of any kind; If the driver is no longer of record 90 days after execution of the LBF CBA, that driver shall receive no additional signing bonus.<sup>20</sup>

The letter continued:

On several occasions during our negotiations, YCS made offers including the economic terms listed in the LBF along with the **Waiver**. On more than one occasion, the ITPEU countered that it would accept the terms similar to the LBF, but not the **Waiver**. YCS explained that the economic terms offered were contingent upon the ITPEU accepting the **Waiver**. The condition that the **Waiver** be included is the same with the LBF for YCS to offer the economic increases provided for in the LBF.

In fact, YCS explained that in the absence of the **Waiver** being accepted, YCS would revise its economic package to reflect the decline in the Las Vegas taxi market due to the entrance of Uber and Lyft in the market. As I explained during our negotiations, the terms as to the annual bonus, safety bonus, health care contribution by YCS should decline commensurate with the decline in Las Vegas market if the **waiver** was not included in the final agreed upon CBA.<sup>21</sup>

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<sup>18</sup> Tr. 446:20 to 447:9.

<sup>19</sup> GCX 30.

<sup>20</sup> GCX 30 at pages 3-4.

<sup>21</sup> GCX 30. (emphasis supplied)

Bohelski put together a cover page explaining Respondent's last, best and final offer for the 2018-2022 CBA and the proposed ratification bonus.<sup>22</sup>

On Saturday, January 6, 2018, the 2018-2022 CBA with the proposed \$500 ratification bonus was ratified by the drivers.<sup>23</sup>

## **B. The Parties' Procedural Grievance Practice**

### **1. The Contractual Grievance Procedure**

Article 15 of the 2018-2022 CBA contains the parties' contractual grievance procedure.<sup>24</sup> Article 15, Section B requires a grievance involving discharge be brought directly to Step Two and must be filed within ten (10) days of the discharge.<sup>25</sup> Grievances not involving discharge must be brought within ten (10) days from the date the complaining party discovered the facts or should have discovered the facts giving rise to the grievance.<sup>26</sup> Grievances beyond Step one must be presented in writing.<sup>27</sup> The Steps of the grievance process are as follows:

**STEP 1:** The driver who has a grievance shall discuss it with the appropriate Employer representative. If the grievance is not settled at the Step One (1) meeting, it may be appealed by the Union in writing to Step Two (2) within ten (10) days of the Step One (1) meeting. Employer grievances shall be in writing and processed beginning with Step Two (2).

**STEP 2:** The Union representative and the Employer representative shall meet within ten (10) days of the written notice demanding the Step Two (2) procedure, and will discuss the grievance. If the grievance is not disposed of to the satisfaction of the party filing the grievance at Step Two (2), the grievance may be appealed to Step Three (3) by the party filing a grievance, by filing a written appeal to the opposing party within ten (10) days after the Step Two (2) meeting.

**STEP 3:** Within eight (8) days after delivery of the appeal from Step Two (2), the parties (the Employer represented by the Employer CEO or his designee, and the Union represented by the Nevada Representative or his/her appointed

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<sup>22</sup> GCX 37.

<sup>23</sup> GCX 25. JD 6.

<sup>24</sup> GCX 5 at pages 20 to 21.

<sup>25</sup> GCX 5 at page 20.

<sup>26</sup> GCX 5 at page 20.

<sup>27</sup> GCX 5 at page 20.

designee) will meet to attempt to settle the grievance. If the grievance is not disposed of to the satisfaction of the complaining party, the grievance may be appealed to arbitration by the Employer or the Union lodging a written appeal with the other party within ten (10) days of the Step Three (3) meeting.<sup>28</sup>

## **2. The Net Book Grievance and Respondent's Change to the Procedural Grievance Practice**

Shortly after ratification of the CBA described above in Section IV, A, Respondent changed the way it was deducting trip charges from the taxi drivers.<sup>29</sup>

On January 29, 2018, Ruthie Jones (Jones), the Union's representative in Las Vegas responsible for managing contracts,<sup>30</sup> filed a Step 1 grievance regarding Respondent changing the method for calculating the drivers' net book (the net book grievance).<sup>31</sup>

On February 13, 2018, a Step 1 meeting for the net book grievance took place.<sup>32</sup>

On February 14, 2018, Michael Bailin (Bailin), Respondent's Director of Taxicab Operations,<sup>33</sup> provided a written Step I decision on the net book grievance and on February 21, 2018, Jones appealed the decision to Step 2.<sup>34</sup>

On March 21, 2018, the parties met at Step 2 to discuss the net book grievance.<sup>35</sup> Notwithstanding language in Article 15 of the CBA requiring the parties' meet within ten (10) days of the demand for Step 2, the parties met approximately 30 days after the demand was made by the Union. During the meeting, Jones stated the burden was on Respondent to prove they discussed the changes to the trip charge during negotiations, and that the Union would proceed to Step 3.<sup>36</sup> Also during the Step 2 meeting, Respondent requested information from the Union

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<sup>28</sup> GCX 5 at pages 20-21. This change was also alleged in the Complaint as a mid-term contract modification. That allegation that was dismissed by the ALJ. The CGC does not take exception.

<sup>29</sup> Tr. 287:23 to 288:5.

<sup>30</sup> Tr. 227:22-25.

<sup>31</sup> GCX 26. JD 6.

<sup>32</sup> Tr. 501:9-11; GCX 27 at page 2.

<sup>33</sup> Tr. 429:1-10. JD 6.

<sup>34</sup> GCX 38. JD 6.

<sup>35</sup> Tr. 508:24 to 509:7. JD 6.

<sup>36</sup> Tr. 511:3-8.

related to the net book grievance including, but not limited to, the Union's bargaining notes reflecting the matter was discussed by the parties. Respondent gave the Union a deadline to provide the information by Friday, April 6, 2018.<sup>37</sup>

On March 30, 2018, Jones responded to Respondent's request for information telling them that the Union did not have any documents.<sup>38</sup>

Notwithstanding the above, on April 2, 2018, McBride e-mailed Jones attaching a letter requesting information that was electronically signed by Schwartz. The Schwartz letter noted the documents requested were necessary so that Respondent could "further evaluate the merits of the Union's January 29, 2018 grievance . . ."<sup>39</sup> Schwartz's letter gave the Union until April 6, 2018, to provide the documents.<sup>40</sup>

On April 9, 2018, and in the absence of receiving a written response on the net book grievance at Step 2, Jones appealed to Step 3.<sup>41</sup> After appealing to Step 3, Jones called Bailin and asked him where her written Step 2 response was. Bailin responded he didn't have to give her one. Jones asked what he was talking about. Bailin said he could give her one, but he didn't have to, and told her to read her contract.<sup>42</sup> There is no dispute that Respondent refused to advance the net book grievance to Step 3 or provide a written response at Step 2.

### **3. Step 2 Grievance History**

At the beginning of the hearing, Respondent did not provide any documents responsive to paragraph 19 of Subpoena Duces Tecum B-1-12UWMVX (the Subpoena). Paragraph 19 of the Subpoena requested:

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<sup>37</sup> Tr. 519:5-14.

<sup>38</sup> GCX 42.

<sup>39</sup> GCX 27 at page 2 of 3.

<sup>40</sup> GCX 27 at page 2 of 3.

<sup>41</sup> GCX 39.

<sup>42</sup> Tr. 515:16-25.

19. For the period covered by this subpoena (from April 1, 2016 through the opening of hearing on October 23, 2018), documents including, but not limited to, filed grievances, grievance forms (including Respondent's notes in the Action taken section of grievance forms), grievance responses, meeting notes, agendas, e-mails scheduling grievance meetings at Step I, II and III, and grievance settlements, describing or referencing all grievances filed by the Union including, but not limited to, the grievance set forth below:

- a. About January 29, 2018, the grievance filed by the Union relating to Respondent's calculation of employees' net books (the net book grievance).<sup>43</sup>

During the hearing, counsel for Respondent, counsel for the Union, and the CGC entered into a written stipulation regarding some, but not all, of the requested grievance documents.<sup>44</sup>

On the final day of the hearing, Respondent produced, in connection with the stipulation, approximately 18 Step 2 grievance forms submitted by the Union to Respondent and Respondent's written responses to those grievances.<sup>45</sup> The Union also produced documents including approximately 27 additional Step 2 grievance forms and responses.<sup>46</sup>

Respondent's witness Bailin testified that during the hearing, and in order to find grievance forms that had not been produced responsive to the Subpoena at the outset of the hearing, he instructed Respondent's HR department to search his Outlook calendar using the search term "grievance" and pull up all the places where he had the term "grievance" listed on his calendar.<sup>47</sup> Those dates included dates when he met on grievances.<sup>48</sup> The parties stipulated that when Bailin searched for grievances on his Outlook calendar, at least 61 records of grievances appeared for the period of time covered by the Subpoena.<sup>49</sup> However, only 18

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<sup>43</sup> JTX 2, paragraph 1.

<sup>44</sup> JTX 2.

<sup>45</sup> JTX 2, paragraph 2; JTX 2(a).

<sup>46</sup> JTX 2, paragraph 4; JTX 2(b).

<sup>47</sup> Tr. 432:22 to 433:3.

<sup>48</sup> Tr. 433:4-6.

<sup>49</sup> Tr. 435:12 to 436:4.

grievance forms were produced by Respondent during of the hearing.<sup>50</sup> Of the 18 Step 2 grievance forms produced by Respondent, all but two (2) forms contained a written response to the grievance at Step 2 under the “Action Taken” section of the form.<sup>51</sup> All 27 of the Union-provided Step 2 grievance forms contained a writer response to the grievance at Step 2 under the “Action Taken” section of the form.<sup>52</sup> In addition to grievance forms, the parties exchanged correspondence relating to grievances including, but not limited to, e-mails and letters.<sup>53</sup> For example, Jones testified she sent about two (2) e-mails per grievance to Bailin and exchanged facsimile messages with him about grievances.<sup>54</sup> Respondent failed to produce any documents other than the 18 Step 2 grievance forms it produced on the final day of the hearing. Together, the Step 2 grievance forms provided by Respondent and the Union show that of the 45 provided, only two (2) did not have written responses contained in the “Action Taken” section of the form.<sup>55</sup>

Jones testified at length about the grievance process. Her testimony can be summed up as follows: except for with respect to the net book grievance, Jones always received a response in writing back from Respondent to her Step 2 grievances.<sup>56</sup> Neither Bailin, nor any other of Respondent’s witnesses testified to the contrary. There is no evidence in the record (or even a hint that such evidence may exist) that Respondent ever refused to provide a written grievance response at Step 2 or refused to advance a grievance to Step 3 following the Union’s appeal of that written response at Step 2.

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<sup>50</sup> JTX 2(a).

<sup>51</sup> JTX 2(a).

<sup>52</sup> JTX 2(b).

<sup>53</sup> See GCX 38; GCX 39; GCX 42; JTX 2(b).

<sup>54</sup> Tr. 520:1 to 521:7.

<sup>55</sup> See JTX 2(a) and JTX 2(b).

<sup>56</sup> Tr. 491:7-24.

**C. Respondent Withholds Second Installment of Ratification Bonus from New Drivers**

As noted in Section IV, A, above. The parties agreed that a \$250 ratification bonus would be paid ninety days (90) after execution of the LBF CBA to all drivers with seniority of less than five (5) years actively employed as of December 31, 2017.<sup>57</sup>

Respondent admits it failed to pay that promised portion of the ratification bonus to drivers.<sup>58</sup> Schwartz testified that Respondent withheld the ratification bonus because the Union filed a grievance.<sup>59</sup> Specifically, Schwartz testified that he found it very difficult to pay drivers the balance of their signing bonus following the filing of the net book grievance. According to Schwartz's testimony, he found it very difficult to pay the balance of the signing bonus because the Union had adopted the position that one of the terms of the CBA they negotiated over was not agreed by the Union.<sup>60</sup> Schwartz's testimony that the Employer's change to the trip charge was in some way related to the ratification bonus is contradicted by his own December 22, 2017, letter to the Union setting forth the parties' agreement for a ratification bonus, which mentions the parties' agreement to the minimum wage waiver (6 times) in exchange for the ratification bonus.<sup>61</sup> The letter fails to mention changes to the trip charge as playing any role in the ratification bonus.<sup>62</sup>

On April 11, 2018, Respondent notified drivers by letter that they would not be receiving the second payment for the ratification bonus that was negotiated because of the dispute between the Employer and the Union over the net book grievance.<sup>63</sup> Respondent e-mailed the Union a

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<sup>57</sup> GCX 30 at pages 3-4.

<sup>58</sup> GCX 1(f) and 1(h).

<sup>59</sup> Tr. 171:24 to 172:12.

<sup>60</sup> Tr. 171:12-23.

<sup>61</sup> GCX 30. (emphasis supplied)

<sup>62</sup> GCX 30.

<sup>63</sup> GCX 31.

copy of the letter the day *after* notifying the drivers they would not receive the ratification bonus.<sup>64</sup>

## V. ARGUMENT

### A. The ALJ Erred in Failing to Find Respondent Failed and Refused to Pay Its New Drivers the Remaining Portion of Their \$250 Ratification Bonus in Violation of Sections 8(a)(3) and (5) of the Act (Exceptions 1 through 4 and 19)

The ALJ found the parties agreement for the CBA included the Respondent paying a ratification bonus in exchange for ratification of the terms of Respondent's last, best and final offer.<sup>65</sup> The ALJ also found that the Union supported the last, best and final offer and the drivers ratified the CBA containing the terms of that ratification bonus.<sup>66</sup> After the Union filed the net book grievance discussed above, Respondent refused to pay the second portion of the ratification bonus. Notwithstanding the parties' clear agreement for a ratification bonus for the CBA, the ratification of the CBA, and Respondent's subsequent refusal to continue in effect the terms of the parties' agreement for ratification of the CBA, the ALJ dismissed the allegation. The ALJ instead found that "since the Union backed away from the conditions for the bonus," presumably by filing a grievance over the correct interpretation of the CBA, "Respondent was not obligated to pay the rest of the bonus until there was a determination the Union's interpretation of the new contract was correct."<sup>67</sup> The ALJ cites one case, also cited by Respondent, in support of the conclusion: *Hertz Corp. & Nat'l Fed'n of Guards, Local 5 (Hertz Corp.)*.<sup>68</sup>

CGC respectfully requests the Board overrule the ALJ's Decision and Recommended Order with respect to Respondent's withholding of the ratification bonus for two (2) reasons:

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<sup>64</sup> GCX 31.

<sup>65</sup> JD 7.

<sup>66</sup> JD 7.

<sup>67</sup> JD 7.

<sup>68</sup> 304 NLRB 469 (1991).

First, the ALJ's conclusion that because the Union filed a grievance relating to a dispute between the parties' over the correct interpretation of one part of the CBA, Respondent was privileged to cease continuing in effect other terms of the parties agreement, is not supported by Board law and fails to apply the correct analysis for alleged violations of Section 8(a)(5) of the Act within the meaning of 8(d). Second, the ALJ's Decision and Recommended Order failed to address the related 8(a)(3) portion of this allegation.

### **1. The ALJ's Reliance on *Hertz Corp.* is Misplaced**

The ALJ relied upon *Hertz Corp.*, supra, for dismissing both the 8(a)(5) and 8(d) allegations. In *Hertz Corp.*, the Board agreed with an ALJ's decision that a union's breach of an express oral bilateral agreement to submit the parties' negotiated contract to a ratification vote justified the Respondent's refusal to implement the terms of the new contract.<sup>69</sup> The Board noted that the contract (even though duly executed), could not become effective until the agreed condition precedent of ratification had been satisfied.<sup>70</sup> The Board also noted the Supreme Court has stated that ratification agreements are enforceable if agreed to by the parties,<sup>71</sup> and that, when a union has agreed to ratification as a precondition to the employer's duty to perform, the employer is under no enforceable obligation to execute the written contract prior to ratification.<sup>72</sup> The Board noted that it was true that ratification is only a permissive subject of bargaining, and that under the authority of *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*,<sup>73</sup> the union's breach of an agreement to obtain employee ratification may not be an unfair labor practice. However, the Board noted it did not follow that the Respondent violated Section

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<sup>69</sup> *Hertz Corp.*, 304 NLRB at 469 (1991).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* citing *N.L.R.B. v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)

<sup>72</sup> *Id.* Citing *Santa Rosa Hosp.*, 272 NLRB 1004, 1006 (1984).

<sup>73</sup> 404 U.S. 157 (1971).

8(a)(5) by thereafter insisting on compliance with the ratification agreement made by the parties.

According to the Board:

In so doing, the Respondent is not bargaining to impasse about a permissive bargaining subject. Bargaining in this case has been concluded, and the parties have expressly agreed to the ratification procedure. The Union's subsequent repudiation of the ratification agreement cannot unilaterally reform the parties' agreement or return the parties to the pre-agreement negotiating stage.

***Accordingly, because the Union has never complied with the parties' agreement to ratification as a precondition to the implementation of the substantive terms of their collective-bargaining agreement, the Respondent never was obliged to put those terms into effect.***<sup>74</sup>

Thus, the Board in *Hertz Corp.*, acknowledged that the Respondent was not obliged to implement the terms of the contract because the Union had failed to meet a condition precedent for implementation—ratification.

This case is clearly not a *Hertz Corp.* case. Even if *Hertz Corp.* is applied to the facts herein, *Hertz Corp.* requires a finding that Respondent violated the Act as alleged. In the instant matter, as in *Hertz Corp.*, bargaining concluded, and the parties expressly agreed to a ratification procedure and a ratification bonus as a condition precedent to execution and implementation of the CBA. Here, in contrast to *Hertz Corp.*, the Union complied with the terms of that ratification agreement, agreed to it and supported ratification. The membership ratified the CBA, the parties executed it, and its terms have been implemented by Respondent. Where in *Hertz Corp.*, no substantive agreement was ever reached, here the parties have one.

Here, also in contrast to *Hertz Corp.*, the Respondent subsequently refused to continue in effect the terms of the parties' ratification agreement because the Union filed the net book grievance. Ironically, the employees, through their Union, did precisely what the parties agreed was the appropriate course of action when there is a dispute regarding interpretation of the terms

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<sup>74</sup> *Id.* at 469. (emphasis supplied)

of the CBA—they filed a grievance. The Union’s filing of a grievance on behalf of employees relating to interpretation of the terms of the CBA, however, does not render the remainder of the parties’ agreement null and void or return the parties to the pre-agreement negotiating stage. Under the CBA, Respondent’s recourse is to contest that grievance through the grievance-arbitration procedure. The CBA does not permit Respondent to resort to the self-help measure of withholding the second installment of the ratification bonus to its new drivers because the Union filed a grievance.

Taking the ALJ’s Decision and Recommended Order to its logical extreme, an employer could unilaterally stop paying overtime to all employees if their Union files a grievance on behalf of one employee regarding interpretation of the overtime provisions of a CBA (since by the act of filing the grievance, the Union has backed away from the parties’ agreement). On the other hand, a Union might strike (notwithstanding a no-strike provision of an agreement) in response to the Employer’s filing of a grievance over a Union steward’s access to the Employer’s facility (since by the act of filing the grievance, the Employer has backed away from the parties’ agreement). If one party’s filing of a grievance can serve to render inapplicable and meaningless the entirety of their agreement, what’s the point of even having a collectively bargained grievance procedure?

**2. Under the Board’s Sound Arguable Basis Standard, Respondent Violated Section 8(a)(1) and (5) of the Act within the Meaning of Section 8(d) of the Act by Refusing to Pay New Drivers the Remaining \$250 Ratification Bonus**

Where the General Counsel asserts an unlawful contract modification within the meaning of Section 8(d), the Board must determine whether the employer has altered the terms of the contract without the consent of the other party.<sup>75</sup> In cases of this type, the Board will not find a

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<sup>75</sup> *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005).

violation if “an employer has a ‘sound arguable basis’ for its interpretation of a contract and is not ‘motivated by animus or . . . acting in bad faith.’”<sup>76</sup> A defense to a contract modification allegation can be that the Union has consented to the change.<sup>77</sup>

Under the sound arguable basis standard, a contract modification violation does not exist if there is a good faith reliance on a sound and arguable interpretation of the contract.<sup>78</sup> As discussed in CGC’s post-hearing brief to the ALJ, any argument put forth by Respondent that it was relying on a sound and arguable interpretation of the parties agreement for the 2018-2022 CBA when it withheld the ratification bonus is implausible.

It is clear the ratification bonus was negotiated in exchange for the Union bargaining committee’s unanimous support of the terms of the CBA in conjunction with approval of the CBA by the membership. The Union provided its support of the terms of the CBA and the membership ratified the CBA. Respondent was obligated to pay final installment of the ratification bonus to new drivers with seniority of less than five (5) years 90 days after execution. Respondent did not pay new drivers the final installment of the ratification bonus. Instead, Respondent reached out directly to drivers to inform them that a dispute had arisen between Respondent and the Union about the conditions for paying the signing bonus and, as a result, drivers would not be receiving it. There is nothing in the language of the parties’ agreement permitting Respondent to withhold payment of the ratification bonus if a dispute arises between Respondent and the Union under that agreement. There is nothing in the language of the parties’

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<sup>76</sup> *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965) (when “an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,” the Board will not determine which interpretation is correct))

<sup>77</sup> *Bath Iron Works Corp.*, 345 NLRB at 501.

<sup>78</sup> *Id.* at 502.

agreement that indicates the ratification bonus was predicated on anything other than the Union's support for the CBA and the members' ratification of the CBA.

By withholding the second ratification bonus payment, Respondent made a significant mid-term modification of the CBA, while the CBA was in effect and without the Union's consent. By doing so, Respondent violated Sections 8(a)(1) and (5) and 8(d) of the Act. The Board has consistently found an employer's mid-term modification of a fixed term contract to be unlawful.<sup>79</sup> This is true even where continued compliance with the contract may cause the employer financial hardship.<sup>80</sup>

### **3. The ALJ Failed to Address the Related 8(a)(3) Allegation**

In the instant matter, Respondent admits that it withheld the second portion of the ratification bonus from its drivers because the Union (the drivers' collective-bargaining agent) filed the grievance related to Respondent's changes to the calculation of drivers' net books. By doing so, it discriminated against its drivers for engaging in union and protected concerted activities, through their recognized collective-bargaining agent.

Employee action taken to implement a collective bargaining agreement is "but an extension of the concerted activity giving rise to that agreement."<sup>81</sup> Such activity is concerted regardless of whether the employee's understanding of the contract is correct.<sup>82</sup>

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<sup>79</sup> See *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), *enfd.* 505 F.2d 1302 (5<sup>th</sup> Cir. 1974), *cert. denied* 423 U.S. 826 (1975); *C & S Indus., Inc.*, 158 NLRB 454, 457-58 (1966); *Hosp. San Carlos, Inc.*, 355 NLRB 153 (2010) (finding employer did not have a sound arguable basis for its interpretation that the contract did not require it pay the full amount of a Christmas bonus owed to employees); *Lenawee Stamping Corp.*, 365 NLRB No. 97, slip op. (2017) (where Board agreed with administrative law judge that the employer did not have a sound arguable basis for granting raises to unit employees without the Union's consent).

<sup>80</sup> See *Ross Crane Rental Corp.*, 267 NLRB 415 (1983); *Oak Cliff-Golman Baking Co.*, 207 NLRB at 1064.

<sup>81</sup> *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), *enforced* 388 F.2d 495 (2<sup>nd</sup> Circuit 1967); *Bunney Bros. Constr. Co.*, 139 NLRB 1516 (1962).

<sup>82</sup> *N.L.R.B. v. Farmer Bros. Co.*, 988 F.2d 120 (9<sup>th</sup> Cir. 1993) (employee's assertion of right to be placed on permanent hire list was protected when he had "honest and reasonable" belief that he had valid contractual right); *W.F. Bolin Co.*, 311 NLRB 1118 (1993) (complaints about travel pay were protected as expression of "honest and reasonable" position concerning right under collective bargaining agreement), *review denied*, 70 F.3d 863, (6<sup>th</sup> Cir. 1995), *enforced*, 99 F.3d 1139, (6<sup>th</sup> Cir. 1996).

As stated by the Board in *Peter Vitalie Co.*:<sup>83</sup>

When employees join to present a grievance concerning wages, hours or working conditions to their employer, their action is concerted.... Unless the concerted action is shown to have been conducted in an abusive manner, it is protected under Section 7 of the Act.... The employer must have known, or believed, that the action was part of group action or on behalf of a group of employees.... When such protected concerted activity is a moving reason for an employer's [advers action] imposed on an employee, then that adverse action violates Section 8(a)(1) of the Act, unless the employer ... demonstrates that it would have taken the same action notwithstanding the protected activity.<sup>84</sup>

Discrimination against employees for asserting their rights under a collective-bargaining agreement is an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.<sup>85</sup>

Here, since Respondent explicitly stated that it was withholding the ratification bonus based on the Union's pursuit of a grievance on drivers' pay, it cannot be disputed that Respondent withheld the ratification bonus because of the union and protected concerted activities in which they engaged through the assertion of contractual rights by the Union, their collective-bargaining agent. The withholding of the bonus therefore violated Section 8(a)(1) and (3) of the Act.

**B. The ALJ Erred in Failing to Find Respondent Unilaterally Changed the Parties' Grievance Processing Practice by Refusing to Provide the Union with a Written Response after Step II Grievance Meetings and Informing the Union It No Longer Had to Provide Such a Response (Exceptions 5 through 15, 17, and 19)**

As stated earlier, the ALJ denied the Complaint in its entirety.<sup>86</sup> However, the ALJ also found Respondent had a general practice of denying grievances in writing at Step II.<sup>87</sup> The ALJ wrote:

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<sup>83</sup> *Peter Vitalie Co.*, 313 NLRB 971, 975 (1994)

<sup>84</sup> *Id.* (citations omitted).

<sup>85</sup> *N.L.R.B. v. City Disposal Systems*, 465 U.S. 822 (1984); *Crown Wrecking Co.*, 222 NLRB 958, 962 (1976).

<sup>86</sup> JD 9.

<sup>87</sup> JD 8.

the record shows that with regard to discharge grievances, Respondent always, or almost always denied step 2 grievances in writing. It did not do so with regard to the grievance over the interpretation of Article 18, Section A. Respondent has not established that it had a different practice with regard to grievances that do not involve terminations. Moreover, Respondent did not produce all the grievance forms requested in the General Counsel's subpoena. I find that the record shows that Respondent generally had a practice of denying grievances in writing.<sup>88</sup>

Given the above, the ALJ clearly found Respondent had a practice of denying grievances in writing at Step II. Having found the existence of a past practice of denying grievances in writing at Step II, one would expect the ALJ to next determine whether that practice had been unilaterally changed in violation of Section 8(a)(5) of the Act, as alleged in the Complaint. However, the analysis of this issue is absent from the ALJ's Decision and Recommended Order. In fact, other than by generally dismissing the Complaint in its entirety, the ALJ entirely failed to address the issue.

Changes to parties' grievance practices have been found by the Board to violate Section 8(a)(5) of the Act, even absent specific contractual language concerning those practices. For example, in *Public Service Co. of New Mexico*,<sup>89</sup> the Board found that a change in the parties' grievance process to require grievances to be described with particularity before supervisors would hear them, to cease having supervisors sign for receipt of grievances after meeting with stewards, and to have more than one supervisor present in grievance meetings, even where contract allowed for presence of one supervisor but was silent on the other practices, was unlawful because the new practices were contrary to past practice and created significant

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<sup>88</sup> JD 8.

<sup>89</sup> 360 NLRB 573 (2014).

procedural hurdles.<sup>90</sup> Indeed the Board has held changes to grievance processing practices can violate Section 8(a)(5) even absent specific contractual language concerning those practices.<sup>91</sup>

The evidence in the instant matter demonstrates not only that Respondent had a practice of providing the Union with written grievance responses at Step 2, but also that Respondent changed that practice when it refused to provide the Union with a written response to the net book grievance. Respondent did not merely forget to respond to the net book grievance in writing, Respondent refused to provide a written response, informing the Union that it didn't have to give them written responses any longer.

There is no dispute that Respondent did not provide the Union with notice and a meaningful opportunity to bargain regarding the changes it made to the parties' grievance practice. The changes made by Respondent were significant. Respondent failed to provide the Union with a written response at Step II despite the parties' longstanding practice. When the Union tried to advance the grievance to Step III in the absence of a written response, Respondent informed the Union it did not have to give them written responses and that the grievance was now untimely. Because of Respondent's refusal to provide a written response, the grievance is stuck in limbo, and the Union is not able to advance it through the remaining steps of the parties' negotiated contractual grievance procedure. This has effectively removed employee access to

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<sup>90</sup> *Id.*

<sup>91</sup> See also *Postal Service*, 341 NLRB 684 (2004) (change in procedure by which union representative must request time for union business by requiring representative to submit request in writing and wait for response before carrying out responsibilities); *Wire Products Manufacturing Corp.*, 329 NLRB 155 (1999) (change in method of selecting arbitration panels violated Act); *Public Service Co. of New Mexico v. N.L.R.B.*, 843 F.3d 999 (D. C. Cir. 2016) (employer violated Act by denying employee right to union representation in racial discrimination complaint where it was customary for union business agent to represent employees in human resources investigations that concern a provision of the collective bargaining agreement, such as race discrimination complaints, even though such investigations were not governed by contractual grievance procedures); *Arizona Portland Cement Co.*, 302 NLRB 36, 43 (1991) (employer's substitution of a dispute resolution policy for its existing grievance-processing system constituted an unlawful unilateral change); *Barnard College*, 340 NLRB No. 106 (2003) (employer's refusal to meet with 2 union representatives at Step II of the grievance procedure where meeting with 2 instead of 1 was customary constituted an unlawful change).

rights conferred by the CBA to grieve disputes concerning the interpretation or application of the Agreement. As such, Respondent's change to the parties' grievance practice violated Section 8(a)(1) and (5) of the Act.

**C. The ALJ Erred in Failing to Find Respondent Unilaterally Changed the Parties' Grievance Processing Practice by Ceasing Its Practice of Advancing Grievances to Step III of the Grievance Procedure Where the Union's Appeal to Step III Was Filed within 10 Days after the Union Received the Respondent's Written Response to the Step II Grievance (Exceptions 5 through 14, 16, 18, and 19)**

The ALJ found the evidence did not demonstrate Respondent had a practice of ignoring the time requirements set forth in Article 15 of the CBA, the grievance procedure.<sup>92</sup> The ALJ noted that the Union informed the Respondent it was taking the net book grievance to Step 3 during the Step 2 meeting, and that "one could argue that . . . it would be a matter of putting form over substance to allow Respondent to refuse to advance the grievance to Step 3."<sup>93</sup> Notwithstanding the above, the ALJ found that "the equities in this case, however, favor Respondent."<sup>94</sup> The ALJ noted his decision was based, in part, on the Union's net book grievance not being filed in good faith, an issue that was not before the ALJ.

As set forth in Section V(B), above, changes to the parties' grievance processing practices violate Section 8(a)(5) of the Act. Here, the evidence demonstrates Respondent had ignored, or at least loosely applied, the time requirements in the grievance procedure in the past. With respect to the net book grievance at issue, there is ample evidence of the parties' loose (if at all) adherence to the time requirements in the grievance procedure. For example, even though the CBA requires Respondent meet with the Union within ten (10) days of a Step I filing, Respondent did not timely meet. The net book grievance was filed January 29<sup>th</sup> and the Step I

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<sup>92</sup> JD 8.

<sup>93</sup> JD 8.

<sup>94</sup> JD 8.

meeting was February 13<sup>th</sup>. Next, even though the CBA requires Respondent meet with the Union within ten (10) days of the Step II filing, Respondent did not timely meet. The Step II was filed February 21, 2018, and the parties met a month later on March 21, 2018. In addition, Respondent's request for information from the Union following the Step II meeting, on April 2, 2018, which Respondent stated was necessary so Respondent could "further evaluate the merits of the Union's January 29, 2018 grievance" indicated no decision had been made at Step 2 sufficient to trigger the ten (10) day period for appealing to Step III.<sup>95</sup> Finally, Respondent requested information and gave a deadline for providing the information of April 6, 2018, which had the Union had responsive information to provide, would have fallen outside the ten (10) days required for advancement of the grievance to Step III. Why would Respondent request the Union provide information to "further evaluate the merits of the Union's January 29, 2018 grievance" returnable after the deadline to appeal the Step II decision? Because Respondent, except for with respect to the Union's appeal of the net book grievance in the absence of a written Step 2 decision, did not strictly abide by the time limitations in the CBA.

When viewed in conjunction with Respondent's unilateral change of refusing to provide a written decision at Step 2, Respondent ignored the time limitations set forth in the CBA (as it had before) with respect to each step of the grievance procedure in this matter, before requesting additional information from the Union and then later denying the grievance and refusing to advance it to Step 3 without ever having provided a written response at Step 2 for the Union to appeal.

Although the ALJ clearly did not believe the grievance had merit, the ALJ was tasked only with deciding whether Respondent had a "sound arguable basis" for its interpretation of the

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<sup>95</sup> A decision the evidence indicates the Union should have received in writing pursuant to the parties' procedural grievance practice.

contractual language about the way drivers would be paid. His further finding that the grievance a lacked merit based on the “clear” meaning of the contract and that the grievance was filed in bad faith is therefore gratuitous and, moreover, is in not supported by the facts.<sup>96</sup>

The contractual formula for calculating drivers’ pay, on its face, is unclear, and, arguably, even irrational, in that it uses the term “net book” in a circular fashion. Specifically, Section A of Article 18 defines “net book” as the total book “reduced by Section B of Article 18, hereof, reduced by 60 cents per trip [plus other fees],” and Section B of Article 18 says drivers will be paid a percentage of their “net book.”<sup>97</sup> The language, therefore, at best, is ambiguous as to whether the trip charge and other fees are to be deducted before or after the application of the percentage in Section B, and, in view of its circularity, is even arguably irrational. The ALJ’s finding that the Union’s filing of a grievance based on this contractual language was in bad faith is therefore in error.

Moreover, even if the ALJ’s finding that the grievance was filed in bad faith were to be accepted, that would not excuse Respondent’s unilateral change to its grievance-processing practices. The merits of the grievances being processed simply have no relevance to the issue of whether grievance processing practices have been changed. The evidence compels a finding Respondent unilaterally changed the parties’ practice in violation of the Act.

**D. The ALJ Erred in Failing to Draw an Adverse Inference Based on Respondent’s Failure to Produce Grievance Records Requested by CGC in Subpoena Duces Tecum B-1-12UWMVX (Exception 6)**

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<sup>96</sup> The General Counsel does not except to the ALJ’s finding that Respondent had a “sound arguable basis for its interpretation” of the contract, but vigorously objects to the ALJ’s unnecessary and unfounded finding that the Union’s grievance was filed in bad faith.

<sup>97</sup> JD 3-4.

The ALJ found that Respondent did not produce the grievance forms requested by CGC's Subpoena.<sup>98</sup> The Subpoena also requested additional documents as would definitively show whether the parties' grievance processing practice had been changed by Respondent, but the ALJ did not mention the additional documents in the Decision and Recommended Order. Those documents included meeting notes, agendas, e-mails scheduling grievance meetings at Step I, II and III, and grievance settlements. Not one of these documents were produced, despite uncontroverted testimony that at least some of them exist. In addition, Respondent provided only 18 grievance forms of the at least 61 grievances Respondent admits were filed during the time period covered by the Subpoena.<sup>99</sup> Notwithstanding the above, the ALJ failed to apply an adverse inference to Respondent for failing to produce documents responsive to the Subpoena.<sup>100</sup>

An adverse inference should be applied to Respondent for failing to produce responsive documents. Additionally, an adverse inference should be applied to Respondent for failing to enter into evidence documents that would have definitively proven or not whether certain allegations occurred. Respondent apparently did not even search for the at issue responsive documents until after the hearing began, and only after CGC raised the issue to the ALJ.

An adverse inference does not shift the burden of proof, nor does such inference generally establish, by itself, the fact at issue, but where a party "presents evidence which, if accepted, establishes a material fact, the failure of an [opposing party] to produce evidence, including testimony, in its possession or control with respect to the existence or non-existence of the fact, is a relevant consideration in determining whether to find the fact."<sup>101</sup>

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<sup>98</sup> JD 8.

<sup>99</sup> Tr. 435:12 to 436:4.

<sup>100</sup> JD 8.

<sup>101</sup> *Fred Stark*, 213 NLRB 209, 214 (1974), *enfd.* 525 F.2d 422 (2nd Cir. 1975), *cert. denied* 96 S.Ct. 1463 (1976).

The Board has the a variety of powers to sanction parties which refuse to comply with subpoenas, which include “precluding the noncomplying party from rebutting [secondary] evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party.”<sup>102</sup> The authority to impose such sanctions flows from the Board’s inherent “interest [in] maintaining the integrity of the hearing process.”<sup>103</sup> As ALJ Kern stated (which the Board approved) in *Mcallister Towing*:<sup>104</sup>

A subpoena is not an invitation to comply at a mutually convenient time. It is an exercise of the Board’s power under Section 11 of the Act. Respondent was compelled to produce the documents when directed to do so. This is particularly so where, as here, Respondent had been in possession of the subpoenas well in advance of trial.

In this case, Respondent was in possession of the Subpoena for approximately one month prior to the hearing. Respondent did not file a petition to revoke any aspect of the Subpoena. Respondent’s refusal to comply with Subpoena paragraph 19 by failing to provide any grievance related documents whatsoever is inexcusable. Respondent’s ability to produce 18 grievance documents between the opening of trial on October 23, 2018, and the last day of trial October 25, 2018, further demonstrates Respondent’s decision to pick and choose whether to respond to the Subpoena (and to what degree). Therefore, General Counsel respectfully requests that the Board find that the ALJ erred in failing to draw an adverse inference against Respondent for its failure to produce information responsive to the Subpoena, and the Board reject Respondent’s defenses regarding whether there was a practice in place for providing written responses at Step 2 of the

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<sup>102</sup> *ADF, Inc.*, 355 NLRB 81 (2010) (two-Member Board, reaff’d 355 NLRB 81).

<sup>103</sup> *NLRB v. C. H. Sprague & Son, Co.*, 428 F.2d 938, 942 (1st Cir. 1970); see also *Perdue Farms, Inc. v. N.L.R.B.*, 144 F.3d 830, 834 (D.C. Cir. 1998) (approving Board’s application of the “preclusion rule” as being necessary to ensure compliance with subpoenas).

<sup>104</sup> *Mcallister Towing*, 341 NLRB 394, 417 (2004) (citation omitted)

grievance procedure and thereafter advancing those grievances to Step 3 regardless of whether those appeals were filed within ten (10) days of the Step 2.

**VI. CONCLUSION**

WHEREFORE, the General Counsel respectfully requests the Board grant the above exceptions for the reasons set forth in the accompanying General Counsel's Brief in Support of Exceptions to ALJ's Decision.

Dated at Phoenix, Arizona, this 24<sup>th</sup> day of January 2019.

Respectfully submitted,

*/s/ Kyler Scheid*

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## CERTIFICATE OF SERVICE

I hereby certify that GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in *NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, a single Employer*, in Case 28-CA-218477 was served via E-Gov, E-Filing, and Electronic Mail, on this 24th day of January 2019, on the following:

### **Via E-Gov, E-Filing:**

Roxanne Rothschild, Executive Secretary  
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