

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CAPITOL TRANSPORTATION, INC.

and

Case 12-CA-188221

ARADIO VINAS, an Individual

and

Cases 12-CA-181123; 12-CA-183368
12-CA-187845; 12-CA-199292
12-CA-201424; 12-CA-213526

UNION DE TRONQUISTAS DE PUERTO
RICO, LOCAL 901, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

and

Case 12-CA-180495

ELIAS TORRES, an Individual

Enrique Gonzalez Quinones, Esq., for the General Counsel
Jose E. Carreras, Esq., San Juan, Puerto Rico,
for the Charging Party

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in San Juan, Puerto Rico on March 12, 2019. The complaint alleges that Capitol Transportation, Inc. (the Respondent) effectively removed the union, Unión de Tronquistas de Puerto Rico, Local 901 IBT (the Union) from its workplace in 2016¹ by repudiating the terms of the parties' collective-bargaining agreement (CBA), refusing to bargain over changes in terms and conditions of employment of employees in the bargaining unit (the Unit), ignoring the Union's requests to meet and bargain over a successor agreement, discharging unit employees because of their membership and support for the union, and unilaterally replacing them with subcontracted and temporary employees, all in violation of Sections 8(a)(3), (5), (1) and 8(d) of the National Labor Relations Act (the Act).² The Respondent denied the material allegations and affirmatively pled that subcontracting and layoffs were permitted under the CBA, past practice and/or bargained between the parties. Alternatively, the Respondent averred that the Union waived the right to bargain.

¹ All dates refer to 2016 unless otherwise stated.

² 29 U.S.C. §§ 151-169.

On the entire record,³ including my observation of the demeanor of the witnesses,⁴ and after considering the brief filed by the General Counsel, I make the following

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FINDINGS OF FACT

I. JURISDICTION

10 The Respondent, a corporation with an office and place of business in San Juan, Puerto Rico, operates a moving company for nonretail and retail customers, and provides shipping, storage, packing, crating and moving services for relocations, including moves between points inside and outside the Commonwealth of Puerto Rico. During the past twelve months, the Respondent purchased and received at its San Juan facility goods valued in excess of \$50,000 directly from points outside Puerto Rico, and derived gross revenues in excess of \$50,000 to transport freight in interstate commerce as agent for various common carriers operating between various States of the United States and Puerto Rico. The Respondent admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Respondent's Management and Supervision*

25 At all material times, the following individuals held the following positions in the employ of the Respondent and served as its statutory agents and/or supervisors within the meaning of Section 2(11) and 2(13) of the Act: Richard Darmanin – vice president; Luis Ortiz – general manager; Erika Del Valle – operations manager; and Wilmarie Cruz – human resource assistant.

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B. *The Collective-Bargaining Relationship*

1. Applicable CBA Provisions

35 Since at least August 24, 2010, the Respondent has recognized the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit (the Unit):

All employees employed by the Respondent engaged in transportation, loading, unloading, warehouse, receipt, dispatch, service, maintenance, cleaning of the warehouse,

³ No one appeared at the hearing on behalf of the Respondent. The General Counsel recited the numerous efforts undertaken to notify the Respondent of the proceeding. Having been represented by counsel at the pleadings stage and for some period thereafter, it was demonstrated that the Respondent was afforded the requisite due process and an opportunity to appear.

⁴ I found all of the witnesses presented by the General Counsel to be credible based their demeanor, familiarity with the subjects covered by their testimony, quality of their recollection, testimonial consistency, the presence of corroboration, and reasonable inferences drawn from the record as a whole. See *Daikichi Sushi*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

and related areas excluding offices; excluding all employees dedicated to incidental tasks associated with Respondent's operation.

This recognition has been embodied in successive collective bargaining agreements, the most recent of which was effective by its terms from August 22, 2014 to August 22, 2017. As of October 2016, the Unit was composed of six employees, Luis Lleras García, Hiram Lozada, Carlos Martínez Rivera, Mario Reyes Rivera, Elias Torres Figueroa, and Arcadio Viñas Cepeda.

This case involves several CBA provisions relating to seniority rights, layoff, subcontracting and the payment of employer contributions. First, the CBA provides that any reduction in the workforce must be implemented based on seniority and notified beforehand to the Union. Article X states, in relevant part:

Section 1. Concept

The right of seniority is defined as the time of service of an employee by classification, by department, and by bargaining unit. This right will prevail in the administration of personnel in all operations compatible with this right.

Section 2.

Workforce reduction due to economic reasons, lack of work and/or any other reason
When it becomes necessary to reduce personnel for economic reasons, lack of work or any other reason, the affected employees will be suspended based on their seniority right per classification. The process should be understood in such way that the last employee in the classification would be the first one suspended.

The employee with the most seniority will have the right to claim work at any classification occupied by an employee with less seniority within the bargaining unit, so long as he is qualified to perform the work required by the classification he is claiming.

Section

9. Notification in cases of layoff

In case of a layoff, the Employer should notify the Union in writing. If the layoff is for one day, it would be notified to the employee directly, if it prolongs for over a day, the Employer will notify both the employee and the Union in writing 5 days in advance.

Article XIX states that subcontracting is only allowed when a unit employee is neither available nor able to perform the work:

Section 1. Assignment of Work

The Employer will assign the work that is performed or can be performed by unit employees. Nobody outside the appropriate unit will be allowed to engage in work that is or can be performed by unit employees, except, but without this being considered a limitation, absence of unit employees and/or service needs.

Article XXXIV, Section 1 also places similar restrictions on the Respondent's ability to subcontract the work:

Section 1. Prohibition and Exception

The Employer cannot subcontract the work that is performed or can be performed by unit employees, except when there exist no unit employees who can perform the job, when the unit employees do not have the knowledge or skills required to perform the job, and in such circumstances as permitted by law.

Article V, Section 4, states that shop stewards have superior seniority, regardless of hiring date, for purposes of reduction of personnel for economic reasons and rehiring.

Article XLVI sets forth the rights and obligations of the employer and employees regarding contributions to employees' saving plans:

1165e Savings Plan

The Employer will pay three percent (3%) of the salary for regular hours worked by each employee covered by this agreement as a matching for the voluntary contributions of the participants. To be eligible for the three percent (3%) matching by the Employer, the employee must also contribute a minimum of three percent (3%) of his salary for regular hours worked. Any employee who starts working [for the Employer] after the signature of this agreement must complete at least one year of service to be eligible for this benefit. The Employer agrees to send a list of the contributions to the Pension Fund, including the name, social security number, and the amount contributed by the employee by no later than the 15th of each month to the Union's address, 352 Calle del Parque, San Juan, PR 00921 in favor of the Pension Plan, and another check in favor of Union de Tronquistas de PR-Local 901 1165e along with the corresponding list and its contributions per employee.

Finally, the disciplinary process at Article XXV, Section 3 sets forth a progressive disciplinary procedure: first infraction – written warning; second infraction – written warning; third infraction – five-day suspension; fourth infraction – discharge. Section 4 of that article further states that the disciplinary action must be written and include cause for the action, date, time and place where the events that led to the disciplinary action occurred.

2. Relationship Between the Respondent and the Union

Since at least 2014, the Respondent sought to eliminate the Union from its facilities as the exclusive collective-bargaining representative of its employees. At some point during that year, Darmanin offered Harry Fuentes Martínez, the owner of HF Transport, Inc., a contract to perform all unit work in order to force out the Union. Fuentes did not accept the offer.

C. *The Discriminatees*

1. Arcadio Viñas Cepeda

Viñas worked for the Respondent for twenty-seven years as a helper and stevedore until he was discharged on November 4. His duties included packing, moving and accommodating material in trailers. Viñas was also part of the Union's bargaining committee and served as a

Union shop steward for approximately five years. His disciplinary history consisted of one warning long before 2016 for failing to punch in.

2. Elias Torres Figueroa

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Torres worked as a group leader for the Respondent for more than eleven years until he was discharged on November 7. He served as the contact person between employees assigned to a particular move and clients, and distributed the work among employees. Torres served as a member of the Union's bargaining committee for the past seven years. His disciplinary history

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consisted of one warning for failing to sign out for a break.

3. Luis Lleras Garcia

Lleras worked eighteen years as a helper, group leader and driver for the Respondent until he was terminated on November 4, 2016. At the time of his discharge, he was the Union's shop steward and served on the bargaining committee.

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D. The Respondent Subcontracts Unit Work

On May 3, Union representative Argenis Carrillo sent a letter to Ortiz about certain complaints from employees alleging that the Respondent discriminated against them and failed to comply with the CBA. Specifically, the Union alleged problems with the funding of the medical insurance and savings plans, and the issuance of employees' pay stubs, among others. The Respondent did not reply and the Union filed grievances regarding those complaints. Subsequently, the Respondent began frequently laying off all or most unit employees even though there was enough work for unit employees to guarantee them at least forty hours per week. Moreover, the Respondent implemented the layoffs without notifying the Union and affording it an opportunity to bargain. The layoffs were spread out between July and November: July 1, 7-8, 19-22; August 4, 17-19, 23-25, 31; September 1-2, 6-8, 12-16, 19-23, 26-29; October

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3-7, 10-14, 18-19, 21; November 3-4.

During the aforementioned period of time that the Respondent was constantly laying off unit employees, the Respondent subcontracted personnel and/or hired temporary agency employees to perform unit work such as pick-up and delivery services and moving services. The subcontractors included Tomas Adorno, HF Transport, Inc., Genaro Bonilla, LEDS Move, J.A.J. Transport, Inc., and Joe Kenny Fuentes. The Respondent contracted with those companies without first notifying the Union and affording it an opportunity to bargain

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E. Layoff of Senior Personnel

In addition to laying off unit employees and replacing them with subcontracted personnel, the Respondent laid-off Lleras on August 31 while less senior unit employees remained working. In addition, on February 21, 2017, the Respondent terminated shop steward Hiram Lozada instead of Mario Reyes. Once again, the Respondent did not bargain with the Union before implementing those layoffs.

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F. *The Respondent Fails to Make Timely Employee Contributions*

Between January 15 and July 29, the Respondent failed to timely deposit the employer and employee contributions to the 1165e Savings Plan on behalf of unit employees. Once again, the Respondent did not notify or bargain with the Union regarding its failure to make timely contributions to its employees' savings plans. On July 29, the Respondent made partial payment (17 payments) towards the amounts owed. However, those amounts were insufficient for the Union to make the necessary and required investments.

G. *The Discontinuation of Compensation for Accrued Annual and Sick Leave to Discharged Employees*

The Respondent's past practice had been to compensate unit employees for accrued annual and sick leave balances after any employee ceases to be employed by the Respondent. However, the Respondent failed to liquidate the accrued annual and sick leave balances of Viñas, Torres, Lleras and Lozada. Viñas did receive compensation for his accrued annual leave balance after he was terminated on November 4, but not for his accrued sick leave balance. Lleras, Torres, and Lozada did not receive the liquidation for either their accrued annual leave or their sick leave balances. Consequently, on December 28, Carrillo sent a letter to Wilmarie Cruz stating that employees were not compensated for their accruals and requesting the status of those payments. The Respondent did not reply. Thereafter, Carrillo sent a letter to Ortiz. Carrillo asked Ortiz to inform the Union when the Respondent was going to liquidate the employees' accrued balances. However, the Respondent ignored Carrillo's letter, did not respond and has never compensated the discharged employees for their accrued balances.

H. *Bargaining Over a Successor Agreement*

The Union and the Respondent began negotiating a new collective-bargaining agreement by August. On September 1, before the expiration of the CBA, Carrillo sent the Respondent a proposal for a successor collective-bargaining agreement. The parties held several bargaining meetings in 2016 but did not reach an agreement. They continued negotiating until the summer of 2017, when they held their last bargaining meeting.

On December 29, 2017, after the CBA expired, Carrillo sent another letter to the Respondent following up on the negotiations for the successor contract because the Respondent had not responded to the Union's prior letters. However, all further attempts to communicate with the Respondent were unsuccessful. After December 2017, the Respondent never responded to the Union's letters and there were no further meetings or bargaining.

I. *Discriminatees file Grievances*

Between July 2016 and their discharges in November 2016, Viñas, Torres and Lleras filed dozens of grievances charging the Respondent of unilaterally subcontracting bargaining unit work, while unit employees were laid off, in addition to other violations to the CBA.

J. The Terminations

At the end of their work shifts on November 4, Del Valle handed Viñas and Lleras termination letters. Torres was out that day but was handed a termination letter by Cruz on
 5 November 7. They asked for explanations but Del Valle only referred them to the letter. Viñas and Lleras also asked Cruz when she entered the office but she too referred them to the letter.

The termination letters stated that Viñas, Lleras and Torres were discharged for conduct
 10 on October 24 through 27 during a move in the town of Juncos. No specific information was provided, however, as to the nature of the alleged misconduct. Moreover, the allegations were false, since the three employees were performing a move in the town of Jayuya during that period of time and were not told that anyone complained about their services.

After terminating Viñas, Torres and Lleras in November, the Respondent did not fill their
 15 positions. In fact, after November 2016, only two-unit employees remained: Hiram Lozada and Mario Reyes. By May 2017, both employees were also terminated, leaving the appropriate unit without employees. After effectively eliminating the bargaining unit, the Respondent filled all of the unit positions with subcontracted personnel, once again without notifying the Union and affording it an opportunity to bargain.
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LEGAL ANALYSIS

I. THE DISCHARGES

The legal standard for determining whether an employer's action against an employee
 25 violates Section 8(a)(3) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish a violation under Section 8(a)(3) of the Act, the General Counsel has the initial burden of showing by a
 30 preponderance of the evidence that a substantial or motivating factor in the employer's decision to take the action was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2013). This burden is typically met by showing the employee engaged in union or protected concerted activity, employer knowledge of that activity, and animus on the
 35 part of the employer towards that activity. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1066 (2007), enfd. 577 F.3d 467 (2nd Cir. 2009); see also *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that “[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation”).

If General Counsel meets this initial burden, then the burden shifts to the employer to
 40 prove that it would have taken the same action even in the absence of the employee's union or protected activity. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016), enfd. 871 F.3d 358 (5th Cir. 2017); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015); *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) enfd. 646 F.3d 929 (D.C. Cir. 2011).
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5 The General Counsel may offer proof that the employer's reasons for the personnel
decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB 946, 949 (2003) (noting that
where an employer's reasons are false, it can be inferred that the real motive is unlawful if the
surrounding facts reinforce that inference.) (citation omitted); *Frank Black Mechanical Services,*
10 *Inc.*, 271 NLRB 1302, 1302 fn. 2 (1984) (noting that "a finding of pretext necessarily means that
the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby
leaving intact the inference of wrongful motive established by the General Counsel"). When
evaluating unlawful motivation allegations, "the Board can consider all of the record evidence,
including the respondent's explanation for the discharge." *Holo-Krome v. NLRB*, 954 F.2d 108,
113-115 (2nd Cir. 1992).

15 On November 4, the Respondent discharged Viñas and Torres. It discharged Lleras when
he returned to work on November 7. These three employees had been active union supporters
and occupied leadership Union positions. Viñas and Lleras were shop stewards for
approximately five years each and all three were members of the Union's bargaining committee.
Several months before their discharge, all three employees had been actively complaining to the
Respondent about repeated violations of the CBA, layoffs, subcontracting and the failure to remit
contributions to employees' savings plans, among others. The Respondent failed to provide any
20 explanation for the discharges, relying instead on vague explanations and false information as to
when the alleged misconduct occurred.

25 As mentioned above, the assertion of false defenses gives rise to an inference "that the
employer desires to conceal the true motive and that the true motive is unlawful." *Triple H*
Electric Co., 323 NLRB 549, fn. 1 (1997). See also, *McKenzie Engineering Co.*, 326 NLRB 473,
484 (1998). That is, it can give rise to an inference "that the [true] motive is one that the
employer desires to conceal—an unlawful motive—at least where . . . surrounding facts tend to
reinforce that inference." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir.
1966). Moreover, the Board has found that failure to be more specific is, itself, an indicium of
30 unlawful motivation, since it deprives an employee of opportunity to explain his version of
conduct for which he is being discharged. *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), *enfd.* 95
F.3d 681 (8th Cir. 1996), *cert. denied* 521 U.S. 1118 (1997).

35 The Respondent's animus is further demonstrated by Darmanin's solicitation of a
subcontractor to perform all unit work with the intention of eliminating the Union and unit
employees. The contractor refused the overture but the Respondent still proceeded with its
scheme by failing to fill the vacant positions after laying off Viñas, Torres, and Lleras, and
replaced them with subcontracted personnel.

40 Based on the foregoing, the Respondent discriminatorily discharged Viñas, Torres, and
Lleras because of their union activities and membership in violation of Section 8(a)(3) and (1) of
the Act.

II. UNILATERAL CHANGES

A. *Legal Standard*

5 Section 8(d) of the Act defines the duty to bargain. It contains the various obligations,
one of which is to bargain in good faith about terms and conditions of employment, and, a
second is to continue in full force and effect the terms and conditions of an existing contract
between the parties. Once an agreement is struck, an employer may not change terms and
10 conditions of employment that are governed by a collective bargaining agreement during the
term of that agreement, absent the consent of the union representing the employees. An
employer who does so violates Section 8(a)(5) and (1) of the Act. See *C&S Industries, Inc.*, 158
NLRB 454, 456-459 (1966); and *Mead Corp.*, 318 NLRB 201, 202 (1995).

15 Where a contract provision has been unilaterally modified, an employer can justify that
conduct by proving that the Union consented to such change or by articulating a “sound arguable
basis” for believing that the contract allowed such a modification. *Bath Iron Works Corp.*, 345
NLRB 499, 501-502 (2005), affirmed, sub nom., *Bath Marine Draftsmen's Assn. v. NLRB*, 475
F.3d 14 (1st Cir. 2007). See also *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010); *San*
20 *Juan Bautista Medical Center*, 356 NLRB 736 (2011). In this case, the Respondent offered no
justification for the unilateral changes it made to its employees’ terms and conditions of
employment discussed below.

B. *Layoffs*

25 Under Section 8(d) of the Act, no party to a collective-bargaining agreement can be
compelled to discuss or agree to a midterm modification of a collective-bargaining agreement,
and, accordingly, a proposed modification can be implemented only if the other party's consent is
first obtained. *Nassau County Health Facilities Association, Inc., et al.*, 277 NLRB 1680, 1683
30 (1977), and cases cited therein. Thus, an employer is not free, without union consent, to make
midterm modifications in wage rates, remove work from the bargaining unit or replace all unit
employees. *AAA Electric, Inc., and Simms Electric Co.*, 190 NLRB 247, 251 (1971), enf. denied
472 F.2d 444 (6th Cir. 1973).

35 The Respondent neither notified nor sought to bargain with the Union before laying off
its employees while at the same time employing subcontracted personnel to perform their jobs.
The CBA prohibited subcontracting of bargaining unit work unless there were no unit employees
available to perform the work. Unit employees, however, were always available to perform the
work but the Respondent intentionally laid them off and diverted their work to subcontracted
40 personnel without obtaining the Union’s consent.

45 Accordingly, the Respondent’s unilateral implementation of these changes without the
Union’s assent violated Section 8(d) and 8(a)(5) and (1) of the Act. See *Torrington Enterprises*,
307 NLRB 809 (1992) (employer unlawfully laid-off bargaining unit employees and replaced
them with non-unit employees and independent contractors without giving prior notice to the
union and providing the union with an opportunity to bargain and their effects on the unit
employees); *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996), enf. denied 134 F.3d 125, 130 (3rd
Cir. 1998) (employer unlawfully subcontracted unit work without giving the union notice and an

opportunity to bargain); *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000) (the bargaining unit is adversely affected whenever bargaining unit work is given away to non-unit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit).

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From July 1 to November 4, the Respondent laid off all or most of the six-unit employees practically every week and subcontracted out that unit work. That pattern persisted after November and for most of 2017 and the Respondent did not fill any vacant unit positions. The Respondent's failure to fill the vacant unit positions also violated Section 8(a)(5) and (1). See *St. George Warehouse, Inc.*, 341 NLRB 904 (2004) (employer who used temporary employees to supplement the work of unit employees, unlawfully stopped hiring unit employees and used temporary employees instead, violated section 8(a)(5) of the Act).

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C. Contributions to the 1165e Savings Plan

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The failure to make, or delay in making, contractually required payments to employee fringe benefit funds constitutes a unilateral act in violation of Section 8(a)(5) of the Act which is not excused by a financial inability to pay. See *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991) (employer unlawfully refrained from making fringe benefit payments and claim of economic necessity was not an adequate justification). Here, the Respondent's failed to remit at least six installments of employer and employee contributions to the 1165e Savings Plan from January 15 to July 29 as required by the CBA. The Respondent, once again, engaged in such conduct without notifying the Union and affording it an opportunity to bargain in violation of Section 8(a)(5) and (1) of the Act.

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D. Accrued Annual and Sick Leave Balances

The Respondent's past practice was to compensate terminated employees for their accrued annual and sick leave balances. Consistent with past practice, the Respondent liquidated the annual leave of Viñas, but failed to compensate Torres, Lleras and Lozada for their accrued annual leave after they were terminated in November. In addition, it failed to liquidate the sick leave balances of all four employees. The Union raised the issue on several occasions but the Respondent ignored the requests and failed to liquidate the accrued balances to these employees, as well as Mario Reyes, in violation of Section 8(a)(5) and (1). See *Resco Products, Inc.*, 331 NLRB 1546 (2000) (employer unlawfully failed to pay accrued vacation pay to employees who accepted employment with successor employer).

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E. Bargaining for a Successor Collective-Bargaining Agreement

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." See *Barclay Caterers*, 308 NLRB 1025, 1035 (1992); *Crispus Attucks Children's Center*, 299 NLRB 815, 838 (1998). The refusal to meet and bargain is a "per se" violation of the Act, and proof of "bad faith" or other subjective intent is unnecessary. As the Supreme Court explained in *NLRB v.*

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Katz, 369 U.S. 736, at 742-743 (1962), Section 8(a)(5), as defined in Section 8(d), “clearly ... may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact—to meet- and confer’—about any of the mandatory subjects.”

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The Union made several requests to meet and bargain over a successor agreement before its latest demand on December 29, 2017. The Respondent, however, has never responded to that request or any of the Union’s previous requests to bargain. Under the circumstances, the Respondent’s failure to meet and bargain violated Section 8(a)(5) and (1) of the Act.

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CONCLUSIONS OF LAW

1. Capitol Transportation, Inc. (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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2. Unión de Tronquistas de Puerto Rico, Local 901 IBT (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

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3. At all relevant times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit (the Unit):

All employees employed by the Respondent engaged in transportation, loading, unloading, warehouse, receipt, dispatch, service, maintenance, cleaning of the warehouse, and related areas excluding offices; excluding all employees dedicated to incidental tasks associated with Respondent’s operation.

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4. By discriminatorily discharging employees Arcadio Viñas and Luis Lleras on November 4, 2016 and Elias Torres on November 7, 2016 because of their union activities and membership, the Respondent violated Section 8(a)(3) and (1) of the Act.

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5. The Respondent violated Section 8(a)(5) and (1) of the Act by making the following unilateral changes to employees’ terms and conditions of employment without first notifying the Union and affording it an opportunity to bargain over the changes: (1) constantly laying off unit employees after July 1, 2016 in order to assign unit work to subcontracted and/or temporary employees, and then leaving those positions vacant; failing to timely deposit employer and employee contributions to the 1165e Savings Plan from January 15 until July 29, 2016; failing and refusing to compensate unit employees for accrued annual and sick leave when they ceased working for the Respondent in and after November 2016; and failing and refusing to meet and bargain with the Union over a successor agreement after December 29, 2016.

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REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. With respect to the Respondent’s discriminatory discharge of Luis Lleras, Arcadio Viñas and Elias Torres, it shall be ordered to offer them reinstatement to their former positions or, if those positions no longer exist, in substantially equivalent positions

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without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired in their place. Lleras, Viñas and Torres shall be made whole for any loss of earnings they may have suffered due to the discrimination against them. All unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, shall be made whole for any loss of earnings resulting from said layoffs. Backpay shall be computed in accordance with F.W. Woolworth Co., 90 NLRB 289 (1950), with interest at the rate prescribed in New Horizons, 283 NLRB 1173 30 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB 6 (2010). The Respondent shall also be required to expunge from its files any reference to the unlawful terminations of Lleras, Viñas and Torres, and to notify them in writing that this has been done.

In accordance with the Board's decision in King Soopers, Inc., 364 NLRB No. 93 (2016), enfd. in relevant 35 part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall be ordered to compensate Lleras, Viñas and Torres, and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in New Horizons, supra, compounded daily as prescribed in Kentucky River Medical Center, supra. Also, in accordance with Don Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB 101 (2016), Respondent shall compensate Lleras, Viñas, Torres, and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and in accordance with Advo-Serv of New Jersey, Inc., 363 NLRB No. 143 (2016), and, within 21 days of the date the amount of backpay is fixed either by the agreement or Board order, file with the Regional Director for Region 12, a report allocating backpay to the appropriate calendar year(s). Finally, the Respondent shall also be required to post a Notice to Employees, both in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Capitol Transportation, Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily discharging employees because of their support for and membership in the Unión de Tronquistas de Puerto Rico, Local 901 IBT (the Union).

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Laying off employees on dates when subcontracted or temporary agency employees are assigned to work, or in violation of employees' seniority rights, without the Union's consent and without first giving the Union notice and an opportunity to bargain about the decision to make such changes.

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(c) Unilaterally transferring unit work to subcontracted or temporary agency employees without giving the Union notice and an opportunity to bargain.

10 (d) Delaying in depositing the contributions to employees' savings plan, or make other changes to the terms and conditions of employment expressly set forth in a current collective-bargaining agreement without the Union's consent, and without first giving the Union notice and an opportunity to bargain with it about the decision to make such changes.

15 (e) Refusing to compensate employees for accrued sick and annual leave when they cease working the Respondent, without giving the Union notice and an opportunity to bargain.

(f) Failing or refusing to bargain in good faith with the Union for a collective-bargaining agreement covering employees in the following unit:

20 All employees employed by Capitol Transportation, Inc. (the Employer) engaged in transportation, loading, unloading, warehouse, receipt, dispatch, service, maintenance, cleaning of the warehouse, and related areas; excluding offices, and excluding all employees dedicated to incidental tasks associated with the Employer's operation.

25 (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

30 (a) Within 14 days from the date of the Board's Order, offer Luis Lleras, Arcadio Viñas and Elias Torres full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

35 (b) Make Luis Lleras, Arcadio Viñas and Elias Torres whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

40 (c) Make whole all employees in the above unit who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for any loss of earnings and other benefits resulting from said layoffs.

45 (d) Compensate Luis Lleras, Arcadio Viñas and Elias Torres, and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and within 21 days of the date the amount of backpay is

fixed either by the agreement or Board order, file with the Regional Director for Region 12, a report allocating the backpay awards to the appropriate calendar year(s).

5 (e) Rescind the unilateral transfer of unit work to subcontractors and restore the status quo by restoring the unit to where it would have been without the unilateral change.

10 (f) Liquidate the accrued annual and sick leave benefits of former employees Mario Reyes, Hiram Lozada and any other former unit employee whom the Respondent failed to compensate for such benefits.

15 (g) Upon request, meet and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the above unit with respect to wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

20 (h) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge will not be used against them in any way.

25 (i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

30 (j) Within 14 days after service by the Region, post at its facility in San Juan, Puerto Rico copies of the attached notice marked "Appendix"⁶ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2016.

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⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. April 30, 2019

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A handwritten signature in black ink, appearing to read "Michael A. Rosas". The signature is written in a cursive style with a prominent initial "M".

Michael A. Rosas
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail or refuse to bargain in good faith with Unión de Tronquistas de Puerto Rico, Local 901, IBT (the Union) as the exclusive collective-bargaining representative of our employees in the below-described appropriate bargaining unit concerning rates of pay, wages, hours of work, and other terms and conditions of employment:

All employees employed by Capitol Transportation, Inc. (the Employer) engaged in transportation, loading, unloading, warehouse, receipt, dispatch, service, maintenance, cleaning of the warehouse, and related areas; excluding offices, and excluding all employees dedicated to incidental tasks associated with the Employer's operation.

WE WILL NOT fire you because of your union membership or support.

WE WILL NOT lay you off on dates when subcontracted or temporary agency employees are assigned to work, or in violation of your seniority rights, without the Union's consent and without first giving the Union notice and an opportunity to bargain with us about the decision to make such changes.

WE WILL NOT delay in depositing the contributions to your savings plan, or make other changes to the terms and conditions of employment expressly set forth in a current collective-bargaining agreement without the Union's consent, and without first giving the Union notice and an opportunity to bargain with us about the decision to make such changes.

WE WILL NOT refuse to liquidate your accrued sick and annual leave when you cease working with us, without giving the Union notice and an opportunity to bargain.

WE WILL NOT unilaterally transfer unit work to subcontracted or temporary agency employees without giving the Union notice and an opportunity to bargain.

WE WILL NOT fail or refuse to bargain in good faith with the Union for a collective-bargaining agreement covering employees in the unit described above.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Luis Lleras, Arcadio Viñas and Elias Torres immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL pay Luis Lleras, Arcadio Viñas and Elias Torres for the wages and other benefits they lost because we fired them.

WE WILL compensate Luis Lleras, Arcadio Viñas and Elias Torres and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and within 21 days of the date the amount of backpay is fixed either by the agreement or Board order, file with the Regional Director for Region 12, a report allocating the backpay awards to the appropriate calendar year(s).

WE WILL remove from our files all references to the discharge of Luis Lleras, Arcadio Viñas and Elias Torres and WE WILL notify them in writing that this has been done and that the discharge will not be used against them in any way.

WE WILL make whole employees in the above unit for the wages and other benefits they lost because we laid them off on dates when subcontractors or temporary agency employees were assigned to work, or in violation of their seniority rights.

WE WILL liquidate the accrued annual and sick leave benefits of former employees Mario Reyes, Hiram Lozada and any other former unit employee for whom we failed to liquidate such benefits.

WE WILL rescind the unilateral transfer of unit work to subcontractors and restore the status quo by restoring the unit to where it would have been without the unilateral change.

WE WILL upon request, meet and bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the above unit with respect to wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

CAPITOL TRANSPORTATION, INC.

(Employer)

Dated: _____ By: _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov
South Trust Plaza, 201 East Kennedy Boulevard, Suite 300, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/12-CA-180495 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE
WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER (813) 228-2641.