

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

TRANSPORTATION SERVICES OF ST.
JOHN, INC.,

and

Case No. 12-CA-202248

UNITED, INDUSTRIAL, SERVICE,
TRANSPORTATION, PROFESSIONAL
AND GOVERNMENT WORKERS OF
NORTH AMERICA, OF THE SEAFARERS
INTERNATIONAL UNION OF NORTH
AMERICA, ATLANTIC, GULF, LAKES
AND INLAND WATERS DISTRICT/NMU,
AFL-CIO

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION
AND MOTION TO STRIKE RESPONDENT'S EXCEPTIONS**

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Table of Contents

Table of Authorities	4
I. MOTION TO STRIKE RESPONDENT’S EXCEPTIONS AND EXHIBITS.....	5
II. STATEMENT OF THE CASE.....	6
III. STATEMENT OF FACTS	7
A. The parties’ current collective-bargaining agreement includes a Grievance and Arbitration Procedure that provides for the selection of an FMCS arbitrator	8
B. The Union filed a grievance on behalf of employee Alvis Emanuel concerning a two-week suspension and after complying with the procedural requirements demanded arbitration	11
C. Respondent unlawfully insists on establishing the cost of arbitration against the cost of the underlying dispute as a factor to consider whether to appoint an arbitrator and to comply with the contractual arbitration procedure	12
D. Respondent also failed to complete the selection of an arbitrator in a second grievance the Union filed on behalf of employee Emanuel alleging Respondent’s failure to pay Emanuel for participating in a bargaining meeting, grievance No. 008-17	16
E. FMCS informed Respondent that there were no local arbitrators available	17
F. Respondent did not select a FMCS arbitrator for Emanuel’s grievance because the cost of the arbitration would presumably exceed the amount owed to Emanuel if he prevailed, thus, effectively modifying the parties’ contract by unilaterally establishing cost consideration as a pre-requisite to the contractual grievance procedure	18
IV. DISCUSSION OF RESPONDENT’S EXCEPTIONS AND ARGUMENT	20
A. Respondent did not file its Post-Hearing Brief with the Division of Judges [Respondent’s Exceptions 2, 3, 16 and 17].....	20
B. Respondent refused to choose an Arbitrator and instituted a cost of arbitration evaluation to decide whether a grievance can proceed to arbitration without the Union’s consent, in violation to Sections 8(a)(5) and 8(d) of the Act.....	21
1. Legal Standard	21
2. The ALJ correctly found that Respondent is refusing to arbitrate grievances when the cost of the grievance is higher than the underlying dispute in the grievance, effectively modifying the Grievance and Arbitration Procedure contained in the parties’ contract (Respondent’s Exceptions 6, 7, 8, 9, 10, 11, 13, 28 and 29)	22
3. Respondent’s Exception 1 alleging that the parties were not given a full opportunity to participate in the hearing, is without merit.....	27

4.	Respondent’s Exception 4 alleging that the ALJ incorrectly described the Respondent as a “regular marine ferry passenger transportation service”, is without merit.....	30
5.	Respondent’s contentions regarding grievance 008-17 and charge 12-CA-186255 are without merit (Respondent’s Exceptions 5, 20, 27, 30, 31 and 32)	30
6.	Respondent’s contention that the ALJ disregarded testimony in an arbitrary and capricious manner are meritless (Respondent’s Exceptions 12, 13 and 14).....	33
7.	Respondent’s contention that the ALJ erred by determining that Respondent refused to arbitrate <i>any</i> cases based on its unilateral determination that the monetary value of a grievance does not warrant the cost of the arbitration (Respondent’s Exceptions 9, 12, 15 and 18).....	34
8.	Respondent’s Exception 19 that the ALJ improperly found that the record confirmed a colorable claim that was timely filed, is without merit.....	35
9.	Respondent’s Exceptions 10, 15 and 21 that the ALJ arbitrarily and capriciously held that the reasonableness of Respondent’s position was immaterial, is without merit	36
10.	Respondent’s Exceptions 9, 12, 18 and 22 that the ALJ arbitrarily determined Respondent failed to prove that the grievance procedure would be untenable financially going forward, are without merit.....	38
11.	Respondent’s contention that the ALJ’s conclusions, findings of facts, and determinations are not supported by the record (Respondent’s Exceptions 23, 24 and 25).....	38
12.	Respondent’s Exception 26 that the complaint must be dismissed because it is time barred, is without merit.....	39
13.	Respondent’s contention that the ALJ’s Decision was contrary to evidence showing the Union’s bad faith, is without merit (Respondent’ Exceptions 28, 29 and 33)	41
14.	Respondent’s Exception 34 that the ALJ incorrectly determined that Respondent has refused to arbitrate the grievances, is without merit	42
15.	Respondent’s Exception 35 that the ALJ erred in failing to recognize that the Complaint is legally defective, is without merit.....	43
C.	Respondent’s general and defective exceptions (Respondent’s Exceptions 1-35)	44
V.	CONCLUSION.....	45

Table of Authorities

<i>King Soopers, Inc.</i> , 344 NLRB 842, fn. 1 (2005)	5
<i>C&S Industries, Inc.</i> , 158 NLRB 454, 456-459 (1966)	21, 37
<i>Mead Corp.</i> , 318 NLRB 201, 202 (1955)	21, 37
<i>Bath Iron Works Corp.</i> , 345 NLRB 499, 501-502 (2005)	21
<i>Bath Marine Draftsmen’s Ass’n. v. NLRB</i> , 475 F.3d 14 (1 st Cir. 2007)	21
<i>Hospital San Carlos Borromeo</i> , 355 NLRB 153 (2010)	21
<i>San Juan Bautista Medical Center</i> , 356 NLRB 736 (2011)	21
<i>GAF Corp.</i> , 265 NLRB 1361, 1364-1365 (1982)	22
<i>Paramount Potato Chip Company, Inc.</i> , 252 NLRB 794 (1980)	22
<i>Independent Stave Company, Diversified Industries Division</i> , 233 NLRB 1202 (1977)	22
<i>Airport Limousine Service, Inc.</i> , 231 NLRB 932 (1977)	23
<i>Whiting Roll Up Door Mfg. Corp.</i> , 257 NLRB 734 (1981)	23
<i>Central Illinois Public Service Company</i> , 139 NLRB 1407 (1962)	23
<i>Southwestern Electric</i> , 274 NLRB 922, 926 (1985)	23
<i>APT Medical Transportation, Inc.</i> , 333 NLRB 760, 764 (2001)	25, 37, 41
<i>Bremerton Sun Publ’g Co.</i> , 311 NLRB 467, 470 n. 8 (1993)	28
<i>Indianapolis Glove Co.</i> , 88 NLRB 986, 987 (1950)	29
<i>American Life and Accident Insurance Co. of Kentucky</i> , 123 NLRB 529, 530 (1959)	29
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3 rd Cir. 1951)	34, 45
<i>Advanced Transportation Co. v. NLRB</i> , 979 F.2d 569 (7 th Cir. 1992)	34
<i>Apple SoCal LLC, d/b/a Applebees</i> , 367 NLRB No. 44 (2018)	39, 40
<i>WGE Federal Credit Union</i> , 346 NLRB 982, 983 (2006)	39
<i>Pankratz Forest Industries</i> , 269 NLRB 33, 36-37 (1984)	39
<i>Kelly-Goodwin Hardwood Co. v. NLRB</i> , 762 F.2d 1018 (9 th Cir. 1985)	39
<i>Redd-I, Inc.</i> , 290 NLRB 1115, 1118 (1988)	40

I. MOTION TO STRIKE RESPONDENT'S EXCEPTIONS AND EXHIBITS

On June 18, 2019, Respondent filed exceptions to the Decision of Administrative Law Judge Elizabeth M. Tafe (the ALJ) in the above-captioned matter of Transportation Services of St. John, Inc., Case 12-CA-202248, reported at JD-44-19.

Preliminary, it is submitted that Respondent's exceptions are procedurally defective under Section 102.46(c)(1), (2), and (3) of the Rules and Regulations of the National Labor Relations Board (the Board) because it does not contain a clear and concise statement of the case containing all that is material to the consideration of the questions presented, does not specify the questions involved and to be argued, together with a reference to the specific exceptions to which they relate, and the argument does not clearly present the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

Furthermore, Respondent attached to its exceptions documents that were not admitted into evidence at the hearing and therefore are not part of the record in this proceeding. In this regard, it is well established that references, and inclusion, of documents that were not admitted into evidence, and are therefore not part of the official record, are excluded from consideration by the Board. See, *King Soopers, Inc.*, 344 NLRB 842, fn. 1 (2005).

Accordingly, General Counsel moves to strike Respondent's exceptions as defective under the Board's Rules and Regulations, as well as the attached exhibits, specifically Exhibit A (Respondent's Post-Hearing Brief dated October 5, 2018; Exhibit B (E-mail including filing receipt dated October 5, 2018, which shows that Respondent improperly filed its Post-Hearing Brief), and Exhibit C (Respondent's position statement submitted to the Region in response to the charge in Case No. 12-CA-186255, which Respondent failed to make an offer of proof after it tried

to introduced during the hearing and the ALJ refused to admit it into evidence). [Tr. 41:18-25, 42-46, 47:1-4].

II. STATEMENT OF THE CASE

Pursuant to Section 102.46 of the Rules and Regulations of the Board, Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision for the Board's consideration in the event the above motion to strike is denied.

On May 20, 2019, the ALJ issued her Decision in which she determined that Transportation Services of St. John, Inc. (Respondent) violated Section 8(a)(1) and (5) of the Act. The ALJ properly found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to continue in effect the terms and conditions of its collective-bargaining agreement with the United, Industrial, Service, Transportation, Professional and Government Workers of North America, of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District/NMU, AFL-CIO (Union), by refusing to arbitrate grievances, and has been failing and refusing to bargain in good faith with the Union within the meaning of Section 8(d) of the Act. [JD 11:14 to 16:6].¹

Respondent excepted to the ALJ's findings that Respondent is refusing to arbitrate grievances, such as the one of employee Alvin Emanuel, because the cost of the grievance is higher than the underlying dispute in the grievance, effectively modifying the Grievance and Arbitration Procedure contained in the parties' contract. Respondent's exceptions are largely based on

¹ As used herein "JD" refers to the ALJ's Decision, followed by the page and line numbers; "Tr" refers to the transcript followed by the page and line numbers; "R. CEX" refers to Respondent's Exceptions to the ALJ's Decision, "GC Ex." refers to General Counsel's exhibits; "JX" refers to joint exhibits; and "R Ex." refers to Respondent's exhibits.

unfounded conclusory statements and contentions that the ALJ's appropriate finding of facts, credibility findings, and determinations should be overturned.

For the reasons discussed below, the General Counsel urges the Board to deny Respondent's exceptions in their entirety, and to affirm the ALJ's findings of facts, conclusions of law, and recommended remedy and Order.

III. STATEMENT OF FACTS

As the ALJ properly found, Respondent is a corporation with a principal office and place of business in St. John, United States Virgin Islands, a Territory of the United States, (USVI) engaged in the business of providing regular marine ferry passenger transportation services between the islands of St. Thomas, USVI and St. John, USVI, and occasional marine ferry passenger transportation services to the islands of St. Croix, USVI and the Commonwealth of Puerto Rico. Annually in conducting its business, Respondent derives gross revenues in excess of \$250,000, and purchases and receives goods valued in excess of \$50,000 at its places of business in the USVI directly from points located outside the USVI, and from other enterprises located within the USVI, each of which receives the goods directly from points outside the USVI. The ALJ found, as stipulated by the parties, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. [JD 2:11-21; JX 24, paragraph 2]. The ALJ further found that the Union is a labor organization within the meaning of Section 2(5) of the Act. [JD 2:23-24].

As stipulated by the parties and found by the ALJ, the following employees constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

All crewmen employed by the Respondent at its place of business located in the United States Virgin Islands.

[JD 2:30-34; JX 24, paragraph 4].

A. The parties' current collective-bargaining agreement includes a Grievance and Arbitration Procedure that provides for the selection of an FMCS arbitrator

As stipulated, since May 1, 1998, and at all material times, Respondent has recognized the Union as the exclusive collective-bargaining representative of all crewmen employed by Respondent at its place of business located in the United States Virgin Islands (USVI). This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from September 1, 2006 to August 31, 2009. [JD 3:1-4; GC Ex. 1(e), paragraphs 5(a) and 5(b); GC Ex. 1(i), paragraph 10; GC Ex. 2; JX 1; JX 24, paragraphs 4-6].

Since the expiration of the collective-bargaining agreement in August 31, 2009, Respondent and the Union have agreed to extend the collective-bargaining agreement on a day to day basis. Meaning that, at all relevant times, the collective-bargaining agreement that was effective by its terms from September 1, 2006 to August 31, 2009, has been in effect and valid. The parties have reserved their right to terminate the day to day extension of the collective-bargaining agreement. But, at no time the parties have terminated the day to day extension. [JD 3:10-21; JX 1; JX 24, paragraphs 7-9; Tr. 22:12-25; 23:1; 25:5-18].

The record clearly shows that the parties' extant collective-bargaining agreement contains the following grievance and arbitration procedure:

Article XI – “Grievance and Arbitration Procedures”

Section 1. Grievances are any disputes, complaints or controversies arising between the parties hereto relating to, arising out of, or about or involving questions of an

alleged violation, interpretation, application or performance of any Article or Articles of this Agreement.

Section 2. If a grievance as herein defined should arise, an honest effort shall be made to settle such difficulties promptly in the manner outlined in the following steps:

STEP 1. The matter will first be discussed between the aggrieved employee and employees, the employee's immediate supervisor and the Shop Steward, not later than two (2) working days after its occurrence. The Supervisor shall advise the employee and the Shop Steward of his decision within two (2) working days after the discussion has taken place.

STEP 2. If the grievance is not satisfactorily adjusted in Step 1 above, the matter shall be reduced to writing and presented to the Company's top management within five (5) work days from the date the grievance arose. Top management shall meet with the Union official, the Shop Steward and the Supervisor within (2) work days after such presentation. Within five (5) work days after this meeting, top management shall advise the Union of their decision in writing.

STEP 3. If top management's decision is not satisfactory to the Union, within five (5) days after receipt of that decision, the Union may present top management with a written demand for arbitration signed by a Union Official. When a demand for arbitration is presented, either party shall have the right to request Federal Mediation and Conciliation Services (FMCS) to provide the parties with a panel of seven (7) impartial Federal arbitrators. Thereafter each party shall strike three names and the person last appearing on the list shall be designated as the arbitrator and his appointment shall be binding on both parties.

Section 4. The arbitrator will set a date and the time for the hearing of the grievance and must notify the parties no less than ten (10) working days in advance of said hearing date.

Section 5. Any decision or award of an arbitrator rendered within the limitations of the above sections shall be final and binding on the Union, the employee and the Company and enforced in any court of competent jurisdiction.

Section 6. Only the Employer and the Union shall have the right to request arbitration.

Section 7. The fees and expenses of the arbitrator (including the cost of a transcript where mutually agreed) shall be equally divided between the Union and the Employer. Otherwise, each party shall pay its own expenses. Employees call to the arbitration as witnesses will be excused by the Company without loss of pay in a manner which will duly disrupt the operations of the Company.

[JD 3:23 to 4:36; JX 1, page 8-10 (our emphasis)].

The above-mentioned Grievance and Arbitration Procedure has remained unchanged since at least 1999. [JD 4:38-39; Tr. 26:19-23]. As established in the parties' CBA, there are time limitations for the filing of grievances. Once a grievance is timely filed, the Union representative and Respondent's representative must hold a meeting to discuss the grievance. Afterwards, Respondent must issue a written response to the Union with respect to the grievance and Respondent's decision. If the Union is not satisfied with Respondent's determination, the Union can take the grievance to the next step and demand arbitration. The demand for arbitration is issued by the Union representative, who submits a summary report to the Union's Vice President, Eugene Irish (Irish), for his review and final decision on how to proceed. Irish would then consult with the Union's legal representatives and solicit a legal opinion on the matter being arbitrated, in order to make a final determination whether or not to arbitrate the grievance. [JD 4:39-47, 5:1-2; Tr. 30:4-25; 31; 32:1-8; 73:1-17]. If the Union is not satisfied with Respondent's decision and wishes to arbitrate the grievance, the CBA provides that a panel of arbitrators shall be selected from the Federal Mediation and Conciliation Services (FMCS). [JD 5:2-3; Tr. 30:23-25].

During the last 12 to 15 years, the Union has demanded arbitration in several cases. However, the parties have arbitrated only one grievance. [JD 5:5-7; Tr. 32:9-15; 140:15-20]. The grievance that was arbitrated was related to the reinstatement of employee Alvis Emanuel. [JD 5:7, fn. 7; Tr. 32:23-25]. A full arbitration hearing was held, pursuant to the Grievance and Arbitration

procedure set forth in the CBA. The arbitrator was a FMCS arbitrator from mainland USA, and the arbitration was held in person. [JD 5:8-10; Tr. 33:1-15; 140:21-23].

B. The Union filed a grievance on behalf of employee Alvis Emanuel concerning a two-week suspension and after complying with the procedural requirements demanded arbitration

On December 27, 2016, the Union through representative Kevin Challenger (Challenger) filed grievance No. 049-16 with General Manager Kenrick Augustus (Augustus) on behalf of employee Alvis Emanuel (Emanuel) contesting a two-week suspension of employment that Respondent imposed upon Emanuel because allegedly he solicited tips from clients. [JD 5:15-18; JX 2; JX 24, paragraph 10].

On January 5, 2017, Challenger met with Respondent's President Loredon Boynes (Boynes), General Manager Augustus, and Emanuel to discuss Emanuel's two week suspension (grievance No. 049-16). [JD 5:24-25; JX 24, paragraph 11]. During the meeting the parties did not reach an agreement; Respondent informed the Union that it was upholding Emanuel's suspension and that it was going to issue a written decision. [Tr. 75:2-20]. Despite the fact that the parties' contract establishes that Respondent shall advise the Union within five work days after the Step 2 meeting, of its decision concerning the grievance, Respondent failed to timely notify the Union in writing of its decision.² [JD 5:28-31; Tr. 75:23-25; 76:1-4; 101:16-24].

After failing to receive Respondent's written decision and after conducting an internal review of the documentary evidence it had obtained while investigating grievance No. 049-16, on February 16, 2017, the Union, through its legal counsel, John J. Merchant, Esq. (Merchant) sent a letter to Respondent's President Boynes demanding arbitration with regard to the grievance No.

² In this regard, it should be noted that the Union followed-up at least in two occasions.

049-16. [JD 6:5-6; JX 3; JX 24, paragraph 12; Tr. 126:20-24]. Accordingly, that same day, February 16, 2017, Merchant submitted the arbitration application to the Federal Mediation and Conciliation Service (FMCS). [JD 6:7-8; JX 4; JX 24, paragraph 13].

On March 3, 2017, almost two months after the meeting to discuss the grievance with the Union and after the Union had moved for arbitration, Respondent sent a letter to the Union denying the Union's request with regards to grievance No. 049-16. [JX 5; JX 24, paragraph 14]. Later, on March 10, 2017, Respondent's legal counsel, Maria Tankenson Hodge, Esq. (Hodge) sent a letter to the Union's legal counsel Merchant, among other things, arguing that grievance No. 049-16 was not ripe for federal mediation or conciliation services. In her letter, Respondent fails to establish the basis for her argument. [JX 7; JX 24; paragraph 16].

On March 23, 2017, the Union replied clarifying that on January 5, 2017, the parties had the Step 2 meeting to discuss grievance No. 049-16, and that afterwards Respondent failed to notify the Union of its decision in writing. The Union's counsel further suggested three options: to arbitrate the grievance pursuant to Article XI of the CBA; that the Company rescind the discipline and suspension of employee Emanuel; or to litigate before the NLRB if the Union observed the due process contained in the CBA and then arbitrate the grievance. [JD 6:25-31; JX 8; JX 24, paragraph 17].

C. Respondent unlawfully insists on establishing the cost of arbitration against the cost of the underlying dispute as a factor to consider whether to appoint an arbitrator and to comply with the contractual arbitration procedure

Given that on March 8, 2017, the FMCS had submitted to the parties a panel of seven (7) arbitrators for grievance No. 049-16 [JX 6; JX 24, paragraph 15], on April 5, 2017, the Union notified Respondent the three arbitrators it eliminated from the panel of seven, for Respondent to do the same. [JD 6:33-36; JX 10; JX 24, paragraph 19]. That same day, April 5, 2017,

Respondent's Counsel Hodge, sent an e-mail to the Union attaching a letter dated March 24, 2017, where she stated that Respondent generally contended, without any specific fact or explanation that the Union did not comply with the procedural requirement of the parties' contract with regard to the grievance. In this email, Respondent further acknowledged that the parties' had agreed to extend the collective-bargaining agreement on a day-to-day basis while they bargain over a successor contract. Respondent further argued that moving the matter to federal arbitration at that point was a step that involved a costly dispute resolution mechanism, particularly for a small Virgin Islands company. Respondent stated that although it was not prepared to rescind the discipline or suspension, *if the Union considered the matter to warrant federal arbitration, Respondent would proceed with the process*. Finally, Respondent asked the Union to consider a local mediation and/or a local mediator, to limit costs. [JD 6:36-47, 7:1-22; JX 11; JX 24, paragraph 20 (our emphasis)].

The following day, April 6, 2017, Respondent through Hodge, sent an email to the Union requesting copies of the seven FMCS arbitrator's résumés. That same day, the Union provided Respondent with the requested information. [JD 7:34-37; JX 13; JX 24, paragraph 22].

On April 6, 2017, the Union also replied to Respondent's March 10th letter [JX 7] indicating that it intended to obtain full disposition of grievance No. 049-16 before an arbitrator. The Union once again demanded arbitration pursuant to the parties' collective-bargaining agreement. [JD 7:24-32; JX 12; JX 24, paragraph 21]. The following day, April 7, 2017, the Union sent another e-mail to Respondent's counsel indicating that once Respondent announced its selection from the remaining arbitrators in the list, the Union would consider whether to make an exception and stipulate to a local arbitrator. The Union, however, clarified that it felt that there was a strong perception that a local arbitrator would be biased and indicated that if Respondent chose a FMCS

arbitrator, the parties would have a pre-hearing meeting to see if the matter could be constructively discussed and settled. [JD 7:39-45, 40:1-2; JX 14; JX 24, paragraph 23].

That same day, April 7, 2017, Respondent sent an e-mail to the Union asking the Union's position about conducting the arbitration hearing by Skype or other remote mean to avoid paying an arbitrator's daily rate and travel expenses to and from the Virgin Islands, pointing out that the expense would substantially add to the cost, no matter how brief the actual hearing was. [JD 7:45-47, 8:1-2; JX 14; JX 24, paragraph 23]. The Union, through attorney Merchant replied to Respondent stating that he was going to discuss it with the Union but noted that he had no prior experience and that it appears that it could be a challenge for an arbitrator to get a proper "read" on witness testimony by video conference. [JD 8:2-4; JX 14; JX 24, paragraph 23]. Respondent agreed with the Union that it would not be a perfect equivalent of an in person hearing for both parties but thought cost considerations were a valid factor when the amount in controversy was not large. Respondent further stated that it was trying to evaluate the remaining arbitrator candidates and would inform the Union when done. [JD 8:4-8; JX 14; JX 24, paragraph 23].

On April 11, 2017, Respondent wrote to the Union stating that it continues to review the list of proposed arbitrators, while it awaits word on its request to have the arbitration done by Skype, videoconference or telephone in order to control the excessive costs associated with the dispute resolution in the territory for the modest amount that was in dispute. [JD 8:10-20; JX 15; JX 24, paragraph 24].

On May 8, 2017, the Union informed Respondent that the Union did not agree to conduct the arbitration through Skype, video conference, or some other means. The Union explained to Respondent its reasons for its objection of having the arbitrator dial in an appearance in a case, where the witnesses' testimony will be considered in light of their physical comportment during

direct and cross examinations. The Union further explained that it could consider such cost cutting measures in matters that merely concern a contractual dispute. The Union once again requested Respondent to select an arbitrator and to notify it of the appointment. [JD 8:22-32; JX 17; JX 24, paragraph 26].

On May 16, 2017, Respondent replied to the Union arguing that there was no reasonable justification for the Union's refusal to consider cost-saving means in order to conduct the arbitration in the Virgin Islands. Respondent argued that with a stateside arbitrator, the cost of travel alone would dwarf the amount in controversy, only so that the arbitrator may consider the "witnesses physical comportment." Respondent further argued that witnesses routinely testify in federal and superior court by video deposition and comparable means, allowing a trier of fact to observe their demeanor. Respondent again asked the Union to consider its request in good faith, and without suggesting that the only way to avoid the alleged punitive expense was for Respondent to capitulate to the Union's demand. Respondent for the third time told the Union that it was still reviewing the available candidates and noted that they were informed that there was at least one arbitrator resident in St. Thomas who has been accepted by another Union, the United Steel Workers, for similar arbitrations, at what Respondent understood was a far more reasonable cost. In this letter, Respondent further states that it was conferring about involving a labor law specialist because it thought that the Union was not prepared to be reasonable about the process of resolving the grievance. [JD 8:34-47, 9:1-10; JX 18; JX 24, paragraph 27].

D. Respondent also failed to complete the selection of an arbitrator in a second grievance the Union filed on behalf of employee Emanuel alleging Respondent's failure to pay Emanuel for participating in a bargaining meeting, grievance No. 008-17

While the Union insisted that Respondent select an arbitrator for grievance No. 049-16, on March 28, 2017, the Union filed another grievance, grievance No. 008-17, on behalf of employee Emanuel concerning Respondent's failure to pay Emanuel for the days he participated in bargaining meetings in accordance with its established past practice for approximately 20 years. [JD 11:1-5; GC Ex. 4; Tr. 35:17-25; 79:3-23; 80:9-13; 81:11-20]. Since the Union also demanded arbitration concerning this grievance, on April 18, 2017, the FMCS submitted a panel of seven (7) arbitrators to be considered by the parties with regard to grievance No. 008-17. [JD 11:5-6; JX 16; JX 24, paragraph 25; Tr. 36:21-23]. On May 19, 2017, the Union notified Respondent the three arbitrators it eliminated from the panel of seven arbitrators the FMCS submitted for grievance 008-17. [JD 9:21-22, 11:6-9; JX 19].

On May 19, 2017, and in order to accommodate Respondent's objection regarding the cost of arbitration, the Union proposed to Respondent as an alternative that if it agreed to resume observance of the arbitration procedure outlined in the parties' contract by promptly selecting one of the panelists provided by the FMCS to resolve grievance No. 049-16, the Union would then agree to have said arbitrator also hear and decide grievance No. 008-17 in order to save money in travel and lodging. [JD 9:19-20; JX 19; JX 24, paragraph 28]. The Union further noted that Respondent's wish to find a labor specialist did not justify further delay in the process and explained that once an arbitrator was selected, such arbitrator could entertain any pre-hearing motion including Respondent's request to have the arbitration by video conference, or other means, motion the Union had a right to vigorously oppose. [JD 9:22-26; JX 19; JX 24, paragraph 28].

Although the Union ended-up not pursuing grievance No. 008-17, Respondent's position with regard to the arbitration and the arbitration costs of grievance No. 008-17 was the same as with grievance No. 049-16. In this regard, Union's Vice President Irish testified that the Union requested a panel of arbitrators from the FMCS, and Respondent did not select an arbitrator from the suggested FMCS panel for grievance No. 008-17. [JD 11:12; Tr. 36:24-25; 37; 38:1-20]. Irish testified that he was aware that Respondent continued to insist in its position regarding grievance No. 008-17, and based on his observation, Respondent would try to insist in the same position for every particular grievance moving forward. [Tr. 64:22-25]. Likewise, General Manager Augustus affirmed that Respondent was willing to arbitrate grievances using "the least expensive way possible". [Tr. 127:8-25; 128:1-5]. Thus, the ALJ correctly determined that "although the evidence involves only one valid grievance, the Respondent's actions and statements in the record make clear that it intends to apply the modification generally". Further, the ALJ determined that "the record shows that Respondent intends to unilaterally impose this same condition on all grievances going forward." [JD 13:16-18; 21-22, fn. 10].

E. FMCS informed Respondent that there were no local arbitrators available

On June 7, 2017, Respondent's legal counsel Hodge sent a letter to the FMCS, with regard to grievance No. 049-16, contesting why the panel of arbitrators proposed in case number 170308-01167-1 (grievance No. 049-16) did not include any arbitrators from the geographic area where the arbitration would be held. In this letter, Respondent argued that this placed Respondent in an untenable position, as the amount in controversy was so modest that the cost of travel, alone, for an arbitrator, would exceed the disputed claim. Attorney Hodge requested that a new panel be compiled, composed of arbitrators from the Virgin Islands and Puerto Rico, and reserved any objection to the proposed arbitration. [JD 9:28-33; JX 20; JX 24, paragraph 29].

On June 9, 2017, the Arbitration Director of the FMCS, Arthur Pearlstein (Pearlstein), replied to Hodge's June 7, 2017 letter, stating that the FMCS can only provide panels of arbitrators who are listed on its roster, and that there were no arbitrators listed from the Virgin Islands and that there was only one arbitrator from Puerto Rico. He further explained that the request for a panel was, in any event a regional request, which includes the states from which arbitrators were randomly drawn from. It is significant to note that Pearlstein stated that if the parties' collective-bargaining agreement provided for something different, to please share the relevant portions of the contract with him so he could review it. [JD 9:33-39; JX 21; JX 24, paragraph 30]. However, it should be noted that based on the fact that there were no arbitrators available from the USVI and only one from Puerto Rico, it is immaterial whether the Union's request was regional, a metropolitan or a sub-regional request, as Respondent is trying to argue. [R. CEX 14].

F. Respondent did not select a FMCS arbitrator for Emanuel's grievance because the cost of the arbitration would presumably exceed the amount owed to Emanuel if he prevailed, thus, effectively modifying the parties' contract by unilaterally establishing cost consideration as a pre-requisite to the contractual grievance procedure

As discussed previously, the record clearly shows that Respondent did not select an arbitrator for Emanuel's grievance No. 049-16 because of cost considerations. Thus, failing and refusing to comply with the Grievance and Arbitration Procedure established in the parties' contract. Respondent's contention has always been that it cannot afford to do arbitration using an FMCS arbitrator because it is too expensive, and it exceeds the amount owed to Emanuel if he prevailed. [JD 10:15-20; Tr. 119:1-4]. Respondent even admitted that it is willing to arbitrate but

in a reasonable way. [JD 10:20-21; Tr. 128:1-5]. The problem, however, is that the reasonableness of the procedure is being unilaterally established by Respondent. [Tr. 141:16-25; 142:1-5].³

However, Respondent assumed that the cost of the arbitration will exceed the remedy owed to the employee. In this regard, during the hearing, Respondent's President Boynes and General Manager Augustus admitted that Respondent did not perform a cost analysis of the arbitration proceedings. [JD 10:31-33; Tr. 119:16-25; 120:1-11; 133:19-25; 134:1-12]. Augustus even admitted that he assumed that the cost of arbitration would be too high. [Tr. 134:19-20]. Respondent further admitted that it never reviewed the résumés of the arbitrators submitted by the FMCS. [JD 10:42-43; Tr. 120:14-18].

As of today, Respondent has not selected an arbitrator from the FMCS list of seven (7) arbitrators provided. [JD 9:45-47, 10:42-43; JX 24, paragraph 33; Tr. 139:6-17]. Respondent insist in having the arbitration proceeding of those grievances where there is no local arbitrator available through video conference, Skype and/or other remote communication means, even though the CBA does not provide for it and the Union has not agreed to said condition. [JD 10:1-13; Tr. 119:5-10; 127:8-25; 128:1-5; 134:21-25; 135:4-6; 137:18-23]. As a result, the ALJ properly found that Respondent violated Section 8(a)(5) and (1) within the meaning of 8(d) by refusing to follow the grievance-arbitration provision in the parties' collective-bargaining agreement when it refused to select from a list of arbitrators presented according to the procedures in Article XI of the CBA, after the Union did not consent to the Respondent's proposal of a midterm modification of the CBA.

³ During the hearing, Respondent also affirmed that it understood that the grievance procedure should change in a way that the arbitration should be conducted with a local arbitrator. [JD 10:21; Tr. 137:18-23].

IV. DISCUSSION OF RESPONDENT'S EXCEPTIONS AND ARGUMENT

A. Respondent did not file its Post-Hearing Brief with the Division of Judges [Respondent's Exceptions 2, 3, 16 and 17]

In its Exceptions 2, 3, 16 and 17, Respondent claims that its due process was violated by the ALJ's failure to consider the post-hearing brief it filed on October 5, 2018. Although Respondent served copy of a post-hearing brief to the General Counsel on that same date, which was the final date the parties had to file briefs with the ALJ, Counsel for the General Counsel was not aware that Respondent's brief was improperly filed as it was not electronically filed with the Division of Judges as required. *"All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to §102.45, must be filed with the Administrative Law Judge, care of the Chief Administrative Law Judge in Washington, DC, the Associate Chief Judge in San Francisco, or the Associate Chief Judge in New York, as the case may be."* Section 102.24 of the Rules and Regulations of the Board (our emphasis).

Thus, it is respectfully submitted that the ALJ correctly found and stated in her decision that Respondent failed to file a post-hearing brief. In this regard, it is not the ALJ's fault that Respondent did not comply with the requirements of Sections 102.24 and 102.42 of the Board's Rules and Regulations. Furthermore, Respondent's responsibility to properly file its post-hearing brief cannot be delegated or transferred to the ALJ or any of the other parties.

In any event, although the fact that Respondent's post-hearing brief was not considered by the ALJ is only attributable to Respondent, it is respectfully submitted that Respondent's due process was not violated since the ALJ correctly relied on the evidence in the record and made its own analysis of the case. Thus, Respondent's post-hearing brief would have not changed the ALJ's findings, conclusions or recommended Order.

Based on the above, Respondent's Exceptions 2, 3, 16 and 17, should be rejected as they are meritless.

B. Respondent refused to choose an Arbitrator and instituted a cost of arbitration evaluation to decide whether a grievance can proceed to arbitration without the Union's consent, in violation to Sections 8(a)(5) and 8(d) of the Act

1. Legal Standard

Section 8(d) of the Act defines the 8(a)(5) 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. Under Section 8(d), it is clear that, once an agreement is struck, an employer may not change terms and 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). In such cases, the gravamen of the violation is contract modification. [JD 11:29-34].

Thus, the Board has established that in order to prove a violation, the General Counsel must show that there is a contract provision that the employer has modified. An employer, however, 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 Ass'n. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). See also *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010). *San Juan Bautista Medical Center*, 356 NLRB 736 (2011). [JD 11:34-40].

2. The ALJ correctly found that Respondent is refusing to arbitrate grievances when the cost of the grievance is higher than the underlying dispute in the grievance, effectively modifying the Grievance and Arbitration Procedure contained in the parties' contract (Respondent's Exceptions 6, 7, 8, 9, 10, 11, 13, 28 and 29)

Respondent excepts to the ALJ's finding and conclusion that Respondent's insistence to conduct the arbitration hearing using a Virgin Islands resident arbitrator, or customary means of remote communication, was a modification of the Grievance and Arbitration Procedure contained in the CBA arguing that the ALJD lacks evidentiary basis for said conclusion. [R. CEX 3]. Respondent further argues that no evidence was presented that the CBA prescribes specific means of conducting an arbitration. [R. CEX 3-4]. Respondent also excepts to the ALJ's conclusion that Respondent's request to conduct the arbitration using a Virgin Island resident arbitrator or using technology to conduct the arbitration remotely, was a refusal to arbitrate or a unilateral modification of the CBA. Respondent argues that the ALJ abused its discretion and incurred in error by not considering the Respondent's positions on the cost estimate of the arbitration. [R. CEX 4-5]. Likewise, Respondent excepts and argues that the ALJ erred in finding that it was immaterial how reasonable Respondent's position was regarding the procedure for arbitration since the Union had no obligation to agree to reasonable positions, and that the ALJ erred in distinguishing or ignoring case law finding that an employer's refusal to arbitrate a single grievance or a narrow category of grievances does not necessarily violate the Act. [R. CEX 5-6]. However, Respondent's exceptions are without merit.

The Board has stated that, where there is a collective-bargaining agreement containing a grievance/arbitration clause, an employer's refusal to take all, or even most, grievances to arbitration constitutes an 8(a)(5) violation. See, *GAF Corp.*, 265 NLRB 1361, 1364-1365 (1982); *Paramount Potato Chip Company, Inc.*, 252 NLRB 794 (1980); *Independent Stave Company*,

Diversified Industries Division, 233 NLRB 1202 (1977); *Airport Limousine Service, Inc., and Jay McNeill, Esq. as Receiver for Airport Limousine Service, Inc.*, 231 NLRB 932 (1977). [JD 12:5-9]. However, a refusal to arbitrate one type of grievance is not necessarily an unfair labor practice. Where an employer refuses to arbitrate a very narrow, specifically defined grievance subject matter, the Board has not found a violation of the Act. *Whiting Roll Up Door Mfg. Corp.*, 257 NLRB 734 (1981); *Central Illinois Public Service Company*, 139 NLRB 1407 (1962); *Airport Limousine, supra*, at 934. In deciding whether refusals to arbitrate violate the Act, *the ultimate question is whether the employer by its conduct has unilaterally modified contractual terms or conditions of employment during the effective period of the contract. Southwestern Electric*, 274 NLRB 922, 926 (1985) (our emphasis). [JD 12:9-17].

Here, the ALJ correctly stated that the question presented in this case was whether Respondent refused to follow the grievance-arbitration provision in the parties' collective-bargaining agreement when it refused to select from a list of arbitrators presented according the procedures in Article XI of the CBA, after the Union did not consent to the Respondent's proposal for a midterm modification of the CBA terms. [JD 11:20-24].

In that regard, the record clearly shows that Article XI of the CBA, the grievance-arbitration procedure, was in effect when the underlying events that led to Emanuel's 2-week suspension occurred, and when the union invoked its rights under the CBA to seek arbitration of its claim that Emanuel's discipline violated the CBA. [JD 12:19-23; JX 1; JX 2; JX 24, paragraphs 6, 7, 9].

The record further shows, as the ALJ correctly found, that Respondent refused to meet its obligations under Article XI of the CBA when it insisted on the right to unilaterally determine that the monetary value of the grievance does not warrant the cost of the arbitration, and requiring

under those circumstances that the Union consent to changing the language of Article XI of the CBA to accommodate the Respondent's desire for a different arbitrator selection process that the one expressly provided for in the parties' CBA. [JD 12:25-30; JX 1]. As the ALJ correctly found, the language of the contract does not authorize Respondent's proposed limitation on arbitration to either insist on a local arbitrator, or to insist on holding the arbitration remotely by video or teleconference. The terms of the CBA clearly require that, after the Union's demand for arbitration and the request for a panel of seven arbitrators explicitly from the FMCS, "each party shall strike three names and the person last appearing on the list shall be designated as the arbitrator and his appointment shall be binding on both parties." [JD 12:30-36; JX 1]. Therefore, the ALJ correctly concluded that nothing in the agreed to grievance-arbitration provision entitles Respondent to refuse to follow this provision due to the anticipated costs of the arbitration. Also, nothing in the agreement permits Respondent to refuse to arbitrate a grievance because the Union does not consent to a different method of selection of an arbitrator than the procedures set forth in the CBA. Likewise, nothing in the agreement permits the Respondent to refuse to follow the grievance arbitration procedure because it unilaterally preferred using a local arbitrator not affiliated with FMCS or to unilaterally insist that the hearing be held by video or teleconference. [JD 12:36-44].

Respondent also argues that if Respondent's position was deemed a modification of the CBA, said modification is justified as a "sound arguable basis" for interpreting the language of the contract to permit the modification. [R. CEX 4]. Contrary to Respondent's contentions, the record is devoid of any evidence establishing or suggesting that Respondent had a "sound arguable basis" justifying its refusal to select an arbitrator or for its insistence on the Union to agree to have the arbitration hearing through Skype, videoconference, or telephone, as an alternate mean to an in-person hearing in order to reduce the costs of arbitration. Respondent's argument has a major flaw;

there is no contract provision, or language, in which Respondent could try to justify its refusal to select an arbitrator until the Union concedes to its request. Nothing in the parties' contract justifies Respondent's clear refusal to select an arbitrator and continue with the parties' grievance and arbitration procedure if the Union does not accept its proposed modification. Moreover, it should be noted that Respondent first raised the argument that it had a sound arguable basis for refusing to follow the grievance and arbitration procedure in its Exceptions. This argument was not raised in its answer to the complaint or before the ALJ.

Respondent instead claimed and argues in its exceptions, that the position taken by the Union with regard to arbitration lacked good faith, was not reasonable and was meant to coerce Respondent into capitulating to the Union's demand for arbitration or to resolve the underlying grievance. Respondent's proposition that the Union had to capitulate or agree to its proposal for a more "reasonable mean of arbitration" on good faith grounds is not supported by Board law. In this regard, Section 8(d) of the Act makes it equally plain that good-faith bargaining "does not compel either party to agree to a proposal or require the making of a concession." See, *APT Medical Transportation, Inc.*, 333 NLRB 760, 764 (2001). Thus, the fact that the Union did not agree to modify the contract cannot be hold against it. To the contrary, the Union, within its right, requested the enforcement and compliance with the terms of the agreement with regard to the grievance and arbitration procedure. The Union simply requested Respondent to comply with the agreed upon contract provision. In addition, the record clearly shows that the Union considered Respondent's proposal and even offered to contemplate alternative means once the arbitrator had been selected, showing the Union's good faith during the process. [JX 14; JX 24, paragraph 23]. The fact that the Union offered to consolidate grievances 049-16 and 008-17, before deciding not to pursue grievance 008-17, demonstrates that it wanted to accommodate Respondent's concerns

regarding the cost associated with the processing of grievances, without abrogating its right and/or compromising its duty to fairly represent its members as best as it deems fit.

Furthermore, in Exceptions 13, 28 and 29, Respondent's attempts to insinuate that the Union engaged in bad faith by suggesting, as a cost reduction consideration, that Respondent settle Emanuel's grievance to avoid the costs of arbitration. This contention is without merit. In this regard, it is common practice, in any adversarial proceeding, including arbitration or any kind of litigation, to consider the procedural costs versus the cost of the underlying dispute. Thus, Respondent's contention in this regard should not be afforded any weight.

In this case, the ALJ correctly found that there have been two grievances where Respondent has failed and refused to select an arbitrator from the FMCS panel because it insisted on having a local arbitrator assigned to the case or that the hearing be conducted through Skype, videoconference, or telephone, in order to reduce the costs associated with the arbitration. Although the ALJ did not rely on the fact that these two grievances were not of the same kind or class, and found it to be only marginally relevant the fact that Respondent also failed to follow the arbitration procedure with regard to grievance No. 008-17, the ALJ still found that Respondent did not limit its refusal to arbitrate to a specifically defined or narrow class of grievances that might excuse its conduct under Board precedent. The ALJ correctly concluded that the record shows that Respondent intends to unilaterally impose this same condition on all grievances going forward. [JD 13, fn. 10].

Nevertheless, even assuming *arguendo*, that Respondent had a right to refuse to arbitrate grievance 008-17 concerning its alleged failure to pay Emanuel for the time he spent in negotiations, it is submitted that Respondent is not refusing to arbitrate a specifically defined, or very narrow class of grievances. Instead the record shows, and the ALJ correctly determined, that

Respondent attempts to impose this same condition to a wide type or class of grievances. [JD 13, fn. 10]. Namely, those where in Respondent's discretion an arbitrator would not be cost-effective. In this case, Respondent's letter to the Union dated May 16, 2017 (JX 18) make it clear that Respondent failed and refused to participate in the selection of an arbitrator because it arrogated to itself the determination as to which grievances should be arbitrated based on cost, contrary to what it is provided by the terms of the parties' contract. Thus, the evidence provides no basis for concluding that Respondent's refusal to arbitrate is narrowly grounded.

In sum, the General Counsel submits that Respondent's refusal to arbitrate grievances, even if it is only grievance 049-16, had the effect of modifying the parties' grievance and arbitration procedure. Furthermore, it could be argued that Respondent in fact repudiated the arbitration provision by plainly and simply failing and refusing to select an arbitrator since at least March 8, 2017, date the FMCS submitted panel of arbitrators to the parties, unless the Union agreed to its cost reduction request. If Respondent's position is upheld, it would mean that Respondent has sole discretion determining which grievances can be submitted to arbitration, and which may not, based on its unilateral cost-effectiveness analysis. It is respectfully submitted that this would defeat the purpose of Section 8(d) and 8(a)(5) of the Act requirement of good faith and to continue in full force and effect the terms and conditions of an existing contract between the parties.

Based on the above, Respondent's Exceptions 6, 7, 8, 9, 10, 11, 13, 28 and 29 have no merit, and should be denied.

3. Respondent's Exception 1 alleging that the parties were not given a full opportunity to participate in the hearing, is without merit

Respondent argues that the ALJ denied Respondent "the right to elicit testimony from a witness from the Regional Office regarding the dismissal of a charge on which the General Counsel

and the Union sought to rely on these proceedings”. Respondent also argues that the ALJ arbitrarily excluded from the record Respondent’s answer to the charge in Case 12-CA-186255 submitted to the Region during the investigation of said charge, as evidence of the merits of the charge. [R. CEX 1-2]. However, Respondent’s contentions are meritless.

The ALJ gave all parties involved a full opportunity to participate in the hearing and to introduce relevant evidence. Respondent’s contention that the ALJ denied its right to elicit testimony from a General Counsel’s witness is baseless. The record clearly shows that Respondent was allowed to thoroughly cross examine all of the witnesses called by the General Counsel during the hearing. Furthermore, there is no evidence that Respondent subpoenaed any witness or that it brought to the ALJ’s attention the need to enforce a validly issued subpoena.

Regarding the charge filed by the Union in Case 12-CA-186255, the record clearly shows that Respondent was able to thoroughly cross examine Union Vice President Eugene Irish over this matter. [Tr. 39:25, 40-67, 68:1-8]. Respondent’s contention that the ALJ arbitrarily excluded a proffered exhibit is equally unfounded. The record in this regard shows that Respondent offered into evidence a document consisting of Respondent’s position statement in response to a charge in Case No. 12-CA-186255, a case not related to the instant matter and not included in the instant complaint. However, the ALJ correctly determined that said document was not admissible into evidence and Respondent failed to make an offer of proof. [Tr. 41:18-25, 42-46]. Thus, at this time, Respondent is precluded from raising the ALJ’s exclusion of this document before the Board. In this regard, it is well settled that in the absence of an offer of proof detailing proposed evidence which, if credited, would warrant a different result, the Board will not find that the ALJ erred by precluding such evidence or remand for further evidence. *Bremerton Sun Publ’g Co.*, 311 NLRB 467, 470 n.8 (1993) (our emphasis).

Moreover, the ALJ is permitted leeway in making evidentiary rulings. Rule 403 of the Federal Rules of Evidence states, in pertinent part: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by ... confusion of the issues, ... or by the consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” Similarly, the Board has long held that, “It is appropriate also for the [judge] to direct the [trial] so that it may be confined to material issues and conducted with all expeditiousness consonant with due process” (footnote omitted). *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950). Toward that end, “[i]n the conducting of a [trial] the question of whether certain lines of inquiry or responses of witnesses should be curtailed rests within the sound discretion of the judge. The judge’s authority to expedite trials must not be exercised to the extent it “limit[s] either party in the full development of its case.” *American Life and Accident Insurance Company of Kentucky*, 123 NLRB 529, 530 (1959). Respondent has not shown that the ALJ has limited its ability to develop the record with relevant evidence on relevant issues. The judge received all competent, relevant, and material evidence to the issues in the Complaint and properly precluded that, which in its discretion, though it was not.

Because Respondent’s position statement in response to the charges in Case No. 12-CA-186255 was not admitted into evidence and is not part of the record in this proceeding, and Respondent did not safeguard its right to object to the ALJ’s determination with regard to the exclusion of this piece of evidence by making an offer of proof, it follows that any reference, and inclusion, of said document should be excluded from consideration by the Board. *King Soopers, Inc.*, *supra*. Hence, Respondent’s Exception 1 has no merit and should be denied.

4. Respondent's Exception 4 alleging that the ALJ incorrectly described the Respondent as a "regular marine ferry passenger transportation service", is without merit

Respondent argues that the ALJ incorrectly described Respondent as a "regular marine ferry passenger transportation service" instead of a "public marine passenger ferry service", as verified by testimony and exhibits. [R. CEX 2]. Contrary to Respondent's exception, the ALJ used Respondent's description as admitted by Respondent in its answer to the complaint and stipulated by the parties before the hearing. [JD 2:13; GC Ex. 1(i), paragraph 4; JX 24, paragraph 2]. Moreover, the ALJ properly established that although there was some discussion in the record relating to Respondent's role as one of two contracted providers of public transportation on behalf of the government of the U.S. Virgin Islands, there is still no dispute that the Respondent is a privately-owned company, subject to the Board's jurisdiction. [JD 2, fn. 4; Tr. 104-108, 129-131].

Accordingly, Respondent's Exception 4 has no merit and should be denied since the ALJ properly described Respondent's business operations as it was stipulated by the parties.

5. Respondent's contentions regarding grievance 008-17 and charge 12-CA-186255 are without merit (Respondent's Exceptions 5, 20, 27, 30, 31 and 32)

Respondent makes several contentions regarding grievance 008-17 and an unrelated charge filed in Case 12-CA-186255. First, Respondent excepts to the ALJ's conclusion that grievance 008-17 was withdrawn by the Union without prejudice, following an initial investigation by the Board. [R. CEX 2]. Respondent argues that the charge "was, in fact, withdrawn after the [Respondent] demonstrated in its answer and evidence that the claim was frivolous, based upon contention that had already been rejected by the NLRB, and that it should be dismissed...It further argues, that there was no evidence in the record that the dismissal was 'without prejudice', nor does it was so stated. Respondent argues that, the withdrawal instead, represented an admission by

the Union, with the NLRB, that its charge against [Respondent] was simply baseless and untimely.” [R. CEX 2-3]. Respondent’s contentions in Exceptions 5, 20, 27, 30 and 31, have no merit.

In this case, the ALJ correctly determined, based on the record, that on March 28, 2017, the Union filed a second grievance, grievance No. 008-17, on behalf of employee Emanuel concerning Respondent’s failure to pay him (Emanuel) for the days he participated in bargaining meetings in accordance with its established past practice for approximately 20 years. [JD 11:1-5; GC Ex. 4; Tr. 35:17-25; 79:3-23; 80:9-13; 81:11-20]. The ALJ also found that the Union filed an unfair labor practice charge related to the allegations included in grievance No. 008-17, which the Union later withdrew without prejudice, following an initial investigation by the Board. [JD 11, fn. 9; R. Ex. 1; GC Ex. 4]. Respondent’s contention, that the Union’s withdrawal of the charge shows that the claim was frivolous and/or constituted an admission by the Union that the charge was baseless and untimely, is a self-serving conclusion that is not supported by the record or Board law. The fact that the Union withdrew the charge in Case 12-CA-186255, cannot be construed to mean that the Union did so because the charge was frivolous. In this regard, the Union testified that it withdrew the charge because the Union determined that the underlying grievance No. 008-17 about Emanuel’s payment for participating in negotiation sessions was time barred. [Tr. 36:1-5; 41:14-17; 45:22-25; 46:1-9].

Second, Respondent takes exception and argues that “the ALJ erred in finding the grievance before her timely filed insofar as it may have referred to the separate matter that should not even have been presented, namely Grievance No. 008-17, regarding the same employee.” That “this new grievance was pretextual as well as untimely, and that the Decision errs in failing to note this.” [R. CEX 9-10]. Similarly, Respondent argues that “the charge originally presented, and the

evidence adduced at the hearing over [Respondent's] objection, regarding the Union's claim of right to seek compensation for Emanuel for attending a union contract negotiation" is not a grievance as defined by the CBA. [R. CEX 12]. That "the ALJ erred in allowing the introduction, over Respondent's emphatic objections of evidence regarding non-grievance 008-17" because it dealt with exact same issues raised in 12-CA-186255. [R. CEX 14-15].

Respondent does not refer to the record in support of these exceptions nor cites any legal authority in support thereof. Respondent simply produced no evidence in support of its claim. In this regard, the record is devoid of any evidence that would establish or at least shed light on the argument Respondent is trying to make before the Board. Here, the ALJ correctly referenced the record when determining that the Union had filed a second grievance, grievance No. 008-17, and a subsequent unfair labor practice charge related to the same allegations. [JD 11:1-4, fn. 9]. The ALJ also correctly concluded, based on the record, "that the Union determined that the second grievance (regarding the failure to pay Emanuel for his participation in contract negotiations) was not viable and dropped it." [JD 13, fn. 10]. Most importantly, the ALJ was not determining the timeliness or validity of grievance No. 008-17. Thus, Respondent's contention has no merit and should be denied by the Board.

During the hearing, Union witnesses testified about grievance No. 008-17 and that Respondent failed to follow the arbitration selection process for said matter discussed above before the Union decided to drop the same. Respondent was able to thoroughly cross examine the Union witnesses with regard to this matter. Thus, the relevancy to this proceeding, is not whether the grievance was a viable one, is the fact that Respondent assumed the same position regarding its cost by also failing to select an arbitrator because of its unilateral cost determination before the grievance was withdrawn. Hence, Respondent's contention has no merit.

Third, Respondent excepts that “the ALJ erred in finding the amended charge timely, because the evidence revealed a bad faith strategy to escape this automatic legal result, in which the Union intentionally filed a vaguely worded grievance on March 28, 2017: Alvis Emanuel ‘was not paid for participating in negotiation.’ [R. CEX 15-16]. Respondent also argued that it was clear that the Union could have never been able to arbitrate grievance No. 008-17. [R. CEX 16-17]. Once again, Respondent argues over the validity and timeliness of grievance No. 008-17, which was not relevant to the ALJ’s determination in this case. As stated before, the ALJ was not determining if grievance No. 008-17 was timely filed or not, instead it used Respondent’s handling of said grievance as background information. In this regard, the record clearly shows that on March 28, 2017, the Union filed a second grievance No. 008-17 and that Respondent did not select an arbitrator concerning this grievance. The ALJ correctly determined, as the record shows, that afterwards, the Union determined it would not pursue grievance No. 008-17, because the Union determined it was time-barred. [JD 11:9-11; GC Ex. 4; Tr. 35:17-25; 79:3-23; 80:9-13; 81:11-20]. It should be noted that there is no evidence that Respondent ever raised as an argument for not processing this grievance its timeliness, which is an argument that, in any event, had to be presented to the arbitrator, as this is an affirmative defense that could be waived by the parties if not timely raised. Thus, Respondent’s exceptions are without merit.

As a result, Respondent’s Exceptions 5, 20, 27, 30, 31 and 32 have no merit and should be denied.

6. Respondent’s contention that the ALJ disregarded testimony in an arbitrary and capricious manner are meritless (Respondent’s Exceptions 12, 13 and 14)

In its Exceptions 12, 13, and 14, Respondent generally argues that the ALJ was arbitrary, capricious and erroneous by disregarding the testimony of Respondent’s witnesses, and by

affording credibility to some of the evidence on the record regarding the Union's response to the Respondent's position regarding arbitration. [R. CEX 7]. However, Respondent's exceptions have no merit.

Respondent again submitted unfounded exceptions and failed to show that the ALJ's credibility resolutions are contrary to the clear preponderance of all the relevant evidence. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). Moreover, Respondent cites no basis or extraordinary circumstances to justify overturning the ALJ's credibility findings. *Advance Transportation Co. v. NLRB*, 979 F.2d 569 (7th Cir. 1992). Accordingly, Respondent's Exceptions 12, 13 and 14 have no merit and should be denied.

7. Respondent's contention that the ALJ erred by determining that Respondent refused to arbitrate any cases based on its unilateral determination that the monetary value of a grievance does not warrant the cost of the arbitration (Respondent's Exceptions 9, 12, 15 and 18)

Respondent argues that the ALJ erroneously found that the record established that the Respondent refused to arbitrate any cases based on its unilateral determination that the monetary value of a grievance does not warrant the cost of the arbitration. [R. CEX 4-5; 7-8]. Also, that the ALJ was arbitrary and capricious in holding that the record establishes that Respondent refused to meet its obligations under Article XI when it insisted on the right to unilaterally determine that the monetary value of the grievance does not warrant the cost of the arbitration. [R. CEX 8-9].

Contrary to Respondent's contention, as discussed previously, the record clearly shows that Respondent did not select an arbitrator for Emanuel's grievance No. 049-16 because of cost consideration, and that Respondent's contention has always been that it cannot afford to do arbitration using an FMCS arbitrator (as established by the CBA) because it is too expensive, and it exceeds the amount owed to Emanuel if he prevailed. [Tr. 119:1-4]. During the hearing,

Respondent's representatives even admitted that they were willing to arbitrate but in a reasonable way. [Tr. 128:1-5]. However, the reasonableness of the procedure is being unilaterally established by Respondent. [Tr. 141:16-25; 142:1-5]. As mentioned previously, Respondent also affirmed that it understood that the grievance procedure should change in a way that the arbitrator should be conducted with a local arbitrator. [Tr. 137:18-23]. The record further shows, as stipulated by the parties, that Respondent did not select an arbitrator from the FMCS list of seven (7) arbitrators provided, and Respondent insists in having the arbitration proceeding through other means not contemplated by the CBA. [JX 24, paragraph 33; Tr. 119:5-10; 127:8-25; 128:1-5; 134:21-25; 135:4-6; 137:18-23; 139:6-17].

Therefore, the ALJ was not arbitrary or capricious when she determined that Respondent refused to arbitrate any cases based on its unilateral determination that the monetary value of a grievance does not warrant the cost of the arbitration. Hence, Respondent's Exceptions 9, 12, 15 and 18 have no merit and should be denied.

8. Respondent's Exception 19 that the ALJ improperly found that the record confirmed a colorable claim that was timely filed, is without merit

Respondent argues that the ALJ improperly found that the record confirmed a colorable claim that was timely filed in grievance No. 049-16. [R. CEX 9]. Respondent's argument has no merit.

Contrary to Respondent's contention, as discussed previously and as correctly determined by the ALJ, the record does not establish that grievance No. 049-16 was not properly filed by the Union through the grievance and arbitration procedure established in the parties' CBA. To the contrary, the record shows that the grievance filed appears to state a colorable claim appropriate for arbitration under the CBA. [JD 13:3-5]. More so, the record clearly shows that at all material

times, Respondent treated grievance No. 049-16 as an arbitrable grievance and agreed to arbitrate, only if the Union consented to terms different from those in the CBA. [JD 13:8-10; JX 11, JX 24, paragraph 20]. It is undisputed that on March 24, 2017, Respondent notified the Union that *if the Union considered the matter to warrant federal arbitration, Respondent would proceed with the [arbitration] process*. Without articulating “how” the Union failed in observing or following the procedural requirements of the parties’ grievance and arbitration procedure, it appears, that Respondent is now trying to contest the grievance timeliness. In this regard, it should be noted that Respondent did not present any evidence in support of this argument before the ALJ or clearly articulate its argument in its Exceptions, effectively precluding the parties from the opportunity to properly litigate the argument or issue Respondent intends to raise. Respondent never clearly raised this argument, instead it appears an afterthought.

Inconsistently, Respondent would have agreed to hold the arbitration hearing under its unilateral terms by videoconference, Skype or telephone, but in the absence of the Union’s agreement to its terms, it generally contends that the Union did not meet the procedural requirements of the parties’ contract. In this regard, it is respectfully submitted that Respondent cannot have it both ways; if the grievance was non-arbitrable, then, there was no need for Respondent to insist on having the arbitration hearing through alternate means and this matter would have been moot. Accordingly, Respondent’s Exception 19 has no merit and should be denied.

9. Respondent’s Exceptions 10, 15 and 21 that the ALJ arbitrarily and capriciously held that the reasonableness of Respondent’s position was immaterial, is without merit

Respondent argues that the ALJ was arbitrary and capricious by holding that it is immaterial how reasonable the Respondent’s position was regarding arbitration and the proposed

contract modification [R. CEX 5-6; 7-8; 10]. However, Respondent's contention is not supported by the record or the applicable case law.

The ALJ correctly determined that that the Union was under no obligation to agree to changes during the term of the CBA. [JD 14:6]. See, *APT Medical Transportation, Inc.*, supra; *C&S Industries, Inc.*, supra; and *Mead Corp.*, supra. Having said that, the Union did consider Respondent's proposed changes and rejected them. As the ALJ found, the Union even suggested combining two grievances to limit costs and explained to Respondent that it would consider alternative means to have the arbitration hearing in cases that only involved a contractual issue, rather than the "just cause" issue in grievance No. 049-16, because the Union believed it would necessitate the arbitrator to observe live witness testimony. [JD 14, fn. 11; JX 14; JX 15, JX 17, JX 24, paragraphs 23, 24 and 26].

As discussed previously, the record reflects that Respondent sought the Union's consent to change the procedures established in the CBA with regard to the arbitration of grievances and that Respondent did not comply with said procedure. Therefore, the issue is not, and has never been, if Respondent's proposed change was reasonable or not, but whether Respondent was entitled to refuse to select an arbitrator just because the Union did not capitulate to its proposed accommodation, which had the effect of modifying the language of the parties' contract. Accordingly, the ALJ's determination was not arbitrary or capricious and instead was supported by the evidence in the record and applicable Board law. Consequently, Respondent's Exceptions 10, 15 and 21 should be denied.

10. Respondent's Exceptions 9, 12, 18 and 22 that the ALJ arbitrarily determined Respondent failed to prove that the grievance procedure would be untenable financially going forward, are without merit

Respondent excepts to the ALJ's determination that Respondent failed to prove the grievance procedure, would be untenable financially going forward or that it would create an economic impact in its business. [R. CEX 4-5; 7; 8-9; 10-11]. However, the record is devoid of sufficient and credible evidence to support Respondent's contention.

During the hearing, Respondent failed to establish that it could not afford the arbitration of grievance No. 049-16 or that it conducted a financial analysis of the cost of the grievances. Respondent simply relied on assumptions and speculations. The record clearly shows that Respondent's President Boynes and General Manager Augustus admitted that they did not perform a cost analysis of the arbitration proceedings. [Tr. 119:16-25; 120:1-11; 133:19-25; 134:1-12]. Augustus even assumed and speculated that the cost of arbitration would be too high. [Tr. 134:19-20].

The entire record supports the ALJ's finding and determination that Respondent failed to prove that the grievance procedure would be untenable going forward. [JD 14:14-18]. Accordingly, Respondent's Exceptions 9, 12, 18 and 22 have no merit and should be denied.

11. Respondent's contention that the ALJ's conclusions, findings of facts, and determinations are not supported by the record (Respondent's Exceptions 23, 24 and 25)

Respondent generally contends that the ALJ's conclusions in Respondent's Exceptions 4 thru 7, 8, 14 thru 15, 17, 21 and 22, are not supported by findings of facts or by any evidence presented during the hearing. [R. CEX 11]. Respondent also generally contends that the ALJ's findings of facts cited in its Exceptions 1 thru 5, 9 thru 11, 15 and 20, were not supported by the

evidence presented at the hearing. [R. CEX 11]. And, that the ALJ's determinations cited in Respondent's Exceptions 4, 6, 7, 12, 13, 16 and 18, are against the weight of the evidence in the record. [R. CEX 11]. Respondent does not cite the ALJ's Decision, the record, or any case law in support of these general contentions, nor does it elaborate any specific proposition to substantiate each of these exceptions.

Contrary to Respondent's general and unfounded exceptions, it is respectfully submitted that the ALJ's decision, findings and recommended Order, are well supported by the record, the evidence and applicable Board law.

Accordingly, Respondent's Exceptions 23, 24 and 25 are defective and should be denied as meritless.

12. Respondent's Exception 26 that the complaint must be dismissed because it is time barred, is without merit

Respondent excepts that the complaint in this case must be dismissed because it is time barred. In this regard, Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." However, the timely filing of a charge tolls the 10(b) time limitation about matters subsequently alleged in an amended charge that are "similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge." Amended charges filed outside the 6-month 10(b) period, "are deemed, for 10(b) purposes, to relate back to the original charge." See, *Apple SoCal LLC, d/b/a Applebees*, 367 NLRB No. 44 (2018), citing *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006) (quoting *Pankratz Forest Industries*, 269 NLRB 33, 36-37 (1984), enfd. mem. sub nom. *Kelly-Goodwin Hardwood Co. v. NLRB*, 762 F.2d 1018 (9th Cir. 1985)). [JD 15:1-9].

To determine whether an amended charge relates back to an earlier charge for 10(b) purposes, the Board applies the “closely related” test set forth in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). *Apple SoCal LLC*, supra. The Board considers (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge, and (2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge. The Board may also consider (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations. *Redd-I*, supra, cited in *Apple SoCal LLC*, supra. [JD 15:11-18].

In this case, the original charge was filed on July 12, 2017. [GC Ex. 1(a)]. The amended charge was filed on March 7, 2018. [GC Ex. 1(c)]. As the ALJ determined, the allegations in the amended charge arise from the very same facts and events as the timely filed charge, alleging that the Respondent unlawfully declined to participate in a grievance pursuant to its obligations in the CBA, in violation of Section 8(a)(5). The only new aspect of the amended charge is the addition of a legal theory involving 8(d) of the Act, which construes the 8(a)(5) violation as a midterm modification of the CBA, rather than a unilateral change. [JD 15:18-23]. As the ALJ concluded, under either theory, the section of the Act litigated is Section 8(a)(5) and the question is whether the failure to follow the grievance procedure violated the Act. Thus, the ALJ correctly found that the complaint allegations were not barred by Section 10(b) of the Act based on the amended charge. [JD 15:27-28].

In view of the above, and because Respondent failed to show that the complaint allegations are time barred by Section 10(b) of the Act, Respondent Exception 26 has no merit and should be denied.

13. Respondent's contention that the ALJ's Decision was contrary to evidence showing the Union's bad faith, is without merit (Respondent' Exceptions 28, 29 and 33)

Respondent argues that the ALJ's Decision was contrary to the evidence that the Union did not exhibit bad faith in seeking to coerce or threatened Respondent to pay the employee for the disputed suspension instead of incurring in the costs of arbitration. [R. CEX 12-14; 17]. Respondent also excepts to the ALJ's determination that the evidence "did not support a finding of bad faith on the part of the Union, by its insistence upon the most expensive procedures for arbitration...". [R. CEX 13-14]. Respondent further unreasonably argues that the decision is contrary to the evidence adduced at the hearing showing an abusive and extortionate approach to the arbitration provision making clear that the Union has been violating the duty of good faith and fair dealing with respect to the CBA. [R. CEX 17].

Contrary to Respondent's contentions, the record shows that the Union did not act in bad faith or used the alleged "large expense of the arbitration procedure" to compel Respondent to knuckle under to the Union's bad faith demands. First of all, the record is devoid of evidence that the Union acted in an abusive manner or that it extortionate Respondent with regard to the arbitration process. As discussed previously, the record shows that the Union invoked its right under the agreed terms and conditions of the extant CBA to have Respondent select an arbitrator in order to resolve a grievance. As a matter of fact, the record shows the Union's "good faith" when trying to accommodate Respondent's requests regarding the arbitration of grievance No. 049-16. As the ALJ concluded, the fact that the Union did not agree to Respondent's proposed changes to the CBA does not constitute bad faith bargaining, as the Union was not obliged to consent to any changes to the express terms of the CBA during the term of the contract pursuant to Section 8(d). See, e.g. *APT Medical Transportation, Inc.*, supra. The evidence clearly

established that the Union considered Respondent's proposed changes and rejected them. The Union acted in good faith when trying to accommodate Respondent's costs concerns by suggesting combining both grievances to limit costs. Moreover, the Union explained to Respondent that it would consider alternative means to have the arbitration hearing in cases that only involved a contractual issue, rather than the "just cause" issue in grievance No. 049-16. [JD 14, fn. 11; JX 14; JX 15, JX 17, JX 24, paragraphs 23, 24 and 26].

Furthermore, as the ALJ correctly concluded, Respondent's assertions that the Union's actions were inconsistent with the standards of good faith and fair dealing pursuant to the law of the Virgin Islands has no bearing on the Board's analysis in this context. [JD 15:38-40].

Thus, Respondent's Exceptions 28, 29 and 33 should be denied.

14. Respondent's Exception 34 that the ALJ incorrectly determined that Respondent has refused to arbitrate the grievances, is without merit

Respondent excepts and argues that the ALJ's Decision "is contrary to the weight of the credible evidence which showed that [Respondent] has clearly not refused to arbitrate the dispute." [R. CEX 17-18]. Respondent argues that the Union refused any arbitration procedure that would make the arbitration a viable option as contemplated in the CBA. It is respectfully submitted that by its own admission and arguments in support of its Exceptions, Respondent is establishing and confirming the violation the ALJ found. In this regard, when Respondent states that the Union refused any arbitration procedure that "would make the arbitration a *viable* option" it is clearly and unambiguously stating that it would only arbitrate under its unilateral terms. (Our emphasis).

In this Exception, Respondent also incorrectly raised without any reference to the record, that the Union's request to FMCS was for a "regional" list of arbitrators instead of a "sub-regional" or "metropolitan" list of arbitrators, with the intention to create an arbitration procedure so

expensive that it would exceed the dollar value of any dispute short of termination. [R. CEX 17]. Contrary to Respondent's contention, the CBA between the parties clearly establishes an arbitration procedure in which the parties have to choose an arbitrator from the FMCS. The record further shows that on June 9, 2017, the Arbitration Director of the FMCS, Arthur Pearlstein informed Respondent's counsel that the FMCS can only provide panels of arbitrators who are listed on its roster, and that there were no arbitrators listed from the Virgin Islands and that there was only one arbitrator from Puerto Rico. [JX 21; JX 24, paragraph 30]. Thus, it was immaterial if the Union submitted its request as a regional, sub-regional or metropolitan request.

Therefore, Respondent's Exception 34 is without merit and should be denied.

15. Respondent's Exception 35 that the ALJ erred in failing to recognize that the Complaint is legally defective, is without merit

Respondent argues that the ALJ erred "in failing to recognize that the Complaint is legally defective by alleging that "Respondent and the Union are parties to a collective-bargaining agreement covering terms and conditions of employment of the employees in the unit, which was effective by its terms from September 1, 2006 to August 31, 2009, and since August 31, 2009, has been extended thereafter and remains in effect by mutual agreement of the parties until such time as a successor collective-bargaining agreement is signed by Respondent and the Union." [R. CEX 18-19]. In sum, Respondent contends that the Complaint is defective because it fails to point out a provision in the contract making the CBA perpetually valid. As explained below, Respondent's contentions have no merit.

In its answer to the Complaint Respondent admitted "that the Respondent and the Union are parties to a collective bargaining agreement, which was effective by its terms from September 1, 2006 to August 31, 2009. Respondent affirmatively stated that from August 31, 2009, to the

present, the parties agreed to extend the expired agreement on a day to day basis, reserving at all times the right to discontinue that daily extension.” [GC Ex. 1(i), paragraph 13]. In addition, before the hearing the parties also stipulated that since the expiration of the collective-bargaining agreement in August 31, 2009, Respondent and the Union agreed to extend the collective-bargaining agreement on a day to day basis [JX 24, paragraph 7]; and that although the parties reserved their right to terminate the day to day extension [JX 24, paragraph 8], at all relevant times, the collective-bargaining agreement has been in effect and valid, since at no time the parties have terminated the agreed to day to day extension. [JX 24, paragraph 9]. Thus, the issue here is not until when the parties’ contract was in effect. What is relevant here is that at the time of the incident subject of the grievance, and at all material times thereafter, Respondent and the Union were parties to a CBA covering the terms and conditions of employment of employees in the Unit, which contained a grievance and arbitration procedure.

Based on Respondent’s admissions and the parties’ stipulations before the hearing, it is submitted that Respondent’s Exception 35 should be denied.

C. Respondent’s general and defective exceptions (Respondent’s Exceptions 1-35)

As stated above, Counsel for the General Counsel submits that Respondent’s Exceptions do not comport with the requirements of Section 102.46(c)(1), (2), and (3) of the Rules and Regulations because, among others, it does not contain a clear and concise statement of the case, does not specify the questions involved and to be argued, and the argument does not clearly present the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on. Respondent further submitted unfounded exceptions and failed to show that the ALJ’s credibility resolutions are contrary to the

clear preponderance of all the relevant evidence. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951).

V. CONCLUSION

For the reasons set forth herein, Counsel for the General Counsel respectfully urges the Board to strike Respondent's exceptions as defective. In the alternative, it urges the Board to deny Respondent's exceptions to the ALJ's decision in its entirety and adopt the ALJ's findings, conclusions, and recommended Order.

Dated this 16th day of July 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2019, I served General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Motion to Strike Respondent's Exceptions in the matter of Transportation Services of St. John, Inc., Case 12-CA-202248, upon the following persons, addressed to them at the below electronic addresses, by the means set forth below:

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