

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

**TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS,  
LOCAL UNION NO. 542, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS  
(UNITED PARCEL SERVICE)**

**and**

**Case 21-CB-233544**

**DEREK CORREIA, AN INDIVIDUAL**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS**

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## I. INTRODUCTION

On July 17, 2019, Administrative Law Judge Gerald Michael Etchingham (“ALJ”) issued his decision in this matter, making findings of fact and conclusions of law that Respondent (Teamsters, Chauffeurs, Warehousemen and Helpers, Local 542, International Brotherhood of Teamsters), by its Business Agent Paul Samson (Samson), violated Section 8(b)(1)(A) of the Act by threatening the Charging Party Derek Correia (Correia) with a loss of employment for engaging in the protected activity of handbilling.

The ALJ’s thoroughly-reasoned decision is based on:

- (a) the relevant (including background) facts;
- (b) established Board law (that the threat is unlawful);
- (c) the ALJ’s crediting of the General Counsel’s witnesses, who *similarly* and *confidently* recalled the events at issue; and
- (d) the ALJ’s discrediting of the Respondent’s witnesses, for reasons including: their inconsistent testimony; the observed *fidgety* and *uncomfortable* demeanor of one of Respondent’s witnesses; and the demonstrated *willingness to lie* under oath of another witness.

On August 14, 2019, Respondent filed Exceptions and a Brief in Support to the ALJ’s Decision (Exceptions). Respondent’s Exceptions lack merit. Briefly as to why: Notwithstanding established Board policy regarding credibility resolutions, Respondent’s Exceptions ask that the Board set aside the ALJ’s credibility resolutions, which resolutions are clearly supported by the record and also based on the ALJ’s observations of the witnesses. Next, Respondent’s Exceptions omit material facts and mis-state the actual legal arguments and reasoning applied. Finally, Respondent’s arguments regarding the alleged (per Respondent) subjective impact the threat had on one of the recipients to the threat is simply not controlling.

## II. OVERVIEW

This case involves a straightforward issue and clear violation of Section 8(b)(1)(A) of the Act.

In December 2017, Charging Party Derek Correia and some of his coworkers prepared and circulated a flier. The purpose of the flier was to inform fellow drivers of their legal and contractual rights bearing on the issue of how many hours/days their employer (UPS) can require drivers to work. The reason the employees engaged in this Section 7 activity is because their coworkers were raising the issue with them and because they were dissatisfied with how Respondent's Business Agent (Paul Samson) was handling (or *not* handling) the issue.

In December 2018, when this peak-seasonal issue about how many hours/days drivers can be required to work arose again, Correia and his coworkers decided to pass out the same flier - for the same reasons - again.

On the morning of December 14, 2018, Correia and two of his co-workers passed out the flier to drivers in front of the main entrance/exit to their building. This time, however, it was not without confrontation from the Respondent Union. In this regard, Respondent's Business Agent Paul Samson, after being tipped off by a shop steward about what the employees (and specifically Correia) were up to, arrived at the facility; walked up to Correia (getting in his face); demanded a copy of the flier; and the conversation escalated.

During the exchange, and after Correia refused Samson's demand for a copy of the flier, Samson questioned Correia's activities; and he (Samson) accused Correia of having no integrity. To the extent it is was not already obvious to Samson by the activity itself, Correia told Samson that they were out there, engaged in this activity, because he (Samson) doesn't do his job.

As Samson turned and proceeded to enter the facility, he (Samson) looked back at Correia and told him (Correia) that his (Correia's) days were numbered with the company, that he was done. Correia replied back, telling Samson that he (Samson) was finished too.

Samson's threat of job loss, credibly testified to by the General Counsel's witnesses, and further supported by the contemporaneous reporting of the threat (in a text), is clearly unlawful in that it was directed at Correia (and his coworkers') Section 7 activities.

In defense, the Respondent Union called two witnesses to try and deny that Samson made the threat. However, for reasons explained by the ALJ, Respondent's witnesses were unconvincing. One of the witnesses could not remember much; and obviously (from his testimony) did not even hear or see everything that occurred. And, the ALJ specifically noted in his decision his *observation* that this witness was fidgety and uncomfortable while testifying.

The second witness – Paul Samson himself – did not specifically deny the threat. To the extent Respondent argues that Samson implicitly denied the threat, Samson's self-serving implicit denial not only lacked credibility, he was materially impeached (as discussed more below) during the hearing on a related issue, rendering his testimony untrustworthy. As the ALJ described this impeachment in his decision: Samson's "willingness to lie on the stand calls his pronouncements on other issues into doubt."

### **III. STATEMENT OF THE ISSUE<sup>1</sup>**

Whether the record evidence and Board law supports the ALJ's findings and conclusions that Respondent, by its Business Agent Paul Samson, violated Section 8(b)(1)(A) of the Act when he (Samson) threatened employees with loss of employment in response to their engaging in union and protected concerted activities.

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<sup>1</sup> There are no underlying procedural disputes. In this regard, Respondent's admissions *in part* in its Answer to the Amended Complaint, along with the introduction of the formal papers, established the filing and service dates of the original and first amended charges. Next, commerce was resolved by introduction of Joint Exhibit 1. Finally, Respondent, in its Answer to the underlying Amended Complaint, admitted to labor organization status and the agency status of its Business Agent Paul Samson.

## IV. STATEMENT OF THE FACTS

### *A. Background*

Teamsters, Chauffeurs, Warehousemen and Helpers, Local 542, International Brotherhood of Teamsters (“Respondent” or “Union”) represents a bargaining-unit of employees employed by United Parcel Service, Inc. (“UPS” or “Employer”).

Among the bargaining unit, Respondent represents employees (including drivers) employed out of the Employer’s San Diego building (also called San Diego facility or hub); and Chula Vista building (also called Chula Vista facility or hub).

The Charging Party (Derek Correia) is a unit employee (package driver) employed out of Respondent’s San Diego building.

Paul Samson is Respondent’s Business Agent, assigned to oversee the San Diego and Chula Vista buildings.

During the relevant time period, Respondent and the Union were parties to collective-bargaining agreements, introduced as Joint Exhibits 2(a)-2(d).

(ALJD 2-3; Tr. 14-15, 22-23, 60, 70, 97; Jx.2(a)-2(d)).<sup>2</sup>

### *B. The Charging Party and his history of Section 7 activity*

Correia is a long-time UPS driver, and equally long-time Union-member. Correia doesn’t hold a Union office or position, but he is an active Union member.<sup>3</sup> In this regard, he attends internal Union meetings and he reads up on the different collective-bargaining agreements applicable to his unit, as well as internal Union documents.

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<sup>2</sup> In this brief, citations to the Administrative Law Judge’s Decision will be referred to as “ALJD” followed by the appropriate page number. Citations to the transcript will be referred to as “Tr.” followed by the appropriate page number. *Note*, regarding the transcript, the ALJ, at fn. 3 of his decision, granted the General Counsel’s June 5, 2019 unopposed Motion to Correct Transcript. General Counsel’s exhibits will be referred to as “GCx.” followed by the appropriate exhibit number; Joint exhibits will be referred to as “Jx.” followed by the appropriate exhibit number; and Respondent’s exhibits will be referred to as “Rx.” followed by the appropriate exhibit number.

<sup>3</sup> Correia described his labor-background roots at page 24 of the transcript.

Correia also (and then) communicates with his co-workers (including by way of flier distribution) about Union issues and/or explaining to employees their contractual rights.

Even during a recent period of time in which Correia was out of work on disability leave (November 2016-September 2018), he continued to engage in these Section 7 activities.

(ALJD 4-5; Tr. 22-25; Rx. 6(a), 6(b), and 6(c)).<sup>4</sup>

***C. Employees take it upon themselves to create a flier to inform coworkers about their legal and contractual rights because the Union isn't helping on the issue***

As the record reflects, Correia, along with some fellow experienced co-workers at the San Diego Building (John Tunnel, Rhett Dillard, Kurt Marchetta, and Tara Jordan), have on occasion created and circulated fliers (without Union involvement) to other co-workers outside of UPS buildings. Drawing upon their knowledge and experience, the fliers inform co-workers about Union issues or educate workers about their contractual rights. The reason they do this is because employees come to them with questions; and because they do not believe that the Union, notably Respondent's Business Agent Paul Samson, is informing or educating the membership.

(See generally ALJD 4-5; Tr. 27, 29, 30-31, 33, 37-41, 61, 77-78, 85, 103-105).<sup>5</sup>

As an example of this activity, and in or about December 2017, Correia and the above-named co-workers created a flier (GCx.2), outlining legal rights (from the DOT) and citing contractual provisions/language bearing on the subject of how many hours or days UPS may compel drivers to work. The flier reflects these employees' interpretation of those rights.

The employees created and distributed this flier in response to co-worker complaints and questions posed to them on the subject; and upon believing that Business Agent's Samson's response to employees on the issue (telling drivers to call in sick on any assigned 6<sup>th</sup> day) was inappropriate.

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<sup>4</sup> The Union provided records of monthly meeting dates the Charging Party attended. The Union did not introduce a complete list of all monthly meetings held during this period of time to compare this with, e.g. to the extent that meetings may not have been held every month.

<sup>5</sup> For Correia, this appears to have begun in or about 2017.

After preparing the flier, Correia, John Tunnel, and Kurt Marchetta (also in December 2017) passed the flyer out to co-workers in the San Diego building parking lot, near the guard shack main entrance/exit. They did not encounter Respondent Business Agent Paul Samson that day.

(ALJD 4-5; GCx. 2; Tr. 25-27, 51, 66, 71-72)(see also Samson's confirmation about the validity of the information on the flier, but what his approach to the issue would be (i.e. employees should just call in sick), at Tr.101,102, and 108).<sup>6</sup>

***D. In December 2018, employees decide to pass out the same flier again***

In December 2018,<sup>7</sup> upon hearing from co-workers that the same issue was re-occurring, and for the same reasons described above, Correia and his co-workers decided to pass out the same flier again on December 14th. (ALJD 4-5; Tr. 29, 72; see also Tr. 102 (employees raising issue again)).

Prior to December 14<sup>th</sup>, Correia spoke with co-worker Samuel "Sammy" Vivanco (Vivanco) about the underlying issue behind the flier; and about the plans to pass out the flier. Vivanco, who had similar concerns about the subject, and about the Union's ineffectiveness on the subject, agreed to help pass out fliers. (ALJD 4; Tr. 30-31, 61).

On the morning of December 14, beginning at about 7:00 a.m., Correia, Vivanco, and John Tunnell arrived at the San Diego building and passed out fliers in the parking lot, near the guard shack main entrance/exit. (ALJD 4-6; Tr. 29, 61, 72-73).

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<sup>6</sup> That the employees who created this flier believe that the legal and contractual rights set out in the flier prevent overtime abuse; and/or that these employees want their coworkers to be informed of these factual rights, is clearly Section 7 activity. The Union's attempts to quibble with the information on the flier, in terms of its limits, or Samson's interpretation of the contract, or how Samson prefers to handle (or ignore) the issue, does not alter that the flier activity is clearly Section 7 activity.

<sup>7</sup> Unless otherwise noted, all dates hereinafter are in 2018.

***E. Samson arrives; confronts Correia; questions Correia; accuses Correia of having no integrity; and threatens him with loss of employment***

At a point that morning between 8:15 and 9:00 a.m., Respondent Business Agent Paul Samson arrived at the facility. Prior to arriving, Samson had been tipped off by a shop steward about what Correia/the others were up to. At the time of Samson's arrival, Tunnell had left to go into work, and so it was just Correia and Vivanco (standing next to each other) passing out the fliers. (ALJD 4-6; Tr. 31-32, 62, 73, 105, 109, 112; GCx.3; GCx.4).

In terms of what happened next, and as Correia testified to, Samson walked up to him (Correia), got into his face, and the following exchange occurred:

- Samson demanded a copy of the flyer. Correia said absolutely not.
- Samson then said to let him (Samson) look at it. Correia again refused.<sup>8</sup>
- Samson questioned what Correia was doing.
- Correia told Samson he was doing his due diligence.
- Samson said to Correia, "due diligence, huh? You know what your problem is? You have no integrity."
- Correia responded to Samson's comment: questioning Samson's integrity; telling Samson that he (Samson) doesn't inform the members; and telling Samson that they (the employees) are the ones out there informing and educating the members because he (Samson) doesn't do it.

(ALJD 5-6; Tr. 31-33, 43, GCx. 3; GCx.4).

At about that point, Samson turned from them and started to walk toward and through the guard shack main entrance/exit, which was only a few feet away. As Samson was going through

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<sup>8</sup> Correia explained that he did not want to provide Samson a copy of the flier because he suspected that Samson was just going to try and take credit for the flier. This reasoning/concern (which Respondent takes issue with) is corroborated by Vivanco's testimony about the December 14<sup>th</sup> conversation. See Tr. 63("... we did this ... for our members and you didn't.").

the entrance/exit, he turned toward Correia and Vivanco, and said (to Correia), “[Y]ou know what . . . your days at this company are numbered . You’re done . . . You’re finished.”

Correia responded to Samson in like kind, saying that he (Samson) was finished too, to which Samson replied to do him (Samson) that favor. (ALJD 5-6; Tr. 33).

Vivanco, who was also called by the General Counsel, corroborated Correia’s testimony. Specifically, Vivanco testified that: Samson came right up to Correia; Samson asked for (and was refused) a flier; Samson questioned what Correia was doing there; and that Samson accused Correia of having no integrity. Vivanco further corroborated that Samson – as he was walking through the guard shack main entrance/exit – threatened Correia’s employment, and that Correia responded back to Samson in similar kind. (ALJD 6-7; Tr. 63, 64).<sup>9</sup>

***F. Correia contemporaneously reports the threat;***

Just after Samson had threatened Correia with job loss, and at about 9:00 a.m., Correia finished passing out fliers for the day, walked to his car, and then immediately texted a group of co-workers to summarize the mornings events. That text included Samson’s threat of loss of employment to Correia. (ALJD 6; Tr. 53-54, 74; GCx. 3 (text); GCx. 4 (a witness’ confirmed receipt of text)).

**V. ARGUMENT**

***A. As the ALJ noted, and under well-settled law, a union may not threaten employees with loss of employment in retaliation for union and/or protected concerted activities***

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their rights under the Act.

A union violates Section 8(b)(1)(A) of the Act by threatening employees with loss of employment or unspecified reprisals for engaging in union and/or protected concerted activities.

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<sup>9</sup> See also the General Counsel’s unopposed Motion to Correct Transcript, which was granted by the ALJ.

*Local 56, United Food and Commercial Workers (Super Fresh Food Markets, Inc.)*, 316 NLRB 182, 184-185 (1995); *Teamsters Local 823 (Roadway Express, Inc.)*, 108 NLRB 874, 875 (1954).

The fact that a union cannot effectuate the threat without the cooperation of the employer; or that a recipient of the threat may not have believed it to be true, are not defenses because the test of coerciveness of a statement is whether the threat reasonably (objectively) tends to have a coercive effect. *Sav-On Drugs, Inc., et al*, 227 NLRB 1638, 1644-1645 (1977)(union unlawfully threatened employees with job loss if they did not sign union authorization cards even though union could not effectuate the threat without the cooperation of the employer); *Carpenters Union Local 180*, 328 NLRB 947, 949-950 (1999)(the fact that the threatened loss or diminution of benefits would result from actions taken by the employer was not an exculpatory factor).

(See similar discussion of Board law by the ALJ at pages 8-9 of his decision).

***B. The ALJ properly concluded that Paul Samson's threat of loss of employment was unlawful***

In his Decision, based on the record evidence, his observation of the witnesses, and applicable Board law, the ALJ made findings and conclusions that the handbilling was protected activity; that Samson threatened Correia with loss of employment; and that the threat would reasonably coerce Correia from exercising his protected right of handbilling. (ALJD 8-9).

The ALJ's decision is fully-reasoned, as explained therein and highlighted by the below.

Protected Activity

First, there is no dispute that Correia and his co-workers were engaged in union and protected concerted (Section 7) activities. (See also discussion at ALJD 8-9).

This activity included speaking with co-workers about the issue; deciding (as a group) to prepare and circulate a flier with legal rights and contractual information on it; recruiting co-workers to help pass out the flier; distributing the flier; and expressing (to Respondent's Business Agent Samson) their reasoning for engaging in the activity, and opinions about Samson's

effectiveness as a Business Agent. Here, while there is an undertone of dissidence to some of the activity (i.e. since they are challenging Samson's effectiveness by their actions and words), that does not alter the fact that all of their activities, including the dissident undertones, constitute Section 7 activity.

Samson made the threat

It is established Board policy not to set aside an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

In his decision, the ALJ credited the testimony of Correia and Vivanco that Samson made the threat. Speaking to their credibility in this regard, the ALJ noted that the two witnesses testified to "remarkably similar statements of the events," and further commented about his observation that both witnesses "confidently recalled the events on December 14 at hearing without pause." (ALJD 8).

Here, the ALJ's credibility resolutions were in part based on his observation of the witnesses. (The same is true of the ALJ's discrediting of Respondent's witnesses – discussed more below). Moreover, that the threat was made is further supported by the record evidence, including the text message, as well as the Union's acknowledgement that other material aspects of the same conversation (that would support a threat in response) occurred.

The Union's apparent contention that while virtually everything - other than the threat - that the General Counsel's witnesses testified about, is true, but that the threat is "disputed" – is unconvincing.

As noted above, the General Counsel presented corroborating witnesses about the events and about the threat. Their testimony was specific and detailed. The contemporaneous reporting of the threat by Correia (via text message) lends even more credence to the witnesses' testimony.

The Union also does not advance any reasonable argument or theory as to why Correia would fabricate the threat and do so immediately upon the encounter (in light of the text); or why Vivanco would falsely substantiate the threat.

The record also reflects that Correia and Samson have known each other for some time, and notwithstanding his opinion about Samson's ineffectiveness, Correia had never before filed any kind of formal complaint against Samson. (Tr. 112). The Union's apparent theory that Correia is making this up simply doesn't hold water.

And the threat is clearly not something that may have been mis-heard - given the very nature of the threat itself.<sup>10</sup>

In support of its denial-of-the-threat defense, the Union cites to two witnesses (employee Chris Turner and Business Agent Paul Samson) that it called during the hearing.

For reasons discussed below, neither witness was credible.

*1. Respondent witness Chris Turner doesn't remember much; didn't hear or see everything; and denied adverse facts to Respondent that even Samson admitted to.*

In support of its denial of the threat, the Union first called employee Chris Turner. Turner is an employee that works out of the Chula Vista building, but he was assigned to work at the San Diego building that day. He does not know Correia or Vivanco personally.

First, it is important to note that unlike Correia and Vivanco, Turner was not directly involved in the exchanges that day. And he is unaware of any back story. Thus, Turner is not as likely to have been paying attention to, or to have remembered the events, as much as the direct participants were.

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<sup>10</sup> Respondent does not advance some alleged statement made by Samson that it contends is what was actually said.

Second, a review of Turner's testimony, notably on cross examination, reflects that Turner could not recall very much about the morning's events, acknowledging that it was a long time ago.

Third, Turner clearly did not see or hear everything that took place, which is evidenced not just by his admissions to this effect, but also by his specific "denials" that Samson engaged in certain conduct that even Samson admitted to. For example, Turner denied that Samson approached Correia and Vivanco to request a flier; denied that Samson had a (conversation) exchange with Correia/Vivanco; and denied that Samson accused Correia of having no integrity. (Tr. 90, 91).

Turner's denials reflect his lack of credibility because these are all facts that Samson even conceded occurred. (Tr. 105-106, 110-111).

That Turner would deny that these factual events occurred (when they did) establishes that at a minimum Turner didn't see or hear everything, if not that Turner was pre-disposed to shaping his testimony to cast Samson as being professional the entire time.

In his decision, for reasons encompassing the above, the ALJ specifically rejected Chris Turner's testimony regarding the December 14<sup>th</sup> events. In his decision, the ALJ pointed out the inconsistency issues associated with Turner. Noteworthy, the ALJ also referred to his *observation* that Turner testified in an "uncomfortable and fidgety manner." (ALJD 7-8).

*2. Paul Samson's self-serving implicit denial (through Respondent's arguments) lacks credibility*

The Union's other witness was Business Agent Paul Samson.

As an initial matter, and as the ALJ noted in his decision, there is no actual conflict between the testimony of Correia, Vivanco, and Samson as to the threat. In this regard, Samson did not testify that he did not make the threat. (ALJD 8). The significance of this omission should not be underscored given that this entire trial centers about the threat.

Moreover, while Respondent's Counsel specifically asked witness Chris Turner if he heard such a threat (Tr. 87), that same approach was not used with Samson.

By its Exceptions, Respondent apparently argues that a denial of the threat should be implied or inferred. However, and again, this trial is about the threat testified to on direct. For Samson to not specifically deny the threat is – contrary to Respondent's arguments on Exception – material.

Notwithstanding the above, and as also noted in his decision, the ALJ proceeded to hold that even if there were a conflict (assuming a denial), the ALJ would credit the General Counsel's witnesses over Samson. (ALJD 8). This holding is fully supported by the record evidence and the ALJ's credibility resolutions in this case. In this regard:

Samson's self-serving testimony, in terms of denying making the threat, and also suggesting that he had no problems with what Correia was doing or saying, was unpersuasive.<sup>11</sup>

Samson acknowledges being tipped off by a shop steward about what Correia and the others were up to before he even arrived. Samson, after arriving at the facility, decides not to just go past them. Instead, he decides to walk right up to Correia and get in his face. Note also that he walked up to and interacted with Correia. Correia was his intended target.

Samson then admits to questioning Correia about what he was doing there; being told by Correia that he (Samson) was ineffective; and that he (Samson) accused Correia of having no integrity.

Notwithstanding the above, Samson implausibly tried to deny that was happening with Correia that day was a big deal to him; that this is part of the job; and that he doesn't take things like this (which bear on his effectiveness) personally. (Tr. 113-115).

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<sup>11</sup> Unlike the General Counsel's witnesses, Samson's testimony on certain background issues, e.g. his knowledge of prior flier activity (Tr. 103-105), and/or about how Vivanco purportedly turned his (Vivanco) back on Samson (Tr. 111-112), was confusing and inconsistent. Samson's inability to testify competently as to background matters further calls into question his credibility.

Samson's testimony in this regard (his words) are clearly contradicted by his actions. He was agitated at what was going on; and he was agitated at Correia's accusations about his effectiveness. And if he was truly not bothered by it, why would he accuse Correia of having no integrity?

To the extent Samson's conduct doesn't already undercut his own testimony, Samson was subsequently and materially impeached during the hearing as to his claims that he doesn't take challenges to his effectiveness like this personally.

In this regard, and after a comparable circumstance was raised (i.e. about employees – earlier in 2018 - circulating (and later filing) petitions with the Union calling for his removal as Business Agent),<sup>12</sup> Samson tried to similarly claim on the witness stand that he doesn't take challenges to his effectiveness like this personally or react harshly.<sup>13</sup>

(ALJD 3-4; Tr. 114-115, 122-123).

Of course, Samson was then materially impeached on the issue. In this regard, and in rebuttal, the General Counsel called employee Rhett Dillard, who attended a June 2, 2018 Union meeting, during which meeting Union President Phil Farias and Business Agent Paul Samson both talked about the circulation<sup>14</sup> of the petitions to remove Samson.

According to Dillard, whose testimony was undisputed,<sup>15</sup> during the June 2<sup>nd</sup> meeting:

- The Union's President, Phil Farias, started, by telling the bargaining-unit employees/members present that he wanted to talk about the petition that was going around asking for Paul Samson to be removed. Farias then questioned the integrity of the person that was circulating the petition (i.e. the person engaged in Section 7

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<sup>12</sup> The two petitions (one for each building Samson oversees) were introduced as Rx.8 and Rx. 9.

<sup>13</sup> The petition evidence is not only relevant in terms of the material impeachment, but it is also relevant to Samson's state of mind going into the encounter with Correia. The petition filing was obviously significant. Samson certainly would be carrying this history into an encounter where once again employees are challenging his effectiveness, given the impact such conduct may have on his tenure as Business Agent.

<sup>14</sup> The petitions had not yet been submitted to the Union.

<sup>15</sup> Union President Phil Farias and Paul Samson both testified during Respondent's case. The General Counsel called Dillard in rebuttal. Neither Farias nor Samson were recalled after Dillard's testimony.

activity), accusing that person of doing it for (unclear) personal gain. Farias then said that if “we” have people like this, “we” need to get rid of them.

- Samson was next to address the petition. Samson told the group that the petition had hit home – that his kids even knew about it. Samson said he brought his wife to this meeting for support (and then pointed to her).
- Samson then told the employees present that while *no one will be fired for signing the petition* everyone will be interviewed.
- If this last statement from Samson was not already coercive enough (with the indirect message being sent), Samson took it a step further by having all of his shop stewards come up and stand behind him. With his stewards behind him, Samson looked out at the employees/members and said that: “when you take a shot at me (pointing to himself), you take a shot at them (pointing to the stewards behind him).”

(ALJD 3-4; Tr. 130-134).

Clearly, by the above, Samson not only took the petition personally, he reacted to this Section 7 activity coercively. Samson’s reaction is relevant to the events of December 14<sup>th</sup> not just because it’s reflective of who Samson is and how he reacts, but also because the testimony impeached Samson on a significant issue – notably how he purportedly doesn’t take things like this personally.<sup>16</sup>

For the above reasons, the record evidence supports credibility resolutions made against Samson.

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<sup>16</sup> Respondent misses the relevance of the petitions by only arguing that the Charging Party did not sign either petition. The General Counsel is not alleging that the threat was in retaliation for Correia signing the petition. (And if anything, that Correia did not sign the petition undercuts any Respondent argument that Correia is making the threat up because he is out to get Samson).

The threat is coercive

Having found the activity protected, and that the threat was made, the ALJ, applying established Board law, concluded that the threat Samson made would reasonably coerce Correia from exercising his protected right of handbilling.

Respondent's arguments to the ALJ and/or now to the Board that the Board should apply a subjective-reaction standard to the threat, and the Board should analyze conduct Correia engaged in after the fact to determine if the threat (made in the presence of other employees) should be coercive, are contrary to the objective standards the Board applies in evaluating the coerciveness of the threat when made. Moreover, what Respondent is suggesting is that under some circumstances, a Union should be able to threaten an employee (and in the presence of other employees) engaged in Section 7 activity with a loss of employment in response to that activity, a theory that obviously runs afoul of the Act.

Even assuming arguendo that the Board were to change the law and apply a subjective-reaction standard as Respondent proposes, the record reflects that Samson's threat did have a coercive effect on Correia. Notably in this regard, he filed an NLRB charge over the conduct to get relief, and he also sent correspondence to the Union (Rx. 2) expressing his concerns about Samson making this threat while also serving as his current Union representative.

***C. The Union's additional arguments are without merit***

Addressing the Union's additional arguments:

\* Respondent's argument that Samson does not have the ability to affect someone's employment and/or that Correia understood that Samson did not have this authority and/or that Correia was not coerced by the threat, is irrelevant in light of the Board law cited above. Moreover, the argument ignores Samson's involvement in allocating work (See ALJD 3).

\* Respondent's argument that Samson did not know what was specifically in the flier until after he threatened Correia is inconsequential. Samson knew that the employees were engaged in Section 7 activity; he clearly had some idea about what was going on; and he was being told that they were engaged in this activity because he (Samson) was ineffective. That's enough for Samson's threat – directed at protected Section 7 activity - to be unlawful. Moreover, Board law would not permit Samson to make an unqualified threat of job loss to an employee – as that would be just as coercive.

Next, even if he didn't know precisely what was in the flier at the time, that would not undercut him having such a hostile reaction, since thoughts of what all could be in the flier - bearing on him as Business Agent - would have agitated him the same.

Similarly, Respondent's apparent argument that there is no conceivable reason why Samson could become upset during the encounter so as to respond with a threat is disingenuous. Samson, by his actions and words, was clearly agitated by what was occurring and how it bore on him as a Business Agent. The circumstances of the events of December 14<sup>th</sup>, including the face-to-face heated exchange Samson had with Correia, and the build-up to the threat that was made, are sufficient to establish and support a finding as to why Samson lost his cool on December 14<sup>th</sup>.

\* By its Exceptions, Respondent also appears to – generally - take issue with the ALJ for not specifically discussing each and every exhibit, or the entire record, within his decision. However, the ALJ specifically stated that his findings and conclusions are based on his review and consideration of the entire record. (ALJD 2, fn. 3).

\* In its Exceptions, Respondent quibbles over minor issues (e.g. telephone calls between Samson and Correia about the CBA) in which Respondent then opines that a credibility resolution in its favor over such an ancillary issue should have been made.

However, the ALJ's credibility resolutions are fully articulated and fully supported by the record. They include his observations of the witnesses; draw on material facts in the record; and take into consideration Samson's willingness to lie on the stand.

\* Respondent's arguments bearing on the evidence of the petition to remove Samson as Business Agent miss the mark. Respondent mis-states the purposes of this evidence, and unconvincingly tries to downplay the significance of this evidence.

As more fully discussed earlier in this brief, and as described in the ALJ's decision, the evidence about the petition and how Samson reacted to it was relevant for impeachment (of Samson) purposes. And in fact, this evidence demonstrated Samson's willingness to lie on the witness stand.

Next, the petition events also provide relevant background evidence that would bear on Samson's state of mind as he came to the scene of the handbilling on December 14<sup>th</sup> and engaged with Correia.

Contrary to Respondent's downplaying argument (i.e. that it was remote in time), the petition events, especially given the significance of those events, were not so far removed in time that they wouldn't be on Samson's mind at the time of the December 14 encounter. Having apparently just survived the petition, here Samson finds himself coming across a group of employees who are challenging his effectiveness as Business Agent.

Respondent tries to confuse the Board by arguing that the General Counsel did not contend that the threat by Samson was in retaliation for the *Charging Party's* involvement in the petition, as the Charging Party did not sign the petition. This is a straw argument, as this is not what the General Counsel is alleging, nor what the ALJ concluded.

Rather, the General Counsel argued, and the ALJ found, that the petition evidence was relevant background evidence, as well as relevant to Samson's (lack of) credibility.

Finally, the General Counsels' arguments, and the ALJ's conclusions, about what Samson testified to regarding the impact of the petition is supported by the record. (See Tr. 114, 115, 122).

## **VI. CONCLUSION**

Based on the record evidence, the ALJ's credibility resolutions (based in part on the observation of the witnesses), and established Board precedent, the General Counsel respectfully submits that Respondent's Exceptions are without merit and should be rejected.

DATED: August 26, 2019

Respectfully submitted,

/s/ Robert MacKay

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## STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the General Counsel's Answering Brief to Respondent's Exceptions** was submitted for E-filing to the National Labor Relations Board on August 26, 2019.

The following parties were served with a copy of said document by electronic mail on August 26, 2019.

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