

NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONCRETE EXPRESS OF NY, LLC,)	
)	
Respondent,	)	Administrative Law Judge
	)	Benjamin W. Green
)	
-and-)	
	)	Case Nos. 02-CA-220381
TEAMSTERS LOCAL 456, INTERNATIONAL	)	02-CA-224789
BROTHERHOOD OF TEAMSTERS,	)	02-RC-218783
)	
Charging Party.)	

**CHARGING PARTY'S POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

BLITMAN & KING LLP
*Attorneys for Charging Party,
Teamsters Local 456*
Office and Post Office Address
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, New York 13204-5412
Tel: (315) 422-7111
Fax: (315) 471-2623
Email: btarnault@bklawyers.com

Of Counsel:

Bryan T. Arnault, Esq.

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455 U.S. 989 (1982) 28, 29, 30, 31

INTRODUCTION

On December 21, 2018, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“Consolidated Complaint”) and Decision on Challenges and Objections and Notice of Hearing (“Decision on Challenges and Objections”)¹ were issued in the above-captioned cases. The Consolidated Complaint was founded upon a charge filed by Teamsters Local 456, International Brotherhood of Teamsters (“Charging Party”, “Petitioner” or “Union”), which alleged that Concrete Express of NY, LLC (“Respondent”, “Concrete Express” or “Employer”) engaged in various unfair labor practices in violation of the National Labor Relations Act (“Act”). The Consolidated Complaint specifically alleges that Respondent violated the Act by:

1. Interrogating employees about their union activities in violation of the Act;²
2. Promising employees improved working conditions, including assignment of newer trucks, if they refrained from engaged in union activity in violation of the Act;³
3. Threatening employees with discharge if they voted for the Union in violation of the Act;⁴
4. Threatening employees with business closure in violation of the Act because such employees supported the Union;⁵

¹ A corrected Decision on Challenges and Objections and Notice of Hearing was served on January 4, 2019. [G.C. Exh. 1(v)].

² See G.C. Exh. 1(s), ¶¶ 8(a), 13.

³ See G.C. Exh. 1(s), ¶¶ 8(b), 13.

⁴ See G.C. Exh. 1(s), ¶¶ 8(c), 13.

⁵ See G.C. Exh. 1(s), ¶¶ 9, 13.

5. Changing terms and conditions of employment by implementing a dress code because employees engaged in protected and concerted activities and to discourage employees from engaging in these activities, in violation of the Act;⁶ and
6. Changing terms and conditions of employment by revoking parking privileges of employees because employees engaged in protected and concerted activities and to discourage employees from engaging in these activities, in violation of the Act.⁷

The Decision on Challenges and Objections specifically relate to a representation petition filed on or about April 19, 2019, and refers the following allegations for hearing:⁸

1. Petitioner's challenge to the ballot of Rafael Valencia ("Rafael"⁹), as Rafael is not employed in the petitioned-for bargaining unit;¹⁰
2. Respondent violated the Act by threatening to terminate employees and by threatening the closure of the plant;¹¹
3. Respondent violated the Act by threatening futility in bargaining with the Union;¹² and
4. Respondent violated the Act by interrogating employees about their Union sentiments.¹³

⁶ See G.C. Exh. 1(s), ¶¶ 12(a), 12(c), 12(d), 12(e), 14, 15.

⁷ See G.C. Exh. 1(s), ¶¶ 12(b), 12(c), 12(d), 12(e), 14, 15.

⁸ The Regional Director overruled Respondent's objections alleging improper election procedures, which Respondent appealed, and remain pending before, the Board.

⁹ For purposes of this brief, I refer to Rafael Valencia and his nephew, Jorge Alberto Valencia Medina, by their respective first names in order to avoid confusion between them.

¹⁰ See G.C. Exh. 1(t), Challenge, pp. 2-4.

¹¹ See G.C. Exh. 1(t), Objection Nos. 1 and 3, p. 4.

¹² See G.C. Exh. 1(t), Objection No. 4, pp. 7-8.

¹³ See G.C. Exh. 1(t), Objection No. C, pp. 18-19.

This matter was heard by Administrative Law Judge Benjamin W. Green on April 23, 2019 and July 30, 2019. The Charging Party, by and through its attorneys, Blitman & King LLP, submits this post-hearing brief to the Administrative Law Judge (“ALJ”) in support of the Complaint and its position in this proceeding.

STATEMENT OF ISSUES

1. Was Rafael Valencia, the Employer’s yardman, ineligible to vote in the election held in Case No. 02-RC-218783, in which the stipulated bargaining unit consisted only of drivers and mechanics?
2. Did Respondent violate Sections 8(a)(1) of the Act when it interrogated employees about their Union activities?
3. Did Respondent violate Sections 8(a)(1) of the Act when it promised employees improved working conditions, including assignment of newer trucks, if they refrained from engaged in union activity?
4. Did Respondent violate Sections 8(a)(1) of the Act when it threatened employees with discharge if they voted for the Union?
5. Did Respondent violate Sections 8(a)(1) and (3) of the Act when it threatened employees with business closure because such employees supported the Union?
6. Did Respondent violate Sections 8(a)(1) and (3) of the Act when it changed terms and conditions of employment by implementing a new dress code because employees engaged in protected and concerted activities and to discourage employees from engaging in Union activity?
7. Did Respondent violate Sections 8(a)(1) and (3) of the Act when it changed terms and conditions of employment by revoking parking privileges because employees engaged in protected and concerted activities and to discourage employees from engaging in Union activity?

8. Did Respondent violate Sections 8(a)(1) and (5) of the Act when it unilaterally changed terms and conditions of employment by implementing a new dress code without first providing the Union notice and an opportunity to bargain?
9. Did Respondent violate Sections 8(a)(1) and (5) of the Act when it unilaterally changed terms and conditions of employment by revoking parking privileges without first providing the Union notice and an opportunity to bargain?
10. Is a bargaining order warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)?

For the reasons and authorities set forth below, each of the above must be answered in the affirmative. The Union respectfully requests that the Administrative Law Judge find that Rafael was ineligible to vote in the election, the challenge to Rafael's ballot be sustained, the Union certified as the exclusive bargaining representative of the petitioned-for unit, and that Respondent violated the National Labor Relations Act as alleged in the Complaint. The remedy issued should include the relief requested in the Complaint.

STATEMENT OF FACTS

1. **Procedural Background**

On April 19, 2018, the Union filed a representation petition with the National Labor Relations Board ("Board") indicating substantial employee support for and the Union's desire to be certified as representative of a bargaining unit of employees working as drivers and mechanics for Respondent Concrete Express, located at 2279 Hollers Avenue, Bronx, New

York.¹⁴ [G.C. Exh. 1 (a)]. The petition was docketed by Region 2 of the Board as Case 02-RC-218783.

Charging Party and Respondent entered into a Stipulated Election Agreement (“SEA”), approved May 2, 2018, which defined the unit as:

Included: All full-time and regular part-time drivers and mechanics employed by the Employer at 2279 Hollers Avenue, Bronx, NY 10475.

Excluded: All other employees, including clerical employees, guards and managers, and professional employees and supervisors as defined by the Act.

[G.C. Exh. 2]. No objection was raised by Respondent to the scope of the petitioned-for unit and Respondent did not, at any time, contend that the yardman classification should be included in the unit.

A secret ballot representation election was held in this case on May 10, 2018. The tally of ballots revealed four ballots cast for the Petitioner-Union, three against, with one challenged ballot. On May 17, 2018, the Petitioner-Union filed five objections to conduct affecting the election. On December 21, 2019, the Regional Director issued a report on objections, directed a hearing on certain Objections, and ordered this case consolidated for purposes of hearing with the unfair labor practice cases described below.

On May 15, 2018, the Union filed an unfair labor practice charge alleging violations of the National Labor Relations Act by Concrete Express, docketed by Region 2 of the Board as Case 02-CA-220381. [G.C. Exh. 1(g)]. The Union filed an amended charge on May 21, 2018, a

¹⁴ The RC Petition sought recognition of the following unit:

Included: All full-time and regular part-time drivers and mechanics employed by the Employer.
Excluded: Managers, supervisors, professional employees, and guards as defined by the Act, and all other employees

second amended charge on June 4, 2018, a third amended charge on June 28, 2018, and a fourth amended charge on October 30, 2018. [G.C. Exhs. 1(i), (k), (m), (q)]. The Union filed a second unfair labor practice charge on July 27, 2018, docketed by Region 2 of the Board as Case 02-CA-224789. [G.C. Exh. 1(o)]. Based on his investigation, on December 21, 2018, the Board's General Counsel, by the Regional Director for Region 2 of the Board, issued a complaint alleging that Concrete Express violated the Act.

2. Concrete Express Operations

Concrete Express sources and delivers mixed onsite concrete to customers in the tristate area. [Tr. 12; G.C. Exh. 7 (Tr. 188:23-189:1)¹⁵]. Christopher Trentini has been the sole owner and legal officer of Concrete Express since it opened for business in 2006/2007.¹⁶ [Tr. 12, 259; G.C. Exh. 7 (Tr. 188:2-13)]. Donna Trentini, Mr. Trentini's wife, is the financial manager of Concrete Express and held this position since the Employer opened in 2005. [Tr. 224].

Diane Denti is the supervisor and dispatcher, and assists with day-to-day operations, including personnel and human resources functions. [Tr. 232; G.C. Exh. 7 (Tr. 45:13-46:3)]. She testified she is the only person that performed dispatching, "always." [Tr. 41: 3-4, 252-53 ("I did all the dispatching.")]. Despite her claim, various drivers testified that George Denti also performed routing and dispatching duties for the Employer. [Tr. 105, 137, 142, 160]. As supervisor and dispatcher, Ms. Denti had regular interaction with the drivers and, if there was

¹⁵ G.C. Exh. 7 is a transcript of the hearing held in RAV Truck and Trailer Repairs, Inc. and Concrete Express of NY, LLC, a Single Employer, Case No. 02-CA-220395. To avoid confusion with the transcript in this proceeding, references to the transcript in that matter will appear as a parenthetical of G.C. Exh. 7.

¹⁶ Mr. Trentini offered conflicting testimony concerning Concrete Express's opening date, testifying that it opened in 2006 [G.C. Exh. 7 (Tr. 188:2-3)] and 2007 [Tr. 12:7-8].

an issue, Ms. Denti's practice was to engage in a one-on-one conversation with the employee to address the problem. [Tr. 47:19-20 ("There's only a few people in that place, so I would go one-on-one with them."), 236:8-10 ("Yes. One on One.")].

As of May 10, 2018, Concrete Express employed seven drivers (Luis Fernandez, Channy Hernandez, Matthew Murray, Christian Reyes, Adman Roberts, John Torres, Winston Walker), one mechanic (Jorge Valencia ("Jorge")),¹⁷ and one yardman (Rafael Valencia ("Rafael")). [U. Exhs. 2, 3; G.C. Exh. 7 (Tr. 48:3-17)]. The drivers are each assigned their own concrete truck, which they, and only they, operate. [Tr. 17:21-24]. If a truck is broken down or in disrepair, the driver assigned to that vehicle will not be able to work for the days in which the vehicle was serviced. [Tr. 56:17-19]. Drivers were generally allowed to wear whatever attire they chose and, at the time of hire, were not informed of any formal dress code.¹⁸ [Tr. 95, 112].

From around winter 2017 through the date of the election, Concrete Express would park its mixer trucks in a garage located at 3771 Merritt Avenue, Bronx, New York. [G.C. Exh. 7(Tr. 282:17-22)]. Drivers would clock in and pick up their assigned truck from the Merritt Avenue garage. [Tr. 68-69, 113, 124, 125]. If the vehicle was pre-loaded, the driver would take the truck to their first job of the day. [Tr. 147, 150]. If not, the driver would go to the Hollers Avenue yard, where they were loaded by the yardman, Rafael Valencia. [G.C. Exh. 7, (Tr. 50:18-22, 134:13-23)]. It took Rafael between 10 and 30 minutes to load each vehicle, putting the necessary components -- sand, stone -- into the truck. [Tr. 72, 117, 145, 164]. The driver would

¹⁷As of May 10, 2018, Jorge was employed by Concrete Express but worked at the Merritt Avenue garage. On or about May 15, 2018, Jorge was transferred from the Concrete Express payroll to the RAV Truck and Trailer payroll. [G.C. Exh. 7(Tr. 443-473 (and G.C. Exhs. 14-17))].

¹⁸ Diane Denti testified that employees were advised of the dress code at the time of hire [Tr. 234], but Ms. Denti has only been employed by Concrete Express since 2017 [Tr. 246:14-15].

then level off the components, and head to the assigned job. [Tr. 72, 116, 144, 293]. After emptying the mixer, the driver would return to the yard to be loaded again. [Tr. 292-93]. Depending on the workload, Rafael would load drivers three-to-five times a day at the Hollers Avenue yard. [Tr. 73, 145; G.C. Exh. 7, Tr. 138]. In the event jobs were slow, drivers would also be at the yard on standby time, waiting for the next job. [Tr. 73, 86-87, 117-118]. The drivers could spend multiple hours a day at the Hollers Avenue yard. [Tr. 87:20 (“Anywhere from two to three hours”)].

Concrete Express mixer trucks are stored at the Merritt Avenue garage and, from fall 2017 through May 10, 2018 election, drivers were allowed to park their personal vehicles in the Merritt Avenue garage. [Tr. 59, 288]. As the area surrounding Merritt Avenue garage is commercial, parking is limited. [Tr. 101, 126]. Drivers would simply leave their keys in the car, so that it could be moved around the garage, if necessary. [Tr. 60, 100, 115, 134]. When not parking in the Merritt Avenue garage, it took drivers between 10 and 30 minutes to find parking in the area and walk to the garage. [Tr. 61:1-4, 101:18-19, 136:18-21, 155:16-17; G.C. Exh. 3 (“Or park by the Yard and then go to the garage. . 10mins earlier[.]”)].

In addition to Jorge, the mechanic Mr. Trentini had on staff at Concrete Express, Mr. Trentini also owned and operated RAV Truck & Trailer Repairs, Inc. (“RAV”).¹⁹ Prior to its unlawful closure, and from March through May 2018, RAV was located at the Merritt Avenue garage. [RAV ALJD, p. 7]. RAV operated as a repair shop that serviced and maintained Concrete Express vehicles and equipment, in addition to vehicles owned by other companies. [Tr. 64].

¹⁹ The Union continues to assert Concrete Express and RAV are a single employer, as found by the ALJ in RAV Truck and Trailer Repairs, Inc. and Concrete Express of NY, LLC, a Single Employer, Case No. 02-CA-220395, decision dated July 15, 2019 (hereinafter “RAV ALJD”).

On May 10, 2018, RAV had one mechanic, Victor Gonzalez (“Victor”). For the week of May 15, 2018, Trentini moved Jorge to the RAV payroll. [Tr. 206]. In the event a maintenance issue arose with a Concrete Express vehicle, the driver would transport the vehicle to the RAV garage for service or Jorge or Victor would travel to the Hollers Avenue yard to service the vehicle. [Tr. 63, 158-59, 206; G.C. Exh. 7 (Tr. 64-65, 104; 157:15-18)]. Victor or Jorge also performed all routine maintenance on the mixer trucks. [G.C. Exh. 7 (Tr. 4, 71-74, 104)].

3. Union’s Organizing Efforts and Stipulated Bargaining Unit

The current cases arise out of a union organizing campaign initiated by the Union in April 2018. The Union began organizing the drivers and mechanics employed by Concrete Express and, what it later found out, RAV. [Tr. 181]. On April 19, 2018, the Union filed a representation petition with the Board seeking to represent nine employees, consisting of the seven drivers employed at Concrete Express and the two mechanics, Jorge and Victor. [Tr. 182; U. Exh. 1].

On May 1, the Union signed the negotiated Stipulated Election Agreement, where the parties omitted the position of yardman from the bargaining unit. [G.C. Exh. 2]. That same day, Union Vice President Dominick Cassanelli spoke with Rafael concerning his role at Concrete Express, who stated he was a yardman. [Tr. 184]. The Union also learned that no mechanics were employed at the Hollers Avenue location. [Tr. 186].

On May 4, 2018, Respondent served a Voter List on the Charging Party, which included seven drivers. [U. Exh. 2]. No mechanics or yardman were included on that Voter List. [U. Exh.

2]. That same day, Respondent served a second Voter List on the Charging Party, this time including Rafael Valencia, with the title of yardman/mechanic.²⁰ [U. Exh. 3].

4. Respondent's Unlawful Pre-Election Conduct

During the period between April 19, 2018 and May 10, 2018, Respondent engaged in a series of unlawful actions – threatening to terminate employees and close the plant if they voted for the union, interrogating employees about their union activities, and promised employees improved working conditions and benefits if they refrained from engaging in union activity.

When threatening the bargaining unit members, Mr. Trentini established a clear pattern in his conduct. Trentini would wait for a driver to be alone in the yard, usually when the employee was washing out the mixer, and then confront the driver about the Union. [Tr. 54; 95; 152]. With respect to each employee, Mr. Trentini used whatever leverage he had over the employee.

Within a week of the May 10 election, Mr. Trentini approached Christian Reyes while Reyes was washing his truck in the Hollers Avenue yard and asked Reyes whether he signed a Union card. [Tr. 54-55]. When Reyes denied signing the document, Mr. Trentini then asked, “what is that what you want, a new truck?” [Tr. 55]. Reyes replied that he “was happy to be working.” [Tr. 55:14-15]. However, at the time, Mr. Reyes was assigned to truck number 9, which was an older vehicle with a history of breaking down. [Tr. 55-56]. Because employees do

²⁰ The mechanics servicing the Concrete Express vehicles were located at the Merritt Avenue garage, and were subject to a Representation Petition in Case Nos. 02-RC-220701 and 02-RC-220218.

not work when their vehicle is broken down, Reyes had previously asked for a new vehicle at least three times, to no avail. [Tr. 56-57].

During the same time period, Trentini confronted Reyes and Channy Hernandez in the Concrete Express office and directly stated that if they did not want to be fired, they should “vote no.” [Tr. 57-58, 131].

Mr. Trentini also took a direct approach with Luis Fernandez, confronting him during the same time period. As Fernandez was washing out his truck at the Hollers Avenue yard, Mr. Trentini approached Mr. Fernandez and told him, if he wanted to keep his job, he should “vote no” for the union. [Tr. 95:10-15; 131].

Mr. Trentini took different approach with John Torres, who he viewed as the organizing ringleader. Mr. Trentini confronted Torres in the Hollers Avenue yard to inquire about Union sympathies, [Tr. 153] and told Torres that “guys are making it seem like you’re the ringleader.” [Tr. 153:21-23].

Mr. Trentini was not the only individual threatening employees in the petitioned-for unit. During that same time period, Mrs. Trentini threatened the drivers that if the Union came in, she would shut down the operation.²¹ [Tr. 93:19-24, 131:15-16].

5. The Bargaining Unit Voted in Favor of Petitioner Union 4-3

On May 10, an election was held between the hours of 5:30 a.m. and 8:30 a.m. at the Hollers Avenue yard. The Tally of Ballots made available to the parties showed four ballots cast for the Union, three votes cast against the Union, and one vote subject to challenge. The Union

²¹ Mrs. Trentini’s testimony differed, testifying that she injected herself into a conversation with drivers to say that she shut down a previous company because of the money she owed the Union. [Tr. 229]. She could not identify when the conversation happened, where it took place, or who was present. [Tr. 228-230].

challenged the vote of Rafael, the yardman, as he was not employed in a bargaining unit position at the time of the election. [Tr. 189].

The Union also timely filed objections to conduct affecting the results of the election. [G.C. Exh. 1(t)].

6. Respondent's Unlawful Post-Election Conduct

Almost immediately following the election on May 10, 2018, Respondent engaged in a series of unlawful actions by unilaterally changing terms and conditions of employment for bargaining unit employees. Within hours of the close of the voting period, Ms. Denti sent text messages to the drivers regarding changes in their daily conditions of employment. At 10:26 a.m., Ms. Denti texted all drivers, stating:

Good Morning. As mentioned many times The proper dress attire
Jeans/work pants, boots and shirts. NO tank tops. NO sneakers.
NO sweat pants. Thank you

[G.C. Exhs. 3, 5]. It is undisputed that this was the first time Ms. Denti sent a group text message to the drivers concerning a dress policy. [Tr. 249-250].

Shortly thereafter on May 10, 2018, Mr. Trentini directed Ms. Denti to message the employees that they were not allowed to park in the garage. [Tr. 2412:18-24, 251]. At 11:27 a.m., Ms. Denti texted the drivers to advise that the Employer was revoking parking privileges. [G.C. Exhs. 3, 5]. Specifically, Ms. Denti stated:

Hi Please be advised as of Friday May 11th cars are NOT to be
parked in the garage. Thank you

[G.C. Exhs. 3, 5]. Responding to the employee retorts, Denti conceded this would result in at least a 10-minute extension of the workday for the drivers, suggesting on the text message

chain for employees “[to] park by the yard and then go to the garage. . 10mins earlier[.]” [G.C. Exh. 3]. After May 10, 2018, drivers no longer parked in the Merritt Avenue garage. [Tr. 135].

ARGUMENT

POINT I

RAFAEL VALENCIA IS NOT A MECHANIC AND INELIGIBLE TO VOTE IN THE ELECTION

On May 2, 2019,²² Petitioner and Respondent entered into the Stipulated Election Agreement, wherein it unambiguously omits the yardman position from the bargaining unit classifications. Despite this, Respondent contends that Rafael is a dual function employee, performing both yardman and mechanic duties. For the reasons explained more fully below, Respondent’s contentions are not supported by any credible evidence, must be dismissed, and the Union’s challenge to Rafael’s ballot must be sustained.

1. The Stipulated Election Agreement Clearly and Unambiguously Reflected the Parties’ Intent to Exclude Yardman Title

As the parties reached a Stipulated Election Agreement that clearly and unequivocally excluded the yardman classification, the “dual function” analysis should not be applied. *See Bell Convalescent Hospital*, 337 NLRB 191 (2001) (“dual function” analysis not applied where parties’ intent to exclude classification was clear). While Respondent agrees that the Stipulated Election Agreement excludes the yardman (as he must based on the unambiguous language), the Board has found that to be eligible to vote in a Board election, the employee must ***be in the appropriate unit***: (1) on the established eligibility date (which is normally during the payroll

²² The Stipulated Election Agreement was signed by the parties on May 1, 2018, and approved by the Regional Director on May 2, 2018.

period immediately preceding the date of the direction of election, or election agreement), and (2) in employee status on the date of the election. *See, for example, Plymouth Towing Co.*, 178 NLRB 651 (1969). It is well established that the Board applies the three-part test set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), to determine whether challenged voters are properly included in a stipulated bargaining unit. Pursuant to that test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in "clear and unambiguous terms" in the stipulation, the agreement is simply enforced.

In this case, it is unnecessary to consider the parties' intent, or analyze Rafael's community of interest, because Respondent's counsel has conceded that the Stipulated Election Agreement is not ambiguous.²³ The unambiguous language of the unit description in the Stipulated Election Agreement covers only drivers and mechanics. It is undisputed that the yardman title was not included as part of the stipulated bargaining unit and the Stipulated Election Agreement must be enforced as drafted. No dual function analysis need be applied.

²³ By e-mail dated August 21, 2019, 6:33 p.m., to the ALJ, with copy to Union counsel, Respondent's counsel wrote the following:

Your Honor:

Good evening. Respondent will not be arguing that the scope of the unit is ambiguous. Thank you.

In response, by e-mail dated August 22, 2019, at 11:32 a.m., the ALJ confirmed the impact on the hearing, stating:

Counsel,

To confirm, the Respondent agrees that the classification of mechanic is included in the unit and the classification of yardman is excluded from the unit pursuant to the parties' unambiguous stipulated election agreement. However, the Respondent will argue that the record evidence proved Rafael Valencia performed sufficient mechanical work to be included in the unit and his challenge overruled.

The Union's position is also consistent with the Voter List first served on the Union by Respondent's counsel, which did not include Rafael.²⁴ The Employer's last-minute attempt to insert the yardman into the unit must be rejected. Simply, Rafael is employed in the position of yardman, a classification not included in the stipulated unit, and is not eligible to vote.

Accordingly, the Union's challenge to Rafael's ballot must be sustained.

2. Rafael Valencia is Not a Dual Function Employee

Despite the evidence to the contrary, Respondent contends that Rafael performs both yardman and mechanic work, *i.e.*, a dual function employee. However, the Board evaluates the employee's job duties at the time of the election, not some period thereafter. Respondent's apparent attempt to obfuscate the facts will not cure the fact that Rafael was not a dual-function employee at the time of the election. While the dual function employee determination is an inherently fact intensive determination, there is no credible evidence that Rafael performed any mechanic work or in the mechanic classification on the date of the election.

The Board performs the dual function analysis of an employee's job duties of an employee at the time of the election. *Peirce-Phelps, Inc.*, 341 NLRB 78 (2004). This is consistent with the eligibility requirements that, to be eligible to vote in a representation election, an employee must be within the proposed bargaining unit on both the established eligibility date and the date of the election. *Plymouth Towing Co.*, 178 NLRB 651.

²⁴ Consistent with the Union's understanding of the unit composition, the Employer first provided a voter list that consisted of only seven drivers. [U. Exh. 2]. The Employer subsequently provided a second voter list of eight individuals, which included Rafael Valencia, and claimed the initial list was provided in error. [U. Exh. 3].

The Board finds that dual-function employees, who perform more than one function for an employer, “may vote even though they spend less than a majority of time on unit work, if they **regularly** perform duties similar to those performed by unit employees for **sufficient periods of time** to demonstrate that they have a **substantial interest in working conditions** in the unit.” *Martin Enterprises*, 325 NLRB 714, 715 (1998) (emphasis supplied). See *Harold J. Becker Co.*, 343 NLRB 51 (2004); *Medlar Electric, Inc.*, 337 NLRB 796, 797 (2002); *Ansted Center*, 326 NLRB 1208 (1998). In determining whether dual-function employees regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit’s working conditions, the Board has no bright line rule as to the amount of time required to be spent in performing unit work. Rather, the Board examines the facts in each particular case. See, e.g., *Davis Transport*, 169 NLRB 557, 562-563 (1968) (employees who spent less than three percent of their time performing unit work during 10-month time period were not included in unit); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 702 (1967) (employee who drove truck on 20 days during the year with no regularity, pattern, or consistent schedule, was excluded from unit of truckdrivers).

That said, the Board generally finds that dual-function employees should be included in a bargaining unit if they spend 25 percent or more of their time performing unit work. *WLVI Inc.*, 349 NLRB 683, 686 fn. 5 (2007); *Avco Corp.*, 308 NLRB 1045, 1047 (1992). Thus, in *Medlar Electric, Inc.*, 337 NLRB 796, 797 (2002), the Board included a dual-function employee who spent at least 25 to 30 percent of his time performing unit work. By contrast, in a situation where alleged dual-function employees had only three percent or less of their time devoted to the type of work done by the employees in the unit, they had no such community of interest

with them that would warrant their inclusion in the unit. They did not spend a substantial period of their time performing “identical” functions. *Davis Transport*, 169 NLRB 557, 563 (1968). Moreover, where an employee, who was primarily involved in running a parts department and performing mechanic’s duties, did some truck driving on all or part of only 20 days in a year but without regularity, pattern, or consistent schedule, the Board found that he did not perform a sufficient amount of work in the truck driver unit to demonstrate that he had a substantial interest in the unit to warrant inclusion. *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 702 (1967). See also *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 817 fn. 3 (2003) (excluding employee who spent 15 to 25 percent of his time performing unit work); *Martin Enterprises*, 325 NLRB 714, 715 (1998) (excluding individual who spent at most 10 percent of his time doing unit work); *Pacific LincolnMercury, Inc.*, 312 NLRB 901, 901 fn. 4 (1993) (noting 5 to 10 percent of time spent doing unit is insufficient); *Continental Cablevision of St. Louis*, 298 NLRB 973, 974 (1990) (excluding dual function employees who averaged 17.28 percent of total hours spent on unit work).

Despite Respondent’s claims to the contrary, Rafael was not, and had never been, a mechanic prior to the election date. At the hearing, neither the four drivers nor the mechanic who testified were able to identify a single instance in which Rafael serviced their Concrete Express vehicle or they witnessed Rafael service another Concrete Express vehicle or piece of equipment. [Tr. 63-64, 65:7-8, 65:23-25, 66, 73:6-9, 104, 104:2-3, 105:1-2, 143:19-144:1, 144:10-13, 159:14-17, 157-158]. Even current Concrete Express employee Channy Hernandez, appearing pursuant to a subpoena, would not corroborate that Rafael performs mechanic duties. [Tr. 144:1 (“I know he loads the trucks. That’s what I know.”)]. Further, Union Vice

President Dominick Cassanelli, while attempting to organize the unit, never witnessed Rafael service any Concrete Express vehicle during his hours of observation of the yard. [Tr. 184:12-14]. Mr. Trentini testified that to repair a mixer, it was a full-day job, and the work would be performed at the Hollers Avenue yard. [Tr. 297]. If Rafael were involved in that work, there would have been testimony from one of the drivers that Rafael was seen performing such work.

By his own admission, and despite Mr. Trentini's claims otherwise, Rafael testified he does not perform any maintenance on the yard equipment or loader. [G.C. Exh. 7, Tr. 139:12-13].²⁵ Rafael also testified that he only performed mechanic's work on the new trucks, which

²⁵ Rafael's admission explicitly contradicts Mr. Trentini's sworn testimony that Rafael performed the maintenance on the loader:

Q ...Did Concrete Express own one or more loaders for loading concrete into its trucks?
A More.
Q How many?
A Two, three.
Q Oh, did any maintenance need to be done on those loaders?
A Yes.
Q And who performed that maintenance?
A Rafael.

Q I'm asking a question whether other people worked on those.
A No. Rafael did the work.

[G.C. Exh. 7 (Tr. 49:2-25)]. Rafael testified to the following:

Q Did you perform work -- would you also do mechanical work on the loader itself?
A (Indiscernible).
Q You didn't do any mechanic work on the loader?
A On the loader, no.

[G.C. Exh. 7 (Tr. 139:9-12)]. Mr. Trentini continued to exhibit the same self-serving testimony as presented in the RAV hearing, contradicting himself in successive answers. To wit, Trentini articulated stated that "Mechanics don't know shit about the mixers." [Tr. 289:14-16], only to immediately deny stating as much, testifying "No, I didn't say they didn't know shit about the mixers." [Tr. 289:22]. Trentini has already proven his inability to offer accurate testimony while under oath and not a single driver can corroborate his claims.

came into service between 2015 and 2017. [G.C. Exh. 7 (Tr. 60, 139:1-6)]. Claims of a long history of mechanics work are belied by this statement.

The dual function analysis must also be considered under the circumstances of the Concrete Express and RAV operations as they existed as of May 10, 2018. At the time leading up to the election, Victor and Jorge were both employed by Concrete Express/RAV to perform mechanics work. It strains credulity that prior to RAV's closure and the loss of RAV mechanics, that Concrete Express would assign the mechanics work to Rafael, the yardman. At best, only after the unlawful closure of RAV and the unlawful discharge of Victor and Jorge, did Rafael perform the mechanics work.²⁶ RAV closed on May 31, 2018, well after the election. [ALJD, p. 31].

While Respondent is likely to rely on Rafael's testimony that he works twenty-five hours per week as a mechanic, this estimate was discussed as conditions existed as of the November 28, 2018 RAV hearing date. This was confirmed by the discrepancy in the number of drivers employed by Respondent. At the time of the hearing, Respondent employed seven drivers. [U. Exhs. 2-3]. For the time period Rafael referenced, RAV only employed four drivers. On direct examination, Rafael testified:

- Q Do you know how many hours per week you perform those jobs?
A Twenty-five – the mechanic, twenty-five.

[G.C. Exh. 7, Tr. 134:7-9]. Cross examination elucidated further detail on that twenty-five hour figure, where Rafael testified to the following:

- Q You said you worked as a mechanic how many hours a week?
A Twenty-five hours a week.
Q Twenty-five?

²⁶ This, however, was not corroborated by Channy Hernandez.

A Yeah.
Q All right. And how many hours a week did you work total?
A Total? About 45.

Q And so if you worked 25 hours a week as a mechanic, you worked 20 hours a week, approximately, as a yardman?
A Yeah.
Q Okay. How many trucks would you load a day?
A How many? It's five.
Q Five trucks a day. How many times a day?
A Two, three times, one time.
Q So you were loading about 10 to 15 times a day though. And how long did it take to load?
A Ten minutes.
Q Ten minutes. How many employees drove trucks for RAV?
A RAV, I have --
Q Strike that. How many employees drove trucks for Concrete Express?
A Four.

[G.C. Exh. 7 (Tr. 137:20-138:17)]. Respondent has failed to offer any evidence that Rafael regularly performed mechanics work for sufficient periods of time as of May 10, 2018.

Rafael's testimony that he spends 25 hours working as a mechanic and 20 hours working as a yardman, servicing four drivers, as of November 2018, must be also considered in light of the unlawful closure of RAV. In November 2018, both Victor Gonzalez and Jorge had been terminated and RAV unlawfully closed. As of May 2018, Rafael would be loading trucks for at least seven drivers (eight if Mr. Trentini was driving) three to five times a day, which took between 10 and 30 minutes to load each truck. This does not account for the other time spent performing work in the yard, including moving the aggregates and other yard work. The math simply does not add up that Rafael had the time to perform the mechanic duties, even if mechanics work was not sent to RAV (which it was). It is also unreasonable to believe that in April and May 2018, when the Concrete Express vehicles were stored at the Merritt Avenue garage and Concrete Express had a mechanic on its payroll – Jorge – located at the garage, that

Concrete Express utilized the yardman to perform mechanic duties. The testimony of the RAV mechanics and drivers was unequivocal and consistent with the only practical alternative – Victor and Jorge performed the mechanical work. Again, there is simply no evidence or circumstance where Rafael performed mechanics work at the time of the Petition, at the time of the eligible payroll period, or at the time of the election.

Finally, Respondent was presented with every opportunity to present a driver witness or other evidence not in the form of biased testimony from an owner or owner’s family member to corroborate that Rafael performed mechanics work at the time of the election. Of the four drivers currently employed, only Channy Hernandez testified, and did not confirm the Respondent’s contentions. Moreover, while Ms. Denti testified that she watched Rafael perform mechanics work at some point in time on the yard cameras [Tr. 257], and Mr. Trentini testified to the existence of those cameras [Tr. 271], Respondent has not provided any video evidence to corroborate its claim and rebut the drivers’ testimony. If the cameras are on a two-week loop, and if, as Respondent claims, half of Rafael’s day was spent performing mechanics work, there must be some video evidence of Rafael performing mechanics work in the fourteen days prior to the election. [Tr. 271:2-8]. Respondent also failed to offer any time sheets, invoices, job tickets, repair ticket, repair request, notes to file, vehicle records, log books, or any other document to track a vehicle’s service record and who performed the task. Respondent is in the best position to establish the status of “dual-function employees” because it has superior access to the relevant information. However, Respondent failed to introduce a single piece of documentary evidence that could corroborate its contentions. The absence of such evidence is glaring, and a negative inference must be taken from the failure to produce such evidence.

Respondent's testimony concerning the dual function status of Rafael reminds of the proverbial house built upon sand -- it collapses because of the questionable evidence of the Respondent which provides its foundation. Rafael simply did not perform mechanic work for a sufficient period of time to demonstrate that he has a substantial interest in the stipulated unit's wages, hours, and conditions of employment and is not eligible to vote.

Accordingly, the Union's challenge to Rafael's ballot must be sustained.

3. Respondent's Claims of a One-Man Unit are Meritless

As Respondent cannot establish Rafael is a dual-function employee, Respondent nevertheless contends that were Rafael not to be included in the existing unit, he would constitute a one-person residual unit and would be foreclosed from exercising his Section 7 right to representation.

Preliminarily, the claim is procedurally improper. Such an allegation should have been raised at a pre-election hearing, not following a Stipulated Election Agreement and election. The Challenge proceedings are not the time to litigate the scope of the unit, especially after a Stipulated Election Agreement was approved by the parties and the Regional Director. Respondent must be precluded from raising this belated challenge.

On the merits, the evidence simply does not establish that Rafael would necessarily be left in a one-person residual unit and precluded from his right to representation for the purposes of collective bargaining if the petitioned-for unit were not found to be appropriate. To the contrary, the record reveals that other non-represented employees worked at the Hollers Avenue yard. [Tr. 105, 137, 142, 160]. At the time of the election, this included George Denti.

For these reasons, the Union's challenge must be sustained.

POINT II

THE EMPLOYER ENGAGED IN UNLAWFUL, PRE-ELECTION CONDUCT BY THREATENING EMPLOYEES IN THE PETITIONED-FOR UNIT

The National Labor Relations Act guarantees the right of employees “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157. To ensure robust protection of these rights, the Act forbids “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” *Id.* § 158(a)(3). The Act also makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of” their rights under § 157. *Id.* § 158(a)(1). An employer violates this provision “when substantial evidence demonstrates that the employer’s actions, considered from the employees’ point of view, had a reasonable tendency to coerce.” *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 543 (6th Cir. 2016) (brackets omitted) (quoting *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005)). Actual coercion is unnecessary. *See id.*

An employer is free to communicate to his employees any of his general views about unionism or any of his views about a specific union, so long as the communications do not contain a threat of reprisal or force or promise of benefits. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). An employer may even make a prediction as to the precise impact he believes unionization will have on the company. *Id.* However, the prediction must be phrased on the

basis of objective fact to convey its belief as to demonstrably probable consequences beyond its control. *AP Automotive Systems*, 333 NLRB 581 (2001).

Here, Respondent's various communications were inherently coercive and violated the Act.

1. Trentini Unlawfully Interrogated Christian Reyes and John Torres

Employers may not interrogate employees in a manner that, under all the circumstances, "reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Caterpillar Logistics*, 835 F.3d at 543 (quoting *Dayton Typographic Serv., Inc. v. NLRB*, 778 F.2d 1188, 1194 (6th Cir. 1985)). "A finding of 'actual coercion' is not required." *Id.* (quoting *Dayton Newspapers*, 402 F.3d at 659). In assessing the coercive potential of an interrogation, the Board considers factors including "the background, the nature of the information sought, the questioner's identity, and the place and method of interrogation." *Id.* (quoting *Dayton Typographic*, 778 F.2d at 1194). There are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178, *enfd.* 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by *Section 7* of the Act." *Westwood*, *supra* at 940; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In a context free of coercion and free of openly expressed hostility to the Union, this allegation would be less strong.

With both Torres and Reyes, Mr. Trentini inquired about union activity at the plant and followed those questions with further unlawful statements. The question about the Union, coupled with the unlawful threat, establishes sufficient coercion. Similarly, by Mr. Trentini identifying Torres as the “ringleader”, he created an unlawful impression of surveillance that would establish sufficient coercion.

Accordingly, Respondent violated the Act.

2. Trentini Unlawfully Offered Increased Benefits to Dissuade Union Support

Trentini made a promise of benefits to Christian Reyes in return for his voting no. Specifically, Trentini offered Reyes a new truck, which would provide more stability and reliable working hours. These are clear tangible benefits and improvement in working conditions that are prohibited by the Act, as they serve as an inducement to avoid union activity.

Accordingly, Respondent violated the Act.

3. Trentini Unlawfully Threatened Discharge of Christian Reyes and Channy Hernandez

Statements made to employees containing threats of job loss if they selected a union as their collective bargaining representative have consistently been found to violate the Act.

Overnite Transportation Co., 296 NLRB 669, 670 (1989).

Here, there can be no dispute that the pointed comments from Trentini, corroborated by Reyes and Hernandez, that they would be fired if the Union was selected, are unlawful.

Accordingly, Respondent violated the Act.

4. Donna Trentini Unlawfully Threatened Closure of the Plant

Section 8(c) of the Act provides that the “expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of

this Act, if such expression contains no threat of reprisal or force or promise of benefit.” Thus, when considering whether an employer has violated Section 8(a)(1) through antiunion exhortations to its employees, the Board and the Supreme Court recognize that Section 8(c) of the Act “implements the First Amendment by requiring that the expression of ‘any views, argument, or opinion’ shall not be ‘evidence of an unfair labor practice,’ so long as such expression contains ‘no threat of reprisal or force or promise of benefit’ in violation of § 8(a)(1).” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969) (quoting Sec. 8(c)).

In determining whether employer speech is violative of Section 8(a)(1), the Supreme Court recognizes that “[a]ny assessment of the precise scope of employer express, of course, must be made in the context of its labor relations setting.” *Gissel*, 395 U.S. at 580. By this, the Supreme Court means that the Board’s duty is to “focus on the question: ‘What did the speaker intend and the listener understand?’ (A. Cox, *Law and the National Labor Policy* 44 (1960),” and particularly to consider that the employer’s words cannot be divorced from context, but must be evaluated with an understanding that “employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts.” *Id.* at 581 (footnotes omitted).

Thus, “any balancing” of the employee rights protected by Section 8(a)(1) and employer speech immunized by Section 8(c), “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *Gissel*, 395 U.S. at 580.

In *Overnite Transportation Co.*, the employer violated the Act after it referred to specific companies that closed “after becoming unionized” and stating that the company “would close its doors if the employees voted for the union.” *Overnite Transportation Co.*, 296 NLRB at 670. The Board reasoned that such statements equate unionization with unprofitability, loss of jobs, and business consequences, and not on the basis of objective fact or consequences beyond the employer’s control. *Id.*

Taking consideration of the Supreme Court’s instruction that employer statements must be considered with any ear toward their meaning to employees sensitive to the threat of plant closings, Ms. Trentini’s comments, considered in context, and by reasonable implication, clearly violated the Act’s prohibition in interference, restraint, and coercion of employees. Her comments were not “carefully phrased on the basis of objective fact”, but specifically intended to suggest that Concrete Express would close the plant on its own initiative, independent of the Union’s role. *Gissel*, 395 U.S. at 580-581. The mild manner of her delivery and couching of the threats as the relaying of a “personal” experience are also irrelevant. *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462-463 (1995). (“Regardless of the tone of his voice, what [supervisor] said . . . conveyed the threatening message that union activities would place an employee in jeopardy. Indeed, such advice, had it come from a friend sincerely concerned for the employee’s job security, might have been all the more ominous”). The fact is, Mrs. Trentini is an admitted supervisor of the Respondent who, along with some other supervisors, made a point of seeking out employees to stoke a fear of plant closing should the employees vote for the Union.

Accordingly, Respondent violated the Act.

POINT III

RESPONDENT VIOLATED SECTIONS 8(A)(3) AND (1) BY CHANGING THE TERMS AND CONDITIONS OF EMPLOYMENT POST-ELECTION

The Complaint alleges that Respondent violated Sections 8(a)(1) and (3) of the Act by (1) implementing an employee dress code; (2) revoking the drivers' parking privileges, both in response to their protected Section 7 activities.

The *Wright Line* analysis is the applicable test to determine whether these actions violated the Act. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982); *NLRB v. Trans. Mgt. Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* analysis); *see also Real Foods Co.*, 350 NLRB 309, 312 (2007) (*Wright Line* is appropriate test to evaluate whether threatened plant closure violates Section 8(a)(3)).

"In *Wright Line* . . . the Board set forth the analytical framework for applying Section 8(a)(3) and (1) where the question presented is whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such activities." *FES*, 331 NLRB 9, 18 (2000). To establish a prima facie case, the General Counsel must establish "union activity, employer knowledge, union animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity." *Farmer Bros. Co.*, 303 NLRB 628, 649 (1991).

After the General Counsel makes a "prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision, . . . the burden will shift to the employer to demonstrate that the same action would have been taken even in the absence of protected conduct." *Wright Line*, 251 NLRB at 1089. An employer

cannot carry out a *Wright Line* burden by simply showing that it had a legitimate reason for the discharge or discipline; instead, the employer must prove by a preponderance of the evidence that the action would have taken place even absent the protected activity. *Centre Property Management*, 277 NLRB 1376 (1985).

The Board has also ruled that pretextual reasons advanced for adverse employment actions indicate an employer's unlawful motivation. *Active Transportation*, 296 NLRB 431, 432 (1989). "[A]ctual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive could be brought to book." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1996).

Circumstantial evidence may be used by the General Counsel to meet its burden of showing employer knowledge and animus. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Such circumstantial evidence may include the timing of alleged discriminatory action, general knowledge of and animus toward employees' union activities, failure to follow past practice, disparate treatment of discriminatees, shifting or irrational explanations for the treatment of discriminatees, and other contemporaneous unfair labor practice. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (May 31, 2018); *Novato Healthcare Center*, 365 NLRB No. 137 (Sep. 29, 2017); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014). Inferences of animus and discriminatory motivation may be warranted under all the circumstances and even without direct evidence. *Ass'n Hospital Del Maestro*, 291 NLRB 198, 204 (1998); *Flour Daniel*, 311 NLRB 498 (1993); *Adco Elec.*, 307 NLRB 113, 1128 (1992).

Timing, the Board and the courts agree, is a critical factor in determining motivation and establishing union animus. *NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1314 (7th Cir. 1998); *NLRB v. Wilhow Corp.*, 666 F.2d 1294, 1302 (10th Cir. 1981) (“[T]he timing of events is an important factor in determining the validity of an inference that there has been a discriminatory firing.”); *Masland Indus.*, 311 NLRB 184, 197 (1992). If knowledge, animus, and the timing of an employer’s actions are proven, it is sufficient to fulfill the General Counsel’s burden of proof under *Wright Line* that the employee was disciplined for exercising his Section 7 rights. *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349 (7th Cir. 1984) (“[T]iming alone may suggest anti-union animus as a motivating factor.”); *Jim Walters Resources*, 324 NLRB 1231, 1233 (1997). Where, as here, an employer—despite having knowledge of suspected misconduct—delays in discharging an employee until after that employee has engaged in protected activity, the Board generally infers that the discharge was unlawful. *Merchants Truck Line*, 232 NLRB 676 (1977), *enfd.* 577 F.2d 1011 (5th Cir. 1978). The Board has repeatedly clarified that the demonstration of a casual nexus is not an element of the General Counsel’s initial burden. *See, e.g., East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at n. 7 (Aug. 27, 2018) (collecting cases).

Finally, the credibility of the employer’s explanation of its reasons for imposing discipline is relevant to determining whether it acted with improper motive. *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003). Where the General Counsel has made a prima facie showing, and the employer’s rebuttal is not credible, a violation will be found. *Adair Standish Corp.*, 290 NLRB 317 (1988).

While the second step of *Wright Line* analysis is necessary in “mixed-motive” cases where some valid rationale contributed to the alleged unlawful action, such an analysis is not

necessary if the respondent's stated reason for discharging the discriminate has been rejected as entirely pretextual. *Parkview Lounge, LLC*, 366 NLRB No. 71 (Apr. 26, 2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014).

Applying *Wright Line*, there can be no dispute that the drivers engaged in protected Section 7 activity by organizing and voting in favor of Union representation. It is equally clear that the drivers suffered a change in their terms and conditions of employment within hours of the close of the election polls. There can be no credible dispute that Mr. Trentini was aware of the election, as he was present at the count on May 10, 2018. The timing is beyond suspicious; **it is determinative**. In both the change in dress code policy and parking policy, Respondent's knowledge of, and prior acceptance of these manufactured concerns, demonstrates Respondent sought to seize upon information it already knew as pretext for the change because of the result of the election just hours earlier.

1. Concrete Express Unlawfully Promulgated a Dress Code in Response to the Union Election

Ms. Denti explicitly contracts herself in her testimony concerning why, on May 10, 2018, just hours after the election, she sent a text message to all drivers regarding the dress code. She testified that it was her practice to engage in a one-on-one conversations to address issues with employees, including dress code concerns [Tr. 47:19-20 ("There's only a few people in that place, so I would go one-on-one with them."), 236]. However, on May 10, she sent a text message to all employees because "[she] did not want to point one person out. I sent a general to everybody." [Tr. 238:11-12]. This directly conflicts with her practice, as she testified. There can only be one explanation for this different approach.

While Ms. Denti claims the text message is a direct response to a single individual driver wearing sneakers, this a group communication that she had never made prior. The only difference is the election held hours before. Therefore, Respondent's mere articulation of a potentially legitimate basis for the change does not establish that Respondent relied on that potential basis in making the change. *Manno Electric*, 321 NLRB 278, 283 n. 12 (1996), *enfd.* ___ Fed. Appx. ___ (5th Cir 1997).

The Union submits that the timing of the change, just two hours after the close of the election polls and after the ballot count, and Respondent's clearly pretextual explanation for the change in dress code and announcement of the policy, demonstrate the drivers' Union activity was a motivating factor for the announcement and that Respondent cannot rebut the evidence of unlawful motivation. *See Parkview Lounge, LLC*, 366 NLRB No. 71, slip op. at 3.

Accordingly, Respondent violated 8(a)(3) and (1) of the Act.

2. Concrete Express Unlawfully Revoked Parking Privileges in Response to the Union Election

On-site parking, especially in the Bronx, is a benefit and an established term and condition of employment.

Ms. Denti's text message revoking parking privileges was the culmination of Mr. Trentini's complaint, made shortly after the election. Following the election, Mr. Trentini visited the garage and witnessed personal vehicles parked inside. Despite his previous acceptance, Mr. Trentini called Ms. Denti to complain and the 11:27 a.m. text message was the sent. The timing offers no alternative that but for the election, drivers would be allowed to continue to park in the garage. On the morning of the election, in a fit of pique after losing the election 4-3, Trentini contacted Denti and ordered her to revoke the driver's rights to park in

the garage. Despite Trentini visiting the garage on a regular basis, and never before having given the direction to Denti, he, post-election, demanded this change.

Beyond the obvious -- that Mr. Trentini changed the conditions within hours of the election -- he also acknowledged he was aware of the parking situation for months and yet he did not act on this until May 10, 2018, the day of the election. In addition to demonstrating animus and unlawful motive, Respondent's indifference to the parking until the employees engaged in protected activity demonstrates that Respondent would not have taken the same employment action even in the absence of protected conduct; indeed, Respondent knew of and ignored the parking concerns for several months. *See Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989) (“[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.”). Thus, Respondent's claim of a lawful reason must be rejected.

Respondent also cannot offer any evidence establishing dates or times of complaints with respect to the parking situation, or the details surrounding the empty claims of a damaged truck. The Union submits that the timing of the change, roughly two hours after the close of the election polls and after the ballot count, and Respondent's clearly pretextual explanation for the revocation of parking privileges and announcement of the policy, demonstrate the drivers' Union activity was the motivating factor for the announcement and that Respondent cannot rebut the evidence of unlawful motivation. *See Parkview Lounge, LLC*, 366 NLRB No. 71, slip op. at 3.

Accordingly, Respondent violated Sections 8(a)(1) and (3) of the Act.

POINT IV

THE EMPLOYER UNILATERALLY CHANGED TERMS AND CONDITIONS OF EMPLOYMENT IN VIOLATION OF THE ACT

An employer violates Section 8(a)(5) and (1) of the Act if it changes the wages, hours or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962). Such changes are mandatory subjects of bargaining if the change has a "material, substantial, and significant" impact on the terms and conditions of bargaining unit members. *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001), citing *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Carrier Corp.*, 319 NLRB 184, 193 (1995), citing *United Technologies Corp.*, 278 NLRB 306, 308 (1986). If an employer makes changes post-election but pre-certification of the labor organization, the employer changes those conditions at its own peril.

An employer is required to bargain over issues concerning employee parking when those issues have a significant, substantial, and material effect on terms and conditions of employment. Compare, *United Parcel Service*, 336 NLRB 1134 (2001) (employer required to bargain over effects of relocating parking lot 1-1/2 miles from its facility, increasing employees' commuting time by 40 minutes), with *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1193 (1986) (no bargaining required where employer prohibited employee parking in first row of parking lot).

Here, Respondent revocation of the parking benefit caused employees to walk an additional 0.4 miles from the most likely available parking spots near Hollers Avenue to the Merritt Avenue garage, in addition to the time required to locate a parking spot. Denti conceded this change would cost employees at least 10 minutes of their time, stating "leave 10mins" earlier. [G.C. Exh. 3].

It is clear from the evidence here that the revocation of the drivers' ability to park in the Merritt Avenue garage had a substantial impact upon the terms and conditions of employment, requiring employees to spend an additional 20-plus minutes per day -- locating parking, parking, and then walking from the parking spot to clock in and pick up the truck in the Merritt Avenue garage. This is a material and significant change, especially where the previous benefit afforded on site parking. These changes can impact the employees' ability to arrive at work on time and related matters. Thus, the ALJ must find that the revocation of the parking benefit has resulted in material changes to the employees' conditions of employment, and Respondent had an obligation to bargain with the Union over the change.

CONCLUSION

For the above stated reasons and authorities, and those advanced by counsel for the General Counsel, the Charging Party respectfully requests that the Administrative Law Judge find: (1) Rafael is not a mechanic, he is ineligible to vote in the election, and sustain Petitioner's challenge to his vote; and (2) Respondent has violated the Act in the manner alleged in the Complaint.

Therefore, for the reasons stated in the Consolidated Complaint, we respectfully request you find the violations alleged and order the requested remedy.

Dated: November 1, 2019
Syracuse, New York

BLITMAN & KING LLP

s/ Bryan T. Arnault
Bryan T. Arnault, Esq.
Attorneys for the Charging Party
Teamsters Local 456
Office and Post Office Address
443 North Franklin Street, Suite 300
Syracuse, New York 13204-5412
Tel: (315) 422-7111
Fax: (315) 471-2623
Email: btarnault@bklawyers.com

cc: Ron Mason, Esq.
Aaron T. Tulencik, Esq.
Mason Law Firm
Attorneys for Respondent
P.O. Box 398
Dublin, Ohio 43017
Email: rmason@maslawfirm.com

Allen Rose, Esq., Counsel for the General Counsel
National Labor Relations Board
26 Federal Plaza
Room 3614
New York, New York 10278
Email: Allen.Rose@nlrb.gov

NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONCRETE EXPRESS OF NY, LLC,)	
)	
Respondent,	)	Administrative Law Judge
	)	Benjamin W. Green
)	
-and-)	
	)	Case Nos. 02-CA-220381
TEAMSTERS LOCAL 456, INTERNATIONAL	)	02-CA-224789
BROTHERHOOD OF TEAMSTERS,	)	02-RC-218783
)	
Charging Party.)	

CERTIFICATE OF SERVICE

Bryan T. Arnault, attorney for the Charging Party in the above-captioned matter, certifies that on this date a copy of the within post-hearing brief was filed with the Division of Judges via the NLRB's e-filing system and served by electronic mail upon Respondent's attorneys and upon Region 2:

Ron Mason, Esq.
Aaron T. Tulencik, Esq.
Mason Law Firm
Attorneys for Respondent
P.O. Box 398
Dublin, Ohio 43017
Email: rmason@maslawfirm.com

Allen Rose, Esq.
National Labor Relations Board
Counsel for the General Counsel
26 Federal Plaza
Room 3614
New York, New York 10278
Email: Allen.Rose@nlrb.gov

Dated: November 1, 2019

s/ Bryan T. Arnault
Bryan T. Arnault, Esq.
Attorneys for the Charging Party
Teamsters Local 456
Office and Post Office Address
443 North Franklin Street, Suite 300
Syracuse, New York 13204-5412
Tel: (315) 422-7111
Fax: (315) 471-2623
Email: btarnault@bklawyers.com