

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

CONCRETE EXPRESS OF NY, LLC,	:		
	:		
Respondent	:	Case Nos.	2-CA-220381
	:	Case No.	2-CA-224789
and	:		2-RC-218783
	:		
TEAMSTERS LOCAL 456, INTERNATIONAL	:		
BROTHERHOOD OF TEAMSTERS	:		
	:		
Charging Party	:		
	:		

CONCRETE EXPRESS OF NY, LLC’S POST HEARING BRIEF

Now come the Respondent Concrete Express of NY, LLC (“Concrete Express” or “Respondent”) and hereby files its Post Hearing Brief to Honorable Benjamin Green Administrative Law Judge. On December 21, 2018 the Regional Director for Region 2 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Case Nos. 2-CA-220381 and 224789. (“Complaint”). On the same day, the Regional Director issued a Decision on Challenges and Objections and Notice of Hearing in in Case No. 2-RC-218783. Subsequently, on January 4, 2019 the Regional Director issued a Corrected Decision on Challenges and Objections and Notice of Hearing because Counsel for Concrete Express was inadvertently not served with a copy of the Regional Director’s original December 21, 2018 Decision. Also on January 4, 2019, The Regional Director issued an Order Further Consolidating Cases and Notice of Hearing in Case Nos. 2-CA-220381, 2-CA-224789 and 2-RC-218783. The Hearing was conducted in New York, New York on April 23, 2019 and July 30, 2019.

I. ISSUES PRESENTED

A. CA CASE

1. Whether Concrete Express, by Chris Trentini, about early May 2018 interrogated employees about their union activities, promised employees assignment of newer trucks and threatened employees with discharge if they voted for the Union and, as such, violated Section 8(a)(1) of the Act.

See, Complaint, ¶ 8.

2. Whether Concrete Express, by Donna Trentini, about one or two weeks prior to the May 10, 2018 election threatened to close the operation if employees selected the Union as their bargaining representative and, as such violated Section 8(a)(1) of the Act.

See, Complaint, ¶ 9.

3. Whether Concrete Express, within few hours of the May 10, 2018 election, implemented a new dress code for its drivers and, as such, violated Section 8(a)(1) and (3) of the Act and Section 8(a)(1) and (5) of the Act.

See, Complaint, ¶ 12(a), (c) and (d).

4. Whether Concrete Express, within few hours of the May 10, 2018 election, revoked the parking privileges of its drivers to park inside Respondent's garage located at 3371 Merritt Avenue, Bronx, New York and, as such, violated Section 8(a)(1) and (3) of the Act and Section 8(a)(1) and (5) of the Act.

See, Complaint, ¶ 12(b), (c) and (d).

B. RC CASE

1. Challenged ballot

Rafael Valencia – Whether Rafael Valencia is a dual functioning employee (yardman/mechanic) and, as such, is employed in the bargaining unit and eligible to vote.

2. Union objections

Union Objection No. 1 and 3 – Whether Concrete Express, during the critical period of the election, threatened to terminate employees and threatened to close the facility if the employees voted for the Union.

Union Objection No. 4 - Whether Concrete Express, during the critical period of the election, threatened futility in bargaining if the Union was voted in.

3. Regional Director's Objection

Whether Concrete Express, during the critical period of the election, interrogated employees about their union sentiments.

II. FACTS

A. CONCRETE EXPRESS OF NEW YORK, LLC

1. 2279 Hollers Avenue

Concrete Express is a service company servicing contractors with concrete. (Tr. 12, General Counsel's Exhibit ["GC"] 7¹, p. 187-188.) 2279 Hollers Avenue is Concrete Express's principal place of business. (Tr. 13-14, 259, GC 7, p. 50.) Concrete Express opened in 2006. Chris Trentini ("Trentini") is the owner, President and only member of the LLC. (Tr. 12, 259, GC 7, p. 188.)

2279 Hollers Avenue is an empty lot that houses the storage of sand, stone, a hot water tank, a silo and a fuel tank. (GC 7, p. 189-190.) The entire area is approximately 2500 sq. ft. and is all outdoor space. (GC 7, p. 190 & R. 7.) Concrete Express utilizes open top trucks for mobile on-site mixing – the trucks contain a sand bin, a stone bin, a cement bin and a water tank. (GC 7, p. 186.) The driver is able to flip a switch and an auger will start mixing the water, stone, sand and cement. (Id.) The requisite material is loaded into the truck at 2279 Hollers Avenue (GC 7, p. 188.)

Concrete Express has seven old trucks and six new trucks. (GC 7, p. 194.) The old trucks are no longer in service and they are not insured or registered. (Id.) Concrete Express has already sold two the seven old trucks. (Id.) The old trucks are currently housed at 3373 Merritt

¹ GC 7 is the transcript from Case No. 2-CA-220395. The referenced page numbers correlate with the page numbers of the transcript.

Avenue (the old location for RAV) which Concrete Express now holds a lease for all of 3773 Merritt Avenue. (GC 7, p. 194-195, 284-286, R. 3 & R. 8).²

Concrete Express purchased six new trucks in 2016. ((Tr. 28, GC 7, p. 192-193.) The trucks arrived in 2016 and 2017 and were placed into service on the following dates: (1) 10.4.16; (2) 3.3.17; (3) 6.27.17; (4) 9.5.17; (5) 9.6.17; and (6) 9.6.17. (GC 7, p. 193 & R. 12). At of the time of the hearing, only four of the six new trucks were in service. (Tr. 28, GC 7, p. 193-194.)

2. 3371 Merritt Avenue

Concrete Express houses its new trucks at 3371 Merritt Avenue³ (Tr. 15, GC 7, p. 194.) Concrete Express drivers pick-up the trucks at 3771 Merritt Avenue and load the trucks at 2279 Hollers Avenue. (GC 7, p. 50.) 3371 Merritt Avenue has no outdoor parking (GC 7, p. 195, 197 & R. 8.) The drivers pick up the trucks at Merritt Avenue and drive to 2279 Hollers Avenue to pick up the material for delivery to the customer. (Tr. 16-17.)

3. Organization and May 10, 2018 Election

On April 19, 2018 the Teamsters Local 456, International Brotherhood of Teamsters (“Charging Party”, “Petitioner” or “Union”) filed an RC Petition to represent all full time and regular part time drivers and mechanics employed by Concrete Express at 2279 Hollers Avenue. (Union Exhibit [U] 1.) On May 1, 2018 the parties reached a stipulated election Agreement wherein the unit was described as, “[a]ll full-time and part-time drivers and mechanics employed by the Employer at 2279 Hollers Avenue Bronx, NY 10475.” (GC 2.) The election was conducted on May 10, 2018. The result of the election was as follows:

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

² Concrete Express leases 3773 Merritt Avenue in its entirety. RAV’s lease contained only 600 sq. ft. of 3773 Merritt Avenue because the remainder of the space (Approx. 4,500 sq. ft. was already leased to another tenant. (GC 7, p. 283-284.)

³ Concrete Express houses its trucks at 2279 Hollers Avenue on the rare occasion. (GC 7, p. 192.)

Approximate number of eligible voters	8
Number of void ballots	0
Number of ballots cast for the Petitioner	4
Number of votes cast against participating labor organizations	3
Number of valid votes counted	7
Number of challenged ballots	1
Number of valid votes counted plus challenged ballots	8
Challenges are sufficient in number to affect the results of the election.	

See, GC 1(v), Corrected Decision on Challenges and Objections and Notice of Hearing. The union challenged Rafael Valencia’s ballot on the basis that he is not employed in a bargaining unit position and, thus, not eligible to vote.

4. Rafael Valencia

Rafael Valencia (“Rafael”) is a yardman/mechanic and has been employed by Concrete Express since its inception. (GC 7, p. 133-134 & 137.) Rafael performs mechanical work approximately 25 hours per week and works 20 hours per week as a yardman. (GC 7, p. 134 & 137 & RAV Truck and Trailer Repairs, Inc., and Concrete Express of NY, LLC, a Single Employer, JD(NY)-12-19, Findings of Fact, p. 3.) Rafael’s duties as a yardman include using a loader to load the trucks with gravel and sand and maintain the loaders. (Tr. 287 & GC 7, p. 134.) As a mechanic, Rafael performs work on Concrete Express trucks such as changing breaks, plugs, blades, batteries, change oil filters, hydraulic systems, PTO, etc. (GC 7, p. 133-134 & 289.) He also greases the trucks and checks the oil. (Tr. 287). Rafael has never worked for RAV and he works only on concrete trucks that belong to Concrete Express. (GC 7, p. 145.) This work is performed at 2279 Hollers Avenue. (GC 7, p. 298.) Jorge Valensia (“Valensia”), Rafael’s nephew, would sometimes help Rafael in the yard. (Tr. 289). They would tear belts out and put belts in; tear augers out and put augers in. (Tr. 290.) Rafael actually trained Valencia to

be a mechanic. (Tr. 269, 290.) Rafael provided hands on training to Valencia upon his hiring⁴ – Valencia would watch and learn from Rafael. (Tr. 290.)

Trentini trained Rafael as a mechanic and Rafael has worked for Trentini (various businesses) since approximately 1984 (Tr. 269 & GC 7, p. 137, 145 & 189.) Trentini and Rafael perform(ed) repairs/maintain(ed) Concrete Express's trucks, both old and new. (Tr. 32, 268, 289 & GC 7, p. 48-49, 288-289 & 297-298.) Trentini and Rafael performed these repairs prior to the election and continued to do so subsequent to the election. (Tr. 268-269, 285.) The majority of these repairs are performed outside at 2279 Hollers Avenue wherein Trentini and Rafael are lying on the gravel or plywood. (Tr. 269.).

Any driver with mechanical issues will often call Trentini. (Tr. 35.) Trentini would try to fix the problem over the phone. (Tr. 36.) If he was unsuccessful in doing so, the driver would come back to the yard and Rafael would perform the requisite repair/maintenance. (Id.) Likewise, drivers also contact Diane Denti ("Denti")⁵ whenever they are experiencing issues their truck. (Tr. 244, 257.) When driver brings the truck back to the yard Rafael will fix it. (Id.) Denti has personally assigned such work to Rafael and this was the practice prior to and during the time of the election. (Tr. 245, 257.) Denti has personally witnessed Rafael changing auger blades and repairing hoses from my office. (Tr. 257-258). Denti has a view of the yard via the security cameras in the office. (Id.) Conversely, Denti has never instructed Gonzalez and Valensia (RAV mechanics) to perform repairs to Concrete Express trucks. (Tr. 253-254.) Subsequent to the election she still receives calls from the drivers whenever they have mechanical issues and Rafael will make the necessary repair. (Tr. 245.) Trentini also repairs the trucks. (Tr. 255-256.)

⁴ Valensia was hired by Concrete Express in 2015/early 2016. (GC 7, p. 55-56, 173.)

⁵ Denti is the Dispatcher for Concrete Express and she also supervises the drivers and Rafael. (Tr. 38-39, 46, 232-233.) Denti is Donna Trentini's sister and Chris Trentini's is her brother-in-law. (Tr. 233.)

In addition to performing general maintenance and repairs noted above, Trentini and Rafael perform all the mixer repairs on the Concrete Express trucks. (Tr. 289.) The mixer is the unit on the back of the truck that sits atop the chassis. (Tr. 295.) The mixer is approximately fifteen to sixteen feet long and contains conveyor belts underneath the unit. (Id.) The conveyor belts move the material out to the auger where the auger mixes the material into concrete. (Id.) When the mixer stops working the auger stops working. (Tr. 295-296.) The mixer repairs are labor intensive requiring a full day's work and requires extensive disassembly including completely removing the belts for repair and possible removal of the chains that the belt is bolted to. (Tr. 297.) The mixer repairs generally took place at 2279 Hollers Avenue because there is more open space to perform repairs as compared to 3371 Merritt Avenue. (Id.) RAV Truck and Trailer Repairs, Inc. ("RAV") mechanics Valencia and Victor Gonzalez (Gonzalez) were not capable of repairing the mixers on their own. (Tr. 289.) Notably, this was not rebutted by the Petitioner Union. They were not as knowledgeable as Trentini and Rafael who have been repairing mixer units since 1987. (Tr. 269.)

5. Dress Code for Concrete Drivers

Concrete Express's drivers were required to wear work pants (jeans are acceptable), work shirt (t-shirts acceptable) and work boots. (Tr. 233-234.) Tennis shoes, sweat pants and shorts are prohibited. (Tr. 234.) The dress code was in effect prior to the election. (Tr. 234.) The dress code is not memorialized in writing. (Tr. 29, 47, 234.) Rather, it is communicated to verbally to the drivers upon hire and other verbal counseling's when a particular driver is not wearing proper attire. (Tr. 47, 234, 236.) And, as admitted to on cross examination by Channy Hernandez ("Hernandez"), a current driver, the dress code at issue was in place prior to the May 10, 2018 election. (Tr. 140.) The dress code is meant to protect the men as they often deliver to

construction sites and long pants and boots offer more protection than sweatpants, shorts and tennis shoes. (Tr. 234.) To be sure, John Torres (“Torres”), a former driver, testified that work boots are safer and offer more protection than tennis shoes. (Tr. 166.) Further, at the end of each day the drivers are required to wash out their truck. (Tr. 269-270.) This requires cleaning the auger with a bar and water hose. (Tr. 270.) In doing so you are physically leaning over the auger⁶ while cleaning it and all the while the auger blades are turning like a corkscrew. (Id.) Thus, if someone is wearing sweatpants it is entirely possible the drawstring could become caught in the auger. (Id.)

Concrete Express does not discipline drivers for violations of the dress code. (Tr. 47, 238) Notwithstanding, Denti verbally counsels the drivers if they are in violation of the dress code. (Tr. 236, 238.) For instance, she verbally counseled Hernandez after receiving a complaint from a jobsite foreman from Poherence in 2017 (a Concrete Express customer) that Hernandez was not wearing the proper safety attire. (Tr. 236-237, 250.) Denti also verbally counseled Christian Reyes (“Reyes”), former driver, for not wearing the proper work attire when he was wearing sweat pants and tennis shoes. (Tr. 237.) Both of these counseling’s occurred prior to the May 10, 2018 election. (Tr. 235-238.)

On the morning of the election, Denti sent a group text message to all of the drivers reminding them of the dress code. (Tr. 235, GC 3 &5.) The timing of Denti’s text was not related to the election. Rather, she sent the text because Hernandez was once again in violation of the dress code because he was wearing tennis shoes, not boots, as is required. (Tr. 235, 238.) Denti testified that the wording of her text is accurate in that she has communicated the dress code many times prior to the May 10, 2018 election. (Tr. 235.)

⁶ Trentini testified a driver is as close to the auger as he was to the witness bench while seated and giving testimony. (Tr. 270.)

6. Parking for Concrete Drivers

Prior to obtaining 3371 Merritt Avenue, the concrete trucks were housed at 2279 Hollers Avenue. (Tr. 16, 259.) The drivers parked near the yard wherever parking was available and then walked to the yard to pick up there truck. (Tr. 259.) They did not park in the yard. (Tr. 139, 154, 238-239, 250, 260.) When Concrete Express obtained 3371 Merritt Avenue in order to provide indoor storage for the new concrete trucks no one affiliated with Concrete Express instructed the men they could park their personal vehicles in the garage – the drivers took it upon themselves to do so. (Tr. 238-240, 261-262.) Just as they did when the trucks were housed at 2279 Hollers Avenue, the drivers were to park wherever parking was available near the garage and walk to the garage to pick up their truck. (Tr. 261-262.) Some of drivers who testified on behalf of the General Counsel admitted that there were no designated parking spaces in the garage. (Tr. 78, 120-121.)

Louis Fernandez (“Fernandez”), a driver who was lawfully terminated after the election for stealing concrete, testified that every one of the drivers parked their personal vehicles in the garage in an effort to lend credence to the General Counsel’s theory that the drivers were given permission to park in the garage. (Tr. 116.) So too did Reyes, a former Concrete Express Driver who was lawfully terminated after the May 10, 2018 election for failing a drug test. (Tr. 79, 265.) However, for RAV mechanic Gonzalez testified that only one or two drivers parked their personal vehicles in the .garage. (Tr. 204.) As a result, Gonzalez and the other drivers had to often move other drivers’ cars out of the way in order to get the concrete trucks in and out of the garage. (Tr. 60, 81, 115-116, 204.)

Denti received a complaint from Winston Walker, a driver, that some of the men were parking in the garage making it difficult for the drivers to get the trucks in and out of the garage.

(Tr. 251-252.) Similar to the dress code, Denti instructed the drivers verbally that they were not permitted to park their personal vehicles in the garage (Tr. 241-242, 251-252, 262-263.) Likewise, she has never disciplined the men for parking in the garage. (Tr. 241-242.) This was before the election. (Tr. 241-242, 262-263.)

Trentini personally witnessed some of the men's personal vehicles parked in the garage when he went to the garage to inspect damage to one of the trucks – one the trucks was missing its freightliner emblem mounted on the front hood. (Tr. 262-263.) Trentini instructed Denti to instruct the men they were not to park their personal vehicles in the garage. (Tr. 263.) Again, similar to the dress code, Denti verbally instructed the men they were not to park their personal vehicles in the garage and this was before the election. (Tr. 263.) On the morning of the election, Trentini again witnessed personal vehicles in the garage and instructed Denti to again instruct the men they were not permitted to park their personal vehicles in the garage. (Tr. 241, 251, 263-264.) This time Denti sent a group text message instructing the men in writing that they were not permitted to park in the garage. (Tr. 251, 264-265 & GC 3, 5.) The timing of Denti's text was not related to the election. Rather, she sent the text because some of the men continually refused to heed her verbal instructions/reminders that they were not permitted to park in the garage as evidenced by the fact that personal vehicles were in the garage on May 10. (Tr. 241, 263-264.)

7. Purported Interrogation and Threats to Concrete Drivers

a. Purported threats of termination

Hernandez and Reyes (a former Concrete Express Driver who was lawfully terminated after the May 10, 2018 election for failing a drug test), each testified that about a week prior to the election they had a conversation in the office wherein Trentini told both Reyes and

Hernandez (in the presence of Denti) that if they wanted to keep their jobs they should vote no. (Tr. 57-58, 79, 130-131, 265.) Both Trentini and Denti denied participating in this conversation or any conversation wherein Trentini threatened any of the drivers with termination relative to their union activities. (Tr. 243, 265.) Notably, this incident was not memorialized in Reyes's Board affidavit. (Tr. 79-80) The charge was initially filed on May 15, 2018, only 5 days after the election and only a few days more than this supposed conversation. (GC 1(g).)

Fernandez, a former concrete driver who was lawfully terminated for stealing concrete, testified that Trentini approached him in the yard while he was washing out his truck and told him if he wanted to keep his job to vote no. (Tr. 95, 107-109 & 265.) Fernandez maintains that this conversation took place just a few days before the election. (Tr. 95.) Trentini denies that any such conversation occurred. (Tr. 265.)

b. Purported threats of closure

Fernandez and Hernandez both testified that they attended a meeting with Matthew Murray (driver), Winston Walker (driver), Admon Roberts (driver), Trentini and Donna Trentini⁷ wherein Donna Trentini stated that if the union comes in all she has to do is shut down the company. (Tr. 93-94 & 129-130.) Both Trentini and Donna Trentini denied ever making such a threat. (Tr. 225-227, 229-230 & 266-267.) Donna Trentini did acknowledge that she shared with some of the drivers her personal experience of having to close her former business (Trentini Mobile Concrete Corp.) because she ran out of money. (Tr. 226-227, 229-230.) She owed Local 456 over \$250,000 and her concrete trucks got repossessed. (Id.)

Notably, both Fernandez and Hernandez testified that during this same meeting, Winston Walker instructed Trentini that if the men were paid better wages they would not need a union.

⁷ Donna Trentini is the financial manager for Concrete Express. (Tr. 224.) Chris Trentini is her husband and Diane Denti is her sister. (Tr. 225, 233.)

(Tr. 94, 129-130.) In response, Trentini instructed the men that he was not permitted to discuss wages with the men because it was against the law. (Id.) Trentini's statement is true given that the Union had filed a RC petition. Accordingly, it is illogical for Trentini to lawfully refrain from discussing wages, but he somehow thought it was lawful to interrogate the men, make promises to the men, and threaten the men with discharge and/or closure of the business.

c. Purported promises and interrogation

Reyes testified that approximately one week before the election he had a conversation with Trentini in the yard as he was washing out his truck. (Tr. 54). Trentini supposedly asked Reyes if he signed a union card and if he wanted to drive one of the company's new trucks. (Tr. 54-55.) When Reyes started working at Concrete Express in May 2017 he admitted he had no prior experience operating a concrete truck. (Tr. 70.) He also acknowledged that the truck he was assigned was considerably smaller than the 6 new trucks in Concrete Express's fleet. (Id.) Reyes's truck was a single axle peterbilt (5 yards) as compared to the new trucks which are capable of holding 12 yards. (Tr. 260, 267.) Reyes was assigned an older truck because he was an inexperienced operator – his CDL was only a month old upon hire. (Tr. 267.) Trentini informed Reyes he was operating this particular truck due to his inexperience and that he had not accumulated enough drive time. (Tr. 268.) Reyes was not the only driver who was operating an old truck. (Id.) Torres, a former driver, was also operating an old truck prior to the May 10, 2018 election. (Id.) Torres was the only driver who had a CDL to operate truck with a manual transmission. (Id.) Trentini denied this conversation ever took place and also testified that he did previously instruct Reyes why he was driving an old truck. (Tr. 265, 268.)

Torres testified that he purportedly had a conversation with Trentini in the yard while his truck was being loaded just days before the election. (Tr. 152-153.) Torres testified that Trentini

noted that there was talk about the union coming in and inquired how Torres felt about it. (Tr. 153.) Torres responded that he thought it was a good thing for the men but that it did not really matter much to him because he received a call from the Department of Sanitation and he would be leaving to take that job as early as July and as late as August. (Id.) Trentini denies that this conversation took place. (Tr. 266).

7. Futility of Bargaining

Petitioner union offered no evidence of futility of bargaining. Specifically, in his Corrected Decision on Challenges and Objections and Notice of Hearing the Regional Director stated as follows:

In its fourth objection, the Petitioner alleges that during the critical period prior to the election, the Employer, by its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by threatening futility in bargaining if the Union was voted in. In its offer of proof in support of Objection No. 4, the Petitioner states that named employees will testify that, prior to the election, the Employer told employees that it would not negotiate with the union.

See, GC 1(v), Corrected Decision, p. 7. Accordingly, this objection has no merit and should be overruled.

B. RAV TRUCK AND TRAILER REPAIRS, INC.

RAV was a registered department of motor vehicle public repair shop. (GC 7, p. 150.) This registration allows RAV to perform public repairs (third party trucks). (Id.) RAV opened in 2015 and Chris Trentini (“Trentini”) is the owner and President. (GC 7, p. 150-151.) RAV was originally located at 38 Edison Avenue, Mount Vernon, New York, 10550. (GC 7, p. 153.) RAV lost the lease for 38 Edison Ave. in February 2018 (GC 7, p. 160). Consequently, Trentini signed a lease at 3773 Merritt Ave. to complete the already scheduled repairs left over from 38 Edison Avenue. (GC 7, p. 163-164.) Trentini signed the lease on March 23, 2018. (GC 7, p.

164.) The lease was month to month with a termination date of May 31, 2018. Although the building itself was approximately 5,000 sq. ft., the terms of the lease only allocated 600 sq. ft. to RAV “to finish the remaining repairs from the previous location.” (GC 7, p. 165-168.) 3773 Merritt Avenue is comprised of a single garage door. (GC 7, p. 167-168.)

Gonzalez began working at RAV in August 2016. (GC 7, p. 55-56 & 71.) Gonzalez worked on third party trucks and Concrete Express Trucks. (GC 7, p. 53.) Gonzalez spent more time working on third party trucks than Concrete Express Trucks. (GC 7, p. 179.) Valencia (“Valencia”) was originally hired as a Concrete Express employee in late 2015/early 2016. (GC 7, p. 55-56 & 173) In early 2018, Valencia began working for RAV at 38 Edison Avenue. (GC 7, p. 55-56 & 184-185.) Valencia contends he was moved to RAV in late 2017 (where he worked on Concrete Express trucks only 2-3 hours per day and the remainder of his time was spent working on third party trucks). (GC 7, p. 100-101.)

Concrete Express only sent its trucks to be serviced by RAV when RAV had little to no work. (GC 7, p. 276-277.) RAV worked on a minimal amount of Concrete Express trucks in comparison to third party trucks. (Id.)When RAV lost its lease at 38 Edison Ave., Valencia and Jorge moved to 3373 Merritt Avenue and serviced the old, out of service Concrete Express trucks to ready them for sale. (GC 7, p. 259.)

III. LAW AND ARGUMENT

A. GENERAL COUNSEL’S BURDEN OF PROOF

The burden of proof to prove a violation of the Act lies with the General Counsel and can only be upheld by a preponderance of the evidence. See, *Keller Manufacturing Co., Inc.*, 272 NLRB 763, 766 (1984). General Counsel cannot sustain its burden of proof by only discrediting any of Respondent’s evidence. *Id.* Rather, in order to prevail, the General Counsel must support its case with substantial evidence *and* the Respondent must fail to counter with affirmative evidence of its

own. Id. Importantly, the “burden of proof never shifts to Respondent nor is any onus imposed upon Respondent to disprove any allegation” set forth in the Complaint. Id.

A preponderance of evidence means that a party has shown that its version of facts, is more likely than not the correct version. See, <http://courts.uslegal.com/burden-of-proof/preponderance-of-the-evidence/>. The notion of “preponderance of the evidence” can be visualized as a scale representing the burden of proof, with the totality of evidence presented by each side resting on the respective trays on either side of the scale. Id. If the scale does not tip toward the side of the party bearing the burden of proof, that party cannot prevail. Id. Accordingly, speculative, conjectural, and/or vague evidence clearly does not meet the preponderance of the evidence burden of proof.

B. COMPLAINT ALLEGATIONS/OBJECTIONS TO ELECTION

The objections (including the Regional Director’s objection regarding interrogation) mirror the allegations set forth in ¶¶’s 8 and 9 of the Complaint. Accordingly, Concrete Express will not address the address the Complaint allegations and Petitioner Union’s objections separately. Further, as noted above, the Petitioner Union failed to offer any evidence regarding Objection No. 4, Threat of futility in Bargaining with the Union. Accordingly, Objection No. 4 will not be addressed but must be overruled.

1. Chris Trentini Did Not Threaten to Terminate Employees if they voted for the Union, Did Not Promise Reyes the Use of a New Truck and Did not Interrogate Employees about their Union Activities (Complaint, ¶ 8, Union Objection No. 1 and Regional Director’s objection)

All of the allegations against Trentini were made by individuals who no longer work for the Company. Fernandez and Reyes were lawfully terminated – Fernandez for stealing concrete and Reyes for failing a drug test. Torres testified he was leaving for a job with the Department of Sanitation while Trentini testified that Torres stopped showing up to work. Further, the allegations which Reyes testified (threat of closure and promise of a new truck) were not even

memorialized in his affidavit. The lone witness who was still employed by Concrete Express (Hernandez) also admitted on cross examination that the General Counsel's allegation that Concrete Express implemented a new dress code to retaliate against the drivers for their union activities and without prior notice to and affording the union the opportunity to bargain was baseless because the dress code was in effect prior to the election.

Moreover, both Fernandez and Hernandez testified that during a company meeting with the drivers, Winston Walker instructed Trentini that if the men were paid better wages they would not need a union. In response, Trentini instructed the men that he was not permitted to discuss wages with the men because it was against the law. (Id.) Trentini's statement is true given that the Union had filed a RC petition. Accordingly, it is illogical for Trentini to lawfully refrain from discussing wages even though it would have presumably guaranteed Concrete Express won the election, yet he somehow thought it was lawful to interrogate the men, make promises to the men and threaten the men with discharge and/or closure of the business. These allegations are dubious, not supported by the record evidence and must be dismissed.

2. Donna Trentini Did Not Threaten to Close the Business (Complaint, ¶ 9, Union Objection No. 3)

An employer's statements violate Section 8(a)(1) of the Act if they have a reasonable tendency to "interfere with, restrain, or coerce" employees in the exercise of their Section 7 rights. See, *Metalcraft*, 2019 NLRB LEXIS 240 at *28, citing *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006). Nonetheless, Section 8(c) of the Act "implements the First Amendment" such that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." See, *NLRB v. Gissel Packing Co.*, 395 U.S.575, 617 (1969).

Section 8(c) states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, 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.

See, §8(c) of the Act. Thus, Section 8(c) gives employers the right to express their opinions about union matters, provided such expressions do not contain any "threat of reprisal or force or promise of benefit." See, *Progressive Electric*, 344 NLRB No. 52, slip op. at 2 (2005). See, also, *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), affd. in part and revd. in part 260 F.3d 465 (5th Cir. 2001) (relying on proposition that "[i]t is well settled that Section 8(c) . . . gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits[,]” the Board found that the employer did not violate Section 8(a)(1) through its agent’s statements to employees that the Union was no good, that it had threatened to burn the plant, and that it would charge up to \$ 300 in weekly or monthly fees).

Donna Trentini did not overtly threaten to close the business. Further, her sharing with some of the men her past experience of having had to shut down a previous union Company in which her employees were represented by this Union, cannot be viewed as an implied threat of force or reprisal. She was simply sharing a personal experience she had with this Union, something she is unquestionably allowed to do.

3. Concrete Express did not implement a New Dress Code nor did it revoke the Drivers’ Parking Privileges (Complaint, ¶ 12.)

The dress code and the restriction from parking inside the garage located at Merritt Avenue were in place well before the election. Again, Hernandez indisputably admitted that the dress code was in effect *prior* to the May 10, 2018 election. Accordingly, he corroborated

Denti's already credible testimony that the dress code had been in place since at least her hire in 2017 and that she had numerous verbal conversations with the employees reminding them of the dress code whenever she had knowledge that they were not properly attired.

Likewise, Denti and Trentini credibly testified that the drivers were not supposed to park their personal vehicle in the garage at Merritt Avenue and they were never instructed they could do so. Whenever Denti became aware that some of the men were parking their personal vehicles in the garage, whether it be complaints from other drivers having a difficult time getting there truck in and out of the garage or from Trentini when he went to inspect damage to a one of the trucks, she verbally instructed the men they were not permitted to do so. The rule is logical given that in order to park their cars in the garage the men would have to move trucks out of the garage before getting their cars in and had to leave the keys in their cars in case others needed to move the car in order to get their truck out. As noted by Reyes, the garage is not the easiest place to get in and out of as there is only one way in and one way out. (Tr. 76.) Also, multiple drivers expressly stated they were given permission to park in the garage, but they were unable to say who gave them permission. The fact that all of the drivers were able to remember specific names and dates on direct examination but on cross examination all of those same drivers were unable to recollect who specifically gave them permission to park in the garage further establishes the improbability of their testimony.

The dress code and parking restrictions were in place before the election. Moreover, Concrete Express did not issue discipline to those who violated the policies before or after the election, only verbal reminders/counseling's to comply with the policies. Therefore, it is axiomatic that Concrete Express did not violate §8(a)(5) and (1) and 8(a)(3) and (1) of the Act in regards to these policies.

C. CHALLENGED BALLOT

1. Rafael Valencia is eligible to vote because he is a Mechanic

Rafael is a dual functioning employee. Dual functioning employees perform both unit and non-unit work. Generally, the same community of interest tests that apply to dual function employees as are applied to part time employees. See, *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). See also, *Wilson Engraving Co.*, 252 NLRB 333, 334 (1980). Notwithstanding, inclusion of a dual function employee within a particular unit does not require a showing of community-of-interest factors in addition to the regular performance of a substantial amount of unit work. See, *Fleming Industries*, 282 NLRB 1030, 1030 fn. 1 (1987). See also, *Oxford Chemicals*, 286 NLRB 187, 188 (1987) (once it is shown that a dual-function employee has a substantial and continuing interest in a particular units terms and conditions of employment, “it is both unnecessary and inappropriate to evaluate other aspects of the dual-function employee’s terms and conditions of employment in a kind of second tier community-of-interest analysis”).

In *Berea Publishing*, 140 NLRB at 519, the Board noted that the “policies of the Act are best effectuated by according to each the same rights and privileges in the selection of the majority representative for the unit in which he works.” Accordingly, the Board will perceive no distinction between the part time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer. *Id.* Based on the teachings of *Berea Publishing*, the Board has consistently held that employees, such as Rafael, who perform more than one function for the same employer may vote, even if they spend less than the majority of their time on unit work, so long as 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 of the unit. See e.g., *Harold J. Becker Co.*, 343 NLRB

51 (2004); *Medlar Electric, Inc.*, 337 NLRB 796, 797 (2002); *Ansted Center*, 326 NLRB 1208 (1998); *Air Liquide America Corp.*, 324 NLRB 661, 662 (1997); *Avco Corp.*, 308 NLRB 1045 (1992); *Continental Cablevision*, 298 NLRB 973, 975 (1990); *Alpha School Bus Co.*, 287 NLRB 698 (1987); *Oxford Chemicals*, 286 NLRB 187 (1987).

There is no clear cut distinction concerning the requisite amount of time needed to be expended performing unit work to affirm the inclusion or exclusion of dual-function employees. Instead, the Board makes this determination on a case by case basis. See, *Bredero Shaw*, 345 NLRB 782, 786 (2005). Notwithstanding, following the teachings of *Berea Publishing*, the Board has found dual-function employees have a substantial interest and should be included in a unit when the dual-function employees perform unit functions for less than half the time. See, e.g., *Wilson Engraving Co.*, 252 NLRB at 334. For instance, the Board commonly 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. See, *WLVI Inc.*, 349 NLRB 683, 686 fn. 5 (2007). See also, *Avco Corp.*, 308 NLRB at 1047 and *Medlar Electric, Inc.*, 337 NLRB at 797 (the Board included a dual-function employee who spent at least 25 to 30 percent of his time performing unit work).

Rafael undeniably meets the applicable criterion noted above warranting his inclusion in the unit and, therefore, was eligible to vote in the May 10, 2018 election. Rafael performs 25 hours of mechanical work a week and works 20 hours per week as a yardman. Rafael's duties as a yardman include using a loader to load the trucks with gravel and sand and maintain the loaders. As a mechanic, Rafael performs the following work on Concrete Express trucks:

- changing breaks,
- changing plugs,
- changing auger blades,
- changing batter,

- changing oil filters,
- repair hydraulic systems,
- repair hoses
- Repair PTO (power Take offs)
- Repair mixers and conveyor belts
- greases the trucks
- checks the oil

Conversely, Petitioner Union maintains that Rafael is not a mechanic and does not perform mechanics work. Rather said work was performed by the RAV mechanics located at 3373 Merritt Avenue. Further, Union Vice President Dominick Cassanelli, Jr. (“Cassinelli”) maintains that he observed the yard, during the organizing drive and never saw Rafael perform mechanical work. He also claims to have had a conversation with Rafael wherein Rafael indicated that he was a yardman but made no mention of being a mechanic. However, Cassanelli admitted that even when the gate is open he did not have viewing access to the entire yard. (Tr. 192.) He also admitted that he was at the yard only 3 days a week and during some of those stays he would leave the yard in order to follow a concrete truck. (Id.) The Union also elicited testimony from five witnesses (three of which are no longer employed by Concrete Express and one of which is no longer employed by RAV) that Rafael does not perform mechanics work on Concrete Express trucks. However, each admitted on cross examination that they spend very little time in the yard, if any, on a daily basis. (Tr. 72-73, 118, 146-147, 156, 159, 212-214.) Accordingly, they have on firsthand knowledge of what Rafael does when they are not present. (Id.) Additionally, part of Rafael’s duty as a yardman is to load the trucks (something the men

are not capable of doing), so when they are present in the yard, Rafael is loading their truck. (Tr. 72, 116, 143-144, 159.)

Notably, Hernandez, the lone witness still employed by Concrete Express, did not definitively state that Rafael was not a mechanic. (Tr. 143, 146.) He indicated that it is possible that Rafael performs mechanical work when he is not in the yard. (Id.) Conversely, the Union's other witnesses who no longer work for Concrete Express categorically denied that Rafael was a mechanic. Additionally, Reyes testified that he would text the mechanics whenever he had an issue with his truck. However, Gonzalez directly contradicted Reyes's testimony and testified that the only way he becomes aware that there is an issue with a Concrete Express truck that may require the attention of a mechanic is when Trentini personally contacts him or someone else from the office at 2279 Hollers Avenue contacts him. (Tr. 207, 217.) Thus, just as Trentini has consistently testified, it is Rafael that regularly performs the repairs to the concrete trucks. If Gonzalez is not contacted by Concrete Express he is completely unaware whether a truck needs serviced. It was only on redirect when the Union was in damage control that Gonzalez changed his testimony during a leading question from Union's Counsel and stated that the drivers will tell him at the end of the day if they are having an issue with a truck. (Tr. 220.) Even then, Gonzalez testified there are days when any given truck is already gone upon his arrival to work and still not back before he leaves for the day. (Tr. 218).

Trentini has consistently maintained that the RAV mechanics did perform limited work on Concrete Express trucks. Trentini's testimony is supported by both RAV mechanics – Gonzalez testified he worked on Concrete Express trucks “about three times a week” while Jorge Valencia testified that he worked on Concrete Express trucks only two to three hours a day. (GC 7, p. 72, 101.) However, Trentini has also consistently maintained that the majority of the

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 1, 2019 an electronic original of Respondent and Concrete Express, LLC's Post Hearing Brief to the Honorable Judge Benjamin Green, Administrative Law Judge was filed via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing Post Hearing Brief were transmitted to the following individuals by electronic mail:

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