CASE NO. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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International Brotherhood of Teamsters ("Teamsters") hereby petitions the United States Court of Appeals for the Ninth Circuit for review of the Order of the National Labor Relations Board in Case Nos. 21-CA-157647 and 21-CA-177303, reported at 369 NLRB No. 37, entered on March 3, 2020, and attached hereto. This order, in part, reversed the Administrative Law Judge's finding that the employer, Intermodal Bridge Transport, through an agent, violated Section 8(a)(1) of the National Labor Relations Act by unlawfully expressing that the union campaign was futile. Teamsters hereby request that this Order be modified to: (1) find that the employer violated Section 8(a)(1) of the Act through its statement of futility and that such statement was not a lawful prediction under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); and (2) order all appropriate remedies.

DATED: March13, 2020

JULIE GUTMAN DICKINSON
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By: */s/ Julie Gutman Dickinson*
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner International Brotherhood of Teamsters ("Teamsters") makes the following disclosure statement:

(1) Teamsters does not have any parent corporations;

(2) There is not any publicly-held corporation that owns 10% or more of Teamsters stock; and

(3) Teamsters is a labor organization representing, through its local unions, approximately 1.4 million members across the country.

DATED: March 13, 2020

JULIE GUTMAN DICKINSON
HECTOR DE HARO
BUSH GOTTLIEB, A Law Corporation

By: */s/ Julie Gutman Dickinson*
by JULIE GUTMAN DICKINSON
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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 801 North Brand Boulevard, Suite 950, Glendale, CA 91203-1260.

On March 13, 2020, I served true copies of the following document(s) described as **PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Bush Gottlieb's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 13, 2020, at Glendale, California.

Ian Zulueta

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DECISION AND ORDER
March 3, 2020

Intermodal Bridge Transport
and
International Brotherhood of Teamsters

Cases 21-CA-157647 and 21-CA-177303

Intermodal Bridge Transport *and* International Brotherhood of Teamsters. Cases 21–CA–157647 and 21–CA–177303

March 3, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On November 28, 2017, Administrative Law Judge Dickie Montemayor issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief. All parties filed answering briefs and corresponding reply briefs.

The Respondent operates a logistics, drayage, and container storage business servicing the ports of Los Angeles and Long Beach, California. Its work involves transporting, by truck, goods contained in shipping containers. Some of the Respondent's drivers own their own trucks, while other drivers lease trucks from the Respondent. This case involves only the drivers who lease trucks.[1]

Applying *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx*),[2] the judge found that the Respondent's drivers are employees under Section 2(3) of the Act, not independent contractors. The judge further found that the Respondent violated Section 8(a)(1) of the Act by misclassifying the drivers as independent contractors and by making various statements. The judge dismissed allegations that the Respondent created an impression of surveillance and unlawfully terminated or suspended driver Eddie Osoy. After the judge issued his decision, the Board issued its decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) (*SuperShuttle*), in which it overruled *FedEx*, supra, to the extent that the Board in *FedEx* "revised or altered the Board's independent-contractor test" by holding that "entrepreneurial opportunity represents merely 'one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*.'" *SuperShuttle*, 367 NLRB No. 75, slip op. at 1 (quoting *FedEx*, 361 NLRB at 620 (emphasis in *FedEx*)).

The National Labor Relations Board has considered the judge's decision and the record in light of the exceptions, briefs, and its recent decision in *SuperShuttle* and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4] Applying *SuperShuttle*, we reach the same conclusion as the judge: the drivers are employees. However, under our recent decision in *Velox Express, Inc.*, 368 NLRB No. 61 (2019), the Respondent did not violate the Act by misclassifying them as independent contractors. We affirm the rest of the judge's unfair labor practice findings, with one exception: we reverse his finding that the Respondent told the drivers that choosing the Union to represent them would be futile.

I. THE RESPONDENT'S DRIVERS ARE EMPLOYEES UNDER SECTION 2(3) OF THE ACT

The threshold question in this case is whether the drivers are employees or independent contractors. Section 2(3) of the Act excludes independent contractors from the definition of "employee" and thus from the Act's protection. As the party asserting that the drivers are independent contractors, the Respondent has the burden of proving as much. See, e.g., *BKN, Inc.,* 333 NLRB 143, 144 (2001). To determine whether a worker is an employee or an independent contractor, the Board applies the common-law agency test, see *SuperShuttle*, 367 NLRB No. 75, slip op. at 1 (citing *NLRB v. United Insurance Co. of America,* 390 U.S. 254, 256 (1968)), and specifically, the non-

[1] The judge found that the drivers who own their trucks are not the subject of this litigation, and no party has excepted to this finding. Unless otherwise specified, "drivers" herein refers to drivers who lease trucks from the Respondent.

[2] Enf. denied 849 F.3d 1123 (D.C. Cir. 2017).

[3] The Respondent, the Charging Party Union, and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Accordingly, we adopt the judge's dismissal of the allegation that the Respondent, through Safety Assistant Vicky Rosas, unlawfully created an impression of surveillance, since the Union's exceptions to that dismissal rely on overturning the judge's finding that Rosas' testimony was credible.

We also adopt the judge's findings that the Respondent, by dispatcher Marlo Quevedo, unlawfully interrogated and threatened drivers Osoy and Jose Portillo and offered Osoy and Portillo more profitable work if they abandoned the Union. The Respondent excepts to these findings on the ground that the judge incorrectly found Quevedo to be an agent and supervisor of the Respondent. We adopt the judge's finding that Quevedo is an agent of the Respondent. Having done so, we need not and do not pass on whether Quevedo is a supervisor under Sec. 2(11) of the Act.

[4] We have amended the judge's conclusions of law consistent with our findings herein. We have also amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein and to conform to the Board's standard remedial language, and we have substituted a new notice to conform to the Order as modified.

exhaustive common-law factors set forth in the Restatement (Second) of Agency § 220 (1958).[5]

The judge applied these common-law factors to the facts of this case. Citing the Board's decision in *FedEx*, he then considered whether the drivers were rendering services as part of an independent business. As noted, however, the Board has rejected *FedEx*'s addition of the "independent business" factor to the common-law test. *SuperShuttle*, 367 NLRB No. 75, slip op. at 1, 7–12. The Board found that *FedEx* improperly "limited the importance of entrepreneurial opportunity by creating a new factor ('rendering services as part of an independent business') and then making entrepreneurial opportunity merely 'one aspect' of that factor." Id., slip op. at 1. As the Board has since reaffirmed, "[e]ntrepreneurial opportunity is not a separate factor in the independent-contractor analysis or a mere aspect of a separate factor; instead, it 'is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain.'" *Velox Express*, 368 NLRB No. 61, slip op. at 3 (quoting *SuperShuttle*, 367 NLRB No. 75, slip op. at 9). And "[w]here a qualitative evaluation of common-law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor." *SuperShuttle*, 367 NLRB No. 75, slip op. at 11. Nevertheless, as required by the Supreme Court's decision in *United Insurance,* 390 U.S. at 256, the Board considers all the common-law factors in the total factual circumstances of a particular case and treats no one factor or the principle of entrepreneurial opportunity as decisive. *SuperShuttle*, 367 NLRB No. 75, slip op. at 11.

Accordingly, we will determine the drivers' status under the traditional common-law test as restated in *SuperShuttle*. For the reasons discussed by the judge and those discussed below, we find that the Respondent has failed to sustain its burden of establishing that the drivers are independent contractors. We therefore find that they are employees under Section 2(3) of the Act.

Viewing the common-law factors through the prism of entrepreneurial opportunity, we find that the Respondent's drivers have little opportunity for economic gain or, conversely, risk of loss. Unlike in *SuperShuttle*, the Respondent's drivers have limited discretion to determine when they work, less discretion to decide what loads to haul, and no discretion to decide to work beyond the end of their shift. Cf. id., slip op. at 12, 14 (finding that the discretion of the franchisee-drivers in *SuperShuttle* to choose when to work and which bids to accept provided them with significant entrepreneurial opportunity and weighed in favor of independent-contractor status). The drivers are able to choose which days to work and what time to start, but the Respondent assigns them to either the day or night shift based on the availability of trucks for lease from the Respondent. When they report for work they must choose, for their first assignment of the shift, from between two and four delivery assignments determined by the Respondent's dispatchers in their sole discretion. Thereafter, the dispatchers control the flow of the drivers' work for the remainder of the shift by providing the drivers assignments and controlling their contact with customers. The drivers do not have their own routes, let alone a proprietary interest in routes that they can sell or transfer, nor can they hire employees to work in their stead. Cf. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 502 (D.C. Cir. 2009) ("[T]his case is relatively straightforward because not only do these contractors have the ability to hire others without [the employer's] participation, . . . they [also] own their routes—as in they can sell them, trade them, or just plain give them away.").

In addition, the Respondent's method for compensating the drivers does not afford them entrepreneurial opportunity. They are paid a per-load rate, a fuel surcharge, and a clean truck assistance payment each week. The amounts of the fuel surcharge and clean truck assistance payments are set by the Respondent, not negotiated by the drivers. In addition, the clean truck payment is subject to forfeiture if the driver does not correctly complete his manifest. The per-load rate is also set by the Respondent, based on negotiations with its customers, not with the drivers.[6] These payments are offset by the daily lease rate for the trucks—again, set by the Respondent, not negotiated with the

[5] The Restatement factors are

(a) the extent of control which, by agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

SuperShuttle, 367 NLRB No. 75, slip op. at 1–2.

[6] The Respondent argues that the drivers negotiated their pay, but we agree with the judge that these negotiations were a ruse. The Respondent negotiated with the customers, set the drivers' rate of pay per load, and then engaged in sham negotiations with the drivers that resulted in across-the-board pay increases for the drivers regardless of whether or not they "negotiated" with the Respondent.

drivers—and by the cost of the fuel used by the drivers, which is deducted from their weekly check. Significantly, the Respondent, in its sole discretion, may reduce the daily lease rate on days when a driver's work assignments were insufficient to cover the regular lease amount. Because the Respondent controls the drivers' compensation and expenses as well as their assignments, the drivers lack "the independence to engage in entrepreneurial opportunities." *Roadway Package System, Inc.*, 326 NLRB 842, 851 (1998). In such circumstances, "there is little room for the drivers to influence their income through their own efforts or ingenuity." Id. at 852.

The drivers' entrepreneurial opportunity is further limited by the fact that the principal instrumentality of their work—the truck—is provided by the Respondent, not owned or controlled by the driver. Moreover, the Respondent leases the trucks to the drivers for just a half-day at a time, for an assigned day or night shift, and requires the drivers to return the truck at the end of their shift so it can be leased to another driver for the next shift. The drivers cannot use the vehicles to perform other work when they are not working for the Respondent, and therefore a driver has no opportunity to put the truck to use in "serving his or another business' customers." Id. at 851; cf. *FedEx Home Delivery v. NLRB*, 563 F.3d at 502 (drivers were independent contractors where, inter alia, they owned their own routes). Additionally, the Respondent only requires the drivers to pay for the use of its trucks on the days that they choose to drive, and the drivers do not have any fixed weekly or monthly fees that they must pay to the Respondent for the right to use its trucks or service its customers. Therefore, the drivers do not have to make a significant initial investment or take on a serious risk of loss to enter into a relationship with the Respondent. Cf. *SuperShuttle*, 367 NLRB No. 75, slip op. at 12 (finding that the drivers' "significant initial investment in their business" by purchasing or leasing a truck and entering into an agreement requiring fixed weekly fees supported a finding of independent-contractor status).

In sum, the record establishes that the Respondent's drivers themselves perform the work of hauling shipping containers to the Respondent's customers, as assigned by the Respondent and not on routes in which they have a proprietary interest, with only limited ability to select or reject work, during shifts specified by the Respondent on the days they choose to work, and, for performing those services, they receive compensation at rates set by the Respondent over which they have no real ability to negotiate. On these facts, we find that the drivers do not have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative, which weighs heavily against a finding that they are independent contractors. See *Velox Express*, 368 NLRB No. 61, slip op. at 4.

Moreover, many of the other common-law factors also support a finding of employee status. The drivers have little control over when they work (either the day or night shift, as assigned by the Respondent) and even less control over what loads they haul and which customers they service (largely determined by the dispatchers), as detailed above. Although the drivers are not subject to in-person supervision—which would be highly impractical given the nature of their work—the Respondent further controls the details of their work through a variety of policies and procedures, detailed in the judge's decision, which the Respondent enforces through a progressive discipline policy. The Board has found that "even . . . occasional instances of discipline indicate significant control" by an employer. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (2015) (citing *Dial-A-Mattress Operating Corp*., 326 NLRB 884, 892–893 (1998)). And, as the Board observed in *SuperShuttle*, "employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa." *SuperShuttle*, 367 NLRB No. 75, slip op. at 9. The Respondent's extensive control over the drivers and their attendant lack of entrepreneurial opportunity clearly weigh in favor of employee status.

The judge also correctly found that the drivers are not engaged in a distinct occupation or business and are not rendering services as an independent business, and their work is part of the regular business of the Respondent. See *NLRB v. United Insurance*, 390 U.S. at 258–259 (one of the decisive factors in finding that company's debit agents were employees was that "the agents [did] not operate their own independent businesses, but perform[ed] functions that [were] an essential part of the company's normal operations"). Moreover, the Respondent provides drivers with almost all of their instrumentalities and tools, as well as a place of work, which also weighs in favor of finding employee status. Although driving a commercial truck requires specialized skills, the drivers' skills are inherent to the performance of the drivers' duties in furtherance of the employer's business, consistent with the common-law definition of an employee. See Restatement Second of Agency § 220(2) cmt. i (worker with special skills is still inferred to be an employee where the worker performs "an incident of the business establishment of the employer"). Even more tellingly, the Respondent provided training to those drivers who needed it. See *NLRB v. United Insurance*, 390 U.S. at 259 (another decisive factor in favor of finding employee status was that employer provided training to new employees). Finally, more than 80 percent of drivers have been with the Respondent for

at least 6 years, suggesting that the drivers function as a permanent work force.

At first glance, the two remaining common-law factors—the method of payment and whether the drivers believed they were creating an independent-contractor relationship—appear to favor contractor status. The drivers are paid by the assignment, and they are issued a 1099 tax form, not a W-2. These factors often favor a finding of contractor status. See *Argix Direct, Inc.*, 343 NLRB 1017, 1021 (2004) (independent-contractor drivers were paid on a sliding scale based on miles covered per day, and they were responsible for paying their own taxes). In this case, however, the Respondent established both the drivers' rate of compensation and the costs of operation, as discussed above. Thus, the only opportunity the drivers had to increase their compensation was to work more hours, and "[t]he choice to work more hours or faster does not turn an employee into an independent contractor," since it "does not mean that they enjoy an opportunity for entrepreneurial gain." *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011), enfd. 822 F.3d 563 (D.C. Cir. 2016).

As more fully explained in the judge's decision, the fact that the drivers signed various documents stating that they were independent contractors also does not support a finding of independent-contractor status, inasmuch as the Respondent manufactured that evidence by directing drivers to complete *and backdate* "Independent Contractor Application" forms to obscure its prior acknowledgment that the drivers were employees. See *OS Transportation LLC*, 358 NLRB 1048, 1063 (2012) (respondent's idea to have drivers incorporate was a "ploy by [r]espondent to insulate itself from having employees and the many implications the employee-employer relationship carries"), reaffd. and incorporated by reference 362 NLRB 288 (2015).

In conclusion, after evaluating the facts of this case in light of the common-law factors, applied within the framework articulated in *SuperShuttle*, we find that the Respondent has decisively failed to meet its burden of demonstrating that the drivers are independent contractors. Accordingly, we affirm the judge's finding that the drivers are employees under Section 2(3) of the Act.[7]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Misclassification Does Not Constitute a Stand-Alone Violation of the Act.

The judge found that the misclassification of employee drivers as independent contractors was a "per se" violation of the Act because misclassification "serves to chill future concerted activity" and "conceals available protections these employees have under the Act." Subsequent to the judge's decision, the Board in *Velox Express* rejected this theory, finding that "it is a bridge too far for us to conclude that an employer coerces its workers in violation of Section 8(a)(1) whenever it informs them of its position that they are independent contractors if the Board ultimately determines that the employer is mistaken." *Velox Express*, 368 NLRB No. 61, slip op. at 7. Accordingly, we dismiss the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by misclassifying its drivers as independent contractors.

B. Allegations Regarding the February 16, 2016 Meeting in the Respondent's Parking Lot

On February 16, 2016, Vice President Ozzie Zea spoke to drivers in the Respondent's parking lot.[8] Zea told employees who wished to work for a union company that they could leave, stating that there was a "big door" and that "there are other trucking companies out there, the doors are open." According to driver Jose Portillo, Zea also told the drivers that he "[did]n't think the Union would happen at the IBT [Intermodal Bridge Transport]," and he asked the drivers who wanted to work per hour to raise their hands. Portillo testified that drivers who did not support the Union raised their hands, indicating that they wished to continue their current, by-the-load system of compensation. For the reasons stated by the judge, we adopt his findings that the Respondent, by Zea, violated Section 8(a)(1) by suggesting that prounion drivers leave the company (thereby threatening them with unspecified reprisals if they chose to remain) and by polling, i.e., interrogating the drivers regarding their support for the Union. See *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006).[9]

[7] In affirming the judge's finding that the drivers are employees under Sec. 2(3) of the Act, Member Kaplan does not rely on the judge's reasoning that the Respondent assigned the drivers to either the day or night shifts, that the drivers do not hire others to drive the trucks for them, and that the drivers are required to clean the trucks and are assessed a fee for not doing so.

[8] In its brief on exceptions, the Respondent contests the judge's finding that Zea called the meeting. We agree with the Respondent that Zea did not call a meeting but was approached by drivers opposed to the Union who asked Zea to speak with them. This error does not affect our analysis of what Zea said to the drivers.

[9] While Member Emanuel agrees with his colleagues and the judge that the Respondent unlawfully polled employees about their support for the Union, he does not agree that the Respondent, through its Vice President Zea, unlawfully threatened employees with unspecified reprisals by telling them that if they wished to work for a union company, "there are other trucking companies out there, the doors are open." As discussed below, Zea made this statement in the context of lawfully predicting that the Union's campaign to organize the Respondent's drivers would not succeed. Therefore, employees would not have reasonably believed that Zea was threatening unspecified reprisals if they continued to support the Union, but would have instead understood that Zea thought that they

We reverse, however, the judge's finding that Zea unlawfully expressed that the union campaign was futile.[10] The Respondent has excepted to the judge's factual finding that Zea "told the workers present that the Union wasn't going to happen." We find merit in this exception as the record does not support the judge's finding. Instead, driver Pedro Miranda testified that, in response to Portillo saying the drivers wanted to be IBT's employees, Zea said "that was not going to happen at his company" and that Miranda also understood that to mean a union would not happen. Portillo testified that Zea said IBT would "just keep going with the same thing" and further stated, based on his experience as a union member, that the Union would "use you" and "just want[s] your money." Zea concluded: "There's the door, the door is large, go look for companies with a union, but I don't think it's going to happen at IBT."

We need not resolve any discrepancies between Miranda's and Portillo's versions of Zea's statements because neither version constitutes a threat that unionization would be futile. Rather, based on his experience in the drayage business, Zea made a lawful prediction that the Union's campaign among the drivers would not succeed. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Even accepting the judge's characterization of Zea's comments, we do not find in them a threat that unionization would be futile. In response to an employee inquiry, Zea discussed his experience as a union member and, according to the judge, stated his opinion that the Union was not going to happen. Not "it doesn't matter if the Union happens (because we won't deal with it even if it does)," but "the Union isn't going to happen," meaning its organizing effort will not succeed. Zea's expression of opinion did not contain a "threat of reprisal or force or promise of benefit," so it is protected by Section 8(c) of the Act.

The precedent the judge relied on in finding a threat of futility is distinguishable. In *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB 1225, 1230 (2014),[11] an employee was told, "'Go file a grievance. You'll get nowhere.'" The Board found that under the circumstances of that case, the statement implied that the employer would ensure the grievance went nowhere, and the Board observed that the speaker subsequently did ensure it went nowhere by unlawfully refusing to reinstate the employee as ordered by the grievance panel. Id. at 1225, 1233. The statement in *M.D. Miller* also undermined confidence in the effectiveness of the bargained-for grievance procedure for resolving disputes. See *Prudential Insurance Co.*, 317 NLRB 357, 357 (1995) (statements suggesting that the contractual grievance procedure is ineffectual violate the Act). In contrast, Zea's comments did not suggest that the Union, if selected, would be ineffectual. Accordingly, we dismiss the allegation that the Respondent unlawfully expressed that the union campaign was futile.

C. Termination/Suspension of Osoy

Eddie Osoy was one of the most prominent and visible supporters of the Union, giving interviews to newspapers regarding the Union's organizing drive and distributing safety vests with a union logo for drivers to wear. Driver-owner Jose Molina was a vocal opponent of the Union who distributed safety vests bearing the Respondent's company logo. On May 25, 2016, Molina and Osoy got into a verbal altercation while Molina was distributing vests. During this argument, Osoy challenged Molina to a fight by saying they should step outside and "kick the mother out of each other." Molina reported the challenge to the Respondent. The next day when Osoy arrived at work, he was escorted off the premises by security guards. Other employees spoke to the Respondent on Osoy's behalf about what had happened, and Osoy emailed the Respondent with his version of what had occurred. Three days later, Osoy was called into work and told that although he had challenged Molina to a fight, enough time had passed that he would be allowed to return to work. Applying *Wright Line*, 251 NLRB 1083 (1980),[12] the judge found that the General Counsel met his burden to show that Osoy's protected activity was a motivating factor in his discipline. Nevertheless, the judge dismissed the allegation that the discipline was unlawful, finding that the Respondent showed it would have taken the same adverse action against Osoy even in the absence of his protected activity. Id.

Even assuming that the General Counsel carried his initial burden to prove that Osoy's protected activity was a motivating factor in his discipline, we affirm the judge's finding that the Respondent met its *Wright Line* defense

would have to go elsewhere to gain union representation because he did not think that the Union would successfully organize the Respondent's drivers. Additionally, Zea's statement did not occur in an atmosphere of numerous severe unfair labor practices that would have led employees to reasonably read an implicit threat into Zea's statement.

[10] Member Kaplan does not reach the merits of the judge's finding that Zea unlawfully expressed that unionization would be futile. In his view, the Respondent has not presented any substantive argument in support of its exception to that finding. Therefore, he would disregard the bare, unsupported exception and affirm the judge's finding solely on this procedural basis in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations. See, e.g., *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018); *Holsum de Puerto Rico, Inc*., 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[11] Enfd. mem. per curiam 728 Fed. Appx. 2 (D.C. Cir. 2018).

[12] Enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

burden. The judge credited the testimony of Molina that Osoy challenged him to a fight. Molina reported the challenge to the Respondent, who then removed Osoy from its premises for 3 days, affording time for the Respondent to investigate and for hostility between Osoy and Molina to cool. Furthermore, although the judge did not note it in his decision, the record demonstrates that the Respondent acted similarly in response to other incidents, one involving a threat and the other involving actual violence. On June 1, 2016, shortly after the altercation between Molina and Osoy, driver Anthony Patterson punched a picketing prounion driver. Upon learning of the incident, Safety Director Brent Bradley immediately placed Patterson "out of service" pending investigation. After Bradley received statements from both Patterson and the security guards who saw the incident, he conferred with Zea, and Patterson was terminated. In 2014, a driver referred to in the record by his identification number was placed out of service after he threatened a dispatcher. Specifically, he told the dispatcher that he could reach through the window and get him. While leaving the dispatch area, the driver damaged a door. Zea immediately placed the driver out of service.

There is no evidence that Osoy was treated disparately. Indeed, the record shows that the Respondent took the more severe action of discharging an antiunion driver when that action was warranted by the driver's violent conduct. In contrast, Osoy's act of challenging a coworker to a fight resulted in the lesser sanction of a 3-day suspension, and Osoy was reinstated after tensions were allowed to ease. Accordingly, we affirm the judge's dismissal of this allegation.

III. AMENDED CONCLUSIONS OF LAW

Delete paragraph 1(a) and 1(c) and renumber the paragraphs within the judge's Conclusions of Law accordingly.

IV. AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall cease and desist from interrogating drivers by polling them to ascertain who supports the Union, threatening drivers with unspecified reprisals by suggesting that they leave the Respondent if they want to work for a union company, interrogating drivers about their support for the Union, threatening drivers with company closure, and promising drivers better work if they abandon their support for the Union. The Respondent will also be required to post a remedial notice to employees in both English and Spanish.

We reject, however, the judge's recommended notice-reading remedy. Notice reading is an extraordinary remedy, see, e.g., *NLRB v. Ingredion, Inc.*, 930 F.3d 509, 519 (D.C. Cir. 2019), ordered where the unfair labor practices are "numerous, pervasive, and outrageous," *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), affd. 400 F.3d 920 (D.C. Cir. 2005), or at least where they are "sufficiently serious and widespread to warrant" such a remedy, *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008). See also *Ozburn-Hessey Logistics, LLC*, 362 NLRB 1532, 1536 (2015) (ordering notice reading based on "serious and widespread" violations in multiple cases), enfd. mem. 689 Fed. Appx. 639 (D.C. Cir. 2016); *Allied Medical Transport, Inc.*, 360 NLRB 1264, 1269 fn. 9 (2014) (ordering notice reading where employer, by a high-ranking manager, committed 10 separate violations of Section 8(a)(1) and discharged two employees in violation of Section 8(a)(3) and (1)), enfd. 805 F.3d 1000 (11th Cir. 2015). The unfair labor practices in this case are limited to four conversations: Zea's conversation with drivers in the parking lot, two conversations between dispatcher Quevedo and Osoy, and one conversation between Quevedo and Portillo. Without minimizing the seriousness of the Respondent's unlawful conduct, we find that it does not warrant the extraordinary remedy of notice reading.

ORDER

The Respondent, Intermodal Bridge Transport, Wilmington, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Polling employees to ascertain who supports the Union.

(b) Threatening employees with unspecified reprisals for supporting the Union by suggesting they leave the company.

(c) Interrogating employees about their support for the Union.

(d) Threatening employees with company closure.

(e) Promising employees better work for abandoning their union support.

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

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

(a) Within 14 days after service by the Region, post at its facility in Wilmington, California, copies of the

attached notice marked "Appendix"[13] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 16, 2015.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 3, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT poll you to ascertain if you support the Union.

WE WILL NOT threaten you with unspecified reprisals by suggesting you leave the company if you support the Union.

WE WILL NOT interrogate you about your support for the Union.

WE WILL NOT threaten you with company closure.

WE WILL NOT promise you better work for abandoning your support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

INTERMODAL BRIDGE TRANSPORT

The Board's decision can be found at www.nlrb.gov/case/21-CA-177303 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

Ami Silverman, Esq. and *Sanam Yasseri, Esq.,* for the General Counsel.

A. Jack Finklea Esq. and *Donald J. Vogel Esq. (Scopelitits, Garvin, Light, Hanson & Feary, P.C.),* for the Respondent.

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

Julie Gutman Dickinson, Esq. and *Hector De Haro, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me beginning on August 22, 2016, with trial testimony concluding on December 7, 2016. Charging Party filed a charge (the allegations which comprise Case Number 21–CA–157647) on August 10, 2015, an amended charge was thereafter filed September 24, 2015. A second amended charge was filed on March 15, 2015. Thereafter, another charge (Case Number 21–CA–177303) was filed on May 31, 2016. An amended charge was filed on June 23, 2016. The charges alleged violations by Intermodal Bridge Transport (IBT) of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). A consolidated complaint was filed on July 5, 2016. Respondent filed an answer on July 18, 2016, to the complaint denying that it violated the Act. After considering the matter (including the briefs filed by the parties on May 1, 2017) and based upon the detailed credibility findings and analysis set forth below, I conclude that Respondent violated the Act essentially as alleged regarding some but not all of the allegations presented.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and I find that

1. At all material times, the Respondent has been a Delaware Corporation, engaged in the business of logistics, drayage, and container storage services with a place of business located at 1919 East Pacific Coast Highway, Wilmington, California.
2. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[1]
3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.
4. At all material times the following individuals held the positions set forth opposite their respective names and have been Supervisors and agents of Respondent within the meaning of Sections 2(11) and 2(13) of the Act:

   (A) Ozzie Zea- Assistant Vice President
   (B) Brent Bradley-Safety Director
   (C) Rod Kirkbridge-Operations Manager
   (D) Christina Rivera-Supervisor Customer Relations

5. At all material times the following individuals held the positions set forth opposite their respective names and have been Supervisors and agents of Respondent within the meaning of Sections 2(11) and (13) of the Act:

   A) Marlo Quevedo- Dispatcher
   B) Veronica Chang-Assistant to the Safety Director
   C) Vicky Rosas-Assistant to the Safety Director

II. ALLEGED UNFAIR LABOR PRACTICES

Background

(1) Joint Stipulations

Prior to the start of the hearing the parties entered into the following joint stipulations:

> (a) Ozzie Zea has from at least October 1, 2014 through the present date been employed by Intermodal Bridge Transport as its Assistant Vice President. Zea's duties include overseeing each of the IBT's departments at its Wilmington, California facility and supervising employees. The parties stipulate that Zea is a statutory supervisor within the meaning of Section 2(11) of the National Labor Relations Act (the Act).
>
> (b) Brent Bradley has from at least October 1, 2014, through the present date been employed by Intermodal Bridge Transport as its Director of Safety, Security and Maintenance at the Wilmington, California facility. Bradley's duties include managing the process of contracting with drivers, managing compliance with state and federal regulations, and supervising employees. The parties stipulate that Mr. Bradley is a statutory supervisor within the meaning of Section 2(11) of the Act.
>
> (c) Mario Quevedo performs dispatching services for IBT at its Wilmington, California facility as an employee of a temporary services agency. Quevedo has performed dispatching services since at least October 1, 2014, to the present, and his duties include coordinating freight movement for customers. Mr. Quevedo dispatches loads to drivers and works to meet customer delivery needs, and performs these duties on behalf of IBT.
>
> (d) Vicky Rosas has been employed by IBT in the safety department at the Wilmington, California facility since at least October 1, 2014. Rosas assists Mr. Bradley by collecting driver logs, entering new drivers into the system, and helping with paperwork relating to accidents, and other administrative and clerical tasks performed on behalf of IBT. Vicky serves as a liaison between IBT and the drivers for matters such as handing out settlement checks, drug testing, collecting and monitoring log books, and obtaining the drivers signatures on weekly contracts with IBT.
>
> (e) Veronica Chang was employed by IBT in the safety department at the Wilmington California facility for the period October 1, 2014 until February 23, 2015. During that time she assisted Bradley with administrative and clerical tasks performed on behalf of Respondent.
>
> (f) Rod Kirkbride was employed by IBT as operations manager at the Wilmington, California facility for the period October 1, 2014 until September 2, 2015, the parties stipulate that Kirkbride was a supervisor within the meaning of Section 2(11) of the Act until September 2, 2015.

(See Jt. Exh. 2.)

[1] In making this finding, I note that Respondent denied it was engaged in commerce. Given IBT's undisputed extensive commercial activity, the performance of services valued in excess of $50,000, and its employment of personnel, I find no merit in Respondent's denial.

(2) Protective order

On December 7, 2016, a protective order was issued to protect and control the production and use of Driver Confidential Material, IBT Confidential Material, and other confidential material collectively referred to as material "Confidential Under Protective Order." (See Jt. Exh. 4.) which contains the protective order itself along with a table listing the exhibits covered by the protective order).[2]

III. FINDING OF FACTS REGARDING IBT'S BUSINESS OPERATIONS

IBT provides drayage services and is in the business of moving goods contained within shipping containers and moving empty shipping containers from various customer locations around the Los Angeles/Ontario California area and in and out of the Ports of Los Angeles and Long Beach and the ICTF and BNSF rail hubs. To perform this work IBT utilizes trucks which transport shipping containers that are fixed atop of a chassis and are driven by drivers who own their own trucks or drivers who lease trucks from IBT. The drivers who lease their trucks are the subject of this litigation while the drivers who own their trucks are not. The majority of the drivers that drive for IBT are drivers who lease their trucks from IBT. The drivers who lease trucks operate under IBT's operating authority. IBT has both Federal and State operating authority which is evidenced by State and Federal numbering that appears on the trucks. IBT similarly has agreements with the ports which allow its trucks to enter into the ports.

Historically, IBT operated with drivers who owned their own trucks. However, in 2008, the ports instituted the Clean Truck Program. As a result of the Clean Truck Program, many drivers' whose trucks did not meet the pollution requirements of the program were no longer able to enter the ports for delivery. Many former owners simply could not afford to purchase the newer trucks that would comply with the Clean Truck Program. After the disqualification of many trucks, IBT on its own accord leased fifty trucks in order to continue its operations. IBT began to utilize a staffing agency, Staffmark to provide it with drivers. These drivers were employed by Staffmark but worked at IBT. IBT itself was leasing trucks the Staffmark employees drove but the drivers did not have to pay any leasing fees. IBT supplied the work and the customers and Staffmark supplied the drivers.

In 2010, IBT decided to change its operating model to one in which it secured driving services directly and cut Staffmark out of the picture. Even though Staffmark was no longer used to supply IBT drivers, the work drivers performed did not substantially change. In fact, the driving that was done by the drivers as Staffmark employees was identical to the work performed by drivers under IBT's new model. In general, the entire business revolved around moving either empty containers or full containers from one location to another. Under this new model, IBT charged drivers a daily lease rate for the trucks which the drivers themselves would have to pay. The drivers would also be charged for other expenses including fuel.

Generally, in order to work for IBT, drivers had to be at least 23 years of age and have fewer than two accidents or moving violations in the preceding 3 years, have a commercial driver's license, a Transportation Worker Identification Card (TWIC), 2 years driving experience, 1 year of specialized experience in the ports and were required to pass a driving proficiency test administered by IBT's safety department. (Tr. 1705–1706.) Until 2014, IBT drivers were required to submit I-9 Employment Eligibility Verification forms. (Tr. 2015–2017; U. Exh. 34.)[3] IBT however on occasion hires drivers with less than 1-year driving experience and provides them with Entry-Level Driver Awareness training. IBT also provides a HAZMAT test and HAZMAT training.

IBT's current driver work force is made up of approximately 95 drivers, 77 who lease trucks and 18 drivers who own their own trucks. (Tr. 3859–3860.) Approximately 38 of IBT's lease drivers, or 50 percent, have been with IBT since 2010.

(a) The lease and transportation agreement

Drivers who lease trucks are required to sign a lease and transportation agreement (LTA), and a weekly truck lease. The LTA presented to the drivers upon the implementation of the new business model were written in English and no translation services were provided to the drivers who did not speak English despite the fact that a large contingent of drivers did not speak English and IBT knew they did not speak English. The drivers who did not speak English were simply instructed where to date and initial the documents. (GC Exh. 7.) This was done using what IBT officials characterized as a "dummy copy" which was essentially a sample copy with the blanks filled in so that drivers could copy and fill in the blanks. (Tr. 3473.) The LTA document was changed in 2014. In 2014, the non-English speakers were similarly presented the new LTA document in English without translation and told to sign the document in order to receive their checks. The 2014 version included a new appendix E titled: "Independent Contractor's Rights While Under Contract with Carrier" which contained language that also appeared in the Revised Independent Contractors Safety and Security Handbook. The language in appendix E contained 20 separate paragraphs that set forth outright IBT's position that the drivers were independent contractors and not employees by describing the drivers' independence and discretion in performing the job. (See GC Exh. 52 p. 26 U Exh. 15 p. 43 for the full text of the 20 pars.) Seemingly cognizant of the issues raised by presenting drivers, who IBT knew for certain did not understand the documents presented to them, IBT added two new documents to the LTA for newly on- boarded drivers. The first document was an acknowledgment form for the driver to sign and the second document was a lease and translation acknowledgement form to be filled out by Brent Bradley attesting that the LTA was explained to the driver with the use of a Spanish interpreter. Upon on-boarding IBT also provided drivers with a handbook which set forth its safety policies and procedures. (GC Exhs. 71, 72, 73.) The

[2] It should be noted that confidential materials, while fully considered herein, if referenced are referenced in short form without direct quotation to preserve the parties agreed upon request for confidentiality.

[3] IBT stopped requiring the I-9 form in 2014.

handbook is printed in English and IBT didn't provide any translation of the handbook to non-English speakers.

(b) The weekly truck lease

The drivers are also required to sign a weekly lease agreement. The lease agreement is a multipage document written in English and presented to drivers to sign when they pick up their checks on Friday. Drivers were advised that they must sign the agreement in order to receive their check and that signing the agreement is a requirement to work. The drivers are not given the full weekly lease document but only the first and last pages (the pages that require some initialing or signing). IBT also provided a sample "dummy copy" which contained the blanks filled out for the drivers to copy. (Tr. 909.) The sample included a provision relating to others driving the truck with the box checked "no" to effectively preclude anyone else from driving the truck leased by the driver or to preclude the driver from hiring others to drive the truck they are leasing from IBT. Drivers do not negotiate the terms of the weekly lease agreement, and drivers also do not negotiate the base rate they are paying for the truck—IBT requires every driver to pay $60 for each day they use the truck (for whatever shift IBT assigns them) except on Saturdays when the lease rate is $20. IBT in its discretion may reduce the daily rate if the diver's work assignments are not enough to cover the regular lease payment. (GC Exh. 128.)

(c) Customers of IBT

The customers IBT services are secured by IBT and not the drivers. The rates the customers pay is negotiated directly by IBT and not the drivers. The drivers do not work for any of IBT's customers exclusively. Simply put, the driver's responsibility is limited to activities related to driving the trucks and delivering the containers. IBT provides the trucks it leases to drivers. IBT or its customers (and not the drivers) provide the chassis which attaches to the trucks that is required to move the goods.

(d) IBT required forms

IBT requires drivers complete a variety of forms relating to their work. This includes Daily Inspection Reports for the trucks, delivery slips, hours of service logs and daily manifests. Much of this paperwork has IBT's name on it. (Tr. 149; 419–420; 541; 676–678; 1103; 943–645; 1410-13; 1103–1105; U. Exh. 12.) The Daily Inspection Report that drivers complete is a formal written inspection of the truck. This inspection form is turned in to IBT daily. A driver is subject to IBT's progressive corrective action program (or progressive discipline program) if they fail to complete this inspection. (Tr. 1855–1856.) All items of disrepair which might be noted in an inspection report are repaired by IBT and not the drivers. IBT also provides drivers with Hours of Service Logs which track how many hours a driver works are turned in weekly and reviewed by IBT. Violations of hours of service rules will subject drivers to IBT's progressive corrective action program including being taken out of service. (Tr. 1807–1808; 1856–1857; 1901–1903, 3795; 3821.) (GC Exh. 78.) For some deliveries IBT requires that specific information to be tracked on the driver's manifest. If a driver fails to do so IBT penalizes drivers by deducting ten dollars from that particular delivery. (Tr. 1537–1539; 2631–2633.)

(e) IBT required safety clothing

Drivers are required to wear a safety vest at IBT's yard and at the port. IBT provided drivers with free vests with the initials "IBT" clearly delineated on them. (Tr. 2927–2928). Currently IBT provides drivers with vests that do not contain the "IBT" logo/designation. (Tr. 2397.)

(f) IBT required radio

IBT provides each driver a radio at the beginning of each shift when the drivers pick up their keys. They are required to use the radio to contact the dispatchers and must turn the radio in at the end of their shift. (Tr. 3095–3096.)

(g) Driver shifts

IBT Drivers are not given a choice in their shift and instead are assigned the shift they work and are not able to unilaterally switch shifts without first requesting and receiving permission from IBT. (Tr. 2931–2932; 1611; 1251–1252). The safety department kept a list of the drivers whose request for shift changes were pending. (Tr. 1735–1736).

(h) Driver hours of work

Although drivers cannot choose their shift they choose which days to work and what time to start. (Tr. 1515–1516; 1601–1602; 3015; 3019–3020; 4121; 4115–4116.) Even though dispatch does not start until 6 a.m., most day shift drivers show up earlier and start waiting at 4 or 5 a.m. (Tr. 3131; 3287–3288; 2885–2887; 2931.) For many, the shift ends when the dispatcher advises that there is no more work. (Tr. 1519; 1171–1172; 2712.)

(i) The dispatching process

IBT has a team of approximately five dispatchers. The dispatchers generally work two shifts—the day shift dispatch starts at 6 a.m. and the night-shift dispatch begins at approximately 4—4:30 p.m.

Since 1999, IBT's practice has been to allow the drivers to line themselves up in the order of morning arrival and will dispatch based upon the driver's order of arrival. (Tr. 1004; 2940–2941; 2793–2795.) Once drivers approach the dispatch window, they are given their keys and radio for the day, and are also given their first assignments—typically one loaded container and one empty container. (Tr. 165; 667; 1004–1009.)

Drivers are responsible for delivering the loads assigned by the dispatchers. The drivers call in on the radio after they finish the delivery and when they finish the assigned delivery, they are given additional assignments by the dispatcher. (Tr. 2951–2954; 3332.)

After April 2015, IBT began to allow drivers to choose from between two and four possible delivery assignments for their first load. (Tr. 170–172; 480–483; 666–6667; 1091–1093; 1394–1396; 2785; 3099–3100.) What loads are offered the drivers to choose from is dependent entirely on the dispatcher's discretion. IBT tracks loads that are refused by drivers in a "Refusal Log." Dispatchers also inform drivers when one of their assignments has an appointment time, either with a customer or at the Port. These appointments are set by IBT and drivers cannot set the appointments themselves. (Tr. 487–4890; 4129–4130; 172–174; 256–257; 939–941). Dispatchers are able to access the Ports'

appointment system electronically to change appointments. (Tr. 3729; 3325–3326; 2054–2058). Drivers only contact dispatch regarding appointments, they do not communicate with the terminals or with customers directly. (Tr. 3336–3338; 487–490; 1180–1181; 1407–1408; 672–674). When drivers miss an appointment, dispatchers have to ascertain a reason that can be communicated to IBT's customer by IBT. (Tr. 3291–3292.)

IBT does not typically instruct drivers what specific routes to take when moving containers. (Tr. 1540; 1044; 2923–2224; 607–608). Once drivers have finished the loads they are initially assigned, they must call dispatchers in order to receive more assignments. (Tr. 4157; 3374–3375; 4147–4158; 3527–3530.) Dispatchers have sole discretion on what if any work to offer drivers. Drivers maintain contact with dispatchers throughout their day to get not only other deliveries but specific instructions regarding deliveries. (Tr. 2951–2954.)

(j) Safety manuals

When IBT first began its leasing program and began onboarding drivers, part of the onboarding process involved giving drivers an "Independent Contractor's Safety and Security Policies" manual ("Policies Manual"). This manual was then updated in 2014. Along with some substantive changes, the new manual was called the "Independent Contractor's Safety and Security Handbook" ("New Handbook"). The handbook and the manual were only provided to drivers in English. (Tr. 1366–1367; 1064–1065; 736–738.)

The amended version set forth rules drivers were recommended to follow. Examples include: (1) Prohibitions against contacting customers directly; (2) Prohibitions against drivers taking loads home; (3) Specific instructions on handling cargo including a prohibition of dropping off cargo without IBT permission. Also including in the manual was a "General Rule for All Customers" which specifically prohibited drivers from resolving disputes on location and mandated that IBT alone through dispatch should resolve such conflicts. (GC Exh. 72 p. 42.)

(k) IBT mandated policies and procedures

Along with the Policies Manual and Handbook, IBT set forth rules and practices and procedures that it expected drivers to comply with in the form of memoranda and notices provided to drivers with their paychecks on Fridays, and notices which were posted next to the dispatch window. (Tr. 2011–-2014; 1439–1444; 2554–2556; 3750; U. Exh. 48.)

Some examples include but are not limited to: (1) instructions on filling out manifests and logs (GC Exh. 47, 48, 74, 75; U. Exh.1, 3, 4, 6); (2) instructions regarding safety meetings for drivers (GC Exh. 49, 76; U. Exh. 32); (3) instructions regarding cleaning the trucks and turning in keys and radios on time (U. Exh. 2, 5); (4) end of shift instructions (U. Exh. 33); and instructions regarding inspections and road checks. (GC Exh. 83, 96; Tr. 1881–1883.)

IBT has also maintained "IBT Container, Cargo & Security Procedures." These procedures were spelled out in a separated handout. (Tr. 2005–2007; U. Exh. 29). This document includes procedures for drivers to follow including: 1) how to inspect a sealed container; (2) how to check a chassis, policies regarding loaded or unloaded containers; and prohibitions regarding unattended cargo. (Tr. 2005–2007.)

(l) Failure to follow IBT policies results in discipline

IBT has established a progressive corrective action (or progressive discipline) policy for its drivers. The first step is a warning, the second step is 1 day out of service, the third step is 3 days out of service, and the fourth step is termination of the driver's contract. (Tr. 1807–1808; 3873–3874.) Unsafe driving can result in "time off up to and including lease termination;" fatigued driving will lead to "at least one day without work;" unfit operation will lead to "at least one day without work;" controlled substance violation will lead to lease termination; vehicle maintenance and cargo related violations will lead to "at least one day without work," and, generally, out of service violations "can result in discipline up to and including termination of lease; depending on their severity." (GC Exh. 95.) There is at least one instance of driver termination for "Breach of company rules" and "dishonesty."[4] (Tr. 1989–1993.)

(m) Costs drivers must pay

he cost to lease a truck was $60 for the daily use of IBT's truck. This rate was set by IBT and not negotiated by the drivers. The drivers would pick the truck up at IBT and return it to IBT. They were not allowed to take the truck home. The trucks were registered to IBT and IBT provided insurance coverage which the driver paid for through a deduction based upon a percentage of their income. The insurance cards provided with the trucks did not reference any particular driver. (GC Exh. 93.) No driver that leased a truck provided their own insurance. Nor did drivers negotiate with the insurer or IBT the cost of insurance. Drivers pay for the fuel they use. IBT provides drivers a fuel charge card and the costs associated with the charges on the card are deducted from the driver's check. Drivers must return their trucks with a full tank of fuel when they return the truck at the end of their shift.

(n) Payment of drivers

Drivers receive settlement checks every week. They are paid a per load rate and a fuel surcharge, as well as a clean truck assistance payment. (Tr. 2625–2627.) The clean truck assistance payment is ten dollars but can be forfeited if drivers do no correctly complete their manifest. The fuel surcharge payment amount is set exclusively by IBT and not negotiated by drivers. IBT issues drivers 1099 tax forms. (R. Exh. 1, 11, 17, 24, 39, 36.) The decision to issue 1099s is made by IBT without driver consent or input.

(o) Pay rates

Drivers receive payment for each container they move or in some circumstances when they have to drive a truck from one location to another without a load (a practice characterized in the industry as "bob-tailing"). IBT unilaterally sets pay rates and periodically changed rates. A standardized rate sheet was given to

[4] For reasons that aren't entirely clear, IBT allowed the driver to continue working after the initial termination decision.

drivers upon onboarding. (GC Exh. 21.) Drivers are also paid for time spent waiting. IBT unilaterally sets wait time rates and drivers do not negotiate the specific rates they are paid for waiting time. (Tr. 506–508; 869; 3096–3097.)

IV. IBT ATTEMPTS TO COVER ITS TRACKS

There are numerous examples in the record of IBT engaging in what can be accurately described as a pattern of attempting to manufacture a record that would color the facts in its favor. The first example of this began with the "Driver's Application for Employment" which the drivers who were on boarded filled out until mid-2014. In mid-2014, IBT changed the form's title to "Independent Contractor Application." IBT then required the drivers to not only transfer the information from the old "Application for Employment" but also required the employees to back date the new application to the date of the original. IBT then destroyed the "Application for Employment" purging it from the driver's files. Brent Bradley testified that the requirement to back date the applications was the result of a "miscommunication" with his assistant. (Tr. 1721.) I find this testimony wholly unworthy of credence. Instead the evidence pointed to an affirmative attempt to conceal the original (which referenced "employment") and color the employment record of the drivers by destroying the original and replacing it with the new "Independent Contractor Application."

While not an exhaustive list, some other examples of affirmative attempts to color the record appear in other changes that IBT made during the course of the business enterprise. One such example includes the creation of a form in which Brent Bradley attests that the LTA was translated in Spanish when in fact Rosas testified that she never translated any LTA's in Spanish. So too, the so called rate "negotiations" with driver's was an attempt to color the record with what can accurately be described as "sham" negotiations the purpose of which was simply to make it appear that drivers had some ability to negotiate rates when in reality they did not (see also footnote 10 *infra*). In some instances, the language in the documents purporting to represent the independence of the employees did not represent the actual conditions under which the employees worked. The most obvious example is language in the LTA which suggests that drivers can work whenever they choose when in reality IBT made the shift assignments. Regardless of the paper trail IBT was attempting to manufacture, the basic duties of the drivers remained the same throughout the relevant period in question.

V. EMPLOYEE VS. INDEPENDENT CONTRACTOR STATUS

The General Counsel alleged violations of various provisions of the Act all of which are dependent upon whether in fact the persons alleged to have been wronged are in fact statutory employees protected by the Act. In order to reach the questions presented regarding whether Respondent violated various provisions of the Act, the threshold issue that must be first resolved is whether the drivers were in fact employees covered by the Act or, as Respondent argues, individuals who are not statutory employees and therefore not entitled to the protections of the Act.

A. Analysis Under Fedex

The party seeking to exclude individuals performing services for another from the protection of the Act on the grounds that they are independent contractors has the burden of proving that status. *BKN, Inc*., 333 NLRB 143, 144 (2001).[5] In *FedEx*, 361 NLRB 610 (2014), the Board clarified and refined its approach to assessing independent-contractor status. Specifically, the Board reaffirmed its reliance on common-law agency principles, as guided by the nonexhaustive list of factors enumerated in the Restatement (Second) of Agency §220 (1958). Those factors include: (1) the extent of control over the details, means, and manner of the work; (2) whether the putative contractor is engaged in a distinct occupation or business; (3) whether the work is done under the direction of the principal, or by a specialist without supervision; (4) the skill required; (5) who supplies the tools and place of work; (6) the length of time for which the person is employed/contracted; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an employment or contract relationship; and (10) whether the principal is in the same business. All the incidents of the relationship must be assessed and weighed, with no one factor being decisive. *FedEx,* supra, slip op. at 1, citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968); *Roadway Package System, Inc*., 326 NLRB 842, 849 (1998) (*Roadway*). In addition, the Board stated that it would consider the extent to which a putative contractor is, in fact, rendering services as part of an independent business with an actual (not merely theoretical) entrepreneurial opportunity for gain or loss. *FedEx*, slip op. at 1. Applying the *FedEx* analysis here, I find that the Employer has failed to establish that the truck drivers are independent contractors rather than employees. Although there are some aspects of the relationship between truck drivers that may suggest the drivers are independent contractors, I find that those aspects are outweighed by the factors showing that the truck drivers actually are employees. In particular, I find that employee status is demonstrated by the extent of IBT's control over the officials, the integral nature of the truck drivers' work to IBT's regular business, IBT's control of the work through the dispatching process, supervision and use of a progressive discipline process, the method of payment, and the fact that the truck drivers officials do not render their services as part of an independent business.

1. Extent of control by employer

IBT has far-reaching control over the means and manner of the driver's work. The control begins at the initial on boarding process. IBT chooses whether the driver will work the day shift or the night shift. (Tr. 119–120, 445, 1304, 1361, 1489.) IBT requires drivers to complete a driver's proficiency test and a written test for entry level drivers with less than 1-year experience. (U Exh. 20.) Entry level drivers have to complete entry

[5] IBT asserted that the burden should fall upon the General Counsel and not Respondent. Assuming for the sake of argument that the proper legal standard placed the burden upon the General Counsel, given the sheer weight of the evidence in this case the same result would follow.

level driver awareness training (U Exh. 21). IBT administers a 14-mile road driving test evaluating drivers on 120 different criteria (U Exh. 22). For HAZMAT drivers IBT requires take tests and complete HAZMAT training (U Exh. 24). On the job, IBT maintains a variety of work rules, including rules that specifically control the driver's job performance. For example, IBT had in place rules regarding the California Safety Analysis which informed drivers that they would be "disciplined" for various rule infractions including speeding over 10 miles over the limit, and for failing to cure defects in the trucks. (GC Exh. 95.) This standing alone supports a finding of employee status. See *Friendly Cab Co*., 341 NLRB 722, 724 (2004), enfd. 512 F.3d 1090 (9th Cir. 2008) (right to discipline supports employee status). See also Restatement (Second) of Agency §§ 2(2) & 220(1) (master (employer) is someone who "controls or has the right to control" another; and servant (employee) is "subject to the [employer's] control or right to control" (emphasis added)); *NLRB v. Associated Diamond Cabs*, 702 F.2d 912, 920 (11th Cir. 1983) ("courts have noted that it is the right to control, not the actual exercise of control, that is significant"). Cf. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (2015) (even occasional instances of discipline indicate significant employer control) (citing *Dial-A-Mattress Operating Corp*., 326 NLRB 884, 889, 892–893 (1998)). IBT requires the maintenance of trucks be performed by their own hired mechanic Ted Moulder. (Tr. 1678.) Drivers are required to clean the trucks and are assessed a fee for not doing so. (U Exh. 2.) IBT also prohibits smoking in the trucks. (U Exh. 2.) IBT required drivers to drain their air tanks at the end of every shift. (U Exh. 33.) IBT required drivers to return radios and keys at the end of each shift and if drivers did not comply were assessed a fee for each day the radio wasn't returned. (U Exh. 5.) IBT had in place safety rules policies and procedures in the form of a driver handbook which set forth the company's policies and procedures to be followed by the drivers. (GC Exh. 71, 72, 77, U Exh. 35.) The handbook also set forth loading and accident procedures the drivers were required to follow as well as customer service, safety, inspections, drug and alcohol testing, and hours of service. (Tr. 1794–1796 GC Exh. 72.) IBT requires drivers to comply with its Container, Cargo and Security Procedures and inspect trucks. (U Exh. 29.) IBT requires drivers to check sealed containers, tire pressure, brakes, mirrors, and tires. (U Exh. 29.) IBT has rules forbidding the unloading of containers without prior authorization. (U Exh. 29.) IBT has rules that require that logs be turned in on a weekly basis (Tr. 1804; 3404–3405.) IBT chooses the customers the drivers service. Drivers cannot choose which of these customers they would work for. Drivers do not negotiate with IBT customers over pay or any terms or conditions of IBT's commercial relationships with its customers. (GC Exh. 103, 104, U Exh. 46, 47.) IBT drivers do not deliver to non-IBT customers. Drivers cannot contact customers directly regarding scheduling. (Tr. 674.) IBT controls the work that the drivers perform through the dispatch process and work assignment process. In essence, the actual order of delivery, place and manner of the delivery of goods along with to whom goods are delivered, as well as how much is charged for the delivery is strictly controlled by IBT. Thus, when drivers work, the most important aspects of the job are undeniably controlled by IBT.

The drivers do have control over some aspects of the job. For example, drivers (who it should be noted, routinely drive to the same port and customer locations) have discretion in the selection of the delivery route. Drivers start time is determined by them. Drivers are free to work or not work. Drivers decide when to take breaks. Drivers choose how often and how long to work. Drivers can reject or cancel loads. Drivers have a limited choice of which loads to accept. Drivers have exclusive control of the vehicles they are driving.

I find the drivers are akin to the canvassers found to be employees in *Sisters' Camelot*, 363 NLRB No. 13 (2015). In *Sisters' Camelot*, the workers were free to work or not work as they chose, but when they did choose to work, they were subject to significant employer requirements. Although the drivers have some discretion over important aspects of their work, IBT nevertheless exercises "pervasive" control over their work. *FedEx*, supra, slip op. at 12–13 (drivers' discretion over aspects of their work outweighed by employer's requirements). In short, I find that IBT's control over the manner of work weighs in favor of employee status.

2. Whether individual is engaged in a distinct occupation or business

The fact that an individual holds a distinct occupation may indicate independent contractor status in certain situations, particularly where the individual's services are engaged temporarily to accomplish tasks incidental to the employer's regular business. But in the circumstances presented here the drivers perform their functions in furtherance of IBT's core operations. See Restatement (Second) of Agency § 220(2) cmt. I (observing that if the occupation, even a highly skilled one, is considered part of the regular business of the employer, there is an inference that the individual is a servant). IBT simply would not be able to function without the drivers. See *United Insurance*, 390 U.S. at 258–259 (considering as one "decisive" factor that employees' functions were an "essential part of the company's normal operations"); *Slay Transportation Co*., 331 NLRB 1292, 1294 (2000*);* The drivers are also fully integrated into IBT's operations. See *Roadway,* supra, 326 NLRB at 851. IBT Lease drivers operate in the name of IBT, drive trucks that have both the DOT and CA numbers displayed on the doors. IBT drivers utilize IBT's insurance. All drivers work solely for IBT and rely on IBT dispatchers to obtain their assigned work. They do not hire others to drive the trucks for them. They do not display their names or logos on the trucks. Although in theory the drivers could work for other employers this is not controlling as part-time or casual employees covered by the Act often work for more than one employer. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011) (citing KCAL-TV, 331 NLRB 323, 323 (2000)), enfd. 822 F.3d 563 (D.C.Cir. 2016); see also *Sisters' Camelot*, supra, slip op at 2 ("the ability to work for multiple employers does not make an individual an independent contractor."). I find that the drivers were not engaged in a distinct occupation or business.

3. Whether the work is usually done under the direction of the employer or by a specialist without supervision

IBT drivers have no direct supervision while driving. This lack of direct supervision, however, reflects the nature of the job itself, rather than suggesting independent-contractor status.

Restatement (Second) of Agency § 220(1) cmt. D (the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking). Nonetheless, IBT controls the work that the drivers perform through the dispatch process and work assignment process. Drivers receive all the work they obtain throughout the day from IBT dispatchers. They report to work, pick up keys to the trucks and radios. They perform their work by receiving assignments through dispatch. These assignments are communicated to them throughout the day by dispatchers and at the end of the day they return the truck to IBT's yard and turn in their keys and radio to IBT. IBT requires that drivers comply with these and other policies and procedures. For example, drivers are required to submit daily manifests and inspection logs. Also, drivers are required deliver to IBT customers and are required to comply with IBT's agreements with those customers in all respects ranging from the manner in which the deliveries are made to the amount of money paid for each delivery.[6] In essence, the actual order of delivery, place and manner of the delivery of goods along with to who goods are delivered, as well as how much is charged for the delivery is strictly controlled by IBT. The submission of the proper company paperwork as well as all deliveries is closely monitored by IBT. Thus, the most important aspects of the job are undeniably controlled and directly or indirectly supervised by IBT. See *FedEx*, supra, slip op. at 13 (finding that "[a]lthough drivers are ostensibly free of continuous supervision in their work duties," the supervision factor favored employee status because the employer essentially directed the drivers' performance by enforcing its rules, by requiring adherence to protocols regarding safety and the performance of their work; see also *Sisters' Camelot*, supra, slip op. at 3 (despite absence of immediate in-person supervision, employer's use of various oversight tools supported finding that the supervision factor favored employee status).The drivers' on the other hand (who it should be noted, routinely drive to the same port and customer locations) have discretion in the selection of the delivery route. These factors favor employee status.

4. Skill required in the occupation

It cannot be argued that some aspects of the job performed by the drivers do not require specific specialized skills. Many of the ordinary functions of driving are not particularly skillful and are performed every day by many (including young drivers) including such simple tasks as starting the vehicle, using turn signals, accelerating, and braking. Nonetheless, these drivers must have particular skills relative to the type of large trucks that are driven including the possession of a Class A license, a TWIC card and a medical certification.[7] But their level of skill does not preclude finding them to be employees. Indeed, many types of employees covered by the Act are highly skilled with expertise in a particular field. As with all of the relevant factors, this factor must be examined in the particular circumstances presented. I find it significant that the drivers' skills are integral to IBT's ability to accomplish its core mission, which tends to show that they are employees, rather than independent contractors providing services on an intermittent basis. See Restatement (Second) of Agency § 220(2) cmt. I. I also note that IBT itself provides Entry-Level Driver training to drivers with less than one year of experience. This training further suggests a connection distinct from that of independent contractors and more common in employer and employee relationships. *Sisters' Camelot*, supra, slip op. at 3 (that employer provided workers with the training necessary to perform the work supported finding employee status); see also *NLRB v. United Insurance Co*., 390 U.S. at 258–259 (agents lacked prior experience and were trained by company personnel, which supported employee status). For those reasons, I find that this factor tends to favor employee status.

5. Whether the employer or individual supplies the instrumentalities, tools, and place of work

IBT provides the drivers with nearly all the necessary instrumentalities, tools and place of work. IBT provides drivers with the trucks, the chassis, radios to contact dispatchers, delivery slips, inspection reports, manifests, logbooks, fuel card, commercial insurance and maintenance of the trucks. In addition, IBT through its dispatch process controls the place of work and through its requirement that drivers park in its yard controls the place in which the leased trucks are stored. *Roadway*, 326 NLRB 842 (1998). *Sisters' Camelot*, supra, slip op. at 3. But it is also true, as IBT argues, that IBT does not supply all work clothes,[8] any tools that they bring with them in the truck as well as personal cell phones or computers, printers or fax machines.[9] On balance, the factors strongly favor employee status as the most critical, important and necessary items to perform the job are without question provided by IBT.

6. Length of time for which an individual is employed

It is undisputed in the record that many of the drivers have worked for IBT for a substantial period of time on a regular and continuing basis. More than a third worked for IBT for more than 6 years, approximately another third for approximately 5 years. In fact, approximately 82 percent of the drivers had worked for IBT since 2013. Some drivers work actually predated 2008. (GC Exh. 54.) The actual lease documents themselves do not provide a fixed term but rather offer an indefinite duration which can be terminated by either party with 24-hour notice, or immediately by mutual agreement. In practice, the longevity of the driver's employment provides strong evidence that the drivers had an expectation of working for IBT over a number of years and the majority of drivers in fact did so. This factor strongly favors employee status as the drivers expected to be retained and were in fact retained for an indefinite period of time and not on a job to job basis.

[6] One customer for example required specific "turn time" data to be collected IBT required drivers to track this information and if they didn't drivers would have money deducted from their paycheck for that route. (Tr. 1537–1539.)

[7] In making this finding, I am not unmindful of the finding in *FedEx* at p. 13 of a contrary finding regarding special skills. It is however not clear whether the employees in *FedEx* were driving class A vehicles as in this case.

[8] The evidence established that IBT supplied and distributed safety vests with the IBT logo to some drivers.

[9] There is no evidence in the record to establish that cell phones, computers or fax machines are required by drivers to perform the job.

7. Method of payment

It is undisputed that the drivers are not paid at the completion of every run, movement or load instead they receive weekly payment. This weekly paycheck set up when coupled with the longevity of the drivers and their expectation of continued employment as well as the expectation that they will receive weekly payment strongly resembles that of an employer employee relationship. As for the actual amount of payment, IBT regulates and controls the rates of compensation for delivery assignments, wait time, fuel charges, rates charged to customers and discretionary reduction of the leasing fees.[10] It is noteworthy that the wait time payment is an hourly rate granted at IBT's sole discretion. Thus, IBT controls matters governing the most essential terms of employment. *Roadway Package Systems, Inc.*, 326 NLRB 842 (1998). Driver's paychecks directly correlate to the assignments which are given to them at dispatch and thus are directly controlled by IBT. See *Sisters' Camelot*, supra, slip op. at 4 (assigning each canvasser to a strictly delineated area exhibits "tight control" over his/her compensation).

IBT does not pay fringe benefits, paid holidays, sick days, vacation days or health insurance. The nonpayment of fringe benefits however does not tilt the scales in favor of independent contractor status as many statutory employees do not receive benefits as a consequence of their employee status. Similarly, IBT does not withhold any taxes and issues drivers 1099 tax forms. IBT had full control over the tax documents it provides drivers and because it unilaterally intended to categorize the drivers as independent contractors does not in and of itself conclusively make it so. This is especially true when as in this case there is a wealth of other indicia which favors employee status. The Board and the courts have routinely looked beyond the tax treatment in making a determination of employee status for this very reason.[11] See In Re *Time Auto Transport, Inc.,* 338 NLRB 626 (2002). On balance the method of payment favors employee status.

8. Whether the work is part of the regular business of the employer and whether the principal is or is not in the business

Respondent asserts that "services provided by drivers . . . do not constitute the essential services necessary to IBT's completion of its work for its Customers." (R. Br. at 91.) Respondent's assertion is simply not supported by the overwhelming substance and weight of the evidence of record and needs little analysis. Respondent in its answer admitted that it "provides logistics, drayage, and container storage services." (R. Ans. at p. 2.) Respondent is without question "in the business." Contrary to Respondent's assertions, the work that lease drivers perform is undeniably integral to the regular business services that Respondent admits it provides. The very heart of its regular business involves drivers moving containers from one location to another. The drivers are an integral part of that business. See, e.g., *Lancaster Symphony*, 357 NLRB 1761, 1765 (2011). IBT simply could not perform its basic and core business operations without the work of its lease drivers. These factors strongly support finding the drivers to be employees.[12]

9. Whether the parties believe they are creating an independent-contractor relationship

Respondent points to various IBT created documents which were unilaterally created by IBT the terms of which drivers had no opportunity to negotiate which refer to drivers as "Independent Contractors." The fact that those documents are unilaterally created and imposed by IBT diminishes the weight to be given them. See *FedEx*, supra, slip op. at 14. The weight given these documents is further diminished by the simple fact that many drivers lacked fluency in the English language and didn't understand the very documents which were presented them and were able to fill in the blanks only after instructed by IBT officials on how to do so. IBT officials were aware of the language comprehension issues and overcame it by placing a sample copy of a Lease Agreement with all the blanks filled in as IBT would like them filled in for the drivers to copy. Although drivers were instructed on which blanks to fill in and what information to include in the blanks many of the IBT Lease and Transportation Agreement documents that appear in the record do not appear to even be signed by any IBT official. See for example (GC Exhs. 21, 22, 31, 32). This calls into question the reliability of the very "agreements" that IBT relies upon and further diminishes the weight given them. What is most damaging to IBT's reliance on these documents is its attempt to change and backdate its own other internal documents which are contradictory to their position. In 2014 after drivers began filing wage claims, IBT's changed its "Application for Employment" to a document titled, "Independent Contractor Application." IBT required drivers to backdate the new applications to the date of their original applications. IBT then destroyed the original applications that referenced "employment." (Tr. 1724–1726.) This backdating and document destruction in order to attempt to cover up and manipulate IBT's employment records erodes the veracity of all of the documents IBT presents as those reflecting the nature of its

[10] There was some evidence that after drivers complained about rates some increase in rates occurred. It appears that these rate increases were orchestrated by IBT with awareness of the potential for litigation for the purpose of creating the mere impression that IBT did not maintain strict control of the rates of compensation. In reality, the rate increase appeared to be a single effort of across the board rate increases in which the rates increases were the same for all employees and even employees who did not "negotiate" were given rate increases. Contrary to Respondent's contentions the facts surrounding the rate increases further supports the conclusion that IBT exercises strict control over driver compensation and thus weighs in favor of employee status.

[11] The California Department of Labor Standards Enforcement (DLSE) in *Naranjo, Townsel and Sivveyra v. Intermodal Bridge Transport*, Case Nos. 05–62622 ;05–62704KR; and 05–664459 KR, made a similar finding, noting that reporting income with a 1099 form is irrelevant to the question of employee status and, "merely the legal consequences of an independent contractor status not a means of proving it." Id. at 19. (U. Br. Exh. 4).

[12] It should be noted that in its decision finding that similarly situated drivers of IBT were in fact employees, the California DLSE in *Naranjo, Townsel and Sivveyra v. Intermodal Bridge Transport*, Case Nos. 05–62622;05–62704KR; and 05–664459 KR, made a nearly identical finding, noting, "Plaintiff's work is the basis of Defendant's business. Defendant obtains customers who are in need of delivery services and provides workers who conduct the service on behalf of Defendant. Without drivers, Defendant would not be able to operate its business." (Id. at 17) (U. Br. Exh. 4).

relationship with the drivers and further diminishes the weight to be given these documents.

Balanced against these factors is the undisputed evidence of record that many not only believe that they are employees but have taken legal action to confirm these very beliefs.[13] Some filed with the California Department of Labor Standards Enforcement (DLSE) and prevailed, others filed in state court. More than 54 drivers joined in one of the known pending state court actions. (GC Exh. 85 a-i, U. Exhs. 9, 10, 11, 51, 52, 53.) Lastly, a majority of drivers presented a petition to IBT in which they identified themselves as, "a majority of full-time and regular part-time employees working as drivers" at IBT. (GC Exh. 2.) I find this factor favors finding the drivers to be employees.

10. Whether the evidence shows the individual is rendering services as part of an independent business

In addition to the factors listed in the Restatement, the Board also considers the extent to which a putative contractor is, in fact, rendering services as part of an independent business with an actual (not merely theoretical) entrepreneurial opportunity for gain or loss. *FedEx*, supra, slip op. at 1. The Restatement of Employment Law Section 1.01(b)(Am. Law Inst. 2015), like the Board in *FedEx* outlines similar factors noting that a person is "rendering services as an independent business person and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire or assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers."

The evidence established that lease drivers do not have control over the most important business decisions of their work. IBT retains total control over the selection of customers and negotiating all terms with those customers including the costs of its services. IBT through its dispatch process determines the order in which items are delivered and where to deploy all of the equipment. The lease drivers do not have any proprietary or ownership interest in the equipment, routes, service areas or any exclusive rights to any particular customers. Nor do any lease drivers provide services to any customers other than IBT customers while leasing trucks owned by IBT.

IBT argues that lease drivers have some indicia of entrepreneurial opportunity e.g., their ability to accept or decline assignments, their ability to choose between a limited few assignments and their ability to choose time of arrival to their designated shift. Similar arguments were considered by the Board in *Lancaster Symphony*. In that case, musicians were paid a set fee for a set number of rehearsals and performances. The fees were unilaterally set by the Orchestra and there were no negotiations over such fees. The musicians did not receive more or less based how well or poorly they performed. The musicians like the IBT lease drivers could decide not to work in a particular program. The Board in considering the question noted,

> The fact that the musicians can decide not to work in a particular program or request to work in more programs does not mean that they enjoy an opportunity for entrepreneurial gain suggesting a finding that they are independent contractors. The choice to work more hours or faster does not turn an employee into an independent contractor. To find otherwise would suggest that employees who volunteer for overtime, employees who speed their work in order to benefit from piece rate wages, and longshoremen who more regularly appear at the "shape up" on the docks would be independent contractors. We reject that notion. 357 NLRB at 1764–1765 (internal citation and footnote omitted). See also *Sisters' Camelot*, supra, slip op. at 5 (the fact that canvassers could decide whether to work on a given day and could increase earnings by making themselves available for more work did not favor independent contractor status, where they had no control over important business decisions such as where they solicited donations or whether to hire or subcontract the work).

Similar reasoning is applicable in this case. Also, despite the fact that drivers can choose from a limited number of dispatch choices IBT has complete control over the business decision of which deliveries it offers them. This directly determines the amount of time the delivery will take over which the driver will have little or no control. Similar to the musicians in *Lancaster Symphony* who had no ability to perform the concert "jobs" faster, the inflexible duration of assigned deliveries does not provide any entrepreneurial opportunities to maximize efficiency and increase income. 357 NLRB at 1765 fn. 8.

These considerations strongly support the conclusion that the drivers do not, in fact, operate independent businesses with entrepreneurial opportunity within the meaning of *FedEx* and, in turn, this factor supports the overall conclusion that the drivers were employees.[14]

There are some factors of varying significance that to some degree supported independent contractor status. On balance, the factors set forth in *FedEx* overwhelmingly support that the drivers were "employees" and thus entitled to the Act's protections. Stated differently, I find that on this record, under the facts of this particular case, IBT failed to carry its burden, and therefore I find that the drivers were "employees" protected by the Act during the relevant period. *FedEx,* supra; *Time Auto*

[13] It is also true that a number of drivers called to testify by IBT testified that they believed they were employees.

[14] Respondent placed much of the emphasis of its arguments regarding this factor on the fact that driver Cabral at one point in time owned a company which was incorporated as Baywater Logistics. Respondent does not address the critical fact that when it was incorporated Baywater Logistics provided brokerage but not drayage services. When asked directly Cabral testified as follows: Q. Okay. Does IBT—has IBT let you know that they have a problem with you operating a business? A. No, we have no conflict of interest. The type of work that I do IBT doesn't do. (Tr. 3153.) The mere fact of incorporation at one time by Cabral of a separate business entity unrelated to the driving Cabral does at IBT does not immunize IBT. Many employees have second jobs or part time jobs apart from the work they do for their primary employer. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011) (citing KCAL-TV, 331 NLRB 323, 323 (2000)), enfd. 822 F.3d 563 (D.C.Cir. 2016). Assuming for the sake of argument that some relationship to his IBT work could be established, I concur with General Counsel's assertion that Cabral was not representative of the other drivers who testified and more of an "outlier." There was no evidence that any other driver even arguably operated as a distinct business.

Transportation, 338 NLRB 626 (2002), affd. 377 F.3d 496 (6th Cir. 2004); *Slay Transportation Co*., 331 NLRB 1292 (2000); and *Roadway Package System*, 326 NLRB 842 (1998). See also *Green Fleet Systems,* 2015 WL 1619964, Case 21–CA–10003 (2015); a case involving truck drivers with many strikingly similar facts which resulted in a similar conclusion that lease drivers were misclassified.

ANALYSIS

IV. IBT'S MISCLASSIFICATION OF THE LEASE DRIVER'S STANDING ALONE IS A VIOLATION OF SECTION 8(A)(1)

After reaching the conclusion that the lease drivers were misclassified, the first question that arises is whether this misclassification is merely a mechanism which triggers the applicability and protections of the Act or if the misclassification itself can constitute a violation. General Counsel argues that an independent violation exists but cites no direct authority for the proposition. Instead, citing *Parexel International, LLC*, 356 NLRB 516, 519 (2011), General Counsel argues that the Board has held in other cases that conduct similar to misclassification that serves to chill future activity or can be used as a "preemptive strike" to prevent employees from engaging in protected and concerted activity violates Section 8(a)(1) of the Act because of its "chilling effect" on employees' future exercise of their rights. Without question, by misclassifying, the employer intends, "the very consequences which foreseeably and inescapably flow from his actions." *Erie Resistor*, 373 U.S. 221, 228 (1963). From a practical standpoint misclassification not only serves to chill future concerted activity as asserted by the General Counsel but essentially deprives and conceals available protections these employees have under the Act. Interference and restraint of Section 7 rights flows directly from misclassification. As such, I find that misclassification rises to the level of a *per se* violation of Section 8(a)(1).[15]

VII. OTHER UNLAWFUL PRACTICES

A. Interrogation, Surveillance, Promise of Better Work for Abandoning Union Activity, Threatening Lease Drivers with Unspecified Reprisals

(1) Interrogation

In determining whether an interrogation is coercive in violation of Section 8(a)(1), the Board applies a totality of the circumstances test which considers whether under all circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Bloomfield Health Care Center*, 352 NLRB 252 (2008). Relevant factors for consideration were set forth by the Board in *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and derived by the Board from standards articulated by the court in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964). The underlying premise of the Board's holding in *Rossmore House* is that on many occasions, interrogations can be completely lawful acts. *Rossmore House* sets forth factors to consider in determining whether any particular interrogation falls outside the bounds of a lawful interrogation. The factors are as follows: (1) The background, i.e., is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was he in the company hierarchy? (4). Place and method of interrogation, e.g., was employee called from work to the boss' office? Was there an atmosphere of "unnatural formality?" (5). Truthfulness of the reply. See *McClain & Co*., 358 NLRB 1070 (2012), see also *Camarco Loan Mfg. Plant*, 356 NLRB 1182 (2011). *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958 (2004). *Rossmore House* provides relevant factors for consideration however, the factors are not meant to be "mechanically applied" and it is not essential to a finding of a coercive interrogation that each and every element of *Rossmore House* be met. The fundamental issue is whether the questioning would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 Rights. This is an objective standard and does not turn on whether the employee was actually intimidated. *Multi-Aid Service*, 331 NLRB 1126 (2000), enf. 255 F.3d 363 (7th Cir. 2001).

(a) IBT's Vice President Zea's Interrogation, Threats of Unspecified Reprisals, Expression of Futility of the Organizing Campaign

The allegations surrounding IBT Vice President Zea's actions revolve around a meeting that took place on February 16, 2016. The subject of the meeting was a flyer that the lease drivers distributed at a Target store. (GC Exh. 4.) The flyer asked Target customers to "tell Target to stop hurting its truck drivers and our families." The flyer further asked Target to, "take responsibility for your supply chain. Stop wage theft here in Los Angeles." (GC Exh. 4.) Zea was angry and upset about the flyer and called a meeting to express his displeasure with the flyer and its potential to cause IBT to lose customers. Despite his denials and assertions to the contrary, I find that during the meeting, Zea angrily told employees that if they wanted to work for a Union company they could leave. There was a "big door" or "the doors are always open" "there are other trucking companies out there, the doors are open."[16] He also told the workers present that the Union wasn't going to happen and in response to a suggestion

[15] In making this finding, I am cognizant of the Board's recognition in *Pennsylvania Interscholastic Athletic Assn.*, 365 NLRB No. 107 (2017), that the Act's Sec. 1 preference is for the inclusion of workers as employees and that any interpretation requires that consideration be given to, "the Act's policy to "encourag[e] the practice and procedure of collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." See also *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 297 (1996) ("[A]dministrators and reviewing courts must take care to assure that the exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach."). Id. at fn. 6.

[16] Zea admitted to making such statements. However, he suggested that he followed up his doors are open statement with an invitation to drivers to return to IBT after they left. (Tr. 3980.) His admission partially corroborates what others testified he said. I find however that that given his anger and the context in which the words were spoken the notion that he invited employees to return simply unworthy of belief.

that Zea fire the pro-union drivers, he conducted a poll asking those who supported the Union to raise their hands.

Regarding the actions of Zea, it is important to set forth my credibility findings regarding this incident. After having viewed Zea's testimony first hand, I am left with the firm impression that the statements and actions attributed to him by others in the meeting (as well as his own admissions) as set forth above were in fact true. Zea's testimony revealed that he had been one of the most important figures in the growth of IBT. He started on the ground floor and was a major contributor to the company. His testimony and demeanor revealed his dedication and loyalty to the company. He invested a great deal of his life skills and energy in an effort to make IBT successful and was personally responsible in large measure for its success. He was adamantly against the very notion of a Union at IBT. Thus, the actions of the Union regarding the Target flyer triggered his angry response.

The Board has long held that statements like Zea's that suggest employees should leave instead of engaging in union activity violate the Act. See *Jupiter Medical Center Pavillion*, 346 NLRB 650, 651 (2006). So, to, the Board has held that expressions of futility like Zea's admonition that "the Union was not going to happen" violate the Act. *See M.D. Miller Trucking & Topsoil, Inc*. 361 NLRB 1225, 1225 (2014). Lastly, I find the polling of employees coercive. Applying *Rossmore*, I find that given: (1) the hostility of Zea toward the Union, (2) the fact that he was the Vice President, (3) the fact that he was seeking the identity of union supporters (4) as well as the context in which the poll arose i.e., upon the suggestion that all Union supporters be fired. The polling/ questioning would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 Rights thus was coercive and violated the Act. In sum, I find that each of the above described actions of Vice President Zea constitutes a separate 8(a)(1) violation.

(b) Dispatcher Quevado's actions

Although denied by Respondent in its answer, I find Quevado to be both a supervisor and an agent under Section 2(11) and (13) of the Act. As noted previously, the parties stipulated that Quevado performed dispatching duties and "Mr. Quevedo dispatches loads to drivers and works to meet customer delivery needs and performs these duties on behalf of IBT." (Jt. Exh. 2.) Section 2(11) defines a supervisor as an individual having authority to "assign" "reward" or "direct" if such requires "the use of independent judgment." Quevado by virtue of his duties not only assigned work, could reward drivers by giving them more lucrative loads and had discretion in determining what work to assign to whom meeting the definition of a supervisor set forth in the Act.

Alternatively, as for Quevado's role as an agent, the common law rule traditionally applied by the Board is that of "apparent authority." *Allegany Aggregates Inc*., 1165 (1993). The test applied is whether "under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Eihorn Enterprises*, 279 NLRB 576 (1986), enfd. 843 F.2d 1507 (2d Cir. 1988). The determination is whether under the circumstances the employee would reasonably believe that the alleged agent was acting on behalf of management. *United Scrap Metal Inc*., 344 NLRB 467 (2005).

The question is whether Respondent cloaked Quevado with apparent authority to act on its behalf. By virtue of Quevado's undisputed actual authority to assign work and the use of his judgment to decide what work to assign to whom, including his ability to reduce lease amounts to drivers, it was reasonable for drivers to conclude that Quevado was acting on behalf of management. Moreover, the fact that Quevado was the brother of Vice President Zea clothed him with an additional layer of perceived apparent authority. Accordingly, I conclude that he was an agent of the Respondent within the meaning of Section 2(13) of the Act.

(c) Quevado's interrogation of Portillo

The allegations surrounding the alleged interrogation relate back to an incident which occurred about a week after Jose Portillo participated in a strike against the company. I credit Jose Portillo's version of the events. Quevado admitted that he had such conversations with drivers. (Tr. 3764–3772.) The conversation occurred at the dispatch window approximately a week after the strike ended. Portillo's credible description of the conversation is as follows:

Q. After the strike was over and you returned to the work, did anyone at the company talk to you about the strike?
A. No. Well, yes, Mr. Marlo from dispatch.
Q. When did he talk to you? How soon after the strike?
A. About a week after, we can say.
Q. Where did this conversation take place?
A. At the window of his dispatch office.
Q. And about what time of day was it?
A. I remember that it was between 8:00 and 9:00 a.m.
Q. And who started the conversation?
A. Mr. Marlo.
Q. And what did he say?
A. He began to speak to me and asking me whether I believed that what I was doing was good.
Q. And did you respond? What did you do say?
A. In the little bit of knowledge I had, yes. And he asked me, "What are the arguments that you guys have?"
Q. What did you say?
A. We told him with were tired of so many retaliations, favoritism, work for free. I'm getting old. I don't have benefits. I'm not working my social. I want a retirement plan. I can't go on paid vacations. And I feel like a slave to this job.
Q. Did Marlo respond to you?
A. "By doing this, do you think you're going to accomplish that?" And I said, "Well, if I don't accomplish this, I will gain something."
Q. Did he respond?
A. Yes. He said, "IBT, it's been years that they've been operating this way and they're going to continue to do so. And there's not going to be anything that will change it." And I said, "Well, we shall see. We're going to continue the fight with my coworkers. We've started something and we're going to keep going until the end." He said, "I tell you as a friend that this is not right. You don't know the power that IBT has. They can do—very simply just close, if they want." And we'll just be

screwed, because your family eats from here. My family eats, and all your coworkers outside eat. And I said, I understand that perfectly, but my family no. I don't have medical insurance and in the same way that I'm telling you, I've told Mr. Ozzie Zea, I want to retire with dignity, with my retirement. Because when I retire, instead of getting retirement, if I continue to work the way I am, I'm going to have to get welfare. Well, he said, keep going then and pay the consequences. And I said, well, we shall see. Have a good day. (Tr. 700–702.)

Applying the *Rossmore House* factors, I find that the conversation between Quevado and Portillo was an unlawful coercive interrogation. Quevado was a dispatcher who could control the amount and type of work given to drivers, the conversation took place at the dispatch window, there was no valid reason shown for his requesting the information he sought and there were threats of reprisals interwoven within the conversation. Under the totality of the circumstances, I find this type of questioning would tend to coerce employees in the exercise of their Section 7 rights.

A separate violation is found in both Quevado's threats of "consequences" and threats of plant closure. See *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). See also *National Steel Supply Inc*., 344 NLRB 973 (2005) (threats of job loss unlawful) see also *NLRB v. McCullough Environmentals Services, Inc*., 5 F. 3d 923 (5th Cir. 1993); and *Indiana Cal-Pro. Inc. v. NLRB*, 863 F. 2d 1292, (6th Cir. 1988) threats of plant closure are "among the most flagrant" instruments of coercion.

(d) Quevado's interrogation of Osoy

Osoy testified to a similar conversation with Quevado at the dispatch window which occurred after the first strike and after drivers presented the petition to Vice President Zea. Osoy testified as follows

Q. This conversation with Marlo at dispatch, who spoke first, and what was said?
A. Marlo spoke first.
Q. What did he say?
A. He said, oh, you are one of the ones that is on strike outside?
Q. And what did you say?
A. I told him, all of this is your fault because you have always, always given me poor work.
Q. And what did he say in response, if anything?
A. Oh, is that the problem? If it's because of that then I can start giving you good work starting today.
Q. What else did he say?
A. But you have to get out of that.
Q. Did he say what he meant by "that"?
A. From the Union.
Q. And did you respond?
What did you say?
A. And I said do we have to come to this where we are demonstrating for you to listen to me?
Q. And what else was said during this conversation?
A. He said that's not a problem. I will give you good work. Just get out of the Union.
Q. How long did this conversation last?
A. From five to ten minutes.
Q. Was there anyone else around during this conversation?
A. No.
Q. After this conversation, did Marlo give you better work?
A. Two weeks after, he began to give me good work.

He also testified he had a second conversation in which Quevado complained about him not abandoning the Union as follows:

Q. You said you had a second conversation with Marlo; is that correct?
A. Yes.
Q. And where did this conversation take place?
A. Where he does the dispatch.
Q. And what was said during this conversation?
A. He said he kept seeing me wearing the vest, that I was not listening.
Q. And did you respond? What did you say?
A. I said what's done is done. I cannot leave this now.
Q. And did he respond?
A. He just put his head down moving it from everywhere. (Tr. 203-208).

He further testified as follows:

Q. Do you remember Marlo making any comment about your family during that conversation?
A. Yes.
Q. What did he say about your family?
A. He told me, do you know what you're getting yourself into? The company is a millionaire company. You're not going to win. You have family. What are you going to support them with? (Tr. 266.)

Applying the *Rossmore House* factors, I find that Quevado unlawfully interrogated Osoy in violation of the Act. As noted previously, regarding Quevado's Interrogation of Portillo, Quevado was a dispatcher who could control the amount and type of work given to drivers, the conversation took place at the dispatch window, there was no valid reason shown for his requesting the information he sought and there were promises of benefits if he abandoned the Union interwoven within the conversation. Under the totality of the circumstances, I find this type of questioning would tend to coerce employees in the exercise of their Section 7 rights. The promise of benefits in exchange for abandoning the Union in and of itself is inherently coercive and supports a finding of a violation standing alone. See *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964). So too, I find that the inherent threat of job loss which comes across loud and clear when Quevado told Osoy, "You have family. What are you going to support them with?" violated the Act. See *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). See also *National Steel Supply Inc*., 344 NLRB 973 (2005), (threats of job loss unlawful). It is important to note that in finding both Osoy and Portillo's versions of these conversations credible, I note the distinct similarities between the nature of the interrogation and the types of threats which were implied especially the references directed to each being unable to provide support for their families' economic wellbeing if they supported the union.

(2) Surveillance

The test for determining whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee reasonably could conclude from the statement in question that his or her protected activities are being monitored. *Mountaineer Steel, Inc*., 326 NLRB 787 (1998), enfd. 8 Fed.Appx. 180 (4th Cir. 2001), see also, *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1276 (2005). The Board's view is that an employer "creates the impression of surveillance when it monitors employees' protected concerted activity in a manner that is "out of the ordinary" even if the activity is conducted openly noting that, "employees should not have to fear that "members of management are peering over their shoulders" taking note of their concerted activities. *Conley Trucking*, 349 NLRB 308 (2007).

(a) Allegations Regarding Safety Assistant Rosas

General Counsel asserts that Safety Assistant Rosas created the impression of surveillance, on May 3, 2016, by allegedly telling Osoy to "be careful" because IBT was recording the drivers and listening to them. General Counsel also suggests that Rosas not only told Osoy to "be careful" but also informed drivers who wore union safety vests that they would be terminated. (GC Br. 170 fn. 157). If true, the allegations surrounding safety assistant Rosas' alleged actions could unlawfully create the impression of surveillance. However, the entire allegation rests upon whether I credit the testimony of Rosas. For her part, Rosas denied ever making the statements like those attributed to her. When asked directly she testified:

> Q. Okay. Have you ever informed any of the drivers to be careful because IBT is watching and recording everything they say and do?
> A. No.
> Q Have you ever informed the drivers that IBT was aware of which of them were filing legal actions against the company?
> A. No.
> Q. Have you ever told any contractor that IBT was recording them?
> A. No.
> Q. Have you ever told any driver that IBT would get rid of them if they engaged in any activities on behalf of the Union?
> A. No.
> Q. Have you ever told any of the drivers to watch out because IBT was going to get them?
> A. No.
> Q. Anything like those statements?
> A. No. (Tr. 3445).

I credit the testimony of Rosas regarding this particular issue. At trial, she appeared to testify in an honest and truthful manner. The picture painted of Rosas in the complaint as threatening union supporters with surveillance and termination simply didn't correspond to the person who testified at trial. The overall testimony and demeanor of Rosas suggested that she was in fact navigating the difficult terrain of remaining cordial with all employees knowing that there was some discord between those who were union supporters and those who were not. Evidence of this is found in her response to Osoy when he advised her that the union was "filing against IBT" and she responded, "well what do you want me to do or what do you want me to say." (Tr. 3462.) Rosas could very well have on the spot threatened Osoy. Instead, her response is couched in some degree of neutrality and recognition of her limited authority as a lower level safety official. Rosas testified that she didn't engage in the conduct attributed to her and I believe her. Assuming for the sake of argument that she told Osoy to "be careful" as alleged by the General Counsel, this in and of itself is not persuasive. More to the point, General Counsel neglects that Rosas is a safety official. I find that a safety official's suggestion to a driver to "be careful" without other convincing evidence is insufficient to establish improper surveillance or threats. Accordingly, I find that Rosas did not monitor employees' protected concerted activity in a manner that is "out of the ordinary" and therefore find that these allegations are not supported by the evidence of record and Respondent did not violate the Act as far as these allegations are concerned.

(b) Termination/Suspension of Osoy

The factual background surrounding the termination suspension allegations are straight forward. Driver Molina credibly testified that on May 25, 2016, Osoy, an open union supporter, challenged him to a fight calling for Molina to step outside the gate to fight him after a dispute arose about the distribution of safety vests. Osoy also challenged other drivers to step outside the gate to "kick the mother out of each other" and telling them in Spanish "let's go outside you sons of whores." (Tr. 2815, 2816, 2834.) Osoy in his testimony admitted inviting Molina outside the gate and admitted he asked the guard to open the gate and inviting other drivers outside also. (GC Exh. 6 p. 3.) Molina reported the incident and IBT put Osoy on "hold" while IBT investigated. (Tr. 2352.) Vice President Zea thereafter instructed that Osoy be escorted out by security the following day. On May 26, 2016, Bradley advised dispatchers that Osoy would not be welcome at IBT until further notice. Bradley later summoned Osoy to his office and advised him that he would be taken out of service and presented him with a letter advising him of such. (Jt. Exh. 1 (e), Tr. 1916.) He was thereafter escorted out by security officers. Other drivers subsequently met with Bradley to plead Osoy's case and suggested that Molina should also have been placed out of service. (Tr. 1937.) IBT thereafter distributed a memo to drivers which reassured drivers that "IBT will take every legal step available to ensure the safety of all individuals on IBT's premises." (Jt. Exh. 1 (f).) Osoy, with the assistance of the Union, drafted an email which chronicled his dissatisfaction with being taken out of service and included his version of the events. He sent this email to IBT officials. (GC Exh. 6.) After IBT received the email, Osoy was invited to meet with Bradley. Osoy met with Bradley and he was given a letter placing him back into service. The letter stated in pertinent part, "through our investigation, it has become clear that you challenged Mr. Molina and others to a fight. That being said, our investigation and the passage of time has led us to believe that the immediate safety threat has dissipated substantially and is seemingly unlikely to recur. As such, to the extent you refrain from challenging others to a physical confrontation, no matter what the circumstances, you are free to resume providing services to IBT

effective immediately." (Jt. Exh. 1 (g).) Osoy thereafter resumed working for IBT.

In order to determine whether an adverse employment action was effected for prohibited reasons, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management. Corp*., 462 U.S. 393 (1983).

To establish an unlawful discipline under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activities. *Wright Line,* 251 NLRB at 1089; *Septix Waste, Inc*., 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004).

Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.,* 316 NLRB 771 (1995); *Manno Electric, Inc.,* 321 NLRB at 280 fn. 12. In applying *Wright Line* the Board has cautioned that, "a judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken [cannot be] a substitute for evidence that the employer would have relied on this reason alone." *Ingramo Enterprise*, 351 NLRB 1337, 13380 fn. 10 (2007), review denied 310 Fed.Appx. 452 (2d Cir. 2009). The Board has also reminded that "[a]n employer has the right to determine when discipline is warranted and in what form . . . . The Board's role is only to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts*." Cast-Matic Corp*., 350 NLRB 1349, 1358–1359 (2007).

Applying the law to the facts of the case, I find that the General Counsel has established a prima facie case. Charging Party engaged in protected and concerted activity when he engaged in strikes, wore and distributed safety vests with the Union logo, and spoke with his coworkers. See *Chromalloy Gas Turbine Co*., 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184, 190 (2d. Cir. 2001). See also, *Worldmark by Windham*, 356 NLRB at 765. Thus, I find that the first element of the prima facie case has been met.

The second element of the prima facie case is also met as it is undisputed that the Employer was aware of Osoy's Union activity. Osoy did not conceal his Union activity and in fact he appeared in a Los Angeles business journal story about Union activity wearing a shirt with a union logo. (GC Exh. 5.) He also openly supported the union wearing a safety vest with a union logo.

The third element of the prima facie case is also met as the discipline took place within a time frame in which improper motives can be inferred. Osoy's discipline was set in motion presumably over disagreement between him and another during a time when he was actively engaged in union activity voicing his displeasure with another regarding the distribution of safety vests that didn't contain a union logo. I find the timing of the discipline sufficient to support an inference of animus. See *Sawyer of Napa*, 300 NLRB 131 (1990), *Olathe Health Care Center,* 314 NLRB 54 (1994), *Daniel Construction Co*., 264 NLRB 569 (1982), enfd. 731 F.2d 191 (2d. Cir. 1984).

Having concluded that the General Counsel satisfied his initial burden under *Wright Line*, the burden shifts to the Respondent to prove, as an affirmative defense, that it would have disciplined Osoy even in the absence of his protected activities. This burden may not be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon for the discharge. Rather, as the Board has consistently held, a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 637 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB,* 498 Fed.Appx. 45 (D.C. Cir. 2012). Further, an employer does not carry its *Wright Line* burden merely by asserting a legitimate reason for an adverse action, where the evidence shows it was not the real reason and that protected activity was the actual motivation. *T&J Trucking Co*., 316 NLRB 771, 771–773 (1995), enf. mem. sub nom*. NLRB v. T&J Container Systems*, 86 F.3d 1146 (1st Cir. 1996); *Stevens Creek*, supra at 637; *Metropolitan Transportation Services*, 351 NLRB 657, 659–660 (2007).

Applying these principles, I find that the Respondent satisfied its burden under *Wright Line*. In particular, Respondent contends it took actions to temporarily place Osoy out of service for 3 days in order to investigate the allegations that in fact he threatened physical violence against another driver. Respondent's position is supported by the credible testimony of Molina, the driver who was on the receiving end of the threats. I am not persuaded by General Counsel's assertion that IBT did not conduct a meaningful investigation nor that Respondent had "no plausible rationale" for its action concerning Osoy. These assertions fall flat in view of the totality of the evidence that Osoy was allowed to return in 3 days after IBT had time to investigate and consider information provided by Osoy himself and by Osoy's own admissions which corroborate the basis upon which Respondent's says its actions were predicated. (GC Exh. 6.) I therefore find that Respondent did not violate Section (8)(a)(3) as it relates to these allegations.

(c) 8(a)(4) violation for termination of Osoy

The General Counsel also alleged that Respondent violated Section (8)(a)(4) by temporarily placing Osoy off duty for 3 days. The same *Wright Line* analysis set forth above applies to violations of Section (8)(a)(4). I therefore find that the above

rationale applies equally to the (8)(a)(4) allegations and find that Respondent did not violate Section (8)(a)(4).

CONCLUSIONS OF LAW

1. The Respondent Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Misclassifying employees as independent contractors.

(b) Vice President Zea interrogating drivers by polling drivers to ascertain who supported the Union.

(c) Vice President Zea expressing futility of the union organizing campaign.

(d) Vice President Zea threatening drivers with unspecified reprisals and suggesting that they leave the Company.

(e) Dispatcher Quevedo interrogating Jose Portillo about his support for the Union.

(f) Dispatcher Quevedo threatening Jose Portillo with unspecified reprisals.

(g) Dispatcher Quevedo threatening Jose Portillo with company closure.

(h) Dispatcher Quevedo interrogating driver Eddie Osoy.

(i) Dispatcher Quevedo promising Eddie Osoy better work for abandoning his union support.

(j) Dispatcher Quevedo threatening employees with unspecified reprisals if they support the Union.

2. The Respondent Company did not otherwise violate the Act as alleged in the consolidated complaint.

REMEDY

The appropriate remedy for the 8(a)(1) violations found is an order requiring the Company to cease and desist from such conduct and to take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Company shall cease and desist from misclassifying its employees and take all affirmative acts necessary to make employees whole for any losses of earnings and other benefits including reimbursement for consequential harm as a result of their unlawful misclassification.

The company shall cease and desist from interrogating drivers by polling drivers to ascertain who supported the Union, expressing futility of the union organizing campaign, threatening drivers with unspecified reprisals and suggesting that they leave the Company interrogating drivers about their support for the Union, threatening drivers with company closure, promising drivers better work for abandoning union support.

Consistent with Board policy and precedent, the Company will also be required to post a notice to employees, in both English and Spanish, stating that it will not continue to engage in the same or any like or related unlawful conduct and that it will affirmatively remedy its unlawful conduct as ordered. See *Nickey Chevrolet Sales, Inc.*, 142 NLRB 23 (1963).

I also find that a special remedy is appropriate. Specifically, I shall order Vice President Zea or, if he chooses, a Board agent in his presence, to read the remedial notice aloud to the employees, at one or more mandatory meetings scheduled during working time to ensure the widest possible attendance a Spanish-language interpreter, must be present as well to translate the reading for employees who are not fluent in both English and Spanish. I find that this special remedy is appropriate under Board precedent given the severity of unfair labor practices committed by the Company's highest ranking local official (vice president) and a dispatcher (agent) who controls the assignments of drivers.

Accordingly, based on the above findings of fact and conclusions of law and the entire record, I issue the following recommended[17]

ORDER

The Respondent, IBT, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Misclassifying employees as independent contractors.

(b) Interrogating drivers by polling drivers to ascertain who supported the Union.

(c) Expressing futility of the union organizing campaign.

(d) Threatening drivers with unspecified reprisals and suggesting that they leave the Company.

(e) Interrogating employees about their support for the Union.

(f) Threatening employees with unspecified reprisals for supporting the Union.

(g) Threatening employees with company closure.

(h) Promising employees better work for abandoning their union support.

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

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

(a) Within 14 days from the date of the Board's order, take all appropriate actions to correct the misclassification including the rescission, in writing, of any company documents that purport to classify employees as independent contractors.

(b) Make employees whole for any loss of earnings and other benefits suffered as a result of the misclassification in the manner set forth in the remedy section of the decision.

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

(d) Within 14 days after service by the Region, post at its facility in Wilmington, California, copies of the attached notice marked "Appendix"[18] in both English and Spanish. Copies of the

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

[18] In addition to physical posting of the paper English/Spanish If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United

notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The notice shall be distributed to the employees, with one of their weekly pay or settlement checks. The notice shall also be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 2015, including all lease drivers.

(e) Within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance by employees, including both company drivers and lease drivers, at which the attached notice will be read aloud by the Ozzie Zea Respondent's vice president or, at the Respondent's option, by a Board agent in Zea's presence, with translation provided by a Spanish-language interpreter for employees who are not fluent in both Spanish and English.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 28, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT misclassify employees as independent contractors.

WE WILL NOT interrogate drivers by polling drivers to ascertain who supported the Union.

WE WILL NOT express futility of the union organizing campaign.

WE WILL NOT threaten drivers with unspecified reprisals and suggest that they leave the Company if they support the Union.

WE WILL NOT interrogate employees about their support for the Union.

WE WILL NOT threaten employees with unspecified reprisals for supporting the Union.

WE WILL NOT threaten employees with company closure.

WE WILL NOT promise employees better work for abandoning their union.

WE WILL NOT threaten employees with job loss and/or company closure if they support the union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, take all actions to properly classify the workers as employees and rescind, in writing, any company documents that purport to classify them as independent contractors. WE WILL make employees whole for any losses suffered as a result of the misclassification including any consequential damages they may have incurred.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-177303 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

States Court of Appeals Enforcing an Order of the National Labor Relations Board."