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June 2, 2020

Via Federal Express

Clerk of Court
United Stats Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
One Courthouse Way
Boston, MA 02210

Re: International Shipping Agency Inc.; Marine Terminal Services Inc.; and Truck Tech Services, Inc. Vs. National Labor Relations Board

Dear Clerk:

Enclosed for filing please find the following:

1. An original and 4 copies of Petitioners International Shipping Agency Inc., Marine Terminal Services Inc. and Truck Tech Services Inc.'s Petition for Review (including 1 copy for service upon Respondent);

2. An original and 3 copies of the Petitioners' Corporate Disclosure Statement;

3. An original and 3 copies of Antonio Cuevas-Delgado's Notice of Appearance; and

We will pay the filing fee online after the case has been docketed. Thank you for your attention to this matter.

Very truly yours,

Antonio Cuevas Delgado

Enclosures

416 Escorial Avenue | Caparra Heights | San Juan, Puerto Rico 00920•3514
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No. _____

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INTERNATIONAL SHIPPING AGENCY, INC.; MARINE TERMINAL SERVICES, INC. and TRUCK TECH SERVICES, INC.

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR REVIEW

Pursuant to Fed. R. App. P. 15(a)(1) and 29 U.S.C. § 160(f), International Shipping Agency, Inc., Marine Terminal Services, Inc., and Truck Tech Services Inc. ("Petitioners") hereby petition the Court for the review of the Decision and Order of the National Labor Relations Board (the "Board") in Cases No. 24-CA-091723, 24-CA-104185, 12-CA-129846, 12-CA-133042, 12-CA-135453, 12-CA-135704, 12-CA-136480, 12-CA-142493, 12-CA-143597, and 12-CA-144073, entered on May 20, 2020 as 369 NLRB No. 79 (2020). A copy of the Decision and Order is attached hereto as Exhibit 1.

Respondent respectfully request that the Court reverse the Board's conclusions and decisions that Respondents violated Sections 8(a)(1), 8(a)(3) and

8(a)(5) of the National Labor Relations Act and deny enforcement of the Board's Order.

Respectfully submitted,

INTERNATIONAL SHIPPING AGENCY, INC., MARINE TERMINAL SERVICES, INC., and TRUCK TECH SERVICES INC.

By their attorneys,

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Dated: June 2, 2020

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. 25(d), I hereby certify that on June 3, 2020 I served a copy of the foregoing document upon the following persons by electronic mail:

William Marrero, Esq.
wmq@wmarrerolaw.com
Counsel for the Charging Party

I also certify that I served a copy of the foregoing document upon the Clerk of the Court on June 3, 2020 for service upon the National Labor Relations Board as follows:

Peter B. Robb, General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

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Exhibit 1

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

International Shipping Agency, Inc., Marine Terminal Services, Inc., and Truck Tech Services, Inc., a single employer *and* Union De Empleados De Muelles (UDEM), ILA 1901, AFL–CIO. Cases 24–CA–091723, 24–CA–104185, 12–CA–129846, 12–CA–133042, 12–CA–135453, 12–CA–135704, 12–CA–136480, 12–CA–142493, 12–CA–143597, and 12–CA–144073

May 20, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On March 30, 2016, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, to amend the remedy, and to adopt the judge's recommended Order as modified and set forth in full below.[2]

I. BACKGROUND

The International Shipping Agency, Inc. (Intership) is a stevedoring company located in Bayamon, Puerto Rico. It handles and warehouses stevedoring freight for various clients, including Trailer Bridge, Inc. (Trailer Bridge). Intership has a long bargaining history with Union de Empleados de Muelles, Local 1901, AFL–CIO (the Union), which represents a unit of approximately 60 Intership employees at its Bayamon stevedoring and marine terminal. Intership's top management includes President David Segarra and Chief Financial Officer Maria Caraballo-Gaud (Caraballo), who held the same positions for wholly-owned subsidiaries Marine Terminal Services, Inc. (MTS) and Truck Tech Services, Inc. (TTS). MTS repaired and refurbished containers that hold freight, chassis upon which containers are placed for transport, and refrigerated containers. TTS repaired stevedoring equipment and vehicles. Luiz Ruiz was MTS's general manager. Enrique Ivan Sosa was TTS's general manager. The judge found that, while MTS and TTS also served some outside clients, they mainly served Intership. On October 19, 2012, Intership closed MTS and discharged all of its employees. On April 26, 2013, Intership closed TTS and discharged all of its employees. Most of the complaint allegations in this case relate to those closures and discharges.

In the absence of exceptions, we adopt a number of the judge's findings. Specifically, we adopt the judge's findings that Intership, MTS, and TTS constituted a single employer; that the Respondent violated Section 8(a)(1) of the Act by interrogating employees on several occasions, by repeatedly threatening employees with discharge, job loss, and plant closure in the event of unionization, by soliciting employees to vote against the Union, by creating an impression that employees' union activity was under surveillance, and by surveilling employees' union activity on several occasions; and that the Respondent violated Section 8(a)(5) by unilaterally changing its procedure for distributing Intership unit employees' vacation checks.[3]

With respect to issues contested before us, we agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(1) when two supervisors grabbed and pushed an employee because of his protected activity.

[1] The Respondent has implicitly 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.

[2] We have amended the judge's conclusions of law consistent with our findings herein. In addition, we have amended the judge's remedy consistent with our legal conclusions, to provide for tax compensation in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and Social Security reporting consistent with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), to provide for search-for-work and interim employment expenses consistent with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), and to require that the notice be posted in English and Spanish and read aloud to employees in both languages. We shall modify the judge's recommended Order to conform to the Board's findings and standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

[3] Regarding the Respondent's change in the vacation check distribution system, the judge found, and the General Counsel does not dispute, that it is unnecessary to order make-whole relief because there is no evidence that employees suffered any monetary losses as a result of this change. Further, in the absence of exceptions, we adopt the judge's finding that it is unnecessary to pass on whether the Respondent's change to its vacation check distribution policy also violated Sec. 8(a)(3).

The complaint additionally alleges that the Respondent violated Sec. 8(a)(5) by assigning duties that had previously been performed by Intership unit welders to mechanics in the unit. Although the judge's analysis is somewhat unclear, it appears that he dismissed this allegation and, in the absence of exceptions, we adopt his dismissal.

In addition, and also for the reasons stated by the judge, we agree with his dismissals of allegations that the Respondent violated Section 8(a)(5) by changing Intership maintenance workers' hours and by changing its auto checker procedures.[4] Finally, for the reasons set forth below, we find, in agreement with the judge, that the Respondent violated Section 8(a)(3) and (1) by ceasing operations and discharging the employees at the MTS and TTS facilities,[5] but we find, contrary to the judge, that the Respondent also violated Section 8(a)(3) and (1) by suspending Intership union steward Efrain Gonzalez-Andino (Gonzalez).[6]

II. CLOSURE OF MTS AND TTS

A. Background

On September 20, 2012,[7] the Union filed a petition in Case 24–RC–089605 seeking to represent a unit of MTS employees. The judge found, and the Respondent does not contest, that in the month leading up to the ensuing Board election, the Respondent repeatedly violated Section 8(a)(1) by interrogating and threatening employees, soliciting antiunion votes, creating an impression that employees' union activity was under surveillance, and surveilling employees' union activity. Specifically, MTS General Manager Ruiz asked an employee if he had spoken to the Union, asked another employee whether he had heard any union rumors and would identify union supporters, and asked a third employee who among the employees supported the Union. Ruiz also told an employee that "if the Union ever came into MTS, the gates would close." Other employees credibly testified that Ruiz made similar threats to them. Another employee testified that Ruiz told several workers that if he learned who signed union cards, he would suspend them. Ruiz additionally solicited an employee to vote against the Union and told the employee to tell others to "side with the Company." Lastly, Ruiz told an employee that the Respondent would learn who signed authorization cards on behalf of the Union.

The Union won the election on October 17 by a vote of 11-2, and on October 19 the Respondent closed MTS. Intership and MTS President Segarra sent discharge letters to all the MTS employees stating that MTS had permanently closed as of October 19 and asserted that the closure was for financial reasons. Before the closure, MTS employees serviced Intership's chassis and equipment. Following the closure of MTS, Intership began having at least some of its chassis and equipment repaired by an outside company, and the Respondent sold MTS's equipment and leased the facility to a third party.

The judge found, and the Respondent does not contest, that after MTS's closure, the Respondent repeatedly violated Section 8(a)(1) by threatening TTS employees. Specifically, the judge found that TTS Operations Manager Ernesto Davila called TTS employees to a meeting and warned them that MTS closed because of the Union. Davila told the employees that MTS closed because "the employees became part of a union and that was not good for the [c]ompany's interests." Davila further threatened that "[I]f the [TTS] employees unionize[d], . . . what happened to MTS, the same thing [would happen] to them, they would be fired . . . ." The judge also credited testimony from several TTS employees that, between November 2012 and February 2013, TTS General Manager Sosa and TTS Special Projects Manager Noel Lopez Soto repeated these and similar threats to employees. In this regard, the judge found, and the Respondent does not contest, that the Respondent violated Section 8(a)(1) when these officials threatened that MTS closed because of the Union, TTS would also close if it unionized, and TTS employees would be out of a job if they unionized. The judge also credited the testimony of Darren Ryan Openhiemer (Ryan), a TTS supervisor at the time, that Sosa and Davila told him MTS closed because it unionized. Ryan related that he was convinced that TTS employees would unionize, and he recalled employees telling him that they were talking to the Union about organizing. He said that he relayed these discussions to Sosa in September in order to offer him a chance to remedy employees' concerns before the employees unionized. Ryan also said that in March 2013, Davila told him that he should tell employees that, if they also unionized, TTS would close and they would be fired.

[4] We understand the judge's analysis regarding the auto checker procedures to cover the complaint allegations that the Respondent violated Sec. 8(a)(5) by unilaterally changing its 8-hour pay guarantee for auto checkers and by unilaterally changing its policy of maintaining a designated auto checker. Although the General Counsel excepts to the judge's findings regarding the auto checker procedures, in his supporting brief the General Counsel makes arguments only as to the change to the 8-hour pay guarantee. For the reasons stated by the judge, we adopt his dismissal of the allegation covering the change to the 8-hour pay guarantee and, in the absence of exceptions, we adopt his dismissal of the allegation regarding the change to the designated auto checker policy.

[5] Because we find that the Respondent violated Sec. 8(a)(3) by discharging the MTS and TTS employees, we find it unnecessary to address the judge's findings that the discharges and closing of MTS violated Sec. 8(a)(5) as well. In concluding that the discharges of the MTS and TTS employees violated Sec. 8(a)(3), we do not find that the Respondent subcontracted all the work formerly performed by MTS and TTS. For the purposes of the discussion below, it is enough to find, as we do, that the record supports finding at least some of the work previously performed by MTS and TTS for Intership continued to be performed by third parties after the closures of MTS and TTS. The Respondent does not contest this.

[6] Member Emanuel disagrees with the majority on the sole issue of the majority's finding that the Respondent's suspension of Gonzalez violated the Act, as explained below.

[7] All dates are in 2012 unless otherwise noted.

On April 26, 2013, the Respondent closed TTS and discharged its employees. As with MTS, the Respondent stated that the decision to close TTS was for "financial reasons." Before the closing of TTS, the TTS employees serviced Intership's Kalmars equipment. Following the closure of TTS, the Respondent began having that equipment repaired by a third party. At the time of the hearing, the TTS facility was vacant and was being marketed for sale.

The judge, applying the analysis set forth 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), concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by closing MTS and TTS, discharging all of the MTS and TTS employees, and subcontracting the functions previously performed by MTS and TTS to outside companies. With respect to both MTS and TTS, the judge found that the General Counsel met his initial burden of proving that the Respondent's actions in connection with the closures of MTS and TTS were discriminatorily motivated by employees' protected union activity. Turning to the Respondent's defense burden, the judge addressed the Respondent's assertion that the decisions to close MTS and TTS and to discharge the employees were based on the Respondent's financial problems and coincided with loss-of-business events that allegedly meant Intership could no longer continue to afford absorbing the cost of its subsidiaries' losses. The judge credited the testimony of the Respondent's officials, supported by substantial documentary evidence, regarding poor fiscal performance and ongoing losses for all three companies, but he discredited their testimony about Intership's financial rationale for closing MTS and TTS when it did. He found this testimony "unpersuasive," largely because MTS and TTS had been accumulating losses that Intership had covered for some time, and the Respondent did not close MTS and TTS until the employees decided to unionize (in the case of MTS) or were considering unionization (in the case of TTS).[8]

We agree with the judge that *Wright Line* is the applicable standard for assessing the lawfulness of the closures of MTS and TTS and that the Respondent's actions in connection with those closures violated Section 8(a)(3). In response to arguments made in the Respondent's exceptions, we clarify below our basis for these findings.

B. MTS's Closure

In exceptions, the Respondent initially contends that the judge erred in analyzing this closure under *Wright Line*. In the Respondent's view, the action complained of here amounts to a plant closure and must be assessed under *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). Under that case, an employer may terminate its *entire* business for any reason it pleases—even antiunion animus—without violating the Act, and the *partial* closing of a business violates Section 8(a)(3) only if (i) it is motivated by a purpose to chill unionism in any of the employer's remaining plants, and (ii) the employer reasonably might have foreseen that the partial closing would likely have that effect. See id. at 273–275. The *Darlington* analysis does not apply, however, to cases in which the employer's action is less than a partial closing. "Both discriminatory relocation of work—the 'runaway shop' gambit—and discriminatory subcontracting were explicitly distinguished from partial closings in *Darlington*, and have been found consistently to violate Section 8(a)(3) when motivated by antiunion animus." *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989).

Consistent with *Darlington* itself and Board precedent, we find that the *Darlington* analysis does not apply here because the MTS closure was not a partial closing.[9] To the contrary, the record shows that at least some of the work MTS employees had performed for Intership continued to be performed by a third party following the closure. The facts of this case are similar to those present in *Monongahela Steel Co.*, 265 NLRB 262 (1982). There, Monongahela Steel and Youngstown Steel constituted a single employer enterprise, and Monongahela Steel acted as a supplier for Youngstown Steel. In response to the Monongahela employees' unionization efforts, the respondent closed Monongahela Steel and began acquiring the materials previously supplied by Monongahela to Youngstown Steel from an outside source. The Board found that this action was "analogous" to the situations outlined by the Supreme Court "'where a department is closed for antiunion reasons but the work is continued by independent contractors.'" Id. at 270 (quoting *Darlington*, supra at 272–273 & fn. 16). We find that the same result is warranted here. Intership and MTS, along with TTS, constituted a single employer enterprise. Prior to the closure of MTS, the MTS employees serviced Intership's chassis and equipment. Following the closure of MTS,

[8] Although the judge did not specifically reference Caraballo's testimony that she recommended the closure of MTS upon notice on October 10 that Intership would no longer be providing services to client Mediterranean Shipping Company (MSC), it is implicit that he did not credit her testimony that this event caused MTS's closure 9 days later. Similarly, it is implicit that he also discredited testimony that the closure of TTS was precipitated by Intership's loss of a client shortly prior to that closure.

[9] Although the Respondent's exceptions do not specifically assert a *Darlington* defense for the closure of TTS, our rationale would apply as well to reject such a defense.

Intership still had a need for chassis repair and began having at least some of its chassis and equipment repaired by an outside party. Thus, contrary to the Respondent's assertions, the closure of MTS was akin to the departmental closures exempted from the reach of *Darlington* by the Supreme Court and, as a result, *Darlington* does not excuse the Respondent's actions in this case. Accordingly, *Wright Line* applies and the focus is on whether the General Counsel has proved that the Respondent's union animus motivated the closure of MTS and discharge of its employees, without inquiry into whether the closure was motivated by a desire to chill unionism among Intership or TTS employees and would foreseeably have that effect.[10]

In the alternative, the Respondent claims in exceptions that the judge erred in finding that it failed to meet its responsive burden under *Wright Line* of proving that it would have closed MTS when it did even in the absence of union activity.[11] The Respondent contends that it closed MTS for "financial reasons." As previously stated, the judge credited testimony from the Respondent's witnesses regarding the financial losses suffered by both MTS and Intership, but he discredited their testimony that Respondent relied solely on financial reasons when it decided to close MTS. We find no basis in the record for disturbing the judge's credibility findings. Contrary to the Respondent 's assertion, the judge adequately addressed and rejected the Respondent's claim that Intership could no longer afford to finance MTS's continuing losses. In assessing the Respondent's closure rationale, we do not question its assertions regarding MTS or Intership's financial problems or that such financial problems could have constituted a legitimate business reason for closing MTS at some point in time. However, it is well established that "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). Further, the Respondent's burden under *Wright Line* is to show "that it would have done what it did, when it did, in the absence of the [employees'] union activities." *We Can, Inc.*, 315 NLRB 170, 172 (1994). We agree with the judge that the Respondent has not met this burden.

To begin, the Respondent's extensive unlawful opposition towards the MTS employees' organizing campaign undermines its assertion that it closed MTS solely because of the Respondent's financial problems. Most notably, that misconduct included repeated threats that MTS would close if the MTS employees voted to unionize. Those threats were realized a mere two days after the Union won the election. Further, while the judge credited testimony, supported by documentary evidence, that both MTS and Intership were experiencing financial losses when MTS closed, he pointed out that MTS had been experiencing financial losses for years. He also noted that the Respondent failed to show that Intership saved any money by closing MTS. He therefore discredited the testimony of the Respondent's officials that they decided to close MTS when they did because Intership could no longer afford to finance its subsidiary's losses. This credibility resolution implicitly included rejecting Caraballo's claim that confirmation of Intership's loss of a client's business on October 10 motivated the decision to close MTS. Finally, it is impossible to reconcile the claims that financial distress motivated this closure with the many subsequent threats to TTS employees that MTS closed as a result of unionization.[12] In these circumstances, we find that the Respondent has failed to establish that it would have closed MTS at the time that it did even absent the employees' union activity.

C. TTS's Closure

With certain exceptions discussed below, the Respondent's closure of TTS largely mirrors its actions in connection with the closure of MTS. As a result, consistent with the discussion above regarding MTS, we find that the Respondent violated Section 8(a)(3) by closing TTS and discharging those employees. With respect to the General Counsel's initial burden under *Wright Line*, the judge found, and we agree, that the General Counsel met his burden of showing that the TTS employees' union activity was a motivating factor in the Respondent's closure of TTS and discharge of the TTS employees. The Respondent disputes this but does so only with respect to its contention that the General Counsel failed to prove that TTS employees were engaging in union activity or considering doing so, and that the Respondent had knowledge of such activity. In this regard, the judge relied on Ryan's credited testimony that TTS employees were discussing unionization and that Ryan told the Respondent's officials they were doing so. Although the Respondent purportedly

[10] We therefore do not need to address the General Counsel's argument in cross-exceptions that a violation should be found even under a *Darlington* analysis.

[11] The Respondent does not except to the judge's finding that the General Counsel met his initial *Wright Line* burden of proving that the MTS closing was motivated by union animus, as demonstrated by the numerous uncontested findings of unfair labor practices, notably including threats of plant closure.

[12] Inasmuch as the three companies are a single employer, the threats by TTS officials are attributable to Intership as well.

does not challenge the judge's credibility finding regarding Ryan, it contends that Ryan's testimony is outweighed by other record evidence indicating that the Union was not seeking to organize TTS employees.

We find no merit in this argument, which distorts the basis of the judge's finding. It is undisputed that the Union was not attempting to organize TTS employees. That fact does not contradict the credited testimony of Ryan that employees were discussing the possibility of unionization among themselves and that the Respondent's officials were aware of and concerned about potential organizing. Further, it is undisputed, as the judge found, that between November 2012 and February 2013, Davila, Lopez, and Sosa repeatedly told TTS employees that (1) MTS closed because of the Union, and (2) if TTS unionized, it would close as well. There is no apparent reason why these threats would be made if the Respondent did not harbor a concern about unionization efforts by TTS employees. Moreover, although the Union was not seeking to organize TTS employees as a separate unit, it was protesting that certain TTS employees were performing what should have been Intership bargaining unit work, and at one time in early 2013 it proposed that these employees become part of the existing bargaining unit.

In sum, the evidence is more than sufficient to meet the General Counsel's initial burden of proving the Respondent's knowledge or belief that TTS employees were involved in union activities.[13] Accordingly, we reject the Respondent's argument that the General Counsel failed to meet his initial *Wright Line* burden of proof. In exceptions summarily challenging the judge's rejection of its *Wright Line* defense, the Respondent asserts, as it did with the MTS closure, that it closed TTS for financial reasons. For the same reasons as set forth above, however, we find that the Respondent failed to meet its burden of proving that it actually would have closed TTS when it did even absent the employees' union activity. It relies on discredited testimony that in any event fails to persuade that the timing of the closure was motivated solely by financial considerations, particularly Intership's additional loss of business proximate to the closure. Particularly in light of the TTS officials' repeated unlawful threats of plant closure made in early 2013, we agree with the judge that the Respondent has failed to persuade that it would have closed TTS when it did even in the absence of known and suspected union activities and the Union's bargaining unit work claims.

III. GONZALEZ' SUSPENSION

On May 30, 2014, Efrain Gonzalez-Andino (Gonzalez), an Intership employee and a union steward, observed Reynaldo Ortega Jimenez (Ortega), a manager for Trailer Bridge, one of Intership's clients, performing bargaining unit work. In his role as shop steward, Gonzalez approached Ortega and inquired about the work Ortega was performing. After first ignoring Gonzalez, Ortega responded with profanity, and Gonzalez replied with profanity as well. As a result of this interaction, Gonzalez received a 3-day suspension. On July 9, 2014, Jose Garcia Ortiz (Garcia), Intership's vice president of terminal operations, issued a memo upholding the suspension. In the memo, the Respondent cited (1) Gonzalez' violation of its client interaction rule, which prohibits employees from interacting with clients and instructs them that any allegation or claim emerging from a work area must be addressed directly to Intership management, and (2) his use of profanity toward a client's manager.

Applying *Wright Line*, supra, the judge dismissed the allegation that the Respondent's suspension of Gonzalez violated Section 8(a)(3). In so doing, the judge found that the General Counsel met his initial burden of showing that Gonzalez' discipline was motivated by his union activity. The judge found, however, that the Respondent met its defense burden of proving that it would have suspended Gonzalez even absent his union steward status because he violated the Respondent's rule prohibiting client interaction and used profanity towards a client. For the reasons set forth below, we find merit in the General Counsel's exceptions contending that the judge erred in finding that the Respondent met its *Wright Line* burden.[14]

We acknowledge that Gonzalez violated the Respondent's no-client-contact rule, but that fact does not dictate a finding that the Respondent sustained its *Wright Line* defense burden. As the Board long ago stated, "employees engaged in [protected] concerted activity generally do not lose the protective mantle of the Act simply because their activity contravenes an employer's rules or policies."[15] And as the Board recently explained in *Boeing*, "an

[13] Contrary to the Respondent's argument in exceptions, proof of an employer's belief that its employees are engaged in protected activities, as opposed to proof of knowledge that they actually are so engaged, is sufficient to meet the *Wright Line* burden. See, e.g., *Hyundai Motor Mfg., Alabama, LLC*, 366 NLRB No. 166, slip op. at 2 fn. 7 (2018) ("Applying *Wright Line*, we reach the same conclusion that the Respondent unlawfully discharged the employees because it believed they engaged in protected concerted activity.").

[14] In exceptions, the General Counsel argues that the judge erred by failing to find that the Respondent did not meet its *Wright Line* defense burden. He also argues that the judge erred by failing to apply *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), to determine the lawfulness of Gonzalez' suspension. We agree with the judge that *Wright Line* is the proper framework for determining whether the Respondent violated Sec. 8(a)(3) by suspending Gonzalez.

[15] *Louisiana Council No. 17, AFSCME, AFL–CIO*, 250 NLRB 880, 882 (1980); see also *Valley Hospital Medical Center*, 351 NLRB 1250, 1254 (2007), enfd. 358 Fed.Appx. 783 (9th Cir. 2009).

employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, even though the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct." 365 NLRB No. 154, slip op. at 16.[16] Here, we recognize that the Respondent's client contact rule serves a legitimate purpose. Further, it could be the basis for disciplining Gonzalez if his contact with Ortega did not involve Section 7 activity. However, the Respondent relied on a facially valid client interaction rule to discipline Gonzalez for engaging in a steward's protected union activity of policing the parties' agreement to ensure that bargaining unit work was being performed by unit employees. Contrary to the judge's analysis, discrimination against this protected activity, not against Gonzalez' status as a union steward, is at issue here. In these circumstances, Gonzalez' purported violation of the client interaction rule cannot stand as a lawful, legitimate reason for his suspension.[17]

The only remaining justification proffered for Gonzalez' discipline is his use of profanity. While we do not condone Gonzalez' use of profanity toward a client, we observe that the Respondent does not argue it would have disciplined Gonzalez for the profanity alone. Rather, the Respondent emphasizes that "the record as a whole shows that the disciplinary action was taken because Mr. Gonzalez ignored a longstanding work-rule sanctioned by the Union." We thus find, on the facts of this case, that the Respondent has failed to prove that it would have suspended Gonzalez for his use of profanity even absent his protected activity. See, e.g., *Oakes Machine Corp.*, 288 NLRB 456, 458 (1988) (where both lawful and unlawful grounds motivated respondent, respondent could not prevail under *Wright Line* without showing that the lawful reason alone would have prompted its actions), enf. granted in part, denied in part on other grounds 897 F.2d 84 (2d Cir. 1990).[18] Accordingly, we find that the Respondent's suspension of Gonzalez violated Section 8(a)(3).[19]

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[16] There is no allegation that the Respondent violated Sec. 8(a)(1) by maintaining the client interaction rule.

[17] Notwithstanding Gonzalez' protected activity, our dissenting colleague finds that the Respondent was justified in disciplining Gonzalez for violating the client interaction rule, just as it would have done with any other employee who violated the rule. Even assuming our colleague is correct that the Respondent could have satisfied its *Wright Line* defense burden by showing that Gonzalez' 3-day suspension was consistent with discipline issued to other employees for violations of the client interaction rule that did not involve protected activity, we find that the Respondent failed to make such a showing here. Garcia's credited testimony, relied on by our colleague, that there were no exceptions to the Respondent's client interaction rule does not establish that the Respondent proved it would have imposed the same discipline in the absence of his protected union activity. The Respondent has not shown either that the rule itself mandated suspension as punishment for infractions of the rule or that it consistently suspended employees who violated the rule. The judge's opinion that the suspension was "reasonable in magnitude" cannot substitute for such proof. Our dissenting colleague is mistaken to the extent he suggests that the General Counsel bears the burden of proving disparate treatment even if he has otherwise met the initial *Wright Line* burden. Further, the judge erred in finding that a letter from the Union's president to Intership unit employees (GC Exh. 51) not only acknowledged the validity of the client contact rule but also "did not challenge its disciplinary reach." The letter made no mention of Gonzalez' suspension, and it is obvious from the charge filed by the Union on his behalf that it does challenge the disciplinary reach of the rule as a basis for suspending him. In these circumstances, we find, contrary to our colleague, that the Respondent has not met its burden of proving that it would have suspended Gonzalez for violating the no-client-contact rule even absent his protected activity.

[18] The circumstances leading to Gonzalez' suspension distinguish this case from *PAE Applied Technologies, LLC*, 367 NLRB No. 105 (2019), relied on by our dissenting colleague. There, employee and union officer Poulos engaged in protected union activity in a conversation with the respondent's manager, and then, after the protected exchange was over, accosted a customer in a rude and disrespectful manner. Id., slip op. at 4–5. The Board found that Poulos was lawfully disciplined for a confrontation with a customer that was "unprotected from the outset." Id., slip op. at 5 fn. 11. Here, in contrast, Gonzalez' encounter with a client was protected from the outset, as Gonzalez initiated the conversation in his role as union steward to police the collective-bargaining agreement. And although the encounter ended with an exchange of profanities, the Respondent does not contend that it would have suspended Gonzalez for that alone, as explained above. For these reasons, we find, contrary to our colleague, that *PAE* is distinguishable.

[19] Contrary to his colleagues, Member Emanuel would affirm the judge's conclusion that the Respondent did not violate Sec. 8(a)(3) and (1) by suspending Gonzalez. Even assuming that the General Counsel met his initial burden of demonstrating that Gonzalez' suspension was motivated by antiunion animus, the Respondent successfully rebutted that case by showing it would have disciplined Gonzalez in any event.

As the judge found, Gonzalez was disciplined for violating Respondent's widely known rule prohibiting employees working at the client's facility from bringing any work grievances directly to the client's supervisors (rather than the Respondent). The "no client contact" rule, the validity of which is challenged neither by the Union nor the majority, was designed to prevent conflicts precisely like the one that occurred between Gonzalez and his client's supervisor Ortega at the client's Trailer Bridge facility. Gonzalez compounded the violation by interacting with Ortega in a rude and vulgar manner. Ortega complained to Garcia, who investigated the incident and issued the suspension, which citied both the no-client-contact rule and the vulgar nature of Gonzalez' behavior. In Member Emanuel's view, the judge correctly concluded that the suspension was lawful. See *PAE Applied Technologies, LLC.*, 367 NLRB No. 105, slip op. at 5 (2019). ("When an employee acts irresponsibly towards a customer, particularly in violation of a work rule explicitly prohibiting 'serious improper behavior or discourtesy toward a Customer,' it is within the purview of the employer to discipline the employee for his or her inappropriate behavior.")

Member Emanuel also disagrees with the majority's assertion that the Respondent seized on the rule violation to punish Gonzalez for engaging in a steward's protected activity of policing the contract. While a union steward's ability to police the collective-bargaining agreement for potential violations is protected under the Act, "the Act is not a shield protecting employees from their own misconduct or insubordination." *Guardian Ambulance Service*, 228 NLRB 1127, 1131 (1977). Thus, the Respondent was entitled to discipline Gonzalez for directly and

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 7(a):

"a. Ceasing operations at the MTS facility and discharging the MTS employees because of the MTS employees' union or other protected activities."

2. Substitute the following for Conclusion of Law 7(b):

"b. Ceasing operations at the TTS facility and discharging the TTS employees because of the TTS employees' union or other protected activities."

3. Insert the following as Conclusion of Law 7(c):

"c. Suspending Efrain Gonzalez-Andino for his protected activity."

4. Omit Conclusion of Law 8(b).

AMENDED REMEDY

Regarding the Respondent's closures of MTS and TTS and the discharge of all the employees for discriminatory reasons, the Board's usual practice in such circumstances is to order a return to the status quo ante—that is, to require the employer to restore the operations as they existed before the discrimination, unless the employer can show that such a remedy would be unduly burdensome, and to reinstate the employees. See *We Can, Inc.*, 315 NLRB at 174 (citing *Lear Siegler, Inc.*, 295 NLRB at 861). The judge found, and we agree, that in the circumstances of this case, an order requiring the Respondent to reopen MTS and TTS would be unduly burdensome and thus not appropriate.

Accordingly, we find that the Respondent's unfair labor practices will be sufficiently remedied by a full make-whole order covering the employees of the closed operations. See *Purolator Armored, Inc.*, 268 NLRB 1268 (1984), enfd. 764 F.2d 1423 (11th Cir. 1985). We shall thus order the Respondent to make whole all MTS and TTS employees who were terminated as a result of the Respondent's discriminatory decisions to close those facilities. We shall require the Respondent to offer each of the discriminatorily terminated MTS and TTS employees reinstatement to any position in its existing operations that he or she is capable of filling, giving preference to the discriminatees in order of seniority. In the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, we shall require the Respondent to place those discriminatees for whom jobs are not now available on a preferential hiring list for any future vacancies that may occur in positions at any of the Respondent's operations in Puerto Rico that said discriminatees are capable of filling. See id. at 1269; see also *Real Foods Co.*, 350 NLRB 309, 315 (2007).

In addition, we shall order the Respondent to make whole affected employees for any loss of wages and other benefits they may have suffered as a result of the Respondent's decisions.[20] Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall also order Respondent to compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate the affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. We shall also order the Respondent to remove from its files any reference to the MTS and TTS employees' unlawful discharges and to notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

In addition, having found that the Respondent violated Section 8(a)(3) and (1) by suspending Efrain Gonzalez-

aggressively approaching the Respondent's client in violation of the workplace rule forbidding such interaction, just as it would have disciplined any other employee engaged in such misconduct. See, e.g., *Postal Service*, 350 NLRB 441, 445 (2007) (employee's misconduct while performing union steward duties "does not prevent the Respondent from taking the same action. . . that it would have taken toward any other employee committing similar insubordinate acts."). Further, there is no evidence that the Respondent applied the rule disparately to single out Gonzalez. When asked if there was any exception to rule forbidding direct client contact, Garcia, whom the judge credited, testified, "No. None, whatsoever." Finally, in policing the collective-bargaining agreement, Gonzalez certainly had other options available, including simply recording written notes on his observations at Trailer Bridge, and reporting this perceived violation directly to the Respondent. Accordingly, Member Emanuel would adopt the judge's dismissal of the 8(a)(3) violation regarding Gonzalez' allegedly unlawful suspension.

[20] We leave to the compliance stage of this proceeding the determination of which MTS and TTS employees are entitled to reinstatement and backpay. See, e.g., *Monongahela Steel*, supra, 265 NLRB at 262. At that time, the Respondent will have the opportunity to prove that any of the employees terminated as a result of the MTS or TTS closures would have been lawfully terminated subsequent to the discriminatory closures and discharges. See, e.g., *Intermet Stevensville*, 350 NLRB 1270, 1275 fn. 21 (2007) (allowing respondent to offer evidence at compliance stage to mitigate backpay if employees would have been lawfully laid off or reassigned).

Andino, we shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, we shall order the Respondent to compensate Efrain Gonzalez-Andino for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, supra. We shall also order the Respondent to remove from its files any reference to Efrain Gonzalez-Andino's unlawful suspension and to notify him in writing that this has been done and that the unlawful suspension will not be used against him in any way.

Further, consistent with the General Counsel's requests in his exceptions, we shall order the Respondent to post the notice in English and Spanish. The Board has held that bilingual notices are proper where a "majority" of employees primarily speak a language other than English. *Bergensons Property Services*, 338 NLRB 883, 883 (2003). Given that many of the witnesses at the hearing spoke Spanish and testified through an interpreter, we agree that a bilingual notice is proper. We also find merit in the General Counsel's exception to the judge's failure to order the Respondent to read the remedial notice aloud to employees. Although notice reading is an extraordinary remedy, we believe it is warranted here.

As we have found, the Respondent's officials unlawfully closed both MTS and TTS and discharged all employees working for those companies. They also unlawfully suspended a union steward and committed numerous violations of Section 8(a)(1), including repeated serious threats of plant closure and discharge by several of the Respondent's senior officials. Collectively, these unlawful actions demonstrate a widespread and serious corporate disdain of employees' Section 7 rights. In these circumstances, we find that a public reading of the remedial notice to employees is an "'effective but moderate way to let in a warming wind of information and, more important, reassurance'" to the bargaining unit employees that their rights under the Act will not be violated in the future. See *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), enfd. 107 F.3d 923 (D.C. Cir. 1997).

We shall accordingly order the Respondent to hold a meeting or meetings during working hours at its Bayamon, Puerto Rico facility, scheduled to ensure the widest possible attendance of employees, at which the appropriate notice is to be read to employees in English and in Spanish by a responsible management official of the Respondent in the presence of a Board agent and a union representative if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a high-ranking responsible management official and, if the Union so desires, a union representative. Further, in view of the fact that the Respondent's MTS and TTS facilities are closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former MTS and TTS employees in order to inform them of the outcome of this proceeding. Last, the judge found, no party excepts, and we agree that a broad cease-and-desist order should be issued.

ORDER

The National Labor Relations Board orders that the Respondents, International Shipping Agency, Inc., Marine Terminal Services, Inc., and Truck Tech Services, Inc., a single employer, Bayamon, Puerto Rico, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union or other protected concerted activities.

(b) Threatening employees with discharge if they engage in union or other protected concerted activities.

(c) Threatening employees with closure of their work facility if they engage in union or other protected concerted activities.

(d) Threatening employees with job loss if they engage in union or other protected concerted activities.

(e) Threatening employees with physical harm and/or physically touching them because of their union or other protected concerted activities.

(f) Soliciting employees to vote against the Union.

(g) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(h) Placing employees under surveillance while they engage in union or other protected concerted activities.

(i) Suspending employees because of their support for and activities on behalf of the Union.

(j) Ceasing operations at the MTS facility and terminating MTS employees because of their union or other protected concerted activities.

(k) Ceasing operations at the TTS facility and terminating TTS employees because of their union or other protected concerted activities.

(l) Unilaterally changing the vacation check distribution system at Intership.

(m) In any other 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) Make Efrain Gonzalez-Andino whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of this decision.

(b) Compensate Efrain Gonzalez-Andino for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Efrain Gonzalez-Andino, and within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

(d) Within 14 days from the date of this Order, offer all MTS and TTS employees who were terminated as a result of the closures of those facilities reinstatement to any position in its existing operations which he or she is capable of filling, giving preference to the discriminatees in order of seniority. In the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those discriminatees for whom jobs are not available on a preferential hiring list for future vacancies that may occur in positions located at any of the Respondent's operations in Puerto Rico that the discriminatees are capable of filling.

(e) Make whole all employees terminated as a result of the closures of MTS and TTS for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Compensate all employees terminated as a result of the MTS and TTS closures for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of affected MTS and TTS employees, and within 3 days thereafter, notify the employees in writing that this has been done and that their discharges will not be used against them in any way.

(h) Rescind the changes to its vacation check distribution that were unilaterally implemented in July 2014.

(i) Before making any further changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at its Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, supervisors, foremen, stevedores, guards and all other employees.

(j) 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 backpay due under the terms of this Order.

(k) Post at its Bayamon, Puerto Rico facility copies of the attached notice marked "Appendix" in both English and Spanish.[21] Copies of the notice, on forms provided by the Regional Director for Region 12, 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 Intership facility involved in these proceedings, it 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 September 1, 2012.

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

(l) Within 14 days after service by the Region, duplicate and mail, at its own expense, copies of the attached notice marked "Appendix" to the Union and to all MTS and TTS employees who were employed by MTS and TTS, respectively, at any time since September 1, 2012. Copies of the notice, on forms provided by the Regional Director for Region 12, shall bear the signature of the Respondent's authorized representative and shall be mailed to the last known address of each of the employees.

(m) Hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read in English and Spanish to all employees by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a responsible management official and, if the Union so desires, of an agent of the Union.[22]

(n) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. May 20, 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 coercively question you about your union or other protected concerted activities.

WE WILL NOT threaten you with discharge if you engage in union or other protected concerted activities.

WE WILL NOT threaten you with the closure of your work facility if you engage in union or other protected concerted activities.

WE WILL NOT threaten you with job loss if you engage in union or other protected concerted activities.

WE WILL NOT threaten you with physical harm or physically touch you because of your union or other protected concerted activities.

WE WILL NOT solicit you to vote against the Union.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT suspend any of you for engaging in union or other protected concerted activities.

WE WILL NOT cease operations at a facility and terminate those employees because of their union or other protected concerted activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

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

[22] If the Bayamon Intership facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted and read within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and read within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees at this facility by electronic means. This delay in notice requirements would not apply to the notice-mailing requirements for former MTS and TTS employees.

WE WILL make Efrain Gonzalez-Andino whole for any loss of earnings and other benefits suffered as a result of his suspension, plus interest.

WE WILL compensate Efrain Gonzalez-Andino for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Efrain Gonzalez-Andino, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer the employees terminated as a result of the discriminatory closures of MTS and TTS reinstatement to any position in our existing operations that he or she is capable of filling, giving preference to the discriminatees in order of seniority. WE WILL, in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those discriminatees for whom jobs are not available on a preferential hiring list for future vacancies that may occur in positions at any of our operations in Puerto Rico that the discriminatees are capable of filling.

WE WILL make all employees terminated as a result of the discriminatory closures of MTS and TTS whole for any loss of earnings and other benefits resulting from their unlawful terminations, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate all employees terminated as a result of the discriminatory closures of MTS and TTS for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the MTS and TTS employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL rescind the changes to the Intership vacation check distribution system that were unilaterally implemented in July 2014.

WE WILL, before making any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at its Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, supervisors, foremen, stevedores, guards and all other employees.

INTERNATIONAL SHIPPING AGENCY, INC., MARINE TERMINAL SERVICES, INC., AND TRUCK TECH SERVICES, INC., SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/24-CA-091723 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.

Isis M. Ramos-Melendez, Lilyvette Rodriguez-Soto, and *Manijee Ashrafi-Negroni, Esqs.*, for the General Counsel.

Antonio Cuevas-Delgado, Esq. and *Lisabel M. Rodriguez-Espinosa (Cuevas Kuinlam, Marquez & O'Neill),* for the Respondent.

Vanessa I. Marzan-Hernandez, Esq. (Schuster Aguilo, LLC) and *Elizabeth A. Alexander, Esq. (Marrinan & Mazzola Mardon, P.C.),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in San Juan, Puerto Rico, during the summer and fall of 2015. The three complaints alleged, inter alia, that the International Shipping Agency, Inc. (Intership), Marine Terminal Services, Inc. (MTS) and Truck Tech Services, Inc. (TTS) (collectively called the Respondent) were a single employer, and violated Section 8(a)(1), (3), and (5) of the National Labor

Relations Act (the Act).[1]

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Intership, a stevedoring corporation, is located in Bayamon, Puerto Rico. Annually, it purchases and receives goods exceeding $50,000 directly from points outside of Puerto Rico. MTS repaired marine chassis and containers at its Bayamon, Puerto Rico facility. During the 12-month period ending December 31, 2012, MTS purchased and received goods exceeding $50,000 directly from points outside of Puerto Rico. TTS repaired stevedoring vehicles and equipment at its Bayamon, Puerto Rico facility.[3] During the 12-month period ending December 31, 2012, TTS purchased and received goods exceeding $50,000 directly from points outside of Puerto Rico. Intership, MTS and TTS admit, and I find, that they are employers engaged in commerce, within the meaning of Section 2(2), (6),. and (7) of the Act. They also admit, and I find, that the Union is a labor organization, within the meaning of Section 2(5) of the Act

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

This case explores whether Intership, MTS and TTS, were a single employer. It also considers whether Intership's closure of MTS and TTS, and related actions, were legitimate business actions, or unlawful efforts designed to prevent unionization.

1. Intership

Intership handles and warehouses stevedoring freight.[4] Its main terminal is located at Pier M at the Bayamon docks. David Segarra is its President; Maria Caraballo-Gaud (Caraballo) is its Chief Financial Officer; Enrique Ivan Sosa-Perez (Sosa) is its Operations Supervisor; and Karen Figueroa is its Director of Human Resources. Intershi and the Union have alongstanding bargaining relationship, and the Union serves as the exclusive representative of the following unit (the Intership unit):[5]

> All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at its Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, supervisors, foremen, stevedores, guards and all other employees.

(Jt. Exh. 2). Rene Mercado has, at all relevant times, served as the Union's president.[6] The parties' current agreement is expired, and they are attempting to negotiate a successor contract.

2. MTS

MTS, a wholly-owned Intership subsidiary, repaired and refurbished containers,[7] chassis,[8] and reefers.[9] It employed mechanics, welders and painters, and mainly served Intership,[10] although it also had a few outside clients.[11] Luis Ruiz was its General Manager. (Exh. 1.)

3. TTS

TTS, a wholly-owned Intership subsidiary, was a motor vehicle repair shop, which repaired Kalmars and other vehicles; it primarily served Intership. Sosa was its General Manager; Ernesto Davila was an Operations Manager; Daren Ryan-Oppenheimer (Ryan) was an Assistant Operations Manager; and Noel Lopez was a supervisor. Sosa set benefits and policies,[12] assigned, scheduled, and discharged workers. (R. Exhs. 28, 31–34.) TTS handled its own unemployment insurance issues and had its own personnel manual. (R. Exhs. 32, 34, 35.)

B. Interrelationship between the Entities

1. Leadership

This chart describes Respondent's hierarchy and leadership:

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[1] The complaints consist of: the complaint dated July 31, 2013 (the first complaint); the complaint dated April 30, 2013 (the second complaint); and the complaint dated August 29, 2014 (the third complaint). (GC Exh. 1).

[2] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

[3] TTS repaired Kalmars (i.e., a brand of freight handling equipment), which includes cranes, forklifts and tractors.

[4] Its major clients include Trailer Bridge, Inc. and Sea Star Lines.

[5] There are roughly 60 employees in the Intership unit.

[6] In June 2015, the Union was placed under a trusteeship, and Mercado was ousted. (CP Exh. 1).

[7] Containers are 20 or 40-foot long, steel, rectangular boxes that hold freight.

[8] Chassis are wheeled, steel frames, which transport containers.

[9] Reefers are refrigerated containers.

[10] Intership could not do such work under the E.P.A. rules, which prohibit sandblasting and painting at the docks.

[11] MTS also serviced Trailer Bridge, Sea Star and other clients.

[12] He selected health and dental providers. See (R. Exh. 27).

Name	Intership Title	MTS Title	TTS Title
C. Alvarez	PRES. OF BD. OF DIR.	SAME ROLE	SAME ROLE
Segarra	PRES. & MBR. OF BD. OF DIR.	SAME ROLE	SAME ROLE
S. Alvarez	VP & MBR. OF BD. OF DIR.	SAME ROLE	SAME ROLE
M. Dubron	SEC. & MBR .OF BD. OF DIR.	SAME ROLE	SAME ROLE
J. Alvarez	UNDERSECRETARY	SAME ROLE	SAME ROLE
P. Alvarez	TREASURER	SAME ROLE	SAME ROLE
L. Alvarez	UNDERTREASURER	SAME ROLE	SAME ROLE
Caraballo	CHIEF FINANCIAL OFFICER	SAME ROLE	SAME ROLE
A. Vasquez	COO	SAME ROLE	SAME ROLE
Quinones	CONTROLLER	SAME ROLE	SAME ROLE
Ruiz	TERMINAL SUPERVISOR	G.M. UNTIL CLOSURE	NO ROLE
Sosa	VP - MAINTENANCE	TECH. SUPPORT MGR.	GM FROM 2011 TO CLOSURE
Lopez	*NO ROLE*	PROCUREMENT SPEC.	SPECIAL PROJECT SUP.
Davila	*NO ROLE*	OPERATIONS MGR.	OPERATIONS SUP.
Nogueras	VP – CRANE DIVISION	NO ROLE	NO ROLE
R. Rivas	TERMINAL SUP.	NO ROLE	NO ROLE
J. Martinez	SECURITY OFFICER	NO ROLE	NO ROLE

(Jt. Exhs. 1, 6–8, 17–19, 20; GC Exhs. 17–20.)

2. Collaboration

a. Services

Before closing, MTS serviced Intership's chassis and equipment.[13] (GC Exhs. 56–58.)[14] Frank's Chassis & Repair now performs these services. Before closing, TTS serviced Intership's Kalmars, which were either repaired on-site,[15] or transported by MTS. (GC Exhs. 27, 35.) Tribo Tech now performs these services.

b. Funding and Inventory

Intership loaned MTS funds for equipment, payroll and supplies. (GC Exh. 10.) Intership's Quinones signed checks for MTS' utilities and other bills. (GC Exhs. 7–9.) Intership also loaned TTS monies for operating expenses; Caraballo and Vasquez signed these checks. Intership paid TTS' utility and credit card bills, and accepted reimbursement. (GC Exhs. 13–16.) MTS also purchased inventory for TTS. (GC Exh. 46.) TTS' purchase orders, machinery and uniforms bore an MTS logo (GC Exh. 34). Intership owned MTS' and TTS' facilities.

c. Common Labor Policy and Interchange

MTS did not have a human resources department; such matters were handled by Intership. When MTS hired, the worker and Intership's Figueroa would jointly sign the employment contract. (GC Exh. 6). In 2005, Ruiz was assigned to MTS by Intership; in 2012, he was promoted by Intership. Ruiz considered himself an Intership employee (tr. 74–75), and continued to work for Intership, following MTS' closure.

Intership's Negron aided TTS with employee evaluations, discharges and other issues.[16] (GC Exh. 52.) Intership's Quinones prepared TTS' payroll. Sosa was appointed to TTS by Intership, supervised by Intership, and uniformly appeared on Intership's payroll.[17] When Ryan was hired at TTS, he received his offer from Intership, signed an employment contract at Intership, and received business cards from them. (GC Exh. 12.) Intership hired TTS' Lopez, and paid his wages, and then sought reimbursement from TTS.

3. Common Control

Intership held meetings, where MTS and TTS reported on their status. (R. Exh. 65.) Intership's financial statements identified MTS and TTS as subsidiaries. (GC Exh. 54.) Intership made the final decision to close MTS and TTS.

c. September to October 2012—MTS' Election and Closure

1. Petition

On September 20, 2012, the Union filed a petition seeking to represent these MTS employees (the MTS unit):[18]

All full-time mechanics, welders, utility, tire repair, and

[13] Intership sent MTS 8 to 10 chassis per week for servicing.

[14] These exhibits were admitted after the hearing.

[15] Ryan credibly testified that 99 percent of TTS' work was performed for Intership.

[16] See, e.g., (GC Exhs. 22–25) (showing that TTS' workers were hired and fired by Intership).

[17] Sosa received business cards from both Intership and MTS. (GC Exhs. 17–18.)

[18] On September 21, the RC Petition was faxed to Segarra, who serves as tripartite role as Intership's, MTS' and TTS' president. (GC Exh. 36; tr. 838.)

> maintenance employees employed by ... [MTS], but, excluding all other employees, managers, supervisors and guards as defined in the Act.[19]

(Jt. Exhs. 1, 9–10.)

2. Preelection Events

a. General Counsel's Position

Jose Nater-Maisonet (Nater), an MTS employee, stated that, in September 2012, Ruiz asked him whether he had spoken to the Union, told him to tell his coworkers to "side with the Company," warned that MTS would find out who signed Union cards, and threatened that "if the Union ever came into MTS, the gates would close." (Tr. 206.) Socrates Escotto-Polanco (Escotto), an MTS employee, recalled a similar exchange. Escotto stated that, in September 2012, Ruiz asked him whether he had heard any union rumors, told him to identify their supporters, and threatened that MTS would close, if it unionized. Jose Velasquez, an MTS painter, said that in September 2012, Ruiz: told several workers that, if he learned who signed Union cards, he would suspend them (tr. 241); said that MTS "would not accept . . . a union" (tr. 242); and asked him who was leading the Union's campaign.[20]

b. Respondent's Position

Ruiz recalled hearing about the Union in September 2012, but, denied interrogating or threatening workers. He said that he discussed the Union with a small group, whom he only advised that the Union was not a good idea, but, remained their choice.

c. Credibility Resolution

Given that Ruiz denied the allegedly unlawful remarks at issue, and eight workers stated otherwise, a credibility resolution must be made. For several reasons, I credit the several employees, who were consistent and forthright. It is implausible that these employees collectively concocted their stories, and still remained able to recount Ruiz' actions with such intricate detail and overall consistency. Ruiz' plant closure threats were also consistent with MTS' closure, within days of the election.

3. Election and Closure

On October 17, 2012, an election was held, which the Union won. (Jt. Exhs. 12–13.) On October 19, without notice to the Union, MTS closed for "financial reasons." (Jt. Exh. 14.) On October 30, the Union sought decisional and effects, which was not granted. (Jt. Exhs. 15, 20.)

4. Closure Rationale and Circumstances

Segarra said that he closed MTS for the following reasons: the loss of major clients (i.e., Sea Star[21]and Mediterranean Shipping (R. Exhs 43–45)); concerns over client Trailer Bridge's bankruptcy filing (R. Exh. 42);[22] and MTS' poor performance. He added that he had been evaluating MTS' potential closure since 2011. (R. Exh. 53.)

Caraballo explained that Intership was under great financial duress when MTS closed, and sustained annual losses of almost $1 million.[23] Between 2011 and 2012, Intership's net income decreased from $4,446,071 to $1,341,384.[24] (R. Exh. 60). She related that she lobbied Segarra to close MTS since 2010 because it was, "bleeding" Intership dry. (Tr. 1346.)

This chart summarizes MTS' net losses from 2008 through 2013:[25]

Year:	*2008*	*2009*	*2010*	*2011*	*2012*	*2013*
Net Loss:	($44,073)	($148,639)	($161,186)	($111,488)	($120,834)	($95,063)

(R. Exhs. 48, 50, 54; GC Exh. 55.) She said that MTS only survived because of Intership'songoing loans and that the Intership Board retained an auditor in 2011 to "study the tax aspects" of MTS' potential closure. (R. Exh. 52(b).) She stated that these factors prompted MTS' closing and that the Union was never a factor. She related that MTS' assets were liquidated and its property has since been leased to Sun Colors Digital Graphics, Inc. through 2018. (R. Exhs. 56–58.) She stated that, since MTS' closure, Intership is no longer engaged in the repair of third-party chassis and containers for profit.

Although, as will be discussed in the analysis section, Segarra's and Caraballo's testimony about MTS' closure rationale was not credited, their testimonies regarding MTS' and Intership's ongoing losses and poor fiscal performance were credited, and supported by voluminous financial records and statements.

D. October 2012 to March 2013—TTS Closure Threats and Shutdown

1. Closure Threats

a. General Counsel's Position

Yamil Colon-Santiago (Colon), a TTS employee, related that, after MTS' closure and Union organizing drive, Davila

[19] There were 16 employees in the unit. (Jt. Exh. 11B.)

[20] MTS employees Bryan Alvarado, Luis Allende, Jason Marrero, Angel Alfredo-Garcia (Alfredo) and Angel Garcia Pabon (Garcia) corroborated Nater, Escotto, and Velasquez, and collectively recalled Ruiz threatening plant closure and job loss, asking about their Union activities, and soliciting them to vote against the Union.

[21] Segarra alleged that this loss resulted in a 33 percent decrease in Intership's revenue.

[22] Caraballo said that this filing stopped Intership from collecting over $700,000 owed by Trailer Bridge.

[23] Intership lost $789,000 between September 2011 and September 2012. (R. Exh. 46.)

[24] Intership's financial problems were captured in its consolidated financial statements for 2013 and 2014, which reflected net losses of $1,463,740 and $1,087,910 respectively. (R. Exh 67.) Caraballo noted that Intership responded to this crisis by undergoing a drastic cost reduction program. See (R. Exh. 65).

[25] MTS' deficit, i.e., a running total of yearly losses, was $740,778 at the end of 2013. (GC Exh. 55.)

called him and other workers to a meeting, and warned that MTS closed because of the Union. (Tr. 392.) He stated that Ruiz said that, if TTS also unionized, it would close. (Tr. 394.) He recalled that, in December 2012, Sosa and Lopez repeated these closure threats. (Tr. 394.) Edgar Alejandro-Diaz (Alejandro) testified that Lopez told him that MTS closed because of the Union, and Lopez and Sosa both said that, if TTS unionized, it would similarly close. John Rosa-Guadalupe (Rosa) provided a similar account. (Tr. 807–808.)

Ryan, a TTS supervisor, related that he was told by Sosa and Davila that MTS closed because it unionized. (Tr. 713–15.) He said that, in March 2013, Davila told him that he should tell employees that, if they also unionized, TTS would close and they would be fired. (Tr. 716.) He recalled Sosa threatening TTS' closure, if employees unionized. (Tr. 717.) Ryan related that he was convinced that TTS would unionize, and recalled employees telling him that they were talking to the Union about organizing. He said that he relayed these discussions to Sosa in September, in order to offer him a chance to remedy employees' concerns before they unionized.

b. Respondent's Stance

Sosa denied knowing that TTS employees were considering unionizing. He and Lopez each denied threatening job loss or plant closure.

c. Credibility Resolution

Given that Ryan, Rosa, Colon and Alejandro reported repeated threats, which Sosa and Lopez each denied, and Ryan said that he told Sosa that TTS employees' were organizing, which also Sosa denied, a credibility determination must be made. For several reasons, I credit Ryan, Rosa, Colon and Alejandro. First, their testimony was deeply consistent and their demeanors were uniformly strong. Second, their testimony was supported by TTS' and MTS' actual closures shortly, after the advancement of the alleged threats at issue. Finally, I found Sosa and Davila to be less than credible witnesses, whose comments were deeply consistent with the slew of unlawful threats and actions present herein.

2. Closure

On April 26, 2013, TTS closed and discharged its employees.[26] Its facility stands vacant and is being marketed by a realtor. Caraballo and Segarra explained that TTS closed for the same reasons that befell MTS (i.e., Intership's and TTS' business problems and losses).[27] Sosa stated that Intership continuously loaned TTS monies to meet expenses. He said that he reported on TTS' exigent financial condition at Intership's Executive Meeting on April 15, 2013 and lobbied for its closure.[28] (R. Exh. 65.) He said that, shortly thereafter, Segarra closed TTS.

Although, as will be discussed in the analysis section, Segarra's, Caraballo's and Sosa's testimonies about TTS' closure rationale were not credited, their testimonies regarding TTS' and Intership's poor fiscal performance were credited, and corroborated by financial records.

E. July 17 to 21, 2014 Strike and Demonstration

On these dates, Intership and MTS employees picketed and held a short-term strike outside of Intership. Picketing occurred around-the-clock and protested MTS' closure. The Puerto Rican Police Department continuously observed the strike. Although Respondent averred that the picketers blocked Intership, the police never cited or stopped them. Region 24 never issued a complaint against the Union, which alleged unlawful blockage.

Arturo Figueroa Rios (Figueroa), former Union attorney, testified that several supervisors observed the picketing. He identified: Rodriguez; Nogueras; Jose Garcia-Ortiz (Garcia), VP–Terminal Operations; Sosa; and Caraballo. He explained that management monitored the picketing from their cars and the gate, and took photos and video footage with their mobile phones. He stated that he asked management to stop intimidating the picketers, but, was ignored. He recollected that, on one occasion, Rodriguez parked his car next to the picket line and took pictures with his phone for an hour. He said that, when he asked him to stop, he replied that he "had instructions to inform [on] who was there and that he would continue to follow . . . the[se] instructions."[29] (Tr. 343.) Miguel Ortiz-Rivera (Ortiz), an employee, corroborated that he heard Figueroa tell Rodriguez not to take photos and Rodriguez reply that he was following orders. (Tr. 379.)

Garcia acknowledged taking photos and video to substantiate blockages. (R. Exh. 18.) He insisted that the picketers blocked the gate, but, said that the police did not agree. Sosa testified that he was there on July 17 and 21 (see (R. Exh 39)); he denied monitoring employees on July 17, but, recalled taking photos on July 21. See (R. Exh. 41). He stated that he took pictures because an unnamed truck driver reported being followed by a car. Rodriguez conceded that he videotaped the demonstration. He denied, however, stating that he was told by management to record the picketers, and said that only took pictures to substantiate blockages.

F. July 21, 2014—Rene Conception-Sanchez Incident

1. General Counsel's Stance

Rene Concepcion-Sanchez (Concepcion), an employee, testified that, on July 21, while talking to a trucker about the strike, Caraballo pushed him and ordered the driver to make his delivery. He said that, during this dispute, Caraballo asked if he was the leader and when he did not respond, Sosa grabbed him and ordered him to reply. He said that Caraballo threatened him that Intership would close, if employees continued. (Tr. 441). Javier Martinez-Ortiz (Martinez) corroborated his account.

2. Respondent's Stance

Caraballo testified that, on July 21, she told the truck driver to enter the facility. She contended that Concepcion hit her with his umbrella, while she spoke to the driver and pushed her. She said that she alerted the police, who asked the parties to separate and warned the picketers to not block the gate. Sosa recalled a truck driver seeking to enter with a delivery, and recollected Concepcion, pressing against Caraballo and inserting himself in her discussion with the driver. He denied grabbing Conception, or witnessing any threats.

[26] The Union had not filed a petition seeking to represent TTS employees, when it closed.

[27] (R. Exh. 26) (TTS' total losses in 2012 were $891,685).

[28] Sosa said that TTS' problems were exacerbated by the loss of several clients. See (R. Exhs. 36–37).

[29] He agreed, on cross examination, that there are dock areas, which are videotaped for security reasons. (Tr. 359.)

3. Credibility Resolution

Given that Concepcion said that Caraballo pushed and threatened him and that Sosa grabbed him, a credibility resolution is needed. Concepcion is credited over Sosa and Caraballo. First, his willingness to testify against high-level superiors without an obvious financial stake enhances his credibility. Second, he had a credible demeanor; he was open and consistent. His testimony was corroborated by Martinez, who was equally credible. Third, if Concepcion had actually struck Caraballo with his umbrella as she related, he would surely have received discipline. The absence of such discipline, consequently, undercuts her credibility. Finally, Caraballo and Sosa seemed more committed to supporting Intership's position than offering candid testimony.[30]

G. July 2014—Caraballo and Segarra Comments

Rivera testified that, after employees returned from the strike, Caraballo said that, if employees continued, "we would be destroying the company and left without a job." (Tr. 499.) Rafael Hernandez-Alicea (Hernandez) testified that Segarra told him that, if the Union continued, Intership could close. (Tr. 547.) He added that Caraballo noted that she did not see him at the strike and told him to "wait until the company closes." (Tr. 549–50.) Segarra and Caraballo denied such commentary, which triggers another credibility analysis favoring Rivera and Hernandez, who were consistent witnesses, with strong demeanors. Moreover, the threats at issue are so deeply consistent with the myriad of other unlawful statements and actions present herein that Caraballo's and Segarra's denials have been rendered practically worthless.

H. Unilateral Change Allegations

1. Vacation Pay Procedure

Concepcion, an employee since 1987, said that Intership had a consistent practice of distributing vacation checks at the terminal on the Friday before a vacation. He related that, after the July 2014 strike, he was required to pick up his vacation check at the main office, which required a 30-minute drive. Jose Rivera-Sanchez (Rivera) corroborated this account. Mercado testified that Intership did not bargain over this change, or notify the Union before implementation. Caraballo conceded making the change and cited confidentiality issues.

2. Maintenance Workers' Hours

a. General Counsel's Position

Rivera testified that maintenance employees in the Intership unit previously worked at least 40 hours per week. He said that, after the July 2014 strike, their work schedules were reduced to 24 hours per week. He related that he did not return to his normal schedule until November 2014. Juan Delgado related that he consistently worked 40 hours before being cut to 32 hours per week in July 2014. Ramon Duran-Colado (Duran) provided similar testimony. Mercado testified that Intership never notified him or bargained over this issue.

b. Respondent Stance

Gerardo Rosa-Garay (Rosa), Intership's Maintenance Manager, and Garcia testified that unit maintenance employees periodically worked 40 hours per week, subject to the availability of sufficient work. They disputed whether they always worked 40 hours per week, and said that they generally worked "as needed." They stated that a standing seniority list governs who is scheduled to work (R. Exhs. 12–13), and insisted that maintenance workers are not guaranteed a full-time workweek.[31] They conceded that the 2 most senior mechanics mostly work 40 hours per week, while their less senior counterparts work fewer hours.

c. Credibility Resolution

This credibility resolution favors Rosa and Garcia. First, Rivera, Delgado and Duran offered generalized and conclusory testimony about their workweek, whereas Rosa and Garcia provided persuasive and detailed accounts. Second, it is noteworthy that Counsel for the General Counsel failed to buttress this allegation with sufficient work schedules and pay records, which would have established a consistent and long-term scheduling practice in the maintenance department.[32] This conspicuous evidentiary lapse solidly resolves this credibility dispute in favor of the Respondent. Finally, absent such records, it is plausible that maintenance employees were assigned "as needed," in accordance with seniority.

3. 8-Hour Auto Checker Guarantee

a. General Counsel's Stance

Checkers inspect, receive, dispatch and load cargo. Rafael Hernandez-Alicea (Hernandez), a checker, testified that he performed automobile checker work three times in May 2014, and was only paid for actual hours worked. He explained that he did not receive the guaranteed 8 hours of pay for such work, which was previously paid.[33] Jose Colon-Rodriguez (Colon), a checker, testified that he was uniformly paid the 8-hour guarantee, irrespective of where he worked until December 2014, when Intership ended this practice. Mercado testified that Intership never notified him about this change or bargained over it.

b. Intership's Response

Garcia stated that checkers at the main gate, which he referred to as "under the canopy," received an 8-hour guarantee, even if they worked less than 8 hours. He related that checkers in the terminal, which he referred to as "in the yard," were only paid for actual hours worked. He explained that checkers only received an 8-hour guarantee under these circumstances:

> When the checkers are assigned to dispatch autos are . . . assigned to our clients' gates, being Sea Star Lines or Trailer Bridge, . . . they are guaranteed 8 hours. . . .

(Tr. 936.) Garcia added that "in the yard" checkers only receive a 4-hour guarantee and, thereafter, are paid for actual hours worked. He said that checkers also receive a 4-hour guarantee, when working on vessels. He explained that GC Exhs. 32–33 demonstrate that Intership did not pay the 8-hour

[30] Regarding Sosa, if he were fully credited on every contested point, such a finding would mean crediting him over at least 10 other witnesses, which is implausible.

[31] Mercado agreed, on cross, that there are some unit employees, who do not work 40 hours per week. (Tr. 1053.)

[32] Such evidence, which should have been readily obtainable, would have persuasively demonstrated this point.

[33] On these dates, he worked 6, 7, and 4 hours, and averred that he should have been paid for 8 hours each day.

guarantee between September 2014 and March 2015.[34]

c. Credibility Resolution

This factual dispute has been resolved in favor of Respondent. First, the dearth of pay records demonstrating a consistent practice weighs in its favor. Second, Garcia's detailed testimony was persuasive, his account was plausible, and his demeanor was superior.

4. Auto Checker Designation

The evidence presented by the General Counsel on this matter was, at best, meager. Mercado testified that Intership had a designated auto checker, until it ceased this practice in January 2015, without notice or bargaining. Garcia explained that Intership would inconsistently appoint a designated auto checker, on the basis of client needs.[35] For many of the reasons previously cited, Respondent wins this credibility dispute. As stated, Garcia was very credible. Additionally, the conspicuous lack of business records demonstrating the existence of a consistent practice on this issue deeply undercuts Mercado's generalized testimony.

I. Suspension—Efrain Gonzalez Andino

On July 9, 2014, Efrain Gonzalez-Andino (Gonzalez) received this memo:

> [O]n May 30 ... you failed to follow a posted . . . guideline . . . [and] used profanity towards a Manager of . . . Trailer Bridge. . . .
>
> On countless occasions, we have notified you . . . that all union personnel only receives instruction from . . . Intership; and . . . if any . . . claim emerges . . . [it has] to be addressed directly to Intership management. . . . [Y]ou blatantly violated these . . . guidelines and . . . used profanity towards a [client's] manager. . . .
>
> [W]e have decided that [a] ... June 2, 3rd and 4th [suspension is warranted] ....

(GC Exh. 30.)

Gonzalez recalled that, on May 30, he observed Trailer Bridge supervisor Ronald Ortega performing Intership unit work. He said that, in his role as a shop steward, he inquired. He recollected Ortega first ignoring him and then responding with profanity, which prompted him to reply in kind. He added that Ortega then told him that the Union had consented to this work arrangement, which the Union later acknowledged. He contended that, although he does not generally interact with customers, he was allowed to do so as a shop steward.

Garcia stated that employees are prohibited from speaking to clients, in order to avoid disputes like the one at issue herein.[36] He related that there are no exceptions and employees can always phone him, whenever an issue arises. He said that he received 2 complaints from Trailer Bridge regarding Gonzalez' undisputed actions. (GC Exh. 47; R. Exh. 11.) He agreed that Gonzalez was not the instigator and denied that his steward status factored into his discipline.

III. ANALYSIS

A. Single Employer Status[37]

Intership, MTS and TTS are a single employer. The Board has held that:

> In determining whether ... nominally separate employing entities constitute a single employer, ... four factors [are relevant]: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's-length relationship. . . .

Cimato Bros., Inc., 352 NLRB 797, 798 (2008). Centralized control of labor relations is the primary factor in this analysis. *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988). "[C]ommon ownership, while significant, is not determinative in the absence of centralized control over labor relations." *Mercy Hospital*, 336 NLRB 1282, 1284 (2001).

1. Common ownership and management

These factors favor single employer status. MTS and TTS were owned by Intership. Segarra, Intership's president, presided over MTS and TTS. Intership held Board meetings, where MTS and TTS reported on their status and decisions regarding their closings were made. All entities have common managers (e.g., VP, Sec., Treasurer, CFO, COO and Controller).

2. Interrelationship of operations

This factor favors single employer status. Before its closure, MTS serviced Intership, its main customer. MTS' Ruiz transferred to Intership, after MTS closed. Before its closure, TTS serviced Intership, its main customer.[38] TTS' Sosa transferred to Intership, after TTS closed. Intership financed MTS and TTS.[39] MTS purchased inventory for TTS. TTS' purchase orders bore an MTS logo. TTS' machinery and employee uniforms had MTS logos.

3. Central control of Labor Relations

This factor supports single employer status. MTS lacked an HR department and delegated this duty to Intership. When MTS hired a worker, the employee and Intership's Figueroa would sign the contract. Ruiz was assigned to work at MTS, and later promoted by, paid by, and supervised by Intership.[40] Concerning TTS, there is mixed evidence of centralized control, which tips in favor of labor relations control. On the negative front, TTS' Sosa independently: made many operational decisions; determined benefits and assignments; assisted discharge decisions; set many workplace policies; and handled unemployment insurance. TTS had its own Employee Manual. On the positive side, however, Intership: prepared TTS' payroll; appointed TTS' Sosa, supervised him and paid him; appointed TTS' Lopez and paid him; and hired TTS' Ryan and supplied his business cards. Also, in spite of Sosa's contrary testimony on independence, several emails demonstrate that Intership

[34] Although the GC offered an exhibit showing that a checker received 8 hours of pay for less than 8 hours of work, when not at the main gate, Garcia claimed that this was an isolated error.

[35] As an example, Garcia said that he would appoint a checker, when freight had 2 makes of cars mixed together.

[36] See also (GC Exh. 51) (citing undisputed workplace rule regarding customer interactions).

[37] This allegation is pled in par. 5 of the first complaint.

[38] Ryan credibly described 99 percent of TTS' workload as involving repairs for Intership.

[39] Intership's Quinones signed checks, while Intership's Caraballo and Vasquez signed checks for TTS

[40] Ruiz considered himself an Intership employee, while at MTS.

still assisted with evaluations, terminations and other personnel matters. This evidence suggests that Intership centrally controlled the most significant labor relations matters (e.g., hiring and control of upper management and other key human resources functions) and relegated some lesser duties to TTS. In sum, this labor relations factor tips in favor of single employer status, given that there is virtually uncontradicted evidence of central control at MTS, and evidence of central control over the most important labor relations matters at TTS.

4. Conclusion

Respondent is a single employer; all factors were satisfied. In sum, there is a clear lack of an arm's length relationship between Internship and its subsidiaries.

B. 8(a)(1) Allegations

1. Interrogations[41]

Respondent unlawfully interrogated its workers. Ruiz asked: Nater if he had spoken to the Union; Escotto whether he had heard any Union rumors and would identify their supporters; and Velasquez who supported the Union. Caraballo asked Hernandez why he was not at the strike.

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

> (1) The background, i.e. is there a history of ... 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 ... hierarchy?
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at 940.

Ruiz' and Caraballo's queries were unlawful. First, as will be discussed, there is extensive evidence of Union animus, threats and hostility, and many of Ruiz' interrogations were accompanied by threats and unlawful comments. Second, Ruiz' queries were designed to ferret out the identity of the Union's supporters and communicated a threat of retaliation. Third, Ruiz and Caraballo are high-level managers. Finally, the queries at issue mostly occurred under intimidating conditions, i.e., one-on-one interactions.

2. Discharge, job loss and plant closure threats[42]

Respondent, by Ruiz, Davila, Lopez, Sosa, Caraballo and Segarra, repeatedly threatened employees in violation of the Act, as summarized below:

Date	Speaker(s)	Recipient(s)	Site	Summary
Sep. 2012	Ruiz	Nater, Escotto, Velasquez, Alvarado, Allende, Marrero, Alfredo and Garcia	MTS	• "[I]f the Union ... came into MTS, ... [it] would close." (Tr. 206). • If the Union won, MTS would close. (Tr. 229). • If Ruiz learned who signed Union cards, he would suspend them. (Tr. 241).
Nov. 2012	Davila	Colon and Ryan	TTS	• MTS closed because, "the employees became part of a union and that was not good for the company's interests." (Tr. 392).
				• "[I]f the [TTS] employees unionize[d], ... what happened to MTS, the same thing [would happen] to them, they would be fired ...." (Tr. 716).

[41] These allegations are listed under pars. 11 and 16 of the complaint in Cases 24–CA–091723 and 24–CA–104185 (the first complaint), and pars. 8 and 10 of the second complaint.

[42] These allegations are pled in first complaint pars. 11–12 and 16 and second complaint pars. 7–8 and 10.

Nov. 2012 to Feb. 2013	Lopez and Sosa	Colon, Alejandro and Rosa	TTS	• "[I]f the "Union ... [came] to TTS, ... [it] would close." (Tr. 394). • MTS closed because of the Union. • If TTS unionized, it would close. • MTS closed because the Union "got in." (Tr. 807). • If TTS unionized, it would also close. (Tr. 808). • Employees would be out of a job, if they unionized.
Jul. 21, 2014	Caraballo	Rivera, Concepcion and Hernandez	Inter.	• If employees continued their Union activities and protests, "[they] would be destroying the company and left without a job." (Tr. 499). • All of the MTS employees were fired and that Intership's employees would be next, if they continued to talk to the Union. (Tr. 441). • If the Union continued to strike, "just wait until the company closes down ...." (Tr. 549-550).
Jul. 24, 2014	Segarra	Hernandez	Inter.	• If the Union continued ..., Intership may close. (Tr. 547).

An employer violates Section 8(a)(1), when it engages in conduct that might reasonably tend to interfere with employees' Section 7 rights. *American Freightways Co.*, 124 NLRB 146 (1959). In evaluating such statements, the Board, "does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Sage Dining Service*, 312 NLRB 845, 846 (1993).

Respondent's repeated threats violated the Act; such threats were continuous, clear and coercive. See, e.g., *Publix Super Markets, Inc.*, 347 NLRB 1434, 1435 (2006) (supervisor unlawfully threatened discipline or discharge for concerted activity); *Braswell Motor Freight Lines*, 156 NLRB 671, 674–675 (1966); *Federated Logistics & Operations.*, 340 NLRB 255, 256 (2003) (unsubstantiated predictions of plant closure resulting from union victory are unlawful;[43] *Mid-South Drywall Co.*, 339 NLRB 480 (2003).

3. Soliciting Antiunion Votes[44]

In September 2012, Respondent, via Ruiz, unlawfully solicited employees to vote against unionization. "[W]here an employer solicits employees to campaign against union representation . . . such solicitation violates Section 8(a)(1) without reference to whether the solicited employee's union sentiments are known. . . ." *Allegheny Ludlum, Inc.*, 333 NLRB 734, 741 (2001), enfd. *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167 (2002). Ruiz unlawfully solicited Nater to vote against the Union, and told him to tell others to "side with the Company."

4. Impression of Surveillance[45]

In September 2012, Ruiz created an unlawful impression of surveillance. At that time, he told Nater that MTS would learn who signed authorization cards on behalf of the Union. See, e.g., *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009).

5. Surveillance[46]

Sosa, Rodriguez, Caraballo and Noguera engaged in surveillance, when they recorded, photographed and otherwise monitored the July 2014 strike. An employer unlawfully "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). The Board considers, "duration of the observation, . . . distance from . . . employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id.

Several factors support a surveillance finding. The management observers at issue (i.e., Rodriguez, Nogueras, Garcia, Sosa and Caraballo) were high-level officials, whom it was "out of the ordinary" to see at the plant gate. Their observation also occurred from a close vantage point over a 4-day period. Their viewing was accompanied by other coercive behavior, including: Rodriguez stating that he "had instructions to inform [on] who was there" (Tr. 343); Sosa and Caraballo grabbing and pushing a picketer; and Caraballo stating that employees would be fired, if they persisted (tr. 441). Lastly, such monitoring was unnecessary, given that the demonstration was peaceful, and supervised by the police. These actions, were, thus, unlawful.

6. Acts of Violence[47]

Respondent violated the Act, when Sosa and Caraballo grabbed and pushed Concepcion on July 21, 2014, while he was informing a trucker about the labor dispute. It is unlawful for an employer to assault or physically abuse employees because of their protected activities. *Studio S.J.T. Limited*, 277 NLRB 1189, 1194 (1985); *Federated Stores*, 241 NLRB 240, 252 (1979). Caraballo's and Sosa's actions were solely aimed to thwart Concepcion's lawful discourse about the labor dispute, and were, accordingly, unlawful.

[43] While a plant closure prediction can be lawful, if the employer shows that it is the probable consequence of unionizing for reasons beyond its control, no showing was made. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[44] These allegations are pled in pars. 11 and 16 of the first complaint.

[45] These allegations are pled in pars. 11 and 16 of the first complaint.

[46] These allegations are pled in pars. 6 and 10 of the second complaint.

[47] These allegations are pled in pars. 7 and 10 of the second complaint.

C. 8(a)(5) Allegations

1. Unilateral changes

a. Legal Precedent

An employer must bargain in good faith with the collective-bargaining representative of unit employees regarding wages, hours and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). An employer, thus, violates the Act, when it makes material unilateral changes in mandatory bargaining topics. *NLRB v. Katz*, 369 U.S. 736 (1962). In order to trigger a bargaining obligation, however, a unilateral change must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). The General Counsel can establish a prima facie unilateral change violation, if it shows that an employer unilaterally made a material and substantial change in a term of employment without negotiating. The burden then shifts to the employer show that the change was permissible (e.g., consistent with established past practice). *Fresno Bee*, 339 NLRB 1214 (2003).

b. Vacation Procedure[48]

Intership violated the Act, when it unilaterally changed the vacation procedure. The Board has held that vacation scheduling and related procedures are mandatory bargaining subjects, and unilaterally imposed changes in this arena are unlawful. *United Cerebral Palsy of New York City*, 347 NLRB 603, 606–607 (2006). In July 2014, Intership ceased distributing vacation checks at the plant on the Friday before a vacation, and instituted a new system, where employees had to retrieve vacation checks at the main office. This material and significant change was unlawfully implemented, without bargaining or notice.

c. Maintenance Assignments[49]

The General Counsel failed to show that Intership unilaterally changed its maintenance assignments in a material or substantial way. Unit maintenance employees never consistently worked 40 hours per week, and were, instead, assigned "as needed." The General Counsel solely offered generalized and conclusory evidence on this point, and failed to produce sufficient work and pay records, which would have adduced a consistent practice.

d. Auto Checkers[50]

The General Counsel failed to show that Intership unilaterally modified its auto checker procedures. The General Counsel offered a dearth of records on this matter, and Garcia's testimony that auto checker procedures remained unchanged was, as discussed, credited.

2. Closure of MTS, and associated discharge of the unit[51]

MTS' closing was a mandatory subject of bargaining under *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in rel. part1 F.3d 24, 31–33, (D.C. Cir. 1993), pet. for cert, dismissed 146 LRRM 2896 (1994). Intership, therefore, violated Section 8(a)(5) by unilaterally closing MTS, without offering the Union a chance to bargain over this matter.

a. Legal Precedent

In *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), the Supreme Court found that an employer's subcontracting of maintenance work, which merely replaced existing employees with those of an independent contractor performing the same work under similar conditions of employment was a mandatory subject of bargaining. The Supreme Court held that, since the subcontracting was unaccompanied by a capital investment or alteration in the entity's basic operation, requiring bargaining over such a decision "would not significantly abridge the company's freedom to manage the business." Id. at 213. Moreover, since the subcontract turned on labor costs, it was "peculiarly suitable for . . . collective-bargaining." Id. at 214.

In *First National Maintenance*, 452 U.S. 666 (1981), however, the Supreme Court held that an employer's decision to close down part of its business was not a mandatory bargaining topic because that type of decision was "akin to the decision whether to be in business at all." Id. at 686. Accordingly, the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." Id. The court left *Fibreboard* intact and stated that each case involving economic decisions that impact employees, "such as plant relocations, sales, other kinds of subcontracting, automation, etc." must be considered on its specific facts to assess whether "the benefit for . . . collective bargaining . . . outweighs the burden placed on the . . . business." Id. at 679, 686 fn. 22.

In *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in rel. part 1 F.3d 24, 31–33 (D.C. Cir. 1993), pet. for cert, dismissed 146 LRRM 2896 (1994), the Board announced the test for determining whether a work relocation decision is a mandatory bargaining topic. The Board held that the General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses. 303 NLRB at 391. Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision. *Noblit Bros., Inc.*, 305 NLRB 329, 330 (1992); *Holly Farms Corp.*, 311 NLRB 273, 277–278 (1993). The Employer may also avoid bargaining if it can show that (1) labor costs were not a factor or (2) even if labor costs were a factor, the union, could not have offered sufficient labor cost concessions to alter its work relocation decision. *Dubuque*, 303 NLRB at 391. Although *Dubuque* specifically concerned work relocation decisions, its principles are applicable to all "Category III" decisions, i.e., decisions that have a direct impact

[48] This allegation is pled in pars. 9 and 12 of the second complaint.
[49] This allegation is pled in pars. 9 and 12 of the second complaint.
[50] This allegation is pled in pars. 9 and 12 of the second complaint.
[51] These allegations are pled in pars. 13, 15, and 18 of the first complaint.

on employment, but, have as their focus the economic profitability of the employing enterprise,[52] which fall within the spectrum between *Fibreboard* and *First National Maintenance*.[53]

b. Intership's Decision to Close MTS Should be Viewed Under Dubuque

As a thresholdmatter, Intership's decision to close MTS was not a *First National Maintenance* decision. MTS was not a separate and distinct entity (i.e., it was just a cog within Respondent's single employer enterprise). Moreover, MTS' main role was to support Intership's stevedoring business by servicing its chassis. Intership's primary business, stevedoring, was effectively unchanged by the subcontract. The elimination of MTS' supporting function precludes *First National Maintenance* treatment, inasmuch as it is not the kind of "partial closing," or going out of part of a business, at stake in *First National Maintenance*. Or put another way, Intership never stopped stevedoring, or performing chassis upkeep; the main thing that the subcontract achieved was that it redistributed Intership's chassis upkeep function from MTS to another entity (i.e., Frank's Chassis).

MTS' cessation was, however, also not a clear case of *Fibreboard* subcontracting. *Fibreboard* subcontracting requires, inter alia, replacing existing employees with a contractors' workers performing the same work under similar employment conditions, *without a capital investment or alteration in the employer's basic operation*. Thus, although some portions of Intership's subcontract support *Fibreboard* handling because it replaced MTS' workers with Frank's Chassis' workers, who performed the same type of mechanical work on the same chassis under presumably similar employment conditions, other factors preclude *Fibreboard* handling. These non-*Fibreboard* factors, which elevate the MTS subcontract to a *Dubuque* issue, are as follows: (1) Intership did not just solely change the identity of the workers repairing chassis, it also disassembled MTS' chassis operation, dumped equipment and machinery, and leased away the building (i.e., this represented a liquidation of several assets that was not present in *Fibreboard*); (2) although Intership continued to perform its main stevedoring function, MTS' closure still represented the end of its minor business venture into repairing chassis for outside clients (i.e., this cessation of a business venture was also not present in *Fibreboard*); and (3) Intership's decision to close MTS was, in part, driven by economic profitability, given that MTS was deeply unprofitable and could not continue without Intership's fiscal aid. Although *Dubuque* specifically concerned work relocation decisions, its principles are still applicable to a "Category III" decision of this nature, which was a decision that had a direct impact on MTS' workers, but, also focused upon economic profitability. *Westinghouse*, supra.

c. Dubuque Prima Facie Case

The General Counsel made a prima facie *Dubuque* showing. The MTS subcontract did not significantly change scope and direction of Intership's business, inasmuch as it uniformly remained a stevedoring company. Intership continued to service constant clients, market the same stevedoring services and compete in identical markets. Such a decision, thus, remained a mandatory bargaining subject. See, e.g., *Bob's Big Boy Restaurants*, 264 NLRB 1369 (1982) (Board held that, where shrimp processing operation was discontinued, processing equipment was sold, and another company was retained to provide processed shrimp to its restaurants, the subcontract was a mandatory bargaining subject because the employer had not changed the nature and direction of its business, and remained in its core business of providing foods, including processed, shrimp, to its restaurants); *Michigan Ladder*, 286 NLRB 21 (1987) (Board held that, where the employer stopped manufacturing ping pong tables and ladder parts, and contracted with a subcontractor to manufacture those items on its behalf, its subcontract remained a mandatory subject of bargaining); It is noteworthy that, although the MTS subcontract involved substantial capital transactions (i.e., the leasing of the MTS facility, disassembly and sale of MTS' equipment, and cessation of performing chassis servicing for outside clients), these substantial capital transactions make this a case appropriately analyzed under *Dubuque*, rather than *Fibreboard*, but does not, independent of other rationales, require a finding that Intership changed the nature or direction of its business. See *Pertec Computer*, 284 NLRB 810 (1987), enfd. 926 F.2d 181 (2d Cir. 1991) (employer closed a facility that manufactured typewriter ribbons and cartridges, relocated some of the work, and subcontracted the rest to a Mexican manufacturer; that was not a fundamental change in the nature of the business because the employer did not change the products, manufacturing process, or technology of production, but merely was having essentially the same work done by other employees in other locations); *Summit Tooling Co.*, 195 NLRB 479 (1972), enfd.474 F.2d 1352 (7th Cir. 1973) (where the employer stopped manufacturing and selling tools and became exclusively a tool design company, it completely closed a severable aspect of its business, which is not present herein).

d. Dubuque Affirmative Defenses

Intership failed to establish any *Dubuque* affirmative defenses. It solely contended that MTS' closure flowed from ongoing losses, but, wholly failed meet its evidentiary burden of showing that labor costs were not a factor in its decision[54] or that, even if such costs were a factor, the Union, could not have offered sufficient concessions to alter its decision.[55]

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[52] *First National Maintenance*, supra, 452 U.S. at 677.

[53] *Westinghouse*, 313 NLRB 452 (1993), enfd.46 F.3d 1126 (4th Cir. 1995) (*Dubuque* applicable to Category III decisions that are not *Fibreboard* subcontracting).

[54] Intership did not show that MTS' losses flowed from non-labor costs (e.g., old equipment, production inefficiencies or outdated technology), which seems intuitively unlikely, given that MTS was a simple paint and repair shop, whose viability did not seem to hinge upon the presence of cutting-edge equipment and technology).

[55] This issue was wholly ignored, inasmuch as Intership never made even a preliminary showing regarding how much money, if any, was saved by subcontracting out its chassis repair operation to Frank's Chassis.

e. Conclusion

In sum, Intership's decision to close MTS must be analyzed under *Dubuque*. The MTS subcontract was unaccompanied by a basic change in the nature of Intership's operation, inasmuch as it steadfastly remained a stevedoring business and only subcontracted out a supporting role, i.e. its chassis repair needs. This was, therefore, not a change in the "scope and direction of the enterprise," which obviated bargaining. It also failed to establish any *Dubuque* affirmative defenses. Thus, bargaining between the parties regarding MTS' closure should have commenced and, "once bargaining to impasse [had] occurred, [if at all] the futility of continuing [would have been] clear [and resolved]." *Pertec Computer*, supra, 284 NLRB at 810–11, n. 3. Intership's failure to take this legitimate course violated the Act.

D. 8(a)(3) Allegations

1. Gonzalez' suspension[56]

Intership lawfully suspended Gonzalez. It demonstrated that it would have suspended him, even in the absence of his protected activity.

a. Legal Precedent

The framework for analyzing whether discriminatory actions violate Section 8(a)(3) is provided under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which requires the General Counsel to show, by a preponderance of the evidence, that the worker's protected conduct was a motivating factor in the adverse action. This initial burden is satisfied by showing protected activity, employer knowledge and animus. If the General Counsel meets this initial burden, the burden shifts to the employer to prove that it would have taken the same adverse action, absent the protected activity. *Mesker Door*, 357 NLRB 591–592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086, 1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have still taken the same action for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

b. Prima Facie Case

The General Counsel made a prima facie showing that Gonzalez' protected activity was a motivating factor. He was a shop steward and Intership knew of his status. There is abundant evidence of Union animus in the form of threats, interrogations, surveillance and other actions.

c. Affirmative Defense

In spite of a strong showing of animus, Respondent persuasively adduced that it would have suspended Gonzalez, even absent his protected activity. First, he breached a well publicized rule prohibiting client interactions.[57] Second, he magnified his violation by using profanity against a customer. Third, Intership did not instigate the investigation; it was initiated by its client, who harbored no obvious Union animus. Fourth, Union President Mercado acknowledged the validity of the rule and did not challenge its disciplinary reach. (GC Exh. 51.) Finally, Garcia's disciplinary rationale was credited and afforded great weight. I find, as a result, that, irrespective of the obvious Union animus present herein, the suspension did not flow from such animus, was reasonable in magnitude, served legitimate business interests, and would have occurred absent his shop steward status.

2. MTS subcontract[58]

The MTS subcontract violated Section 8(a)(3). Intership failed to show that it would have subcontracted out MTS' work, in the absence of employees' Union activities.

a. Legal Precedent

Counsel for the General Counsel contends that the discriminatory subcontract should be analyzed under *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). This contention is invalid; the subcontract should be properly viewed under *Wright Line*.

i. Applicability of *Darlington*

In *Darlington*, an 8(a)(1), (3), and (5) case, the Supreme Court held that an employer may lawfully close its entire business for any reason; lawful or unlawful. The Supreme Court stated in footnote 5 that "no argument is made that Section 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise." 380 U.S. at 267 fn. 5. The Supreme Court further held that an employer may lawfully close part of its business, even if the closing is motivated by union animus, unless it is also "motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect." *Darlington*, 380 U.S. at 275. After the Supreme Court remand to the Board, the Board found a chilling effect sufficient to support an 8(a)(3) violation. The Fourth Circuit then enforced the Board's initial finding that the employer's refusal to bargain with the union after the closing violated Section 8(a)(5), relying on the 8(a)(3) violation. See *Darlington*, 165 NLRB 1074 (1967), enfd. 397 F.2d 760, 774 (4th Cir. 1968), cert. denied 393 U.S. 1023.

The *Darlington* line of cases holds that if an employer partially closes its operation with a motivation to affect union activities at its remaining plants, it violates Section 8(a)(3).

[56] These allegations are pled in pars. 5 and 6 of the third complaint.

[57] The General Counsel failed to show that this rule was disparately enforced.

[58] These allegations are pled in pars. 13 and 17 of the first complaint.

Purolator Armored, Inc., 268 NLRB 1268 (1984). Furthermore, an employer in such a case also violates Section 8(a)(5) in the likely event that the employer also fails to notify, and bargain with, the employees' bargaining representative. *Parma Industries,* 292 NLRB 90 (1988). The Board has dismissed an 8(a)(5) allegation over the closing of an entire business, where the *Darlington* precedent ruled out an accompanying 8(a)(3) violation. *Milo Express, Inc.*, 212 NLRB 313, 314 (1974). Thus, in 8(a)(3) cases, *Darlington* is applied in 8(a)(5) partial closing cases, *where there is no other basis upon which to argue that a bargaining obligation exists.* To hold otherwise would contradict and undermine the *Darlington* principle that an employer has a right to get out of one part of its business, even if it does so because of union animus, so long as it does not attempt to gain "unfair advantage" over union supporters at its other operations. *First National Maintenance,* supra, 452 U.S. at 682. As the Court observed in *First National Maintenance,* Section 8(a)(3) represents the Union's "direct protection against a partial closing decision" motivated by union animus. Accord: *D & S Leasing*, 299 NLRB 658 (1990) (cancellation of subcontract violates Sec. 8(a)(3) and (5) because of union animus); *Parma Industries*, 292 NLRB 90 (Sec. 8(a)(3) and (5) partial closing); *Mashkin Freight Lines, Inc.*, 272 NLRB 427 (1984) (Sec. 8(a)(3) and (5) closing and relocation of operations). Section 8(a)(5), independent of Section 8(a)(3), does not provide protection, direct or indirect, to a union to insist upon bargaining over an employer's decision to partially close its business.

The instant dispute, thus, should not be considered under the business closure principles set forth in *Darlington* because Intership had a bargaining obligation for the MTS subcontract under *Dubuque*. See, e.g., *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989) (*Darlington* not applicable where employer did not cease operations, but rather transferred some work to another location and subcontracted the remaining work; *Darlington* explicitly distinguished discriminatory relocation and subcontracting from partial closings). The bargaining obligation at issue herein, therefore, renders the MTS subcontract into a non-*Darlington* matter.

ii. Applicability of *Wright Line*

Although *Darlington* may be inapplicable, the Board may still analyze allegedly discriminatory subcontracts and work transfers analogous to the MTS subcontract under the parameters set forth in *Wright Line*. See, e.g., *Plaza Properties of Michigan, Inc.*, 340 NLRB 983, 987 (2003) (unlawful subcontracting is recognized exception to *Darlington* principles); *Westchester Lace, Inc.*, 326 NLRB 1227 (1998); *Carter & Sons Freightways*, 325 NLRB 433, 438 (1998); *Joy Recovery Technology Corp.*, 320 NLRB 356 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Ferragon Corp.*, 318 NLRB 359, 360–62 (1995), enfd. 88 F.3d 1278 (D.C. Cir. 1996) (Table); *Handi-Bag, Inc.*, 267 NLRB 221 (1983).

b. Prima Facie Case

The General Counsel presented a prima facie *Wright Line* showing that Intership discriminatorily subcontracted out MTS' work. Intership knew that the MTS unit had elected the Union, which satisfies the protected activity and knowledge elements. Regarding animus, there is overflowing evidence of animus in the form of the several threats, interrogations, surveillance activities and other unlawful actions present herein. In addition, the virtually lockstep timing between the Union's election victory and MTS' subcontract strongly demonstrates animus. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

c. Affirmative Defense

Respondent failed to show that it would have contracted out MTS' chassis repair work, absent the MTS unit's protected activities. Intership contention that it subcontracted out MTS' work for financial reasons is unpersuasive. First, Intership accepted MTS' mounting losses for several years without intervention, and only responded after MTS unionized. If MTS' deep losses were a valid reason, Intership would have subcontracted out the MTS operation vastly sooner. Second, even though Intership contends that it subcontracted out MTS' work because of mounting losses, it conspicuously made no showing that it saved any money via the subcontract (i.e., by offering business records showing how much money was saved by using Frank's Chassis).[59] Third, there is extensive evidence of animus, which renders any contention that the subcontract was non-discriminatory implausible. When Intership repeatedly told the MTS unit that it would close if they unionized and then fulfilled its promise within 2 short days of the Union's election victory; its anti-Union sentiments became blatant. In sum, Intership discriminatorily subcontracted out MTS' work.

3. TTS Subcontract[60]

Intership discriminatorily subcontracted out TTS's work.[61] Intership failed to show that it would have subcontracted out TTS' work, absent employees' protected activities.

a. Prima Facie Case

The General Counsel made a prima facie showing of a *Wright Line* violation. Ryan credibly testified that TTS employees were discussing unionizing. The several plant closure and discipline threats, and other unlawful comments and actions, establish knowledge and animus.

b. Affirmative Defense

For many of the same reasons considered for MTS above, Intership's claim that it would have transferred out TTS' work, irrespective of employees' protected activities is unpersuasive.

[59] Intership failed to offer records showing that MTS' losses exceeded the cost of subcontracting to Frank's Chassis.

[60] This is pled in pars. 14 and 17 of the first complaint, which was amended to reflect an April 26, 2013 closure.

[61] For the same reasons considered for MTS, the TTS subcontract was not a "partial closure" under *Darlington*. Moreover, TTS was not a partial closure; it was simply a work relocation or subcontract of a single employer's (i.e., Intership) in-house Kalmar servicing division (i.e., TTS) to Tribo Tech (i.e., the new subcontractor), which left Intership's core business function (i.e., stevedoring) essentially unchanged.

First, its contention that it closed TTS because of mounting losses is undermined by its acceptance of TTS' mounting losses for several years without intervention. It only responded to such losses, once TTS' employees began considering unionizing. If TTS' deep losses were the true reason for the subcontract, Intership would have subcontracted out its work far earlier. Second, even though Intership contends that it subcontracted out TTS' work because of mounting losses, it again made no showing that it saved money via the Tribo Tech subcontract.[62] Third, there is extensive evidence of animus, which renders Intership's claim that the TTS subcontract was non-invidious implausible. Finally, Intership's unlawful handling of the MTS subcontract, in violation of Section 8(a)(3) and (5) demonstrates a common scheme to use unlawful subcontracts and work transfers to thwart unionization.[63]

4. Changing Vacation Procedure on July 24, 2014[64]

Intership's alteration of the vacation procedure was found to violate Section 8(a)(5). It is, thus, it unnecessary to determine whether such action also violates Section 8(a)(3), given that the resulting remedy would be duplicative. *Pennsylvania Energy Corp.*, 274 NLRB 1153 (1985).

Conclusions of Law

1. Intership, MTS and TTS, which collectively comprise the Respondent, are a single employer, and are jointly and severally liable for the violations found herein.

2. Intership, MTS and TTS are individually, and as a single employer, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union is, and at all times material times was, the exclusive representative of the employees for collective bargaining within the meaning of Section 9(a) of the Act in the following appropriate bargaining unit, which has been identified as the Intership unit:

> All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at Intership's Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, guards and supervisors as defined by the Act, foremen, stevedores and all other employees.

5. The Union is, and at all times material times was, the exclusive representative of the employees for collective bargaining within the meaning of Section 9(a) of the Act in the following appropriate bargaining unit, which has been identified as the MTS unit:

> All full-time mechanics, welders, utility, tire repair, and maintenance employees employed by MTS at its facility located in Bayamon, Puerto Rico, but, excluding all other employees, managers, supervisors and guards as defined in the Act.

6. Respondent violated Section 8(a)(1) by:

(a) Interrogating employees about their Union or other protected activities;

(b) Threatening employees that they would be disciplined or discharged, if they engaged in Union or other protected activities;

(c) Threatening employees that it would close, if they engaged in Union or other protected activities;

(d) Soliciting employees to vote against the Union;

(e) Creating the impression that it was engaging in surveillance of employees' Union or other protected activities; activities; and

(f) Engaging in surveillance of employees' Union or other protected

(g) Threatening employees with violence and/or physically abusing them because they engaged in Union or other protected activities.

7. Respondent violated Section 8(a)(1) and (3) by:

(a) Subcontracting and transferring its operations at MTS, its subsidiary, and effective terminating the MTS unit, because of their Union or other protected activities.

(b) Subcontracting and transferring its operations at TTS, its subsidiary, and effective terminating its TTS employees, because of their Union or other protected activities.

8. Respondent violated Section 8(a)(1) and (5) by:

(a) Unilaterally changing the vacation check distribution system at Intership, without affording the Union notice and an opportunity to bargain as the exclusive collective- bargaining representative of the Intership unit.

(b) Unilaterally subcontracting and transferring work performed by the MTS unit, and effectively terminating the MTS unit, without affording the Union notice and an opportunity to bargain as the exclusive collective-bargaining representative of the MTS unit over this decision and its effects.

9. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not violated the Act in any other manner.

Remedy

Having found that Respondent committed certain unfair labor practices, it is ordered to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

Although the General Counsel seeks an order requiring Respondent to restore MTS and TTS, restoration of the status quo ante is inappropriate, when it causes undue hardship. *Chinese American Sewing Co.*, 227 NLRB 1670 (1977). For several reasons, I find that the restoration of MTS and TTS will cause an undue hardship. First, Intership is presently under significant financial duress and has sustained mounting losses; therefore, requiring it to restore 2 deeply unprofitable subsidiaries, in tandem with its own losses, would create an undue hardship. Second, while Intership accelerated MTS' and

[62] It failed to produce any records showing that the cost of using Tribo Tech was less than TTS' deficits.

[63] FRE 404(b) (specific acts of misconduct are relevant to demonstrate a common scheme or plan).

[64] This allegation is pled in pars. 9 and 11 of the second complaint.

TTS' closures for discriminatory reasons, it is probable that it would have eventually cut its losses and closed these unprofitable entities on its own initiative. As a result, forcing Intership to reverse this eventual course via restoration enhances an undue hardship finding. Lastly, MTS' facility has been leased through 2018, its equipment disassembled and disposed of, and over 3.5 years have passed since closure. TTS's building has also been emptied and is being marketed by a realtor, its equipment disassembled and disposed of, and over 3 years have passed since closure.

Backpay for the MTS unit should be handled as follows:

> [I]n order to recreate as nearly as possible the situation that existed at the time Respondent should have bargained, and to make whole all employees of the ... [MTS unit] for any loss of pay suffered as a result of the discrimination against them, we shall order Respondent to pay employees who were employed on the date of the closure their normal wage rate from ... [October 19, 2012], until the earliest of the following conditions as met: (1) mutual agreement is reached with the Union relating to subjects about which Respondent is required to bargain; (2) good-faith bargaining results in a bona fide impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure to the Union to bargain in good faith. Of course, if Respondent decides to resume its ... [MTS operations] and offers to reinstate the ... [MTS unit] to their same or substantially equivalent positions, its liability will cease as of that date.

National Family Opinion, 246 NLRB 521, 522 (1979).

Backpay for the TTS employees, where there was neither bargaining obligation nor unit, should be handled under the procedure set forth by *Purolator Armored*, supra (describing the backpay procedure where an employer discriminatorily and analogously closed a division, but, demonstrated that restitution would create an undue hardship). Under *Purolator Armored*, Respondent is required to offer reinstatement to each of the TTS discriminatees by either (1) reinstituting its TTS operation, at its discretion, and offering reinstatement to each of the discriminatees to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee to any positions in its existing Intership or other subsidiary operations, which they are capable of filling, giving preference to the discriminatees in order of seniority; and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs they are capable of filling. Respondent shall also make the discriminatees whole by paying each of them a sum of money equal to the amount that would have been earned as wages from April 26, 2013 (i.e., the commencement of the TTS subcontract) to the date that they either secure equivalent employment with Respondent or it makes an offer of reinstatement, as stated above.

In addition to making the MTS unit and affected TTS employees whole for any loss of earnings, such employees shall be made whole for the loss of any other benefits. Backpay shall be computed on a quarterly basis from their discharges to proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall compensate these employees for the adverse tax consequences, if any, associated with receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for each employee.[65] *Don Chavas, LLC d/b/a/ Tortillas Don Chavas*, 361 NLRB No. 10 (2014); *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Respondent shall also rescind the unilateral changes made to the Intership unit's vacation procedures,[66] unless it has already done so, and, henceforth, bargain with the Union concerning any contemplated changes in the wages, hours, working conditions, and other terms and conditions of employment of the Intership or MTS units.

Respondent shall distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. *J Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[67]

ORDER

Respondent, International Shipping Agency, Inc., and its subsidiaries, Marine Terminal Services, Inc. and Truck Tech Services, Inc., which constitute a single employer located in Bayamon, Puerto Rico, and other locales, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their Union or other protected activities;

[65] On August 17, 2015, the General Counsel filed a Motion to Amend Complaint, which sought to supplement the desired remedy by reimbursing affected employees for search for work and work related expenses caused by their loss of employment, without regard to whether interim earnings are in excess of these expenses. Normally, those expenses are considered an offset to interim earnings. But, the General Counsel seeks a change in existing rules regarding search-for-work and work-related expenses. This would require a change in Board law, which is the sole province of the Board. Therefore, I shall not include this remedial proposal in my recommended Order.

[66] There is no evidence that employees suffered any monetary losses from the changes to the vacation procedure.

[67] 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

(b) Threatening employees that they will be disciplined or discharged, if they engage in Union or other protected activities;

(c) Threatening employees that it will close, if they engage in Union or other protected activities;

(d) Soliciting employees to vote against the Union;

(e) Creating the impression that it is surveilling employees' Union or other protected activities;

(f) Engaging in surveillance of employees' Union or other protected activities;

(g) Threatening employees with violence to their persons or property and/or physically abusing them because they engage in Union or other protected activities;

(h) Subcontracting and transferring its operations at MTS, its subsidiary, and effectively terminating the MTS unit, because of their Union or other protected activities;

(i) Subcontracting and transferring its operations at TTS, its subsidiary, and effectively terminating its TTS employees, because of their Union or other protected activities;

(j) Unilaterally changing the vacation check distribution system at Intership, without affording the Union notice and an opportunity to bargain as the exclusive collective-bargaining representative of its employees at Intership in the following appropriate unit:

> All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at Intership's Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, guards and supervisors as defined by the Act, foremen, stevedores and all other employees.

(k) Unilaterally subcontracting and transferring work performed at MTS, and effectively terminating those employees, without affording the Union notice and an opportunity to bargain over its decision to subcontract and its effects as the exclusive collective-bargaining representative of its employees at MTS in the following appropriate unit:

> All full-time mechanics, welders, utility, tire repair, and maintenance employees employed by MTS at its facility located in Bayamon, Puerto Rico, but, excluding all other employees, managers, supervisors and guards as defined in the Act.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[68]

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

(a) Upon request, bargain with the Union as exclusive bargaining representative of its employees in the MTS unit concerning their decision to subcontract out MTS' operations and terminate the MTS unit.

(b) Make whole the MTS unit employees in the manner set forth in the remedy section of this Decision.

(c) Make whole the affected TTS employees by either (1) reinstating the TTS operation and offering reinstatement to each of the discriminatees to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee to any positions at Intership or any other subsidiary operations, which they are capable of filling, giving preference to discriminatees in order of seniority, and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs they can fill.

(d) Make whole the TTS discriminatees by paying each of them a sum of money equal to the amount that would have been earned as wages from the date of termination to the date they either secure equivalent employment or receive an offer of reinstatement, together with interest thereon.

(e) Compensate all affected MTS and TTS employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(g) On request of the Union, rescind any changes made to the vacation scheduling procedure at Intership.

(h) Within 14 days after service by the Region, post at its Bayamon, Puerto Rico facility copies of the attached notice marked "Appendix.[69] Copies of the notice, on forms provided by the Regional Director for Region 12, 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. Respondent shall also shall duplicate and mail, at its own expense, a copy of the notice to all former MTS and TTS employees

[68] A broad order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979).

[69] 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.

employed by the Respondent at any time since September 1, 2012. If the Respondent has since gone out of business or closed the Intership facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it there at any time since September 1, 2012.

(i) 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 it has taken to comply.

Dated, Washington, D.C. March 30, 2016

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 interrogate employees about their Union or other protected activities.

WE WILL NOT threaten employees that they will be disciplined or fired, if they engage in Union or other protected activities.

WE WILL NOT threaten employees that we will close, if they engage in Union or other protected activities.

WE WILL NOT solicit or lobby employees to vote against the Union.

WE WILL NOT create the impression that we are watching employees' Union or other protected activities.

WE WILL NOT watch employees' Union or other protected activities.

WE WILL NOT threaten employees with violence to their persons or property and/or physically abuse them because they engage in Union or other protected activities.

WE WILL NOT subcontract and transfer our operations at MTS, our subsidiary, and effectively terminate the MTS unit, because of their Union or other protected activities.

WE WILL NOT subcontract and transfer our operations at TTS, our subsidiary, and effectively terminating our TTS employees, because of their Union or other protected activities.

WE WILL NOT unilaterally change the vacation check distribution system at Intership, without affording the Union notice and an opportunity to bargain as the exclusive collective-bargaining representative of our employees at Intership in the following appropriate unit:

All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at Intership's Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, guards and supervisors as defined by the Act, foremen, stevedores and all other employees.

WE WILL NOT unilaterally subcontract and transfer work performed at MTS, and effectively terminate those employees, without affording the Union notice and an opportunity to bargain over our decision and related effects as the exclusive collective-bargaining representative of our employees at MTS in the following appropriate unit:

All full-time mechanics, welders, utility, tire repair, and maintenance employees employed by MTS at its facility located in Bayamon, Puerto Rico, but, excluding all other employees, managers, supervisors and guards as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, upon request, bargain with the Union as exclusive bargaining representative of our employees in the MTS unit concerning our decision to subcontract out MTS' operations and terminate the MTS unit.

WE WILL make whole the MTS unit employees, with interest.

WE WILL, in the event that we agree to reopen MTS, offer the former MTS employees their former jobs or, if those jobs no longer exist, substantially equivalent positions.

WE WILL offer full and immediate reinstatement to each of the TTS employees who lost their positions as a result of our discriminatory subcontract of their work by either (1) reinstating our TTS operations and offering reinstatement to each of the discriminatees to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee to any position at Intership or our other existing subsidiary operations, which they are capable of filling, giving preference to discriminatees in order of seniority, and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs they are capable of filling.

WE WILL make whole the TTS discriminatees mentioned above by paying each of them a sum of money equal to the amount that would have been earned as wages from the date of our unlawful TTS subcontract to the date they either secure equivalent employment with us or we make an offer of reinstatement, together with interest thereon.

WE WILL compensate affected MTS and TTS employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years of

each employee.

INTERNATIONAL SHIPPING AGENCY, INC., AND ITS SUBSIDIARIES, MARINE TERMINAL SERVICES, INC., AND TRUCK TECH SERVICES, INC., A SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/24-CA-091723 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.

No. _____

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INTERNATIONAL SHIPPING AGENCY, INC.; MARINE TERMINAL SERVICES, INC. and TRUCK TECH SERVICES, INC.

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Marine Terminal Services, Inc., and Truck Tech Services, Inc. hereby give notice that their parent company is International Shipping Agency Inc., which is a privately held corporation. No publicly-held corporation owns 10% or more of the stock in Marine Terminal Services Inc., Truck Tech Services, Inc., or International Shipping Agency Inc.

Respectfully submitted,

[SIGNATURE TO FOLLOW ON SUBSEQUENT PAGE]

INTERNATIONAL SHIPPING AGENCY, INC., MARINE TERMINAL SERVICES, INC., and TRUCK TECH SERVICES INC.

By their attorneys,

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Dated: June 2, 2020

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. 25(d), I hereby certify that on June 3, 2020 I served a copy of the foregoing document upon the following persons by electronic mail:

William Marrero, Esq.
wmq@wmarrerolaw.com
Counsel for the Charging Party

I also certify that I served a copy of the foregoing document upon the Clerk of the Court on June 3, 2020 for service upon the following persons by Federal Express Overnight Delivery:

Peter B. Robb, General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Antonio Cuevas Delgado (# 23743)
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United States Court of Appeals
For the First Circuit

NOTICE OF APPEARANCE

No. **Short Title:** International Shipping Agency Inc. et als v. NLRB

The Clerk will enter my appearance as counsel on behalf of ***(please list names of all parties represented, using additional sheet(s) if necessary)***: International Shipping Agency Inc.; Marine Terminal Services Inc.; and Truck Tech Services, Inc. as the

[ ] appellant(s) [ ] appellee(s) [ ] amicus curiae

[X] petitioner(s) [ ] respondent(s) [ ] intervenor(s)

Signature

June 2, 2020
Date

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Email (required)

Court of Appeals Bar Number: 23743

Has this case or any related case previously been on appeal?

[X] No [ ] Yes Court of Appeals No._____

Attorneys for both appellant and appellee must file a notice of appearance within 14 days of case opening. New or additional counsel may enter an appearance outside the 14 day period; however, a notice of appearance may not be filed after the appellee/respondent brief has been filed without leave of court. 1st Cir. R. 12.0(a).

Counsel must complete and file this notice of appearance in order to file pleadings in this court. Counsel not yet admitted to practice before this court must promptly submit a bar application. 1st Cir. R. 46.0(a)(2).