

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**ALSTATE MAINTENANCE, LLC**

**And**

**Case No. 29-CA-252004**

**VERNON HARRIS, an individual**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 32BJ**

**and**

**Case No. 29-CB-252635**

**VERNON HARRIS, an individual**

**GENERAL COUNSEL'S POST-HEARING BRIEF TO THE  
ADMINISTRATIVE LAW JUDGE**

Matthew A. Jackson  
Counsel for the General Counsel  
National Labor Relations Board  
Region 29  
Two MetroTech Center, Suite 5100  
Brooklyn, New York 11201-3838  
matthew.jackson@nlrb.gov  
Tel. (718) 765-6202  
Fax No. (718) 330-7579

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## I. STATEMENT OF THE CASE<sup>1</sup>

On May 6, 2020, the Regional Director for Region 29 of the National Labor Relations Board (“Board”) issued a Consolidated Complaint and Notice of Hearing (“Complaint”) based upon unfair labor practice charges filed by Charging Party Vernon Harris, an individual. The charge in Case No. 29-CA-252004 was filed by Mr. Harris against Respondent Alstate Maintenance, LLC (“Respondent Employer”) [GC 1(A)], and the charge in Case No. 29-CB-252635 was filed by Mr. Harris against Respondent Service Employees International Union, Local 32BJ (“Respondent Union”) [GC 1(C)]. The Complaint alleges, *inter alia*, that at all material times, Mr. Harris worked as a supervisor of Respondent Employer as defined by Section 2(11) of the National Labor Relations Act (“Act”), and that Respondent Employer violated Section 8(a)(1) and (2) of the Act by providing financial assistance and support to the Union by requiring Harris to pay dues and/or fees to Respondent Union and by discharging Harris because he failed and refused to pay such dues and/or fees. [GC 1(E).] The Complaint further alleges that Respondent Union solicited and received financial assistance from Respondent Employer by attempting to cause and causing Respondent Employer to require Mr. Harris to pay dues and/or fees to Respondent Union as a condition of his employment. [*Id.*] The Respondents each deny that it has violated the Act. [GC 1(G), 1(I).]

The case was heard before Administrative Law Judge Benjamin W. Green via Zoom videoconference over four non-consecutive days of hearing, beginning on August 4, and ending on August 19, 2020.

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<sup>1</sup> All factual citations are from the official hearing record. Citations to the Transcript will appear as “Tr. \_\_\_,” denoting the particular the page(s) cited in the Transcript. Citations to Exhibits in the record will be denoted as “GC \_\_\_” for General Counsel exhibits, “ER \_\_\_” for exhibits introduced by Respondent Employer Alstate Maintenance, LLC, “UN \_\_\_” for exhibits introduced by Respondent Union Service Employees International Union, Local 32BJ, and “JT \_\_\_” for joint exhibits.

These cases present two central legal questions. The first is whether Charging Party Harris was employed as a supervisor within the meaning of Section 2(11) of the Act by virtue of the responsibilities and authority vested in him by Respondent Employer in his capacity as a Lead Agent in Respondent Employer's baggage handling operation at John F. Kennedy International Airport ("JFK").<sup>2</sup> As discussed fully herein, record evidence shows that, on a daily basis, Mr. Harris was responsible for assigning employees various jobs to perform on behalf of Respondent Employer using his independent discretion and that he further assigned employees overtime and determined when they could take breaks. In addition, the record further reveals that Respondent Employer effectively made Harris an acting supervisor on a regular basis constituting approximately 20 percent of his working hours each week, during which time Harris was vested with full supervisory authority, including the power to dismiss employees from work without pay if they engaged in what Harris himself determined was misconduct.

The second question presented in this case is whether the Respondents were permitted under the Act to compel supervisor Harris to pay money to the Union pursuant to a "Union Security" clause in a collective-bargaining agreement that explicitly excluded him from the bargaining unit covered by the contract as a Section 2(11) supervisor. It is undisputed that Respondent Union requested that Respondent Employer terminate Harris's employment because he had failed to pay dues and/or fees to Respondent Union, and that Respondent Employer obliged by discharging Harris for that reason. However, as explained below, because Harris was a statutory supervisor expressly excluded from the bargaining unit under the plain terms of the Respondents' collective-bargaining agreement, the Respondents' could not lawfully apply the Union Security clause to him and force him to pay dues or fees to Respondent Union under threat of discharge.

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<sup>2</sup> The General Counsel does not allege in this case, and takes no position regarding, whether any other individuals employed by Respondent Employer as Lead Agents are statutory supervisors.

Thus, by terminating Harris's employment because he failed to pay dues or fees to Respondent Union, Respondent Employer provided unlawful assistance to Respondent Union in violation of Section 8(a)(2) and (1) of the Act. Respondent Union likewise solicited unlawful financial support from Respondent Employer by demanding that it discharge Harris for failing to pay dues or fees to Respondent Union and received such unlawful assistance when Respondent Employer acquiesced and terminated Harris's employment, in violation of Section 8(b)(1)(A) of the Act.

## **II. FACTS**

### **A. Overview of Respondent Employer's Operations at JFK Terminal 1**

Respondent Employer is engaged in the business of providing ground services at John F. Kennedy International Airport located in Queens, New York. [GC 1(E), 1(I).] Respondent Employer admits that, during the twelve-month period ending April 30, 2020, in the course of providing these services, it purchased and received at its New York facility goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New York and performed services valued in excess of \$50,000 for various airline companies, which are themselves directly engaged in interstate commerce. [*Id.*] Although Respondent Employer in its Amended Answer to the Complaint herein asserted that it was a derivative airline carrier under the Railway Labor Act and not subject to Board jurisdiction [GC 1(I)], Respondent Employer subsequently stipulated that it consents to the Board's jurisdiction in the instant case, [JT 12]. Consistent with its stipulation, Respondent Employer presented no evidence during the hearing to substantiate its abandoned claim that it is not subject to the Board's jurisdiction in this matter. Accordingly, the record establishes that, at all material times, Respondent Employer has been an employer within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent Employer operates out of several terminals at JFK Airport, including Terminals 1, 4 and 5. [Tr. 26-27.] Only Respondent Employer's operations at Terminal 1 are relevant in this case. Respondent Employer provides several different services at JFK Terminal 1 to its client, Terminal 1 Group, which is comprised of various airline carriers who operate out of Terminal 1. [Tr. 254.] The services Respondent Employer provides at JFK Terminal 1 include baggage handling, wheelchair assistance for passengers, passenger service relations (PSR), skycap and customs and border patrol (CBP) support. [Tr. 24.] The wheelchair assistance service involves transporting passengers with mobility issues from inbound flights to other destinations within the airport. PSR involves directing and assisting passengers on inbound flights who must go through a security checkpoint before proceeding into the airport. Skycap is a service that enables passengers with excess baggage to check their bags in for their flight curbside outside the Terminal, as opposed to inside the Terminal at one of the airline counters. The CBP service involves transporting and re-routing passengers' bags that come in from inbound flights and must be re-checked for security. [Tr. 24-26.]

#### 1. Respondent Employer's Baggage Handling Operation

Respondent Employer's baggage handling operation is of particular relevance in this case. Respondent Employer is responsible for helping manage the flow of passenger luggage on behalf of the various airlines operating at JFK Terminal 1 to ensure that passengers' bags get routed to the appropriate airplane and arrive with the passengers at their destinations.

The baggage handling service begins at the check-in counters run by the airlines. The various airlines operating at Terminal 1 typically assign a ticketing agent to interface with passengers and check them in for their flights. [Tr. 305.] At Terminal 1, there are eight airline

counters, known as Counters A through H. [Tr. 262.] The Counters are on the Departures level of the Terminal, before the main security checkpoints. [Tr. 33.]

Respondent Employer employed two classifications of workers in its baggage handling operation: baggage handlers and lead agents. The job of the baggage handler was primarily to be present at the various airline counters during the time when the check-in process for a flight is open in order to lift passengers' bags and monitor the luggage belt that moves the bags away from the counter for security screening and routing to airplanes. Baggage handlers additionally ensured that the bags get placed on the appropriate airplane. [Tr. 22-23, 26.] The baggage handler was responsible for placing bags on the belt at an appropriate distance from one another, including by using tubs, to avoid causing a jam. [Tr. 256.]

Baggage handlers were also stationed at other areas of the Terminal to assist with other aspects of the operation. Respondent Employer stationed baggage handlers in an area called the CBRA room, which is where the bags coming from the departure counters go for security screening. [Tr. 33-34.] Baggage handlers assigned to work in the CBRA room worked closely with agents of the federal Transportation Security Administration (TSA) and assisted TSA agents performing security screening of passenger luggage by removing the bags from the baggage belt as they come into the CBRA room, scanning the bags using a scanner device that is specially programmed to perform CBRA functions, and routing them to get to the appropriate airplanes after the bags have been screened. [*Id.*; Tr. 369-70.]

Baggage handlers also worked in separate area for oversized luggage called CTX. Baggage handlers assigned to work at CTX must track the bags that come into the oversize area using stickers and specially programmed scanners that help ensure the bags get properly routed. [Tr. 35

-36, 369-70.] Only the baggage handlers who are assigned to work in the CBRA room or the CTX oversize area use scanners to track luggage as part of their job duties. [Tr. 428.]

In addition, Respondent Employer assigned baggage handlers to work in the Arrivals level of the Terminal performing re-check services, which involves transporting bags that must be re-screened for security purposes after a passenger has arrived at JFK from an inbound flight originating in a different location. [Tr. 34.]

Baggage handlers were required to wear a uniform consisting of a blue-green jersey bearing Respondent Employer's logo or insignia and black pants while on duty. [Tr. 22-23.]

Respondent Employer expected baggage handlers to remain active at all times when on duty, and they were never supposed to stand idle. [Tr. 374.] Once the employees stationed at a particular check-in counter completed their work, they were required to vacate that counter and move to work at another part of the operation. [Tr. 373-74.] Employer managers and supervisors emphasized to baggage handlers and Lead agents that employees must not be seen idling in the Terminal and must "Always be active." [Tr. 399-400; Tr. 374-76.]

Respondent Employer employed about four Lead agents in its Terminal 1 baggage handling operation. [Tr. 278.] Lead agents were generally responsible for overseeing the work of the baggage handlers to ensure that they were in position to effectively manage the flow of luggage through the system. [Tr. 36.] It was the Leads' job to traverse the various areas where baggage handlers worked and ensure that they were performing their jobs adequately. [Tr. 396-97.] Leads would occasionally step in to assist baggage handlers with their work of physically moving passenger luggage onto the luggage belts in situations where the operation was short staffed, or in order to relieve an employee who needed a break. [*Id.*]

Leads, and in particular Charging Party Vernon Harris, were responsible for assigning baggage handlers to various posts throughout the baggage handling operation, as discussed more fully below. Respondent Employer's Employee Handbook expressly codified the role of Leads in assigning employees, providing that "Employees must follow Rules and Regulations and Job Assignment given by management and/or Leads." [GC 6.]

Leads were also required to wear particular clothing, namely a plain white shirt with no insignia and black pants, while on duty. Unlike baggage handlers, Leads did not have to wear clothing bearing the Employer's logo or insignia. [Tr. 42-43.]

## 2. Supervision of Respondent Employer's Baggage Handlers

Respondent Employer employs a General Manager who is responsible for overseeing all operations and services Respondent Employer provides at JFK Terminal 1. [Tr. 28.] There were several different individuals who occupied the Terminal 1 General Manager position at various times relevant to this matter. Since April 2018, Vincent Gilmore has served as Respondent Employer's General Manager at Terminal 1.

Below the General Manager in Respondent Employer's hierarchy at Terminal 1, there are approximately seven or eight individuals with the job title of "Supervisor." [GC 7, Tr. 29.] The Supervisors had a shared office in Terminal 1. [Tr. 37.] The credible evidence presented in this case establishes that Respondent Employer did not dedicate Supervisors specifically to the baggage handling operation. Instead, according to the testimony of Charging Party Harris, there was no supervisor who was specifically dedicated to overseeing the baggage handling operation at Terminal 1. [Tr. 28, 124.] The Supervisors worked more as general Supervisors who were each responsible for all operations and services Respondent Employer maintained at Terminal 1. [Tr. 29-32.] The supervisors did not spend much of their work time in the unsecured area at the

Departures level of the Terminal where baggage handlers primarily worked. Rather, Harris testified that he observed the Supervisors spending the majority of their time at the Arrivals level or on the secured side of the Departures level meeting with Terminal 1 Group representatives. [*Id.*] Supervisors were only seldomly present in the areas where baggage handlers worked, such as the check-in counters or the CBRA room. [Tr. 36.]

Harris's testimony establishing that Respondent Employer did not have dedicated baggage handling supervisors who spent significant amounts of time in the baggage handling areas overseeing employees is corroborated by the testimony of employee witness Eon Weldron. Weldron testified that he observed the Supervisors spending most of their work time in the supervisors' office and that he saw Supervisors in the area by the Departures check-in counters, where Weldron worked as a baggage handler, "Not too often" and certainly much less frequently than Weldron saw Leads working in that area. [Tr. 395-96.]

Respondent Employer General Manager Vincent Gilmore, however, testified that Respondent Employer has dedicated baggage supervisors who oversee the baggage handling operation and "delegate the work to the baggage Lead. . ." [Tr. 256.] Gilmore testified that there are also dedicated supervisors who oversee each of the other services Respondent Employer provides at Terminal 1 [Tr. 280-83], in addition to other general supervisors. [Tr. 257.] However, when he testified about the role of each of his supervisors, Gilmore did not identify any of them as a general supervisor. [Tr. 280-83.] When asked to explain the difference between a baggage handling supervisor and a general supervisor, all that Gilmore could say was that they are in different departments. [Tr. 257.]

According to Gilmore, dedicated baggage supervisors spend their work time on the unsecured portion of the Departures level "working the counters" and "constantly moving around

the floor.” In stark contrast to the testimony of the employees who actually worked in that area, Gilmore testified that there would never be a time when a baggage supervisor would be anywhere other than at the counters or belts in the Departures check-in area. [Tr. 270.] Respondent Employer did not call any purported baggage supervisor to testify in this case to corroborate Gilmore’s testimony regarding the role of a baggage supervisor.

**B. Collective-Bargaining History Involving the Bargaining Unit Represented by the Union**

Respondents admit in their respective Answers to the Complaint in this case that, at all material times, Respondent Union has been a labor organization within the meaning of Section 2(5) of the Act. [GC 1(G), 1(I).] Respondent Union was certified as the collective-bargaining representative of Respondent Employer’s employees on October 30, 2015, following a representation election administered by the Board in Case No. 29-RC-159794. [JT 11.] Prior to that certification, Respondent Employer’s JFK employees had been represented by another union, Local 660, United Workers of America (“Local 660”). [Tr. 102.] Local 660 began representing the employees in about 2012. [*Id.*] The bargaining unit (“Unit”) represented by Local 660 included “all full-time and regular part-time Skycaps, Wheelchair Agents, Baggage Handlers, Passenger Service Agents, Boarding Gate Agents and CTX Baggage Handlers in Terminal 1 and 4 of the JFK International Airport.” Importantly, the Unit excluded “office clericals, foremen, sales personnel executives, Guards and Supervisors as defined in Section 2(11) of the Act.” [JT 11.] The collective-bargaining agreement entered between the Employer and Local 660 did not mention Lead agents and was completely silent regarding whether Leads should be included or excluded from the Unit. [UN 2.] Nevertheless, despite the language in the collective-bargaining agreement excluding foremen and supervisors from the Unit, Respondent Employer and Local 660 had still considered and treated Lead agents as part of the Unit. [Tr. 166-67, 245.] Accordingly,

Charging Party Harris believed that he was included in the Local 660 Unit, even during the time he worked as a Lead agent. [Tr. 166-68.]

When Respondent Union won certification in October 2015, it inherited the extant Unit that had been previously represented by Local 660. [JT 11.] On about December 29, 2016, Respondent Employer entered into a new collective-bargaining agreement with Respondent Union (the “CBA”). [JT 2.] Under the new CBA, the Parties defined the Unit as “all employees employed on the premises of . . . JFK Airport or performing airport-related services, except for employees represented by another union while working on accounts between the Port Authority of NY-NJ (“PANY”) and/or Federal Express and the Employer, excluding security guards, food service employees, engineers, retail employees, supervisors/managers, all financial and office employees as defined by the National Labor Relations Act.” [JT 2; Tr. 8-9.]

The CBA between the Respondents further included at Article 3 a “Union Security and Check-Off” provision, which made it “a condition of employment that all Employees covered by this Agreement shall become and remain members in the Union . . .” The provision goes on to clarify that the membership requirement may be “satisfied by the payment of financial obligations of the Union’s initiation fee and periodic dues uniformly imposed.” [JT 2.] The Union Security clause further provides that Respondent Employer is obligated to discharge an employee within 15 days upon its receipt of a written notice from Respondent Union stating that the employee has failed to pay dues and/or fees in accordance with the Union Security provision. [*Id.*]

Like the Local 660 contract that preceded it, the CBA between the Respondents also does not mention Lead agents and is completely silent regarding whether Lead agents should be included or excluded from coverage under the CBA. [*Id.*] The CBA, however, does explicitly exclude supervisors as defined by the Act from the Unit covered by the agreement. [*Id.*] There is

no evidence that the Respondents made any other agreement to include Lead agents in the Unit, or that they notified employees in the Unit that Lead agents would be included in the Unit, even if they are considered supervisors under the Act.

**C. Charging Party Harris's Employment History and Job Duties as Lead Agent**

Charging Party Vernon Harris began working for Respondent Employer at JFK Terminal 1 in about December 2008. [Tr. 21-22.] Harris began his employment as a baggage handler and was promoted to Lead agent starting in about August 2014, before becoming full-time Lead agent in about January 2015. [Tr. 23.] Harris considered the move from baggage handler to Lead as a promotion because Leads earn a higher wage rate and because the position of Lead entailed greater responsibility and authority over the baggage handlers to ensure that they performed their work successfully. [*Id.*]

At all relevant times, Harris's regular work hours were from 6:00 a.m. to 2:30 p.m. on Wednesdays, Thursdays and Fridays, and from 3:00 a.m. to 11:30 a.m. on Saturdays and Sundays. [Tr. 30.]

Harris reported to the seven or eight general Supervisors, who were his superiors in Respondent Employer's company hierarchy. [Tr. 124, 255.] During his shifts, there were about four or five general Supervisors on duty. As noted above, Harris testified that the Supervisors were responsible for overseeing Respondent Employer's entire operation at Terminal 1, not just the baggage handling service, and spent little time in the areas where baggage handlers worked. [Tr. 28-32.] Thus, it was Harris's job to oversee the work of baggage handlers. [Tr. 36-37.] Harris spent most of his work time traversing from one end of the Departures check-in counters area to the other end, checking all of the counters and making sure that baggage handlers were stationed where they were supposed to be and were doing what they were supposed to be doing. [Tr. 43-44.]

Occasionally, airline representatives would approach Harris, as the Employer's representative, and ask him to ensure that employees performed a certain task. As an example, Harris testified that airline representatives occasionally asked Harris to ensure that a wheelchair attendant be made immediately available to assist one of the airline's passengers, and Harris obliged, directing an employee to complete that task. [Tr. 44.] In addition to walking the floor on the Departures check-in level in order to monitor employees working there, Harris was also responsible for frequently visiting the other areas where baggage handlers worked, including the CTX oversized area and the CBRA room. [Tr. 36-37, 44.]

Part of Harris's job also entailed going into the Supervisors' office in order to check postings on a message board located there, where Respondent Employer kept operational notices regarding matters that were ongoing in the Terminal. Harris testified that he was required to check those messages so that he could properly direct employees and "control the operation." [Tr. 38.] At certain times, particularly in the early morning hours on Saturdays and Sundays when Harris began his shift at 3:00 a.m., he also needed to go into the Supervisors' office to get certain equipment that baggage handlers needed to use to perform their work in the CBRA room. [Id.] Accordingly, Respondent Employer gave Harris keys to the Supervisors' office, which rank-and-file employees did not have. [Tr. 37-38.]

Harris was an hourly wage worker and was required to log his hours on a timeclock and sign in and out of work at the beginning and end of each shift. [Tr. 39-41.] He punched in and out using the same timeclock that baggage handling employees used, as well as the general Supervisors, who were also required to punch in and out. [Id.] Respondent Employer required employees to log their in/out times using both a digital timeclock and a hand-written sign-in sheet. Harris's job as Lead agent required him to frequently check the written sign-in sheet to determine

which employees were on duty at any given time and ensure that employees signed in at the time when they actually arrived. [*Id.*, Tr. 44.]

Harris received no formal training regarding what his role and responsibilities were as a Lead agent. [Tr. 38-39.] He learned what he was supposed to do on the job primarily by observing what other Leads did and applying that to his own pre-existing knowledge and experience. [*Id.*]

1. Harris Was Responsible for Assigning Employees

a. *Harris Assigned Employees to Different Jobs Within the Baggage Handling Operation*

Harris's primary responsibility as Lead agent was to "set the floor," as Harris put it, or to ensure that baggage handling employees were assigned to appropriate positions to meet the needs of the operation. [Tr. 41.] There were typically between 18 and 32 baggage handlers on duty during Harris's shifts. [Tr. 77.] At the start of their shifts, baggage handlers were required to report to Harris in order to receive their initial job assignment for the day. [Tr. 41, 137, 401-02.] Harris was thus responsible for assigning these employees to different posts in the baggage handling operation, whether that be to one of the various departure check-in counters or to one of the specialized baggage handling areas like CTX oversize. [*Id.*] Harris routinely made these assignments on a daily basis [Tr. 81], often reassigning employees to multiple posts over the course of their shifts in order to meet the changing needs of the operation. [Tr. 139-40.]

Harris's testimony establishing that he assigned employees to different posts in the baggage handling operation was corroborated by the testimony of two neutral employee witnesses. In that regard, Eon Weldron, testified that he received his daily work assignments from Lead agents, including Harris, with whom Weldron worked during certain shifts as a baggage handler. [Tr. 398, 402.] Weldron confirmed that Harris was the person who gave him instructions and told Weldron where he should work as soon as Weldron reported in for duty. [Tr. 402.] A second employee

witness – Ivan Johnson – who worked as a baggage handler on the night shift, similarly testified that it was a Lead who assigned him to his posts on a daily basis. [Tr. 342-43.]

Not all assignments were the same, as the work that needed to be done at each post differed. For example, certain airline carriers had specific requirements regarding how they wanted baggage handlers to move bags and record the processing of passenger luggage. [Tr. 78-79.] Harris testified that certain airlines, including “JAL, Japan Airline,” Korean Airline, Lufthansa and Turkish Airlines, required special procedures that baggage handlers were expected to follow. [*Id.*] These airlines required baggage handlers to do more than just put the bags onto the luggage belt at proper distance. They additionally required employees to use a system of stickers and lists to track and record which bags were oversized and which were merely “pull bags.” Baggage handlers assigned to work at one of these airlines’ counters were required to record the “pull bags” on one sheet of paper and record the oversized luggage on a separate sheet, while also recording the times that the pieces of luggage were sent away from the counter. [*Id.*]

Harris additionally assigned employees to work in the CTX oversize area of the baggage handling operation. The work in CTX varied from the work performed at the different check-in counters because, unlike most counters, employees stationed at CTX were required track the bags that come into the oversize area using stickers and specially programmed scanners that help ensure the bags got properly routed. [Tr. 35 -36, 369-70.]

Harris independently determined which employees to assign to the different posts based on his assessment of the employee’s skills and reliability. Harris was not required to get approval from Supervisors or the General Manager to assign baggage handlers to the various posts, and Supervisors did not direct or instruct Harris in terms of how to assign workers. [Tr. 80-81.] Harris testified that he assigned employees at the counters that had more stringent requirements for

baggage handlers based on whether he believed that the employees had the ability to do the job to the airline's specifications. He testified that he assigned certain baggage handlers at CTX based on their ability, punctuality, efficiency and consistency. [*Id.*] His determinations regarding where to assign employees did not depend strictly on the employees' relative seniority, but was instead based primarily on Harris judgment regarding the person's "ability to work." [*Id.*]

Despite the testimony of Harris and two baggage handling employees establishing that Leads assigned employees to their posts on a daily basis, General Manager Vincent Gilmore contrarily testified that Respondent Employer managers, not Leads, assign employees. [Tr. 261-62.] Gilmore testified that, for every quarter of the year, Respondent Employer has a process called "baggage bid" in which employees request to work at certain posts designated by Employer management based on the flights scheduled to depart from the Terminal in the coming quarter. [*Id.*] Respondent Employer then selects which employee should be assigned to each post and assigns them to that position for the duration of the quarter. [*Id.*] Gilmore testified that a Lead agent could not reassign a baggage handler from the post to which the employee had been assigned through the baggage bid. [*Id.*] According to Gilmore, baggage handlers were expected to work at the same counter throughout their entire shifts, and if there was no flight departing from that counter, then the employee would just stand idle until the next flight opened at his/her assigned counter. [Tr. 290-91.] Here again, Gilmore's testimony directly contradicts the testimony of Harris and Weldron [Tr. 373-76, 399-400], who, unlike Gilmore, actually worked in the baggage handling operation. Moreover, Respondent Employer failed to produce any documentary evidence or other corroborative witnesses to substantiate Gilmore's claims regarding the "baggage bid" and the supposed quarterly assignment of baggage handlers to specific posts.

b. *Harris Recommended Employees for Assignment in the CBRA Room*

Harris additionally helped determine which employees would work alongside TSA agents in the CBRA room at Terminal 1. [Tr. 85.] Employees who worked in the CBRA room had to be specially trained on how to work that job because the operation in CBRA differed from other areas of the baggage handling operation. [Id.] Employees who worked in CBRA needed training to help them understand how to read and operate the monitor in the room, which tracks the bags coming in, as well as training on how to use the scanner device to scan bags in and out of CBRA. [Tr. 378.] TSA agents participated in training the employees who were selected to work in CBRA. [Id.] Harris selected which employees would receive the training that would enable them to do this work. Harris testified that he determined which employees to recommend for CBRA training based on the employees' punctuality as well as Harris's assessment of the employees' ability to adhere to instructions from TSA agents. [Id.]

Harris testified that when he selected an employee to be trained in CBRA work, he would bring that employee to the Supervisor's office to discuss Harris's recommendation. Harris further testified that the Supervisor typically approved Harris' assignment and put the employee through the CBRA room training. [Id., Tr. 207.] Given the heightened security measures associated with the CBRA room work conducted in conjunction with heavily-regulated TSA agents, and the detailed nature of Harris' testimony, Gilmore implausibly testified that employees are not required to undertake any special training to work in the CBRA room and therefore Leads do not recommend employees for such training.

c. *Harris Assigned Employees Overtime*

In addition to determining where employees would work in the baggage handling operation and what kind of jobs they would be required to perform, Harris was also responsible for assigning

paid overtime work to employees. [Tr. 86-88.] Harris typically did not determine whether or when overtime work was required from employees, but when Supervisors told Harris that Respondent Employer wanted baggage handling employees to work additional hours, the Supervisors left it to Harris' judgment to determine to whom the extra work should be given. Harris offered the overtime work to select employees, and the employees were typically eager to get the additional paid time and volunteered to work. [*Id.*] However, Harris testified that there were instances when there were fewer overtime opportunities than there were volunteers, and in those instances, Harris determined which employees to offer overtime to based on his assessment of their "credibility," or their reliability in terms of coming to work or staying at work as the employees said they would. [Tr. 89.]

Employee Eon Weldron again corroborated Harris's testimony regarding his authority to assign employees overtime. Weldron testified that Leads, including Harris, occasionally approached baggage handlers and asked them to work overtime. If the employee agreed to take the overtime shift, then they would work the additional hours, without any involvement from a Supervisor. [Tr. 406-07.]

Supervisors did not discuss with Harris or instruct him as to which employees he should select for overtime work. [Tr. 89-90.] Instead, the Supervisors left these overtime determinations entirely up to Harris. [*Id.*] Once Harris made his determination about which employees should be offered overtime, he was not required to get that decision approved by a Supervisor or manager. [*Id.*] Gilmore disputed that Harris selected which employee received overtime, instead contending that he or general Supervisors determined which employees were assigned overtime. Because Respondents failed to call any supervisors to testify, Gilmore's generalized testimony is uncorroborated, which stands in sharp contrast to Harris' corroborated testimony.

d. *Harris Determined When Employees Could Take Breaks*

Harris additionally was responsible for ensuring that employees took breaks. [Tr. 203.] While the times of employees' 30-minute meal breaks and 15-minute rest breaks were pre-determined by higher-level management [Tr. 416-18], employees could not just leave their posts at their designated break times. Rather, baggage handlers needed permission from Harris, as a Lead, to take their breaks. [Tr. 51-52, 406.]

Harris testified that he never denied breaks to any employees [Tr. 194], but sometimes he denied employees' requests to take breaks at certain times and instead required that they wait to take their break at a time that better served the interests of the operation. [Tr. 406.] Harris further testified, without contradiction, about an incident in which he directed a female employee to take her break after she had finished working at one of the departure check-in counters. The employee, however, refused to go on break after her work at the counter finished. [Tr. 203.] Harris was concerned that if this employee did not take her break at the time Harris wanted her to, then she would go on break later and be unavailable to work at a different counter when Harris anticipated needing her there. [*Id.*] Harris reported the employee's refusal to follow his orders to management, and the General Manager, in turn, gave the employee a "stern warning." [*Id.*]

e. *Respondent Employer Held Harris Accountable for Ensuring that Employees Were Properly Assigned*

The evidence further establishes that Respondent Employer held Harris accountable for the actions of the baggage handlers under his supervision. Harris testified that he was responsible for ensuring that the luggage the baggage handling crew was required to process got on the appropriate airplanes on time to allow for the planes to timely depart. [Tr. 73-74.] Harris testified, without contradiction, that if he failed to ensure that employees were in proper position and working fast enough to accomplish that goal, then Respondent Employer would discipline him [*Id.*].

Accordingly, Harris frequently encouraged employees to work faster in order to make sure that they got the bags processed and moved through the system in time to catch the flights. [Tr. 91.] The baggage handlers always complied with Harris's requests for them to work faster. [*Id.*] Thus, Respondent Employer did not have occasion to discipline Harris for employees' failure to timely move passenger luggage. [Tr. 74.]

Although Harris was never disciplined in relation to the performance of baggage handling employees, he testified that he did receive disciplinary warnings when employees were not in the position where Respondent Employer needed them to be. [Tr. 74-76.] The incident occurred in about 2014 or 2015, during Harris's early morning weekend shift, at a time when Respondent Employer had a contract to provide certain services at the "tower" at Terminal 1. [*Id.*] As explained more fully below, Harris was responsible for overseeing all of Respondent Employer's services during his early morning shifts. A manager for the Terminal 1 Group observed that there were no employees stationed at the tower at 5:00 a.m., when there should have been two employees there. [*Id.*] The Terminal 1 Group manager informed Respondent Employer's General Manager at the time that the employees were not at their station, and the General Manager in turn held Harris accountable for that and reprimanded him. [*Id.*] Harris's testimony establishing that he was held accountable for employees not being at their station at the appropriate time is undisputed by Respondent Employer. The General Manager also instructed the two employees who were supposed to be at the tower that they must report to Harris as the Lead every morning. [*Id.*] The Employer, however, did not issue Harris any written form of discipline for this incident. [*Id.*]

2. Harris Helped Enforce Respondent Employer's Rules and Reported Employee Misconduct to Management

In many respects, Harris served as Respondent Employer's eyes and ears monitoring employees' behavior and ensuring that they followed company rules and policies. In that regard,

Respondent Employer told Harris that he was responsible for enforcing various Employer policies, including rules prohibiting employees from eating in the locker rooms at the Employer's facility [Tr. 47-48], from eating or drinking while on duty [Tr. 51], and uniform/dress code policies. [Tr. 71.] Harris was also responsible for monitoring employees' time and attendance, making sure that employees were working when they were signed in and expected to be on duty. [Tr. 44, 57.] Harris typically reprimanded any employee he perceived as violating rules or policy and verbally warned him or her not to violate the rule or policy again. [Tr. 54-55.] In situations where the employee continued to violate the rule or policy after Harris had warned them, or when Harris believed that an employee's conduct was "out of control" [Tr. 181], Harris wrote incident reports, which he submitted to Employer management. [Tr. 54-55, GC 4, GC 5.]

Harris testified that he wrote about 8 or 9 incident reports during his employment as a Lead agent. [Tr. 63.] The record, however, contains just two incident reports written by Harris, both dated in November 2016. [GC 4, GC 5.] The form Respondent Employer used at that time establishes that supervisors were responsible for preparing the incident reports, as the top of the form calls for the "Supervisor's Statement." [Id.] At the top of both incident report forms in evidence, Harris crossed out the word "Supervisor" and wrote in "Lead Agent." [Id.]

In the incident reports, Harris described the events and infractions that he observed and explained that he believed the employee's conduct was in violation of company rules or policy. [Id., Tr. 54-62.] Harris wrote one of the incident reports because he observed that an employee had left his assigned post before the end of his shift. He wrote the other incident report because an employee did not report to the check-in counter where Harris had assigned him. [Id.] Harris made clear in these reports that he believed the employee had engaged in misconduct in violation of rules or policy, but he did not make any specific recommendation that the offending employee

should be disciplined. [*Id.*, Tr. 163.] In each instance, Harris submitted the incident report to either the General Manager or a Supervisor and allowed one of them to address the matter further. [Tr. 54-62.] Harris testified, without contradiction, that even though he did not include a specific recommendation for discipline, in each of the two instances in the record herein, a Supervisor later informed Harris that the employee whom Harris “wrote up” was in fact warned or sternly reprimanded by management. [*Id.*] There is no evidence that rank-and-file baggage handlers submitted incident reports to management regarding the conduct of other baggage handlers.

In addition to writing and submitting incident reports, Harris also verbally reported what he perceived as employee misconduct to Respondent Employer management. Harris testified that, in one instance, he repeatedly observed an employee named Solomon being absent from his assigned post in the CBRA room when he was supposed to be on duty. [Tr. 63-65.] After Harris had observed this conduct several times within a short period of time, he reported the matter to the General Manager, who subsequently discharged the employee for stealing company time. [*Id.*] In another instance, Harris observed that an employee named Rahim Harris repeatedly came into work late and failed to sign the sign-in attendance sheet. [Tr. 66-70.] Harris verbally reported the perceived misconduct to three different supervisors who declined to take action. Harris then reported the matter to General Manager Vincent Gilmore. [*Id.*] When Harris subsequently reported to Gilmore that the same employee had again engaged in similar misconduct, Gilmore terminated the employee. [*Id.*] In reporting employee Rahim Harris to Gilmore, however, Charging Party Harris again did not make any recommendation of specific disciplinary action, but he expressed to Gilmore and to Assistant General Manager or “duty manager” Rita Kumar [Tr. 118, 268] that he believed Rahim Harris should be suspended or otherwise disciplined in a manner that management found appropriate. [Tr. 155-56, 221-22.]

In his capacity as the *de facto* enforcer of company rules and policies, Harris had the authority to summarily remove employees whom he thought were in violation of policy from their assigned posts and bring them to the Supervisors' or Manager's office for corrective action. [Tr. 71.] Harris testified about one such instance that occurred in about early 2019, when Harris found a group of employees, including an employee named Eon Edwards, improperly dressed while working in the CBRA room. [Id.] Harris instructed the employees to fix their attire, but Eon Edwards did not comply. Harris, in turn, immediately ordered Edwards to leave his post in the CBRA room and report to the Supervisors' office, where Harris verbally informed Supervisor Cebon Crawford about Edwards' perceived misconduct. [Id.] Supervisor Crawford then reprimanded Edwards and warned him that if he continued to fail to follow instructions given to him by Harris or other Leads, then the Leads would send him home without pay. [Id.] Respondent Employer failed to call Supervisor Crawford to testify about his recollection of this incident, so Harris' testimony detailing this example of him exercising his authority stands unrebutted.

3. Respondent Employer Granted Harris Full Supervisory Authority During Early Morning Hours When No Supervisors Were on Duty

As noted above, Harris worked on Saturdays and Sundays from 3:00 a.m. to 11:30 a.m. [Tr. 30.] The record establishes, and the Respondents do not dispute, that there were no general Supervisors on duty during the hours of 3:00 a.m. to 7:00 a.m. on those days. [Tr. 92, GC 7.] Generally, the Supervisors did not come into work until 7:00 a.m. [Tr. 286-87, GC 7.] The General Manager also typically was not at Terminal 1 during these early morning hours. [Tr. 295-96, 303-04.] Thus, for the first four hours of each of his weekend shifts, Harris was the highest-ranking Respondent Employer official at the facility. Accordingly, Respondent Employer put Harris in charge of its entire operation during those four hours, including not only the baggage handling operation, but also the other services Respondent Employer provides at Terminal 1, including

skycap, PSR and wheelchair assistance. [Tr. 92-93.] In effect, Harris served in an acting general Supervisor capacity during these times. Harris had to communicate with the Terminal 1 Group manager to ensure that employees were properly positioned in both the Arrivals and Departures levels so that all services were properly staffed. [*Id.*] Harris was responsible for giving instructions to wheelchair attendants as to where they should go to assist passengers, and he was responsible for directing skycap employees to service passengers outside the Terminal building. [Tr. 94.]

In addition to those additional acting supervisor duties, Harris still had his regular duties of assigning baggage handlers to different posts as required, according to Harris's assessment of the needs of the operation. [*Id.*, Tr. 368.] Although there were fewer flights departing from Terminal 1 during those early morning hours on weekends, the mutually-corroborating testimonies of Harris and Eon Weldron establish that there were several early morning flights that regularly departed at those times [Tr. 362, 404], which baggage handling employees invariably had to service. Harris testified that there were typically about 11 baggage handling employees on duty during the early morning hours. [Tr. 189, 356-57.] Harris assigned them to check-in counters and other posts to service the early morning flights, which opened for passenger check-in two to three hours before the flights were scheduled to depart. [Tr. 362-64, 405.] Harris also assigned baggage handlers to arrange luggage carts and bag bins at the various check-in counters in preparation for the flights that would be departing from those counters later in the day. [Tr. 364-65.]

Again, contrary to the mutually corroborating testimonies of Harris and Weldron, General Manager Gilmore, testified, implausibly, that there were no flights operating during the hours from 3:00 a.m. to 7:00 a.m. on weekends and that there were no baggage handling operations performed during those times. [Tr. 286-87.] Instead of servicing the flight check-in process, Gilmore claimed that baggage handlers and Leads on duty during those hours were responsible simply for preparing

the Terminal for flights that would depart later, in particular by arranging the luggage carts and bag bins or tubs at the various counters. [Tr. 258.] Gilmore asserted that baggage handlers have “very, very little” work to do at those times. [Id.] Moreover, Gilmore claimed that Lead agents working in these early morning hours did the same work as baggage handlers. [Id.] Harris, however, credibly testified that it takes the baggage handlers whom he assigns to set up the luggage carts and bag bins no more than 90 to 100 minutes to complete those tasks. [Tr. 364-68.] For the remainder of the four-hour period, Harris testified that baggage handlers are kept busy servicing the check-in process for early morning flights. [Id.] It is unclear from Gilmore’s testimony what, if anything, Gilmore claims employees do for the entirety of this portion of their shifts. Gilmore’s testimony concerning Respondent Employer’s operations during the early morning hours was not corroborated by any documentary evidence or witness testimony.

*a. Harris Was Authorized to Discipline Employees as Acting Supervisor by Dismissing Them from Their Shifts without Pay*

As the highest-ranking official at the facility during the period from 3:00 a.m. to 7:00 a.m. on weekends, Harris was authorized to discipline employees he believed were engaged in misconduct. [Tr. 95.] Harris testified that he exercised this disciplinary authority in two instances, both times sending employees home without pay before the end of their shifts. [Tr. 95-101.]

First, Harris testified that one Saturday early morning, on a date he could not recall, he assigned an employee named Chotai to assist with the wheelchair service operation after the Terminal 1 Group representative asked Harris to send employees to a certain area of the Terminal to help transport passengers. [Tr. 95-99.] Harris recalled that Chotai initially complied with Harris’s instruction, but he helped only one passenger, before he “disappear[ed]” and Harris could not find him, even though there were more passengers who needed wheelchair assistance. [Id.] When Harris later encountered Chotai, Harris asked the employee why he stopped helping in the

wheelchair operation, and Chotai answered that he did not think he should be assigned to do wheelchair service because he was working overtime. Harris then told the employee that it didn't matter whether he was on overtime or regular time, he had to follow Harris's instructions regardless, and if he did not follow Harris's instructions, then Chotai would be sent home. [Id.] Harris testified that he then dismissed Chotai and forced him to sign out of work before 6:00 a.m., earlier than his scheduled shift ended. [Id.] After general Supervisor Kenneth Mitchell came into work at 7:00 a.m., Mitchell asked Harris what had happened to Chotai, and Harris told Mitchell that the employee refused to comply with Harris's instruction to assist in the wheelchair operation, so Harris sent him home. [Id.] The Supervisor mentioned that Chotai had been working on overtime, but Harris retorted that overtime is still on duty time, and Harris asserted that he would similarly dismiss any employee who refuses to follow orders while on duty. Supervisor Mitchell agreed and said "okay." [Id.] Respondent Employer did not call Supervisor Mitchell to controvert any of Harris's testimony in this regard.

Harris further testified about an incident where, as acting supervisor during the early morning hours, he sent home without pay an employee named Brad Starks. [Tr. 100-102.] On a Sunday morning sometime in about late 2017 or early 2018, not long before Vincent Gilmore became the General Manager in April 2018, Harris observed employee Starks come into work smelling foul with dirty clothes. [Id.] When Harris independently determined that Starks' appearance and odor were not acceptable for work, he immediately sent Starks home. [Id.] Harris notified one of the Supervisors – either Wilfred Chance or Cebon Crawford – about the incident after the Supervisor came into work. Harris testified that he told the Supervisor that he had to send employee Starks home because he had "dirty attire." [Id.] The Supervisor replied that if Harris again observed Starks engaged in similar conduct, Harris should send him home once again. [Id.]

Respondent Employer again failed to call any witnesses to refute Harris' testimony regarding this incident.

Several weeks before Harris sent employee Starks home without pay, the General Manager at the time, Vincent Orodasio, had warned Starks about coming into work wearing dirty clothes and having improper personal hygiene. [Tr. 100.] On about October 18, 2017, Manager Orodasio issued Starks a Written Warning for coming to work when the Manager determined that his "Hygiene was not up to normal standards." [ER 2.] After issuing this discipline, Orodasio spoke with Harris and Supervisor Kenneth Mitchell and told them that anytime one of them observed Starks at work with what Harris or Mitchell thought was poor hygiene, they should immediately send him home. [Tr. 216.] Several weeks later, Harris assessed Starks' condition to be inappropriately unhygienic early on that Sunday morning described above, and Harris exercised his authority to dismiss Starks from his shift. [Tr. 100, 150-51.]

General Manager Gilmore – who was not employed at Terminal 1 during either of the disciplinary incidents described above [Tr. 298] – testified that Lead agents were not authorized to take immediate disciplinary action in the event that an employee engaged in misconduct during the early morning hours when general Supervisors were not present. [Tr. 267.] Gilmore testified that if a Lead observed misconduct from an employee during those times, the Lead must immediately call a Supervisor or Gilmore himself. [*Id.*] Harris, however, testified that there was no such requirement, and that Respondent Employer never even provided Harris with off-duty contact information for any Supervisors or managers. [Tr. 377-78.] Tellingly, Respondent Employer failed to introduce any evidence showing that it had distributed supervisors' off-duty contact information to Lead agents. Thus, the credible evidence shows that Harris, as acting

supervisor during the early morning hours on weekends, was authorized to dismiss employees from their shifts for what Harris independently concluded was misconduct.

**D. Harris Attempted to Become a Non-Member Agency Fee Payer of the Union**

During his employment, Harris incorrectly believed that as a Lead agent, he was included in the bargaining Unit initially represented by Local 660 and subsequently represented by Respondent Union. [Tr. 168-69.] Harris was a dues-paying member of Local 660. [Tr. 103-04.] He also served as a shop steward for Local 660 starting in about May or June 2013 and continuing in that role until Local 660 was voted out and Respondent Union became the certified bargaining representative of the Unit in late 2015. [*Id.*; JT 11.] Local 660 excused Harris from paying dues while he served as shop steward. [Tr. 167.] Harris was a member and shop steward of Local 660 during times when he worked as both a baggage handler and a Lead. [Tr. 104-05.]

Harris did not support Respondent Union's efforts to replace Local 660 as the bargaining representative of the Unit. He opposed Respondent Union in the October 2015 election, in which he voted as an employee. [*Id.*, JT 11.] After Respondent Union was certified as the bargaining representative of the Unit, Harris decided that he did not want to become part of the Union because he was opposed to its political activities. [Tr. 105.] Instead, Harris wanted to become a non-member agency fee payer. [*Id.*] He was aware of the fact Respondent Union had entered a CBA with Respondent Employer that contained a "Union Security" clause and understood that provision required employees covered by the CBA to pay membership dues or agency fees to the Union as a condition of employment. [Tr. 106.]

After Harris learned of the CBA and the Union Security provision, he spoke with Respondent Union Coordinator Todd Jennings when one of his co-workers introduced Harris to Jennings at the food court at Terminal 1. [Tr. 106-07.] Harris recalled that he first spoke with

Jennings at the food court in about July 2018. [*Id.*] He testified that he and Jennings spoke “generally” about the Union, but Harris was firm on not joining Respondent Union. [*Id.*] Jennings similarly testified that he initially spoke with Harris about Harris becoming a shop steward for Respondent Union because Harris had served in that role for Local 660. [Tr. 350-51.] Harris testified that Jennings told him that he would help Harris become a non-member agency fee payer by bringing Harris documents that Harris needed to submit to become an agency fee payer. [Tr. 107.] Jennings, however, testified that Harris never mentioned to him his desire to become a non-member agency fee payer, but admitted that Harris did tell him that he was opposed to becoming a member of the Union. [Tr. 351.]

Harris recalled speaking with Jennings several additional times after that first encounter, and each time they met, Harris asked Jennings for help submitting paperwork required for Harris to become an agency fee payer. [Tr. 108-09.] Harris testified that he spoke with Jennings about seven times concerning this matter. [*Id.*] Jennings, however, testified that he only spoke with Harris two or three times, and their conversations did not involve a discussion about Harris becoming an agency fee payer. [Tr. 351.]

Respondent Union sent Harris a letter dated April 1, 2019, which notified Harris that Union records showed that he had not been paying Union dues or agency fees and that he owed \$810 in unpaid dues or fees as of the end of March 2019. [JT 3.] Harris testified that he received the letter in about May 2019 and read it, but he did not understand how he had come to owe the Union \$810, and the letter did not explain the basis for that figure. [*Id.*, Tr. 109-10.] The Union’s April 1 letter to Harris attached a separate document titled “Notice Regarding Union Security Agreements and Agency Fee Obligations.” [JT 3.] The Notice stated that agency fee objections must be made in writing and sent to Respondent Union’s Agency Fee Administrator. It stated that “No special form

is required to register an objection,” but the letter of objection must include the objector’s name, address, employer and social security number. [*Id.*] However, these instructions appear in the sixth paragraph of a seven-paragraph letter written in small, single-spaced type font. [*Id.*] Harris testified that he read the Notice regarding agency fee objections, but he did not fully understand it and sought clarification and guidance from Todd Jennings. [Tr. 111, 178-79.]

Sometime after he received the Union’s April 1 letter, Harris spoke again with Jennings and addressed the letter he had received. He asked Jennings why he owed \$810, even though he had not signed any “contract” with the Union. [Tr. 112.] Harris asked Jennings if the agency fee and the membership dues were the same amounts, and Jennings answered that they were not. [*Id.*] Harris recalled that Jennings said that he would show him the difference between the two payment amounts at a later time when Jennings intended to bring Harris forms Harris could use to become an agency fee payer. [*Id.*] Harris testified that Jennings never showed him the forms or documents that he repeatedly told Harris he would give him to help him become an agency fee payer. [*Id.*]

Harris testified the he did not receive any other letters or notices addressed to him from Respondent Union before he was discharged from his job at Terminal 1. Union steward Vladimir Clairjeune, however, testified that he attempted to hand delivered a letter from the Union to Harris on May 15, 2019 when Clairejeune saw Harris at the food court at Terminal 1. [Tr. 323.] The letter, dated May 6, 2019, explicitly warned Harris that his failure to at least make arrangements to pay unpaid dues or fees to the Union would cause the Union to request that the Employer terminate Harris’s employment. [JT 4.] The letter further stated that the Union would accept a total of \$135 in full settlement of all back amounts Harris owed to the Union, which amounted to three months’ worth of dues or agency fees. [*Id.*]

Clairejeune testified that when he tried to give Harris the letter at the food court on May 15, along with a separate document explaining employees' right to be agency fee payers, Harris swatted the documents away and refused to take them. [Tr. 323-24.] Clairejeune testified that he attempted to explain to Harris that if he did not address this matter, then he may be fired, to which Harris allegedly replied that if the Union tried to get him fired, he would "get his lawyer involved." [Id.] Harris denies that Clairejeune ever attempted to delivery any documents to him. [Tr. 114.] Harris claims that he did not receive a copy of Respondent Union's letter dated May 6, 2019 until months after he had been discharged, when an attorney for Respondent Employer shared the document with Harris in connection with an unemployment insurance proceeding. [Tr. 113.]

Harris testified that he never received any documents or guidance from Todd Jennings regarding becoming an agency fee payer, and as a result, he did not understand what he had to do to remain a non-member of the Union. [Tr. 107-12.] Harris was also confused about the Union's demand that he pay \$810. [Id.] Accordingly, Harris never paid any money to Respondent Union. [JT 11, Tr. 169-70.]

**E. Respondent Union Requested that Respondent Employer Discharge Harris for Failing to Pay Union Dues and/or Fees and Respondent Employer Obligated**

Harris testified that he received a different letter from the Union in about September 2019. [Tr. 114-15.] This letter was dated September 9, 2019 and was addressed to Respondent Employer. [JT 5.] In this letter, Respondent Union requested that the Employer enforce the Union Security clause in the CBA by advising Harris that, unless he paid the money that the Union claimed he owed it, Respondent Employer would terminate his employment within 15 days. [Id.] Respondent Union admits in its Answer to the Complaint that, by this September 9 letter, it solicited assistance and support from Respondent Employer by attempting to cause Respondent Employer to require Harris to pay dues and/or fees to the Union, or else face discharge. [GC 1(G).]

After Harris received Respondent Union's letter to the Employer requesting his discharge, he reached out to Manager Gilmore to discuss it. [Tr. 115.] Gilmore, in his testimony, confirmed that he spoke with Harris about the September 9 letter. [Tr. 274-75.] Gilmore testified that he told Harris that he must pay the money he owed to the Union within 15 days, or else he would be discharged. [*Id.*] Harris testified that he asked Gilmore how he could owe so much money to the Union, and Gilmore replied that he could not help Harris with this issue and that he must speak with Union representative Jennings about it. [Tr. 115.] Despite Gilmore's suggestion, Harris did not contact Jennings or any other Respondent Union representative concerning the September 9 letter he received requesting his discharge [Tr. 116], and Harris never paid any dues or fees to Respondent Union. [JT 11.]

Respondent Employer terminated Harris employment on October 3, 2019. Assistant manager Rita Kumar called Harris into the manager's office that day, where Harris met with Kumar and Gilmore. [Tr. 117-18.] Gilmore told Harris that he was being discharged for his failure to pay dues to the Union. [Tr. 276.] Gilmore testified that the only reason Respondent Employer discharged Harris was because he failed to pay dues or fees to the Union [*Id.*], and Respondent Employer admits in its Amended Answer to the Complaint that Harris was discharged because he failed to pay dues and/or fees to the Union. [GC 1(I).] Employees who remained on the job after Harris was fired were aware that Harris had been discharged for failing to pay money to Respondent Union. [Tr. 339, 385.]

### **III. ARGUMENT**

#### **A. Harris's Testimony Regarding His Role as a Lead Agent Should Be Credited Over Contradictory Testimony from Gilmore**

The sole factual disputes that bear directly upon the determination of whether Respondents have violated the Act concern whether Harris's job duties as Lead agent made him a supervisor

under Section 2(11) of the Act. There is no dispute that Respondent Employer discharged Harris because he failed to pay dues or fees to the Union, or that Respondent Union solicited and received assistance from the Employer by requesting Harris's termination. The only disputed factual question bearing upon whether the Respondents have violated the Act as alleged in the Complaint is whether Harris worked as a supervisor under Section 2(11) of the Act. On that issue, the record reflects a sharp contrast between the testimonies of Harris and General Manager Vincent Gilmore. Harris thoroughly testified at length and in great detail about his job duties, and in particular his role in assigning employees, granting them breaks and overtime opportunities, enforcing company rules and reporting misconduct to management, and serving as the acting supervisor in the early morning hours on weekends. Gilmore, in contrast, offered cursory testimony that ineffectively attempted to contradict Harris.

Harris spent hours upon hours on the witness stand, testifying over multiple days [Tr. Vol. 1, 3, 4], during which he patiently and scrupulously answered questions from not only Counsel for the General Counsel, but also the Administrative Law Judge and three different attorneys representing the two Respondents. Through it all, Harris remained forthright and confident in the accuracy of his testimony, which was consistent throughout. Harris's demeanor, moreover, exuded his certainty regarding the matters about which he spoke. The record clearly shows that Harris – an individual who had worked for Respondent Employer for nearly 11 years in the baggage handling operation at Terminal 1 – knew the Employer's operations well, had command over the facts relating to his role as Lead agent, and diligently explained what his role was.

Harris' credibility regarding his job duties and responsibilities as a Lead agent, and Respondent Employer's baggage handling operation generally, was bolstered by the testimony of each of the two other baggage handling employees who appeared in this proceeding. Specifically,

Harris's testimony establishing that, as a Lead, he was responsible for assigning employees to their posts on a daily basis, was corroborated by both Eon Weldron and Ivan Johnson, both of whom worked as baggage handlers during Harris's tenure with Respondent Employer. [Tr. 342-43; Tr. 398, 402.] Employee Weldron similarly confirmed Harris's testimony that baggage handlers were not allowed to stand idle while on duty and leads would assign them to different posts to prevent employees from idling [Tr. 399-400], and that general Supervisors for Respondent Employer did not spend much time in the baggage handling operation. [Tr. 395-96.] Weldron's testimony also validated Harris's account of how he, as a Lead agent, assigned employees overtime. In addition, Weldron corroborated Harris's testimony concerning Respondent Employer's operations during the early morning hours on weekends, confirming that there were several regular flights that departed JFK Terminal 1 at those times, that the baggage handling service was fully operational and that Harris was the one who gave instructions to employees and told them where to work. [Tr. 402, 404.]

Manager Gilmore, however, offered perfunctory, non-specific testimony about the baggage handling operation and the role of a Lead agent that was at odds with the accounts of the workers on the job. On direct examination, Gilmore provided mostly canned, monosyllabic denials concerning the authorities of Lead agents. [Tr. 259-61, 262-63, 265-67.] Frequently, when he did offer an explanation, his testimony was refuted by not only Harris but neutral employee witnesses as well. For example, Gilmore testified that Respondent Employer had dedicated baggage handling supervisors who continuously walked the floor at the Departures level of Terminal 1, going from check-in counter to counter throughout the workday overseeing the baggage handling operation. [Tr. 270.] Gilmore went so far as to testify that there would never be a time when a baggage handling supervisor was not present at the Departures level. [*Id.*] To the contrary, Harris

accurately testified that it was his job as Lead agent to walk the floor of the Departures level because the general Supervisors usually worked in other areas of the Terminal. [Tr. 28-32, 43-44, 124.] Employee Weldron corroborated Harris in this regard, testifying that Supervisors were infrequently present on the Departures level and were seen there far less frequently than were Leads. [Tr. 395-96.] Meanwhile, no other witness corroborated Gilmore's testimony that was at odds with Harris and the employees.

Gilmore also testified that Respondent Employer assigned baggage handlers long-term post assignments via a "baggage bid" process, whereby employees would be stationed at one post consistently throughout a three-month period. [Tr. 261-62.] Here again, Harris and Weldron both refuted Gilmore by mutually testifying that Leads gave baggage handlers their assignments on a daily basis. [Tr. 373-76, 399-400.] Respondent Union employee witness Ivan Johnson similarly confirmed that a Lead agent typically assigned him to his daily posts, contradicting Gilmore's false claim that higher-level management placed employees at posts for the duration of quarterly intervals. [Tr. 342-43.]

In his desperate attempt to discredit the evidence establishing that Harris served as acting supervisor during the early morning hours, Gilmore offered testimony that is dubious on its face, and which was again contradicted by multiple other witnesses. Gilmore testified that there were no flights and no baggage handling operations performed at Terminal 1 during the hours of 3:00 a.m. to 7:00 a.m., when Respondent Employer admittedly had no general Supervisors on duty. [Tr. 286-87.] However, even infrequent air travelers anecdotally know that a busy airport like JFK almost invariably has flights departing in the early morning hours. Under cross-examination, Gilmore himself contradicted his misleading claim that there were no flights or baggage handling operations before 7:00 a.m., when he acknowledged that Cayman Airlines operated a flight that

left Terminal 1 at 8:00 a.m., and the baggage service for that flight started before 7:00 a.m. [Tr. 289.]

Gilmore further dissembled regarding Respondent Employer's operations in the early morning hours by testifying that the baggage handling employees on duty during those times were only responsible for moving luggage carts and bag bins to help set up for flights later in the day. [Tr. 258.] Gilmore claimed that baggage handlers did "very, very little" work during these early morning hours, while Harris clarified that moving the luggage carts and baggage bins took an employee at most 90 to 100 minutes, and Harris's testimony in that regard is uncontroverted. [Tr. 364-68.] It simply strains credulity to believe that Respondent Employer would pay these employees for four hours of labor when they only had 90 to 100 minutes' worth of work. The only plausible reason baggage handlers were on duty during the early morning hours was because Respondent Employer needed workers to service an active baggage handling operation during those times, and Gilmore either misrepresented his knowledge of the operation or he was so far removed from the operation on the ground that he lacks even basic knowledge of it. Either way, his testimony regarding these operational matters cannot be credited.

Gilmore's testimony that Lead agents working during the early morning hours were required to call off duty Supervisors or managers when they observed employee misconduct is similarly belied by the sheer lack of evidence establishing that Respondent Employer provided Leads with Supervisors' or managers' off duty contact information. Harris credibly testified that Respondent Employer did not even give him supervisors' off duty contact information [Tr. 377-78], and Respondent Employer failed to present any evidence to the contrary. If such evidence exists, it was Respondent Employer's burden to introduce it into the record, and its failure to do so is telling and compels the inference that Respondent Employer never provided off duty contact

information and did not require Leads to call Supervisors or managers when they were not present in the Terminal.

Gilmore likewise incredulously testified that baggage handlers were expected to stand idle at their pre-assigned check-in counters when there were no departing flights operating baggage service at those counters. [Tr. 290-91.] Here again, Gilmore's testimony defies common sense. It is highly improbable that Respondent Employer would pay employees, day in and day out, to stand around its client's Terminal doing nothing. Gilmore's farfetched testimony in this regard was again disproven by the mutually corroborative testimony of Harris and employee Weldron, who each confirmed that Respondent Employer never permitted employees to stand idle while on duty and expected workers to "Always be active," as Weldron put it. [Tr. 399-400; Tr. 374-76.]

In sum, Gilmore's testimony was replete with falsehoods that were directly refuted by Harris and employee witnesses Weldron and Johnson. Gilmore's testimony regarding Respondent Employer's operations and the duties or responsibilities of Harris or other Lead agents is completely unreliable and should not be credited. Accordingly, any factual disputes regarding Harris's role as Lead agent should be decided in favor of Harris and the employee witnesses, who not only had innermost knowledge of the operation but also testified fully, honestly and consistently, in stark contrast with Gilmore.

#### **B. Harris Worked as a Supervisor under Section 2(11) of the Act**

Under Section 2(11) of the Act, a supervisor is defined as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent

judgment.” The party asserting supervisory status bears the burden of establishing it by preponderance of the evidence, and “the sole question the Board must answer when making a supervisory determination is whether the party asserting supervisory status has proved that the person issuing commands possesses one or more of the indicia set forth in Section 2(11).” *G4S Government Solutions, Inc.*, 363 NLRB No. 113 (1996); *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003) (supervisory status must be proven by preponderance of evidence). “The possession of any one of the authorities specified in Section 2(11) is sufficient to place an employee in the supervisory class.” *George C. Foss Co.*, 270 NLRB 232, 234 (1984).

Charging Party Harris’s job duties and authorities as a Lead agent in Respondent Employer’s baggage handling operation entailed at least one of these supervisory functions, thereby making him a statutory supervisor under Section 2(11) of the Act. Specifically, Harris’s role in assigning employees to do different jobs on a daily basis, assigning employees overtime, determining when employees could take breaks, and serving as acting supervisor during early morning hours on weekends rendered him a Section 2(11) supervisor, in addition to numerous additional secondary indicia of Harris’s supervisory status, as explained below.

1. Harris Assigned Employees Using His Independent Discretion

The Board construes the term “assign” under Section 2(11) to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee” because the place, time and tasks of an employee are important aspects of his/her terms and conditions of employment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). An individual whose decisions or effective recommendations affect such terms and

conditions of employment is a statutory supervisor. *Id.* The record in the present case establishes that Harris assigned employees within the meaning of Section 2(11) of the Act.

a. *Harris Assigned Employees to Varied Job Posts*

The credible evidence in this case establishes that, as a Lead agent, Harris was responsible for ensuring that Respondent Employer's baggage handling operation was properly staffed and running smoothly by assigning baggage handling employees to work in various posts within the operation multiple times per day. [Tr. 41, 81, 137-40, 401-02.] In order to do this, Harris had to independently evaluate not only the needs of the operation in relation to the compliment of employees he had on duty at any given time, but also the relative skills and reliability of the available baggage handlers and the specific requirements of each post. [Tr. 80-81.] No higher-ranking Respondent Employer officials were involved in making these determinations. [*Id.*]

These assignments were not routine or clerical in nature because many of the posts to which Harris might assign employees required baggage handlers to perform different tasks. [Tr. 35 -36, 78-79, 369-70.] Harris testified that several of the airlines operating check-in counters at Terminal 1, who were, in effect, Respondent Employer's clients, required baggage handlers to do additional work in order to keep track of the luggage they processed. Whereas some airlines only expected Respondent Employer's baggage handlers to place passengers' bags onto the luggage belt at proper distance, other airlines expected employees to do that, plus separately track oversize bags versus "pull bags" using a system of stickers and lists and recording the times that certain bags left the check-in counter. [Tr. 78-79.] Aside from airlines with these kinds of special requirements, Harris also assigned employees to the CTX oversize area, where the work differed from that performed at the various check-in counters in that employees working in CTX had to work in conjunction with federal TSA agents and used special scanners to track the bags coming in and going out of

the area. [Tr. 35 -36, 369-70.] Harris also effectively recommended that certain employees receiving training so that they could work in the CBRA room, and general Supervisors generally followed his recommendations in that regard. [Tr. 85, 207, 378.]

Under *Oakwood Healthcare*, the assignment of employees to a certain department or to significant overall tasks generally qualifies as “assigning” within the meaning of Section 2(11), while giving ad hoc instructions to an employee to perform a discrete task does not. 348 NLRB at 689. In *Oakwood*, the Board held that, in the health care setting, assigning an employee to care for a particular patient or group of patients constitutes a supervisory assignment, whereas ordering an employee to immediately perform a particular act for a patient does not reflect a supervisory function. *Id.*

In the present case, Harris’s assignment of baggage handlers to work at particular posts on a consistent basis for much of their shifts is analogous to the assignment of a health care worker to regularly administer medication to a particular patient. In the health care context, certain patients may be especially demanding or may have special preferences or requirements that impact how the employee administering medications will have to do the job. In the context of baggage handling at JFK Terminal 1, certain airlines similarly had particular demands and imposed additional requirements on baggage handlers working at their counters. Moreover, baggage handlers assigned to work at the CTX oversize area and the CBRA room had to deal with the needs and requirements of heavily-regulated TSA agents, while also interpreting information on monitors and manipulating scanner devices that employees at most other posts did not have to use. As the *Oakwood* Board stated, “there can be ‘plum assignments’ and ‘bum assignments’— assignments that are more difficult and demanding than others,” and the power to assign an employee to one or the other certainly affects the employee’s terms and conditions of employment.

348 NLRB at 689 (assigning an employee to patients requiring more care rather than patients with less demanding needs reflects supervisory authority). In the baggage handling operation at Terminal 1, the different demands of certain posts made Harris's authority to assign employees to these different posts a supervisory function, in accordance with *Oakwood*.

Because the work required at different posts varied, Harris carefully selected which employees to post at each particular station. Harris determined which employees to assign to the different posts based on his assessment of the employee's skills and reliability. Thus, he assigned workers to assist airlines with special demands if the employee had demonstrated to Harris his/her ability to meet the needs of those airlines. [Tr. 80-81.] Harris assigned employees to work in CTX based not only on their ability to operate the equipment necessary to do the job (i.e., the scanners), but also upon whether Harris viewed favorably the employees' punctuality, efficiency and consistency. [*Id.*] The Board in *Oakwood* held that weighing the needs of a client against the skills or special training of available personnel, in the manner that Harris did, involves the exercise of independent judgment. 348 NLRB at 693. The evidence further establishes that Harris made these judgments on his own, without any direction or instructions from general Supervisors, managers, or any Respondent Employer rules or guidelines. *Brusco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012) (judgment of a supervisor must not be controlled by detailed instructions).

Accordingly, the evidence establishes that Harris assigned employees to the place and tasks that they would be required to do on a daily basis, that his assignments were not of a routine or clerical nature, and that he made these assignments using his independent judgment. As a result, Harris assigned employees within the meaning of Section 2(11), and, in accordance with *Oakwood*, he was at all relevant times a supervisor under the Act.

b. *Harris Selected Employees for Overtime Work*

The evidence further establishes that, like the assignment of employees to different posts, Respondent Employer imbued Harris with the authority to determine which employees would be given paid overtime opportunities when the Employer determined that overtime was required. [Tr. 86-88.] Harris selected which employees to offer available overtime to without any involvement from Respondent Employer's general Supervisors or managers. [*Id.*, Tr. 406-07.] Harris's assignment of overtime often required him to use his discretion in instances where there were fewer overtime opportunities than there were employees who wanted to work extra hours. [Tr. 86-88.] In those situations, Harris decided which employee to offer the overtime to, based on his assessment of their "credibility" or reliability in terms of coming to work and staying at work as the employees said they would. [Tr. 89.]

The selection of employees for overtime work constitutes a supervisory indicium because it reflects assigning employees in regard to the time of their work. See *Oakwood*, 348 NLRB at 689; see also *Earle M. Jorgensen Co.*, 240 NLRB 1296 (1979) (selection of employees for overtime after management has determined that overtime is necessary indicative of supervisory status); *Thompson Industries*, 169 NLRB 429, 431 (1968) (selecting employees for overtime when higher-level officials authorize such overtime is a supervisory function when performed using independent judgment). Here, Harris chose which employees should be given overtime work independently, using his discretion concerning the employees' perceived reliability. Thus, Harris' selection of employees for overtime opportunities represents another indicium establishing that he was a supervisor under Section 2(11).

c. *Harris Determined When Employees Could Take Breaks*

Like selecting employees for overtime, determining when employees may take their breaks impacts the time of their work and is a factor in evaluating an individual's supervisory status. See

*Oakwood*, 348 NLRB at 689; see also *Heck's Inc.*, 277 NLRB 916, 919 (1985) (“determining when employees will take breaks . . . fall[s] squarely within the statutory definition of a supervisor”).

In the instant case, the record establishes that baggage handlers needed permission from Harris or another Lead agent to take their breaks. [Tr. 51-52, 406.] While Respondent Employer management pre-determined a schedule for employees' breaks [Tr. 416-18], Harris had the authority to override that schedule and delay an employee's break if Harris concluded that the needs of the operation required the employee to work longer. [Tr. 406.] Harris also told employees that they should take their breaks at times that Harris thought to be appropriate in order to fulfill operational needs, including the incident Harris testified to concerning an employee he directed to take a break at a certain time in order to ensure that she would be available to work when Harris anticipated needing her later in the day. [Tr. 203.] Harris again made these decisions regarding employee break times independently, without higher-level supervisory involvement, using his judgment about the needs of the baggage handling operation. Accordingly, Harris' role in assigning employees breaks further establishes that he was a Section 2(11) supervisor. See *Heck's Inc.*, *supra*.

2. Harris Served as Acting Supervisor Vested with Full Supervisory Authority

Even if Harris's authority to assign employees to varied job posts, select them for overtime work and determine when they could take breaks is insufficient to establish that he was a statutory supervisor, the evidence establishing that Respondent Employer, in effect, made Harris an acting supervisor vested with full supervisory authority during the hours from 3:00 a.m. to 7:00 a.m. every Saturday and Sunday conclusively confirms that Harris was indeed a supervisor under the Act. During these early morning hours on weekends, neither the general Supervisors nor the General Manager was on duty at Terminal 1, and Harris was the highest-ranking Respondent

Employer official present. [Tr. 92, 286-87, 295-96, 303-04, GC 7.] Respondent Employer entrusted Harris with overseeing all operations at Terminal 1 during these times. [Tr. 92-93.]

Harris's supervisory authority during the early morning hours included the authority to discipline employees whom Harris concluded were engaged in misconduct. The record establishes that Harris exercised this authority to discipline employees on two occasions, each time dismissing an employee from the remainder of his shift without pay. [Tr. 95-101.]

In each instance where Harris decided to implement this kind of discipline, he acted independently and in the interest of Respondent Employer, using his discretion and judgment. When Harris, on an unspecified date, dismissed employee Chotai from the remainder of the employee's assigned overtime shift, Harris did so because he independently determined that Chotai had been insubordinate and refused to follow Harris's instruction to assist passengers with wheelchair service, thereby hampering the operation. [Tr. 95-99.] In late 2017 or early 2018, Harris likewise independently decided to send employee Brad Starks home because Harris determined that Starks's personal hygiene was unacceptable. [Tr. 100-02.] While it is true that, weeks earlier, the General Manager had disciplined Starks for similar misconduct and told Harris to send Starks home if he again came into work with poor hygiene, Respondent Employer still authorized Harris to determine whether Starks's hygiene was appropriate and when to dismiss him from his shift for it. In neither case where Harris sent employees home did Harris seek permission from a higher-level supervisor before imposing the discipline. In both instances, Harris later informed a general Supervisor about the discipline he gave, and the Supervisors affirmed that Harris acted appropriately, demonstrating that Respondent Employer supported Harris exercising this authority. [Tr. 98-99, 101-02.]

The evidence thus establishes that for at least eight hours per week, every week, Harris was the highest-ranking official responsible for overseeing Respondent Employer's operations at Terminal 1 and, during those times, he had supervisory authority to discipline employees using his independent discretion. As Harris worked 40 hours per week [Tr. 30], he was acting supervisor for 20 percent of his regular work time.

In cases where an individual spends a portion of his/her time working as a supervisor, "the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions." *Oakwood*, 348 NLRB at 694 (citing *Aladdin Hotel*, 270 NLRB 838 (1984)). Under this standard, "regular" means according to a pattern or schedule, as opposed to sporadic, and although the Board has not adopted a strict numerical definition of what constitutes a "substantial" portion of time acting as a supervisor, the Board has found supervisory status where the individuals in question served in a supervisory role for at least 10-15 percent of their total work time. *Id.* (citing *Archer Mills, Inc.*, 115 NLRB 674, 676 (1956) (10 percent of total work time spent supervising is sufficient to confer supervisory status); *Swift & Co.*, 129 NLRB 1391 (1961) (15 percent is sufficient)); see also *Honda of San Diego*, 254 NLRB 1248 (1981) (supervisory status found where individual regularly substituted as supervisor 10 out of 40 hours per week); *Sewell, Inc.*, 207 NLRB 325, 330-332 (1973) (supervisory status found where individual worked as supervisor 1 day out of every two weeks).

Here, Harris spent 20 percent of his total work as acting supervisor in charge of Respondent Employer's operations during the early morning hours before any higher-level supervisors checked in for duty. This constitutes a "regular and substantial portion" of his work time under *Aladdin Hotel* and *Oakwood* and makes Harris a supervisor under the Act. *Aladdin Hotel*, 270 NLRB at

839-40. Like the putative supervisors in *Aladdin Hotel*, Harris also supervised the same employees with whom he was supposedly together in the same bargaining unit, and there was no clear separation between Harris' supervisory and nonsupervisory duties. *Id.* Under these circumstances, Board law holds that Harris should be deemed a supervisor within the meaning of Section 2(11) of the Act. *Id.*

3. Harris Possessed Secondary Indicia of Supervisory Status

While the foregoing conclusively establishes that Harris was a Section 2(11) supervisor by virtue of his authority to assign employees and his regular and substantial work as acting supervisor, it may nonetheless be necessary to consider additional or secondary indicia of Harris's supervisory authority. In "borderline cases," the Board looks to certain well-established secondary indicia of supervisory status, or indicators of supervisory status not specifically enumerated in Section 2(11), including job responsibility, attendance at supervisory meetings, and whether the putative supervisor possesses a status separate and apart from that of rank-and-file employees. *Baby Watson Cheesecake, Inc.*, 320 NLRB 779, 784 (1996) (citing *NLRB v Chicago Metallic Corp.*, 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan*, 237 NLRB 844 (1978); and *Flexi-Van Corp.*, 228 NLRB 956 (1977)). Such secondary indicia may be a factor in establishing supervisory status if there are one or more primary Section 2(11) indicia present. See e.g., *Central Plumbing Specialties*, 337 NLRB 973, 975 (2002); *The Arc of South Norfolk*, 368 NLRB No. 32 (Jul. 31, 2019).

In the present case, Harris possessed several secondary indicia of supervisory authority. First, as a Lead agent, Harris earned a higher wage rate than did rank-and-file employees. [Tr. 23] *The Arc of the South Norfolk*, 368 NLRB No. 32 (higher pay earned by putative supervisor constitutes secondary indicia of supervisory status). Second, as a Lead agent, Harris was not

required to wear a uniform displaying the Employer's insignia or logo, but rather was expected to wear only a plain white shirt and black pants, thereby setting him apart from the employees below him. [Tr. 22-23, 42-43.] *Monotech of Mississippi v. N.L.R.B.*, 876 F.2d 514, 517 (5th Cir. 1989) (wearing a different uniform than rank-and-file employees constitutes secondary indicia of supervisory status).

In addition, the Board also considers as secondary indicia of supervisory status whether the putative supervisor spends "more time ordering others around than actually doing production work." *Id.* at 517. In this regard, the evidence establishes that Harris spent very little of his work time physically handling passenger luggage and would only step in to help with this "production" work when the operation was short staffed or when there was a rush and the work needed to get done immediately. [Tr. 396-97.] Instead, Harris devoted most of his time to assigning employees and overseeing the work of others.

Other secondary indicia of supervisory status which Harris possessed include the evidence establishing that he had keys to and regularly accessed the locked Supervisors' office and that he occasionally participated in supervisory meetings. [Tr. 37-38, 199-200.] *Service Employees International Union*, 322 NLRB 402, 407 (1996) (having keys to supervisory office and attending supervisory meetings support finding supervisory status).

Finally, the evidence establishing Harris's role in enforcing Employer policies and reporting employee misconduct similarly sets him apart from bargaining Unit employees and represents still another indication of his supervisory status. Harris had the authority to reprimand employees when he observed them in violation of an Employer rule or policy, report employee misconduct to management via incident reports, and immediately remove employees from their assigned work posts and bring them to the management office for possible discipline. [Tr. 54-62,

71.] In this regard, Harris filled out and submitted to management incident report forms that were designed for completion by a supervisor. [GC 4-5.] These are not powers that rank-and-file employees possessed. Thus, Harris's role as Respondent Employer's figurative "eyes and ears" on the ground overseeing baggage handlers certainly distinguishes him from the baggage handlers he oversaw and may be considered as yet another factor establishing Harris as a Section 2(11) supervisor.

In sum, Harris's authority to assign employees using his independent judgement and his regular and substantial time spent as acting supervisor during the early morning hours, along with various secondary supervisory indicia prove by a preponderance of the evidence that Harris was, at all reasonable times, a supervisor under Section 2(11) of the Act.

**C. Respondent Employer Provided Unlawful Assistance to Respondent Union by Discharging Its Supervisor Harris for Failing to Pay Union Dues or Fees**

Article I, Section 1.1. of the CBA between Respondent Employer and Respondent Union, as well as the collective-bargaining history involving the Unit, excludes from the Unit "supervisors/managers . . . as defined by the National Labor Relations Act." [JT 2, JT 11, Tr. 8-9.] The Unit also traditionally excluded "foremen" as well as statutory supervisors. [JT 11.] The exclusion of "foremen" from the Unit at the time when the Unit was formed under Local 660 strongly indicates that individuals charged with the duties and responsibilities entrusted to Lead agents like Harris were not supposed to be included in the Unit. Nevertheless, Respondent Employer and Local 660, and later Respondent Employer and Respondent Union, still treated Lead agents as part of the Unit.

The record contains no evidence that the Respondents made any agreement between them to broaden the scope of the Unit to specifically include Lead agents, even if they qualified as supervisors under the Act. Accordingly, Section 2(11) supervisors are necessarily excluded from

coverage under the CBA, and the Respondents could not lawfully apply the CBA's "Union Security" provisions to them. See *Mortuary Employees' Union (San Francisco Funeral Service, Inc.)*, 192 NLRB 616, 622 (affirming that "where an employee is not covered by the unit described in a collective-bargaining agreement containing a union security provision, any discharge of such excluded employee by the employer at the insistence of the Union for failure to join the Union is a violation of the Act"). In *Mortuary Employees Union*, the Board affirmed that a union violated Section 8(b)(1)(A) and 8(b)(2) of the Act by causing the discharge, pursuant to a union security clause, of an individual whose job duties and functions made him a management-trainee and placed him outside of the bargaining unit covered by the contract containing the union security provision. *Id.* (the employer was not named as a respondent in the case). Similarly here, because Charging Party Harris was a Section 2(11) supervisor excluded from the Unit, as explained above, the Respondents, respectively, violated the Act by collaborating to discharge Harris for failing to pay dues or fees to Respondent Union in accordance with the Union Security clause of a collective-bargaining contract that did not apply to him.

Section 8(a)(2) of the Act provides that "it shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." In *Electromation Inc.*, the Board stated that the inquiry regarding a Section 8(a)(2) violation is twofold: essentially, whether the organization at issue is a labor organization, and if it is, whether the employer has engaged in any of the three forms of conduct proscribed by Section 8(a)(2), including providing financial or other assistance. 309 NLRB 990, 996 (1992), *enfd.* 35 F.3d 1138 (7th Cir. 1994).

Here, there is no dispute that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus, the inquiry turns to whether Respondent Employer provided

financial assistance to Respondent Union by requiring its supervisor Harris to pay dues or fees to the Union as a condition of his employment and then discharging him because he failed to pay. In *Wells Enterprises*, the Board affirmed an administrative law judge's determination that the employer violated Sections 8(a)(2) and (1) of the Act by contributing vending machine, as well as "micro-market" proceeds to its employees' bargaining representative. 365 NLRB No. 7, slip at 2 (Dec. 22, 2016). Through these vending and micro-market funds, the Board determined that the employer contributed financial support to the union in violation of Section 8(a)(2) of the Act. *Id.* Similarly, the financial support at issue in the present case is the dues that Respondent Employer required its supervisor Harris to pay to the Union as a condition of his employment. By forcing Harris, a supervisor and agent of Respondent Employer, and not an employee as defined by the Act – to pay dues to the union, and in spite of supervisors being explicitly excluded from the parties' collective bargaining agreement, Respondent Employer provided unlawful financial assistance to Respondent Union in violation of Section 8(a)(2) of the Act. Just as the Board in *Wells Enterprises* concluded that the employer in that case violated Section 8(a)(2) and (1) of the Act by contributing financial support to the union via funds other than lawfully deducted dues, the same violation has occurred in the instant case through Respondent Employer forcing its agent-supervisor to pay dues to the Union. See also *Dixie Bedding Mfr. Co.*, 121 NLRB 189, 195 (1958) (finding Section 8(a)(2) financial support violation where Employer paid out of its own funds the initiation fees and dues of employees who signed cards for the union).

The fact that Harris never paid any money to Respondent Union does not undermine the violation established by the record herein. The only reason that Harris did not pay dues or fees to Respondent Union was that Respondent Employer discharged him when he refused to do so. Respondent Employer's act of forcing its supervisor and agent Harris to financially support the

Union, or else be fired, constitutes the kind of unlawful financial support that Section 8(a)(2) forbids.

The Respondents may argue that before Mr. Harris filed his charges in the instant case, neither party knew that Lead agents who possessed similar authority to Harris are considered supervisors under the Act, and therefore Respondents never intended to unlawfully apply their Union Security agreement to a statutory supervisor excluded from the Unit. Respondent Employer may thus argue that it acted in good faith in applying the Union Security clause to an individual it honestly believed was a statutory employee within the Unit covered by the CBA. Respondent Employer's good faith notwithstanding, Board law makes clear that the good faith of the parties is not a defense to unlawful assistance, as scienter is not an element of a Section 8(a)(2) violation. *Int'l Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731 (1961).

Alternatively, the Respondents may contend that Lead agents had always been treated as part of the Unit, and thus Respondent Employer and Respondent Union, as well as Local 660 before it, had all consistently operated under an implicit agreement that Lead agents would be included in the Unit, regardless of their supervisory functions and the clear language of the CBA excluding statutory supervisors. While Board law allows supervisors to be lawfully included in a bargaining unit with rank-and-file employees in certain instances where both the employer and union mutually agree to do so, the Board in *Arizona Electric Power* explained that this concept applies only where both parties had knowledge of or had admitted the supervisory duties and Section 2(11) status of employees in the disputed classifications. 250 NLRB 1132, 1132-33 (1980) (affirming lawfulness of including supervisors in bargaining unit with rank-and-file employees because the parties had "full knowledge" of the job functions of individuals in the disputed classifications as well as their supervisory status). Here, neither Respondent can claim that they

had knowledge of Harris's supervisory functions or his Section 2(11) status because both Respondents continue to deny that Harris was in fact a supervisor. Thus, the Respondents cannot rely upon their mutual intent to include Harris in the Unit specifically as a supervisor because they never made any explicit agreement to that effect with knowledge of Harris's or other Lead agents' supervisory status. The record Respondents attempted to build in this case is entirely contrary to the existence of any such express agreement. Rather, Respondents advance the argument that they did not know or realize that Harris qualified as a Section 2(11) supervisor by virtue of his job duties, and as a result, they mistakenly applied the CBA and the Union Security clause to Harris, despite Harris's exclusion from coverage under the CBA according to its express terms. While it is utterly implausible that Respondent Employer, who conferred Harris' Section 2(11) authority, misapprehended the scope of Harris' authority, there is nevertheless not so much as a scintilla of evidence of any conscious exploration and agreement between Respondents to fold Harris as a Section 2(11) supervisor into the Unit.

The Respondents may also point to Section 14(a) of the Act, which provides that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization." Section 14(a), however, is inapposite, as simply does not address the central issue presented here: whether a supervisor can be required to pay dues over his objection, pursuant to a collective-bargaining agreement that explicitly excludes supervisors from coverage. Section 14(a), therefore, has very little, if any bearing upon the determination of the violations in this case.

Of course, the gravamen of an unlawful assistance violation is whether the employer's assistance reasonably tended to coerce the employees in the exercise of organizational rights. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 588 (1941). In the present case, the coercive effect of

Respondent Employer's unlawful assistance manifested in multiple ways. Most significantly, Unit employees quickly became aware that Harris had been fired because he failed to pay money to the Union. [Tr. 339, 385.] Seeing Harris, their frontline supervisor, summarily discharged for this reason demonstrated to Unit employees the power of Respondent Union, working in conjunction with Respondent Employer, to compel a supervisor to pay money to the Union, or else be fired. Discharging Harris for failing to give financial support to Respondent Union had the coercive effect of showing employees that Respondent Employer fully supported this Union and would go so far as to force its own supervisor and agent to pay money to Respondent Union. Further, bargaining Unit employees' interests do not align, and oftentimes conflict, with those of statutory supervisors. Respondent Employer and Respondent Union certainly knew and appreciated this fact when they expressly excluded Section 2(11) supervisors from the Unit. Yet by treating supervisor Harris as though he were part of the Unit and applying the Union Security clause to him, Respondents disregarded the inherent conflict of interest between supervisors and Unit employees, thereby coercing employees, whose interests were diluted by this forced expansion of the Unit. Employees would reasonably be coerced in their exercise of Section 7 rights in light of these actions by Respondent Employer.

Respondent Employer, therefore violated Section 8(a)(2) and (1) of the Act by compelling its supervisor Harris to financially support the Union and terminating his employment on October 3, 2019 when he refused to do so.

**D. Respondent Union Solicited and Accepted Unlawful Assistance by Demanding that Respondent Employer Discharge Harris because He Failed to Pay Dues or Fees to the Union**

Just as Respondent Employer violated the Act by providing unlawful assistance to Respondent Union in violation of Section 8(a)(2) and (1), Respondent Union, in concert with Respondent Employer's violation, violated Section 8(b)(1)(A) of the Act by accepting

Respondent Employer's unlawful assistance and causing Respondent Employer to require its supervisor Harris to pay dues or fees to the Union. See *Wells Enterprises*, 365 NLRB No. 7 (employer violated Section 8(a)(2) and (1) of the Act by contributing unlawful financial support to the union, and union violated Section 8(b)(1)(A) of the Act by receiving those funds).

In *Jackson Engineering Co.*, the Board approved the judge's finding that the respondent employer violated Section 8(a)(2) of the Act and the respondent union therefore also violated Section 8(b)(1)(A) by union officials receiving payments from the respondent employer, in the form of kickbacks for work the union referred to the employer. 265 NLRB 1688, 1688-1689 (1982), *enfd.* 735 F.2d 1384 (DC Cir. 1984). Similarly, in *Mistletoe Express Service*, an employer and union were found to have violated Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act, respectively, by placing in their contract a clause providing that the employer pay the union 50 cents for each hour worked by a casual employee. 295 NLRB 273, 293 (1989); see also, *Sweater Bee by Banff, LTD.*, 197 NLRB 805 (1972), *enfd.* 486 F.2d 1395 (2d Cir. 1973) (employer violated Section 8(a)(2) of the Act by paying dues to a union from employer funds without deducting dues from employees' paychecks, and the union violated 8(b)(1)(A) of the Act by executing and giving effect to a collective-bargaining agreement where this practice continued.) Significantly, the Board in *Mistletoe Express* affirmed the that violations of the Act had occurred, even though the contract provision in question was only ratified and not implemented; essentially the violation still occurred without payment actually occurring because the contract provision itself demonstrated the lack of arms-length interaction between the parties. 295 NLRB at 293. Similarly here, the parties agreed that Respondent Employer would provide an improper payment to Respondent Union by requiring its supervisor Harris to pay dues, although the payment in this case did not occur because Harris was terminated by Respondent

Employer at Respondent Union's request when he would not agree with the Respondents' scheme for him to pay dues.

Accordingly, the application of the foregoing precedents compels the conclusion that Respondent Union violated Section 8(b)(1)(A) by soliciting unlawful financial assistance from Respondent Employer via its September 9, 2019 letter requesting Harris's discharge and later received such unlawful assistance when Respondent Employer acquiesced and terminated Harris on October 3.

**E. A Complete and Appropriate Make-Whole Remedy Is Required to Rectify Respondents' Unfair Labor Practices**

In order to effectively remedy the unfair labor practices described above and established by the record herein, Respondent Employer must be required to reinstate Charging Party Harris to his former position of employment, and Respondents collectively must be ordered to, joint and severally, make Harris whole for whole for any loss of pay he may have suffered because Respondents conspired to cause his discharge in violation of the Act by paying Harris a sum of money equal to the amount he normally would have earned as wages from the date of his discharge until the date he is offered reinstatement. See *Mortuary Employees Union*, 192 NLRB 616, *supra* (ordering union to make whole and seek reinstatement of an individual whose discharge the union unlawfully caused based on a union security provision of a contract that did not apply to the him); see also *Sweater Bee by Banff*, 197 NLRB at 805-06 (ordering make-whole remedy for unlawful assistance violation).

To effectuate an appropriate make-whole remedy, the General Counsel seeks an Order requiring Respondent Employer to produce appropriate W-2 forms to the Regional Director. In *Tortillas Don Chavas*, 361 NLRB 101 (2014) the Board explained that allocating backpay to the appropriate earnings periods for Social Security Administration (SSA) purposes is consistent

with the Board's make-whole remedial power and established SSA allocation as a standard remedy.<sup>3</sup> In *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016), in order to effectively administer the remedy it had ordered, the Board modified the remedy to require respondents to file reports allocating backpay ("reports") with the Regional Director, rather than directly with the Social Security Administration ("SSA"). *Id.* slip op. at 1. The reports are transmitted to SSA annually in April/May. However, the Board also observed that SSA would not accept such reports prior to its receipt of the affected employees' W-2 forms. *Id.*

In support of the effective administration of the SSA-allocation remedy specified in *Tortillas Don Chavas*, the General Counsel seeks an Order requiring Respondent Employer to submit appropriate W-2 forms to the Regional Director, in addition to the SSA reports. This will allow the Region, in effectuating compliance, to compare the information on the W-2 forms and the SSA reports to ensure accuracy and consistency between the two. Experience has demonstrated that SSA will not credit earnings or otherwise process SSA reports Regional Directors forward before engaging in this process themselves, and problems associated with inconsistent information due to error or incorrect documentation has led to lower SSA benefits than those to which some discriminatees would be otherwise entitled. See General Counsel Memorandum 20-02. Requiring Respondent to produce the appropriate W-2 forms to the Regional Director will enable Regional personnel to ensure the reports are correct prior to submission to SSA, and thus avoid the problems and inconsistencies in those documents that may lead to difficulties with correct SSA allocation.

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<sup>3</sup> The Board has observed this practice since the decision in *Latino Express*, 359 NLRB 518 (2012), a decision rendered at a time when the composition of the Board improperly included two persons whose appointments to the Board were constitutionally infirm under *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Accordingly, the Board's decision in *Tortillas Don Chavas* was to "continue" the remedy of requiring SSA reports, and for the reasons stated therein.

The Board ordinarily orders respondents to preserve and, where good cause is shown, provide information to the Regional Director, including payroll records, SSA payment records, timecards, and other personnel records necessary to analyze backpay due under the terms of its orders. See *Ferguson Electric Co.*, 335 NLRB 142 (2001). Ordering respondents to provide W-2 forms in cases involving backpay requires a minimal effort on their part, especially given that they are providing them to SSA already, while doing so will significantly aid the Regions' administrative effectuation of Board remedies at the compliance stage.

In sum, ordering Respondent Employer to provide the Regional Director with appropriate W-2 forms serves the goal of ensuring accuracy in the reports and enables Regional personnel to identify any inaccuracies or inconsistencies before problems arise in this connection at SSA.

#### **IV. CONCLUSION**

Based on the foregoing, and the record as a whole, Counsel for the General Counsel submits that the weight of the credible evidence firmly establishes that at all material times, Charging Party Vernon Harris was a supervisor within the meaning of Section 2(11) of the Act, and that Respondent Alstate Maintenance, LLC violated Section 8(a)(1) and (2) of the Act by providing financial assistance and support to Respondent Service Employees International Union, Local 32BJ by requiring Employer supervisor Harris to pay dues or fees to the Union as a condition of his employment and discharging him when he refused to do so, and further that Respondent Union violated Section 8(b)(1)(A) of the Act by soliciting and accepting the unlawful Financial assistance provided by Respondent Employer. In light of these violations, the General Counsel respectfully urges the Administrative Law Judge to recommend a Board Order that adequately remedies these unfair labor practices, as set forth above, and requires Respondent Employer to reinstate Harris to his former position of employment, award Harris backpay and

otherwise make him whole joint and severally with Respondent Union, and post at its JFK Airport facilities an appropriate Notice to Employees advising employees of their rights under the Act and assuring employees that Respondent Employer will not continue to engage in the unlawful conduct established in this case. Counsel for the General Counsel further urges the Administrative Law Judge to recommend a Board Order that effectively remedies the violations committed by Respondent Union by requiring it to award Harris backpay and otherwise make him whole joint and severally with Respondent Employer, and post at its office, as well as at any Union bulletin boards at the Employer's JFK facilities, an appropriate Notice to Employees advising them of their rights under the Act and assuring employees that Respondent Union will not continue to engage in the unlawful conduct proven by the record herein.

Dated: October 9, 2020  
Brooklyn, NY

Respectfully submitted,



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Matthew A. Jackson  
Counsel for the General Counsel  
National Labor Relations Board  
Region 29  
Two MetroTech Center, Suite 5100  
Brooklyn, New York 11201-3838  
Phone (718) 330-7713  
Fax (718) 330-7579