JD–57–18
Commerce, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC

XPO CARTAGE, INC.

Respondent

and

Cases 21–CA–150873
21–CA–164483
21–CA–175414
21–CA–192602

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Charging Party

Jean C. Libby, Esq. and *Mathew J. Sollett, Esq.,*
for the General Counsel.
Robert G. Hulteng, Esq., Phillip B. Baldwin, Esq., and *K. Kayvan Iradjpanah, Esq.,*
for the Respondent.
Amanda Lively, Esq. and Michael Odoca, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Los Angeles, California, on July 24 – August 3, 2017 and September 11 – 13, 2017. The International Brotherhood of Teamsters (the Charging Party) filed the charge in Case 21–CA–150873 on April 24, 2015. The first amended charge in Case 21–CA–150873 was filed by the Charging Party on June 29, 2015, and the second through fifth amended charges were filed on August 11 and 20 2015,, April 14 and June 1, 2016, respectively. The Charging Party filed the charge in case 21–CA–164483 on November 18, 2015. The first amended charge in Case 21–CA–164483 was filed on February 26, 2016. The charge in Case 21–CA–175414 was filed by the Charging Party on May 3, 2016, with a first amended charge filed in the case on June 28, 2016. On February 3, 2017, the Charging Party filed a charge in Case 21–CA–192602 with a first amended charge filed on February 9, 2017. Following the issuance of the initial Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, and the Second Consolidated Complaint, on March 22, 2017, the General Counsel issued an Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing. XPO Cartage, Inc. (the Respondent) filed timely answers.

The consolidated complaint alleges that the Respondent violated the National Labor Relations Act (NLRA/the Act) when (1) on or about February 26, 2015, the Respondent, by Hector Banuelos (Banuelos), at the dispatch window at the Commerce facility, told an employee that the employee was not receiving work assignments because he was wearing union insignia clothing; (2) on or about March 4, 2015, the Respondent, by dispatcher Armando Rodriguez (Rodriguez), at the Commerce facility, prohibited employees from talking about the Union during working hours while permitting employees to talk about other nonwork subjects; (3) on or about March 6, 2015, the Respondent, by Ezequiel Chevez (Chevez), at the Commerce facility, prohibited employees from wearing union insignia at work while permitting employees to wear other insignia; (4) on or about April 22, 2015, the Respondent, by Enrique Flores (Flores), at the Commerce facility, interrogated an employee about the employee's union membership, activities, and sympathies, and the union membership, activities, and sympathies of other employees; and implicitly threatened an employee with job loss and/or unspecified reprisals if the Union won or came into the Commerce facility; (5) on or about April 27 and September 30, 2015, the Respondent, by Chevez and/or Miguel Camacho (Camacho) engaged in surveillance or created the impression of surveillance of employees engaged in union activities; (6) on or about May 5, 2015, the Respondent, Flores, in Flores' office at the Commerce facility, interrogated an employee about the employee's union membership, activities, and that of other employees; solicited employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment; and threatened an employee with less desirable work all because of his union support and activity, or if the Union came into the Commerce facility; (7) at all material times since at least about February 11, 2015, the Respondent has maintained as a condition of employment for its employees and has required its employees to sign and be bound by Equipment Lease Agreements and the Independent Contractor Hauling Agreement, with both containing provisions that require employees to resolve disputes through individual arbitration proceedings and relinquish any right they have to resolve disputes through collective or class action; (8) on or around March 10, 2016, the Respondent, through Rodriguez, conditioned work assignments on the removal of union insignia; (9) since at least December 30, 2014, the Respondent has misclassified its employee-drivers as independent contractors; (10) on or around February 26, 2015, the Respondent refused to assign work to its employee Humberto Canales (Canales); (11) on or about January 5, 2017, the Respondent refused to consider for hire or hire Canales; (12) in or about the months of March through June 2015, the Respondent denied a truck- repair loan to its employee Domingo Avalos (Avalos), and then required him to make a large cash payment to have the truck repaired; and (13) on or around June 18, 2015, the Respondent prohibited its employee Avalos from working.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for the General Counsel's exhibit; "R. Exh." for the Respondent's exhibit; "CP Exh." for the Charging Party's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief; "R Br." for the Respondent's brief; and "CP Br." for the Charging Party's brief. During the hearing, I granted the parties joint motion to seal and place under protective order pages 1041 through 1225

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, has been engaged in the business of transportation logistics services with a place of business located at 5800 Sheila Street in Commerce, California.[2] During the 12-month period ending December 31, 2015, the Respondent performed services valued in excess of $50,000 directly to points outside the State of California. The Respondent denies that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(ww)). However, the evidence is undisputed that the Respondent provides "drayage services and short haul trucking in markets across North America" including commercial activity in Southern California. (GC Exh. 72.) Moreover, there is ample evidence, and the Respondent admits, that it has performed services valued in excess of $50,000 directly to points outside of California. Consequently, I find no merit in the Respondent's denial; but rather, at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

During the administrative trial, the Respondent stipulated that the following individuals are or were agents of the Respondent within the meaning of Section 2(13) of the Act: Flores, Chevez, Banuelos, Camacho, Steve Casillas (Casillas), Javier Velasco (Velasco), Javier Martin Del Campo (Del Campo).

II. Alleged Unfair Labor Practices

A. Overview of Respondent's Business Operation

XPO International, Inc. (XPO Int'l) was founded in 1997, and is headquartered in Chicago, Illinois with facilities throughout the United States. Prior to March 2014, the Commerce facility was owned and operated by Pacer Cartage, Inc. (Pacer). Pacer and transportation logistics company Harbor Rail Transport (HRT) were wholly owned subsidiaries of Pacer International, Inc. However, in about April 2014, XPO Int'l purchased Pacer International, Inc. and changed the name to XPO Cartage, Inc.; and HRT's name was changed to

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of the transcript. While fully considered herein, those portions of the transcript that are sealed under protective order, where referenced, are done so without direct quotation to preserve the parties agreed-upon request for confidentiality.

[2] During the hearing, the Commerce facility was referred to as the "yard", "terminal", "facility" or "building". Those names will be used interchangeably throughout the decision to refer to the Commerce building and land located at 5800 E. Sheila Street, Commerce, CA 90040.

XPO Port Services, Inc.[3] Consequently, the Respondent is now a wholly-owned subsidiary of XPO Int'l; and provides "drayage services and short haul trucking in markets across North America."[4] (GC Exh. 72.) The majority of the Respondent's revenue is derived from transportation logistics with a significantly smaller portion coming from fuel depots, pull chassis, container storage, and container per diems. (Tr. 1049, 1930, 1937; GC Exh. 72.) The Respondent solicits customers and controls almost all aspects of customer interactions. The Respondent is solely responsible for negotiating the rates customers will pay for, among other items and services, deliveries, loading and unloading cargo, layover and redelivery charges, and delay time. Additionally, the Respondent interacts with clients regarding scheduling and handles all customer complaints. Except for getting their signature upon pickup or delivery, drivers have no interaction with the Respondent's customers.

The allegations at issue center on the Respondent's Commerce terminal, which the Respondent has operated since April 2014. The terminal is a low-slung building with a slightly taller structure attached to it; and it is located on Sheila Street which has a fair amount of commercial traffic. The terminal building is surrounded by fencing and is entered through a one-way driveway that is gated with a security guard booth in front. There is a separate driveway on the opposite side for exiting. In front of the building are multiple parking spaces which can accommodate cars and truck tractors. The property also has docks for loading and unloading trucks. (Tr. 45–46; GC Exh. 10.)

Camacho joined the Company in November 2013 as a dispatcher. He has also served as manager of rail-to-rail lease drivers, the operations manager/driver liaison of the Commerce, San Diego, and Rancho Dominguez facilities; and general manager of the Commerce facility from October 2015 until August 2016, when he was again promoted. In November 2014, Del Campo began working for the Respondent as a dispatcher and continued in that role until he became a regional recruiter. In September 2016, Del Campo was promoted to general manager of the Commerce terminal and served in that position until his resignation in August 2017.[5] Director of Drayage Operations for California Jeffrey Trauner (Trauner) was serving as the Commerce facility general manager as of the hearing date. Banuelos was the dispatch manager for the terminal until he left the Company. From 2015 to 2016, Flores was the safety manager. Casillas served as the safety specialist until May 2017. Chevez was the recruiter for drivers from 2010 to 2016 when he was replaced with Javier Velasco (Velasco).

In 2015, approximately 120 drivers operated out of the Commerce terminal. As of the date of the administrative trial, about 130 drivers received dispatches from the Commerce terminal with approximately 22 employees performing jobs such as dispatcher, customer service representative, settlement specialist, safety specialist, dock worker, or general office coordinator.

[3] The "Respondent," "company," and "Pacer" are used interchangeably to refer to the Respondent, except in instances where a specific reference to "Pacer" is necessary for clarity.

[4] Drayage is commonly defined as the transporting of goods, usually in shipping containers, between customers and ports, terminals, or rail yards.

[5] Del Campo resigned from the Respondent to accept a position as a terminal manager for Universal Logistics.

(Tr. 1710, 1931, 1932, 1937.) Fifteen drivers were incorporated, two drivers hired other drivers to work for them, and one driver simultaneously worked for the Respondent and other companies.[6]

The Respondent's dispatchers are tasked with assigning loads to drivers.[7] A computer application, Truck Plus, contains a daily list of the deliveries and services available for assignment.[8] The system also contains information on whether the driver has been placed out of service.[9] There are several methods for determining if a driver is available to accept an assignment. The driver can telephone dispatch or appear in person to request a load. Additionally, dispatchers will telephone the driver about 3 hours prior to the scheduled delivery time to ask if the driver will accept an assignment. A driver will often be offered multiple assignments or options for a load. The Commerce terminal normally has the drivers pick up loads from the rail yard (or the port) and deliver the cargo to a customer's warehouse. Infrequently, the drivers make customer to customer deliveries. After the driver accepts the assignment, the dispatcher assigns the delivery to the driver using the Truck Plus application. Truck Plus then transmits to the assigned driver the customer name, address, time of appointment or any "pickup numbers" the driver needs to pick up or deliver the load. If a driver anticipates being late for the pick-up or delivery, the driver has to contact dispatch. If a delivery must be rescheduled or there is an issue with a particular deliver, it is referred by dispatch to the planners who enter the work into the "system" and forward it on to customer service for a resolution. Customer service contacts the customer to resolve the situation. Work assignments are offered on a 24-hour cycle, 7 days a week.

Drivers have broad discretion in determining whether to accept an assignment from dispatch. On average about 20 percent of the loads offered are rejected by drivers.[10] If a driver rejects a load, the dispatcher contacts the next available driver; but will return to the driver who

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[6] Individuals hired by drivers to operate their trucks are termed "second seat" drivers. An example of this arrangement is driver Jose Solis (Solis) who owns two trucks and employees two second seat drivers.

[7] The terms "load," "assignment" "trips," "work," and "business" are used interchangeably. "Moves" is a term similar in meaning.

[8] Prior to the current Truck Plus system, the Respondent used a software program to track available work named Pegasus. There was undisputed testimony that the application is standard use in the logistics industry. It is unclear whether Truck Plus application and the SmoothCom application mentioned at fn. 18 are one and the same.

[9] There was undisputed testimony by a dispatcher that he is also aware of where drivers reside and often tries to offer them assignments in close proximity to their residences.

[10] The General Counsel argues that the right to reject loads is only theoretical because "the drivers were not free to reject work assignments, because they rarely did." (GC Br. 71.) Although the General Counsel's witnesses testified that they rarely rejected loads, none testified to specific acts of retaliation that they had experienced as a result. Solis testified that Velasco admitted he was informed that one of the two reasons driver Canales might not be rehired was because he rejected loads. However, given the hearsay nature of the testimony and with no other credible evidence to corroborate it, I accord Solis' testimony little weight on this point.

originally rejected the work if another assignment becomes available. Drivers also control their availability. They determine which days, specific hours, and the number of hours to work (work shift); the distance they are willing to travel for a load; when and how much time to take off from work for sick leave, vacation, or any other reason. Despite testimony from a few of the drivers that they have to receive approval from the Respondent to take time off or change their work shift, I find there is no credible evidence to support that assertion.

B. Implementation of the Lease to Own Program in 2010

In 2009, the State of California initiated new stricter emission standards which resulted in drivers having to acquire compliant trucks.[11] Prior to 2010, drivers purchased their trucks without assistance from the Respondent. However, as a result of the new emission standards, many drivers needed financial help getting new trucks because they were more expensive costing on average $80,000. In 2010, Pacer, through CTP, began a lease to own program for those drivers who needed help acquiring trucks that met the new California emission standards. Drivers were given the option of choosing their trucks among those in stock and accorded a modicum of freedom in decorating it in small ways such as affixing their nicknames or personal logos to the side of the tractor.[12] As a condition of obtaining a lease, CTP required drivers to sign an Equipment Lease Agreement (ESA) which was written in English. (GC Exhs. 11, 35.) (examples of the ESA) The ESA required the drivers to enter into a separate independent contractor agreement with Pacer, entitled the Vehicle Lease and Independent Contractor Hauling Agreement (the Hauling Agreement). (GC Exhs.12, 49; R Exh. 36.) (examples of the Hauling Agreement) The Hauling Agreement classified the drivers as independent contractors and was written in English and Spanish. Under the ESA terms, drivers paid a $2500 security reserve and monthly lease payments of equal amounts until the end of the lease term on December 31, 2016.[13] At the end of the lease, drivers could purchase their truck at the fair market value by paying a single balloon payment of the balance amount or return their truck to CTP. CTP stopped entering into new lease agreements with drivers by the end of 2015, and ceased all involvement in truck leasing on December 31, 2016.[14]

[11] Since there terms "tractor" and "truck" were used interchangeably at the hearing, I will continue to use those terms in the same manner throughout this decision.

[12] Decorations cannot cover the Department of Transportation required placards which identifies the Respondent's name and permit numbers.

[13] The minimum balance of the security reserve increased yearly.

[14] Several witnesses testified that they obtained their trucks from CTP: Jose Herrerra (Herrerra), Jose Lopez (Lopez), Humerto Canales (Canales) and Mario Montenegro (Montenegro). Lopez and Herrera own their trucks. Canales returned his truck. Montenegro currently leases a truck through Peterbilt Motors Company and leased two trucks with CTP. The record is unclear on the financial arrangements Montenegro made to continue leasing the trucks after CTP left the truck leasing market.

1. ESA terms

The ESA specified that a driver who leased trucks through CTP's program must also enter into a Hauling Agreement with the Respondent. Additionally, the driver was required to participate in and pay the cost for CTP's prepaid maintenance service; was not allowed to alter the truck without CPT's approval; must maintain and pay for insurance that met CTP's requirements; receive prior approval from CTP to assign or sublease the vehicle; agree to CTP's and Pacer's general indemnity terms; and to indemnify them for any taxes, fees, duties, and other governmental charges assessed. CTP had the right, at the driver's expense, to inspect the truck at least every 90 days or upon request. The driver was solely responsible for repairs, routine maintenance, damage and risk of loss. The ESA specified that the Respondent was the sole owner of the truck and retained legal title until it was purchased by the driver.

2. The Hauling Agreement terms

The Hauling Agreement specifies that the parties to the agreement intend to create a principal-independent contractor relationship; and the driver has had an opportunity to have the driver's own legal counsel review the agreement. In emphasizing the principal-independent contractor relationship, the agreement notes that the Respondent will not and has no right to control the driver's manner of accomplishing the service the driver has agreed to perform under the Hauling Agreement. Subject to the requirements imposed by law and client demands, drivers have complete control over all aspects of vehicle operation. Under the agreement, drivers have the right to decline any shipment offered; and the Respondent is not required to provide drivers a minimum number of shipments or work. The Respondent will not withhold taxes or provide benefits for drivers. Drivers are not required to purchase or rent equipment from the Respondent. The Hauling Agreement allows drivers, at their own expense, to hire second seat drivers or other personnel to operate their trucks. If, however, a driver hires a second seat driver, or other personnel, the driver is solely responsible for that driver's (or personnel) direction and control, including wages, assignments, hours, grievances, and any other personnel issues. Moreover, those second seat drivers have to meet all of the industry and regulatory standards and qualifications.

Under the agreement, drivers are required to have their truck inspected every 90 days by a licensed state inspection station or other qualified vehicle inspector. Drivers are free to use their trucks to transport for other carriers or any other business purpose. However, drivers have to provide the Respondent "reasonable" notice of vehicle availability. Drivers also have the freedom to: determine which insurance carrier to use, and the amount of coverage above the required coverage; where to seek financing for a truck lease or purchase; work schedule and number of hours to work; when to pick up a load or request an assignment; how a shipment is to be loaded, route to take to deliver or pick up a shipment; number and duration of rest stops; where to purchase fuel and repair the truck. The Respondent may, in its sole discretion, offer drivers credit towards such things as maintenance, repairs, and tires. The Respondent is also solely responsible for determining compensation and how it is calculated, and establishing the settlement procedure. In order to receive payment, drivers must obtain customer signatures upon delivery of trailer and containers. Also, any delay or unloading time must be preapproved by the

Respondent. The Hauling Agreement is for a term of 90 days and automatically renews for successive 90-day periods, unless either party notifies the other of nonrenewal at least 5 days prior to the renewal date. Last, the agreement includes several attachments that include: the compensation rate and fuel surcharge and how they are calculated; and forms for drivers to sign acknowledging those deductions they are accepting or declining.

3. Bush Lease Agreement

Sometime between 2012 and 2014, Bush Leasing also began leasing trucks to drivers who hauled goods for the Respondent's customers.[15] Unlike CTP, Bush is not a subsidiary of, nor is it in any way owned by the Respondent.[16] The Bush agreement contains many of the same terms as the CTP lease agreement. It required the driver to make weekly lease payments, pay a security deposit, maintain insurance meeting its criteria, and general indemnification terms. Like the CTP agreement, the Bush contract was also contingent on the driver signing an operating agreement with the Respondent. The Bush agreement states the driver "shall use the Vehicles only in its business. . .," without specifying a carrier. (GC Exh. 50 at sec. 6)

C. *Company Changes after the Purchase of Pacer in April 2014*

Shortly after purchasing Pacer, the Respondent began making changes in the Company, including at the Commerce facility. Trucks, letterheads, buildings and other items were rebranded with the Respondent's name. The Respondent also began to "fully integrate the Standard Operating Procedures (SOPs) across the XPO Cartage terminals". (GC Exh. 76.)

In about April 2014, the Respondent made plans to require that drivers sign an Independent Contractor Operating Contract (ICOC) in place of the ESA and Hauling Agreement they had previously signed. Drivers who did not sign the ICOC by the deadline of March 1, 201, were not allowed to drive for the Company.[17] (GC Exh. 60.) From October 2015 to August 2016, Camacho held several meetings in Spanish with the drivers to distribute and explain the ICOC. The length of time drivers took to review the ICOC before signing varied. Although several drivers hired attorneys to review and negotiate changes to some of the terms of the ICOC, this was not the norm.[18] (R. Br. P. 6; Tr. 1165–1169, 1182–1183.) The majority of drivers signed the ICOC without changes. Regardless, the evidence is undisputed that the drivers play no role in securing the Respondent's customers.

[15] A Bush leasing representative is present at the Commerce facility about once a week.

[16] Less than a majority of the current drivers obtained their trucks from sources other than CTP or Bush. Nevertheless, all drivers who transported goods and provided services for the Respondent's clients had to sign the Hauling Agreement, and ultimately the ICOC. (R. Exhs. 27, 29.)

[17] Camacho provided undisputed testimony that about twenty drivers declined to sign the ICOC; and therefore, they no longer transported goods for the Respondent's clients.

[18] There was undisputed testimony that some of the drivers reviewed the ICOC with family or friends before signing it.

1. ICOC terms

The ICOC is a 21-page document, written in English, and includes separate schedules that address factors such as compensation, safety, and discipline. (GC Exh. 49.) It governs all aspects of the driver-company relationship. The ICOC contains many of the same terms set forth in the ESA and the Hauling Agreement; but there are differences. The ICOC specifically designates the drivers as independent contractors or independent business enterprises; but includes a separate schedule N, which the drivers have to sign acknowledging their independent contractor status.[19] The agreement states that although the Respondent will have exclusive control, possession, and use of the vehicle; the driver continues to be responsible for controlling the method and means by which it is operated. The agreement continues authorizing drivers to utilize second seat drivers and other personnel. The drivers are solely responsible for their direction and control, operating costs, wages and other personnel matters. The terms related to alternative use of the vehicle and second seat drivers are essentially unchanged from the Hauling Agreement, except for the addition of a few, mostly regulatory, details.

The driver may operate the vehicle for other motor carriers, sublease the vehicle, or use it for other alternate uses.[20] Drivers are free to incorporate. However, only a tiny fraction of the drivers have incorporated. Similar to the Hauling Agreement, the ICOC allows drivers to reject assignments without penalty or prejudicing the driver for receiving future trips. Moreover, drivers are not guaranteed a minimum volume of business, amount of pay, or number of trips. In order to receive work, the driver must possess a cell phone and data transmission service that is compatible with the Respondent's mobile application and operating system.[21] The Respondent does not provide the drivers with mandatory training, performance evaluations, or audits.

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[19] Drivers Montenegro, Michael Ackling (Ackling), Lawrence Decoud (Decoud), and Brian Davis (Davis) considered themselves to be independent contractors and for financial reasons preferred an independent contractor relationship with the Respondent.

[20] A driver may use the vehicle to drive for another carrier while simultaneously driving for the Respondent. However, when driving for another motor carrier, the driver must do so using: his or her own Department of Transportation (DOT) identification number and California identification number; his or her own name or company name; and insurance coverage specifically for the other motor carrier. The driver must also cover the Respondent's and registration numbers while hauling for another carrier. Trauner could recall only two drivers who drove simultaneously for the Respondent and another motor carrier. (Tr. 1993–1984.)

[21] Although several of the General Counsel's witnesses testified that the Respondent has GPS tracking abilities on their trucks, I find that the record does not support those assertions. The Respondent implemented a mobile communication system, SmoothCom, for tracking customers' shipments and other demands. Dispatchers, using the SmoothCom application, will send to a driver's cell phone a request for the driver to accept or reject an assignment. If the driver accepts the assignment via the SmoothCom application, it will send the driver all the necessary customer and delivery information. If the driver rejects the assignment, the dispatcher contacts the next person on the list of available drivers. Certain customers' sites have "geofences" encircling the perimeter of their property. Consequently, when a driver enters the property, the geofence is activated; thus allowing the drivers to note in the SmoothCom application that they have arrived

Additionally, drivers are responsible for their own maintenance and truck repairs, fuel, tires, parts, supplies (except for Respondent provided containers and trailers), taxes, fees, fines, and penalties. However, Schedule B of the ICOC lists certain credits the Respondent will provide to the driver. The Respondent will pay for carrier permits; and certain fees, fines and permits related to preloaded, sealed or containerized loads. The ICOC notes that the parties agree the Respondent will not deduct taxes from the driver's weekly paycheck, nor will it provide benefits.[22] The Respondent is solely responsible for setting the compensation rates which are set forth in detail at Schedule B of the ICOC. As in prior agreements, the ICOC notes that the compensation rates are based on a mileage band and point-to-point rates. In order to get paid, the driver is responsible for getting customer signatures for deliveries, pick-ups, and delay or unloading time. As a courtesy to drives, the Respondent will make available to them on a voluntary basis a fuel service card for use to buy fuel and obtain cash advances. The charges to the fuel card and an administrative fee will be deducted from the drivers' weekly settlement statement.[23]

Under the terms of the ICOC, the parties agree that drivers must, in compliance with State and Federal regulations, complete the legally mandated daily logs, daily trip record form, daily vehicle inspection report, maintain records of vehicle repairs and maintenance, and provide monthly vehicle maintenance reports. The Respondent agrees to provide the drivers with: shipping documents; vehicle inspection forms; and company identification placards. The Respondent will also pay for the drivers to have legally mandated vehicle inspections; and DOT mandated medical examinations and drug and alcohol tests. Drivers are not allowed to park or store their trucks on the Respondent's property unless the driver has entered into a parking space access agreement the terms of which are set forth at Schedule P of the ICOC. ICOC terms related to indemnification and insurance coverage are essentially the same as those set out in the Hauling Agreement.

According to the terms of the ICOC, it is effective only for a 90 day period and can be renewed by either party at the end of that period. However, if the driver is organized as a limited liability corporation (LLC), corporation or other legal entity, the contract will automatically renew for three additional 90-day periods unless a party gives notice of termination. Even if, however, the contract has expired, the provision will continue to apply to the driver and the Respondent for up to 3 months after its expiration so long as the driver is accepting trips from the Respondent and the contract has not been superseded and replaced by a new agreement.

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or left a customer site. The tracking associated with the geofencing is limited to the immediate area of the customers' properties.

[22] During the administrative trial, the terms "settlement statement" and "paycheck" were used interchangeably.

[23] The fuel service card is referred to by all parties as the "Comdata" card. The card provides fuel discounts at designated fueling stations.

D. Drivers

Individuals interested in transporting goods for the Respondent normally contact a recruiter who works for the company. (Tr. 48, 250.) Recruiters also utilize various tools to get qualified individuals to drive for the Respondent. Drivers who transport goods for the Respondent's clients must submit an application, possess, at minimum, a Class A commercial driver's license (CDL), possess at least 18 months of tractor-trailer driving experience, and meet Federal mandated requirements (e.g., pass a drug test, driving test, and safety test).[24] (GC Exh. 61.) Although not required by federal regulations, the Respondent mandates that drivers who move goods for its clients have attended trucking school; be at least 23 years old; no DUI within the past 10 years; no speeding ticket; no more than one preventable accident in the past 36 months; no involvement in a fatal accident; and no more than one moving violation in the past 36 months. (Tr. 1829.) Drivers must not only comply with Federal regulations for medical examinations and drug tests, but the Respondent also has the option to require drivers to take additional medical examinations and participate in its random drug and alcohol testing program. Drivers whose applications are accepted by the Respondent are provided with a company safety handbook and documents explaining the driver orientation training program.[25] (GC Exh. 72.)

There are no other outward indications that the drivers are affiliated with the Respondent. The drivers do not wear company provided uniforms, adhere to a dress code, possess company emails or business cards, wear company name tags or carry company identification badges. Although drivers are allowed to personalize their trucks with nicknames and logos, the trucks must have the Respondent's placard affixed to their trucks identifying the Respondent's name, logo, DOT and California identification numbers. While drivers may occasionally use the company's office equipment, there is no evidence detailing whether all (or most) of the office equipment is routinely available to the drivers or if it is an infrequently provided courtesy.

E. Federal and State Regulations

Motor carriers and drivers are subject to a myriad of rules and regulations, many of which are codified in the Code of Federal Regulations (CFR) and state regulations. (R. Exhs. 38, 39, 41.)

[24] Several drivers have taken additional State and, or Federal examinations to acquire special endorsements which allow them to transport, among other items, tanks and hazardous materials.

[25] Vice President of Fleet Safety and Driver Compliance William Maleski (Maleski) testified that although drivers do not have to follow the rules in the XPO Safety Handbook for Independent contractors and it is not enforced, he does not require any company agent or supervisor to communicate this to the drivers. If the provision refers to a state or regulatory requirement, the drivers are notified of their responsibility to adhere to those regulatory mandates.

F. Union Organizing Campaign

In 2014, the union began an organizing campaign at the Commerce terminal. In November 2014, a number of drivers signed a letter demanding improvements to their working conditions and for the Respondent to cease misclassifying them as independent contractors. (GC Exhs. 28.) They delivered the letter to Pacer officials. Additionally, the drivers submitted a letter to one of the Respondent's managers again demanding to be reclassified as employees. As part of the union organizing effort, in 2015 and 2016 the drivers engaged in pickets, strikes, and handbilling. They also delivered petitions to the Respondent after it acquired Pacer demanding better working conditions and to be reclassified as employees. Many drivers wore union branded safety vests to show their support for the union. Drivers Canales and Napoleon Gaitan (Gaitan) have both been featured in the media complaining about their working conditions and explaining their support for unionization of the Commerce terminal. Several of the drivers, including Avalos, twice visited the Respondent's corporate offices as part of a union delegation to meet with company representatives about their complaints. Avalos and Canales were also members of the drivers' union organizing committee; and were tasked with talking with their fellow drivers about supporting and joining the unionization campaign. While gathered in the terminal yard, the drivers often discussed among themselves nonwork topics and debated the benefits of supporting the Union.

Many drivers filed complaints with state administrative tribunals alleging that they were misclassified as independent contractors. Several drivers also filed claims with the Department of Labor Standards Enforcement (DLSE) of the California Department of Industrial Relations. (GC Exhs. 31, 66, 68, 80–82)[26]

G. Employees Versus Independent Contractors

The complaint alleges numerous 8(a)(1) and (3) violations involving the drivers. First, however, the threshold question that must be answered is whether, during the relevant period, the drivers who transported merchandise for the Respondent's customers are employees of the Respondent as defined by the Act or independent contractors who are excluded from coverage. See Section 2(3) of the Act.

[26] During the administrative trial, counsel for the General Counsel moved for the admission of GC Exhs. 80, 81, and 82 over counsel for the Respondent's objections. I reserved ruling on the admissibility of the exhibits. After careful consideration of the parties' arguments and Board law, I am overruling the Respondent's objections and admitting GC Exhs. 80, 81, 82. See *Forrest City Mach. Works, Inc*., 326 NLRB 1093, 1094 (1998); *Armored Transportation of Nevada, Inc.*, 265 NLRB 1648, 1653 (1982); *Magic Pan, Inc*., 242 NLRB 840, 841 (1979); *Duquesne Electric*, 212 NLRB 142, 142 fn. 1 (1974).

The party asserting that individuals are independent contractor, and thus are not covered under the Act has the burden of proof. *BKN, Inc*., 333 NLRB 143, 144 (2001).[27] In *NLRB v. United Insurance Co. of America*, 88 S.Ct. 988 (1968), the Supreme Court held that common-law agency principles are used to decide whether a worker is an employee protected under the Act or a statutorily exempt independent contractor. The Supreme Court noted that in applying the common law principles, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" but rather the important point, "is that the total factual context is assess in light of the pertinent common-law agency principles." at 88 S.Ct. 988. Consequently, the Board and the courts have used the Restatement (Second) of Agency §220 (1958) as a roadmap for analyzing these types of cases under the common-law agency principles. The Board typically looks at ten non-exhaustive common-law principles, set forth in the Restatement (Second), to determine whether the party arguing for a worker to be classified as an independent contractor has met its burden. More recently, the Board has taken the opportunity to "restate and refine" its approach in independent contractor cases. *FedEx Home Delivery*, 361 NLRB No. 55 (2014). The Board relies on common-law agency principles as guided by the following nonexhaustive common-law principles:

a.) The extent of control which, by the agreement, the employer may exercise over the details of the work.

b.) Whether or not the one employed is engaged in a distinct occupation or business.

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

d.) The skill required in the particular occupation.

e.) Whether the employer of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

f.) The length of time for which the person is employed.

g.) The method of payment, whether by the time or by the job.

h.) Whether or not the work is part of the regular business of the employer.

i.) Whether or not the parties believe they are creating the relation of employer and employee.

[27] The Respondent argues that the General Counsel has the burden of establishing jurisdiction, including "proving that all of the Drivers have been misclassified in violation of the Act." (R. Br. 34.) I agree that the General Counsel has the burden of proving jurisdiction, which I found has been established. See above, sec. I. However, refer to sec. III(a) of this decision for a discussion on the issue of whether misclassifying employees as independent contractor constitutes an independent violation of Sec. 8(a)(1) of the Act.

j.) Whether the principal is or is not in the business.

Id.; Restatement (Second) of Agency.

1. Extent of control by employer

The General Counsel argues that the evidence shows the drivers have virtually no control over their work performance because the Respondent exclusively interacts with customers, and controls the drivers' work assignments, work schedules, insurance, and their ability to work for other companies. (GC Br. 69.) The Respondent counters that the drivers have significant control over their schedules, work assignments, truck appearance, routes, and truck maintenance decisions. In support of its position, the Respondent points to, among other factors, the fact that it does not discipline drivers, conduct performance reviews/evaluations/audits, or otherwise supervise or track drivers' movements. (R. Br. 36–69.)

I find that the Respondent maintains significant control over the drivers' work. This finding is supported by the evidence showing the extent of the Respondent's control over: virtually all aspects of the company's interaction with the clients; the drivers' compensation for deliveries and other services; scheduling of the drivers deliveries; the types of equipment drivers must use for deliveries; the type of insurance drivers must maintain pursuant to their contract with the Respondent; requirement that the trucks are branded in the Respondent's name when delivering for its clients; and the standardization of the contract between the drivers and the Respondent.

The evidence establishes that the Respondent solicits the client base, negotiates shipping contracts with the clients, and interacts with clients regarding scheduling, and services. Moreover, it is the Respondent's dispatchers and not the drivers who contact the customers if there is a problem with the delivery or the time of the delivery. The Respondent uses a software program to track the timing, and to a lesser extent, the movement of deliveries to help its dispatchers control their flow and deal with any complaints from clients regarding their shipments. The driver has virtually no contact with the customer except for the minor interaction (receiving a client signature) that might occur when delivering the load.

The Respondent's standard practice is to compensate drivers weekly based on the number and types of deliveries they completed for the week. The compensation rates are pre-determined by the Respondent, and set forth in Schedule B of the ICOC. The rates are based on the Respondent's estimation of the miles it takes to complete the delivery. The drivers have no input into these predetermined mileage calculations. Moreover, if the driver decides to deviate from the route the Respondent used to calculate the mileage, he or she is responsible for any increased cost. The drivers do, however, receive additional compensation for certain bobtail moves and other services.[28] (GC Exh. 60.) While the ICOC allows for changes to the fees paid to drivers, it

[28] Bobtail moves are defined as the "movements of the tractor without a container." (GC Exh. 60, schedule B, p. 2.))

is clear from the language of the contract that those changes are for temporary and rare occurrences. Id. Although there is evidence that a small fraction of the drivers negotiated changes to the point-to-point rate paid for a job, the record is devoid of substantive evidence showing that numerous other payments unilaterally implemented by the Respondent are negotiable. There is no evidence, for example, showing that the Respondent's unilaterally determined fees paid to drivers for the carrier's fuel surcharge ("FSC"), accessorial amounts, and "Clean Truck Operation" fee were subject to negotiations. It is undisputed that the Respondent does not withhold taxes from the drivers pay or provide them with fringe benefits.

Second, the evidence shows that the drivers have some control over their work assignments, work schedules, and opportunity to work for other companies. There was almost universal agreement from the drivers who testified that they decide which loads to accept, the number of hours to work, which shift to work, when to take time off from work, when to take breaks, selection of the delivery route, and exclusive control over the trucks they drive which includes most maintenance and repair decisions. Although the General Counsel argued that in practice drivers were retaliated against for rejecting loads, I find otherwise. The ICOC specifically allows drivers to reject loads without suffering negative consequences from the Respondent; and I find there was no substantive evidence that drivers were retaliated against for exercising this right. (GC Exh. 60 sec. 4(D) and Schedule N.) The drivers' right to reject loads was not merely theoretical. See II(A). The Respondent does, however, have a somewhat limiting impact on the extent drivers control the loads assigned to them. The Respondent alone determines the pickup and delivery locations and sets specific appointment times based on the customer's request. A tiny portion of the Respondent's customer base allows some flexibility in the delivery times but the flexibility only extends from 24 hours to a 3-day window for pickup or delivery.

Consequently, I find that this factor weighs in favor of employee status.

2. Whether drivers are engaged in a distinct occupation or business; and whether the drivers' work was part of the Respondent's regular business

The General Counsel argues that the drivers lack the infrastructure and administrative support needed to operate as an independent business. According to the General Counsel, the drivers are "independent in name only" because: the drivers do business in the name of the Respondent; and the Respondent provides the customers, clerical support, forms, credit cards, and scanners. The Respondent counters that the evidence supports a finding that the drivers are engaged in a distinct business because: "many" of the drivers are incorporated and hire and compensate their own drivers; several drivers simultaneously work for other companies while transporting cargo for the Respondent's clients; the drivers are not required to wear items identifying them with the Respondent; and the drivers own or lease vehicles of their own choosing, personalize their vehicles, and pays for essentially all the costs associated with truck ownership.

It is uncontested that the Respondent provides the customers and maintains an administrative support staff. However, the evidence fails to establish the extent to which that

staff supports the Respondent's logistic function versus their direct support to the drivers. The evidence is too minimal to show that the administrative staff's primary function is to support the drivers. Moreover, the forms, credit cards, and scanners play a miniscule role in the drivers' ability to do their job.[29] The Comdata credit card is offered as a convenience for the drivers. It allows them to get fuel at a discount from participating retailers; and eliminates the need for the drivers to have readily available funds on hand for fuel purchases. However, the driver, not the Respondent, is wholly responsible for paying the charges on the card. Further, the scanners are used by the dispatchers to assist them to keep track of scheduling, deliveries, and identifying problems in the delivery chain. These scanners are not unique to the Respondent but rather are standard in the logistics industry. It is undisputed that the Respondent, to comply with state and Federal reporting requirements, provides the drivers a limited number of forms to complete on a recurring basis.

The Respondent makes several valid points relating to factors supporting a finding that the drivers are engaged in a distinct occupation or business. Other than the federally mandated identifying markers on the containers and tractors, the record is undisputed that drivers are not required to wear uniforms or other items identifying them with the Respondent. Even the placards on the side of the tractors with the Respondent's name and DOT number can be covered if the driver is hauling for another company while simultaneously transporting for the Respondent's clients. Second, a few drivers already owned their own trucks before entering into hauling agreements with the Respondent; but most drivers had lease-to-own contracts. Drivers can purchase or lease their vehicles from a truck dealership of their choosing; and many of the drivers personalize their vehicles with nicknames and logos. Moreover, the driver is solely responsible for maintaining, repairing, insuring, and all the other responsibilities that come with owning a vehicle.

There is evidence, albeit minimal, that a small number of the drivers are incorporated, hire and compensate second-seat drivers, and simultaneously work for the Respondent and other companies. During the period at issue, there were about 130 drivers hauling out of the Commerce terminal. Fifteen drivers were incorporated, 2 hired second-seat drivers, and 1 simultaneously worked for the Respondent and other companies. The Charging Party argues that the ability of drivers to hire second-seat drivers or perform work for other companies is an illusion.[30] According to the Charging Party, the Respondent had the ultimate control over who can be hired as a second-seat driver and also erects hurdles making it almost impossible for drivers to simultaneously work for the Respondent and other companies.

Regardless, the pivotal question is "whether or not the work is part of the regular business of the employer." Restatement (Second) of Agency § 220(2)(h). Stated another way, whether the drivers are "a regular and essential part of the company's business operations." *Roadway*

[29] In context, it appears that the reference to "scanners" refers to the software application the dispatchers use to keep track of delivery appointments and assign loads to the drivers; and that drivers use to accept or reject assignments.

[30] See *Sisters' Camelot*, 363 NLRB No. 13, slip op at 2 ("the ability to work for multiple employers does not make an individual an independent contractor.")

Package System, Inc., 326 NLRB 842, 851 (1998). The Respondent argues that it is not in the same business as the drivers because the drivers "are in the business of actually driving goods from point to point, utilizing their special licenses and skills as Class A commercial drivers. XPO, in contrast, performs logistical coordination between customers, ports, and rail yards." (R. Br., 116.) The General Counsel contends that "the movement of containers by the drivers is the core of Respondent's operation." (GC Br. 87.) The Charging Party also notes that "without the work of the drivers, XPO could not exist." (CP Br. 41.) I agree. The Respondent could not perform its function without the drivers.[31] When performing this function for the Respondent, drivers use their trucks which were emblazoned with the Respondent's name and logo. To the casual observer, most likely, the driver and truck are indistinguishable from the Respondent.

Accordingly, I find that this factor weighs in favor of employee status.

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

Although the drivers are not supervised while driving and have discretion in choosing the delivery route, this is not necessarily indicative of an independent contractor status. Rather, it reflects the nature of the job itself. "In some types of cases which involve persons customarily considered as [employees], there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a[n] [employee] although it is understood that the employer will exercise no control over the cooking." Restatement (Second) of Agency § 220(1) cmt. D. Moreover, while the Respondent does not dictate the drivers' work schedule, require the drivers to work a set number of hours, or control when the drivers choose to take days off from working, the Respondent, through the dispatchers, controls the distribution of work assignments to the drivers. Further, the drivers are not allowed to directly contact customers if: there are problems with the pickup or delivery; if the customer wants to add extra services; or if the driver has questions about the delivery or pickup. All information about the moves is controlled by the dispatchers who relay the relevant portions of the move to the driver when they accept the assignment. Nonetheless, there is also no substantive evidence of an agreement between the Respondent and the drivers for close supervision. The record is also devoid of evidence that the drivers receive evaluations, audits, or training.

Accordingly, I find that this factor weighs in favor of independent contractor status.

[31] In a decision with facts similar to those at issue, the California DLSE held that the drivers were at the very core of the employer's regular business. *Naranjo, Townsel and Sivveyra v. Intermodal Bridge Transport*, Case Nos. 05-62622; 05-62704KR; and 05-664459KR ("Plaintiff's work is the basis of Defendant's business. Defendant obtains customers who are in need of delivery services and provides workers who conduct the service on behalf of Defendant. Without drivers, Defendant would not be able to operate its business.")

4. The skill required in the particular occupation

All of the drivers have a Class A Commercial driver's license and at least 18 months of prior experience as a commercial truckdriver. In order to get a CDL, the driver has to take and pass a written examination. Additionally, several of the drivers have taken and passed tests to acquire special endorsements which allow them to transport, among other items, tanks and hazardous materials. Federal and/or state regulations also mandate that the drivers take and pass a medical examination and drug test. The Respondent does not provide training to drivers. Prior to 2015, the Respondent administered a driving test before approving their applications. However, this did not constitute training, but rather was part of the process to determine whether an applicant met the qualifications to be a driver. In 2015, the Respondent stopped giving the test and instead increased the years of experience needed to haul goods for its clients. Although the Respondent conducts periodic safety training sessions, they are voluntary and there is no evidence that drivers are penalized if they do not attend.

Accordingly, I find that this factor weighs in favor of independent contractor status.

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

The drivers supply the most essential tool for the work, the tractor truck. The driver is responsible for choosing, purchasing or leasing, maintaining, repairing, insuring, and all the other responsibilities that come with owning the truck. Moreover, the drivers provide their own mobile phones, work clothes, safety vests, and any tools they may bring with them in the truck. The Respondent, however, supplies the chassis, the software applications used to transmit assignment details and notify dispatch when the delivery begins and ends, delivery slips (hand tickets), inspection reports, manifest, and operator's daily memo. There is no evidence that the drivers had regular (or any) access to the Respondent's computers, printers, scanners, fax machines, business cards, or email account. The evidence also established that the drivers were free to park their tractors wherever they wanted to park.

Accordingly, I find that this factor weighs in favor of independent contractor status.

6. Length of time drivers were employed

The ICOC provides that the duration of the agreement is for ninety (90) days from the signing of the contract. Additionally, if the driver is organized as a limited liability company (LLC), corporation or:

> other form of legal entity and in good corporate standing under Applicable Law, this Contract will renew without action by either party for three (3) additional ninety (90) day periods, unless either party givers notice of non-renewal to the other party for any reason at least thirty (30) days before the end of any such 90-day period.

(GC Exh. 52, p. 3.) Moreover, even if the contract has expired, the provisions will continue in effect for up to 3 months after expiration so long as the driver is still accepting trips from the Respondent and the contract "has not been superseded and replaced by a new agreement." Id. It renews automatically every 90 days for drivers who have organized themselves as a LLC, corporation or other legal business. Ten drivers testified at the hearing on the length of their relationship with the Respondent. Since at least 2010, Herrerra, Avalos, Lopez, Gaitan, Canales, Montenegro, and Solis drove for Pacer and then continued driving for the Respondent after it took ownership of the company. Ackling, Decoud, and Davis had shorter stints transporting goods for the Respondent, but nonetheless, each has driven for the Company for at least 2 years. Despite the contract, the facts in evidence establish that, in practice, the drivers expected and were retained for an indefinite period and not on a job-to-job basis.

Accordingly, I find that this factor weighs in favor of employee status.

7. Method of compensation

The record is clear that the drivers are not paid on an hourly or monthly basis or at the completion of each delivery. Rather, the drivers are compensated weekly. It is undisputed that the Respondent compensates the drivers based on the number of deliveries they complete; and occasionally, the Respondent, will pay the drivers above the normal rate for extra tasks requested by the clients. The drivers' compensation varies depending on many factors e.g., number of deliveries, miles driven, number of trucks leased or owned, number of second-seat drivers. The pay rates for deliveries, fuel surcharges, accessorial-related fees, hazardous material shipment premium, labor charges, chains/tie downs, wait times, and a host of other fees are determined by the Respondent. (GC Exh. 52, Schedule B.) Moreover, the Respondent negotiates with clients, without input from the drivers, over the rates it will charge the customers. It also decides unilaterally the formula to use for calculating the mileage rate paid to drivers. The terms of the contract allows the Respondent to unilaterally change the driver's fees after giving at least a fifteen (15) day notice. After receiving notice of the proposed fee changes the driver can consent to the change or if the driver refuses, the Respondent can terminate the contract. Consequently, I find these factors render meritless the Respondent's argument that because a small portion of drivers were able to negotiate a change in their compensation this favors independent contractor status for the drivers.

It is undisputed that the Respondent does not pay the drivers fringe benefits, e.g., paid holidays, paid sick days, health insurance, vacation days. The Respondent also does not deduct taxes from their paychecks. Regardless, there are more indicia favoring employee status in this instance. See *Time Auto Transport, Inc*., 338 NLRB 626 (2002) (the board looked beyond the tax treatment in making a determination on employee status because there was a wealth of other factors favoring such).

Accordingly, I find that this factor weighs in favor of employee status.

8. Whether the parties believe they are creating an employer-employee relationship

Both the General Counsel and the Charging Party argue that the proper consideration for determining employee status under this factor is "the putative employees' belief as to whether they are employees or independent contractors." (GC Br. 87; CP Br 41-42.) The Respondent counters that the drivers knew they were entering into an independent contractor relationship with the Respondent when they knowingly signed the ICOC, which is replete with references noting that by signing the agreement, the drivers were engaging in an independent contractor relationship with the company.

The Respondent believes that the ICOC agreement and other actions the Respondent has taken are clear indications to the drivers that they were entering into an independent-contractor relationship with the company. It is undisputed that the ICOC labels the drivers as independent contractor rather than employees. Moreover, the drivers signed the ICOC and the attached Schedule N acknowledging their independent contractor status and the responsibilities and rights therein. (GC Exh. 52, Schedule N.)[32] The Respondent also believes that the drivers are independent contractor based on its treatment of them, which includes, among other acts: the Respondent does not withhold taxes from the drivers' paychecks; drivers are able to incorporate, personalize their trucks, hire employees to operate their trucks, and decide their own schedules and how much to work; and drivers are not required to wear uniforms or other items identifying them as the Respondent's employees. The evidence established that the drivers file tax returns as independent businesses, and deduct business expenses on their taxes. Also, several drivers testified that they understood, agreed with, and desired their designation as independent contractors. The Respondent's witnesses Montenegro, Decoud, Ackling and Davis testified that they viewed themselves as independent contractors and for financial reasons preferred the independent contractor relationship with the Respondent. Solis did not testify to his beliefs on whether he believed he was an independent contractor or employee. However, he owns 2 trucks and employs 2 second seat drivers which heavily favors a finding that Solis more likely than not believed that he was an independent contractor.

The Board has held that independent contractor agreements are strong evidence that the parties believed they were entering into an independent contractor relationship. See, e.g., *Arizona Republic*, 349 NLRB 1040 (2007); *Standard Oil Co*., 230 NLRB 967 (1977). However, in *FedEx*[33] the Board found that independent-contractor agreements are not necessarily conclusive evidence of the intent of the parties when one of the parties has not been afforded the opportunity to negotiate the terms of their employee status in the agreement. *FedEx*, 361 NLRB

[32] Second-seat drivers do not sign the ICOC. However, they sign Schedule K of the ICOC which relates to privacy disclosures and consent form. Schedule K clearly designates the drivers and second-seat drivers as contractor and contractor driver. (GC Exh. 60, Schedule K.) Driver Blair Davis (Davis) testified at the hearing that he requires his second-seat drivers to sign a document acknowledging their independent contractor status. (R. Exh. 32; Tr. 1774-1775.) There is no evidence that other drivers who employ second-seat drivers use a similar form.

[33] 361 NLRB 610 (2014).

at 623. Consequently, a finding on whether the parties believe there is an independent contractor relationship is fact specific. Although the Respondent pointed to instances, in the case at hand, where drivers negotiated over some of the terms of the contract with modifications being made as a result, there is no evidence that drivers were able to negotiate a change in the agreement to their classification as independent contractors. On the contrary, the ICOC specifically states that if a "Reclassification Decision" is issued then either party may terminate the contract on one day's notice. Moreover, there was credible testimony that the Respondent informed the drivers in a series of meetings that if they did not sign the ICOC, which repeatedly labeled them as independent contractors, by the deadline they would be unable to drive for the Respondent. (Tr. 849–854, 1215–1216.) This is further supported by the Respondent's witness, Camacho, who testified that about 20 drivers, who had driven for the Respondent prior to the introduction of the ICOC, declined to sign it and subsequently stopped providing service for the Respondent. Further, there is absolutely no evidence that the drivers were told they could negotiate their independent contractor or independent business designation.

The General Counsel also argues that despite signing the ICOC, the drivers did not believe they were contractors because they did not understand its terms. According to the General Counsel a sizable portion of the drivers were not fluent in speaking or reading English but were provided the written agreement in English and were not given an adequate opportunity to review it. I do not find the General Counsel's argument persuasive on this point. The drivers were given the agreement in Spanish and English; and the employer's managers held a series of meetings with the drivers to explain to them, in Spanish, the terms of the agreement. Approximately 2 months before the March 31, 2016, deadline to sign the ICOC, the drivers were also given a copy to take home and review. Some drivers gave the agreements to their lawyers to review, others reviewed it with family or friends, and still other drivers admitted to signing the agreements without reviewing the terms.

In support of its argument that the drivers believe they are employees, the General Counsel produced evidence of a few drivers who have filed claims with the DLSE complaining that the Respondent has misclassified them as independent contractors. Citing *Menard Inc*., 18–CA–181821, 2017 WL 5564295 (NLRB Div. of Judges Nov. 17, 2017), the Respondent counters that "the General Counsel's burden [is] to show that *all* of the Drivers never believed they were creating an independent-contractor relationship." (R. Br. 77.) *Menards* holds no precedential value because the Board adopted the judge's decision in its entirety to which no exceptions had been filed.[34] Regardless, I do not find the Respondent's argument persuasive on this point. The facts in *Menards* differ in key respects from the case at hand. None of the witnesses in the *Menard* case, including the General Counsel's own witnesses, testified that they believed an employee-employer relationship had been created. However, in the current case all of the drivers who appeared on behalf of the General Counsel testified that they believed the Respondent's actions and the work they did for the Respondent created an employee-employer relationship. In *Menards*, "all of the contractors who testified were incorporated separately from

[34] *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel)*, 357 NLRB No. 140 fn. 1 (2011); *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 175 fn. 2 (2000); *Watsonville Register-Pajaronian*, 327 NLRB 957 959 fn. 4 (1999).

the Respondent." at 2. The judge also noted that Menards used hauling contractors with widely varied circumstances ranging from a single driver with a truck who drove exclusively for the employer to a "larger, established, hauling contractors with multiple trucks, employees, and clients." Id. Menards used one of three different contracts with haulers depending on their circumstances (e.g., single driver, large hauling companies with multiple trucks and employees). Only a small number of the drivers in the current case are incorporated and all of them sign the same standard contract with the Respondent. Restatement (Agency) Second cmt. 2 notes that the parties belief or disbelief that an employee-employer relationship exists is not determinative because that belief is simply "an assumption of control by the one and submission to control by the other." The important factor is "whether the community custom in thinking that a kind of service, such as household service, is rendered by servants . . ." Id. There was simply no evidence introduced by either party on this point.

Accordingly, I find this factor weighs in favor of employee status.

9. Whether the principal is or is not in the business

As previously discussed, I found that despite the additional drayage related services the Respondent performed, there was no substantive distinction between its core businesses and the function of the drivers.

Accordingly, I find that this factor weighs in favor of employee status.

10. Significant entrepreneurial opportunity for gain or loss

In *FedEx*, the Board stated that in evaluating independent-contractor status it would also analyze as a separate factor the "significance of a putative independent contractor's entrepreneurial opportunity for gain or loss" that is actual and not merely theoretical. *FedEx*, supra at 624. In deciding this factor, the Board considers "whether purported contractors have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work." at 3. Significant consideration in this factor is evidence of the drivers' ability to hire employees, work for other companies and develop a clientele separate and distinct from the Respondent's; ability to incorporate; and any other entrepreneurial options the drivers have to increase their opportunity for risk or profit.

Many of the factors considered in determining whether the employer or worker exercises control over their work also applies to entrepreneurial opportunity. The ICOC includes an alternative uses of vehicles provision allowing the driver to use the truck to haul for other carriers or companies; and gives drivers who possess one or more trucks the right to hire workers (second-seat driver) to drive for them. Drivers are also required to sign the attached Schedule T which sets forth in detail the requirements for a driver's alternative use of the truck. If the driver uses the truck to haul for other companies or hires second seat drivers, the provisions require the driver to, among other actions: (1) have the second seat driver(s) to submit an application and supporting documentation to the Respondent for approval; (2) use the driver's own DOT number and cover the Respondent's name and other identifying marks when working for other

companies; (3) under applicable circumstances, when using the truck for another company, obtain insurance separate and apart from that used while hauling for the Respondent or obtain proof of indemnity bond; and (4) indemnify the Respondent for any charges, liabilities or fees imposed on the Respondent as a result of misuse. (GC Exh. 52, Schedule T.)

Although the Respondent insists drivers were not told they could not work for other companies, all of the drivers at the administrative trial testified that they had not worked simultaneously for another company and the Respondent. Additionally, Dispatcher Armando Rodriguez (Rodriguez) acknowledged that all, except three of the drivers on the day shift, worked 10 hours a day 5 to 6 days a week, which would have precluded them from performing any significant amount of work for other companies without violating DOT limits on the number of hours a driver can drive. (Tr. 1680–1681.) Consequently, the facts are clear that the *actual* opportunity to work simultaneously for another company and the Respondent does not exist, unless one is able to hire a second seat driver. Further, the drivers' ability to hire second seat drivers is contingent upon the Respondent granting approval. While the Respondent insists that the drivers are solely in control of hiring second seat drivers, the facts prove otherwise. The ICOC, including Schedule T, mandate that the second seat driver's application be submitted to the Respondent for review and approval. The Respondent argues that it simply reviews the second-seat drivers' applications and documents to ensure that the state and federal requirements are met. However, the Respondent's own witness, Camacho, admitted that Canales was rejected as a second seat driver for reasons totally unrelated to federal mandates. Camacho acknowledged that Canales second seat driver application was rejected because the dispatchers felt Canales was difficult, rude, and demanding. Regardless of the legitimacy of the reasons for rejecting Canales' application, if the driver had true control over hiring the second seat driver, barring Canales' failure to meet state or federal requirements, the driver should have been the ultimate decisionmaker. See III(F)(1).

The evidence also established that the drivers did not solicit customers for the Respondent, had no control over rates charged the customers, and no meaningful interaction with them. Moreover, the drivers had no involvement in the formula created and used to calculate the rate schedule for drivers. I find that the drivers had no substantive ownership interest in the work other than their investment in the truck, which in many cases they did not even own. Even the small number of drivers who had second-seat drivers or more than one truck had no significant proprietary interest in the overall business.

Accordingly, I find that this factor weighs in favor of employee status.

The evidence shows there are some factors supporting independent contractor status: the Respondent did not provide drivers fringe benefits or withhold taxes from their paychecks; did not control the routes drivers chose to take for deliveries; did not control drivers' work schedules or rest breaks; did not dictate where drivers' parked their trucks; did not require drivers to wear company uniforms, use its business cards or provide them with company emails; the drivers did not work under the direct supervision of the Respondent or a specialist without supervision; and the Respondent did not supply the instrumentalities, tools and place of work to allow the drivers to perform their work. Nonetheless, there are more factors favoring employee status: the

Respondent solicits the clients and controls virtually all aspects of the Company's interaction with them; the Respondent determines the rate schedule and fees for the drivers; the Respondent controls the distribution of assignments to drivers; the drivers are not engaged in a distinct occupation of business, but rather work as part of the Respondent's regular business; the drivers are, in practice, retained for an indefinite period; the Respondent is in the same business as the drivers; and the drivers do not have a significant entrepreneurial opportunity for gain or loss.

Accordingly, I find that the drivers were employees protected by the Act during the relevant period. Compare *FedEx*, supra; *Time Auto Transportation* 338 NLRB 626 (2002), affd. 377 F.3d 496 (6th Cir. 2004); *Slay Transportation Co*., 331 NLRB 1292 (2000); and *Roadway Package System*, 326 NLRB 842 (1998), with *Diamond L Transportation*, 310 NLRB 630 (1993); *Precision Bulk Transport*, 270 NLRB 437 (1986); and *Don Bass Trucking*, 275 NLRB 1172 (1985).

III. Alleged Unfair Labor Practices

A. Respondent misclassification of workers as independent contractors

The General Counsel argues that the Respondent's misclassification of the drivers as independent contractors "in and of itself violates § 8(a)(1)." (GC Br. 97.) The bases for the General Counsel's argument are: (1) treating drivers as employees while classifying them as independent contractors serves no legitimate business purpose but rather denies them the rights accorded them as statutory employees and chills them in the exercise of those rights; and (2) misclassification "suppresses future § 7 activity by imparting to the drivers the message that they do not possess § 7 rights in the first place." Id. The Respondent counters that the allegation is a novel legal theory that has never been recognized by Board or "any court of law." (R. Br. 132.)

On December 18, 2015, the General Counsel issued an advice memorandum concluding that the Region should issue a complaint alleging that the employer's misclassification of its employees as independent contractors in itself violated Section 8(a)(1) of the Act. Pursuant to a case before him, on September 25, 2017, Administrative Law Judge Arthur Amchan (judge) issued a decision in *Velox Express, Inc*., 15–CA–184006 (NLRB Div. of Judges September 25, 2017) finding that the employer had violated Section 8(a)(1) of the Act when it misclassified its drivers as independent contractors instead of employees.

On December 1, 2017, the General Counsel issued Memorandum GC 18–02 rescinding, among other Advice memoranda, the memorandum arguing that an employer's misclassification of employees as independent contractors in and of itself violates Section 8(a)(1) of the Act. The General Counsel noted, however, that the Regions should continue to "submit to Advice any case where there is evidence that the employer actively used the misclassification of employees to interfere with Section 7 activity". (Memorandum GC 18–02, p. 5) Consequently, on December 4, 2012, the Coalition for a Democratic Workplace (CDW) and the Chamber of Commerce of the United States of America (the Chamber) submitted a motion requesting that the Board solicit briefs in *Velox Express*. On February 15, 2018, the Board issued a Notice of Invitation to File Briefs on the following question:

> Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?

On April 11, 2018, the Board granted to the parties and any interested *amici* an extension of time to file supplemental and responsive briefs. See www.nlrb.gov for the complete case history of *Velox Express* and the above-referenced memoranda.

Section 102.35 of the Board's Rules and Regulations, authorize administrative law judges to order the severance of proceedings prior to the issuance of their decision. Therefore, I will sever from the complaint and defer ruling on the allegation that since December 30, 2014, the Respondent has misclassified its employee-drivers as independent contractors. Since this is an issue of first impression that is currently pending before the Board, it would be a waste of judicial resources for me to rule on the matter. See *Quaker Tool & Die, Inc*., 169 NLRB 1148, 1148 (1968) (reversing the judge on the merits of severance, but not questioning the judge's authority); *Adair Standish Corp*., 283 NLRB 668, 669-671 (1987), enfd. mem. 875 F.2d 866 (6th Cir. 1989) (judge properly severed the case); *NLRB v. Chapa De Indian Health Program, Inc*., 361 F.3d 995, 1002 (9th Cir. 2003) (noting administrative law judge denied Respondent's motion to sever).

B. *Required Binding Arbitration Agreements Relinquishing Rights to Collective Action*

In *D.R. Horton*, 357 NLRB 2277 (2012), the Board held that an employer violates Section 8(a)(1) of the Act when it requires employees, as a condition of their employment, to sign an arbitration agreement that prohibits them from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Id. at 2277. The Charging Party in *D. R. Horton* was required, as a condition of employment, to sign an arbitration agreement that did not have an opt-out clause. In addition, the arbitration agreement contained a clause precluding Charging Party and other employees covered by the Act from filing joint, class, or collective claims in arbitral and judicial forums.

The General Counsel argues that the arbitration provisions contained in the ELA and ICOC are contrary to the holding in *D. R. Horton* and thus illegal because they "contravene the essential rights granted by § 7 of the Act." (GC Br. 106; GC Exh. 49, 52.) In support of its position, the General Counsel attempts to show that the present case does not pose a conflict between the Federal Arbitration Act (FAA) and the NLRA. Moreover, the General Counsel contends that prior Supreme Court decisions which addressed this issue are distinguishable from the instant case.[35] The Respondent counters that the arbitration agreement is lawful because: (1) it has an opt-out provision; (2) it is not mandatory; and (3) it does not apply to claims before the

[35] *CompuCredit v. Greenwood*, 132 S.Ct. 655 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *AT&T Mobility v. Concepcion*, 313 S.Ct. 1740 (2011).

NLRB. The Respondent also notes that some of the drivers exercised their option not to sign the ICOC arbitration agreement. (GC Exh. 60 at Schedule R.)

Subsequent to the deadline for filing posthearing briefs in this matter, on May 21, 2018, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) holding that arbitration agreements with clauses banning employees from bringing class or collective actions are enforceable against employees who have signed such agreement.[36] In light of the Supreme Court's decision in *Epic Systems*, upholding the enforceability of arbitration agreements with class-action waivers, I conclude that the complaint must be dismissed. See *Costa Mesa Cars, Inc*., 366 NLRB No. 154 (2018); *Muy Pizza Southeast*, LLC, 366 NLRB No. 158 (2018); *Rim Hospitality*, 366 NLRB No. 155 (2018).

Accordingly, I recommend dismissal of paragraph 13(a) of the complaint.

C. On June 18, 2015 Respondent Allegedly Prohibited Domingo Avalos from Working

The General Counsel alleges that on about June 18, 2015, the Respondent suspended Domingo Avalos (Avalos), thus prohibiting him from working in violation of the Act. According to the General Counsel, the evidence supports a finding that the Respondent's suspension of Avalos was unlawful because: (1) Avalos' union activities were well known to the Respondent; (2) the timing of Avalos' suspension is suspicious; and (3) the Respondent's reasons for suspending Avalos demonstrate that union animus was a motivating factor. The Respondent counters that its action was lawful because in order to comply with state and federal regulatory requirements, it was mandated to remove Avalos from service because he had an air brake restriction on his license.

(1) Facts

The Federal Motor Carrier Safety Administration (FMCSA), which is part of the Department of Transportation (DOT), has devised a system for rating a carrier's level of compliance with safety regulations. A carrier is assessed a Compliance Safety and Accountability (CSA) score. The CSA works as follows:

> [A] company's safety data appears online in FMCSA's Safety Measurement System (SMS). FMCSA updates the SMS once a month with data from roadside inspections, including driver and vehicle violations; crash reports from the last two years; and investigation results.

(R. Exh. 19.) The SMS considers several factors and then organizes the data into seven Behavior Analysis and Safety Improvement Categories (BASICs). Carriers are grouped according to their BASIC with other carriers that have a similar number of safety events and then ranked and assigned a percentile from 0 to 100. The higher the carrier's score the worse the performance. If

[36] The Court issued *Epic Systems* together with *Murphy Oil USA, Inc*., No. 16–307, and *Ernst & Young LLP v. Morris*, No. 16–300.

a carrier's CSA score exceeds a certain threshold, CSA will intervene and assess fines or, in the most severe cases, suspend a carrier's authority to operate. FMCSA has also created a CSA booklet which the Respondent gives to drivers at the start of their contract.

State and Federal regulations require that drivers submit to their carrier on a daily basis a vehicle inspection report. Additionally, all trucks associated with the Respondent must undergo a 90-day inspection program instituted by the California Highway Patrol (CHP).[37] The CHP provides a compliance check list to carriers whose California terminals are subject to inspection by CHP. If drivers for a motor carrier fail to adhere to Federal and State safety requirements, the motor carrier can be assessed a poor rating from different regulatory agencies, subject to a monetary fine, or, as noted earlier, suspended from operating.

Avalos began driving for the Respondent approximately 6 years ago when he contacted the Respondent's recruiter, Chevez, about driving opportunities. During that time, the Company was owned by Pacer. Chevez asked him to submit an application with his CDL and medical card. He was also sent for a drug and alcohol test which Pacer paid to have conducted; and Flores gave him a road test. After the preliminary matters were completed, Chevez told Avalos that a driver, Jose Alva (Alva), needed a second-seat driver and arranged for them to meet. Avalos and Alva came to an agreement; and Avalos drove for him for approximately 2 years until Alva abandoned his truck leases. Avalos contends that after Alva abandoned his trucks, he and Alva's other second-seat drivers had to wait about 3 to 4 weeks before the Respondent gave them "the opportunity to keep driving with a different driver, but we couldn't do that until XPO offered us a way to rent the trucks, us, directly." (Tr. 271.) Based on his complete testimony on this point, however, it is clear the Respondent did not preclude them from continuing to drive. Despite having the freedom to lease a truck from any number of private leasing companies and arranging their own financing, the drivers chose to wait around for 3 to 4 weeks until the Respondent made a suggestion to them on how they could lease a truck. (GC 34, 35, 36; Tr. 271–270) Moreover, despite being given the opportunity to review the lease agreements prior to signing them, Avalos admits he signed the documents without review. Avalos leased and drove his own truck until 2015, when he began to drive for another driver.

Avalos usually drives 6 days a week Monday through Saturday from 6 a.m. to 6 p.m. He calls the dispatchers daily for assignments; and usually receives from 4 to 8 moves a day. All of the information related to an assignment is sent to the SmoothCom application on his mobile phone. The information includes the customer's name and address, pickup location, starting and completion times for the delivery, and alternate routes he can take to avoid pay scales. Avalos acknowledges that he can reject a move but claims he only refused a load once.

In about 2014, Avalos became aware of the Union's campaign to organize drivers. Consequently, he began to attend union meetings, participate in union strikes, pass out union flyers to other drivers, encouraged coworkers to support the Union, attended a company

[37] The evidence is undisputed that although Federal regulations require only a yearly truck inspection, the State of California requires truck inspection every 90 days.

shareholder meeting to lobby on behalf of the Union, wore a safety vest with the union logo, and was interviewed by a local newspaper. (GC Exh. 40.)

Avalos testified that on June 18, 2015, he went to the dispatch window to ask for an assignment but was told that he was out of service.[38] According to Avalos, dispatch told him to speak with Safety Specialist Casillas for information on the reason for his out of service status.[39] Avalos testified that he went to Casillas' office whereupon Casillas pointed to the computer and informed him that he had been taken out of service because there was an air brake restriction on his license which precluded him from operating a truck with an air brake system. All of the trucks operating out of the Commerce terminal, including Avalos' truck, had air brakes. Avalos contends that he told Casillas there was not a restriction on his license; and it was valid until August 4 because he had received a letter from the California Department of Motor Vehicle (DMV) stating, "in order for me to get a new license in August the 4th, I needed to do the written test about the air brake system at the DMV." (Tr. 355, 470 - 471.) He admitted that in their meeting he did not have the letter from the DMV or any other documents to show Casillas that he had a valid license with no restrictions on it. Moreover, Avalos acknowledged that the Respondent would verbally notify him that his license was due for renewal about a month or two prior to the expiration date; and the Respondent also received a notice from DMV that his CDL would be suspended if he did not renew it and pass the air brake test. According to Avalos, Casillas dismissed his explanation and told him that the computer system indicated there was an air brake restriction on his license. Consequently, Avalos went to speak with Flores who also told him there was an air brake restriction on his license.[40] He explained to Flores about the letter he received from the DMV but Flores repeated that he was out of service so Avalos left.[41]

It is undisputed that on June 23, Avalos went to the DMV to get documentation to show that his license was valid until August 4 and did not have an air brake restriction. See GC Exh. 41. Avalos claims that he returned to the Commercial terminal and showed Flores the document purportedly showing that his license was valid. Id. Avalos testified that he then accused Flores of placing him out of service as "a reprisal for having went to Connecticut to speak to their superiors of expo—of XPO." (Tr. 358.) Moreover, he attested that Flores denied that he was being retaliated against for attending the meeting in Connecticut and insisted that Avalos could

[38] During this period, Avalos was a second seat driver for Marco Ruiz (Ruiz). "Out of service" refers to a driver who has been temporarily suspended from driving for any number of covered reasons.

[39] Casillas is no longer employed with the Respondent. At the time of the hearing, he was a safety specialist with Total Transportation.

[40] Avalos gave undisputed testimony that his conversation with Casillas occurred in his office at about 7:00 a.m.

[41] Unlike Avalos, Flores does not recall if Avalos approached him about the issue. He also does not recall Avalos explaining to him that the restriction was a mistake. Consequently, I credit Avalos' testimony that he met with Flores who refused to accept his explanation that the DMV letter stated his CDL was valid until August 4; and Flores reiterated Avalos was out of service.

not drive until he produced his renewed license. It is undisputed that on July 1, Avalos produced a renewed license without restrictions and was immediately placed back in service.

In May 2011, Casillas began working for the Company as a safety specialist at the Commerce terminal. Camacho, Flores, and Martin Del Campo each served as his immediate supervisor at some point during his tenure with the Respondent. Part of Casillas' job duties involved ensuring that the Respondent is in compliance with federal, state, and local laws and regulations. He also monitored whether truck inspections and the drivers' CDLs and medical cards are current. Casillas was the official responsible for reviewing the pull notices, which were sent directly to him from the DMV.[42] He would review, sign, date, and file the notices. Whenever there were discrepancies in a driver's driving record that Casillas did not understand, he would review them with Flores. Together, Flores and Casillas also conducted annual reviews of the drivers' driving records. In his position as a safety specialist, Casillas did not have supervisory authority over employees.

In order to remain in compliance with State and Federal regulations, a motor carrier has to remove a driver from service when notified that the driver has a restriction on his/her license. The driver is returned to service when the restriction is corrected. According to Casillas, on June 18, 2015, Avalos approached him with a copy of his temporary CDL.[43] Casillas attested that he noticed that there was a restriction on Avalos' temporary CDL so he told Avalos he had to get it lifted before he could continue to drive. The restriction was a DMV code 48, indicating that Avalos could not drive a truck with air brakes. Casillas testified that Avalos responded "ok" and walked away. He insists that Avalos never disputed that there was a restriction on his CDL. Casillas testified that the next day he asked Avalos for a copy of his temporary CDL because he forgot to get it the previous day. He said Avalos told him he would bring him a copy. On June 18, 2015, Casillas went into the Pegasus computer system and entered information showing that Avalos had been placed out of service because of an air brake restriction. He then sent an email to Camacho, Flores, and dispatch notifying them of Avalos' out of service status. On June 19, 2015, Casillas told Flores that he "still needed to get a copy of [Avalos'] temporary license." (Tr. 1414.) Flores told him to continue asking Avalos for a copy of the temporary CDL. According to Casillas he asked Avalos about three times for a copy of his temporary CDL but he never produced it. Casillas acknowledges that he was aware of Avalos' involvement in the Union.

In 2004, Flores was hired as a driver recruiter by Pacer and continued in that role for about 3 years until he was promoted to the regional safety manager position. After the Company

[42] The California DMV administers the employee pull notice (EPN) program. Carriers are required to register their drivers in the EPN program which keeps track of the drivers' safety/driving record. If a driver has no safety violations in a 12 month period, the motor carrier will only get an annual update on the driver's safety record. However, the DMV, under its EPN program, will send the motor carrier notice (pull notice) if there is a change in a driver's driving record in a 12-month period.

[43] Sometimes drivers would provide Casillas with a temporary CDL when, for example, drivers went to the DMV to renew their CDL and would be given a temporary paper copy of the CDL by the DMV until their permanent license arrived.

was purchased by the Respondent in 2014, he continued to serve as the regional safety manager where he oversees multiple terminals (Commerce, Lathrop, Oakland, Portland, and Seattle). At some point he also oversaw the operations at the terminals in San Diego, Calexico, and Harbor Rail. In his current position, Flores' duties are to ensure that the company and the drivers comply with Federal, State and local regulations.

It is undisputed that Casillas notified Flores through email and in person that Avalos was being placed out of service because he presented Casillas with a temporary CDL with a restriction. Flores told Casillas to have Avalos return with a valid license; and he corroborated Casillas' testimony that Flores told Casillas to get a copy of Avalos' temporary driver's license with the restriction. There is no evidence that the Respondent ever obtained a copy the temporary CDL at issue. Flores denied that the Union was mentioned during his conversation with Casillas about Avalos' CDL restriction; and noted that there have been other instances when drivers were placed out of service because of restrictions on their CDL. *See* Tr. 1319 – 1323; R. Exhs. 21, 22.

(2) Analysis

The Board applies the *Wright Line*[44] analysis to cases that involve disputes about an employer's motivation for taking an adverse employment action against employees. The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take an adverse employment action against an employee was the employee's union or other protected activity. Under the *Wright Line* framework, the elements required for the General Counsel to show that protected activity was a motivating factor in an employer's adverse action are: (1) union or protected activity; (2) an employer's knowledge of that activity; and (3) discriminatory animus on the part of the employer. *Adams & Associates, Inc*., 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enf. 801 F.3d 767 (7th Cir. 2015). The General Counsel can establish proof of an employer's motive using either direct or circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004); *Ronin Shipbuilding*, 330 NLRB 464 (2000). Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence that the action would have occurred even absent the protected concerted activity. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996). The General Counsel may offer proof that the employer's articulated reason is false or pretextual. Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line*, id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

[44] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

Applying the *Wright Line* analysis to the facts of this case, I find that the General Counsel has failed to establish a prima facie case. It is undisputed that Avalos engaged in protected activity when he attended union meetings, wore a safety vest with the union logo, participated in strikes, spoke with reporters about the union campaign, and traveled with union supporters to meet with Respondent's corporate executives. It is also undisputed that the Respondent was aware of his union activity. Camacho observed Avalos handing out union flyers to drivers. Casillas admitted he was aware of Avalos' union activity. Moreover, Avalos wore his safety vest with the union logo to the Commercial terminal where he went to on an almost daily basis because that is where he parked his truck. Although the General Counsel has established the first and second element of its prima facie case, I find that there is no direct or circumstantial evidence proving that the Respondent harbored animus against Avalos because of his protected conduct.

The General Counsel argues that four factors support a finding that discriminatory animus can be inferred: (1) it does not make sense that Avalos would have had a temporary license and presented it to Casillas when his license was not due to for renewal for almost another 2 months; (2) even assuming Avalos renewed his license prior to June 18, 2015, the Respondent failed to explain why Avalos had an airbrake restriction placed on his license; (3) the Respondent had no documentary evidence to support its claim, i.e., proof of the temporary CDL showing the air brake restriction; and (4) "why Avalos would have submitted his restricted license to Casillas at all." (GC Br. 136.)

I do not find the General Counsel's arguments persuasive. First, the reason the DMV placed an air brake restriction on Avalos' license is irrelevant to the question of whether the Respondent took action against him because of his protected concerted activity. I found credible Casillas' testimony on why the Respondent did not have a copy of Avalos' temporary CDL noting the air brake restriction; and I find more credible his version of the discussion he had with Avalos on June 18, 2015. It was the DMV's independent action of placing a restriction on Avalos's CDL that required the Respondent to place him out of service until Avalos renewed his license and got the restriction removed. See 49 CFR Section 383.37. Moreover, Avalos admitted that he received a letter from the DMV informing him that his license was going to be suspended but claims he cannot recall if it was ultimately suspended. He also admitted that the DMV sent the Respondent a notice that Avalos' license would be suspended. Avalos acknowledged that the Respondent would notify him a month or two before his license expired that it would have to be renewed. More importantly, Avalos admitted that he received a letter from the DMV informing him that "in order for [him] to renew [his] license, [he] needed to do a written test about the air system." The evidence is undisputed that Avalos was placed back in service as soon as he provided proof that his license had been renewed with no restrictions.

Accordingly, I recommend dismissal of paragraph 17(b) of the complaint.

D. Surveillance and Interrogation of Drivers on April 22, 27, May 5, and September 30

The General Counsel alleges that (1) on or about April 22, 2015, the Respondent, through Flores, interrogated an employee about the employee's union activity and those of other employees; and implicitly threatened an employee with job loss and/or unspecified reprisal if the Commerce facility was unionized; (2) on or about April 27 and September 30, 2015, the Respondent, through Chevez and Camacho, engaged in surveillance or created the impression of surveillance of employees engaged in union activities; and (3) on or about May 5, 2015, the Respondent, through Flores, interrogated an employee about the employee's union activities and those of other employees and solicited complaints, made promises and threats all in relation to union activities and support. The Respondent counters that Avalos' version of conversation with Flores on April 22, 2015, did not occur; and Flores never solicited complaints or made promises in an effort to restrict employees' right to engage in union activity or threatened or unlawfully interrogated any of the drivers. The Respondent also denies that Chevez and Camacho ever engaged in unlawful surveillance or created the impression of unlawful surveillance.

(1) Facts

(a) April 22, 2015 alleged conversation between Avalos and Flores

The General Counsel alleges that on April 22, 2015, Flores asked Avalos a series of questions to try and gauge his level of union involvement and those of other drivers.[45] According to Avalos, Flores asked him into his office and began the conversation by telling him that Flores' manager told him to ask Avalos, "what our purpose was, what we were doing about the Union." (Tr. 331.) Avalos testified that he told Flores, "my pleasure, whatever you'd like to know." He also claimed that Flores "asked me why were we doing this movement about speaking to my coworkers about the Union for what is it that we were talking about or asking for." Id. Avalos said that he responded with a litany of problems relating to compensation, dispatching, and, most importantly, their desire to be reclassified as employees. Moreover, Avalos contended that Flores took notes and recorded Avalos' responses in a notebook. Avalos also attested that Flores told him that he would forward Avalos' concerns to his superiors; but cautioned him that if the drivers continued to agitate for unionization, the company would end up bankrupt or leave the market like Green Fleet.[46] Last, Avalos testified that Flores warned him against organizing his coworkers; and gave as an example Flores' own attempts to organize workers at his last place of employment which ended with Flores' coworkers turning against him and his termination. At some point during the meeting, Avalos stated that Flores told him that Pacer was about to be sold to XPO.

[45] Avalos testified that the conversation occurred in early March 2015. However, the complaint alleges that the cause of action occurred on April 22, 2015.

[46] Green Fleet is a drayage company which purportedly was preparing to file for bankruptcy. The Company was also the subject of a complaint filed with the NLRB. *Green Fleet*, 2015 WL 1619964.

Flores denied most of Avalos' testimony. He insisted that he had never been involved in a union organizing campaign; and denied working for Green Fleet or having any knowledge about whether it filed for bankruptcy. Likewise, Flores denied threatening Avalos or anyone else regarding the union; and contends that he did not tell Avalos the Respondent would go bankrupt if the drivers voted the union in as their bargaining representative. He also disputed the accusation that he told Avalos or any other driver that they could not talk about the Union or wear union insignia items. Despite the allegations, Flores insisted that he had established a good rapport with most, if not all, of the drivers, noting that a few times he has even played soccer with them after work.

This is a classic case of "he said, she said" without a persuasive argument from either party as to why I should believe one witness' testimony over the other. Overall, however, I find that Flores was a more credible witness than Avalos. Throughout the trial I found that Avalos lacked credibility. Especially on cross-examination, I found that the majority of his testimony was evasive and calculated to be misleading. He gave intentionally deceptive and often confusing testimony. An example is Avalos testified on direct examination that at the start of his lease, Chevez, Flores, and Banuelos told him that he could not drive for another company using his leased truck. He also testified that when the work was slow the drivers would ask if they could drive for another company, but the Respondent would deny the request. However, on cross-examination counsel for the Respondent pointed to his affidavit to the Board where Avalos stated, "If I wanted to work for another employer, I think that it would be fine, but it never happened." Even on the most minor of points, Avalos gave testimony that strained credulity. For example, he testified that when he drove for Alba, he was given a fuel card which provided a discount on fuel. Nonetheless, a mere few seconds later, he denied the card provided a discount on fuel then claimed he did not recall what he meant when he said it did provide a discount. Avalos finally settled on denying that the fuel card allowed him to buy gas cheaper even though all the other witnesses who were asked that question agreed that the fuel card provided a discount on gas. Likewise, he testified on direct examination that after Alba defaulted on his truck leases, the Respondent refused to allow him or Alba's other second seat drivers to work for other drivers. He insisted that they had to wait until the Respondent offered them an opportunity to lease trucks that they could afford. However, on cross examination, Avalos grudgingly admitted, after being confronted with objective documentation, that he began leasing a truck directly from Pacer within 5 days of Alva defaulting on his truck leases. It is also notable that on direct examination Avalos could clearly remember almost every detail of events that had occurred 2 or more years prior. Inexplicably, Avalos could recall almost nothing about those same events when questioned on cross-examination. Moreover, I find little to nothing in the record to indicate that Avalos' testimony is likely to be more credible than Flores' testimony; and therefore, I credit Flores' denial that he made the statements attributed to him by Avalos.

(b) April 27, 2015 allegation of surveillance

The union drive at the Commerce facility started in about 2014. Since that time, Santos Castaneda (Castaneda), union organizer for the International Brotherhood of Teamsters, has been at the Commerce facility a minimum of once a week; and during strikes he is at the facility daily. His hours at the facility were normally from 6 a.m. to 4:30 p.m. Castaneda acknowledges that

Camacho has spoken to him about not entering company property. Since the union organizing effort, there have been about five strikes and more than 10 handbilling actions at the Commerce facility. The strikes have lasted from 2 to 5 days.

On April 27, 2015, the drivers began a strike that lasted 4 or 5 days. Approximately, 20 to 30 drivers picketed outside the Commerce terminal. On the day at issue, Camacho was in his office when he looked out the window and noticed that trucks and tractor trailers were backed up in both directions on Sheila Street trying to enter the Commerce yard. The traffic jam was caused by the picketers, at various intervals, blocking the entrance into the yard. Castanedas, was in the middle of Sheila Street trying to direct the traffic. Camacho had spoken with Castanedas on several occasions about "safety concerns, also about being inside the property." Consequently, Camacho decided to call the sheriff's department because he was concerned about the safety implications.[47] While he was waiting for the sheriff's deputies to arrive, Camacho went outside and documented the scene by snapping a few pictures.[48] It was important to him to take pictures of the activity taking place in case a driver for the Respondent got into an accident; and he would have documentation to show his driver was not liable. Camacho emailed some of the pictures he shot to management and in one of those emails he noted that Avalos was "actively involved with the Teamsters." Chevez and Flores also came out into the yard to look at the picketers but there is no evidence that they were taking pictures of or recording the picketers. The sheriff's deputies eventually arrived. Camacho acknowledge that among the picketers he recognized Avalos, Canales, and Gaitan.

(c) *May 5, 2015 allegation of threats*

On May 5, 2015, Canales and Flores met in Flores' office. The facts about the content of their conversation are in dispute. Canales testified that Flores asked him to come into his office and then posed to him a series of questions. He claimed Flores asked him: what he disliked about the Company; why the drivers wanted to unionize; how many drivers were part of the unionizing campaign and their names; if Canales was willing to arranged for other drivers to talk to Flores about the union effort and if they would express the same sentiment as Canales; and the changes Canales would like the Company to implement. Canales testified that he told Flores: the names of a few of the drivers which included "Jose"; replied that he could probably bring another driver to speak with Flores; said he would change the Company so that it is "honest" and did not rob "people of their salary"; and hire dispatchers that were not "corrupt." According to Canales, Flores then told him that Green Fleet had changed its pay structure to hourly; and their drivers were unhappy with the change. Canales also claims that Flores asked him how many days he had not worked. Canales responded that there was a 2-week period when he had not worked; and Flores allegedly replied:

[47] Likewise, Avalos testified that the police were called on many occasions because the picketers sometimes blocked the trucks from exiting the Commerce parking lot.

[48] Avalos testified he saw Camacho with a mobile phone in his hands pointed at the strikers; and it appeared to him that Camacho was taking pictures of and/or recording the picketers. According to Avalos, Camacho pointed his phone at them for 3 to 10 minutes. Camacho tried to locate the pictures that he took with his phone but was unable to find them.

> If I can do something for you. He said, "I'm going to send an email to see if they can take away the payments for the truck and for the insurance, for the time that you were out without working."

(Tr. 847.) Jose allegedly entered the office at that point and "said was the same as what [Canales] had said." Id. Canales acknowledges that up to that point he and Flores had maintained a friendly relationship.

Flores denied interrogating Canales, threatening him with less desirable work if the Union came into the facility, soliciting complaints and grievances, or promising Flores benefits as an inducement not to support the union. Although he admitted that he did not recall the conversation in detail, Flores testified that he recalled Canales mentioning the Union in the context of complaining that he had no benefits such as a retirement plan or health insurance. Flores surmised that he "probably" responded that there were other companies who offered those benefits; and it was Canales' choice to move on. Again Flores claims that although he does not recall making the statements, he admitted there is a possibility he asked Canales what could the Company do better to improve the working conditions; and the Respondent would never move to an hourly pay system. Flores also admitted there were times he would talk with Canales about the Union but insisted that the majority of their conversations were about their families. Nonetheless, Flores denied promising Canales certain benefits or telling Canales that he could have some of his truck payments or insurance canceled. Flores testified that he did not have the authority to take those actions; and there is no evidence to dispute his testimony on this point. Last, Flores disputed the assertion that he threatened someone with less desirable work because of their union affiliation.

Overall I credit Canales' version of the May 5, 2015 conversation he had with Flores. Flores admitted that he only vaguely recalled the conversation and offered mostly general denials. Although he did not specifically recall his response, Flores admitted that he might have asked Canales, "what things the company could do better to improve the condition of everybody there." (Tr. 1329–1331.) He also admitted that it was "possible" he might have told Canales the Respondent would never move to an hourly pay system. Flores relied primarily on closed questions and answers to refute Canales' version of their conversation. Canales' testimony, however, was detailed in terms of the date, location, and approximate time of the conversation. Also, his description of the content of the discussion is believable when viewed in context. The discussion occurred within days of the drivers' April 27, 2015 strike in front of the Commerce facility. There was no other reason given by Flores for wanting to speak with Canales in his private office other than to talk with Canales about his union sympathies and the union campaign. Unlike Canales, Flores could only vaguely recall the conversation. Last, Flores' interrogation of Canales on his desire for and support of the union soon after the April 22, 2015, strike has the ring of truth about it. Consequently, I credit Canales's testimony about his discussion with Flores on May 5, 2015.

(*d)) September 30, 2015 allegation of surveillance by management*

On September 30, 2015, Avalos and Castaneda were handbilling on the public sidewalk in front of the Commerce terminal. Handbilling involved handing informational flyers about the union to the Respondent's drivers as they entered and exited the Commerce yard. They began handbilling about 5:00 p.m. and stayed for about two hours. At some point during the handbilling, a driver told Camacho that Castaneda was jumping onto the trucks before they had come to a complete stop. Consequently, Camacho went outside and observed what he perceived to be Castaneda on the Respondent's property. He stood approximately 100 yards from Castaneda and Avalos, and next to guard shack which is located inside the entrance of the Commerce yard. Camacho felt that Castaneda jumping on trucks before they stopped was a safety concern. He had cautioned Castaneda in the past against it; and spoken with both Castaneda and Avalos about trespassing on company property to conduct handbilling. Consequently, Camacho took a picture of Castaneda and Avalos to document his observation. Avalos and Castaneda saw Camacho outside observing them. Castaneda saw Camacho pointing his mobile phone at him and Avalos for a few seconds.[49] He acknowledges, however, that he does not know if Camacho was actually taking pictures or recording him and Avalos. Camacho admits that he was outside for approximately 10 minutes but contends he only took pictures for about 30 seconds. Regardless, it is undisputed that Camacho was outside observing Avalos and Castaneda for about 10 minutes and briefly took pictures of some of their actions. It is also undisputed that a driver exiting the yard refused to take a flyer from Castaneda or Avalos because he saw Camacho watching them and was fearful of reprisal.

(2) Analysis

The Board has adopted the test established in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) to determine if management directly interrogating employees during union organizing campaigns violates Section 8(a)(1) of the Act. *Field Family Associates, LP d/b/a Holiday Inn-JFK Airport,* 348 NLRB 16 (2006); *Smithfield Foods*, supra. Under the Bourne test, the factors to consider are: the background; the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In applying these factors, the Board assesses whether, based on the facts of the specific case, the questioning at issue would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Temecula Mechanical, Inc.*, 358 NLRB No. 137 (2012).

I credited Flores' denial that he made the statements attributed to him by Avalos in their conversation on April 22, 2015. Since this allegation turns almost entirely on credibility, and the General Counsel has the burden of proving credibility, I find that the General Counsel has failed to prove the allegations in paragraph 9(a) and (b) of the complaint. See *Central National*

[49] Avalos testified that Camacho was taking pictures or recording them with his mobile phone for 10 to 15 minutes. I credit Castaneda's testimony that Camacho was pointing his mobile phone at them and it appeared that for a few seconds Camacho was recording them and/or taking their picture.

Gottesman, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

I found, however, that the evidence supported Canales' version of his conversation with Flores on May 5, 2015, discussion. Based on the factors set forth in the Bourne test, I find that on May 5, 2015, the Respondent, through Flores, unlawfully interrogated Canales, solicited employee complaints and grievances, and promised increased benefits and improved working conditions. I credited Canales' testimony that Flores asked him a series of questions that were directed at determining Canales' and other driver's level of union involvement and support. Moreover, Flores encouraged and admitted that he asked Canales to specify his grievances against the company and ways the company could improve the drivers' working conditions. This was said in the context of Flores' overall attempts to gauge Canales' and other drivers' level of union involvement. It is within this same context that when Canales complained about the number of deductions from his paycheck, Flores promised that he would try to alleviate some of Canales' financial burdens. Simply because Flores may not have possessed the authority to keep the promise, it does not negate the fact that he knowingly made the promise in an attempt to influence Canales' (or other drivers') level of union support.

I find, however, that there is no evidence Flores threatened Canales or any other driver with less desirable work because of their union support and activity or if the union was voted into the Commerce facility. The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara New-Press*, 357 NLRB 452, 476 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010). I find that the General Counsel has failed to present persuasive evidence to establish that the conversation between Flores and Canales contained an unlawful threat of less desirable work as a consequence of Canales' or other drivers' his support of the Union. The record is simply devoid of evidence to support this charge.

Accordingly, I recommend dismissal of paragraphs 9(a) and (b) and 11(c) of the complaint. However, I find that the Respondent has violated paragraphs 11(a) and (b) of the complaint.

The Board and federal case law have long held that surveillance of employees by an employer, even if the employees are unaware of it, violates the Act. *NLRB v. Grower-Shipper Vegetable Assn.*, 122 F.2d 368 (9th Cir. 1941); *Ivy Steel & Wire, Inc*., 346 NLRB 404 (2006). Nonetheless, an employer may observe employees engaging in Section 7 activities in an open and public manner on or near its property. This observation is legal if done in a manner that is not out of the ordinary and absent coercive behavior. *Smithfield Foods, Inc*., 347 NLRB 1225

(2006) (employer did not engage in illegal surveillance when, because of a reasonable concern about employee trespassing on employer property, it moved a security camera to an area where employee handbilling and trespassing had taken place); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007) (the Board found unlawful surveillance where supervisor admitted to working outside her normal schedule because she believed union activity may be occurring); *Eddylean Chocolate Co*., 301 NLRB 887, 888 (1991) (noting "[t]he Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not do something out of the ordinary"). Evidence of coerciveness includes, the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005), petition for review denied 515 F.3d 942 (9th Cir. 2008). The Board has held, however, that random or isolated observations of Section 7 activities, such as handbilling, do not violate the Act. Id.

It has been established that since 2014, union organizers have conducted at least 10 handbilling actions and 4 or 5 strikes on the public road (Sheila Street) in front of the Commerce facility. It is also proven that during the April 27, 2015 strike, the drivers were picketing on the sidewalk of a busy public street. Camacho, Flores and Chevez came outside and observed the picketing from inside the Respondent's property line; and Camacho took a few pictures of the strikers. Camacho forwarded as an email attachment a couple of pictures he took to management with a note that Avalos was actively involved in the Union. Also, on September 30, 2015, Camacho came out for a short period (about 10 minutes) and took pictures of Avalos and Castaneda handbilling because Camacho was concerned about Castaneda jumping on trucks before they completely stopped.

Applying the standards set out in the above cited cases, I find that the General Counsel has not met his burden of proof. The evidence established Camacho went outside to observe the handbilling only because he had received a complaint from a driver that Castaneda was jumping onto trucks before they had completely stopped. Notably, Castaneda did not deny that he had been jumping onto the trucks before they came to a complete stop. It has also been established that Camacho only observed the handbilling for a short period (about 10 minutes) and took a small number of pictures for a few seconds. Despite Avalos' suspicion, there is no evidence that Camacho videotaped the handbilling. Also, based on his vantage point, the evidence shows that Camacho had a reasonable basis for believing that Castaneda was violating the Respondent's prohibition against the union handbilling or picketing on union property. Moreover, there was no evidence showing that it was unusual for Camacho to stand or be in the Commerce yard near the office building or guard shack.

During the April 2015 strike, I find the evidence shows that Camacho had legitimate concerns about safety issues because of the traffic jam caused by the picketers which justified his pictorial documentation of the strikers. Castaneda did not dispute that there was a traffic jam caused by the picketers; and that he was in the middle of the street trying to direct the trucks and public traffic. The picketing occurred on a busy public street, and in front of the Respondent's property. Based on the facts, it was also reasonable that Camacho was concerned about Castaneda trespassing on company property since he had warned Castaneda several times in the

past about his actions; and sheriff's deputies had also spoken with him in the past about proper conduct around the Commerce facility. See, e.g., *Saia Motor Freight Lines, Inc*., 333 NLRB 784 (2001) (employer justified in photographing striking employees after complaining to police without success, employees actually impeded traffic, and employer did not begin photographing until the impeding of traffic began); *Washington Fruit and Produce Co*., 343 NLRB 1215, 1217 (2004) (finding no violation where the employer videotaped a strike because of reasonable concerns of possible trespassing and safety issues even though no disruption had yet occurred)

Accordingly, I recommend dismissal of paragraphs 10 and 12 of the complaint.

E. February 26, 2015, Respondent Allegedly Refused to Assign Work to Employee and Told Employee the Reason was Because he Wore Union Items

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act when on February 26, 2015, the Respondent told Canales that he was not receiving assignments because he was wearing a safety vest with a union logo. Moreover, the General Counsel charges that the Respondent violated Section 8(a)(3) of the Act when on February 26, 2015, the Respondent refused to assign work to Canales because of his union activity. The Respondent denies the charges. According to the Respondent, Canales version of his conversation is not credible because Canales' witness, Montenegro, failed to corroborate his version of Banuelos' statements to Canales; and the record shows Canales was given work on February 26, 2015.

(1) Facts

On February 26, 2015, Canales, after waiting for about 2 hours in the dispatch area for an assignment, got angry and started to leave. As he was walking from the Commerce terminal building, he saw Banuelos walking from his car in the parking lot. As they were approaching one another, Banuelos asked Canales how he was doing. Canales, who was wearing the union safety vest that he wore to the Commerce terminal daily, groused to Banuelos that ever since he went on strike he felt that he had been getting fewer and worse assignments. He also told him that he was angry about having to wait around for hours that day and not receiving an assignment. Banueolos told him that he would check into the situation and walked to the dispatch area. Shortly thereafter, Banuelos, while laughing, called Canales to the dispatch window and told him he was not getting work because he was wearing a union safety vest. Canales testified that a driver, Mario Montenegro (Montenegro), and dispatcher Felipe [last name unknown], were present during the exchange between himself and Banuelos. According to Canales, Montenegro told him that Banueolos was "just kidding" about Canales not receiving work because he was wearing a union branded safety vest. He claimed that he responded to Montenegro that his job was not a game and he was going to make public Banuelos' remark to him. Montenegro, however, did not support Canales testimony that Montenegro heard Banuelos tell Canales that Canales was not receiving work because of his support for the union. Montenegro also testified that he did not hear Banuelos say anything to Canales about not associating with the union. According to Montenegro, as he was walking past Canales, Canales said "…you are a witness. And I ask him witness for what. And he said you just say yes. And I just walked down." (Tr. 1469–1472.) Montenegro was confused by Canales comments.

(2) Analysis

Despite the Respondent's failure to call Banuelos as a witness to refute Canales' testimony, I do not credit Canales' testimony accusing Banuelos of telling him he would not get work until he removed his union vest. First, the witness that Canales alleged would corroborate his testimony credibly denied hearing an exchange between Canales and Banuelos about Canales not being given work until he removed his union safety vest. However, Montenegro had heard Canales on several occasions calling dispatchers corrupt. Second, I do not find credible that after allowing Canales to wear his union safety vest without retaliation on an almost daily basis since at least 2014, the Respondent would now decide to take action against him. Canales admitted that he wore his union safety vest whenever he went to the Commerce terminal, which was almost daily. Moreover, Montenegro also noted that Canales wore a union vest to work all the time. Despite Canales' accusation to the contrary, there is no objective evidence that since he began wearing the union safety vest or after his participation in the strike that Canales was given fewer or worse assignments. Third, the General Counsel, just as it pointed out about the Respondent and Banuelos, could have produced Dispatcher Felipe to corroborate Canales' testimony on this point.

This brings me to the question of whether Canales was denied work on February 26, 2015, because he of his union activity. The evidence establishes that Canales engaged in protected union activity; and the Respondent was aware of that activity. However, I find there is no credible evidence to show that Canales was denied work on February 26, 2015, because the Respondent harbored anti-union animus against him. Although the complaint specifically alleges that Canales was not given work on February 26, 2015, Canales' clarified on direct examination that he was upset because he had been given only one dispatch that day. The General Counsel notes that he picked up a container "with which he made three stops, and returned the container to the same location. (R. Exh. 8). His logs show he returned to the facility at 12:30 p.m. and did not work thereafter." (GC Br. 126–127.) The General Counsel's evidence in support of the allegation is Banuelos' alleged statement referencing Canales' union vest and records showing he only received one move on the day at issue. This falls far short of proving retaliatory motivation on the part of the Respondent. First, Canales own testimony supports a finding that even assuming Banuelos' made the statement attributed to him, it was likely made in jest. Canales noted Banuelos was laughing when he made the statement, and Montenegro (although he denied hearing the discussion between Canales and Banuelos) told him Banuelos was joking. Further, Canales acknowledged that he left immediately after Banuelos allegedly made the statement, therefore, eliminating the opportunity to get work. Moreover, the General Counsel failed to provide evidence that there were deliveries available to assign to Canales that afternoon which he would have wanted to accept. There was undisputed testimony that drivers are not guaranteed a certain amount of work and occasionally there is a lower volume of available deliveries resulting in fewer assignments for drivers. (GC Exh. 52, p. 13; Tr. 191–192)

Last, I do not find that Canales overall is a credible witness; and found him hostile when questioned by counsel for the Respondent. Often he responded to questions on cross-

examination with evasive, contradictory, and confusing answers. As an example, when probed on cross examination about his eligibility for bonuses and ability to set his own schedule, Canales gave several nonsensical responses denying he could get bonuses or set his own work schedule until finally admitting to both. (Tr. 952–956.) He also provided convoluted answers in an attempt to deny what he previously admitted to in his affidavit to the NLRB or would provide an answer unrelated to the question asked by the Respondent's counsel. Frequently, Canales provided what I perceived as deliberate nonresponsive answers to questions posed by the counsel for the Respondent. On direct examination, he tailored many of his answers to conform to the responses he felt would best help the General Counsel's attorney, rather than to illuminate the truth. Based on the evasive, confusing, and contradictory responses Canales gave on cross-examination, his overall demeanor, and the totality of the evidence, I find he was not a credible witness. Consequently, I credit Montenegro's testimony; and I find that the record supports a finding that Banuelos did not make the statements attributed to him by Canales.

Accordingly, I recommend dismissal of paragraphs 6 and 16(a) of the complaint.

F. March 6, 2015, Respondent Prohibited Employee from Wearing Union Items

The General Counsel alleges that on or about March 6, 2015, the Respondent, through Chevez, prohibited employees from wearing Union insignia at work while permitting employees to wear other insignia in violation of the Act. Specifically, the General Counsel argues that the evidence is undisputed that Chevez told Avalos that "once he crossed the entrance into the Facility, it was illegal to wear his Union vest." (GC Br. 111.) According to the General Counsel, the Respondent failed to show there were special circumstances justifying a limited or complete ban against wearing the union safety vest. The Respondent counters that Avalos admitted his memory regarding the exchange between himself and Cheves is faulty; and Avalos conceded that he was never prohibited from wearing his union logo safety vest.

(1) Facts

The Respondent maintains a rule that individuals in the terminal yard must wear a safety vest.[50] The reason for the rule is to make individuals in the yard more visible to trucks, therefore, reducing the possibility of people being injured by a moving vehicle. Since 2014, Avalos has worn his union safety vest whenever he is at the Commerce terminal, which is every day that he drives for the Respondent. It is undisputed that several members of the Respondent's Commerce terminal management team and dispatchers have seen Avalos wearing the union branded security vest "hundreds of times." (Tr. 428 –430, 449.) Avalos has also been an active union supporter since the union organizing campaign at the Commerce yard began in 2014. He has attended union meetings, participated in union organized strikes, passed out informational flyers about the Union, spoken with coworkers about the Union, met with the Respondent's upper management officials in Connecticut about working conditions, and spoken with reporters about the union organizing campaign.

[50] While the existence of the rule is undisputed, the record does not specify whether the rule requiring individuals to wear a safety vest while in the terminal is oral or written.

On March 6, 2015, Avalos was in the yard wearing his union safety vest. Chevez saw him and told Avalos that whenever he was in the Commerce yard that it was illegal for him to wear that safety vest.[51] In response to Chevez, Avalos questioned him about the source of the prohibition against wearing the union safety vest while in the Commerce yard. Chevez answered that he would look for the information but never produced it. After the discussion about Avalos wearing his union logo safety vest, Chevez never again mentioned it.[52] Avalos never stopped wearing a safety vest with the union insignia, continues to wear the vest, and has not been disciplined as a result. Drivers Canales and Jose Herrerra (Herrerra) also testified that they wore their safety vests with the union insignia almost daily. Neither Canales nor Herrerra testified to any specific retaliatory actions taken against them because they chose to wear the vests.

(2) Analysis

In *Republic Aviation*,[53] the Supreme Court held that the right of employees to wear union buttons at work, absent "special circumstances", is a protected activity. This right has been extended to other union clothing and items. *Chinese Daily News*, 353 NLRB 613 (2008) (employer violated the Act by creating a dress code policy prohibiting employees from wearing clothing with the name or logo other than the employer, specifically including the union); *Sam's Club, Division of Wal-Mart Stores, Inc*., 349 NLRB 1007 (2007) (while the Board held banning badge backer bearing a statement of their rights under the Act was unlawful, it found the employer could prohibit the wearing of lanyards with the union logo only because the employer was able to establish the nonbreakaway nature of the lanyards created a safety issue); *P.S.K. Supermarkets, Inc*., 349 NLRB 34 (2007) (the Board held the exposure of customers to union buttons, standing alone, is not a special circumstance, nor is the fact that the rule prohibited all buttons, not just union buttons). The right of employees to wear items with union insignias must be balanced against an employer's right to manage its business in an orderly fashion. However, a rule restricting or prohibiting the wearing of items with union logos must be narrowly tailored to justify the rule. *Wal-Mart Stores v. NLRB*, 400 F.3d 1093 (8th Cir. 2005), enforcing as modified, 340 NLRB 637 (2003) (employer violated the Act because there was no evidence that shirts with union logos interfered with the operation of the store); *Goodyear Tire & Rubber Co*., 357 NLRB 337 (2011) (employer ban on employees wearing T-shirts that said "scab" in relation to contract employees was not justified by special circumstances).

[51] On direct examination, Avalos testified that during this conversation with Chevez, another driver, Jose Bareto (Bareto), was a witness to the conversation. However, he acknowledged on cross examination that in his affidavit to the NLRB he stated that he was alone when Chevez allegedly made the comment about his union safety vest. Avalos explained the contradictory statements by testifying, "As I mentioned I didn't remember exactly how it happened. It's been more than two years now." (Tr. 446–448.) Based on Avalos' admission that he did not recall the exact details of the encounter with Chevez, I find that the exchange between Avalos and Chevez occurred in private.

[52] The Respondent did not produce Chevez to refute Avalos' testimony about this incident.

[53] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Since the Respondent did not produce Chevez or any witness to dispute the statement attributed to Chevez by Avalos, I find that Chevez did tell Avalos "[t]hat after crossing the yard, the door, the entrance to the yard, I could not use a union vest." (Tr. 328–329.) However, there is no evidence that the Respondent had a verbal or written rule prohibiting employees from wearing union insignia at work while allowing them to wear non-union branded items. There is also no evidence that the Respondent had an implied rule banning employees from wearing items with the union insignia while in the Commerce yard. Third, there is no evidence that the officials responsible for creating the Respondent's workplace rules and policies authorized or were even aware of Chevez's statement. In fact, Avalos admitted that Chevez never mentioned again the ban on wearing union items in the yard and did not enforce it. Moreover, there is no evidence that Chevez' sole statement made to Avalos in private interfered with, restrained or coerced employees in the exercise of their Section 7 rights. As noted above, none of the other drivers who were called as witnesses testified to being banned from wearing union items in the Commerce yard. On the contrary, several of the drivers testified that they wore their union branded safety vests whenever they provided services for the Respondent. Likewise, Avalos acknowledged that since 2014, almost daily, he has worn the union safety vest; he did not remove the vest when Chevez told him it was prohibited, and he has continued to wear the union safety vest since the conversation with Chevez.

Accordingly, I recommend dismissal of paragraph 8 of the complaint.

G. March 4, 2015 & March 10, 2016 Alleged Prohibition on Talking About the Union and Wearing Union Items

The General Counsel alleges that on or about March 4, 2015, Rodriguez prohibited employees from talking about the Union during working hours while allowing employees to talk about nonwork related subjects in violation of the Act. According to the General Counsel, Rodriguez overheard Avalos conversing with other employees about the Union and warned Avalos that it was illegal to recruit for the Union while at work; and he was warning Avalos so that Avalos "wouldn't get in trouble." The Respondent denied that Rodriguez made the statements attributed to him by Avalos. Even assuming Avalos' version of the conversation is accurate, the Respondent argues that it would still fall short of constituting an unlawful interrogation.

(1) Facts

(a) *March 4, 2015 allegation employer prohibited union talk*

There was undisputed testimony that the drivers' conversations in the yard cover a wide range of non-work topics, including politics and religion. On March 4, 2015, Avalos overheard some of the drivers near the dispatch window voicing negative comments about the union. He began talking to them about the benefits of unionization in an attempt to correct what he felt was their misperception about the union. According to Avalos, Rodriguez, who was at the dispatch window, interrupted him and said it was illegal for Avalos to recruit union members. Avalos

testified he told Rodriguez that he was not recruiting but rather giving the drivers correct information about the Union. Rodriguez replied that it was illegal; and he was telling this to Avalos so that Avalos "wouldn't get in trouble." According to Avalos' testimony, Rodriguez ended the conversation after that comment. The General Counsel called Napoleon Gaitan (Gaitan), a driver at the company since 2011, as a witness to provide corroborating testimony. Unfortunately, Gaitan was not a persuasive corroborating witness. He testified that he only heard Rodriguez ask Avalos whether he was recruiting for the union. Gaitan could not recall Avalos' response and denied hearing anymore of the conversation between Avalos and Rodriguez, noting, "I didn't continue listening."

Since 2000, Rodriguez has been employed by the Respondent; and for the past 5 years he has worked as a dispatcher reporting to General Manager Jeffrey Trauner (Trauner). Rodriguez works at the Commerce terminal from 5 a.m. to 2 p.m. Monday through Friday. Including Rodriguez, there are seven dispatchers on the day shift at the Commerce terminal. Rodriguez works at a desk located in front of a dispatch window near the entrance to the yard, where he dispatches assignments to drivers who appear in person for work. Drivers often congregate near the dispatch window waiting for assignments. Consequently, Rodriguez has heard them engage in discussions about the union but denies ever participating in those conversations. Rodriguez acknowledges that he is aware that some drivers are union supporters because they wear their union safety vests; and he has seen them picketing in the yard. When asked by drivers his feelings about the Union, Rodriguez tells them that "they have the right to assemble."

Although Rodriguez denied engaging in discussions with drivers about the union, he did not provide specific testimony denying the statements attributed to him by Avalos. It is true that Gaitan was not able to corroborate Avalos' testimony but counsel for the Respondent failed to specifically address the allegation during his direct examination of Rodriguez which I find curious. Consequently, I have to weigh the specific detailed testimony of Avalos that Rodriguez made the statement versus Rodriguez general denial about not engaging drivers in discussions about the Union. Moreover, Rodriguez' denial is also difficult to accept because he goes on to testify about discussions with drivers who ask him about the union and his response. This contradicts his prior testimony that he never talked about the union with drivers. Consequently, I credit Avalos' testimony on this point.[54]

(b) *March 10, 2016 allegation employer banned union items*

On March 10, 2016, Gaitan arrived at the Commerce terminal dispatch window to request an assignment. As was his normal custom, he was wearing his union logo safety vest. Gaitan testified that Rodriguez told him that if Gaitan removed his union logo safety vest, Rodriguez would give him an assignment. According to Gaitan, he asked Rodriguez whether he would be given work if he took off the union safety vest; and Rodriguez responded yes. Gaitan testified that he removed his union logo safety vest and gave it to Rodriguez who handed him an XPO logo vest. According to Gaitan, Rodriguez then told Gaitan to check his phone which showed he

[54] This does not, however, negate my prior finding that on the whole Avalos was no a credible witness.

had been given an assignment. Gaitan stated that he wore the company provided safety vest for two days before reverting back to wearing his union branded safety vest. It is undisputed that Gaitan is a supporter of the union organizing campaign; and he has been involved in union protests against the Respondent, signed union organizing petitions, and admittedly always wears a union logo safety vest.

Rodriguez denied ever telling a driver or hearing another dispatcher tell a driver that the driver would not get work if the driver supported the union. He also denied all allegations that he told Gaitan or any other driver to take off their union branded safety vest and never saw another dispatcher do it either. However, Rodriguez did admit that on one occasion Gaitan was walking on the dock without a safety vest so he gave him a company vest to wear. Although Rodriguez was aware of Gaitan's union support, he insisted that he did not tell Gaitan he would not receive assignments if Gaitan supported the union.

(1) Analysis

The Board has consistently held that it is unlawful for an employer to prohibit employees from discussing unionization during working hours while allowing discussion of other non-work related matters. *Emergency One, Inc.*, 306 NLRB 800, 806 (1992) (banning discussions about the union while allowing general conversations a violation of the Act); *San Luis Trucking Inc.*, 352 NLRB 211, 228 (2008) (rule prohibiting employees from talking to each other regardless of working hours infringes on employees' right to confer about "terms and conditions of employment" and likely to have a "chilling effect").

The evidence does not establish that the Respondent has a written policy directly addressing discussion of unionization during work hours. Moreover, there is no showing that it had orally communicated to drivers such a rule. There is also no credible evidence of a past practice of the Respondent admonishing drivers not to speak about the union with other drivers during work hours. However, I have previously found the facts established that drivers engaged in discussions about non-work topics while on the job; and on March 4, 2015, Rodriguez told Avalos that it was illegal to recruit union members while on duty and Avalos could get in trouble for doing it. There is no evidence, however, that anyone other than Avalos heard the comments; and the evidence does not suggest that Avalos was in anyway restrained in the exercise of his Section 7 rights. The following month Avalos participated in a strike against the Respondent; in September 2015, he engaged in handbilling in front of the Commerce facility; and he continued to wear his union logo safety vest. I find that Rodriguez's comment to Avalos was an isolated incident of slight severity and was not communicated to anyone other than Avalos. See *Avis Rent-A-Car System*, 280 NLRB 580 (1986).

Accordingly, I recommend dismissal of paragraph 7 of the complaint.

As noted earlier in this decision, the Board has held that an employer may ban employees from wearing items with union insignia if the employer establishes that "special circumstances" exist. *Republic Aviation Corp. v. NLRB*, supra. The Board has also held that an employer who withholds or threatens to withhold work or benefits because of employees' union activity

violates the Act. *Highland Superstores, Inc.*, 314 NLRB 146 (1994); *TRW Vidar*, 290 NLRB 6 (1998). It is well understood that an employer, and by extension its agents and supervisors may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so as long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Albertson's, LLC*, 359 NLRB 1341, 1372 (2013) quoting *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1968). Whether the statements are a threat is viewed from the objective standpoint of the employee, over whom the employer has a measure of economic power. See *Mesker Door, Inc*., 357 NLRB 591, 595 (2011); *Inn at Fox Hollow*, 352 NLRB 1072, 1074 (2008). An employer's communication to employees that they will jeopardize their job security, wages or other working conditions if they support the union is a violation of Section 8(a)(1). *Metro One Loss Prevention Services Group*, at 89; *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000).

The allegation regarding the March 10, 2016, exchange between Gaitan and Rodriguez turns almost entirely on the credibility of the two witnesses. Gaitan claims that Rodriguez would only assign him work after he removed his union safety vest; and Rodriguez insists the allegation is untrue. I find, however, that they were equally credible. The evidence that slightly tips the scales in favor of Rodriguez's testimony is the fact that Gaitan admitted that he only wore the company vest for two days; he had worn the union vest almost daily and whenever he was in the yard since 2014; and there is no objective evidence that Gaitan received fewer assignments after he started wearing the union vest or publicly voicing his support for the Union. When viewed in context, it weakens his overall credibility on this point. Consequently, I find that Rodriguez did not make the statements attributed to him by Gaitan; nor condition work assignments on employees not wearing items with the union insignia. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591-592 (1954) (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

Accordingly, I recommend dismissal of paragraph 14 of the complaint.

H. January 5, 2017, Respondent Refused to Consider for Hire or Hire Canales

The General Counsel alleges that about January 5, 2017, the Respondent refused to consider for hire or hire Canales because of his union activities. The Respondent insists that Canales' application to drive for the Company was not approved because he was disrespectful, threatening, and rude towards its dispatchers and other employees.

(1) Facts

In April or May 2016, Canales stopped driving for the Respondent because he was unhappy with his compensation and the quality and quantity of the assignments he received. Consequently, he broke the lease on his truck and turned it over to another driver who assumed the payments. Subsequently, Canales looked for opportunities to be a second seat driver. In December 2016, Canales spoke with a driver, Javier Solis (Solis), about being his second seat

driver. Solis told him to "apply" with the Respondent, which he did in January 2017. Canales talked with Recruiter Velasco, about applying to be a second seat driver. Velasco walked him through the application process. On January 3, 2017, he submitted his online application using the Respondent's computer. See GC Exh. 61. Three days after Canales submitted his online application, Velasco called Canales to notify him that it was not approved.[55] Several days after his application was rejected, Canales contacted Flores to ask him to explain why his application had not been approved. According to Canales, Flores asked why his application had not been approved; and he responded that he was told it was because he is "controversial"; and the decision to reject his application was made by "operations." Canales testified that he asked Flores who was operations; and Flores answered the dispatchers were operations. Flores also told him to contact the supervisor.[56]

After his conversation with Flores, Canales testified that he spoke with Del Campo who told him that his application had been rejected because Canales was "controversial and because of the actions I had done previously." According to Canales, he responded by disputing the characterization of him as controversial and denied having "done anything wrong." Canales testified that they had a brief disagreement until Del Campo stated, "And if I had known that it was you who was calling me, I would not have answered your call because I know . . . you're going to get me into trouble." (Tr. 876–877.) Thereafter, the conversation ended; and Canales has had no contact with the Respondent since that phone call.

Solis corroborated Canales testimony that the reason Canales was not allowed to return as a driver is because within the company Canales was viewed as "very problematic." Solis spoke with Velasco about the Respondent authorizing Canales to be Solis' second seat driver. Velasco told him that that Canales probably would not be authorized to return as a driver because he rejected lots of moves and yelled at the dispatchers. Solis had never personally heard Canales curse at the dispatchers. While Velasco told him that he could make no guarantees, he instructed Solis to have Canales complete the application.

Sometime after Canales contacted the Respondent about returning to the company as a second seat driver, Velasco informed Del Campo that Canales had applied to drive for the

[55] Canales testified that when Velasco told him the "department of operations" had rejected his application, he asked Velasco "who was operations?" (Tr. 874.) He stated that Velasco responded the dispatchers were operations. Canales attested he told Velasco that he was going to speak with the supervisor, Flores, because the manager and not the dispatchers should make the decisions on approving drivers' applications. Velasco was not called as a witness to dispute Canaels' testimony. Consequently, I credit Canales version of his discussion with Velasco.

[56] Flores testified that he did not "recall" a telephone conversation with Canales about his desire to return to the company as a driver, but he remembered speaking with Canales about it in person. Despite the contradictory testimonies of Canales and Flores regarding whether their conversation was by telephone or in person, I find that the resolution of this point is not necessary for me to rule on the merits of the allegation. Flores provided undisputed testimony, however, that he did not have any involvement in the Respondent's decision to reject Canales' application.

Respondent again and asked if it was okay for Canales to return. Del Campo told Velasco to process Canales' application and "run the reports" and then they would make a decision on whether to approve his application. Del Campo acknowledged that reports labeling Canales' prior behavior with the dispatchers as confrontational and bullying were a consideration in his decision whether to approve the application. Consequently, he consulted with "operations" to determine if they were amenable to Canales returning. Del Campo also spoke with Trauner about the decision whether to allow Canales to return as a second seat driver. He told Trauner that "a couple of dispatchers" told him that they had heard that Canales was reapplying to return; and they were concerned because Canales had a "hostile history" with the company and had left on "bad terms." Since Del Campo was the ultimate decision-maker in the matter, Trauner told him to make whatever decision he thought was best for the company. Trauner and Del Campo were aware that Canales was an "ardent" union support and they discussed it during their conversation about Canales' desire to return to R. However, they insist the reason the Respondent did not want Canales back as a second seat driver was solely because of his prior bad history with the company. Trauner admitted that he and Del Campo were concerned their rejection of Canales' application might be misinterpreted as them retaliating against Canales because of his union activity. Consequently, the Respondent's legal counsel was consulted and approved the action. Del Campo, in taking action not to approve Canales' return as a second seat driver, denied harboring any animosity against Canales because of his union activity or that anti-union animus played a role in his decision.

(2) Analysis

Under the *Wright Line* analysis, in order to sustain its initial burden of proof, the General Counsel must first prove that Canales' union activities were the substantial or motivating factor in the Respondent's decision to reject his application as a second seat driver. Upon such a showing, the Respondent then must present evidence that it would have taken the same action even absent the union or protected concerted activity. See *Correctional Medical Services*, 356 NLRB 277, 278 (2010).

It is undisputed that Canales has engaged in union or other protected activity. As previously noted, Canales wore his union logo safety vest in the yard on an almost daily basis; was part of a lawsuit against the Respondent alleging misclassification and unfair working conditions; participated in union strikes and petitions against the Respondent; and voiced complaints about the Respondent in interviews with the media. It is also undisputed that the Respondent was aware of Canales' union activity. Clearly, the rejection of Canales' application to drive constitutes an adverse employment action. The remaining question is whether the Respondent took this action against Canales because of discriminatory animus. I find that the evidence fails to establish the Respondent action was based on anti-union motivation.

The General Counsel argues that animus can be inferred because the Respondent, through Flores, singled Canales out for interrogation, promises, and inducements; and the Respondent opposed the union organizing effort. I find the General Counsel's arguments non-persuasive. I previously found that the Respondent did not interrogate, conduct surveillance, or threaten

employees or make promises and solicit complaints and grievances to convince them not to support the union.

Assuming arguendo that the General Counsel established a *prima facie* case, I find that the Respondent articulated legitimate non-discriminatory reasons for its action; and has met its burden of showing that Canales' application would have been rejected even in the absence of the protected conduct. See *Wright Line*, supra, 251 NLRB at 1089. According to the General Counsel, the Respondent offered shifting reasons for its action against Canales; and an adverse inference should be drawn from Velasco's failure to testify. The General Counsel contends that this is evidence that the true reason the Respondent did not authorize Canales' to serve as a second seat driver is because of his union activity. The Respondent counters, however, that Canales was not brought on as a second seat driver because he had a history within the company of disrespectful, bullying, and intimidating behavior towards the dispatchers.

Several witnesses provided credible evidence which supports my finding that the Respondent had legitimate nondiscriminatory bases for not allowing Canales to return as a second seat driver. Flores and Montenegro credibly testified that several times Canales' called the dispatchers "corrupt" without any apparent provocation on their part. (Tr. 1331, 1501.) Likewise, Rodriguez credibly testified that Canales was rude, demanding and cursed at the dispatchers. He said that Canales accused the dispatchers of being corrupt and was disrespectful towards them. As noted earlier in the decision, Rodriguez admitted that when Canales submitted his application to again drive for the Company, he told Velasco that it was difficult to work with Canales because he was threatening, disrespectful, and demanding. Dispatchers also told Del Campo, when he consulted with them about Canales returning to the company, that Canales was confrontational with them. Even if some of the reported incidents were false or embellished, there is no credible evidence that Del Campo knew that the incidents were exaggerated or false. Consequently, it is reasonable that Del Campo, when confronted with serious allegations of disrespectful and intimidating behavior by Canales, had a responsibility to consider those complaints. Canales' denial regarding several aspects the charges is irrelevant. The relevant questions are whether Del Campo or other managers were told of the dispatchers' complaints and if those complaints appeared credible enough to warrant that Del Campo take them seriously? I find nothing in the record to cast doubt on Del Campo's sincerity in taking seriously the complaints. It is undisputed that several dispatchers complained to Del Campo about what they perceived to be Canales' hostile and disrespectful behavior. There was no credible evidence to dispute why the dispatchers' perceptions were unreasonable. Therefore, I find that the Respondent has articulated legitimate non-discriminatory reasons for its action; and has met its burden of showing that Canales' application would have been rejected even in the absence of the protected conduct.

Accordingly, I recommend that the complaint in paragraph 16(c) be dismissed.

I. From March Through June 2015 Avalos Requested a Truck Repair loan from Respondent

The General Counsel alleges that from March through June 2015, the Respondent denied Avalos a truck repair loan because of his union activities. The Respondent counters that the evidence does not show that Respondent had ever made a loan to a driver for as large as the one requested by Avalos; the Respondent made an earnest effort to assist Avalos in getting his truck repaired; and Avalos was not credit worthy.

(1) Facts

Occasionally, the Respondent made loans to drivers to get their truck repaired. In the past, the driver would request a loan and if approved the truck would go to one of the Respondent's repair vendors for a repair quote. The Respondent would pay the repair vendor directly and deduct a fixed amount from the drivers' weekly paycheck until the loan was repaid. In mid-2015, however, the Respondent began to more thoroughly scrutinize requests for repair loans and started to require that drivers complete a form requesting a loan for a truck repair. If the loan was approved, the Respondent would issue a promissory note presumably to the driver. The record does not contain a written company policy capping the amount it would approve for a truck repair loan or place a limit on the number of truck repair loans a driver could receive.

On a Friday or Saturday in March 2015, Avalos took his truck to the mechanic onsite at the Commerce facility because his truck's gauge was showing low oil pressure and the check engine light was on. Jesus Perez (Perez) is the mechanic and owner of JP Diesel Repair with an exclusive onsite vehicle repair shop at the Commerce terminal. His main repair shop is located in Fontana, CA, and he has another vehicle repair shop in Mexico. Perez has been the exclusive vehicle repair shop inside the Commerce terminal for about 3 years, where he works with his employee, Salomon.[57] JP Diesel Repair specializes in maintaining and repairing engines and transmissions for tractor-trailer trucks. In response to Avalos' complaint of low oil pressure, Perez explained the steps he would take to diagnose the source of his oil pressure problem. He told Avalos he first checks to ensure the oil pressure gauge is accurate and it is not an electronic issue. Perez proceeded to explain to Avalos him all the steps that needed to be taken to address the issue, starting with replacement of the oil pressure sensor and oil filter. He warned Avalos that if replacement of those parts did not resolve the problem, then Avalos' truck had a larger mechanical problem. Avalos asked Perez if he had the parts in stock and the cost to replace those two components was about $40. Although Avalos expressed unhappiness with the price, he ultimately consented and asked if he could pay Perez on Monday. Perez agreed and proceeded to replace and test the new sensor and oil filter in Avalos' truck. Unfortunately, it did not cure the problem. Consequently, Perez ran more tests and noticed that Avalos' truck was abnormally low on oil. The engines on the types of trucks driven by Avalos should have the oil

[57]The insurance that covers JP Diesel Repair allows the shop located in the Commerce terminal to only work on trucks owned by those who drive for the Respondent or lease their trucks through Bush. Perez has other customers not affiliated with the Respondent or Bush but he cannot use his shop at the Commerce terminal to work on those customers' trucks.

changed about every 25,000 miles. After checking the truck's fault codes and noticing the excessive amount lost oil, Perez told Avalos "this needs to be looked into internally because it is going to cause a big problem." Avalos told him to just add the oil because he had to work and if anything happens to the truck the Respondent "would be able to fix it." Avalos never paid Perez for the replacement and testing of the new sensor and oil filter in Avalos' truck.

Approximately 3 weeks after his initial visit to Perez in March 2015, Avalos' truck became inoperable and was towed to Perez's shop at the Commerce yard.[58] Perez immediately noticed that there was no in the engine and the engine would no longer rotate ("seized engine"). He told the terminal manager that the truck had to be towed to Perez's Fontana location where his shop performed major truck repairs.[59] The truck was towed to the Fontana repair shop where a more detailed inspection revealed that a major oil leak had occurred over a relatively long period of time and caused irreparable damage to the engine. Avalos' truck had 306, 611 miles on the odometer when the engine failed. Typically, the type of engine in Avalos' truck does not fail until about 500,000 or more miles. It was Perez's assessment that the engine failure was due to negligence on the part of Avalos because he could see that based on the amount of damage, Avalos had continued to drive the truck even after many components had failed.[60] Perez gave Avalos three repair quotes: a quote for a new engine at $25,000, a used rebuilt engine at $18,500, or take the damaged engine apart and replace only the parts that had failed. However, he informed Avalos that the third option was not practical because too many parts had failed. Avalos settled on a rebuilt engine at a cost of about $18,500 but not including labor cost.

Prior to speaking with Perez, Avalos went to Banuelos to request a truck repair loan. Banuelos told him to get an estimate from the repair shop. Accordingly, Avalos provided Banuelos with an estimated cost and told him that the truck could be repaired in about five days. Banuelos told him that the Respondent would approve the loan to repair his truck; and the

[58] Avalos began driving as a second seat driver for Marco Ruiz one day after the engine failed in his truck.

[59] Perez could not recall whether the person who approached him was Mike Schultz, the terminal manager Hector Banuelos or a person named "Javier" [last name not stated]. Avalos did not accompany the towed truck.

[60] On cross examination, Avalos testified that he could not recall if his truck had been causing him problems prior to the engine failure. However, counsel for the Respondent directed Avalos to a line in the affidavit he gave as part of the NLRB investigation into his complaint which read, "The truck was giving me a lot of problems and sometimes this year Pacer took it to get an estimate on the repairs and it was around $20,000." (Tr. 456) He claimed that the statement was not referring to the engine, but rather referenced other truck components. Montenegro testified that about 1-1/2 - 2 years ago, Avalos told him his engine was making a noise and asked him for his opinion. He asked Avalos if he had checked his oil but Avalos allegedly responded "I'm going to use it until it stops. I'm going to drive it until the engine—there's a storm." (Tr. 1473). I credit Montenegro's testimony on this point. His testimony was consistent with Perez's experienced assessment of the underlying reason for the truck's engine failure.

mechanic could begin the work.[61] Banuelos, at some point, contacted Perez and instructed him to give him quotes for the truck repair; and told Perez that he wanted the estimates quickly so he could get the loan approved because they needed Avalos back on the road. On March 27, 2015, Perez emailed Banuelos an explanation of the required repairs for Avalos' truck with the quote for the repairs attached. (R. Exh. 31.) On March 31, 2015, Banuelos emailed to Vice President of Transportation Don Ingersoll (Ingersoll) and copied Camacho, Territory Director Alok Kumar (Kumar) and Mark Schenewerk (Schenewerk), Avalos' request for a loan to repair his truck and attached Perez's estimate. (R. Exh. 17.) Kumar responded that it was doubtful the loan would be approved but requested additional information before making a final decision.

Five days after Perez told him that his truck would be repaired, Avalos went to the repair shop to check on its status. Perez informed him that his loan request had been denied by the company. In 2015, Camacho became the operations manager. In that role he functioned as the driver liaison.[62] Therefore, Avalos approached Camacho about the status of his loans request. Camacho replied he would investigate and give him an update.[63] Consequently, on May 18, 2015, Camacho sent an email to Kumar and Schenewerk that Avalos needed a more than $20,000 truck repair loan "because of negligence" and attached an article about Avalos' involvement in the union organizing campaign. (GC Exhs. 40, 73.) Kumar or Ingersoll told him that the loan had previously been denied. Camacho relayed this information to Avalos. However, Camacho maintained ongoing discussions with Kumar, via email, on the possibility of the Respondent reversing that decision. On June 8, 2015, he sent an email to Kumar informing him that Avalso wanted to know the status of his agreement with CTP and reminding Kumar that Avalos' loan request had been denied. He also added, ". . .[Avalos] is actively involved with the teamsters." (GC Exh. 74, 75.) Camacho then went to Avalos and asked him if he could contribute any money towards the cost of the repair.[64] Avalos told him that he was unable to afford any money or make a down payment towards the repair of the truck. Camacho followed up with an email to Kumar which read:

> Followed up with Domingo and he sated he cannot come up with anything on his end. Furthermore, he has been placed OOS as a driver due to an air brake restriction. At the end of the day if we decide to terminate his contract and repo the unit we will still need to repair it in order to reseat. If we decide authorize the

[61] Avalos stated that the largest loan he had ever received from the Company was $8000; and he had never been required to have money for down payment before being approved for a loan.

[62] Camacho was the drivers' initial contact for loan requests. Sometimes he had the authority to unilaterally approve loan requests for up to $2000. Larger loan amounts had to get approval from higher level management.

[63] Camacho testified that during his tenure as general manager in 2015, he was aware of the Respondent approving loans in the range of $2000 to $7000 which was the typical cost of a truck repair.

[64] Avalos testified that Camacho said the Respondent would approve the loan if Avalos could make a $3000 to $4000 down payment. In order to rule on the merits of this allegation, it is not necessary for me to resolve the slight difference in Avalos' and Camacho's testimony on this point.

> repair and set up a deduction for Domingo it would be in the area of $200.00 a week for 2 years. I think because of his heavily involvement with the teamsters they would try and use it against us.

(GC Exh. 75.) Camacho denied that the news article about Avalos union sympathies or his union activity played a role in the decision to deny Avalos the loan. Camacho admitted, however, that he was concerned "how it would be perceived" if the Respondent authorized Avalos' loan with "all the litigation going on" so he forwarded Avalos' loan request up the supervisory chain for upper management to make the decision.

In the meantime, Perez continued to send inquiries to the Respondent every 3 months asking about the status of the loan request, but would consistently be told that "we're still looking into it." Since, the Respondent never approved Avalos' loan request, Perez did not repair the truck. Eventually a CTP representative came to his shop to verify the truck was there and told him it was for sale.

Two or 3 months after his truck became inoperable Avalos learned definitively that the company was not approving the loan. Camacho never gave him a reason for the denial. Since Avalos could not afford to repair his truck and was unable to drive it, Avalos' contract with the Respondent was terminated and the company kept the truck. Avalos is currently a second-seat driver for Juan Magana.

(2) Analysis

In applying the *Wright Line* standard, it is undisputed that Avalos engaged in union activity and the Respondent was aware of that activity at the time he made his request for the truck loan. Moreover, I find that union animus was a motivating factor in the Respondent's decision to deny Avalos' loan request.

Several emails that Camacho sent to the ultimate decision-makers clearly document his concerns about the Respondent approving the loan because of Avalos union activity. Moreover, despite its irrelevance to Avalos' loan request, Camacho repeatedly mentions in those emails Avalos active involvement in the union. (GC Exhs. 73, 74, 75.) During the hearing, he was he provided unpersuasive reasons for why he kept referencing Avalos' union activity when asking about the status of the loan request. He testified that the size of the loan was a concern. However, when he was pressed about why he mentioned Avalos' union activity to upper management in connection with the loan request, Camacho claimed it was because if the loan was approved the union could use it to claim Avalos was an employee; but if Avalos was denied the loan, the Respondent would be viewed as "heartless." However, he admitted that he had approved loans to drivers in the past and was not concerned about them being viewed as employees. Camacho also admits that when he was general manager at the Commerce terminal, none of the loans made to drivers required them to make a down payment before receiving the loan. He acknowledges that Avalos was the first time he had ever made such a request to a driver. Moreover, while Camacho denied having a role in the decision on the loan request, he does not deny that his input may have influenced the decision to reject the loan request.

Accordingly, I find that the Respondent violated the Act as alleged in paragraph 17(a) of the complaint.

CONCLUSIONS OF LAW

1. The Respondent, XPO Cartage, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on May 5, 2015, interrogating an employee about the employee's union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees the Respondent has violated Section 8(a)(1) of the Act.

4. By, on May 5, 2015, soliciting employee complaints and grievances, promising its employees increased benefits and improved terms and conditions of employment, the Respondent has violated Section 8(a)(1) of the Act.

5. By, in the months of March through June 2015, denying a truck repair loan to its employee Domingo Avalos, and then requiring him to make a large cash payment to have the truck repaired, the Respondent has violated Section 8(a)(1) and (3) of the Act.

6. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily denied a truck repair loan to Domingo Avalos and required him to make a larger down payment because of his union activities must make him whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him from the date of the discrimination to the date he is made whole. Compensation shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall compensate Domingo Avalos for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[65]

ORDER

The Respondent, Stahl Specialty Company, Warrensburg, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee complaints and grievances, promising its employees increased benefits and improved terms and conditions of employment.

(b) Interrogating employees about their union membership, activities, and sympathies.

(c) Denying loans or other benefits to employees because of their union membership, sympathies and, or other protected concerted activities; or otherwise subjecting employees to adverse employment consequences because they engage in union or other protected concerted activities.

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

(a) Within 14 days from the date of the Board's Order, offer Domingo Avalos, if he still desires the loan, a truck repair loan under the same terms and conditions as offered to other employees.

(b) Make Domingo Avalos whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

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

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

(d) Within 14 days after service by the Region, post at its facilities in Commerce, California, copies of the attached notice marked "Appendix."[66] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 30, 2014.

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

Dated: Washington, D.C. September 12, 2018

Christine E. Dibble (CED)
Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT deny loans to or otherwise demand from employees greater requirements to secure the loan because of their support for the International Brotherhood of Teamsters.

WE WILL NOT interrogate employees about their union membership, activities, and sympathies in an effort to interfere with, restrain, and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL NOT solicit employee complaints and grievances or promise employees increased benefits and improved terms and conditions of employment in an effort to interfere with, restrain, and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL, make Domingo Avalos whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, compensate Domingo Avalos for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

XPO CARTAGE, INC.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449
Telephone: (213) 894-5200
Fax: (213) 894-2778
Hours of Operation: 8:30 a.m. to 5:00 p.m. PT

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-150873 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 634-6502.