UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DPI NEW ENGLAND, Respondent, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 25 Charging Party.	*	Case No. 1-CA-44833

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

Respectfully Submitted,

Arthur M. Brewer
Kraig B. Long
Shawe & Rosenthal, LLP
20 S. Charles St., 11th Fl.
Baltimore, MD 21202
(410) 752-1040
(410) 752-8861 (fax)

Counsel for Respondent

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RESPONDENT'S 'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board,[1] DPI New England,[2] by its undersigned counsel, hereby excepts to the failure of Administrative Law Judge Paul Bogas ("ALJ") to find that (1) the conduct of Roger Beattie warranted his discharge (Exception No. 1); (2) Alex Adorno and Anthony Glover were discharged for legitimate business reasons (Exception No. 2); and (3) the conduct of Derek Mace warranted his discharge (Exception No. 3).

I. INTRODUCTION

The International Brotherhood of Teamsters, Local 25 (the "Union") filed charges with the NLRB, claiming that Respondent engaged in certain unfair labor practices

[1] Hereinafter referred to as "the Board" or "the NLRB."

[2] Hereinafter referred to as "DPI," "Company" or "Respondent."

between July 2008 and September 2008.[3] A trial was held in Boston, Massachusetts on February 9, 10 and 11, 2009. On May 29, 2008, the ALJ issued his Decision in which he held that the Respondent engaged in certain unfair labor practices. The Respondent delineated its specific exceptions to the ALJ's findings of fact and conclusions of law in Section 102.46 of the NLRB's Rules and Regulations. Those exceptions may be grouped into three (3) categories: (1) the conduct of Roger Beattie warranted his discharge; (2) Alex Adorno and Anthony Glover were discharged for legitimate business reasons; and (3) the conduct of Derek Mace warranted his discharge.

II. STATEMENT OF FACTS

A. DPI – The Company

1. DPI is the exclusive wholesale distributor of products for Starbucks stores and licensed Starbucks venders (collectively, "Starbucks" or "Starbucks stores") in Massachusetts, Connecticut, New Hampshire, Maine, Vermont and upstate New York. (Tr. 282, 370-371).

2. The Company operates a warehouse and distribution facility in Canton, Massachusetts (the "Canton Facility") where products are stored, loaded on the Company's fleet of trucks and delivered to the Starbucks stores 365 days a year. (Tr. 281-282, 286, 293).

3. Starbucks is the Company's sole client. (Tr. 358).

[3] For a complete recitation of the procedural history of this matter, see General Counsel's Exhs. 1(a) – (j).

4. Mark Donohue is the Company's Director of Operations. He has overall responsibility for the operations at the Canton Facility, including enforcing Company policies and procedures and ensuring that its customers receive the product they ordered in a timely manner. (Tr. 274-275).

5. Frank Driscoll is the Company's Operations Manager. He is responsible for overseeing the day-to-day operations of the Canton Facility, including the Warehouse, Transportation and Administrative departments. Driscoll reports to Donohue. (Tr. 368).

1. Drivers

6. The Company currently employs 53 truck drivers that deliver to 325 Starbucks stores in the New England area. (Tr. 281).

7. Drivers are assigned a route of stores that they make deliveries to every day. Deliveries are typically made later in the day or after store hours. (Tr. 12).

8. Drivers are responsible for loading their trucks, delivering the product to each store on their route, bringing the product into the stores and removing any empty product trays. (Tr. 13).

9. There are two drivers assigned to each route. (Tr. 322-323, 371-372).

10. The schedule is set up so that one week, one driver (Driver A) works four days and the other driver (Driver B) works three days. The following workweek, the procedure is reversed. (Tr. 322-323, 371-372).

11. Prior to September 2008, Drivers were divided into two classes: (i) drivers with a Class A Commercial Driver's License (CDL) (Class A Drivers) and (ii) drivers with a Class B CDL (Class B Drivers). (Tr. 376, 444, 604).

12. Class A Drivers are licensed to drive larger tractor-trailer trucks as well as straight trucks. (Tr. 339).

13. Tractor-trailers generally have 36 to 42 feet of storage space. (Tr. 376, 400-401, 444, 604).

14. The Company's fleet consisted primarily of 36 foot tractor trailers, but included a 42 foot tractor trailer as well. (Tr. 376, 400-401, 444, 604).

15. As of September 15, 2008, the Company employed only Class A Drivers. (Tr. 281).

16. Roger Beattie, Anthony Glover and Alex Adorno were all Class B Drivers. (Tr. 19, 186, 247).

17. Beattie was hired in December 2005. (Tr. 11). Glover was hired in July 2007. (Tr. 202). Adorno was hired in 2006. (Tr. 233). The Company offered them employment in the warehouse when they failed to obtain a Class A license by September 15, 2008. They refused.

2. Warehouse Employees

18. There are approximately 47 warehouse employees on the day and night shifts. (Tr. 275-277, 281).

19. Warehouse employees are divided into two groups: (i) "pickers" (or selection staff) and (ii) loaders. (Tr. 278-279).

20. Pickers are responsible for selecting the day's order of products from the warehouse. (Tr. 278-279).

21. The pickers are segregated based on the product that the employee is responsible for selecting. (Tr. 477).

22. Derek Mace was hired in February 2006 as a warehouse employee. (Tr. 104). The Company discharged him on August 4, 2008 for interfering with employees while they were working. (GC Exh. 17; Tr. 463).

23. Mace picked milk products and worked in the milk cooler on the far end of the warehouse. (Tr. 463, 477). Warehouse employees who pick pastry products work in a section of the warehouse further down from the milk cooler. (Tr. 477). Warehouse employees who pick the Hi Volume Items work in a section at the other end of the Warehouse from the milk cooler. (Tr. 477).

B. <u>The Products that the Company Supplies</u>

24. In 2006, the Company supplied various products to a little over 200 Starbucks stores. (Tr. 272).

25. By July 2008, the Company was supplying 325 Starbucks stores in the greater New England area with all of the products those stores needed to operate. (Tr. 275). This included everything from coffee, pastries, sandwiches, cups and napkins to restroom products, cleaning supplies and trash cans. (Tr. 282-283). The Company supplied all items used, sold or consumed at Starbucks. (Tr. 282-283).

1. Paper Products

26. Paper products consist of a wide range of items, including all sizes of cups, lids, coffee stirrers, hot beverage sleeves, sugar, creamers, napkins, paper towels, toilet paper, etc. (Tr. 294).

27. Prior to August 2008, an outside (unrelated) supplier delivered paper products to the Canton Facility. The paper products were unloaded by warehousemen and reloaded on Company trucks which were later delivered to the stores. (Tr. 298-299). At

that time, the Company delivered a week's supply of paper products to one or two stores a day. (Tr. 383-385).

2. Coffee Products

28. The Company supplies all of the variety of coffee products that Starbucks uses and sells in its stores. (Tr. 291).

29. The term "coffee products" (or "cross-dock coffee") is not limited to coffee. It also includes Starbucks travel mugs, gift items, music CDs, coffee makers and other retail items. Garbage cans, brooms, floor mats, display signs, store decorations and other products that the stores use to operate also are considered cross-dock coffee products. (Tr. 291-294, 373-374, 378).

30. The Company receives a daily shipment of "coffee products" via a common carrier from the Starbucks roasting plant in York, Pennsylvania. The products arrive shrink-wrapped and on pallets labeled by store number. (Tr. 291-293).

31. Orders are placed daily and vary each day based on the needs of the stores. The Company does not know the amount of products that will need to be delivered on any given day. (Tr. 286-288, 289-291, 323-324, 446-447).

32. Driscoll testified that the Company may not know the next day's orders until the afternoon before or early in the morning on the day of delivery. Consequently, the Company cannot determine the space that will be needed on a particular truck until after the products are ready to be loaded. (Tr. 45-47, 323-324, 448-452).

33. The Company generally receives a manifest from Starbucks the night before listing the number of pallets of product that are scheduled for delivery in the morning. (Tr. 409-410, 447-452).

34. The manifest does not provide any information about the type of products that are on a particular pallet. (Tr. 447-452). As such, the Company does not know what those products are until they arrive at the Canton Facility and are inspected. (Tr. 409-412, 447-452).

3. Hi Volume Items

35. Hi Volume SKU items ("HVS Items" or "Hi Volume Items") consist of 27 of the most used or sold products at Starbucks stores. (Tr. 284) ("top movers").

36. These include items that Starbucks sells, such as certain coffee, specialty drinks like frappucino, Tazo teas, lemonades, designer juices and espresso drinks. They also include items that the stores use in operation of the business, like soymilk, cream, fruit concentrates, etc. (Tr. 291, 373).

37. HVS Items are seasonal. For example, during the winter months there is a spike in the amount of coffee delivered, while in the summer months the Company delivers more cold beverages, like lemonade and designer juices. (Tr. 291, 373).

38. Promotions that Starbucks may have from time to time also impact the quantity of high volume items to be delivered. (Tr. 286-287, 379).

39. Orders of Hi-Volume items vary by store. One day a store may order all 27 HVS Items while another store could order just a few items. (Tr. 288-289).

40. Each afternoon, each Starbucks store places an individual order for HVS Items to be delivered the next day with the Company. (Tr. 288-289). The Company processes the orders through its inventory and prepares the product to be loaded onto the trucks for delivery the next day. (Tr. 288-289).

C. Starbucks Increases the Company's Delivery Requirements

1. March 2008: Number of Routes Increase

41. On March 1, 2008, the Company significantly increased the number of routes it operated from 13 night routes and 5 day routes to 21 night routes and 10 day routes with about 10 stores per route. (Tr. 322, 374-375).

42. As a result, the Company hired ten (10) new drivers, increasing the number of drivers from 43 to 53. (Tr. 302, 374-376).

43. All of the newly hired drivers held a Class A CDL. (Tr. 302, 374-376).

2. March-April 2008: March Launch

44. Beginning in March 2008, the Company began supplying Hi Volume Items and "cross-dock" coffee products to the Starbucks stores in its territory. (Tr. 284-285).

45. In anticipation of this new delivery requirement, the Company leased eight (8) additional tractor-trailers. (Tr. 301-302, 374-376, 444).

46. Prior to this time, HVS Items and coffee products were supplied by another (unrelated) company that delivered the products directly to the Starbucks stores. The Company never had to transport HVS Items to the Starbucks stores in its territory before March 2008. (Tr. 284-285).

47. To transition the drivers to these new delivery requirements, the Company phased in the process. This was called the March Launch. (Tr. 377).

48. The March Launch occurred in three phases. It began on March 10, 2008. (Tr. 377).

49. During the first phase, from March 10 to March 24, 2008, drivers delivered daily shipments of HVS Items to only half of the stores on their route. (Tr. 377-378).

50. The second phase took place the following two weeks when drivers started making daily deliveries of HVS Items to all of the stores on their routes. (Tr. 377-378).

51. During the third phase, which began on or about April 14, 2008, drivers started delivering the "coffee products" to the stores on their route. (Tr. 302, 377-378).

52. The Company soon began experiencing a number of problems with trying to fit the increased product on its smaller straight trucks. (Tr. 326-333, 380-382; 399, 412-413).

53. Beattie testified about the "enormous" increase in his work load as a result of the new delivery requirements beginning in April 2008 and the problems he experienced getting all of the product on his "little straight truck compared to the other tractor/trailer trucks." (Tr. 64, 68-70-71, 74-76).

54. Driscoll testified about the impact of these new delivery requirements:

> Q Did you observe or witness the increase in high volume items coming in to the summer of 2008?
>
> A Yes I did.
>
> Q And how did it manifest? How did you -- what did you notice?
>
> A We were having some trouble fitting product on trucks, depending on how the coffee products came in. How big they would be and how big the high volumes would be. We were starting to, on the smaller vehicles, stack product instead of having it in a line to deliver. We were starting to have more damaged items. Stores calling in that they were putting high volume on trays and the trays were crushing into the pastries, or pastries were crushed, sandwiches were crushed. We started seeing complaints like that, that we really hadn't seen.
>
> Q And when you say smaller trucks, what are you referring to?
>
> A The straight trucks.

* * *

> Q And how does that effect the driver of a straight truck that has to jam all their product on there?
>
> A Well it took a lot longer to load the truck. It took a lot longer to unload the truck. The way we had set it up was basically you would go in with a two-wheeler, go under a tray of items and go out. Now you were stacking the items on top of items. So now instead of being able to just go in, grab it and go, now you've got to start handling the trays and putting them in a manner to unload. The same thing when you were loading. You may have had somebody help you pick it up and put it on top, but now that you're unloading, you're out there by yourself. So we saw the times getting longer too. (Tr. 380-381).

3. June-August 2008: Paper Launch

55. In June 2008, Starbucks informed the Company that it would start supplying all of the paper products to the stores in its territory. Paper products previously were delivered to the Canton Facility via common carrier and then delivered to the stores on Company trucks. At that time, the Company delivered a weekly supply of paper products to one or two stores a day. (Tr. 383-385).

56. The Company began delivering paper products to all 325 stores on a daily basis in August 2008. (Tr. 383-384).

57. At this same time, the Company also became a regional distribution center of paper products for five (5) Starbucks distribution centers throughout the country. By August 2008, the Company was purchasing the paper products, warehousing them at the Canton Facility and distributing them to the distribution centers. (Tr. 279-281, 298-299, 303).

58. As the Company's delivery requirements increased, so did the problems with fitting loads onto the straight trucks.

59. Beattie testified about several instances where he had difficulty loading his truck with product:

> The first night I went in there I was delivering their paper products and they had a lot of paper products. They had probably somewhere in the neighborhood of 75 to 80 pieces, a box of all different sizes that I had broken down into I would say about six seven-foot, eight-foot high stacks, each weighing about 200 to 350 pounds, somewhere in that neighborhood.
>
> * * *
>
> Later on that week I came back on a particularly heavy night. They were my first store or my second store on my route and I had a small truck and my truck was loaded to the back. It was loaded so much I couldn't even open that back door I had to get in through the side door because it was jammed. (Tr. 47).
>
> When I couldn't fit all the stuff in the smaller truck I had to load the entire truck to full capacity, unload it myself, load the trailer and wait for them to call in the Class A driver. (Tr. 74).

60. Donohue and Driscoll both testified about numerous instances where a straight truck had to be unloaded and then loaded onto a tractor trailer because the load would not fit on the truck. (Tr. 326-333, 381-382, 419-427; R. Exh. 5(b)).

61. In those instances, the Class B Driver would have to ride along with the Class A Driver operating the tractor trailer to show the driver the route.

62. This meant that the Company was paying two drivers for work that one driver regularly performed. (Tr. 424).

63. Driscoll testified that the paper launch, along with the other delivery requirements and the increased number of stores the Company was serving, prompted the Company to phase out its use of straight trucks beginning in June 2008:

> Q: Okay. Did the increase in new products that the company was seeing, did it -- did the company make any effort -- excuse me. Did the company make any efforts to address these increased loads that you were now seeing?
>
> A: We noticed the problems, we saw the issues with loading and we started thinking about going to all tractor trailers.
>
> Q: Okay. And when -- can you give us a time period when you –

A: That was probably in late June when we were going over it, because at that time we were starting to see that we couldn't fit stuff on straight trucks. We were stripping straight trucks, and putting it on trailers and calling other drivers to go out on that. Trying to get the driver that only had a class B and take his freight and put it on another truck and put him on a different run. We were calling in class A drivers to go with the class B drivers, stripping their trucks out and loading a trailer so we could get the product out.

Q: Okay. Now what impact if any would the company going to tractor trailers would have had on your drivers?

A: <u>They all would have needed a class A license</u>. (Emphasis added).

* * *

Q: Okay. And did there come a time when the company decided to proceed in phasing out short straight trucks and moving towards tractor trailers?

A: Yes, in July.

Q: Okay. And what was the basis for that decision?

A: Starbucks had given us another piece of business they wanted us to do.

Q: Okay.

A: And it was very -- it was big. And we were having trouble right now with the amount of freight going on the trucks --

Q: And what --

A: -- the straight trucks.

Q: I'm sorry. And this piece of business spoke about, what is that?

A: Their paper products. (Tr. 381-383).

64. Driscoll further testified that during this time Starbucks had indicated that it might designate the Company as its regional supplier of pastry products and sandwiches. This would further increase the Company's delivery requirements. (Tr. 446-447).

65. On or about July 11, 2008, the Company notified all Class B Drivers that due to the increased delivery requirements, they had to obtain a Class A license by September 15, 2008. (ALJ Exh. 1).

66. The Company posted this July 11 Notice on the door to the dispatch office, where notices and other information for drivers were generally posted. The notice remained up through September 2008. (Tr. 213-214, 386-387, 604-605).

67. The July 11 Notice provided the Class B Drivers with the necessary information regarding the new Class A license requirement.

68. The July 11 Notice provides, in relevant part:

> In order to meet the delivery requirements of Starbucks, DPI will require all class B Drivers to obtain a Class A License by September 15, 2008.
>
> All class B Drivers should get their Class A Permits as soon as possible.
>
> All B Drivers should see me as soon as they obtain their permit. At this point they will be set up with a training program to gain the experience and training needed to obtain a Class A license.
>
> DPI will only employ Drivers with class A license after September 15, 2008. (ALJ Exh. 1; emphasis added).

69. The Company offered a training program "to allow class B Drivers to obtain a class A License at little cost to themselves." (ALJ Exh. 1; Tr. 387-388).

70. As part of the training program, the Company provided drivers with over-the-road training with its experienced Class A Drivers. (ALJ Exh. 1; Tr. 82-83).

71. The Company offered use of its tractor trailers to allow drivers to practice maneuvers that are tested on the Class A examination. (ALJ Exh. 1; Tr. 82-83, 87-88).

72. The Company also offered the use of a tractor trailer and a licensed Class A Driver to take the over-the-road portion of the test. The Company paid for the cost of the first test. (ALJ Exh. 1; Tr. 215-216).

73. All Class B Drivers were encouraged to speak with the Transportation Manager to work out the details. (ALJ Exh. 1).

74. To obtain their Class A CDL, Beattie, Glover and Adorno had to pass a written examination and successfully pass an over-the-road examination. (Tr. 611).

75. Beattie testified about what was required to obtain a Class A permit and license:

> Q. What did it entail studying for your Class A permit?
>
> A. Oh, just basically going over the stuff, materials, you know, provided by the registry on their website.
>
> Q. Is there another step after getting the permit to get a license?
>
> A. I also neglected to mention that in studying for my Class B I had to do things I would have to do for my Class A such as my air brakes and things like that and I'm sorry, counselor, I didn't hear your last question.
>
> Q. What is your understanding of what more you need to do to get the license?
>
> A. What I have to do is to correctly perform several different maneuvers under the direct supervision of the inspecting officer, a State Trooper, and then I have to successfully complete a road test with the same State Trooper. (Tr. 20-21).

76. The Company hired Carlos Marques in 2005 as a Class B Driver. (Tr. 600-601).

77. In April 2008, Marques started working on obtaining his Class A license and took advantage of Company's training program. (Tr. 602).

78. He testified that the reason he decided to get his Class A license was because:

> [T]he volume of the products increase and it couldn't fit in my truck and I don't want to change my route because I know all my customers and they know me and I like my route and if the circumstances I have to, you know, be changing my route

and eventually no route would be able to do Class B, anyway and I see myself out of the door. (Tr. 602-603).

79. Marques testified that the Company's program provided him with the necessary training to obtain a Class A license. (Tr. 388-389, 606-607; ALJ Exh. 1).

80. To obtain his Class A license, Marques first had to pass a written, on-line examination at the motor vehicle department to obtain his permit. (Tr. 611). Marques testified that a number of the Class A Drivers at the Company helped him study for the written question portion of the exam. (Tr. 607).

81. Marques obtained his permit in less than a week. Once he had his permit, Marques had to successfully perform certain maneuvers in a tractor-trailer and pass an over-the-road test conducted by a state trooper to obtain his Class A license. (Tr. 612-613).

82. On his days off, Marques practiced maneuvers in the Company parking lot and went on runs with experienced Class A Drivers where he got a chance to drive a tractor-trailer for part of a route. (Tr. 607).

83. Marques testified that because of the training he received at the Company, he felt prepared to take the over-the-road test in just over five (5) weeks. (Tr. 611-612).

84. Marques testified that it cost him a total of $90 to obtain his Class A permit and license through the Company's training program. (Tr. 612).

85. Marques indicated that it would have cost him only $50 if he did not have to retake the examination twice because of mechanical problems with the truck he used to take the over-the-road test. (Tr. 612, 388-389).

86. Marques stated that had there not been a problem with the truck, he would have obtained his license in May 2008, rather than July 2008. (Tr. 608-609).

D. Union Organizing

87. Beattie testified that on July 11, 2008, the Company called a mandatory meeting for all drivers to discuss the "rumors" management had heard about the Union, which he attended. (Tr. 27).

88. Beattie was asked at the hearing if he spoke at the July 11 meeting:

> Q: Did you speak at the meeting?
>
> A: I did.
>
> Q: Do you recall what you said at the meeting?
>
> A: Not verbatim, but the gist of my comments were that I was well aware that my particular route, Route 713 had drastically increased in the amount of work load just recently because in my estimation it was over my effort in organizing the union. I expressed my displeasure about that. (Tr. 27).

89. On cross-examination, however, Beattie testified that for the most part, he did not say anything at the July 11 Meeting. (Tr. 70-71, 93, 95).

E. Derek Mace Interferes With Employees During Working Time

90. In July 2008, Driscoll testified that a number of employees verbally complained to him about Mace interfering with their work. (Tr. 464, 466, 473-474).

91. Mace testified that he talked to "most everybody" about the Union, and handed out between 20 to 40 union authorization cards. (Tr. 105).

92. Driscoll asked some of the employees to put their complaints in writing. (Tr. 466).

93. Driscoll received written complaints from three employees: (i) Thomas Taft, *see* R. Exh. 17 (Tr. 106-107); (ii) Roy Blakely, *see* R. Exh. 18; and (iii) Mark Cinelli. (Tr. 464, 466).

94. Driscoll stated that none of the complaints that he received were from employees who worked in the milk cooler with Mace. (Tr. 474-475).

95. Driscoll received complaints from employees who worked in separate sections (or rooms) of the warehouse, including employees who picked products in areas far removed from where Mace worked. Mace had no reason to be in these areas during work time. (Tr. 473-478).

96. Driscoll also testified that on one occasion in late July 2008 he saw Mace riding a pallet jack "the length of the dock without any product on the pallet jack and go into Mr. Beattie's trailer for about 20 minutes to where I had to go out there and get him and get him back to work." (Tr. 474-475).

97. Driscoll conducted a follow up investigation. (Tr. 470-471, 474-475).

98. As part of his investigation, Driscoll spoke with a number of the employees who complained to obtain more details regarding their complaints. (Tr. 470-471, 474-476). Driscoll also testified that he was told by supervisors that they had received complaints about Mace as well. (Tr. 471, 472).

III. ARGUMENT IN SUPPORT OF EXCEPTION NO. 1

A. Respondent's Exception No. 1

The ALJ erred when he failed to "draw all those inferences that the evidence fairly demand[ed]" regarding the termination of Roger Beattie. The ALJ ignored the Respondent's legitimate business justification for its Class A license policy, misconstrued testimony from the Respondent's primary witness regarding the policy, and substituted his own business judgment for that of the Respondent's. *Allentown Mack Sales and Service, Inc. v. National Labor Relations Board*, 522 U.S. 359, 378 (1998).

B. Respondent Did Violate 8(a)(1) And 8(a)(3) When It Instituted The Class A License Requirement

The Board adopted the *Wright Line* test to balance the interests of employers and employees in mixed motive cases under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA"). *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980). The test gives the General Counsel the initial burden of making a *prima facie* showing sufficient to support an inference that protected conduct was a "motivating factor" in the employment action. *Id.* If that burden is satisfied, the employer must prove that it would have taken the same action in the absence of protected union activity. *Id.* In this case, the record is clear that the Respondent implemented its Class A license policy based on legitimate business needs. When Beattie failed to obtain his Class A license by the September 15 deadline, he (as well as Glover and Adorno) was offered a position in the warehouse. Beattie declined the position.

As a preliminary matter, there is no dispute that DPI had a legitimate business need for its Class B drivers to obtain Class A licenses. The ALJ cited *Structural Composites Industries*, 304 NLRB 729, 729-730 (1991) and *Weldun International*, 321 NLRB 733, 747 (1996) for the proposition that DPI needed to prove not only that it *could* have acted as it did, but that it *would* have done so absent protected union activity. (ALJ Decision, p. 29, ln. 37-43). The ALJ credited the Respondent's argument that given drastic changes in business, "most or all of [DPI's] drivers would need Class A licenses." (ALJ Decision, p. 29, ln. 29). Beattie admitted that straight trucks, the only trucks Class B Drivers could drive, were insufficient to make deliveries because of the "enormous" delivery surges in March 2008. (Tr. 69-70). Beattie testified that there were a number of times when he loaded his truck and then had to unload it because the product did not fit. On those

occasions, the Company had to call a Class A Driver and wait for him to arrive at the warehouse. Beattie and the Class A Driver would then load the tractor-trailer and Beattie would accompany the Class A Driver on the route to make the deliveries.[4] (Tr. 46-47, 74). In short, DPI had to pay two (2) employees to do the work of one. (Tr. 424).

C. The ALJ Erred When He Ignored The Respondent's Legitimate Business Justification For Implementing Its Class A License Policy When It Did And How It Did

The ALJ expressly found that in July 2008 the Respondent posted the following notice announcing that all drivers must have a Class A license by September 15, 2008:

> **In order to meet the delivery requirements of Starbucks,** DPI will require all Class B Drivers to obtain a Class A License by September 15, 2008. All Class B Drivers should get their Class A Permits as soon as possible.
>
> DPI values the contributions of its employees as such has come together with a Training Program to allow Class B Drivers to obtain a Class A License at little cost to themselves. DPI will provide training on routes by experienced Class A Drivers who will train the Class B drivers on all aspect of tractor trailer driving. DPI will make available equipment to be used should a Driver want additional practice when he is off duty. DPI will pay the cost of first road test. DPI will pay cost of addition test only if the equipment causes a failing grade on the first test. DPI will however provide tractor and trailer for additional tests if needed.
>
> All B Drivers should see me as soon as they obtain their permit. At this point they will be set up with a training program to gain the experience and training needed to obtain a Class A license.
>
> All Class B Drivers are encouraged to see me personally to work out the details. **DPI will only employ Drivers with Class A license after September 15, 2008.** (ALJ Exh. 1; emphasis added)

[4] The Class A Driver was not familiar with Beattie's route.

The ALJ held that "if the Respondent did not inform the drivers of the September 15 license deadline until early September [as the General Counsel alleged] it would lend credence to the General Counsel's contention that the Respondent imposed the new licensing requirement not because it hoped the Class B drivers would meet it, but so that Beattie could not meet it." (ALJ Decision, p. 16, ln. 13-16). The ALJ concluded that the Respondent presented "convincing evidence that it had a good reason for wanting to phase out the use of the smaller straight trucks in favor of the larger tractor trailer trucks" when it issued the notice in July 2008. (ALJ Decision, p. 29, ln. 27-29). The ALJ found that the period from July 11 to September 15 provided the drivers enough time to obtain their Class A licenses. (ALJ Decision p. 16, ln. 18-33).

Despite these findings, the ALJ held that Respondent imposed the Class A licensing requirements because of Beattie's union activity. The ALJ held that the Respondent failed to demonstrate "that it would have implemented the new requirement *when* it did and *how* it did if not for antiunion animus." The ALJ's findings, however, ignored the evidence that Respondent presented at trial as to why the Company implemented its Class A license policy when it did and how it did. *Allentown Mack*, 522 U.S. at 378.

The evidence was uncontroverted that DPI had a large increase in product it had to deliver in March of 2008. It also knew that it was going to have yet another surge of product in August, thus further burdening its delivery capabilities. (Tr. 339, 389, 399).

DPI knew that Class B drivers could obtain a Class A license in nine (9) weeks.[5] In fact, Marques, a former Class B driver, had gotten his permit and finished training in about 6 ½ weeks. (Tr. 611-612, 627). DPI's decision to implement the Class A policy on July 11 and set a September 15 deadline was interrelated. The Company had to move quickly to prepare for the August surge. That is why the policy was promulgated in July.

The ALJ put much weight on the fact that "[t]he Respondent has not explained how the September 15 deadline was arrived at...The Respondent has not tied the specific September 15 date to any occurrence unrelated to the union campaign." (ALJ Decision, p. 30, ln. 38-40). The record, however, reveals otherwise. Both Driscoll and Donahue testified consistently about the Company's reasons for imposing the September 15 deadline. (Tr. 339, 382-383, 389). Driscoll's testimony proceeded with the following:

> Q: [A]nd at this time, we're talking about when this increase in June of '08, who were the drivers that were driving the straight trucks or had class B licenses?[6]
>
> ...
>
> Q: [d]id you mention anything to [the Class B drivers] about getting Class A drivers licenses?
>
> A: Yes I did.

---

[5] Often in the record and the ALJ's Decision, the time period is referred to as "2 months." However, the exact amount of days between the July 11, 2008 announcement and the September 15, 2008 deadline was nine (9) weeks and three days. Because time is so crucial to the Respondent's case and the ALJ's rationale, the Respondent will refer to the time period as a nine (9) week period.

[6] This first question was included merely to show the time period, June 2008 or sometime thereafter prior to July 11, 2008.

Q: Okay. And did there come a time when the company decided to proceed in phasing out short straight trucks and moving toward tractor trailers?

A: Yes, in July.

Q: Okay. And what was the basis for that decision?

A: Starbucks had given us another piece of business they wanted us to do...And it was very – it was big. And we were having trouble right now with the amount of freight going on the trucks...the straight trucks.

Q: [A]nd this piece of business spoke about, what is that?

A: Their paper products. (Tr. 382-383).

A few moments later, Driscoll testified as follows:

Q: Did you give the Class B license holders a deadline to get their Class A?

A: September 15, 2008.

Q: Why September 15, 2008?

A: We knew the new [paper][7] product was going to be coming in August, and we were having problems with the straight trucks and getting the product on it. (Tr. 389).

Donahue testified as follows:

Q: [W]hy were you going to require class A licenses after (*sic*) [September] 15th?

[7] It is implied throughout this portion of the record that the "new product" referred to the new paper products that DPI would be delivering. The paper products were the only "new products" being discussed at this point.

A: Because of the amount of product that was coming in, it was determined that we would need class A trucks, tractor trailer trucks to make the deliveries. And at that time, we were not going to have any B trucks going out." (Tr. 339).

The ALJ ignored this critical testimony. Indeed, in light of this testimony, the "when" and "how" of DPI's policy makes complete sense. DPI was told by Starbucks in June of 2008 that it would drastically increase its demands on DPI by requiring it to deliver all of its paper products in August. (Tr. 382-383, 389). One month between hearing from Starbucks in June and expecting the increase in August, DPI implemented its policy to get its Class B Drivers trained and able to drive tractor trailers.

The ALJ did not discredit the testimony of Driscoll and Donahue. He simply ignored it. (ALJ Decision, p. 30, ln. 38-40). This was significant and violates the Supreme Court's requirement that the ALJ "draw all those inferences that the evidence fairly demands." *Allentown Mack*, 522 U.S. at 378. By failing to acknowledge the evidence of the August surge in paper products, the ALJ failed to draw all fairly demanded inferences. This constitutes grounds for reversal.

The Respondent's position is supported by the Board's decision in *Coyne International*, 326 NLRB 1187, 1193 (1998). There, the Board found that the respondent had "amply demonstrated" that its closure of its Charleston facility had been a "lawful decision...[to] reduce[] volume and...to [attempt] to reduce its expenditures." The Board reasoned that this was so "because of [the Charleston facility's] *drastically* reduced volume of business attributable to the loss of its largest customer DuPont." *Coyne International*, 327 NLRB at 1193 (emphasis added). In this case, Beattie testified how his workload had "*drastically* increased" as a result of an "enormous increase" in business from DPI's very

large and only customer, Starbucks. (Tr. 27, 69; emphasis added). Settled law requires, we submit, that DPI's employment action was lawful because while in *Coyne* the Board found it lawful that the company had shut down a whole building because of a drastic *decrease* in business, DPI implemented its policy because of drastic *increase* in business. (Tr. 388, 396-397).

The ALJ put much weight on the fact that bad economic conditions that have been around for quite some time cannot satisfy *We Can*'s "when" requirement. *We Can, Inc.*, 315 NLRB at 171; *Lear-Siegler, Inc.*, 295 NLRB 857, 859 (1989) (ALJ Decision, p. 29, ln. 34-37). The record evidence does not support this conclusion. While the demands on DPI's drivers increased *dramatically*, it happened gradually. The Board should look to not merely when the March surge began but when it began to be felt by the drivers. The March increase in business was phased in. (Tr. 301-302, 374-378,444). Beattie did not begin to notice the severity until late April or early May. (Tr. 66). This places the impact of the March surge far closer to July 11, 2008. This, coupled with Starbucks' announcement in June 2008 of the expected August 2008 surge in paper products, shows that DPI's economic situation was dramatically changing.

The economic conditions in the cases cited by the ALJ were materially different from those in this case. In *Lear-Siegler, Inc.*, the economic reasons provided for closing one plant were meager: claims that the facility was outdated, loss of work in another region and a new "philosophy" of "asset utilization." *Lear-Siegler*, 295 NLRB at 859. Unlike *Lear-Siegler*, the changes in DPI's business conditions are not disputed. Class B Drivers, with the exception of a few minor tasks, could no longer make deliveries on straight trucks.

(Tr. 46-47, 74). They were complaining to the Company about conditions and they were damaging increased amounts of product in transit. (Tr. 326, 380). Driscoll testified:

> We were starting to have more damaged items. Stores were calling in that they were putting high volume on trays and the trays were crushing in to the pastries, or pastries were crushed, sandwiches were crushed. We started seeing complaints like that, that we really hadn't seen. (Tr. 380).

In short, Class B drivers were no longer able to do their job.

In *We Can, Inc.*, *supra*, the problem was that the proffered economic justifications for firing eight (8) employees had been present for "quite some time." The Board held that the respondent failed to provide an explanation concerning why it fired the employees when it did. In this case, DPI's economic conditions were not static – they had not been around for "quite some time." They were dynamic and had been growing since March 2008. (Tr. 66). They were expected to and did surge upward again in August. (Tr. 382-383, 389, 399).

The ALJ also criticized DPI for not having documentation regarding its decision to implement the Class A license policy, citing *Weldun International*, 321 NLRB at 734 (finding layoff unlawful when employer failed to produce "any documentation <u>or credited testimony</u>" indicating that a layoff was planned prior to the filing of the representation petition) (emphasis added).[8] The fact that DPI made this decision *by phone* and *never* documented it has no bearing on the objective facts which are largely undisputed – business was dramatically increasing.

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[8] As noted earlier, the ALJ did not discredit the testimony of Donahue and Driscoll regarding the increase in business that the Company experienced.

The ALJ's suspicion of the timing of DPI's announcement hinges on his failure to consider a crucial event that took place during the July 11 meeting. *Allentown Mack*, 522 U.S. at 378. The ALJ was suspicious of DPI for announcing its Class A license policy on the same day that it conducted a meeting to dissuade its employees from unionizing. (ALJ Decision, p. 29, ln. 45-48). The ALJ stated:

> At the July 11 meeting, Beattie openly acknowledged his union activity and, as that meeting was ending, Driscoll pulled Beattie aside and orally notified him about the new requirement and the September 15 deadline. (ALJ Decision, p. 29, ln. 49-51).

According to the trial record, however, after Driscoll asked the employees why they wanted to unionize, Beattie replied that his work load "had drastically increased...just recently because in my estimation it was my efforts in organizing the union. I expressed my displeasure about that." (Tr. 27). After the meeting, Driscoll privately met with Beattie regarding his concerns. According to Beattie's testimony,

> Frank Driscoll pulled me aside and said that they were anticipating a much heavier work load and as a result we were going to have more stuff on the trucks and that he wanted everybody to obtain a Class A permit by September 15th because they were anticipating a big, big rush in the winter.[9] (Tr. 28).

The ALJ's characterization of the meeting is simply not supported by the record.

The ALJ also was suspicious of the timing because the Respondent did not establish the date when the Class A policy was initially decided and that DPI had not documented that decision. (ALJ Decision, p. 30, ln. 38-40). Failure to document the decision is irrelevant when the increase in business is a matter of record and the Company hired ten (10) Class A drivers in 2008. This, we submit, shows the need for Class A

[9] The ALJ specifically discredited Beattie's testimony that he was told that he had to obtain a Class A *permit*, and found that all drivers were told that they needed to obtain a Class A *license* by September 15.

drivers. The ALJ's suspicion regarding the timing of the announcement of the policy is belied by his specific finding that the period between July 11, 2008 and September 15, 2008 was "a short, but not necessarily, unworkable time period." (ALJ Decision, p. 16, ln. 18-20).

D. The ALJ Misconstrued Marques' Testimony Regarding The Time It Would Take A Class B License Holder To Obtain A Class A License

The ALJ also erred when he ignored and, perhaps even misunderstood, Carlos Marques' testimony. The Respondent subpoenaed Carlos Marques to prove that a Class B Driver *could* get a Class A license in nine (9) weeks. Marques was a Class B Driver who obtained his Class A permit in less than a week. (Tr. 627). He took advantage of the training offered by the Company. (Tr. 388-389, 606-607; ALJ Exh. 1). He was prepared to take his Class A test in less than 5½ weeks. (Tr. 611-612). The ALJ, however, summed up Marques' testimony as follows:

> [E]ven Marques did not succeed in upgrading within 2 months. The evidence showed that Marques already had his Class A permit in April and began training, but did not obtain his Class A license until July – over 2 months later. (ALJ Decision, p. 30, ln. 31-34).

This conspicuously omits both how quickly Marques obtained his permit (less than a week) and the *reason why* Marques was delayed in getting his license, namely, equipment failure due to no fault of his own. (Tr. 607-609, 627).[10]

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[10] Beattie, Adorno and Glover had testified that they had only been told to get their Class A *permits* by September 15, 2008. (ALJ Decision, p. 17, ln. 15-24). However, the ALJ discredited their testimony. He credited the testimony of Driscoll, Donahue and Marques that DPI's Class B drivers had been on notice that they needed to get their Class A *licenses*. (ALJ Decision, p. 16, ln. 26-28). This was likely in no small part due to how highly credible the ALJ considered Marques, a fellow DPI truck driver with Beattie, Adorno and Glover. (ALJ Decision, p. 17, ln. 32-35).

The ALJ's decision acknowledges that the period from July 11 to September 15 was sufficient. The decision states that the time period was "a short, but not necessarily unworkable time period." (ALJ Decision, p. 16, ln. 19-20). Despite this finding, he concluded that the nine (9) week period was "almost certain to result in the elimination (*sic*) [of] Beattie from his position as driver." (ALJ Decision, p. 30, ln. 24-25).

The ALJ, we submit, failed to make the fairly demanded inference from Marques' testimony that DPI's implementation of its policy was fair and achievable. It allowed more than nine (9) weeks for something that could be accomplished in less time. Further, the ALJ's statement that the policy was "almost certain to result" in Beattie's termination is undermined by the ALJ's previous statement that the time period was "short, but not necessarily unworkable." (ALJ Decision, p. 16, ln. 19-20).

E. The ALJ Erred When He Failed To Consider The Fact That DPI's Work Schedule Made It Easier For Class B License Holders To Obtain Their Class A Licenses By September 15

The ALJ further erred when he failed to consider the evidence which explained why DPI's schedule for drivers placed them in a good position to complete their training. *Allentown Mack*, 522 U.S. at 378. Namely, each driver works on a two-week cycle, working only four days one week and three days the next. (Tr. 322-323, 371-372). During their three (3) day workweek, the drivers work one of the nights that they are off as a "floater" and ride with another driver to learn a new route. (Tr. 371-372) . This allowed them six (6) days off over the course of a two (2) week period.

The ALJ referenced Steve Sullivan's testimony for the proposition that it takes 120-160 hours of training to obtain a Class A license. (ALJ Decision, p. 30, ln. 27-28; Tr. 637). He testified that his program recommended a person spend at least 20 hours a week

in training for 6-8 weeks. (Tr. 634-635). When asked whether he thought someone could accomplish this in 6-8 weeks while working full time, Sullivan stated "it would be almost impossible if they worked a full day, meaning...7:00 to 3:30 or 8:00-4:30 shift...We shut down at 4:30." (Tr. 635). DPI drivers, however, do not work a typical Monday through Friday schedule. On their cycle, they had ample opportunity to obtain their Class A licenses.[11]

The ALJ failed to make the necessary inferences fairly demanded by the work schedule of DPI drivers. *Allentown Mack*, 522 U.S. at 378. This clearly explains why a DPI Class B license holder would be able to obtain his Class A license by the September 15, 2008 deadline.

F. The ALJ Erred When He Substituted His Own Business Judgment For That Of DPI

In *Lampi LLC*, 327 NLRB 222, 222-223 (1998), the Board held that that it should not substitute its own views of what should merit discharge, but rather it should look to, among other things, "how [the Respondent] treated other employees with recorded incidents of discipline." Here, the ALJ held that "[t]he Respondent [did] not explain ...why it did not choose to allow Beattie, Adorno and Glover more time, in which to meet the new requirement." (ALJ Decision, p. 30, ln. 36-38). It is not, we submit, the ALJ's role to interject his business judgment for that of DPI. More importantly, the Respondent

[11] On a 9-week timetable, even if it took the drivers the maximum 160 hours to obtain their Class A licenses, they could do so working less than 8 hours a day on their days off. If it took them 120 hours, which is more likely considering their straight truck experience, they could obtain their licenses in 8 weeks working only 2 days a week at 7 ½ hours a day. This shorter length of time is more likely considering Marques' testimony. It is further likely considering Sullivan's own testimony that persons who have their Class B licenses have "less of a training curve" when obtaining their Class A licenses. (Tr. 634).

presented evidence which explained that the reason that it did not grant the drivers additional time was because the August surge had already begun.

IV. ARGUMENT IN SUPPORT OF EXCEPTION NO. 2

A. Respondent's Exception No. 2

The ALJ erred when he failed to require the General Counsel to establish a *prima facie* case that the discharges of Alex Adorno and Anthony Glover were motivated by a desire "to discourage union activity." *ACTIV Industries*, 277 NLRB 356, fn. 3 (1985).

B. The ALJ Erred When He Failed To Require The General Counsel To Provide Sufficient Evidence To Establish A *Prima Facie* Case That DPI Sought to Discourage Support of The Union.

The ALJ cited *Weldun International*, for the proposition that an employer violates the Act by laying off employees with no union affiliation if the layoff "was part of an effort to discourage employees from supporting the Union." (ALJ Decision, p. 29, ln. 13-16). As shown above, the Respondent's decision to implement the policy requiring all Class B Drivers to have a Class A license was legitimate. It was not adopted for anti-union reasons, but rather legitimate business reasons. Therefore, the ALJ's reliance on *Weldun International* is misplaced.

V ARGUMENT IN SUPPORT OF EXCEPTION NO. 3

A. Respondent's Exception No. 3

The ALJ erroneously relied on an improper hearsay ruling when he concluded that Mace was discharged because he had engaged in protected union activity.

B. The ALJ Erred When He Misapplied The *Burnup* Test By Neglecting Relevant Case Law and Erroneously Discrediting Evidence That Established Respondent's Honest Belief that Mace Had Engaged In Misconduct

Under *Burnup & Sims, Inc.* unfair labor practice claims are analyzed with a three (3) part test. 379 U.S. 21 (1964) (citing *Detroit Newspapers*, 342 NLRB 223, 228 (2004)). First, the General Counsel must establish that the employee in question was engaged in protected activity and that the employer took action against the employee because of it. *Detroit Newspaper*, 342 NLRB at 228. If the General Counsel is successful, the burden shifts to the employer to establish that it had an honest belief that the employee engaged in the misconduct for which he was lawfully discharged. *Id.* Third, if the respondent is successful, the burden shifts back to the General Counsel to "affirmatively establish that the employee did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge." *Id*; *Akal Security*, 354 NLRB No. 11 (2009).

The Board's statement of the relevant case law regarding establishing an "honest belief" in *Detroit Newspaper* is directly on point:

> The employer's burden of establishing its "honest belief" is no more than that and does not require it to prove that the striker did in fact engage in misconduct. It does, however, require more than the mere assertion that it had such a belief. There must be some specificity, linking particular employees to particular allegations of misconduct. **The employer's "honest belief" may be based on hearsay sources**, such as the reports of nonstriking employees, supervisors, security guards, investigators, police, etc. ...Whether or not the employer had an "honest belief" is judged on the basis of the evidence available to it when it took the disciplinary action and it need not attempt to get the striker's side of the story before doing so. (*Detroit Newspaper*, 342 NLRB at 228-229; emphasis added; citations omitted).

To establish its honest belief, the Respondent provided more than an assertion. Driscoll testified about numerous complaints that DPI had received from warehouse workers and supervisors that Mace had been disrupting them at work. (Tr. 463-464, 471, 473-474);

Axelson, Inc., 285 NLRB at 864 (holding that the ALJ improperly required the respondent to establish more than an "honest belief," where the ALJ implicitly required that the respondent prove that the employee in fact committed the alleged misconduct).[12] Even if the testimony was hearsay, it would have been sufficient. *Clougherty Packing Co.*, 292 NLRB at 1142 (holding that "[h]earsay reports by supervisors or coemployees" can form the basis to establish an honest belief). The oral complaints allowed the Respondent to meet its burden to establish what it knew when it suspended, investigated, and discharged Mace. *Giddings & Lewis*, 240 NLRB at 448 ("An employer's failure to interview the strikers prior to discharge or to attempt to obtain their versions of misconduct is not unreasonable when the employer...has relied upon the accounts of persons who witnessed the misconduct."); *Associated Grocers of New England*, 227 NLRB at 1207 (holding that a general manager's reliance on "eyewitness accounts, given by comparative strangers, without obtaining the strikers' stories," reasonably supported respondent's honest belief). The ALJ did not find these oral complaints credible because they were hearsay. This is directly contrary to Board precedent. Hearsay is sufficient to establish an honest belief. *Clougherty Packing Co.*, 292 NLRB at 1142. The Respondent's honest belief is to be judged based on what it knew at the time it took an employment action. *Giddings & Lewis*, 240 NLRB at 448; *Associated Grocers of New England*, 227 NLRB at 1207. Even if Mace's testimony did affirmatively discredit the Respondent's honest belief, that was something to be considered under the third step of the *Burnup-Detroit Newspaper* analysis.

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[12] Respondent also offered written complaints at trial. They are not the subject of this appeal.

The Respondent established its honest belief and satisfied its burden. The ALJ only found otherwise because he did not follow established Board precedent.

C. The ALJ Misapplied The *Wright Line* Test By Erroneously Discrediting Evidence As Hearsay That Supported Respondent's Legitimate Business Justification

The ALJ improperly excluded the oral complaints as hearsay (ALJ Decision, p. 5, ln. 42-43). The ALJ's rejection of the Respondent's argument that Mace was interfering with the work of others was predicated solely on his ruling that the oral and written complaints received by Driscoll were hearsay. The oral complaints, however, about Mace's interference were sufficient to have incited DPI to suspend, investigate, and discharge Mace even in the absence of protected union activity.

Driscoll's testimony about the oral complaints is not hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. (Fed. R. Evid. 801(c) (2009)).

This testimony was not offered to prove the truth of the matter asserted. Instead, it was offered to prove DPI's "notice and knowledge of the complaint[s]." (Tr. 465). This explained why Driscoll believed Mace was disrupting warehouse workers throughout DPI, why Mace was suspended, why DPI commenced an investigation of Mace during that suspension and why DPI ultimately discharged Mace on August 4, 2008. (GC Exh. 17).

The ALJ, however, excluded the oral complaints relied upon by Driscoll as hearsay. (ALJ Decision, p. 5, ln. 42-43).[13] He did not explain why he found these oral complaints to be hearsay. The record shows that the issue came up twice and both times

[13] Respondent does not object to the ALJ's exclusion of the written complaints.

the ALJ *admitted* oral complaints because they were *not* hearsay. They were admitted because they were offered not to prove the truth of the matter asserted but rather to show DPI's "notice and knowledge of the complaint[s]." (Tr. 465, 471-472).[14]

These oral complaints constituted evidence central to the Respondent's case. It included statements from six (6) employees (ALJ Decision, p. 8-9, 1-20, 26-43). Driscoll's testimony regarding employee Menderios is:

> I was trying to go to work, I was trying to get into the freezer and Derek [Mace] stopped me, he was talking to me about joining the Union...I went to go to the battery room, he followed me in there (ALJ Decision, p. 8-9, ln. 41-43, ln. 1-4; Tr. 550, ln. 19-25, ln. 1).

Driscoll obtained additional complaints during his investigation. One must assume that the ALJ also found this to be hearsay because he sums it up as Driscoll's "strained" portrayal of the facts. The ALJ's quoted complaints from the investigation speak for themselves.

- Driscoll testified that he talked to Baldack, a supervisor who reported that Mace "was in the pastry room, like four five times I had to get him out [of] there today."

- Driscoll testified (*sic*) [at] a meeting with Dominic Statkus, who he described as lead milk loader. Driscoll stated that: "[Mace is] always trying to organize something, he's not where he's supposed to be. I got to go looking for him. A lot of times he's on the trucks just talking to the drivers...Derek's holding...court in the pastry room a lot."

- Driscoll testified that he interviewed Marguerite McClellan, the lead person in pastries ... McClellan [told him], "Yeah, [Mace is] always over here...slowing down the line or having meetings in the pastry room...everyone was saying he was talking union."

- Driscoll also testified that he talked to Scott LaPlante, who assembled orders of high volume products...LaPlante [stated]: "Yeah, that guy's

[14] Notably, after the second objection, the General Counsel did make a continuing objection to the whole line of questioning (Tr. 471, ln. 20-22). But at no time on the record did the ALJ sustain that objection regarding the oral complaints, and at no place in his opinion does the ALJ explain why he found the oral complaints to be hearsay.

> always down here to try and drum up votes for something. I keep walking away from him, he keeps following me…I mean, the guy would follow you everywhere." (ALJ Decision, p. 10, ln. 1-17).

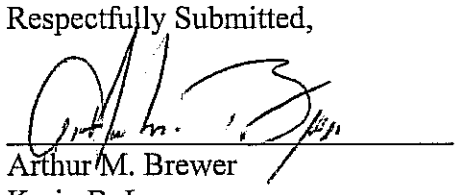
These complaints support the abundant cause that DPI had to discharge Mace, independent of any protected union activity. The complaints show that the Respondent, in fact, had an honest belief that Mace was disrupting work throughout the warehouse. These complaints also show that the Respondent had a legitimate business justification for discharging Mace.

The Respondent satisfied its burden. In *PHC-ELKO, Inc.*, 347 NLRB No. 123, the Board was faced with a letter that documented several reasons why an employee was fired, some lawful and some unlawful. The Board found that the respondent had met is *Wright Line* burden of proving that it would have discharged an employee even if only one of the reasons in the letter was lawful. *PHC-ELKO, Inc.*, 347 NLRB No. 123, slip op. at 4. Such was the case with Mace and his disruption of the work of others at the warehouse. (Tr. 464; Tr. 466; Tr. 473-474). Even if his dishonesty toward management regarding his union activity was not valid, the Respondent provided sufficient reason for his discharge: an honest belief that Mace was interfering with the work of others. Under *PHC-ELKO*, this satisfies Respondent's burden.

V. CONCLUSION

For the reasons set forth above, the Employer respectfully requests that the Board reject the ALJ's Recommended Decisions and Order on Objections.

Respectfully Submitted,



Arthur M. Brewer
Kraig B. Long
Shawe & Rosenthal, LLP
20 S. Charles St., 11th Fl.
Baltimore, MD 21202
(410) 752-1040
(410) 752-8861 (fax)

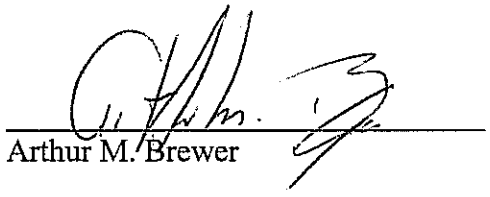
Counsel for Respondent

June 26, 2009

CERTIFICATE OF SERVICE

This is to certify that a copy of Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision and Recommended Order was served this 26th day of June, 2009, by electronic mail and First Class mail, postage prepaid upon:

Elizabeth M. Tafe, Esq.
Emily Goldman, Esq.
National Labor Relations Board, Region 1
10 Causeway Street, 6th Floor
Boston, MA 02222-1072
elizabeth.tafe@nlrb.gov



Arthur M. Brewer

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