

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

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

**RESPONDENT’S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S DECISION AND
RECOMMENDED ORDER**

The Respondent/Employer, DPI New England (hereinafter referred to as “DPI,” “Company,” or “Respondent”), in accordance with Section 102.46 of the Rules and Regulations of the National Labor Relations Board, hereby excepts to the Findings of Fact, Conclusions of Law, and the Recommended Remedy and Order of the Administrative Law Judge Bogas (hereinafter referred to as the “ALJ”) in the above-captioned matter. The Company’s Exceptions are set out below.¹

¹ References to the ALJ’s decision are in the form of “(ALJ Decision, p. ____, ln. ____).” The parties’ respective trial exhibits are referenced as follows: General Counsel’s as GC EX and Respondent’s as R EX.

Findings of Fact

II. Alleged Unfair Labor Practice

A. Background Facts

1. Exception is taken to the ALJ's Finding of Fact set forth on page 3, line 12. The ALJ failed to note that Beattie corroborated that delivery demands had "drastically increased." (Tr. 27, ln. 18-23).
2. Exception is taken to the ALJ's Finding of Fact set forth on page 3, lines 14-20. The ALJ failed to note that Starbucks had notified DPI of the August 2008 increase in deliveries in June 2008 or shortly thereafter. (Tr. 382-383, ln. 12-14, ln. 25, ln. 1-11).
3. Exception is taken to the ALJ's Finding of Fact set forth on page 3, lines 22-34. The ALJ failed to distinguish between Class A and Class B license holders. He focused only on distinguishing tractor-trailers from straight trucks.
4. Exception is taken to the ALJ's Finding of Fact set forth on page 3, lines 22-34. The ALJ failed to note that another consequence of drivers using straight trucks was that Starbucks was complaining to DPI about damaged products. (Tr. 326, ln. 14-18).

B. Union Campaign

5. Exception is taken to the ALJ's Finding of Fact set forth on page 4, line 5. The ALJ failed to note that Beattie had a Class B license.
6. Exception is taken to the ALJ's Finding of Fact set forth on page 4, line 15. The ALJ failed to note that Crane had a Class A license, even though he also drove a straight truck. (Tr. 136, ln. 12-13).
7. Exception is taken to the ALJ's Finding of Fact set forth on page 4, lines 30-35. The ALJ relied entirely on Mace's testimony regarding the grounds for his suspension and termination. He does not mention Driscoll's extensive testimony regarding the pre-suspension complaints regarding Mace set forth on page 8, lines 26-43 and page 9, lines 1-20. He also does not mention the results of the investigation of Mace, set forth on page 10, lines 1-17.
8. Exception is taken to the ALJ's Finding of Fact set forth on page 4, lines 31-37. The ALJ noted only that DPI employees routinely discussed non-work

matters and failed to note that all of the complaints about Mace had taken place well outside of his work area. (Tr. 477, ln. 3-25; Tr. 478, ln. 1-7; Tr. 548, ln. 5-12).

C. Management Meets with Employees

9. Exception is taken to the ALJ's finding on page 5, line 42, that "Driscoll's testimony is hearsay," with respect to pre-suspension complaints about Mace. Driscoll's testimony was not hearsay because it was not offered to prove the truth of the matter asserted, but only that DPI was on notice of complaints of Mace's misconduct. (Tr. 465, ln. 18-21; Tr. 471-472, ln. 14-25, ln. 1-4).
10. Exception is taken to the ALJ's finding on page 5, line 42, that "Driscoll's testimony is hearsay," with respect to pre-suspension complaints received by Driscoll about Mace. At trial the ALJ *admitted* such complaints *both times* when offered by the Respondent. (Tr. 465, ln. 10-11, ln. 18-20; Tr. 471-472, ln. 16-25, ln. 1-6).
11. Exception is taken to the ALJ's finding on page 5, lines 42-43, that Driscoll's testimony was "outweighed by Mace's credible contrary account."
12. Exception is taken to the ALJ's finding on page 5, line 43, that Mace's testimony was entirely "contrary" to Driscoll's testimony. The ALJ recounted on page 5, lines 37-38 and 44-50, only testimony that established that Mace was completing his own work. He assumed, contrary to the evidence, and merely asserted that he was not interfering with the work of others.

D. Mace Terminated

13. Exception is taken to the ALJ's Finding of Fact, set forth on page 7, lines 43-45. He failed to note that Driscoll had, on several occasions, seen Mace talking to DPI employees outside of his work area and had moved him back to his work area. (Tr. 553, ln. 14-19).
14. Exception is taken to the ALJ's Finding of Fact set forth on page 8, lines 5-7. The ALJ erroneously stated that "Driscoll could recount just one specific instance that he personally witnessed [of Mace's misconduct]," even though Driscoll had testified to seeing Mace outside of his work area talking to other DPI employees on several occasions. (Tr. 553, ln. 14-19).
15. Exception is taken to the ALJ's suspicion of Driscoll on page 10, line 1, for being "surprisingly specific" with his testimony, despite not having written

records. This suspicion was both improper and inconsistent with the ALJ's credibility finding regarding Mace on page 5, lines 43-44, where he found that Mace's credibility was "enhanced by the level of detail he provided."

16. Exception is taken to the ALJ's finding on page 10, lines 19-20, that "Driscoll strained to portray any information that he received about Mace's union activities in the light most favorable to the Respondent." The oral complaints about which Driscoll testified quite clearly were damaging for Mace, absent any "strained...portray[al]."
17. Exception is taken to the ALJ's finding on page 10, lines 25-27, that it was "somewhat implausible" that Driscoll had "received multiple complaints about Mace, given that he never warned Mace to discontinue such conduct prior to suspending/discharging him." In fact, Driscoll had stopped Mace from interfering with the work of others on multiple occasions prior to his suspension. (Tr. 553, ln. 14-19).
18. Exception is taken to the ALJ's finding on page 10, lines 46-48, that "the Respondent has not shown that Driscoll received complaints that Mace was...interfering with the work of...other workers." The evidence *did* show that Driscoll had received such complaints. (Tr. 463-464, ln. 18-25, ln. 1-9; Tr. 471 ln. 4-10).

E. Beattie, Adorno and Glover Discharged from Positions as Drivers

19. Exception is taken to the ALJ's Finding of Fact on page 14, lines 31-32. The ALJ failed to note that Beattie had not obtained his Class A permit until September 16, *after* the September 15 deadline (Tr. 24, ln. 1-2).
20. Exception is taken to the ALJ's Finding of Fact on page 15, line 3, where the ALJ failed to note that DPI had offered to rehire Beattie, Adorno and Glover should they obtain their Class A licenses. (Tr. 397, ln. 2-15). This was corroborated by Glover. (Tr. 223-224, ln. 23-25, ln. 1).
21. Exception is taken to the ALJ's Finding of Fact on page 15, lines 20-22, that Driscoll was "quite vague" when he said that the Class A license policy was decided as a collaborative effort. It *was* a collaborative decision decided by a group of people (Tr. 349, ln. 15-18), thus making it very likely to have been "a collaborative effort on all parts." Further, this testimony came out on cross-examination. Had the General Counsel thought it was "quite vague," it could have inquired further. It did not.

22. Exception is taken to the ALJ's misconstruing the facts on page 15, lines 35-37. The ALJ wrote that "[t]wo straight trucks are still regularly used." The ALJ failed to note that while these trucks are "regularly" used, they are used significantly less than a truck assigned to a normal delivery route (the relevant trucks in this case).

Analysis and Discussion

II. Section 8(a)(3)

A. Mace Suspended and Terminated

23. Exception is taken to the ALJ's legal finding on page 25, lines 1-5, that Driscoll's testimony regarding the oral complaints that he received was insufficient to establish Respondent's honest belief under *Burnup* because, in the ALJ's erroneous opinion, it was hearsay. It was not hearsay. Even if it was hearsay, it was sufficient to establish Respondent's honest belief under *Burnup*. *Clougherty Packing Co.*, 292 NLRB 1139, 1142 (1989).
24. Exception is taken to the ALJ's legal finding on page 25, lines 24-33, that the General Counsel has met its affirmative burden under *Burnup* to show that the misconduct underlying Respondent's honest belief never occurred. General Counsel's case amounted only to Mace's denial that the charges against him were true. *Clougherty Packing Co.*, 292 NLRB at 1142.
25. Exception is taken to the ALJ's legal finding on page 25, lines 35-52, that Mace's conduct was not sufficiently egregious to warrant his suspension and dismissal. It was.
26. Exception is taken to the ALJ's reliance on the erroneous factual finding on page 25, lines 40-41, that Respondent had not notified Mace that his behavior was unacceptable prior to his suspension. It had. (Tr. 553, ln. 14-19).
27. Exception is taken to the ALJ's legal finding on page 25, lines 50-52, that "under the *Burnup* analytical framework, the Respondent unlawfully suspended...Mace in violation (*sic*) section of 8(a)(3) and (1)." (Emphasis added).
28. Exception is taken to the ALJ's legal finding on page 25, lines 50-52, that "under the *Burnup* analytical framework, the Respondent unlawfully...discharged Mace in violation (*sic*) section of 8(a)(3) and (1)." (Emphasis added).

29. Exception is taken to the ALJ's reliance on erroneous factual findings on page 26, line 38-39, that Mace did not interfere with the work of others. He did interfere with the work of others. (ALJ Decision, p. 8, ln. 26-43; p. 9, ln. 1-20; p. 10; ln. 1-17).
30. Exception is taken to the ALJ's legal finding on page 26, lines 39-41, that Respondent did not have a good faith belief that Mace had interfered with the work of others because, *inter alia*, the oral complaints testified to by Driscoll were hearsay. The oral complaints received by Driscoll prior to Mace's suspension were not hearsay because they were not offered to prove the truth of the matter asserted. They established that DPI was on notice that there had been complaints, justifying Mace's suspension and investigation. (Tr. 465, ln. 18-21; Tr. 471-472, ln. 14-25, ln. 1-4).
31. Exception is taken to the ALJ's legal finding on page 26, lines 42-58, that Mace's discipline was out-of-proportion to his offenses. It was not. The ALJ substituted his business judgment for that of the Respondent.
32. Exception is taken to the ALJ's legal finding on page 26, lines 50-52, and page 27, line 1, that "Respondent discriminated in violation of Section 8(a)(3) and (1) on July 24, 2008, when it suspended Mace...because of Mace's union and concerted activities..."
33. Exception is taken to the ALJ's legal finding on page 26, lines 50-52, and page 27, line 1, that "Respondent discriminated in violation of Section 8(a)(3) and (1) on July 24, 2008, when it suspended Mace...in order to discourage [union and concerted] activities."
34. Exception is taken to the ALJ's legal findings on page 26, lines 50-52, and page 27, line 1, that "Respondent discriminated in violation of Section 8(a)(3) and (1)...on August 4, 2008, when it converted [Mace's] suspension into a termination, because of Mace's union and concerted activities...."
35. Exception is taken to the ALJ's legal findings on page 26, lines 50-52, and page 27, line 1, that "Respondent discriminated in violation of Section 8(a)(3) and (1)...on August 4, 2008, when it converted [Mace's] suspension into a termination...in order to discourage [union and concerted] activities."

B. Discharge of Adorno, Beattie and Glover

36. Exception is taken to the ALJ's failure to properly apply Board precedent on page 29, lines 4-7, where the ALJ cited *Pillsbury Chemical Co.*, 317 NLRB 261 (1995) for the proposition that "the employer's antiunion motivation is

still unlawful where that employee was laid off to mask the antiunion motivation of actions against the employer's real target."

37. Exception is taken to the ALJ's failure to properly apply the *Wright Line* burden to the General Counsel on page 29, lines 4-7.
38. Exception is taken to the ALJ's legal finding on page 29, line 26, that the Respondent failed to meet its *Wright Line* defensive burden. The Respondent met its burden.
39. Exception is taken to the ALJ's legal finding on page 29, lines 29-35, that the Respondent failed to prove by a preponderance of the evidence that it would have implemented its Class A license policy *when* it did and *how* it did, absent protected union activity. The Respondent met its burden.
40. Exception is taken to the ALJ's failure on page 29, line 49, to note that at the July 11, 2008 meeting, Beattie did not merely "openly acknowledge his union activity," but also informed DPI that one of his grievances was his increased workload. (Tr. 27, ln. 18-23).
41. Exception is taken to the ALJ's legal finding on page 29, line 51, that the timing of DPI's announcement of the Class A license policy was suspicious. It was not suspicious. The policy was fair and able of being completed as Marques' testimony irrefutably established. (Tr. 627, ln. 2-6; Tr. 611-612, ln. 12-25, ln. 1).
42. Exception is taken to the ALJ's finding on page 30, lines 5-7, that there was no legitimate explanation for the Class A license policy's time of announcement on account of the fact that Donahue did not provide one. Beattie implicitly provided the answer for the timing by testifying that he had complained about the increased demands on straight truck drivers at the July 11 meeting. (Tr. 27, ln. 18-23). This explains why Driscoll brought up the policy after the meeting: to help remedy Beattie's problem without resorting to a union.
43. Exception is taken to the ALJ's failure on page 30, lines 5-7, to draw an inference reasonably demanded by the facts, as the Supreme Court required in *Allentown Mack Sales and Service, Inc. v. National Labor Relations Board*, 522 U.S. 359, 378 (1998), that Driscoll had discussed with the Beattie the new licensing requirement after the July 11 meeting because it was *directly related* to Beattie's concern that his straight truck could no longer effectively be used to complete his deliveries.

44. Exception is taken to the ALJ's legal finding on page 30, lines 8-14. The ALJ relied on case law regarding layoffs for the proposition that a "layoff may be found unlawful where [the] employer failed to produce any documentation or credited testimony indicating that a lay off was planned" prior to employees engaging in protected union activity. *Weldun International*, 321 NLRB 733, 734. DPI did not engage in a layoff.
45. Exception is taken to the ALJ's finding on page 30, lines 16-19, that changes in delivery demands on DPI did "not explain the timing of the new requirement." The ALJ omitted from his analysis the announcement by Starbucks in June 2008 that it would significantly increase its demands on DPI by August of 2008 (Tr. 382-383, ln. 12-14, ln. 25, ln. 1-11; Tr. 389, ln. 19-25). The ALJ also failed to consider Beattie's exact statements during the July 11 meeting preceding DPI's individual notification of Beattie. (Tr. 27, ln. 18-23).
46. Exception is taken to the ALJ's finding on page 30, lines 23-25, that DPI's deadline for its Class B drivers to obtain Class A licenses was "extremely short...[and] almost certain to result in the elimination of Beattie from his position as driver," both because it is wrong and because it contradicts the ALJ's statement earlier in his decision on page 16, line 19, that the deadline was "short, but not necessarily unworkable."
47. Exception is taken to the ALJ's failure on page 30, lines 21-44, to comply with the Supreme Court's requirement in *Allentown Mack Sales and Service, Inc. v. National Labor Relations Board*, 522 U.S. at 378 to make inferences fairly demanded by the fact that DPI drivers had 6 days off over the course of 2 weeks (Tr. 322-323, ln. 23-25, ln. 1; Tr. 371-372, ln. 20-25, ln. 1-5) when he considered whether it was fair for the drivers to complete 120-160 hours of training in under 9 weeks. Had he done so, he would have at least considered the fact that DPI drivers do not work a typical work week and that even if they trained only on their days off, it would take them less than 9 weeks to complete their training working less than 6 hours a day. Further, if it took them 120 hours (which is far more likely given their straight truck experience), it would take them only 8 weeks working 7.5 hours a day working only 2 days a week (giving them a day off, and over a week not to train). This should also have been considered in light of Marques' ability to complete the training in 6 ½ weeks (Tr. 627, ln. 2-6; Tr. 611-612, ln. 12-25, ln. 1), which indicates that the 120-160 hour recommendation was unrealistically high.
48. Exception is taken to the ALJ's failure on page 30, lines 31-34, to comply with the Supreme Court's requirement in *Allentown Mack Sales and Service, Inc. v. National Labor Relations Board*, 522 U.S. at 378 that he draw fairly demanded inferences from all of the facts. He failed to make a fairly

demanded inference that Marques would have obtained his Class A license in 6 ½ weeks had it not been for equipment failure, and that thus Beattie, Adorno and Glover could have done so as well.

49. Exception is taken to the ALJ's incorrect statement on page 30, lines 36-37, that Respondent did not explain how the September 15 deadline was determined. The Respondent explained this through its testimony that it anticipated a huge surge in delivery demands by August 2008, a few weeks after July 11. (Tr. 382-383, ln. 25, ln. 1-11; Tr. 389, ln. 19-25; Tr. 339, ln. 7-12; Tr. 399, ln. 21-22). This policy allowed Respondent to continue employing Beattie, Adorno and Glover (Tr. 396-397, ln. 23-25, ln. 1-15), while also enabling them to get the necessary training to obtain Class A licenses. (Tr. 627, ln. 2-6; Tr. 611-612, ln. 12-25, ln. 1).
50. Exception is taken to the ALJ's unlawful speculation on page 30, lines 37-38, that DPI should have granted Beattie, Adorno and Glover extra time to obtain their Class A licenses. This is not required by Board precedent, *In re Jewish Home for the Elderly*, 2003 WL 22829143, *adopted and modified by* 343 NLRB 1069, *enfd.* 174 Fed. Appx. 631(2nd Cir. 2006); *NLRB v. Chugach Management Services, Inc.*, 163 Fed. Appx. 812; *Lampi LLC*, 327 NLRB at 222-223.
51. Exception is taken to the ALJ's unwarranted inference on page 30, lines 40-44, that DPI could have implemented its Class A license policy as early as April. Even though the drastic delivery increases began in March, they were felt only gradually, with Beattie only noticing them toward the end of April, or at the beginning of May. (Tr. 66, ln. 22-23).
52. Exception is taken to the ALJ's legal finding on page 30, lines 46-48, that "Respondent failed to meet its burden showing that it would have taken the same action it did, when it did, in the absence of antiunion motivation." Respondent met its burden.
53. Exception is taken to the ALJ's legal finding on page 30, lines 50-51, that "Respondent discriminated in violation of section 8(a)(3) and (1) by imposing the new licensing requirement... [on] Beattie." (Emphasis added).
54. Exception is taken to the ALJ's legal finding on page 30, lines 50-51, that "Respondent discriminated in violation of section 8(a)(3) and (1) by...discharging...Beattie." (Emphasis added).
55. Exception is taken to the ALJ's legal finding on page 30, lines 50-51, that "Respondent discriminated in violation of section 8(a)(3) and (1) by imposing

the new licensing requirement...[on] Adorno...and Glover.” (Emphasis added).

56. Exception is taken to the ALJ’s legal finding on page 30, lines 50-51, that “Respondent discriminated in violation of section 8(a)(3) and (1) by...discharging Adorno...and Glover.” (Emphasis added).

Conclusions of Law

Mace

57. Exception is taken to the ALJ’s Conclusion of Law set forth on page 31, lines 16-17, that “[t]he Respondent violated Section 8(a)(3) and (1) of the Act: on July 24, 2008, when it suspended Mace...[allegedly] because of Mace’s union and concerted activities....”
58. Exception is taken to the ALJ’s Conclusion of Law set forth on page 31, lines 16-17, that “[t]he Respondent violated Section 8(a)(3) and (1) of the Act: on July 24, 2008, when it suspended Mace...[allegedly]...in order to discourage such activities.” The ALJ never analyzed this issue of discouraging union activities in his decision regarding Mace.
59. Exception is taken to the ALJ’s Conclusion of Law set forth on page 31, lines 16-17, that “[t]he Respondent violated Section 8(a)(3) and (1) of the Act...on August 4, 2008, when it converted [Mace’s] suspension into a termination, [allegedly] because of Mace’s union and concerted activities....”
60. Exception is taken to the ALJ’s Conclusion of Law set forth on page 31, lines 16-17, that “[t]he Respondent violated Section 8(a)(3) and (1) of the Act...on August 4, 2008, when it converted [Mace’s] suspension into a termination, [allegedly]...in order to discourage [union and concerted] activities.” The ALJ never analyzed the issue of discouraging union activities in his decision regarding Mace.

(Emphasis added throughout).

Beattie

61. Exception is taken to the ALJ’s Conclusion of Law set forth on page 31, lines 20-22, that “[t]he Respondent violated Section 8(a)(3) and (1) of the Act...when it imposed the new licensing requirement...[on] Beattie...[allegedly] because of [Beattie’s] union and concerted activities....”

62. Exception is taken to the ALJ's Conclusion of Law set forth on page 31, lines 20-22, that "[t]he Respondent violated Section 8(a)(3) and (1) of the Act...when it imposed the new licensing requirement...[on] Beattie...[allegedly]...to discourage [union and concerted] activities." The ALJ never analyzed the issue of discouraging union activities in his decision regarding the application of the Class A license policy to Beattie.
63. Exception is taken to the ALJ's Conclusion of Law set forth on page 31, lines 20-22, that "[t]he Respondent violated Section 8(a)(3) and (1) of the Act...when it...discharged...Beattie...on September 15, 2008, [allegedly] because of [Beattie's] union and concerted activities...."
64. Exception is taken to the ALJ's Conclusion of Law set forth on page 31, lines 20-22, that "[t]he Respondent violated Section 8(a)(3) and (1) of the Act...when it...discharged...Beattie...on September 15, 2008, [allegedly]...in order to discourage [union and concerted] activities." The ALJ never analyzed the issue of discouraging union activities in his decision regarding Beattie's discharge.

(Emphasis added throughout).

Adorno and Glover

65. Exception is taken to the ALJ's Conclusion of Law set forth on page 31, lines 20-22, that "[t]he Respondent violated Section 8(a)(3) and (1) of the Act...when it imposed the new licensing requirement...[on] Adorno...and Glover...[allegedly] because of [Beattie's] union and concerted activities...."
66. Exception is taken to the ALJ's Conclusion of Law set forth on page 31, lines 20-22, that "[t]he Respondent violated Section 8(a)(3) and (1) of the Act...when it imposed the new licensing requirement...[on] Adorno...and Glover...[allegedly]...in order to discourage [union and concerted] activities."
67. Exception is taken to the ALJ's Conclusion of Law set forth on page 31, lines 20-22, that "[t]he Respondent violated Section 8(a)(3) and (1) of the Act...when it...discharged Adorno...and Glover on September 15, 2008, [allegedly] because of [Beattie's] union and concerted activities...."
68. Exception is taken to the ALJ's Conclusion of Law set forth on page 31, lines 20-22, that "[t]he Respondent violated Section 8(a)(3) and (1) of the Act...when it...discharged Adorno...and Glover on September 15, 2008, [allegedly]...in order to discourage [union and concerted] activities."

(Emphasis added throughout).

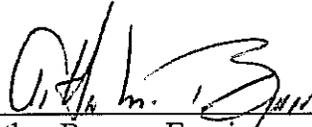
Recommended Remedy

69. Exception is taken to the Remedy as set forth on page 31, lines 31-36.

Proposed Order

70. Exception is taken to the proposed Order set forth on page 31, lines 25-44, and page 33, lines 9-30.

Respectfully submitted,



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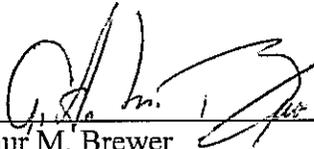
June 26, 2009

Counsel for the Respondent

CERTIFICATE OF SERVICE

This is to certify that a copy of Respondent's 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:

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