

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

DPI NEW ENGLAND

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25

CASE 1-CA-44833

JD-22-09

**GENERAL COUNSEL'S ANSWER TO RESPONDENT'S EXCEPTIONS AND
BRIEF IN SUPPORT OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. General Counsel's Answers to Respondent's Specific Exceptions

Pursuant to Section 102.46(d)(2) of the Board's Rules and Regulations, Counsel for the General Counsel files the following Answering Brief to Respondent's Exceptions and her Brief in Support of the Administrative Law Judge's Decision.¹

Respondent's repeated assertions in its Exceptions and Brief that the Administrative Law Judge failed to consider certain facts in his findings and conclusions are simply not supported by the Decision or by the overall record.² For the most part, Respondent excepts to the Administrative Law Judge's credibility findings and his conclusions based on those findings. As set forth below, the Judge fully considered all the facts in a reasoned and impartial manner and made appropriate conclusions based on his factual findings. As the General Counsel believes necessary, Respondent's stated exceptions are addressed specifically below. Respondent's arguments are addressed in General Counsel's Brief in Support of the Judge's Decision.³

¹ Certain of Respondent's exceptions (Exceptions 3, 5, 7, 11, 15, 16, 22, 23 to 25, 27 to 29, 31 to 39, 44, 46, 48, and 52 to 70) should be disregarded, because they do not meet the Board's minimum standards of Sec. 102.46(b)(1)(iii) of the Board's Rules and Regulations, in that Respondent failed to reference specific support in the record for these exceptions in either its Exceptions or its Brief in Support of Exceptions. *BCE Construction Inc.*, 350 NLRB 1047, 1047-1048 (2007); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, fn.1 (2005), *enfd.* 456 F.3d 265 (1st Cir.2006). The substantive lack of merit of these exceptions is addressed in this Answering Brief.

² In its Brief in Support of Exceptions, Respondent makes numerous misstatements of fact and cites references that do not support these factual assertions. For example: At paragraph 10, page 3 Respondent erroneously asserts that drivers work four days one week and three days the next, and the transcript references do not support this contention; at paragraph 22, page 5, Respondent's assertions about the reasons for Mace's discharge are not supported by the transcript reference; Respondent's inference that 10 drivers were hired "as a result" of the so called "March launch" is not supported by the transcript references of paragraph 42, page 6; and Respondent baldly claims his client made a statement unsupported by the transcript reference at paragraph 94, page 17. Moreover, there is no support in the record for Respondent's repeated assertions in its brief and exceptions that an August business "surge" was announced by Starbucks in June. See, e.g. Exception 44 and page 23 of Respondent's Brief, citing the trial transcript at pp. 382-383, and 389, which does not support this factual assertion. Thus, to the extent Respondent's factual characterizations in it Brief are inconsistent with the factual findings in the ALJD, they should be disregarded as unreliable representations.

³ In this brief, "GC." is used to designate General Counsel's exhibits; "R." is used to designate Respondent's exhibits; "Tr. " is used to designate pages of the official transcript; and "ALJD" or Judge's Decision is used to designate the Administrative Law Judge's Decision.

The General Counsel relies on the findings of fact, legal analysis and conclusions in the Judges Decision,⁴ and, therefore, the facts of the case will not be restated herein except when necessary to address Respondent's specific Exceptions.

A. Respondent's Exceptions to Factual Findings in the Judge's Decision lack merit, and should be rejected.

As set forth below, Respondent's specific Exceptions⁵ can be grouped as follows:

1) criticism of immaterial or inconsequential semantics regarding facts not in dispute or that are otherwise clearly set out in the Decision, and which were fully considered by the Judge;

2) exceptions that are not supported by the record; 3) exceptions to the Judge's well reasoned credibility determinations; and 4) exceptions to the Judge's appropriate application of the hearsay rule and hearsay exceptions.

1) Exceptions 1, 3, 5, 6, 19 and 44: Facts that are not in dispute or otherwise set out in the Decision.

Regarding these exceptions, Respondent makes immaterial and inconsequential criticism of the Judge's language choice regarding facts that are not in dispute or that are otherwise set forth in the Decision, and which were fully considered by the Judge.

Regarding Exception 1, the complaint Beattie made at Respondent's July 11 meeting is set forth accurately in the Judge's factual findings (ALJD 6:4-6), and is fully considered by the

⁴ In Cross-Exceptions, Counsel for the General Counsel respectfully excepts to only two narrow issues: 1) The Judge's apparent inadvertent failure to identify a specific remedy in the Remedy Section for the Sec. 8(a)(3) and (1) violation he clearly found regarding Rick Crane's discipline, and from which he recommended appropriate relief in the recommended order and notice; and 2) The Judge's failure to recommend in the Remedy Section that the Board order backpay be calculated using a compound interest formula, as set forth in the General Counsel's Brief in Support of Cross-Exceptions.

⁵ Respondent lists 70 specific Exceptions in its Exceptions document, but then refers to three comprehensive Exceptions in its Brief in Support of Exceptions. Here, when referring to the comprehensive exceptions in the brief, I will call them, e.g., "Exception No. 1 on Brief" and when referring to those in the Exceptions document, Exception 1, 2, 3, etc.

Judge as evidence of knowledge of union activity in his *Wright Line*⁶ analysis (ALJD 28:31-34), consistent with Beattie's testimony (Tr. 27:18-23). Regarding Exceptions 3, 5, 6, there is no dispute that Beattie had a Class B license and Crane had a Class A license (ALJD 14:27-31; 11:50-51), or that to drive a tractor trailer, employees needed a Class A license, but they could drive straight trucks with only a Class B license (ALJD at 15:27-37).

Regarding Exception 19, the Judge accurately finds that Beattie did not work on September 15, and that he informed Respondent he had obtained his Class A permit the following day, which was also the day he was told he would be terminated, September 16 (ALJD 19:41-47; Tr. 24:1-25). As Respondent admits, and the Judge finds, that it imposed the rule requiring drivers to have their Class A licenses by September 15, the actual date Beattie obtained his permit is immaterial to the Judge's reasoning that this rule was unlawful (ALJD 17:26-28).

Regarding Exception 44, the unlawfulness of Respondent's termination of the Class B Drivers' employment is not affected by whether it is characterized as a lay off or a discharge: It turns on Respondent's unlawful motive. Therefore, the Judge's consideration of Board precedent regarding lay offs in his analysis of Respondent's unlawful motive is appropriate. Moreover, Respondent has presented no cites to record evidence in support of its Exception 44 distinguishing its acts in any material way from a lay off.

2) Exceptions 2, 4, 20, 22, 41, 45, 46, 47, 48, 50 and 51: Exceptions not supported by the record.

These exceptions are not supported by the record as a whole; they rely on exaggerated interpretations of the facts or outright misstatements of the facts. Moreover, the Judge arguably made implicit credibility determinations contradicting these propositions, based on the credibility

⁶ *Wright Line, a Division of Wright Line, Inc.*, 252 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

determinations he expressly made when he fully considered the record regarding the material issues.

Regarding Exceptions 2, 45 and 49, Respondent's repeated assertions that the record supports its contention that Starbucks announced in June 2008 that there would be some kind of a business "surge" in August 2008, is simply not true. There is no such support in the record. Significantly, the trial transcript pages Respondent cites in its Exceptions and Brief for this contention do not support or even address it (Tr. 382-383, 389). Therefore, Respondent's attempt to justify its September 15 deadline for the drivers to obtain Class A licenses utterly fails.

In Exception 4, Respondent misrepresents the facts. The transcript reference it provides clearly indicates that it was Respondent's drivers not its client Starbucks, who were complaining about the capacity of the trucks (Tr. 326: 14-18). This citation has nothing to do with damaged products, as Respondent avers.

Here, again, Respondent misrepresents the record in Exception 20. The transcript citation provided by Respondent (Tr. 397:2-15) to support its contention that the Judge failed to find it had offered to rehire drivers Beattie, Glover and Adorno does not support that contention. The record shows, instead, that Respondent told the drivers they could reapply after they got their Class A licenses. Clearly, being offered a job and being told one can reapply for a job, are two very distinct personnel actions (Tr. 398:106).

Respondent provides no record citation to support its contention in Exception 22 that the Judge misconstrues the facts; however, there is support for the Judge's findings in the record (Tr. 353).

Respondent argues in Exceptions 41, 46 and 49, that the Judge came to an incorrect conclusion regarding whether the rule gave the Class B drivers about two months (from July 11

to September 15) to get Class A licenses was neither reasonable nor legitimate. This exception should be rejected, because the Judge properly considered all the relevant evidence to conclude the time period was "an extremely short deadline" (ALJD 30:20-25). It is true that, the Judge also characterizes the time period as perhaps a "short but not necessarily unworkable" time period (ALJD 16:18-20). However, a fair reading of the whole record and the full decision does not suggest or require any different result. As set forth in the Decision, the Judge considers the various accounts of how long it takes to learn to drive a tractor trailer, and consequently, how long it takes to earn a Class A license. He considers the experience of driver Marques; he considers the experience of driver Crane; he considers the training program offered by Respondent; he considers various reports about the cost of private driving schools, and the representations by the Teamster's Director of Training about how their school curriculum is structured. The Judge considers that the drivers work full-time, and that it may take some time to get a permit, although, that process is somewhat mechanical, and further observes, the deadline appeared to be designed so that the drivers would almost certainly fail to meet it. Respondent's frustration that the Judge found that, based on all the circumstances, a two-month time period was an unreasonably short deadline for the drivers to obtain their Class A licenses, is not itself evidence that the time period was reasonable or that the Judge erred.

Regarding Exception 47, the Judge clearly did consider that Respondent's drivers drove full-time, and that their schedules were 4 days per week (ALJD 6:46-51).

Regarding Exception 48, the Judge considered that Marques presented himself to take the Class A license twice before he obtained the license, and that he was unable to complete the test due to equipment failure (ALJD 16:26-33). He further considered that Marques did not ultimately get his license until over two months after he got his permit (ALJD 16:33-35; 30:32-

33). Respondent wants the Judge to conclude that Marques was able to pass the test in only six and one-half weeks based on Marques' representations that he was ready then. However, the record does not require such a conclusion. Many people do not pass tests they think they are ready to accomplish. Judge Bogas appropriately assessed that Respondent's evidence that Marques obtained his license in July, when he obtained it in April, supports his conclusion that September 15 deadline was a daunting obstacle for the Class B drivers, and was not shown by Respondent to have been established with legitimate business purposes (ALJD 30:29-47).

Respondent contends in Exception 50 that Judge Bogas engaged in " 'unlawful speculation' ...that DPI *should have* granted Beattie, Adorno and Glover extra time to obtain their Class A licenses." (emphasis added). However, by this contention, Respondent misrepresents the Judge's findings. As part of the Judge's reasoning that ultimately leads to the determination that Respondent did not meet its *Wright Line* defense, the Judge notes that, "Respondent has not explained ... why it did not choose to allow Beattie, Adorno and Glover more time, or an extension of time, in which to meet the new requirement." Here, the burden is on Respondent under *Wright Line* to show it would have imposed the rule, as it did, even in the absence of employees' protected activity. Judge Bogas, by this comment, is merely observing that, had Respondent explained this issue, it might have bolstered its case; but, indeed it did not do so. Of course, Respondent is not required to explain anything; however, if Respondent wishes to convince the Judge and the Board, that it met its *Wright Line* burden, it must present evidence in support of its defense, and it would be helpful if it explained why it acted as it did. Here, as part of a complete analysis, the Judge appropriately points out an absence of evidence on a particular point. And, there is nothing speculative or unlawful about this analysis.

Similarly, in Exception 51, Respondent contends that the Judge's finding is unwarranted regarding Respondent's decision to impose the new licensing deadline being made as early as April. However, this contention cannot be sustained on the record. Significantly, the finding is based on testimony of Respondent's own witness, Donohue (Tr. 349:1-10). It is disingenuous at best for Respondent to urge the Judge is "unwarranted" in finding a fact when that fact is directly supported by admissions by Respondent's own witnesses.

3) Exceptions 7, 8, 11, 12, 13, 14, 15, 16⁷, 17, 18, 21, 23, 25, 26, 29 and 31: Exceptions to credibility determinations.

These exceptions find fault with the Judge's credibility determinations which discredit, in part, the testimony of Respondent's witnesses Driscoll and Donohue.⁸ It is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950). Contrary to Respondent's assertions, Judge Bogas made carefully reasoned considerations in making the credibility determinations complained of in these Exceptions, and the exceptions should be rejected. The Judge properly considered, *inter alia*, the overall circumstances, witness demeanor, consistency and specificity of testimony, all appropriate factors in making such credibility determinations. There is no basis for disturbing these findings. *Standard Drywall, supra*.

⁷ To the extent Respondent raises in Exceptions 15 and 16 (or in Exceptions 41 and 50, *infra*.), that the Judge showed inappropriate bias in making credibility determinations, this contention should be rejected as entirely without merit. As set forth herein, the Judge's credibility determinations raised in these exceptions are thorough and detailed, well-reasoned, reflective of careful consideration and fully supported by the record. Moreover, because General Counsel's witnesses are discredited on certain key facts as well as Respondent's, the Judge's impartiality in making credibility determinations can hardly be disputed. As the United States Supreme Court stated in *National Labor Relations Board v. Pittsburg Steamship Co.*, 337 U.S. 656, 659 (1949), even "... total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Cited by the Board in *Midland National life Insurance Co.*, 244 NLRB 3, fn. 2 (1979).

⁸ Although, Respondent refers in its Exceptions to Driscoll in Exception 22, the testimony Respondent is referring to was provided by witness Donohue.

4) Exceptions 9, 10, 23⁹ and 30: Exceptions to application of hearsay rule.

Respondent's assertions in Exceptions 9, 10, 23 and 30, that the Judge improperly considered as hearsay the complaints Driscoll purportedly received about Mace's activity is mistaken and without merit. Respondent's evidence on this issue was hearsay: this includes Driscoll's testimony about statements he heard from others in the workplace regarding Mace's activities; and the two handwritten statements by employees Respondent offered as evidence (R. 17 and 18). Fed.R.Evid. 801(c). Properly recognizing this evidence as hearsay, and over hearsay objections by Counsels for General Counsel, the Judge received the statements into the record while making clear to the parties that the statements were *not* being received for truth of the matters asserted therein (Tr. 471:11-472:6); in other words, these out of court statements were received into the record only for non-hearsay purposes.

On cross-examination, General Counsel elicited additional related testimony to demonstrate that Driscoll spoke to many more employees about Mace's union activities than Driscoll originally admitted, and to expose elaboration, inconsistencies, and the self-serving story-telling nature in Driscoll's testimony about his investigation into the purported misconduct of Mace. This evidence was not offered for the truth of the substance of the statements made to Driscoll, but to elicit admissions from Driscoll regarding his interrogations of many employees about Mace's activities, and to develop a record regarding Driscoll's credibility. Respondent offered much of the same evidence, not for the truth of the statements, but for their affect on the listener, Driscoll, to try to defend its theory that Driscoll had an "honest belief" that Mace had engaged in misconduct (Exception 23). The Judge properly considered this evidence for the non-hearsay purposes for which it was offered. The Judge, however, discredited that evidence, because, *inter alia*, as uncorroborated hearsay, he found the evidence unreliable, pointing out

⁹ Some of the exceptions raise both hearsay and credibility issues.

that neither party called witnesses to corroborate Driscoll's claims accounts regarding his investigation (ALJD 7:1-10-25, 23:5-6). In discrediting Driscoll's testimony about his inquiries into Mace's conduct, the Judge also considered the inconsistencies in Driscoll's testimony, the demeanor in which Driscoll testified, and factual inconsistencies between the two written reports about Mace's activities (R. 17 and 18, which are also hearsay)¹⁰ and Driscoll's testimony about what those two employees purportedly said to him. All this together, according to the Judge, made the evidence about Driscoll's investigation into Mace's conduct unreliable. Therefore, having been discredited, this evidence (whether considered hearsay or non-hearsay) cannot support a finding that Driscoll had an "honest belief" in Mace's misconduct. It has been discredited. The Judge properly considered the evidence and concluded that Mace's credible testimony established that Mace had not engaged in misconduct.¹¹

Of course, although the Federal Rules of Evidence (FRE) are to be applied in an unfair labor practice hearing "so far as practicable," the Judge may properly consider hearsay evidence for its truth, when warranted in this administrative context. Sec. 10(b) of the Act; *Alvin J. Bart & Co.*, 236 NLRB 242 (1978). Judge Bogas admitted the evidence regarding Driscoll's questioning of employees for non-hearsay purposes, and then, discredited that evidence for the fact that it happened as Driscoll testified it happened, as discussed above. The Judge further analyzes, however, that, even if Respondent's evidence is considered for the truth of the assertions therein, when weighed against Mace's direct testimony, he would conclude that Mace's version of the facts was more reliable and believable (ALJD 10:30-48). The Judge considered all

¹⁰ See *Continental Pet Technologies*, 291 NLRB 291, 294 (1988) (Board adopts Judge's analysis in ruling that handwritten reports submitted as complaints to human resources department remained hearsay, although they may remain relevant for a "state of mind" non-hearsay purpose.)

¹¹ See *Vencor Hospital-Los Angeles*, 324 NLRB 234 (1997)(Board adopts factual findings based on evidence admitted only for non-hearsay purposes, rejecting charging party's exceptions to Judge's inadvertent referral to evidence as hearsay in the decision.)

the relevant evidence, for what is was worth, and appropriately came to his conclusions based on the record as a whole. Therefore, Respondent's Exceptions 9, 10, 23 and 30 cannot be sustained.

Therefore, Respondent's exceptions should be rejected as the Judge formed appropriate conclusions based on his consideration of all the record evidence.

B. Respondent's Exceptions to the Legal Analysis, Conclusions and Recommendations in the Judge's Decision lack merit, and should be rejected.

As set forth more fully in the Brief in Support of the Judges Decision below, the Judge applied the appropriate legal standards, fully considered all the facts, and presented well-reasoned legal analyses that result in conclusions the Board should adopt.

Exceptions 23 to 35 address Respondent's criticism of the Judge's conclusion that Respondent violated Sec. 8(a)(3) and (1) when it suspended and then discharged warehouseman Derrick Mace. As discussed below, the Judge's reasoning and conclusions, based primarily on his application of *Burnup and Sims*,¹² is correct, and the General Counsel urges the Board to adopt the Judges Decision in this regard.

Exception 36 addresses Respondent's criticism of the Judge's conclusion that drivers Adorno and Glover were discharged as cover for their unlawful discharge of union leader Beattie. As discussed below, long-established Board law supports the Judge's conclusion that Respondent's discharge of Adorno and Glover was unlawful under the circumstances of this case.

Exceptions 37 to 56 address Respondent's criticism of the Judge's conclusion that Respondent unlawfully discharged Beattie, Adorno and Glover in violation of Sec. 8(a)(3) and (1). As set forth below, the Judge's reasoning and conclusions, based primarily on his

¹² *Burnup and Sims, Inc.*, 379 U.S. 21, 57 LRRM 2385 (1964), 137 NLRB 766 (1962).

application of *Wright Line*, is correct, and the General Counsel urges the Board to adopt the Judge's Decision in this regard.

In Exceptions 40, 42, and 43, Respondent urges the Board to find that Respondent implemented the requirement that drivers obtain Class A licenses by September 15 in direct response to Beattie's complaint at the employer's July 11 anti-union meeting regarding the increased workload. In Exception 42, Respondent admits:

...Beattie implicitly provided the answer for the timing [of the imposition of the Class A license requirement] 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.** (emphasis added).

The General Counsel does not object to the Board finding, based on Respondent's admissions in Exception 40, 42 and 43 that, in addition to those reasons found by the Judge, one of the reasons Driscoll implemented the new requirement that drivers get Class A licenses was to help Respondent remedy Beattie's complaint about increased work demands, *without resorting to a union*, and that the new licensing requirement was *directly related* to Beattie's concerns raised at the July 11 anti-union meeting.

Exceptions 57 to 70 summarily address Decision's *Conclusions, Remedy* and *Recommended Order* in the Judge's Decision related specifically the discharge violations only, and, for the reasons discussed in the Brief in Support of the Administrative Law Judge's Decision, these exceptions lack merit.

II. General Counsel's Arguments in Support of the Decision of Administrative Law Judge Paul Bogas.

A. Judge Bogas correctly determined that Respondent violated Sec. 8(a)(3) and (1) of the Act by suspending and discharging warehouseman Derek Mace, because of employees' union and concerted protected activities and in order to discourage such activities; therefore, Respondent's Exception No. 3 in its Brief in Support of Exceptions, lacks merit.

- 1) Judge Bogas applied the appropriate standard by applying *Burnup and Sims* to this violation, and reached the correct result.

Because Respondent asserts that it believed that Mace had engaged in misconduct when it suspended him and then fired him for his union and protected concerted activity, Judge Bogas appropriately considered the violation under the standard set out by *Burnup and Sims* (ALJD 23:30-25:52). In *Burnup and Sims*,¹³ the Supreme Court determined that Section 8(a)(1) is violated if it is shown that a discharged employee was at the time engaged in a protected activity; that the employer knew it was so; that the basis of the discharge was an alleged act of misconduct in the course of that activity; and that the employee was not, in fact, guilty of that misconduct. When an employee is disciplined for an alleged violation of a lawful rule while engaging in protected concerted activity, an employer is not privileged to act on its good faith belief that misconduct occurred. *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130 (D.C. Cir. 2001); *Tri-County Manufacturing and Assembly, Inc.*, 335 NLRB 210, 219-220 (2001).

Here, Mace clearly was engaged in union activity, Respondent knew about his union activity, and Respondent claims to have terminated him because of misconduct during his union activity. Even assuming that Respondent could establish it had a good faith belief that Mace engaged in misconduct, the record shows, as the Judge finds, that Mace did not do so. Mace testified credibly that he did not interfere with anyone's work and that he did not fail to do his own work. Although Respondent refers to a no-solicitation distribution policy, it presented no

¹³ 379 U.S. 21 (1964).

evidence that the policy existed prior to the union drive or that it was applied to anyone other than Mace. There is no credible non-hearsay evidence contradicting Mace's credible testimony about his actions. Further, Respondent provided no documentary evidence to contradict Mace's testimony on these points. As found by the Judge, even assuming a good faith belief in misconduct, the record establishes that Mace did not engage in any misconduct.¹⁴ Respondent, therefore, is not privileged to rely on its mistaken belief in order to justify suspending and terminating Mace. Id.

Moreover, as the Judge concludes, the record does not support a finding that Respondent even had a good faith belief that Mace engaged in misconduct, as Respondent's witnesses have been shown not to be credible and Respondent provided no substantive evidence in support of its position (ALJD 24:38-25:22). Even the so-called complaint letters by Taft and Blakely do not reveal allegations that Mace was doing anything wrong: all he was doing was talking to them about the union. Therefore, Respondent's suspension and termination of Mace because of his union activity has no defense. Respondent asserts Mace was fired for: interfering with his co-workers jobs (by talking to them about the union); violating the company's no solicitation and distribution policy (by talking about the union) and not doing his work (when he was talking about the union)¹⁵ and lying to management (by not admitting he was talking to coworkers about the union).¹⁶ None of these asserted reasons are lawful reasons.

¹⁴ An Employer may not lawfully discipline an employee for making pro-union statements that merely make other employees uncomfortable. *Chartwells, Compass Group*, 342 NLRB 1155 (2004).

¹⁵ Driscoll admits no one else had ever been disciplined for talking about anything at work (Tr. 587).

¹⁶ Here, there is no allegation that Mace engaged in any outbursts or opprobrious conduct that would lead the Board to apply its standards set forth in *Atlantic Steel*, 245 NLRB 814, 816-817 (1979) to determine whether he lost the protection of the Act.

Counsel for the General Counsel took the position in its Brief to the ALJ that in this type of case, where Respondent fired Mace directly because of his union activity, a *Wright Line*¹⁷ analysis is not needed, as there is no dual motive to assess. *Noble Metal Processing, Inc.*, 346 NLRB 795, fn. 2 (2006). However, no exception is taken here to the Judge's application of *Wright Line*, in the alternative, to the facts as set forth in the Decision (ALJD 26:1-27:2). The record fully supports the Judge's determination that the General Counsel established that Respondent's suspension and discharge of Mace was discriminatorily motivated, and that Respondent did not establish it would have suspended and terminated Mace in the absence of his union activity.

- 2) Respondent cannot show that Judge Bogas' proper hearsay rulings were erroneous, that his credibility determinations should be reversed, or that he erroneously found Respondent failed to establish an honest belief that Mace engaged in misconduct.

As set forth in detail above in the Answers to Respondent's specific exceptions related to the application of the hearsay rules, *supra*, at I.A.4, the Judge made proper hearsay rulings at trial, and applied proper weight in the Decision to hearsay evidence and to the evidence of out of court statements offered for non-hearsay purposes. Respondent's mere assertion that these rulings are erroneous is unconvincing.

Similarly, as set forth above in the Answers to specific exceptions to the Judge's credibility determinations, *supra*, at I.A.3, Respondent has failed to establish, through, direct evidence, circumstantial evidence, inference, or otherwise, that it had a good faith or honest belief that Mace engaged in misconduct. Contrary to Respondent's assertions, the Judge did not reject Respondent's honest belief arguments because they relied on hearsay evidence: he overtly discredited that evidence. See *supra*, at I.A.4. In three single-spaced pages of the Decision, the

¹⁷ 251 NLRB 1083 (1980).

Judge meticulously considered Respondent's evidence that complaints were made about Mace's activities. After doing so, he clearly discredits that evidence, based, *inter alia*, on witness demeanor, plausibility of and inconsistencies in the substance of the testimony, lack of corroboration of the hearsay evidence, and an adverse inference taken from Respondent's failure to present witnesses at its disposal who would be in a position to corroborate testimony (ALJD 8:5-11:12).

The Judge's rulings, findings and conclusions are proper and correct.

- 3) The Judge correctly determined that Respondent had *not* established a legitimate business justification for its actions when he determined that Mace's suspension and discharge violated Sec. 8(a)(3) and (1).

Finally, in contrast to Respondent's protestations, the Judge did appropriately consider Respondent's defense that it acted with legitimate business justifications for suspending and terminating Mace. The Judge found, however Respondent did not establish any legitimate business reason for its actions (ALJD 26:28-50).

Therefore, Respondent's Exception No. 3 on Brief should be rejected.¹⁸

B. Judge Bogas correctly determined that Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging truck drivers Roger Beattie, Anthony Glover and Alexander Adorno, because of employees' union and concerted-protected activities and in order to discourage such activities.

- 1) Judge Bogas applied the appropriate standard and reached the correct result.

Although, in its post-hearing brief to the ALJ, the General Counsel argued that the standard to apply should be that of constructive discharge, the Judge appropriately determined,

¹⁸ In its Exception No. 2 on Brief, as well as its specific Exceptions 58, 60, 62, 64, 66, and 68, Respondent asserts that the Judge failed to appropriately require a the General Counsel to show Respondent violated Sec. 8(a)(1) by discouraging employees' exercise of their Section 7 Rights. However, Respondent is mistaken. No additional showing is required for the Board to find a derivative Sec. 8(a)(1) violation when it has found a violation of Sec. 8(a)(3). See *UPS*, 353 NLRB No. 39, slip op. at 10 (2008) (Whenever Section 8(a)(3) is violated, it also discourages employees in exercising their Sec. 7 rights, constituting a derivative violation of Sec. 8(a)(1)); *Chinese Daily News*, 346 NLRB 906, 933 (2006). Therefore Respondent's Exception No. 2 on Brief should be rejected.

based on all the evidence, and Respondent's subsequent admission in its Post-hearing Brief the ALJ, that Respondent indeed discharged Beattie, Glover and Adorno (ALJD 28:46-52).¹⁹ Thus, the Judge's application of the *Wright Line* analysis is appropriate and Counsel for the General Counsel's constructive discharge arguments are no longer necessary.

Under *Wright Line*, the General Counsel bears the initial burden to show that Respondent's decision to discharge Beattie was motivated, at least in part, by antiunion considerations (See ALJD 26:2-5; 28:30). The General Counsel may meet this burden by showing: the employee engaged in union activity; the employer knew of the union activity; and the employer harbored animosity toward the union or union activity (see ALJD 26:4-7). If the General Counsel establishes discriminatory motive, the burden then shifts to Respondent to show it would have taken the same actions even absent the protected conduct (see ALJD 11-13).

The Judge correctly found, applying *Wright Line*, that General Counsel met its initial burden to show the discharge of Beattie was unlawfully motivated (ALJD 28:30). Roger Beattie had significant union activity. He helped organize the drivers. He was a contact person with the union. He distributed scores of union authorization cards. There is sufficient evidence to support the Judge's conclusion that Respondent had knowledge that Beattie was the lead union organizer on behalf of the drivers. Driscoll admits that, early in the organizing effort, he saw Mace and

¹⁹ In addition to Respondent's Counsel's admissions, record evidence supports the finding that the drivers were discharged, and not either laid off, demoted or voluntarily quit. For example, a careful review of the memos Beattie, Glover, and Adorno received on September 15 and 16 raises substantial doubt as to whether really had been offered jobs in the warehouse at all. See GC 8, 25, 29. Although Driscoll testified at the hearing that he offered them jobs in the warehouse, Adorno does not recall being offered a job -- he only recalls being told he could apply for a job in the warehouse. The memos, dated September 15, on their face, do not clearly offer jobs these workers. The memos indicate which shifts have openings, and instructs the drivers to, "Please contact Frank to set up an interview to discuss these opportunities in more detail." GC 25. Further, the memos do not set forth clearly what the hourly rate would be, indicating it is not a firm offer of employment. The language is certainly not language a clear transfer or a demotion. It leaves the drivers' in an unemployed status, if they do not apply for a new job. A conclusion can be drawn on these facts that the three drivers were discharged in the traditional sense (rather than constructively discharged), as Respondent admits in his brief to the ALJ. The *Wright Line* assessment applies equally well to the traditional discharge analysis as to a constructive discharge.

Driscoll riding a pallet jack together. By July, Driscoll clearly knew that Mace was a lead union organizer on behalf of the warehouse workers, such that Beattie's participation in concerted activities with Mace would have caused Driscoll to suspect his union activity by July. Driscoll clearly was suspicious of Beattie's activities when he called Glover and asked him what Beattie was talking to all the drivers about. Also, in July, Beattie spoke up in the employer's anti-union meeting about concerns over working conditions.

Beattie spoke with many employees about the union and distributed at least 40 to 45 union cards within a workforce with about 50 drivers and 47 warehouse workers (ALJD 4:5-8). The physical space of the warehouse and dock area lends itself to viewing employee activity by Respondents supervisors. Beattie also organized the meetings for workers, by trying to corral coworkers to come to the meeting. Other employees clearly knew he was a lead organizer. Also, in September, Crane mistakenly called Robataille when he meant to call Mace and revealed Beattie's role as a leader in the union effort by his explanation that "Roger" told him how many votes they had.²⁰

The timing of the change in the requirement that drivers get Class A licenses by September 15, and Respondent's unwillingness to discuss any extensions of time, also supports a conclusion that Respondent knew of Beattie's union organizing activities.

The circumstances above, including the timing of the requirement, as well as Respondent's unlawful interrogations and creation of impressions of surveillance and the unlawful termination of Mace, also support the Judge's finding that Respondent had hostility toward the union, or anti-union animus (ALJD 28:41-45).

²⁰ Judge Bogas refers to the Board's "small plant" inference to bolster the other direct and indirect evidence he relies on to convincingly find Respondent knew of Beattie's union activity (ALJD 28:35-41). See *ADB Utility Contractors*, 353 NLRB No. 21, slip op. at 28 (2008). The record, and the ALJD, support a conclusion that Respondent had knowledge of Beattie's union activity even without relying on the "small plant" inference (ALJD 28:30-34).

With respect to the question of motive for discrimination against Anthony Glover and Alexander Adorno, Judge Bogas correctly applied the Board's longstanding precedent finding that, when employees are swept up in a negative employment action as cover for the discriminatorily motivated act, the Board will find the employment actions unlawful (ALJD 29:1-9). For example, in *Pillsbury Chemical Co.*, the Board found the lay off of an employee unlawful because it was done to “give an aura of legitimacy” to the demotion of the union activist.²¹ Therefore, the fact that neither Glover nor Adorno had significant union activity other than their support for the union is not material. Here, they were the only two drivers left who did not have their Class A licenses other than Beattie, and, Respondent apparently determined they were expendable, as part of the cost of getting rid of Beattie.²²

Thus, the General Counsel established that the requirement of obtaining Class A licenses by September 15, and the subsequent elimination of the Class B driving positions, was discriminatorily motivated (ALJD 29:20-22). Under *Wright Line*, the burden then shifts to Respondent to show it would have taken the same action even in the absence of the union activity. The Judge correctly found that Respondent did not meet this burden (ALJD 29:24-29).

The Judge concludes that Respondent could not show on the record that it would have imposed the September 15 deadline *when* it did and *how* it did, despite its showing that its volume of work had increased (ALJD 29:27-44).

²¹ 317 NLRB 261 (1995).

²² In its Exception No. 2 on Brief, Respondent cites *ACTIV Industries, Inc.*, 277 NLRB 356, fn. 3, for the proposition that the Judge improperly applied the wrong precedent. *ACTIV Industries*, however, is inapposite. That case concerned a mass discharge of a third of the workforce. Rather than a mass lay-off in retaliation for union activity or to discourage union activity, the motivation shown here by Respondent was to eliminate the union activist, thereby discouraging union activity. Glover and Adorno were terminated as cover, victims of Respondent's unsuccessful attempt to manufacture a rule to explain away its unlawful actions. As discussed above, *supra*, at fn. 14, the Sec. 8(a)(1) violation found by the Judge for the unlawful terminations is a derivative violation: whenever Section 8(a)(3) is violated, it also discourages employees' in exercising their Sec. 7 rights, constituting a derivative violation of Sec. 8(a)(1). See *UPS*, 353 NLRB No. 39, slip op. at 10 (2008); *Chinese Daily News*, 346 NLRB 906, 933 (2006). Thus, Respondent's Exception No. 2 on Brief should be rejected.

Respondent makes a big deal in the record about its purported increased volume and scope of sorting and delivery work to its one client, Starbucks, at the material time in Summer 2008. However, being really busy cuts as much against the idea that Respondent would need to eliminate the Class B drivers' jobs as it cuts for it. Being so busy, they might have accommodated these drivers' in the Straight Truck runs. In Summer 2008, there continued to be use of straight trucks for certain runs, and regular use of drivers as "helpers" in the cab with another driver. Thus, if their goal was really to just keep the deliveries going, they might have accommodated the discriminatees' driving skills in various ways, as they did for Marques.

Respondent asserts that it had made a formal decision to eliminate Class B driving positions, but it produced no documents at trial confirming that any meeting to discuss this issue or decision took place, even though the decision involved managers in both Canton and Maryland, and was an important decision. There was no evidence presented that the company had ever eliminated jobs before. Other than the July 11 memo (ALJ 1) there was no documentary evidence presented that any such decision ever took place.

Moreover, Respondent's averment that DPI was experiencing significant challenges due to its volume and growth is irrelevant to the General Counsel's argument that its imposition of more onerous rules on Beattie, Glover, and Adorno was unlawful. Whether or not it could have lawfully terminated the employment of these men as drivers is not the standard: The question is, has Respondent shown it would have taken the same employment actions in the absence of the union activity. See, e.g., *Structural Composites Industries, Harsco Corp.*, 304 NLRB 729, 729-730 (1991) (It's not enough for Respondent to show it could have discharged employee lawfully; it must establish that it would have done so in the absence of the employee's union activity.) That Respondent could have made a lawful decision to require its drivers to all have Class A

licenses is not at issue, as the wisdom of Respondent's business decisions are irrelevant. Here, the Judge correctly determined that Respondent has not, and cannot, establish that it would have made this requirement to obtain the Class A license by September 15, when and how it did, in the absence of Beattie's union activity.

The Judge found that Respondent implemented the new Class A license rule directly following the July 11 antiunion meeting. The Judge relied on the timing of implementation of this rule, in part, to determine that the rule was unlawfully motivated. Further, Respondent now asserts in its Exceptions and Brief on Exceptions, that, indeed, it implemented the new requirement that drivers get Class A licenses in response to employees concerns raised at the July 11 antiunion meeting (Exception 42; see also Answers above, *supra*, at I.B.4.) Significantly, Respondent now admits, as discussed above, that it implemented the new requirement in order to avoid the union. Thus, the Judge's well-reasoned finding of antiunion motivation is enhanced by Respondent's admissions in its Exceptions.

Thus, the Judge correctly determined, based on a fair and full assessment of all credible evidence, that Respondent discharged drivers Beattie, Glover and Adorno, in violation of Section 8(a)(3) and (1).

- 2) Respondent has not established that Judge Bogas' inferences were erroneous in any of his factual findings or that he erred in determining Respondent's institution of a Class A license requirement was unlawful.

As set forth in detail above in the Answers to Exceptions, Respondent has not shown that any of Judge Bogas' factual findings were erroneous or should be reversed. Respondent misstates the Decision when it claims that the Judge determined that the record showed that the two months" from July 11 to September 15 was enough time to obtain [a] Class A license." (Exception No. 1(c) on Brief, at p. 20 of Respondent's Brief in Support of Exceptions.) In

contrast, in the Decision, the Judge specifically reasoned that, if the deadline was imposed on July 11 (rather than September 4 as originally urged by the General Counsel), his analysis is more complicated, because this two month period "... is a short, but not necessarily unworkable, time period." (ALJD 16: 18-20). Later, the Judge finds, based on his consideration of all the facts, including the "short but not necessarily unworkable" time period, that the September 15 deadline was sprung on the Beattie, Glover and Adorno, "under circumstances that meant that the drivers would almost certainly fail to meet it." (ALJD 30:40-45).

As discussed above in Answers to Exceptions, *supra*, I.A.2, Respondent also misrepresents that the record supports its contention that Respondent's client Starbucks notified it in June 2008 about a business increase or "surge" coming up in August 2008. That proposition is simply not supported by the record referenced in these exceptions.

Nor has Respondent presented any evidence in support of its argument that the Judge misconstrued Marques' testimony regarding how long it takes to get a Class A license. The Judge's Decision does not "conspicuously omit" any facts regarding the reasons why Marques failed to get his license: they are in plain black and white in the decision (ALJD 16:25-34; 30:31-34). That the Judge did not choose to generalize from one individual's perception of his own talents (that Marques believed he was capable of passing the test after 6 to 7 weeks of training) a universal expectation for all drivers, in the face of contrary evidence, is not bias or error on the Judge's part; it's merely good judgment.

Similarly, the judge did not fail to consider the drivers' schedules in making his determination about the likelihood that the Class B drivers could meet Respondent's Class A licensing requirement by September 15, as Respondent asserts. He did consider their schedules. (ALJD 3:46-52; 30:25-30). The Judge determined Respondent had not shown the September 15

deadline was reasonable (and, therefore a legitimate rule), based, in part, on the fact of the drivers' full-time schedules. Moreover, it is Respondent that is mistaken about the details of the drivers' schedules in the facts it avers in support exceptions (Respondent's Brief on Exceptions, p. 3, para. 1; discussed *supra*, at fn. 2).

The Judge correctly determined, based on all the record evidence and applying appropriate precedent, that Respondent violated Sec. 8(a)(3) and (1) of the Act when it discharged drivers Beattie, Glover and Adorno. Therefore, Respondent's Exception No. 1 on Brief should be rejected as without merit.

C. Judge Bogas correctly determined that Respondent violated Sec. 8(a)(3) and (1), and Sec. 8(a)(1), in other respects.

Respondent filed no exceptions to Judge Bogas' correct and well-supported determinations that Respondent violated Sec. 8(a)(3) and (1), and Sec. 8(a)(1), in other respects, and, therefore, those findings are not in dispute. Specifically, there are no exceptions to the Judge' determination that Respondent violated Sec. 8(a)(3) and (1) by its discipline of driver Rick Crane in September 2008; and no exceptions to the Judge's findings that Respondent violated Section 8(a)(1) by engaging in unlawful interrogations and by unlawfully creating the impression of surveillance of employees during the union campaign, preceding the unlawful discharges. The General Counsel urges the Board to fully adopt the Judge's Decision and Recommendations, including these finding those violations that are no longer in dispute.²³

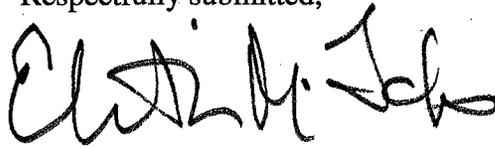
²³ In the absence of any exceptions to these violations, Counsel for the General Counsel deems it unnecessary to repeat here her arguments in favor of finding these violations.

III. Conclusion and Remedy

For the reasons discussed above, it is submitted that the General Counsel has established, by a preponderance of the evidence, that Respondent violated the Act as alleged in the Complaint and that the Judge's Order and Remedy should be adopted.²⁴

Dated at Boston, Massachusetts this 17th day of July, 2009.

Respectfully submitted,



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²⁴ With the exception of the nature of the interest to be calculated and awarded as addressed in General Counsel's separate Brief in Support of its Cross Exception to the Decision of the ALJ.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of

DPI NEW ENGLAND

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 25

CASE 1-CA-44833

DATE OF MAILING July 17, 2009

**AFFIDAVIT OF SERVICE OF copy of GENERAL COUNSEL'S ANSWER TO RESPONDENT'S
EXCEPTIONS AND BRIEF IN SUPPORT OF THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic transmission upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 17th day of July, 2009

DESIGNATED AGENT

Michelle D. Cassata
NATIONAL LABOR RELATIONS BOARD