UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

GENE'S BUS COMPANY
a/k/a ARDSLEY BUS CORPORATION INC.,

Respondent

and

TRANSPORT WORKERS UNION OF
GREATER NEW YORK, LOCAL 100, AFL-CIO

Charging Party

Case No. 2-CA-38713
2-CA-39049
2-CA-39376
2-CA-39467

RESPONDENT'S EXCEPTIONS AND SUPPORTING BRIEF

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

On March 2, 2010, the Administrative Law Judge Raymond P. Green ("ALJ") issued a Decision finding that Ardsley Bus Corporation ("Employer" or the "Respondent") violated Section 8(a)(1), (3), and (5) and Section 8(d) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1), (3), and (5) and § 158(d).

The Respondent continues to contest jurisdiction by the National Labor Relations Board ("NLRB" or "the Board") as may be seen below.

This case has been transferred to the Board to review exceptions to the Decision rendered by the ALJ. The exception and supporting brief have been filed within the allotted time with the permission of the Board and are therefore timely.

STATEMENT OF ISSUES

1. Was there any proof to cause the ALJ to reverse his ruling that the evidence was inconclusive that the Respondent was engaged in interstate commerce?

2. Was there any basis in the record for the ALJ to reverse his opinion that once the Petition to Decertify was made by 193 out of 220 employees, that the Union lost its majority status and that the Respondent was not obligated to negotiate with the Union?

3. Where the ALJ held that there was little or no credible evidence that management played any direct or indirect role in the solicitation of a Petition prepared and filed by 193 of 220 employees to decertify the Union, did the ALJ err in holding that the alleged violations tended to cause the employees to file their petition to decertify?

4. Did the General Counsel violate his statutory and ethical responsibility by withholding evidence from the Respondent which bore specifically on the issue of the Union's lack of majority status and their personal knowledge of the employees' intent to oust the Union?

5. Was there any basis in the record for the ALJ to conclude that the alleged grievances filed by the Union representatives without any support from the members "tended" to show that the employees lacked the requisite free will to decertify the Union?

6. Where the ALJ predicated his finding that a Union employee, Cesar Uchofen was assaulted by the General Manager based on the testimony of the Union employees who filed self serving grievances without any support from any of the employees of the Respondent of a witness improperly received into evidence when the General Counsel's witness testified that she never witnessed the altercation?

7. Was the bias and prejudice exhibited by the ALS in assisting counsel for the General Counsel so egregious as to grant the Respondent a *de novo* hearing?

PREFATORY STATEMENT

For more than five (5) years, the Employer and Local 100 of the TWU worked together in a spirit of harmony and good will. However, the spirit of cooperation changed when, in 2007, Local 100 assigned one of its employees, a John Simino, to act as a "union organizer." Mr. Simino elevated an employee, Cesar Uchofen, to the position of Shop Stewart and together, they mounted a campaign to humiliate and degrade the General Manager, an African American, by engaging him in verbal altercations in front of the employees and in the case of the owner, who is Jewish, started a campaign of anti-Semitism. The ALJ acknowledged that the "portrayal of Jews as rats was a stereotype utilized by the Nazi regime in Germany. The rank and file members of the Union were not only upset with their representatives smear campaign against their employer but also the raising of their dues without doing anything for them.

The bullying tactics of Mr. Simino and Mr. Uchofen, acting under the orders of their Union, backfired when 193 out of 220 employees prepared and circulated a petition to decertify their Union. Four (4) of the Respondent's employees went to the National Labor Relations Board and personally presented their petition to a Colleen Breslin, who later became Counsel for the General Counsel at the hearing. The employees complained to Ms. Breslin that the Union had raised their dues twice and that the Union had done nothing for them. Ms. Breslin heard the employees describe the treatment of Local 100 that they objected to and her answer was "unions are good." Ms. Breslin concedes that she was provided with the signatures of the employees, but continued to pursue her bias in favor of the Union and against the free will of 193 employees of Ardsley Bus Corp.

The employees began meeting with another union who was more attentive to their needs -- Local 713. The Company Union (Local 100) learned of the meetings with Local 713 and notified Ms. Breslin. No grievance was filed by the Union to remotely suggest that the Employer had any responsibility in the drafting or circulating the petition or in encouraging the employees to meet with Local 713. However, Ms. Breslin unilaterally decided to subpoena two (2) employees in regards to

the petition and on their meeting with the Local 713. Ms. Breslin also learned that a RC-Certification of Representative petition was filed by Local 713. (R 21)

Mr. Simino testified that he continued to lose control of his members and that fewer and fewer employees would show up at Union meetings.

A union representative, Cesar Uchofen, was justifiably terminated, according the ALJ, for insubordination while distributing "surveys" during a State mandated medical examination.

Mr. Uchofen received his reward for his bullying tactics by being hired immediately by the union and he continues to enjoy his position with the union as of this date.

Ms. Breslin subpoenaed six (6) employees to testify at the hearing as to the Union's allegations of the Employer's alleged involvement in the drafting and circulation of the petition. However, she realized that their testimony would not support the specious allegations alleged by the Union and decided not to call them as witnesses. Of the six (6) employees subpoenaed, only the General Manager was called to testify by the General Counsel.

The only other witnesses called to support the pretextual grievances were Simino and Uchofen and as may be seen by their testimony, the only time they told the truth was when they forgot to lie.

Ms. Breslin had direct knowledge that the employees were exercising their free will to decertify the Union and were seeking the services of another union to represent them. However, Ms. Breslin refused to disclose material facts within her file regarding the exercise of the employees' free will and refused to admit into evidence a statement that she took from an employee, Michael Wade that the reasons behind the circulation of the petition were in fact caused solely by the Union's tactics. The statement taken by Ms. Breslin could only be marked for identification as Respondent's Exhibit 18 (which is attached to this brief - *See Exhibit "B", infra*) which was objected to by the ALJ in spite of the fact that the General Counsel remained silent.

The ALJ, unfortunately, refused to require the General Counsel to comply with his civil and statutory duty to disclose information regarding the Union's loss of majority status which would have shown that the employees were exercising their free will and that the alleged grievances, even if true, had no impact upon their wish to decertify the Union. The Respondent's counsel's application that the General Counsel comply with Rule 3.4 of the New Rules of Professional Conduct effective April 1, 2009, which mandates that a lawyer shall not conceal or knowingly fail to disclose that which the lawyer is required by law to reveal, was denied by the ALJ.

The ALJ, although holding on the record that the petition to decertify showed that the vast majority of the employees did not want the Union and, therefore, the alleged grievances were moot, without any basis in the record and without any notice that he would decide otherwise, opined that the alleged grievances "tended" to cause 193 out of 220 employees to sign the petition. The ALJ ignored many decisions of this Board and the Court of Appeals that the "free will of the employees to oust their union must be respected" and even if alleged grievances are found (which did not happen) the General Counsel must show a "nexus" between the alleged grievances and that the conduct of the employer was the proximate cause of the signing of the petition.

The ALJ turned *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), *NLRB v. B.A. Mullican Lumber*, 535 F.3d 271 (2008) and a host of other cases on their ears, and hence, this appeal.

STATEMENT OF THE CASE

On June 30, 2009, the Regional Director issued a consolidated complaint based on the allegations of unfair labor practices by the Transport Workers Union of Greater New York, Local 100 ("the Union") against Ardsley Bus Corporation Inc. a/k/a Gene's Bus Company ("the Employer" or "Respondent"). On September 11, 2009, the Regional Director issued an Amended Consolidated Complaint.

The Respondent's Answer denies the allegations in the Complaints and sets forth three affirmative defenses which are: (1) the Union has proceeded to litigate various charges before the National Labor Relations Board which have been addressed in an arbitral forum; (2) a vast majority of the employees have signed a petition manifesting their intent to remove the Union; and (3) the Board lacks jurisdiction in this matter since the Respondent does not satisfy the Board's criteria for interstate commerce. (General Counsel's Exh. 1 - hereinafter referred to as "GC Exh.")

The case was tried before the Administrative Law Judge Raymond P. Green ("ALJ") in New York City on October 14, 15, 16, 19, 26, 27, 28 and November 30, 2009.

On March 2, 2010, the ALJ issued his ruling in which he determined that the Respondent had violated Section 8(1), (3), and (5) and Section 8(d). The ALJ held that the Respondent's unfair labor practices "tended" to influence 193 employees' dissatisfaction with the Union. Moreover, the ALJ held that the authenticity of the petition had not been shown by the Respondent, notwithstanding that the petition had not been disputed at the time of the hearing.

STATEMENT OF FACTS

A. Nature of the Respondent's Operations

Gideon Tiktin is the Owner of Ardsley Bus Corp. and Thomas Gillison is the General Manager. The Employer operates a local school bus transportation service for the public schools of Westchester County. Contracts made for the services of the school buses are made within the State of New York.

1. The General Counsel Failed to Prove that the Respondent Is Engaged In Interstate Commerce

On October 14, 2009, the Respondent produced all documents required under the Subpoena Duces Tecum as requested by the field attorney Colleen Breslin. The Administrative Law Judge gave the General Counsel an opportunity to review the financial records of Ardsley Bus Corp. in order to determine if the Employer is involved in interstate commerce. The General Counsel chose not to have the Respondent produce its business financial records.

Furthermore, the General Counsel marked for identification four documents, including three Commerce Questionnaires dated August 8, 2008, May 8, 2009 and May 13, 2009, and one affidavit signed by Gideon Tiktin on May 13, 2009.(GC Exh. 4) The affidavit was to provide the Board with a more complete explanation to the previously submitted Commerce Questionnaire on May 8, 2009:

> 1. I am the President of Gene's Bus Service Corporation and I make this Affidavit to amend the answer Questionnaire on Commerce Information previously submitted by me to change the answer to paragraph 10(a) from "yes" to "no." The purpose of this amended Questionnaire is to indicate to this honorable Board that my company does not derive gross revenue from sales or performance of services directly to customers outside the State of New York which exceed $50,000.

(GC Exh. 4)

In view of the documents presented by the General Counsel, the Administrative Law Judge could not make a conclusion as to the issue of jurisdiction:

> JUDGE GREEN: . . . So I am going to receive this set of documents which General Counsel had described as a piece of evidence. That's all I'm doing. **I'm not making any conclusions about it one way or the other, other than receiving it as a piece of paper that's signed by your client.** So that's all I'm doing. . . .

(Tr. 32-33; Emphasis added)

The ALJ made it clear that the Respondent did not concede to any element of jurisdiction (Tr. 28-29). Since there was no conclusion made on the probative value of the documents relating to interstate commerce, General Counsel's Exhibit 4 is insufficient to establish jurisdiction. Moreover, Mr. Tiktin who handles the financial matters of Ardsley Bus Corp. was subpoenaed but was never called upon to testify although he was at the hearing everyday. Hence his explanation set forth in his affidavit above remains uncontested. The General Counsel permitted Mr. Tiktin's affidavit to be the last word on the defense of jurisdiction.

B. History of Collective Bargaining Agreements

On or about September 2000 the Union and the Respondent entered into a Collective-Bargaining Agreement ("CBA") in which the Union was designated as the bargaining agent. The term of the 2000 CBA ended on June 30, 2002. Subsequently, there was another CBA and Memorandum of Agreement ("MOA") which both began on July 1, 2002 and ended on June 30, 2006. The term of the last and final MOA was July 1, 2006 thru June 30, 2009.

1. Expiration of the 2006-2009 CBA

The General Counsel called as his witness a lawyer for the Union who claimed that she was involved in the negotiations with the Employer regarding the 2002-2006 CBA. She testified extensively about the conversations she had with the Respondent. Upon cross-examination the witness was compelled to produce correspondence that she had in her possession which she refused to disclose in her direct examination. The witness failed to produce a letter dated April 7, 2006 sent

by her firm to Mr. Tiktin, placing him on notice that there was an intent to terminate the CBA upon the date of expiration and nothing more:

> Re: Notice of Intent to Terminate and Renegotiate the CBA Upon its Expiration
>
> * * *
>
> Please accept this letter as **notice of termination of the collective bargaining agreement ("CBA") between the parties upon its expiration and a request to commence negotiations.** You are simultaneously being provided with a notice which has been provided to FMCS.
> Please contact me at your earliest convenience so that we can arrange mutually convenient times **to negotiate a successor to the CBA, which expires on June 30, 2006.** . . .

(Respondent's Exhibit 36, hereinafter referred to as "R"; Emphasis added)

The letter of April 7, 2006 revealed that after the agreement expired, there was no expressed or implied intention for the terms of the contract to survive. Furthermore, at the direction of the Court, the witness produced a set of notes taken during the negotiations of the 2002 CBA (R. Exh. 35). The notes produced by the witness also made no mention of an extension of the contract beyond the expiration date of June 30, 2006.

C. September 2007: Change of Union Representatives

On or about September 2007 the relationship between the Employer and the Union took a drastic change for the worst.[1] Before 2007, the relationship between the Union and the Employer was based on mutual respect. The amicable relationship changed when the Union replaced their Union representatives with John Simino, without the approval or vote of employees. Later, in March 2008 (GC Exh. 11), again without the consent of the members, the Union elevated Cesar Uchofen. Both Simino and Uchofen worked in concert to emasculate the General Manager, Thomas Gillison, and to embarrass and humiliate the President, Gideon Tiktin.

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[1] This was also acknowledged by the ALJ (ALJ 8:31-32)

1. Since the Change of Union Representatives, the Union Has Attempted to Shut Down the Respondent's Business

In September 2007 the Union representatives intruded onto the yard of Ardsley Bus Corp. and stopped buses from running their routes. Mr. Gillison testified that the Union representatives had stationed themselves in the yard, telling drivers that the buses were unsafe when in fact the buses had been checked the previous night and were found to be safe. (Tr. 131) The Union carried on this behavior for months, completely disregarding the detrimental impact that their conduct was having on the operation of the Employer's business. (Tr. 131) Furthermore, Mr. Simino acknowledges the significant drop in attendance at the Union meetings and the lack of support for the Union after the new regime:

> THE WITNESS: The Union holds meetings at Ardsley Community Center, across the highway from the bus company about once every two months. **The attendance at these meetings since September has declined significantly before the problems** -- oh, I'm sorry. Period. **Before the problems with Ardsley began to escalate in or about September, we'd get about thirty or so members. And the last couple of meetings, we had about fifteen.**

(Tr. 800; Emphasis added)

The new Union representatives continued to exhibit their contempt for the Employer in December 2007 when the Union placed a replica of a blown up rat outside the Ardsley Bus Corp. offices with the image of Gideon Tiktin as "Scrooge":

> THE WITNESS: **Yes. It was a big, blown up balloon with a generator blowing this thing up.**
> JUDGE GREEN: Yes. I've seen them.
> THE WITNESS: **And they tied some kind of a notice around it telling him some kind of name with his name onto it, saying that he was this. And it had my name on it. But I don't care about my name.**
>
> * * *
>
> A **I believe it was "Gideon Tiktin is Scrooge and Tom Gillison," something else.** I forgot. **But two of the Christmas figures of whatever. Scrooge and somebody else. But I remember that with them. But I found it despicable. I told John Simino to**

> **his face it was despicable. We called in the Dobbs Ferry Police. Even the police told the Union how despicable that was.**[2]

(Tr. 353-354; Emphasis added)

Not only was this done to disrespect the Employer but also to humiliate the management in front of the employees. It was apparent that since the change of Union representatives, there was a plan by the Union to create a confrontational environment with the Employer and to undermine the Employer in the eyes of the employees.

D. <u>Self Serving Grievances Filed by John Simino</u>

1. <u>Summer and August Picks</u>

In order to further disrupt the Employer's business, the Union Representative, John Simino, began filing self serving grievances when he knew that there was not one (1) single employee out of more than 200 who agreed with him. The General Counsel presented a grievance submitted by John Simino regarding the summer pick, but did not indicate which, if any, employees were complaining. (GC Exh. 48). Furthermore, Simino testified that in fact there were no grievances filed by the employees for the summer and August picks:

> JUDGE GREEN: All right. But then -- but, that's what the -- **unfortunately or fortunately, that's what this case is about. So, you have to tell me the names of individuals who personally complained about that their seniority rights were abused as a result of the -- any of the picks.**
> THE WITNESS: I have a problem naming them in front of the Employer.
> JUDGE GREEN: **Okay. Then, I'm going to conclude that there were none.**

(Tr. 708-710)

In spite of the fact that there was not one (1) employee who was called to testify in support of the General Counsel's argument, the ALJ held that the Employer had not posted all routes with

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[2] Judge Green agreed with Mr. Gillison when he wrote in footnote "5" to his Decision **"For whatever it is worth, I note that Tiktin is Jewish and that the portrayal of Jews as rats was a stereotype utilized by the Nazi regime in Germany".** *(ALJ pg. 9:8 fn 5)*

respect to seniority. (ALJ 25:34-39). The ALJ refers to a letter written by Gillison on August 28, 2008 (GC Exh. 25) where in the ALJ states that Gillison had essentially admitted that certain routes were assigned by means other than the bidding/seniority process (ALJ 20:24-26). Contrary to the ALJ's interpretation of the letter, Gillison states that in fact "[a]ll these routes were posted on the pick board." (GC Exh. 25). When called as a witness for the General Counsel, Gillison confirmed that all routes had been posted on the board for 2008 and 2009. (Tr. 188)

2. Decertification Petition

Simino continued to perpetuate his lies when he testified that the Employer had circulated a petition to decertify the Union. (Tr. 714). After a series of questions to learn which employee he had heard this information, he testifies that it was Michael Wade. (Tr. 715). Michael Wade is the same employee who had physically collected the signatures on the decertification petition (R. 6a) and who had given a statement to Ms. Breslin stating that he and his fellow employees no longer wanted to be represented by the Union because they had been raising their dues (R. 18). (*See **Exhibit "B"** - Wade Affidavit referred to infra)*

Although the ALJ found that the Employer was not involved in the circulation of the petition (ALJ 34:15-16), it does not diminish Simino's submission of lies and deceit at the hearing. It is clear that he is willing to fabricate the actions of the Employer in order to forcefully regain the bargaining unit that no longer wants his representation.

E. March 2008: Suspension of Cesar Uchofen

In March 2008, Cesar Uchofen was suspended for the misuse of a Company vehicle (Tr. 148-149). In order to settle the dispute and to make a good faith attempt to improve the relationship between the Union and the Employer, Mr. Gillison agreed to reduce the suspension and provide back pay for the two and a half day suspension (GC Exh. 13), when in fact, the evidence showed that Mr. Uchofen had received a parking ticket (GC Exh. 10) when he had willfully taken the Company van in violation of the Company Policy to the Union headquarters in Yonkers (Tr. 370-375). In spite of

Uchofen's violation of company policy, the ALJ held that the suspension was not motivated by Uchofen's violation but by his request to have union representation. (ALJ 12:18-19). This allegation was not once charged in the Complaint or argued in the hearing.

F. <u>November 2008: Alleged Assault of Cesar Uchofen</u>

The Complaint by the General Counsel alleged that the General Manager, Thomas Gillison had kicked one of the employees.[3] The Respondent denied this allegation in his Answer. (GC Exh. 1) The General Counsel called an employee, Rosie Clayton to testify as to the alleged assault upon Cesar Uchofen by Mr. Gillison:

> **Q Did you see any interaction between Cesar and Tom in November of 2008 at Ardsley that seemed unusual to you?**
>
> * * *
>
> **A No. I just heard commotions.**

(Tr. 1104; Emphasis added)

Although the witness had not seen any such physical interaction, the ALJ ruled that the employee's testimony "essentially corroborated" Uchofen's testimony. (ALJ 13:14)

G. <u>January 2009: Termination of Cesar Uchofen</u>

Rosie Clayton, an employee called by the General Counsel, also testified that in January 2009, Uchofen walked into the ABC Trailer to circulate Union surveys among the employees while there was a 19-A examination in progress. The 19-A examinations are mandated by New York State in order to insure that the drivers are in good physical health to operate the buses (Tr. 385). Ms. Clayton testified that Uchofen was distracting the employees while they were supposed to be listening to Mr. Gillison (Tr. 1109-1110). As a result, the ALJ held that Uchofen was justifiably terminated due to his insubordination:

> There was no good reason for Uchofen to be in the trailer handing out his papers or talking to the employees while the Company was conducting the exams. He could have easily waited just outside the

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[3] Complaint ¶ 16(a)

> trailer which was still on the Respondent's property and handed out his questionnaires. Indeed, the evidence is that before this particular date, he did so without any interference on the part of the Company.
>
> Despite the fact that the Company demonstrably held Uchofen in enmity, this did not give him, even though a union representative, the right to do whatever he liked. As I conclude that his actions on January 21, 2009 were not protected by the Act, I shall recommend that this allegation be dismissed.

(ALJ 15:50-16:7)

H. May 2009: Arbitration Proceedings

The CBA entered into on or about September 2000 provided that all grievances be submitted to arbitration. (GC Exh. 53). On April 17, 2009, the Employer and the Union entered into a Stipulation agreeing to arbitrate the grievances submitted in the letter dated November 19, 2008 including in part, John Simino et al. (denial of summer pick) and John Simino et al. (denial of August pick). (GC Exh. 95) Respondent's Exhibit 34 is a letter dated December 8, 2008 by the Charging Party's attorney, Ms. Ursula Levelt, further outlining the nature of the grievances that were to be before the arbitrator which mirror the allegations in the Complaint regarding the information requests[4] made by the Union and alleged violations regarding the August pick.[5]

These matters were arbitrated on May 4, 2009, May 20, 2009, June 22, 2009, June 30, 2009 and July 22, 2009. There were two Opinion and Awards issued by the Arbitrator on July 17, 2009 (GC Exh. 91) and August 18, 2009 (GC Exh. 90) which make specific reference to the "evidence requests" and additional work available after the route pick which are alleged in the Complaint. Although the allegations had already been litigated in the arbitral forum, the ALJ held that he would not defer the allegations that an arbitrator had already ruled upon. (ALJ 29:14). [6]

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[4] Consolidated Complaint ¶ 2(b), 7(e), 7(f), 10(c), 14(a), 14(b), 14(c), 14(e), 22(a), 22(b) and 22(d) (GC Exh. 1)

[5] Consolidated Complaint ¶12(b) and 12(c) (GC Exh. 1)

[6] Immediately following the ALJ's Decision, the Union withdrew their action filed in the Federal Court to confirm the Arbitration award.

I. June 2009: Contract Negotiations

On June 5, 2009, the Respondent's counsel wrote to the Union's Attorney stating that the Respondent agreed to meet in order to negotiate a new contract, but informed the Union's attorney that the Respondent was out of the country. Furthermore, the Respondent requested that Cesar Uchofen, a Union representative who had been terminated in January 2009, not be present at the negotiations due to "his bias and because of the fact that [the Respondent] has had to call the police on no less than two (2) occasions to remove him from the business grounds." (GC Exh. 85) The Employer did not want his good faith attempt to bargain with the Union to go afoul due to the contemptuous nature of Mr. Uchofen's conduct toward the Employer in previous occasions.

J. In June 2009, 193 out of 220 Employees Were So Dissatisfied with the Union that They Filed a Petition with the Board to Have the Union Removed

The employees presented their Employer with a petition (R Exh. 6b) containing signatures from a vast majority of the employees alleging their dissatisfaction for the Union and their intention to have the Union removed. (Tr. 436-437). This petition was signed by 193 employees out of 220 eligible employees at the time, as testified by Mr. Gillison (Tr. 433). In an effort to remove the Union, an overwhelming majority of the employees signed a petition which stated, in English and Spanish:

> **We the undersigned wish to have the present union, T.W.U. Local 100 *removed* from Ardsley Bus Company. The reason for this request is that this union is only taking out money weekly and causes huge problems between the company and the employees. The union has raised the weekly dues twice within one year. We understood that the dues were to remain the same length of the contract, which is three years.**

(R Exh. 6b; Emphasis added)

This petition was received by Mr. Gillison on or about June 16, 2009 (Tr. 438). Around the same time that he received the petition, Mr. Gillison also received a letter addressed to himself and Mr. Tiktin requesting that the Employer no longer collect Union dues from the employees:

> **Mr. Gideon and Tom we do not want to be a part of this union and we do not want to pay union dues to this union any longer. On July 1, 2009 when the contract is over we are asking you not to deduct any more union dues from our checks.**

(R Exh. 6a; Emphasis added)

The General Counsel was well aware long before the hearing was conducted of the employees' refusal to have the Union represent them. In fact, Ms. Colleen Breslin, Field Attorney at the time, who was to become the Counsel for the General Counsel at the hearing took statements from three (3) employees, Luis Maceira, Reynaldo Gomez, and Michael Wade, and each of them represented their intention to remove the Union and that management was not involved in the circulation of the petition.[7] In spite of the information acquired, Ms. Breslin continued to urge the charge that management was circulating the petition which was inconsistent with the employees' statements.

Furthermore, four (4) of the rank and file employees personally appeared at the Board and presented their petition to Ms. Breslin. The employees told Ms. Breslin of their dissatisfaction with the Union and expressed the reasons for wanting to oust the Union. Ms. Breslin concedes that she was provided with signatures from the employees but continued to prosecute the matter with a complete disregard for the employees' free will to choose their union. (Tr. 547) The extent of Ms. Breslin's knowledge was graphically shown in a statement she personally obtained from Michael Wade. (R. 20 - *Exhibit "B"*). Ms. Breslin's conduct in disregarding the employees' intention to remove the Union was driven by her bias which was later clearly revealed to another employee by stating that "unions are good."[8]

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[7] R 7, R 8, R 20 (Respondent's exhibits 7 and 20 are attached as *Exhibit "A" & Exhibit "B"*)

[8] Reynaldo Gomez testified that when Ms. Breslin took his statement she spoke to him about the Union stating "[t]hat Unions are good for the employees, and that they fight -- fight for good things for their employees". (Tr. 817).

Moreover, John Simino's testimony establishes the Union's loss of popularity among the employees by the significant drop of attendance at the Union meetings. (Tr. 800) The lack of attendance was but another way that the employees were able to display their dissatisfaction with the Union. Not only was the petition signed by a majority of the employees evidence of dissatisfaction, but also the drop in attendance is significant in determining how the employees felt about the Union and their representation. Additionally, not a scintilla of evidence was produced by the General Counsel to contradict the employees' dissatisfaction for the Union, nor did the General Counsel show that the drop of attendance was due to any conduct on the part of the Employer.

1. The Employees' Letter and Petition to Decertify Were Admitted Into Evidence Without Objection

Ms. Breslin, acting as Counsel for the General Counsel, was now confronted with her face to face meeting with four (4) employees who had circulated the petitions and with absolutely no evidence to support her contention that the Employer was involved in the circulation of the petition. Hence, the General Counsel offered "no objection" to the admission of the employees' petition to decertify (R. 6b) and to a letter signed by six (6) of the employees requesting that the Union be removed and not to deduct dues from their pay checks (R. 6a) into evidence:

JUDGE GREEN:	I don't have a problem with this. She apparently has the copy of the Petition in her hand ---
	* * *
JUDGE GREEN:	When you get it out please ask the Reporter to mark it as Respondent's Exhibit 6.
	* * *
MR. PIRROTTI:	They marked it.
	* * *
JUDGE GREEN:	He wants you to identify what this is. First of all, did you get it?
THE WITNESS:	**Yes sir. Absolutely. I've seen it. This is a letter sent to Mr. Tiktin and I about the employees' wishes not to have union dues taken out of their pay any longer since the contract ended. They did not want any part of the Union. That's the letter there. They wrote it to us. That's the first page.**
JUDGE GREEN:	And the subsequent pages are?

THE WITNESS: **Are the signatures that they collected to -- I believe they brought them to the NLRB. I believe that's how they did it.**

(Tr. 434- 444; Emphasis added)

Whereupon General Counsel did not object to the petition and it was moved into evidence:

MR. ROSE: We don't object to this document, Your Honor.

(Tr. 444; Emphasis added)

Without an objection from the General Counsel or the Union's attorney, the petition and letter from the employees were then received into evidence as an original since **there was no dispute about its authenticity:**

JUDGE GREEN: Well maybe they kept the document. I don't know. **The rule on copies is that unless there is a genuine dispute about the authenticity of a document, that a copy is the same as an original. <u>So I'm going to receive it</u>.**

(Tr. 444; Emphasis added)

Clearly the General Counsel had information in his possession that would confirm the petition's authenticity and the employees' will to have the Union removed as their bargaining representative, hence the admission of the documents without an objection. The Respondent attempted to obtain Ms. Breslin's file to obtain evidence that the Union no longer had majority support but the application was resisted and as a result the Respondent was denied the opportunity to view the file on this critical issue. (Tr. 552) Respondent urged that General Counsel had an affirmative duty, ethically and statutorily, to provide the documentation requested to establish the free will of the employees. The General Counsel in choosing not to disclose the information violated the fundamental policies of the Act to protect the employees' right to choose or reject a union.

Although the Respondent had not received the relevant material in the possession of the General Counsel, the Respondent was assured that if a majority of the employees had manifested their intentions to decertify the Union, the Respondent would ultimately win. Thus, the ALJ, referring to the Employer's affirmative defense that the Union had lost majority status, held:

> **The second affirmative defense is that the employees by a vast majority signed a petition asking to be decertified. Well, I've received the evidence on that. And ultimately, I must say, that if it's correct that these employees voluntarily wanted the Union -- manifested their intention not to be represented by the Union, and given the other circumstances of the case, you're going to win. You're going to win a portion of the case if ultimately that's correct.**

(Tr. 465; Emphasis added)

2. **General Counsel's Unsuccessful Attempt to Taint the Petition**

Ms. Breslin subpoenaed six (6) employees[9] to testify at the Hearing in an attempt to show that these employees were supervisors and were allegedly involved in the circulation of the petition to decertify. However, the only employee who was called to testify was the General Manager who testified that the Employer was not involved in the circulation of the petition. The remaining five (5) employees subpoenaed were never called to testify. Ms. Breslin understood that if called as witnesses, the employees would have testified that Management had taken no part in the preparation or circulation of the petitions.

The General Counsel attempted to amend his Complaint to allege that a supervisor had solicited employees to sign the petition to decertify (GC Exh. 114) and relied on the testimony on an employee who he subpoenaed who signed the petition. The employee, Juventino Lopez, testified that another employee, Rosa Villela, who circulated the petition, was a supervisor and that she had solicited his signature for the petition to decertify. The ALJ rejected the General Counsel's proposed amendment and held that the new allegation was not corroborated by any other person and was not supported by any other probative evidence (GC Exh. 115).

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[9] The employees subpoenaed were the President, Gideon Tiktin, the General Manager, Thomas Gillison and four employees Elisa Arias, Rosa Villela, Joe Ramos and John Stewart. This employees were allegedly involved in the solicitation of the decertification petition by among other things, intimidating the employees.

The ALJ, again addressing the General Counsel's contention that the Respondent's supervisors were involved, made it clear that there was absolutely no proof to support counsel's unfounded belief:

> **The General Counsel produced a single witness, (out of more than 200 employees), who gave uncorroborated testimony to the effect that Rosa Villela and Elise Arias asked several employees on one occasion if they had signed the petition. As the evidence does not establish that either is a supervisor within the meaning of Section 2(11) of the Act or that such a -question was within their authority as employees of the Respondent, I do not conclude that this single transaction violated the Act.** *(ALJ 34:15 fn.12; Emphasis added)*

As may be seen from the ALJ's ruling, he described the General Counsel's evidence as so pitiful that he could only present one witness out of 200 and that the one witness said nothing. Hence, the General Counsel's argument that the Employer had solicited the petition through his supervisors was without basis in fact. Furthermore, the General Counsel understood that none of the 193 employees who signed the petition would support his argument and so he chose not to call those witnesses to the stand.

K. The ALJ Opined that if a Majority of the Employees Manifested Their Intentions to Decertify the Union that There Would be no Basis for the Union's Grievance and 193 out of 220 Employees Did Just that

The Respondent's counsel chose to rest his case after the General Counsel had presented his case. The Employer left the hearing with the words of the ALJ resonating in his ears. The ALJ opined not once, but more than once, his opinion that the Respondent could legally withdraw recognition from Union. Thus, he held:

> **If the Respondent prevails on its assertion that it had the right to withdraw recognition from the Union because it has demonstrated, by probative evidence, that a majority of employees had objectively manifested their intention not to be represented by the Union, then the Respondent would thereafter be free to make any and all changes in the terms and conditions of employment without having to bargain with the Union.**

(GC. Exh. 115; Emphasis added)

Moreover, after the Respondent presented his objective evidence to the Union's majority status, the ALJ shifted the burden of proof upon the General Counsel and the Charging Party to dispute the authenticity by presenting evidence of a real dispute:

> JUDGE GREEN: **No, no. I actually haven't noticed that yet. Because, actually, the evidence so far has not really indicated a climate of coercion and – so far. It may at some later point. But it hasn't so far. So in any event, you can go get the W-4 forms and see whether or not these signatures are forgeries. You can do whatever you'd like. But I've received the document in evidence. It doesn't matter where it came from. It could have come from a garbage can. It doesn't matter. It doesn't make any difference. If you have a genuine dispute as to the authenticity of those documents, then you have to present some evidence to show me that there is a real dispute. And you haven't done so yet. When you do, then we'll talk about it.**

(Tr. 519; Emphasis added)

1. The ALJ's Decision Completely Contradicts His Rulings Made at the Hearing

In spite of the fact the General Counsel did not once present any evidence of a real dispute as to the petition, the ALJ nevertheless, in complete contradiction to his ruling held that:

> At this point, I wish to point out that notwithstanding the fact that I received the signed petition into evidence no one was called to testify about who, when or how the signatures were obtained. Nor was I presented with a group of authenticated exemplar signatures with which to make a signature comparison. I simply have no evidence to authenticate that the signatures on the petition are genuine. Maybe [they] are. But there is no evidence to demonstrate that they are.

(ALJ 39:34-41)

The repeated rulings that if the employees had manifested their intent to the remove the Union that the Employer would have been within his rights to withdraw recognition, was in complete contradiction with his ultimate decision that the signatures were not authenticated and that there was no witness to the signing of the petition.

If the General Counsel had attempted to dispute or attempted to present testimony that the signatures were not authentic, the Respondent would have called witnesses to rebut the General Counsel's contentions. However, when the General Counsel rested his case without challenging any of the Respondent's evidence on the Union's loss of majority status, the Respondent was not required to rebut unforeseen arguments not made by the General Counsel.

2. **The Petition Was in Fact Verified by General Counsel's Own Witnesses**

The General Counsel's witness, Juventino Lopez, testified that his signature was in fact on the decertification petition. When asked by the General Counsel about his signature which is on the petition, Mr. Lopez unequivocally verified his signature:

JUDGE GREEN:	**Is your signature on there?**
THE WITNESS:	**Yes, it's here.**
JUDGE GREEN:	**Is that your signature?**
THE WITNESS:	**Yes.**

(Tr.1143; Emphasis added)

Mr. Lopez also testifies that he knew of the employees who were collecting signatures in the yard and none of them were supervisors. He testified that a man named Luis (Maceira) collecting signatures to remove the Union (Tr. 1137). The General Counsel called another employee, a Guillermo Sanchez, who also testified to the validity of the petition and its circulation by the employees. When questioned by the General Counsel, Mr. Sanchez spoke of his fellow employees who were circulating the petition, when, where and how it was circulated:

Q **Mr. Sanchez, I want to draw your attention to the events around June of 2009.** Just answer the question.

* * *

Q **Are you aware that some employees were collecting signatures around this time to get rid of the Union?**

* * *

A **Yes.**
Q **How are you aware of that?**
A **Because they had a clipboard with all their names, their names were there, and they were stating that we had to get rid of the Union.**

* * *

Q **Who had the clipboards with the signatures?**
A **At this time I recall Carmen, Luis Maceira and another person who speak Portuguese, but I don't know his name.**

* * *

Q **And where were they collecting signatures?**
A **They would usually stand at the parking lot where the buses park. But they caught me on the entrance to the office where the new trailer is. That's where they asked me to sign.**

(Tr. 1057-1060; Emphasis added)

Mr. Sanchez had physically seen his fellow employees soliciting signatures to oust the Union. Mr. Sanchez's testimony not only corroborates the testimony given by Mr. Lopez but also verified that the petition was indeed being solicited by his fellow employees and that the letter signed and submitted by the employees as Respondent's exhibit 6a is in fact signed by the rank and file employees who prepared and circulated the petition:

> **The following people collected employee signatures to get the union out: Luis Maceira - Carmen Genao - Leoncio Roman - Delroy - Edury Camarena - Aurea Silva - and Michael Wade.**

(R. Exh. 6a; Emphasis added)

ARGUMENT

POINT I

THE GENERAL COUNSEL FAILED TO PRODUCE ANY EVIDENCE TO CAUSE THE ALJ TO REVERSE HIS RULING THAT THE EVIDENCE PRESENTED WAS INCONCLUSIVE THAT THE RESPONDENT WAS ENGAGED IN INTERSTATE COMMERCE

The Respondent's Answer denies the paragraphs in the Complaint that allege the Respondent is engaged in interstate commerce, therefore placing the burden of proof on the General Counsel to show that the Respondent is engaged in interstate commerce. The Complaint alleges:

> 2. . . . (b) Annually, Respondent, in conducting its operations described above in subparagraph (a), derives gross revenues in excess of $250,000 and purchases and receives goods and supplies valued in excess of $5,000 directly from suppliers outside the State of New York.
> (c) Annually, Respondent, in conducting its operations described above in subparagraph (a), provided services valued in excess of $50,000 for the County of Westchester within the State of New York, an enterprise directly engaged in interstate commerce.
> (d) Annually, Respondent, in conducting its operations described above in subparagraph (a), purchased and received at its place of business goods valued in excess of $50,000 from suppliers of fuel and automotive parts and materials located within the State of New York, each of which other enterprises has received these goods directly from points outside the State of New York.
>
> 3. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(GC Exh. 1)

The General Counsel failed to prove that the Respondent derives gross revenue in excess of $250,000 *and* purchases and receives goods and supplies valued in excess of $5,000 directly from suppliers outside the State of New York. The General Counsel did not prove that the County of Westchester is an enterprise directly engaged in interstate commerce, and also fails to show how this is relevant to the issue of jurisdiction under the Board's standards. The General Counsel also failed to prove that the Employer purchased and received at its place of business goods valued in excess of $50,000 from suppliers of fuel and automotive parts and materials located within the State of New

York, each of which other enterprises has received these goods from points outside the State of New York.

A. Standard of Proof

The terms "commerce" and "affecting commerce" are defined in Section 2(6) and (7) of the Act as follows:

> (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States . . .
>
> (7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(Section 2(6) and (7) of the Act)

The National Labor Relations Act provides the Board with the discretion to decline to assert jurisdiction over a labor dispute wherein the effect of such a labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction:

> **Sec. 14. . . . (c) [Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts]** (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act [to subchapter II of chapter 5 of title 5], **decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction** . . .

(Section 14(c)(1) of the Act)

In order to assert jurisdiction, the facts under which the decision was made in *Charleston Transit Co.*, 123 NLRB 1296 (1959) requires a showing that purchases of goods and supplies were made outside the state:

> Purchases of diesel fuel, tires, and parts **produced out of the State exceeded $160,000** in 1958.

(Id.; Emphasis added)

Thus the very language in the Board's Outline of Law and Procedure in Representation Cases expresses the additional standard wherein purchases of goods and supplies out of state must be shown:

> This standard is distinguishable from the one described immediately above in that **it embraces enterprises engaged in intrastate operations but which nonetheless affect substantially interstate commerce.** Thus, in *Charleston*, the employer operated a local passenger transit system by bus in and around Charleston, West Virginia, carrying no freight or mail nor interchanging or sharing facilities with any other transit company. **However, it carried more than 9 million passengers, including those using bus service to large plants, and its annually purchased fuel, tires, and parts produced out of the State in a sum exceeding $160,000.** □

(NLRB - An Outline of Law and Procedure in Representation Cases 280-4100 et seq.; Emphasis added)

B. <u>Evidence Presented Regarding Jurisdiction</u>

The Respondent specifically denies the allegations in the Complaint which allege that the Employer purchases goods and supplies from directly outside the State of New York. The General Counsel has not met its burden in showing that the Employer is engaged in interstate commerce, and therefore the Board should decline to assert jurisdiction over the Employer.

In view of the fact that there was no admission made by the Employer relating to jurisdiction, the General Counsel unsuccessfully attempted to establish jurisdiction by moving into evidence three Commerce Questionnaires and an Affidavit by Mr. Tiktin (GC Exh. 4). Mr. Tiktin's uncontroverted affidavit belies the General Counsel's argument that the Employer is within the Board's jurisdiction by stating that he "does not derive gross revenue from sales or performance of services to customers outside the State of New York which exceed $50,000". (GC Exh. 4). The record further shows that the ALJ accepted the Employer's sworn statement and found that the issue of jurisdiction was inconclusive:

> JUDGE GREEN: . . .So I am going to receive this set of documents which General Counsel had described as a piece of evidence. That's all I'm doing. **I'm not making any conclusions about it one way or the other, other than receiving it as a piece of paper that's signed by your client.** So that's all I'm doing. . . .

(Tr. 32-33; Emphasis added)

Moreover, the General Counsel did not subpoena the Respondent's financial records nor did he call to the stand Mr. Tiktin, who had been subpoenaed, to testify as to the financial aspects of the company. As the hearing continued, the General Counsel did not argue or present any further evidence on the issue of jurisdiction.

In spite of the General Counsel's lack of proof required to establish jurisdiction, the ALJ in violation of the holdings of *Writer's Guild of America, Inc.*, 350 NLRB 393, eld that the Respondent is an Employer engaged in commerce and that its operations affect interstate commerce. (ALJ 4:25-26). The ALJ incorporates the facts of the Respondent's business operations in his Decision with no reason as to why the facts cited are sufficient to assert jurisdiction over the Employer. The ALJ did not indicate to the Respondent that he had changed his mind as to inconclusive nature of the General Counsel's evidence on the issue of jurisdiction. Thus the ALJ blind sided the Employer into believing that the subject of jurisdiction was inconclusive.

POINT II

ONCE THE RESPONDENT PRESENTED OBJECTIVE AND PROBATIVE EVIDENCE THAT THE UNION HAD ACTUALLY LOST MAJORITY SUPPORT, WHICH THE GENERAL COUNSEL DID NOT ATTEMPT TO REBUT, THE COMPANY'S JUNE 2009 WITHDRAWAL OF RECOGNITION WAS LAWFUL

Referring to the Employer's affirmative defense that the Union had lost majority status, the ALJ unequivocally held that:

> **The second affirmative defense is that the employees by a vast majority signed a petition asking to be decertified. Well, I've received the evidence on that. And ultimately, I must say, that if it's correct that these employees voluntarily wanted the Union -- manifested their intention not to be represented by the Union, and given the other circumstances of the case, you're going to win. You're going to win a portion of the case if ultimately that's correct.**

(Tr. 465; Emphasis added)

A. Standard of Proof

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) the Board determined that an employer who withdraws recognition from an incumbent union, may do so only if the union had in fact lost majority status. *Id.* at 725. Thus, "[i]f the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had lost majority support at the time the employer withdrew recognition. *Id.* In *Levitz* the Board further clarified the standard by introducing a burden shifting standard where an employer may over come a violation of the Act where the evidence presented to support the Union's loss of majority status is unrebutted:

> **An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence.**

(Id. at 725 fn. 49)

The above cited case was reinforced by the Fourth Circuit in *NLRB v. B.A. Mullican Lumber*, 535 F.3d 271 (2008) where the employer was found to have lawfully withdrawn recognition from a union after having presented unrebutted objective evidence to the union's majority status:

> **In short, Mullican Lumber presented objective evidence demonstrating that, more than not (the preponderance standard as required by *Levitz*), the Union had lost majority status, and there is no substantial evidence to conclude otherwise. Accordingly, we conclude that there is no substantial evidence to support the Board's conclusion that Mullican Lumber violated § 8(a)(5) in withdrawing recognition of the Union.**

(*Id.* at 281; *Emphasis Added*)

B. Respondent's Objective Evidence to the Union's Lack of Majority Status Without Objection

As may be seen from this Brief, the following overwhelming objective evidence to the Union's majority status was presented to the ALJ and was totally ignored:

(a) A petition to decertify signed by 193 out of 220 employees, circulated by the employees and was admitted into evidence without an objection

(b) The employees personally delivered the petition to Ms. Breslin and presented their arguments as to why they wanted to decertify the Union.

(c) The employees submitted their petition to decertify to the Employer with a letter demanding that the Employer stop withholding Union dues from their pay checks.

(d) The employees' statements taken by Ms. Breslin before the hearing belied the allegations in the Complaint and further show that the employees wanted to have the Union removed, including the affidavit by Mr. Gomez stating that he wanted to sign the petition (R 8).

(e) An employee called by the General Counsel verified his signature on the decertification petition.

(f) The employees met with and asked Local 713 to represent them (R 21) and the Union received a copy of the petition filed by Local 713.

The General Counsel rested his case without putting in a single piece of evidence that the Union was supported by a majority of employees in June 2009.

1. **The ALJ Failed to Apply the Burden Shifting Standard**

During the hearing, the ALJ acknowledges receipt of the objective evidence to the Union's majority status and shifted the burden to the General Counsel to dispute the authenticity of the signatures on the decertification petition:

> JUDGE GREEN: **No, no. I actually haven't noticed that yet. Because, actually, the evidence so far has not really indicated a climate of coercion and -- so far. It may at some later point. But it hasn't so far. So in any event, you can go get the W-4 forms and see whether or not these signatures are forgeries. You can do whatever you'd like. But I've received the document in evidence. It doesn't matter where it came from. It could have come from a garbage can. It doesn't matter. It doesn't make any difference. If you have a genuine dispute as to the authenticity of those documents, then you have to present some evidence to show me that there is a real dispute. And you haven't done so yet. When you do, then we'll talk about it.**

(*Tr. 519; Emphasis added*)

In spite of the ALJ's invitation to the General Counsel to submit evidence to dispute the petition, the General Counsel failed to do so. However, incredibly the ALJ held that it was the Employer's responsibility to produce evidence to authenticate the signatures, not the General Counsel's responsibility to rebut the signatures. His Decision is clearly inconsistent with his statements made at the hearing and the standard of proof enunciated in *Levitz*. The Respondent presented objective evidence to the Union's majority status and the General Counsel failed to present any evidence to contradict the Union's lack of majority status.

2. **It Was Improper For The ALJ to Speculate as to the Validity of the Decertification Petition When It Was Contrary to the Record and there Was Never Any Evidence Submitted by the General Counsel**

The ALJ sought to discredit the decertification petition signed by 193 out of 220 employees by speculating in effect on what the General Counsel might have argued if he had challenged the Respondent's evidence. By basing his Decision on his own conjecture, rather than the evidence and the arguments actually presented by the parties, the ALJ crossed the line and acted as an advocate for the General Counsel.

The ALJ speculated that there were about 190 signatures on the petition but that there was no proof that the people whose signatures are contained on it actually signed the petition. (ALJ 39:36-37) At the time of the hearing, the Respondent was never asked to provide any documentation to authenticate the signatures because they had not be objected to. The evidence presented by the General Counsel strictly focused on the allegation that the Employer had solicited the signatures through his supervisors, which was found to have no basis in fact. (ALJ 34:15 fn. 12).

The Fourth Circuit in *NLRB v. B.A. Mullican Lumber*, 535 F.3d 271 (2008) overruled the Board's decision that the employer unlawfully withdrew recognition by stating that since the General Counsel did not object to the evidence of the union's loss of majority status presented by the employer. The ALJ may not make arguments nor presume evidence that was not offered by the General Counsel:

> As a consequence, **the ALJ's opinion could only speculate as to the arguments that the General Counsel *could have made* in response to Mullican Lumber's evidence on the lack of majority support-such as that Mullican Lumber might have had more than 220 production employees or that some of the signatures on the decertification petitions might not have been valid. But, the General Counsel *neither made these arguments nor presented any evidence to support them.* Moreover, the General Counsel never even challenged the authenticity or accuracy of Carroll's letter or the other evidence Mullican Lumber presented.**

Id. at 279

Clearly *Mullican* prevents the ALJ from making arguments or speculations in favor of the General Counsel. The matter presently before the Board is similar to the facts in *Mullican*, where in both cases, the ALJ made an objection to the authenticity of the documents presented by the Employer where there had been no objection made by General Counsel at the hearing. As in *Mullican*, the ALJ's advocacy for the General Counsel should not be condoned. Therefore, the Board should set aside the Decision made by the ALJ and at the very least afford the Respondent a *de novo* hearing.

POINT III

IN THE EVENT THAT THE ALLEGATIONS ARE FOUND TO BE VIOLATIONS, THE UNFAIR LABOR PRACTICES DID NOT TEND TO INFLUENCE 193 EMPLOYEES TO FILE THEIR PETITION TO DECERTIFY THE UNION

A. The ALJ's Decision Found No Credible Evidence of Management's Role In The Decertification Petition

After listening to the overwhelming testimony that the employees were so dissatisfied with their Union, the ALJ held:

> **I do note, however, that there is little or no credible evidence that management played any direct or indirect role in the solicitation of the petition.**

(ALJ 34: 14-15; Emphasis Added)

However, incredibly and without any basis in fact or law, the ALJ held that "the Respondent's unfair labor practices from 2008 through June 2009 tended to have the probable effect of undermining the Union in the eyes of the bargaining unit employees." Furthermore, he held "I would therefore view these unfair labor practices as a proximate cause for any disaffection that employees would have had with the Union." (ALJ 39:10-14) The ALJ provides the Respondent with absolutely no reason as to how the violations could so strongly influence 193 employees into circulating and signing a decertification petition.

B. Standard of Proof

In *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Board qualifies the employer's ability to rebut the presumption of the union's majority status by stating that an employer may not avoid its duty to bargain by relying on any loss of majority status attributable to his own unfair labor practices. *Id.* In considering which unfair labor practices may prohibit an employer from lawfully withdrawing recognition, the Board must find that the unfair labor practices must have caused the employee disaffection or at least had a "meaningful impact" in bringing about that disaffection. *Id.*

Moreover, the United States Court of Appeals for the District of Colombia in the matter of *Williams Enterprises v. National Labor Relations Board*, 956 F.2d 1226, 292 U.S. App. D.C. 105 held that even if the alleged conduct of the employer constituted a violation of Section 8(a)(1) that:

> we must now decide **whether a causal nexus existed between that unfair labor practice and the Union's loss of majority support.** . . *St. Agnes, 871 F.2d at 147; see also Avecor Inc. v. NLRB, 931 F.2d 924, 934 (D.C. Cir. 1991), cert. denied, 501 U.S. 1048, 112 S.Ct. 912, 116 L.Ed2d 812 (1992)* (substantial evidence must support finding that unfair labor practices had tendency to undermine majority strength).
>
> * * *
>
> . . **An analysis using those factors and explaining why the unfair labor practice would have a lasting effect on the employees' view of the union might well have met the standards we set out in *St. Agnes and Avecor.* But because the Board's decision contained no such explanation, we remand this case for further findings concerning the effect that the August 8(a)(1) violation had on the employee petition signed in December.**

(Id. at 1235, 1236; Emphasis added)

Similarly, in a decision by this Board in the matter of *Airport Aviation Services Inc.*, 292 NLRB 823 (1989), the Board sustained the ALJ's ruling, referring to the alleged refusals to provide payroll records, that the employer's conduct did not taint the petition:

> **Similarly we find that there is no nexus between the October 1983 8(a)(5) and (1) violations and the withdrawal of recognition. There is no evidence that the employees were aware of the Respondent's failure to comply with the October 1983 information requests or that they became disaffected because of it.**

(Id. at 824; Emphasis Added)

C. The Alleged Violations Did Not Influence 193 Employees to Sign a Petition to Decertify the Union

Perhaps the most outrageous finding was the ALJ's decision that "the alleged loss of majority status was likely caused by the Respondent's course of illegal conduct." (ALJ 39:29-30) Contrary to the ALJ's decision, there was absolutely no evidence that the Employer influenced his employees to reject the Union. The petition submitted by the employees showed they were motivated by their

self interest and their free will to decide what is best for them. Thus, the preamble to the petition in Spanish and English states:

> **We the undersigned wish to have the present union, T.W.U. Local 100 removed from Ardsley Bus Company. The reason for this request is that this union is only taking out money weekly and causes huge problems between the company and the employees. The union has raised the weekly dues twice within one year. We understood that the dues were to remain the same length of the contract, which is three years.** *(R 6b)*

Moreover, the letter by the employees to the Employer reaffirmed that the employees rejected the Union's representation and reaffirmed that when the contract is over that "we are asking you not to deduct Union dues from our checks" (R 6a). The employees who had physically collected the signatures wrote to Gideon Tiktin, the owner, and Tom Gillison, the General Manager manifesting their intention to remove the Union as their collective bargaining representative:

> **Several employees of the company have been for the past month collecting signatures from the employees to get the TWU — Local — 100 out. We do not want this union here and we do not want to pay dues to this union any more. The following people collected employee signatures to get the union out: Luis Maceria — Carmen Genao — Leoncio Roman — Delroy Antonio — Edury Camarena — Aurea Silva — and Michael Wade. We collected 190 signatures from the employees.**
>
> * * *
>
> **Mr. Gideon and Tom we do not want to be a part of this union and we do not want to pay union dues to this union any longer. On July 1, 2009 when the contract is over we are asking you not to deduct any more union dues from our checks.**

(R Exh.. 6a; Emphasis added)

The employees who signed the bottom of the letter were Luis Maceira, Carmen Genao, Leoncio Roman, Delroy Antonio, Edury Camarena, Aura Silva and Michael Wade. The employees were able to come together in a united common goal, to remove the Union. The Decision made by the ALJ treats the employees as if they are incapable of exercising their core rights because they have been so easily influenced by the Employer.

1. The Union's Conduct Was the Sole Determining Factor in the Employees' Decision to Insist that the Union be Removed as Their Bargaining Agent

The evidence presented at the hearing displayed the changing relationship between the Union and the Employer in 2007, more so the disrespect and utter contempt the Union representatives had toward the Employer. This was clearly evident in December 2007 when the Union representatives decided that they were going to place a replica of a blown up rat outside of the Ardsley Bus Corp. Offices with the image of Gideon Tiktin as "Scrooge" for all the employees to see. Thus, the Employer's General Manager testified after being called as General Counsel's witness:

> THE WITNESS: **Yes. It was a big, blown up balloon with a generator blowing this thing up.**
> JUDGE GREEN: Yes. I've seen them.
>
> THE WITNESS: **And they tied some kind of a notice around it telling him some kind of name with his name onto it, saying that he was this. And it had my name on it. But I don't care about my name.**
>
> * * *
>
> A **I believe it was "Gideon Tiktin is Scrooge and Tom Gillison," something else.** I forgot. **But two of the Christmas figures of whatever. Scrooge and somebody else. But I remember that with them. But I found it despicable.**

(Tr. 353-354; Emphasis added)

The Union representatives acted as hoodlums by degrading and emasculating the Employer in front of his employees. The ALJ had the temerity to state that the Employer's alleged conduct "tended to have the probable effect of undermining the Union in the eyes of the bargaining unit employees." (ALJ 39:11-12) Clearly it was the Union's intention from the very beginning of the relationship to undermine the status of the Employer and make it known to the employees that the Union was running the show around Ardsley Bus Corp. The record is totally barred of any other conclusion.

Furthermore, the record is absent of any such finding that Union activities were diminished in any way by the alleged violations. John Simino, a Union representative testified for the General

Counsel that the Union had still been holding meetings and there were still people attending those meetings. (Tr. 800). Moreover, Cesar Uchofen, another Union representative also testified for the General Counsel that he had no problem passing around flyers for the Union in the presence of management. (Tr. 952). The record shows that the Union activities were still available for the employees if they choose to participate in those activities.

2. The General Counsel Did Not Argue, Let Alone Prove, that the Union Had Lost Majority Status as a Result of the Employer's Alleged Violations

During the course of the hearing, the General Counsel did not present any evidence to contradict the Union's loss of majority status among the employees. The General Counsel did not at any time during the hearing make the argument that the violations in the Complaint were directly related to the Union's loss of majority status. Moreover, there was not one witness who testified that any of the allegations in the Complaint had an impact on their choice to remove the Union. In fact, two (2) of the employees, Luis Maceira and Reynaldo Gomez, questioned by Ms. Breslin in May 2009 evidenced their intention to remove the Union (R. Exh. 7 & R. Exh. 8, respectively; *see also Exhibit "A" - Maceira Affidavit referred to infra*). Mr. Maceira stated in his affidavit that he had circulated a petition to remove the Union and that the Union was not representing the employees well. (R Exh. 7 - *See Also Exhibit "A" - Maceira Affidavit referred to infra*) Mr. Gomez stated that he was trying to find the employees who had the petition because he wanted to sign it. (R Exh. 8)

Furthermore, four (4) of the employees who had circulated the petition personally delivered it to Ms. Breslin. Although, the employees explained to Ms. Breslin that they no longer wanted to be represented by the Union, Ms. Breslin continued to ignore the employees' right to reject the Union. The employees did not once state that their disaffection for the Union was based upon the alleged acts of the Employer. The employees wanted to remove the Union for the very fact that the Union had raised their dues twice within one year, where the employees understood that the dues were to remain the same for the length of the contract. (R Exh. 6b).

POINT IV

THERE WAS NO SUPPORT IN THE RECORD FOR THE VIOLATIONS FOUND IN THE ALJ'S DECISION OTHER THAN THE UNCORROBORATED STATEMENTS OF THE UNION REPRESENTATIVE

The standard of proof required by the General Counsel is the preponderance of the evidence, as held in the matter of *Writer's Guild of America, Inc.*, 350 NLRB 393:

> However, it is beyond question that a Respondent can stand mute, and the burden of proof still remains with the General Counsel to establish an alleged violation of the Act by a preponderance of the evidence.

(Id. at 402; fn 21)

A. Allegations Regarding Cesar Uchofen in 2008

1. Suspension March 2008

In March 2008, Cesar Uchofen received a parking ticket (GC Exh. 10) while at the Union headquarters in Yonkers, NY. (Tr. 370-375) The Company's policy prohibits personal use of the company vehicle and subjects violators to employee termination (GC Exh. 9). Uchofen failed to inform the Employer that he had received a ticket, notwithstanding it was his clear duty to do so, and as a result, the fine on the ticket was doubled (Tr. 375). Uchofen was thereafter suspended for his improper use of the company vehicle. (Tr. 370-375) When Uchofen demanded to have Simino present during the meeting between himself and Gillison regarding the parking ticket, Gillison instead asked to speak to Uchofen alone in order to avoid further conflict. The ALJ held that the Respondent interfered with Uchofen's right to have Union representation and that Uchofen's suspension was motivated by his request to seek Union representation. (ALJ 12: 18-19)

It was quite clear at this time that Uchofen and Simino were the vortex of the problems at Ardsley Bus Corp. Given past experience with Simino's inappropriate anti-Semitic remarks (Tr. 353-354), Mr. Gillison may have over reacted when Uchofen sought Simino's representation. The ALJ stated in his decision that the Employer's refusal to allow Uchofen Union representation "tended"

to impact the employees' decision to remove the Union.(ALJ 39:14-16) Assuming arguendo that the Decision regarding Uchofen's suspension is correct, the ALJ does not justify how, if at all, this affected the employees discontent for the Union.

2. <u>Alleged Assault in November 2008</u>

Cesar Uchofen's account of the incident of November 2008 was again another way to undermine the Gillison in the eyes of the employees by making false allegations. Uchofen testified that in November of 2008 he was kicked in the back by Thomas Gillison. The Administrative Law Judge held:

> According to Uchofen as he was leaving the trailer, Gillison kicked him in the back and told dispatcher John Stewart to take him of his run. **Employee Rosie Clayton essentially corroborated Uchofen's account.** I therefore conclude that the Respondent, by Gillison's actual assault on Uchofen, violated Section 8(a)(1) of the Act.

(ALJ 13:13-15; Emphasis added)

The General Counsel called Rosie Clayton, an employee, to testify:

> **Q** **Did you see any interaction between Cesar and Tom in November of 2008 at Ardsley that seemed unusual to you?**
>
> * * *
>
> **A** **No. I just heard commotions.**

(Tr. 1104; Emphasis added)

The testimony given by Clayton is quite clear that she did not see any physical interaction between Uchofen and Gillison. Given Clayton's testimony, there can be no reasonable assumption that would corroborate Uchofen's account. Clayton's testimony does corroborate that there was a verbal confrontation between Gillison and Uchofen. However, the General Counsel has failed to prove that the "actual assault on Uchofen" took place.

Furthermore, Uchofen testified that John Steward, an employee, was present during the confrontation between himself and Gillison. (Tr. 938-939) Although subpoenaed by the General Counsel, Mr. Stewart was never called to testify. Uchofen's account of the confrontation between

himself and Gillison was not "essentially corroborated" by any of the employees. Therefore, the ALJ's determination should be rejected based on the lack of evidence as to the alleged assault.

B. Information Relevant to Summer Camp Routes 2008

Simino complained that he received the information regarding the summer camp routes, however, it was "not received timely". The ALJ found that the Respondent had not provided the Union with information relevant to the summer camp routes in a timely fashion. (ALJ 17:44-45) The Respondent's uncontroverted evidence showed that the summer route information was given to Simino as soon as the Employer received it. (Tr. 191) Mr. Gillison also testified that a meeting was held between himself, Simino, and Ms. Hogan, another Union representative for the purpose of discussing the summer route picks and the information requested by the Union. (TR. 198) Simino corroborated Gillison's testimony that there was a meeting regarding the summer pick. (Tr. 614) The record does not show that the Employer received the summer route information any earlier than when it was given to the Union.

C. Respondent's Alleged Refusal to Meet with the Union Regarding Step Two Meetings

The ALJ held that the Respondent refused to respond to at least two (2) requests by the Union to have step two (2) meetings. (ALJ 18:30-31) The ALJ fails to specify which step two (2) grievances the Respondent allegedly refused to honor. Furthermore, the ALJ held that this alleged violation "tended" to have the probable effect of undermining the Union in the eyes of the employees. (ALJ 29:23-24) The ALJ fails to explain how, if at all, this alleged violation could have caused 193 employees' discontent towards the Union. Additionally, there is no showing that there were actually employees who were complaining about the grievances filed by the new Union representatives.

D. Allegations Regarding the Posting of Summer and August 2008 Picks

The ALJ held that there was no evidence that the Employer had posted the summer routes, and that there was no dispute that in August 2008 the Company had omitted a substantial group of

routes for the regular school year from the bidding process. (ALJ 25:30-33). The ALJ found that the Employer was in violation of the Act by not following the terms of the collective-bargaining agreement. (ALJ 25:36-39)

The General Counsel did not call one witness to testify that all the routes were not posted on the pick board for the summer and August 2008 picks. Furthermore, Simino could not name one employee who had objected to any of the picks:

> JUDGE GREEN: All right. But then -- but, that's what the -- **unfortunately or fortunately, that's what this case is about. So, you have to tell me the names of individuals who personally complained about that their seniority rights were abused as a result of the -- any of the picks.**
> THE WITNESS: I have a problem naming them in front of the Employer.
> JUDGE GREEN: **Okay. Then, I'm going to conclude that there were none.**

(Tr. 708-710)

The ALJ further stated that, "the evidence shows that the Company did not, in fact, post all of the routes." (ALJ 20:21-22) In his Decision, the ALJ refers to a letter written by Gillison to Simino on August 28, 2008 (GC Exh. 25) wherein the ALJ stated that Gillison had essentially admitted that certain routes were assigned by means other than the bidding/seniority process. (ALJ 20:24-26) The ALJ's interpretation of Gillison's letter is inconsistent with the unequivocal statement to the Union that all the routes were posted on the pick board. (GC Exh. 25).

E. <u>Allegations of Direct Dealings</u>

The ALJ found that Gillison had bypassed the Union by asking the employees to sign a letter regarding the mechanic's tool allowance (ALJ 30:31-32) and a letter relating to the employees' summer route pick in 2008. (ALJ 31:15-18)

1. <u>Mechanics' Letters</u>

The ALJ held that the Company had asked the mechanics to sign a letter confirming that they had received their tool allowance. (ALJ 30:12-13)

However, it was clear from the testimony that Gillison had no part in the production of these documents. Furthermore, there were no witnesses who testified that Gillison had asked the employees to sign such a document.

The General Counsel called Gillison to the stand where he testified, contrary to the ALJ's Decision, that he had received the letters (GC Exh. 50 and GC Exh. 51) from the mechanics themselves:

> Q Okay. Could you explain what 51 is?
>
> * * *
>
> A 51 is a document given to me by the mechanics
> Q Who drafted the document?
> A I have no idea.
> Q You don't know who typed it up?
> A Sir, I do not know. I just said I do not know.

(Tr. 335-336)

As is obvious from the above, the record is absent of any showing that the Respondent had bypassed the Union and directly dealt with the employees regarding their tool allowance.

2. <u>Summer Route Pick Letters</u>

In December 2008, the Union began to file self-serving grievances with no support by the employees (*see, infra)*. (Tr. 709-710) The Union claimed that there were no summer picks and therefore, Gillison asked the employees to confirm that they did pick their summer route. (Tr. 328) Considering the problems that the Union had already caused the Employer by undermining his authority before the employees (Tr. 353-354), the Employer did not want the Union to file another self-serving grievance, especially since no employees had made any complaints about the summer route pick. (Tr. 709-710)

F. <u>Alleged Interrogations by Respondent's Attorney</u>

The ALJ held that the Respondent violated Section 8(a)(1) of the Act by interrogating Reynaldo Gomez, an employee, who was asked to appear before Ms. Breslin pursuant to her

subpoena. Mr. Gomez spoke to his employer regarding his obligation to appear and his employer suggested that he speak to employer's counsel. (R. Exh. 8)

Although the ALJ cited *Johnnie's Poultry*, 146 NLRB 770, 775 (1964), he also pointed out the reason for the inadvertence of counsel:

> The respondent's counsel, Anthony Pirrotti, is not a specialist in labor law or in the procedures of the National Labor relations Board. As such, it would not surprise me if he **inadvertently** ran afoul of the procedures set forth in *Johnnie's Poultry,* 146 NLRB 770, 775 (1964)...

Moreover, nowhere in his Decision, does the ALJ state that the interview occurred in a "coercive" atmosphere when Gomez appeared at counsel's office.

In any event, *Johnnie's Poultry* is inapplicable to the matter currently before the Board, in that Gomez asked to speak with Gillison about the subpoena issued by the Board. As stated in Mr. Gomez's affidavit, Gillison suggested that he visit the Employer's attorney to find out more information.(R. Exh. 8) The Employer did not require that the employee follow up with the attorney. Furthermore, the employee did not testify that he was coerced in any way or that he was forced into meeting with the Respondent's attorney. Gomez's participation was strictly voluntary. (R. Exh. 8) The context was free from Employer hostility to union organization and was not coercive. The Respondent in no way interfered with the employee's rights by agreeing to meet on the employee's behalf.

G. <u>May 2009 Respondent's Alleged Failure to Furnish Information to the Union</u>

In May 2009 the Union sent the Respondent a letter requesting information allegedly in preparation for collective bargaining.(GC Exh. 75) Contrary to the record, the ALJ held that the Respondent refused to furnish the information requested by the Union. (37:30-31). In fact, Respondent's counsel did respond to the Union's request on June 5, 2009 by stating that the Respondent had been out of the country and that Respondent's counsel would call the Union's attorney upon his return. (G.C. 85) At a meeting held on June 18, 2009, the Union presented an

oral list of demands, but refused to submit that list in writing. Thereafter, the Petition to Decertify was received by the employer and all negotiations with the Union ceased.

H. Respondent's Refusal to Allow Cesar Uchofen to be Present During Collective Bargaining

On June 5, 2009, Respondent's counsel responded to the Union's demand to schedule a collective bargaining meeting with the condition that Uchofen not be part of the negotiating team:

> However, in regard to your proposed negotiating committee, you of course understand from the Arbitration before Referee Sayegh that we cannot permit Mr. Uchofen to be part of any negotiating team because of his bias and because of the fact that my client has had to call the police on no less than two (2) occasions to remove him from the business grounds.

(GC Exh. 85)

The ALJ held that the Respondent violated the Act by refusing to accede to the Union's choice of having Uchofen as one of the people within the bargaining committee. (ALJ 37:49-50) The ALJ cited *Pan American Grain Co.*, 343 NLRB 205, 206 (2004) by stating in pertinent part:

> one party cannot legally refuse to bargain because it doesn't like who the other party has chosen as its bargaining representatives. The only exception is if it is demonstrated that the selection of a particular individual or individuals would bring such ill will to the bargaining table so as to make good faith bargaining impossible.

(ALJ 37:37-42)

Uchofen's allegations of threat and assault with no basis in fact, along with his utter contempt for management exhibited before all of the employees at the 19-A examination, clearly demonstrated Uchofen's intent to undermine the Employer in any way possible. The totality of the circumstances show that in order for the Employer to have been able to bargain with the Union in good faith and without bias, Uchofen should not have been allowed to be present at the bargaining meeting.

POINT V

THE BIAS AND PREJUDICE EXHIBITED BY THE ALJ IN ASSISTING COUNSEL FOR THE GENERAL COUNSEL WAS SO EGREGIOUS THAT A HEARING *DE NOVO* MUST BE GRANTED

The ALJ understood from the moment that the Respondent entered the hearing room that the Respondent's defense was that the Regional Director conducted an improper investigation into the fact that the Union had lost majority status among the employees and had signed a petition to decertify. The ALJ showed his bias against the Employer's defense by making *sua sponte* objections, whenever the General Counsel failed to object.

Respondent's counsel argued that Ms. Breslin, Counsel for the General Counsel, had subpoenaed witnesses as part of the investigation and acquired information that the allegations made by the Union had no basis in fact. The Affidavits of Reynaldo Gomez and Luis Maceira were taken on May 12, 2009 by Ms. Breslin, which revealed that neither the Employer nor management had any part in the production or circulation of the decertification petition.

A. The Maceira Affidavit

The ALJ expressed his disdain for the affidavit of Maceira taken by Ms. Breslin before the Respondent's counsel had an opportunity to offer the affidavit into evidence by forewarning the General Counsel not to "object yet. It hasn't been offered into evidence." (Tr. 468) With no objection by the General Counsel before the ALJ's statement, the ALJ was clearly alerting the General Counsel to object to the document.

However, when the Respondent's counsel attempted to move Maceira's affidavit into evidence, based upon the forewarning of the ALJ, the General Counsel promptly answered "objection". Respondent's counsel then advised the ALJ:

> MR. PIRROTTI: You just told him what to say, Judge, You just told him what to say.
> JUDGE GREEN: I'm giving him the option. If he wants to object, I'll sustain the objection. If he doesn't want to object, then I'll let it in.

> MR. PIRROTTI: I'm sorry, Your Honor, but that's not proper. Respectfully, it's not proper.

(Tr. 479)

Respondent attempted to move Mr. Maceira's affidavit into evidence, however, the ALJ refused to do so and his Affidavit was placed in a rejected exhibit file and was marked as R. Exh. 7; Tr. 479-480. The Respondent has *attached hereto as* ***Exhibit "A"*** Mr. Maceira's affidavit to show that it was the rank and file employees who wanted to oust the Union and that he, on behalf of the employees, prepared and circulated the petition to decertify the Union. These facts were well known to the Regional Director and Counsel for the General Counsel but nevertheless they were ignored to urge the false allegations claimed by the Union.

Respondent's counsel attempted to show that Ms. Breslin was conducting an improper investigation by accepting the Union's claim that the employer had attempted to coerce the employees into decertifying the Union. Judge Green, responding to Respondent's counsel's request that Ms. Breslin state for the record whether her investigation indeed showed that the employees at all times exercised their free will, *sua sponte* held "No -- I'm not going to let her do that"; and further stated "I'm not litigating how the investigation was conducted." (Tr. 728)

B. <u>The Wade Affidavit</u>

Additionally, the Respondent has also *annexed hereto as* ***Exhibit "B"*** a statement taken by Ms. Breslin of Michael Wade, an employee who also stated that he had circulated the petition to decertify the Union in June 2009 and that he did not want to be represented by the Union. The ALJ improperly rejected Mr. Wade's affidavit without an objection from the General Counsel:

> MR. PIRROTTI: -- to do now is I'm going to move in evidence Michael Wade's affidavit, then.
> JUDGE GREEN: And I'm going to reject it

(Tr. 729)

The ALJ again refused to move the affidavit into evidence, and thus, his Affidavit was placed in a rejected exhibit file and was marked as R. Exh. 20; Tr. 729-730.

Clearly the ALJ prejudiced the Respondent by not admitting into evidence the above documents that would further establish that the Regional Director and the Counsel for the General Counsel were at all times aware that the allegations made by the Union had no basis in fact. Moreover, there was not one employee who testified that they were complaining about any of the allegations brought by the Union.

C. <u>Testimony of John Simino</u>

At a critical time in the cross-examination of John Simino, who was testifying on the issue of the fall pick, the summer pick and charter pick, which were alleged grievances, Respondent's counsel asked for the names of any employees who complained regarding the fall pick, the summer pick or charter pick. (Tr. 708-709) Simino had a problem in naming names and Judge Green held:

> JUDGE GREEN: Okay. Then, I'm going to conclude that there were none.

(Tr. 710)

Simino testified that since September, his membership had declined significantly. (Tr. 800) He attempted to exculpate his conduct in causing the loss of membership by claiming that the reason behind the employees refusal to attend the meetings called by him was because "the employees were scared to be associated. . . with their union" (Tr. 800)

Respondent's counsel attempted to elicit , on cross-examination, what he meant by the word "scared" and for the name of any employees that claimed they were "scared". The ALJ, without any objection from the General Counsel, *sua sponte*, interrupted the questioning, refused to permit the witness to answer and stated:

> JUDGE GREEN: He's not going to produce anybody . The General Counsel or the Union's counsel will produce any witnesses they have. This is not an appropriate question. If and when they ---

(Tr. 800)

D. The ALJ Sought to Undermine the Confidence of the Respondent In His Counsel and His Hostility Towards Counsel Was Apparent

Simply put, the ALJ did not appreciate Respondent's counsel's advocacy on behalf of his client and chose to attack counsel by his *sua sponte* opinion that counsel was an inexperienced labor lawyer. (Tr. 231) This outrageous conduct occurred at the hearing, in the presence of the Employer.

During the investigation, the Employer told his counsel that an employee, Mr. Gomez, was to appear and testify before Ms. Breslin. A limited interview was conducted by Respondent's counsel. Gomez's testimony at the hearing did not reveal that the interview was done in a coercive manner or that he felt he was obligated to meet with counsel. The ALJ *sua sponte* announced his destain of counsel's competency by contemptuously expressing his opinion that the interview conducted attributed to his lack of experience in labor law or in the procedures of the National Labor Relations Board. (ALJ 31:24-25)

The Respondent's Counsel moved Gomez's statement taken by Ms. Breslin into evidence (R. 8) The purpose was to show that there was no coercive atmosphere present and the limited nature of the interview. Thus, Gomez stated in his affidavit:

> Halfway through last week, I went to the lawyer's office with Luis Maciera and John Ramos, who was designated by Tom as a translator. John Ramose was a former union representative. When we got to the lawyer's office, he asked me how long I had been with the company, if it paid the Union and if I picked my route in August. The lawyer did not offer to accompany me to the appointment, did not take any notes and it was a brief meeting. He did not ask me to report to him what happens at the appointment.

(R. 8)

The ALJ saw an opportunity to attack counsel and undermine his counsel's relationship with the Respondent by opining:

> JUDGE GREEN: I know. But you're not a labor lawyer and you've never been.

(Tr. 231)

At one point in the hearing, the ALJ even told the Respondent to seek alternative representation, after Respondent's counsel objected:

> JUDGE GREEN: Why don't you please leave and let the client get another attorney.

(Tr. 1117)

From the very beginning of the hearings, the ALJ showed his hostility when he ordered that the Respondent comply with General Counsel's application to turn over thousands of pages of documents "within five minutes":

> JUDGE GREEN: Okay, fine. So now we're going to see if you're right. Turn over the documents.
> MR. PIRROTTI: And I'm saying to you there is no basis for you to ask and to rule -- excuse me, to rule that my client has to stop his entire business to --
> JUDGE GREEN: -- Turn over the documents right now.
> MR. PIRROTTI: Well you don't have to raise your voice.
> JUDGE GREEN: Turn over the documents. I'm ruling against you.
> MR. PIRROTTI: We have to -- I will give you every respect which --
> JUDGE GREEN: Please don't have this argument. You don't have to respect me or not. Turn over the documents.
> MR. PIRROTTI: That's your ruling, sir?
> JUDGE GREEN: Yes, that is my ruling.
> MR. PIRROTTI: and we respectfully object.
> JUDGE GREEN: Okay, fine.
> MR. PIRROTTI: And we ask for a mis-trial.
> JUDGE GREEN: Fine. Denied. Turn over the documents. I want to know in five minutes whether or not these documents are turned over.

(Tr. 45)

During the Hearing, the hostility and prejudice of the ALJ was shown again and again:

> JUDGE GREEN: . . .We're going to be here -- you're not going to go to your house in Florida. You're not going to go to your house in --
> MR. PIRROTTI: -- You're not threatening me, are you?
> JUDGE GREEN: I am threatening you. . .

(Tr. 232)

The ALJ's tactics and overwhelming hostility impeded on the Respondent's due process rights to a fair trial.

CONCLUSION

The Decisions of the NLRB have consistently supported the inalienable rights to accept or reject their bargaining agent. The overwhelming proof is that 193 out 220 employees manifested their intention to decertify the Union by signing a Decertification Petition. There was not one scintilla of evidence and not one employee that the General counsel interviewed to the contrary.

The proof amply showed that it was the conduct of the Union representative, John Simino and Cesar Uchofen, who caused the dissatisfaction of its members. They were bullies and showed the most anti-Semitic behavior. In fact, the ALJ's decision held that "there is no credible evidence that management played any direct or indirect role in the solication of the petition". (ALJ 34: 14-15)

The entire record and applicable case law prove that there was not basis in fact to find any violations committed by the Respondent. Furthermore, even if the violations were found to be shown, which they were not, the General Counsel failed to meet his burden to show that the alleged violations "tended" to cause the employees to sign the Petition to Decertify.

The Respondent was denied his due process rights by the ALJ, who showed his rank prejudice against the employer, and therefore, the Decision should be vacated and/or in the alternative, the Respondenet should be granted an opportunity to present this case before an imparital Administrative Law Judge.

Dated: Ardsley, New York
March 29, 2010

Respectfully submitted,

ANTHONY J. PIRROTTI, ESQ.
LAW OFFICES OF ANTHONY J. PIRROTTI P.C.
Attorneys for Respondent
501 Ashford Avenue
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(914) 693-8000

S

Ardsley Bus Corporation

Case No. 2-CA-38713

Confidential Sworn Testimony by Witness

I, Luis Maceira, after been duly sworn in, declare the following;

A Labor Department representative has assured me that this confidentially sworn testimony will be considered by the Labor Department as a law executing confidential document and that no details of said document should be made available, unless absolutely necessary in formal court proceedings.

My address is 127 Haseco Avenue, Port Chester, NY 10573

My phone number is (914) 481-5091 – my cell phone number is (914) 584-5844

1- I've been an employee of Gene Bus Corporation or Ardsley Bus Corporation for about 10 years, as a driver. Currently my supervisor is Elisa Arias, sometimes John, the dispatcher, supervises me. I work from Monday thru Friday from the hours of 7:45am to 4:00 pm. I work the "county" route.

2- Starting last year, I began noticing that Union representatives were causing animosity between them and the mechanics as the Union representatives repeatedly pointed out alleged problems with headlights, brakes and other mechanical problems. Issues which are the responsibility of the D.O.T and the company mechanics. Cesar, the Union representative would start by creating problems with Tom in front of the employees, screaming at Tom and causing problems for the employees. As a result due to Cesar and the Union activities, I started talking with other employees, to take action and get rid of the Union. I decided that we needed to make a list of employees who wanted the Union out. I think it was in or close to October of 2007. The list said something like "the following persons do not wish to be part of the Union", I circled every name on the list and I asked them to sign it. I never had an across the board meeting with the employees about the list, I just approached them in the yard to see if they would want to take out Cesar's Union. Since I had previews experience with the Labor Department in the past, I knew that if I collected over 50% of the signatures needed, we could take out the union.

R-7

The list was in circulation for about a month, but there was not enough support. I don't know where the list is at this moment, it could possibly be at home. I never gave the list to neither company nor union representatives.

3- I never spoke with Tom, Elisa or any other representative of Ardsley Bus Company about the list or any movement by the employees to get the Union out. I do not recall a conversation with any employee in which I explained that Tom or Elisa asked me to circulate a list or petition to get the Union out. While discussing my intention to get the Union out with other employees, I also explained to them that we needed benefits And this Union was not representing us well.

4- I never heard Tom or Elisa saying that the employees had to sign a document to get the Union out.

5- There was nothing done by me in 2008 to try and get the Union out.

6- Anthony Pirotti is not my lawyer. Three or four days ago, after receiving the appointment with the Labor Department, I brought it to Tom to ask him what was this appointment for. Tom said "I don't know" and he recommended that I speak with his lawyer Anthony Pirotti. The lawyer (Anthony Perotti) came to the office and said that he would take care of business and told me that I should go the appointment. I did not employ Mr. Perotti as my lawyer. I understood that he represented the company.

7- I assisted the "route pick" in 2008 in order to choose the school route for the year. When I went to the trailer to pick up my route, I noticed the routes posted on sheets of paper against the wall. Each sheet had the name of the route, the amount of hours and the route address. I had to sign something the day I picked up my route, but I don't remember what sheet I signed. I have seen the sheet next to this testimony but I do not know what it for is. I did not sign it.

I have received a copy of this Confidential Sworn Testimony to be revised. If after revising this document, I remember any new facts or details that would be helpful to the proceedings and choose to make changes; I will immediately contact the Labor Department representative. I understand that this testimony is confidential pending formal court proceedings and said document is not to be shown to anyone other than my lawyer or my representative in these proceedings.

_____

Luis Maceira

Ciudad de Nueva York
Condado de Nueva York

Ardsley Bus Corporation
Case No. 2-CA-38713

Declaración Jurada Confidencial de Testigo

Yo LUIS MACEIRA después de haber sido debidamente juramentado declaro lo siguiente:

Un agente de la Junta Nacional de Relaciones del Trabajo (la Junta) me ha asegurado que esta Declaración Jurada Confidencial de Testigo será considerada por la Junta como un documento confidencial de ejecución de ley y el mismo no será divulgado a menos que sea necesario divulgar esta Declaración Jurada Confidencial de Testigo con relación a un procedimiento legal formal.[1]

Mi dirección es 127 Haseco Avenue, Port Chester, NY 10573.

Mi número del teléfono es (914) 481-5091. Mi teléfono celular es (914)584-5844.

1. Yo he sido empleado de Gene Bus Corporation, o Ardsley Bus Corporation por 10 anos, más o menos, como un manejador. Ahora mi supervisor es Elisa Arias y también John, el dispatcher, me supervisa algunas veces. Mis horas de trabajo son lunes a viernes a 7:45 am a 4:00 pm. Trabajo en la ruta de "county."
2. Empezando en el ano pasado, yo empecé notando que los representantes de la unión estaban causando conflictos con respeto a los luces, a los frenos y otros asuntos que son responsabilidades de DOT y los mecánicos. Cesar, el representante de la Unión, empezaba teniendo problemas con Tom en frente de los empleados, gritando a Tom y causando problemas por los empleados. Como

[1] **DECLARACION DE LEY DE INFORMACION CONFIDENCIAL**
Solicitar información con esta forma está autorizada por la Ley Nacional de Relaciones del Trabajo, 29 U.S.C. Sección 151 et seq. El uso principal de esta información es para ayudar a la Junta Nacional de Relaciones del Trabajo (JNRT) en el proceso de representación y o en los procedimientos de práctica injusta del trabajo y los procedimientos relacionados o de litigación. El uso rutinario de esta información está disponible en el Registro Federal, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). La JNRT explicará luego sobre el asunto cuando le sea pedido. Revelar esta información es voluntaria. Sin embargo, fallar a proveer esta información puede causar que la JNRT niegue proceso adicional en práctica ilícita de trabajo o en representar el caso, o puede darse el caso que la JNRT le emita una citación y la puede hacer cumplir en el tribunal federál.

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resulta de las actividades de Cesar y la Unión, yo empecé hablando con otros empleados a tomar acción para sacar la Unión. Yo decidí que debíamos hacer una lista de empleados que quisieron sacar la Unión. Creo que fue en o cerca del October 2007. La lista dijo que algo como "los siguientes personas no desean la Unión mas" y yo lo circulé por persona a persona y les preguntaba firmarla. Yo nunca tenía una junta con empleados acerca de la lista, solo les acerque en la yarda para ver si los empleados quisieron sacar la Unión de Cesar. Porque yo tenía experiencia con Departmento Laboral en el pasado, yo sabía que si yo podía colectar más de 50% de firmas, nosotros podíamos sacar la unión. Lo circulé por como un mes pero no había demasiado apoya. No sé donde está esta lista en este momento, posiblemente está en mi casa. Nunca los dí a representante de compañía o a la Unión.

3. Nunca hablé con Tom o Elisa u otro representante de Ardsley Bus acerca esta lista o un movimiento de los empleados para sacar la Unión. No me recuerdo una conversación con ninguna empleado por la cual yo le explique a otro empleado que Tom o Elisa me preguntaban a circular una lista o petición para sacar la Unión. Mientras discutiendo mi intención para sacar la Unión con otros empleados, solo les explicaba que nosotros necesitábamos beneficios y la Unión no nos representaba bien.
4. Yo nunca escuché Elisa o Tom diciendo que los empleados debían firmar un documento para sacar la Unión.
5. No hice nada de tratar a sacar la Unión en el ano 2008.
6. Anthony Pirotti no es mi abogado. Hace tres o cuatro días, después de recibir mi Citación de la Junta, lo traje a Tom Gillison para preguntar que era la Citación. Tom le dijo "no sé" y me recomiendo a hablar con su abogado Anthony Pirotti. El abogado vino a la oficina y me dijo que iba a arreglar el asunto y me dijo que yo debo ir a la reunión en la Junta. No le empleaba para ser mi abogado. Entiendo que él representa la compañía.
7. Asistí el Route Pick en agosto 2008 para eligir mi ruta por el ano de escuela de 2008. Cuando entré el trailer para recogir su ruta, yo noté que una hoja de cada ruta estaba en la pared. Esta hoja tenía el nombre de la ruta, la cantidad de horas

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de cada ruta y la dirección de cada ruta. Yo tenía que firmar algo en el dia cuando recogí mi ruta pero no me recuerdo cual hoja firmé. He visto la hoja anexado a esta Declaración pero no sé exactamente que es la hoja. No lo firmé.

He recibido una copia de esta Declaración Jurada Confidencial de Testigo para mi revisión. Si luego de haberla revisado de nuevo recuerdo datos o información que pudieran ser relevantes a la misma, o si luego deseo hacer cambios a esta declaración le notificaré al agente de la Junta inmediatamente. Entiendo que esta declaración es un documento confidencial de ejecución de ley, y que el mismo no deberá ser mostrado a persona alguna, excepto a mi abogado o a mi representante en este procedimiento.

He leído esta Declaración que consiste de 3 páginas, incluyendo esta página, entiendo su contenido completamente y certifico que, según mi mejor entender y creencia, es cierta y correcta.

Luis Maceira

Suscrito y Jurado delante de mi en
26 Federal Plaza, 3614
Nueva York, Nueva York
Este 12 día de mayo de 2009

Colleen P. Breslin
Agente de la Junta Nacional de
Relaciones del Trabajo

FORM NLRB-5168
(2-08)

Transportation Workers Union, Local 100 (Ardsley Bus Corporation), Case No. 2-CB-22146

Confidential Witness Affidavit

I, MICHAEL WADE, being first duly sworn upon my oath, hereby state as follows:

I have been given assurances by an agent of the National Labor Relations Board that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the Board and will not be disclosed unless it becomes necessary to produce the Confidential Witness Affidavit in connection with a formal proceeding.[1]

My address is 4342 Edson Avenue, Bronx, NY 10466. My cellular number is (914) 510-3364 and my home telephone number is (347) 275-9146.

1. I am employed by Ardsley Bus Corporation as a school bus driver. I have worked for Ardsley going on five years, always as a bus driver. For the school year of 2008-2009, I worked on a route that I think was called Quad Village – it included the Jewish school. I worked about twenty hours on that route and sometimes I worked more hours on extra routes or charter route. I think this route ended the 16th or 17th of June 2009. I was making $18.30 an hour during the school year.
2. This summer – the summer of 2009 - I ran the Mohawk camp route, that route started probably a week or so after school was out. I picked this route at the pick for summer routes which took place shortly after school got out, in or around late-June

[1] **PRIVACY ACT STATEMENT**
Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further an unfair labor practice or representation case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

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Exhibit 20
2-CA-36713

1 2009. The camps are not assigned by hour but by pay – some camps paid about $65
2 hours a day and others $80 hours a day – and so we picked them according to pay. I
3 understand that each camp set its rates of pay. Mohawk camp paid about $65.00 a
4 day. There are also charter and extra routes during the summer and I ran some of
5 those if my seniority allowed. Summer camp runs are over so now I'm just waiting
6 for my school year routes to begin.

7 3. In or around mid-June 2009, I started talking to friends here and there about finding a
8 new union for Ardsley because myself and some coworkers were unhappy with local
9 100. I don't remember how I heard about Local 713, we were told about it, just on
10 the street someone told me about them. I don't remember who originally told me
11 about them. I think I also heard about another union called Local 123 or something
12 like that but one of my coworkers, I don't know who, made the first contact with
13 Local 713 and we decided to hear what they had to say. The group that was looking
14 for a new union included myself, Carmen Genao, Louis Maciera and Delwood.
15 Shortly after we started talking about getting a new union in, Carmen and Louis told
16 me that there would be a meeting with the new union Local 713 in Tarrytown. The
17 meeting took place sometime in mid-June 2009.

18 4. The ones that met with Local 713 in or about mid June 2009 at the Tarrytown hotel
19 were George, Carmen Genao, Delwood, Mercedes and Louis. There were three
20 people from Local 713 who came to the meeting – there was a Bob, a Peter (I think)
21 and another gentleman whose name I don't remember (he's the gentleman who
22 accompanied me to the Board offices to give this affidavit.) At this meeting, the
23 Local 713 representatives were telling us about Union dues and what they might be

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able to do for us. They said they wanted to hear what we wanted and the big thing we brought up was medical insurance. They said that they had a plan that would set my family up if something happened to me – I remember them talking about my family getting $5000 or $10000 under their plan if something happened to me. They talked about union dues and said something like we would pay a certain amount each month but that it wouldn't go up too often. This was important to me because it seemed like Local 100's dues were going up just about every month or so.

5. Also at this meeting, they explained that we needed to collect about 200 signatures from employees to get rid of Local 100. The Local 713 representatives gave us a form to collect these signatures. The form had two columns of lines on it, and on top there were two blurbs next to one another, one was in Spanish and one was in English. The paragraph said "we the undersigned wish to have the present union T.W.U. Local 100 removed from Ardsley Bus Company. The reason for this request is that this union is taking out money weekly and causes huge problems between the company and the employees. The union has raised weekly dues twice within one year. We understood that the dues were to remain the same length of the contract, which is three years." Local 713 explained that if we wanted to get rid of Local 100, we needed to get about 200 signatures.

6. The group of us left the meeting with copies of this form and over the next week or so, we stood in the yard to catch who we could to see if they wanted to sign the form. I just explained to people what we were trying to do, we did it as soon as we finished the morning run until we went back out again. I never told anybody to sign the form,

1 I just explained what we was trying to do and that we need signatures and they wanted
2 to get this new union in. I gave mine to Louis, I don't know what he did with them.
3 7. After we had collected enough signatures, myself and Louis, Carmen and Aurea took
4 them to the National Labor Relations Board to get rid of Local 100. We went to the
5 labor board during no work time and a friend of mine from childhood gave us a ride
6 there in his own car. I don't remember his name. We learned at the labor board that
7 we could return with those signatures to file a decertification petition after june 30,
8 when Local 100's contract expired. The labor board also explained that it would be a
9 good idea for us to verify the signatures that we each had collected. After we left,
10 someone in the group got us all together to get the signatures verified. I don't
11 remember where we went to do this but I do remember that to verify them, I filled out
12 another paper that says "General Affidavit" on top of it and I signed it in front of a
13 notary.
14 8. After that, one of my coworkers – I don't remember who – informed me about that
15 Local 713 was having a second meeting on July 27, 2009. I may have heard about it
16 by word of mouth in the yard, I don't remember. It was a couple of days before Local
17 713 held its second meeting that I heard about it. That meeting took place between
18 9:30 and 10:00 am, I think it started around 10:00 am, after we finished our morning
19 run. It took place at Ardsley Center. There were only about 6 of us who ended up
20 being present at that meeting – it was me, Ms. Rose, Delwood came late and I think it
21 was two other people, I can't remember exactly who else was there. There were about
22 six or seven representatives from Local 713 there – Peter, Bob, Randy and a couple
23 others whose names I don't remember.

9. As I drove up in my school van, I noticed representatives from Local 100 standing across the street from the center and as I was driving by to go park, one of the guys from Local 100 was saying something to me, I had my windows up so I don't know exactly what he was saying. I know that they were representatives from Local 100 because they were wearing Local 100 shirts, I think there were about four of them. . The main person I recognized was John and I don't know who the others were – they were all men and none were Ardsley employees, as far as I could tell. I saw somebody holding a camera, it was silver and bigger than a cell phone and one of them was holding it in his hand. I did not see anyone take pictures with this camera. They were positioned across the street, sort of diagonally across the street about 20 to 25 feet. I was alone in the school van. I then parked my vehicle right in front of the building and walked in. At that point, I could hear the Local 100 people talking across the street but I could not make out what they were saying.

10. At that point, the meeting had not started – it was probably between 9 and 9:30 am, there were donuts and coffee provided by Local 713. You enter through the two glass doors to the main room and to the right there is an office door – inside that office there are two ladies who run the center. I could not say what those ladies look like, I just know that there are usually two females in that room. There are chairs about 10 feet from the door where we were going to sit and so about less than five minutes after I entered, and was standing near these chairs, I heard a male voice speaking, I couldn't see who it was. I heard that voice saying that if they rented the hall out to Local 713, we will picket. It sounded to me like the person speaking was standing outside the front door but holding it open to speak. I also could not see the two

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1 women in the office but I had seen as I came in so I know they were in the office.
2 One of the women replied that if Local 100 ever did that, they would never rent the
3 center out to Local 100 either and that they would call the police. I did not hear the
4 male voice respond.
5 11. I did not report this conversation to Local 713 representative at that time but there
6 were Local 713 representatives present. I was asked by Local 713 to testify to it at the
7 Labor Board because they knew I had also heard this statement. Bob and Peter called
8 me last week to ask me what was going on and to see if I would come down to testify
9 and then Randy just called me a few days later to tell me when I was scheduled to
10 come down.
11 12. Local 713 started the July 27 meeting at around 10 am. During the meeting, they
12 discussed again dues and insurance. It didn't really last too long because there were
13 not too many people there. As I said above, it was me, Ms. Rose, Delwood came late
14 and I think it was two other people. That's when we got the yellow cards to hand out
15 to employees. One of the Local 713 representatives passed out cards to us to sign to
16 get Local 713 in and then he also gave each of us a bunch of cards to pass out to other
17 employees. The Local 713 people that we needed to collect about 100 cards to get
18 Local 100 out and get Local 713 in. I can't remember whether they mentioned an
19 election or not. The meeting was short, it didn't last even an hour.
20 13. During the meeting, I turned around and noticed a police officer present. He was
21 standing in the back and it appeared that he was talking to someone, I don't remember
22 who. I don't remember if he was talking to someone from Local 713 or to someone

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else. At the end of this meeting, I noticed this same police officer outside the center, driving away in a police car.

14. Behind and above the Ardsley Center is a grocery store and as I walked out, someone called my name. I looked up and noticed that the guy John from Local 100 was standing on the roof of the grocery store. He just called my name, and I said hello and I just kept on getting in the van. I did not notice that he was holding a camera. I did not see the other Local 100 people around at that time.

15. After the meeting, I took the cards back to the yard to hand out. I passed out the cards for maybe a week. Louis was also handing out cards, even though he wasn't at the July 27 meeting so I assume Local 713 had gotten him extra cards to give out. Mostly it was in the yard, a couple of them I think I either distributed or received back while on the camp run. I handed out the cards in between runs, while I was waiting to go back out. I handed out the cards all over the yard, sometimes in the break room, sometimes when I was talking to others in the yard. As far as I know managers didn't know anything about us collecting the signatures or the cards. I think I collected about 7 cards originally and then more after that. I can't remember who I collected cards from. I always returned the cards to either Louis or Carmen and I understand that they returned them to Local 713.

16. Employees are supposed to punch a card when we arrive in the morning, when we return back from out morning runs, when we leave for our afternoon run and when we arrive back from our afternoon run. It actually ends up being a much less formal system though where employees just got to the trailer to let the dispatchers know that I'm back. Some people go home between shifts but I usually hang around the yard in

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1 case there are midday runs or something like that. I understand that unless I am out
2 on a run, I am not getting paid for the time that I'm there.
3 17. I have heard that there will be some kind of election to get Local 713 in. I was talking
4 about this to Joe Ramos who works for Ardsley, he told me that it could be about a
5 year before there is even an election. That's all Joe Ramos has said to me about these
6 things. Local 713 representatives have also mentioned at some point that they are
7 waiting for everyone to come back from vacation to get as many people to attend
8 meetings as they can.
9 18. During the week of August 24, 2009, Ardsley held a route pick for fall routes. I found
10 out about because supervisors announced that it was that time again to have a route.
11 They always hold it this time of year to make sure we get our routes by seniority. The
12 pick took place over the whole week, administration sent out notices telling
13 employees what time they could come pick the routes. I picked on August 26. When
14 I entered the ABC trailer, present were George, Carmen, Louis, Ms. Rose, Elisa (who
15 we call Ellie). Tom Gillison was also there, because he had to sign the papers to
16 prove that everything was fine.
17 19. Every year the pick process is pretty much the same - when you enter the room, the
18 routes are posted on the bulletin board and they are sectioned off into main routes (for
19 example, Quad Village, Irvington High School and Springhurst). Each route has its
20 own form, the form usually says the name of the route and its number and it lists the
21 time and the stops for the route written right there on the form. Administration uses
22 the same basic form every year when it posts the routes, they just change it for each
23 route. When it gets to you, you look at what's left on the board and then you tell them

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this is the one I want, they'll put an X on the sheet and your name. For this year's summer and fall picks, we also had to sign a form that has the name of our route on it as well as a place where employees and Tom both sign to say that seniority has not been violated in our pick. Elisa was pretty much running every thing. After I signed that form, Elisa took a copy of the form of the route you picked (which they make before putting an X through it) and we take it up to the dispatch office to get a calendar of the school you're doing and an left/right sheet. The left/right sheet is the directions. Every year since I've been there, I have gotten a left/right sheet for my routes every year.

20. Ardsley allows employees to use the van during non-route hours for personal matters so long as employees get permission. For example, if you drop your kids off at the school, they don't care if you just stop off for a quick errand on your way back to the yard, so long as you are not gone for a long time. You need to get permission if you take the van out after returning it to the yard. The reason that I took an Ardsley school bus to Local 713 July 27, 2009 meeting was because I just stopped by on the way back from my morning run. Dispatch knew that I took the van to the meeting because when I got back to Ardsley, I told John, Elisa and one other person that I had just been at the Local 713 meeting with the van. They did not ask me what happened at the meeting, I just told them where I had been.

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FORM NLRB-5168
(2-08)

I am being provided a copy of this Confidential Witness Affidavit for my review. If, after reviewing this affidavit again I remember anything else that is relevant, or desire to make any changes, I will immediately notify the Board agent. I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.

I have read this statement consisting of 10 pages, including this page. I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.

Michael Wade
Affiant

Subscribed and sworn/affirmed to before me telephonically at New York, New York on this 1 day of September 2009.

Colleen P. Breslin
Field Attorney
National Labor Relations Board

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) S.S..

ANNE K. BRACKEN, being duly sworn, deposes and says:

I am not a party to the action, am over the age of eighteen (18), and reside at Stormville, New York.

On **March 29, 2010,** I served the within **RESPONDENT'S EXCEPTIONS AND SUPPORTING BRIEF** by depositing a true copy thereof, enclosed in a FEDERAL EXPRESS wrapper addressed as shown below, into the custody of FEDERAL EXPRESS, for overnight delivery, prior to the latest time designated by the service for overnight delivery, addressed to each of the following persons at the last known address set forth after each name:

TO: ALLEN M. ROSE, ESQ. & COLLEEN BRESLIN, ESQ.
Counsel for the General Counsel, National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614, New York, New York 10278

DENIS ENGEL, ESQ.
COLLERAN, O'HARA & MILLS, LLP
1225 Franklin Avenue, Suite 450
Garden City, New York 11530

Anne K. Bracken
ANNE K. BRACKEN

Sworn to before me this
29th day of March, 2010

Notary Public
ANTHONY J. PIRROTTI
Notary Public, State Of New York
No. 24[illegible]1860
Qualified In Westchester County
Commission Expires December 31, 2010