

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

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

Respondent

Case Nos. 2-CA-38713  
2-CA-39049  
2-CA-39376  
2-CA-39467

and

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

Charging Party.

**RESPONDENT'S ANSWERING BRIEF TO  
GENERAL COUNSEL'S CROSS-EXCEPTIONS**

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## BRIEF COUNTER-STATEMENT OF FACTS

### **A. Nature of Respondent's Operations**

The parties to this action consist of the Charging Party, the Transport Workers Union of Greater New York, Local 100, AFL-CIO ("Union"), and the Respondent, Gene's Bus Company a/k/a Ardsley Bus Corporation ("Employer"). Gideon Tiktin is the President of Ardsley Bus Corp. and Thomas Gillison is the General Manager. Mr. Tiktin and Mr. Gillison are the only supervisors at Ardsley Bus Corp. who fall within the meaning of Section 2(11) of the National Labor Relations Act. (*Tr. 491-494*) The Employer operates a local school bus transportation service for the public schools of Westchester County. (*Tr. 112, 124-126*)

### **B. History of the 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. (*GC Exh. 53*) 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. (*GC Exh. 53*) The term of the last and final MOA was July 1, 2006 thru June 30, 2009. (*GC Exh. 53*) There was no extension to the contract and was treated as so by John Simino, Union representative, by confirming in his affidavit on January 23, 2009 that "the current collective bargaining agreement expires on June 30, 2009." (*GC Exh. 14*).

**C. September 2007: Change of the Union Representatives**

On or about September 2007 the relationship between the Employer and the Union took a drastic change for the worst. 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, again without the consent of the members, the Union elevated Cesar Uchofen. (*GC Exh. 11*) Both Simino and Uchofen worked in concert to emasculate the General Manager, Thomas Gillison, and to embarrass and humiliate the President, Gideon Tiktin.

**1. The Union's Attempt to Shut Down the Employer's Business Is Criticized by the Employees**

In September 2007, the new Union representatives trespassed onto Respondent's property and stopped the Employer's buses from leaving the yard to pick up children and bring them to school. (*Tr. 131*) In General Counsel's Cross-Exceptions Brief, he states on page 3 that Gillison disliked the safety inspections performed by the Union representatives. In reality, Gillison testified that the Union representatives were told during their "safety inspections," that the buses had been checked the night before and that they had all passed inspection, but the Union representatives continued to harass the Employer by stopping the buses and disrupting the Employer's business operations. (*Tr. 131-132*)

A statement was taken from an employee, Luis Maceira, by Ms. Colleen Breslin, the Field Attorney at the time, where he explained to Ms. Breslin that he "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.” (See Exhibit “A” ¶ 2 annexed to the Respondent’s Exceptions Brief) It is clear that the employees observed the Union representatives misconduct and disapproved of the unnecessary actions taken by the representatives by causing problems with the other employees.

The 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 General Counsel acknowledges in his cross-exceptions brief that Gillison disliked “the placement of an inflatable rat adjacent to Respondent’s facility.” (GC Cross-Excep. pg. 3) The General Counsel cites pages 351 thru 355 of the transcript where Gillison describes the horrific anti-Semitic attack that was made on the owner, Gideon Tiktin right outside of the Company’s office for all of the employees to see:

**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.<sup>1</sup>**

*(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. October 2007: Employees Dissatisfied with the Union's Representation Started a Petition to Remove the Union and Stopped Attending Union Meetings**

In the affidavit taken by Ms. Breslin of Maceira, he informs her of the employees' dissatisfaction with the Union beginning in October of 2007. He stated in pertinent part:

Cesar, the Union representative would start by creating problems with Tom in front of 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 think it was in or close to October of 2007.

*(Exhibit "A" ¶ 2)*

The employees were well aware of the misconduct exhibited by the Union representatives in the work place toward management. Maceira also explained to Ms. Breslin that he felt that the Union was not representing them well and that they needed benefits. *(See Exhibit "A" ¶ 3)*

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<sup>1</sup> 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*)

Furthermore, Simino acknowledged that the employees had lost interest in attending the Union meetings. Mr. Simino's testimony tells of the significant drop of attendance by the Ardsley Bus Corp. employees at the Union meetings:

**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 drop in attendance is significant in determining how the employees felt about the Union's conduct and their representation as a bargaining agent.

**E. Union Representatives Continue to Disrupt the Employer's Business Operations**

**1. March 2008-2009: Uchofen's Misuse of the Company Vehicle to Union Headquarters**

In March 2008, the Union representative Uchofen attempted to exercise his control over the Employer by willfully taking the Company van in violation of company policy to the Union headquarters in Yonkers, NY. (Tr. 370-375) While at the Union office, Uchofen had received a parking ticket that was later sent to the Employer with a fine that had doubled, at the expense of the Employer, because Uchofen had neglected to tell the Employer of the ticket when he had received it. (Tr. 375). The Company's policy specifically prohibits personal use of the company vehicle and subjects violators to employee termination (GC Exh.

9). Uchofen was in fact suspended for his misuse of the Company vehicle. (Tr. 370-375) Uchofen's disregard for the Employer's rules and regulations regarding the company van take home privileges demeaned the Employer's authority among his employees.

**2. 2008-2009 Self-Serving Grievances Filed by Simino Unsupported by the Employees**

In order to further disrupt the Employer's business, the Union Representative, John Simino, began filing self serving grievances regarding the Employer's route picking process. As shown by Simino's testimony, there was not one (1) single employee out of more than 200 who supported the grievances. (Tr. 708-710) 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; Emphasis Added)*

**3. January 2009: Uchofen's Interference with a State Mandated Health Examination**

In furtherance of the Union's goal to disrupt the Employer's business operations, Uchofen insisted on passing around a Union survey during a 19-A New York State mandated

health examination. (*Tr.* 385) Rosie Clayton, an employee who was present at the examination, testified that Uchofen had come into the examination talking about the Union and distracting the employees while they were supposed to be taking an eye exam. (*Tr.* 1109-1110) As a result, the ALJ properly held that Uchofen's conduct was not protected by the Act and, therefore, the Respondent's decision to terminate Uchofen was not a violation of the Act. (*ALJ* 15:50-16:7)

**F. October 2007 Petition Evolves into a Decertification Petition Signed by 193 Out of 220 Disgruntled Employees Whereby the Union Lost Its Majority Status**

**1. Employees Seek Representation from a New Union, Local 713**

Michael Wade, an employee at the Company also appeared at the Board offices to provide a statement to Ms. Breslin regarding his discontent with the Union. (*See Exhibit "B" annexed to the Respondent's Exceptions Brief*) Wade explained to Ms. Breslin that the employees at the Company were unhappy with Local 100 and wanted to hear what the new union would have to offer. (*See Exhibit "B" ¶ 3*) The first meeting attended by the employees was sometime in mid-June 2009, where Local 713 talked about medical insurance and union dues. Wade explained to Ms. Breslin that "[t]his was important to me because it seemed like Local 100's dues were going up just about every month or so." (*See Exhibit "B" ¶ 4*) Wade states that after the meeting with Local 713, he and some other employees stood in the yard and explained to the employees that they were trying to remove the Union and get Local 713 to represent them. (*See Exhibit "B" ¶ 6*)

2. **Employees' Decertification Petition Continuously Stemmed from their Dissatisfaction with the Union's Conduct and Lack of Representation**

Ms. Breslin also took a statement from Reynaldo Gomez, an employee, which stated that the petition to decertify the Union had also been circulating in the latter part of 2008. (*R Exh. 8 ¶ 4*) He expressed to Ms. Breslin that he had wanted to sign the petition being circulated by the employees but that every time he had tried that the employees did not have the petition in their possession. (*R Exh. 8 ¶ 4*)

After two (2) years of circulation, in June 2009, the employees presented their Employer with the 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.<sup>2</sup>

In fact, the ALJ held that there was no credible evidence of management's role in the decertification petition:

**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)*

Furthermore, four (4) of the rank and file employees personally appeared at the Board and presented their petition to Ms. Breslin. *(R Exh. 6a)* The employees told Ms. Breslin of

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<sup>2</sup> R 7, R 8, R 20 respectively *(Respondent's exhibits 7 and 20 are attached as Exhibit "A" & Exhibit "B" to Respondent's Exceptions Brief)*

their dissatisfaction with the Union and expressed the reasons for wanting to oust the Union. (*R Exh. 6a*) 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 Exh. 20 - Exhibit "B" annexed to Respondent's Exceptions Brief*). 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."<sup>3</sup>

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 at the Union meetings was due to any conduct on the part of the Employer.

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<sup>3</sup> 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*).

## ARGUMENT

### **A. THE ALJ PROPERLY DISMISSED THE GENERAL COUNSEL'S UNSUPPORTED CLAIMS REGARDING UCHOFEN**

#### **1. The ALJ Properly Rejected Uchofen's Out of Court Statement Which Was Contrary to The Record**

On March 19, 2008, Cesar Uchofen was called to speak to the General Manager, Thomas Gillison, in regards to his company van privileges. (*Tr. 868-869*) Gillison had informed Uchofen that he had received information of a parking ticket that Uchofen had received while using the company vehicle to visit the Union headquarters. (*GC Exh. 10*) The company policy strictly prohibits employees from using the company van for personal use. (*Tr. 370-375*) While speaking to Gillison about the issuance of the parking ticket, Uchofen testified at trial that Gillison allegedly stated:

He told me also because I am the -- you know, a Union person, you think you are smarter than me. You don't know who you are dealing. I am going to take all the shit from you. I say you're not supposed to talk like that to me.

(*Tr. 870-871*)

The ALJ denied the General Counsel's claim that Gillison threatened Uchofen with violence based upon Uchofen's in court statements. The ALJ held:

The General Counsel points to an assertion in Uchofen's affidavit to the affect that during this conversation, Gillison stated; "I'm going to squeeze the shit out of you." **I am not going to rely on this to find that the [sic] Gillison threatened Uchofen with violence. For one thing, this out of court statement is hearsay is offered by the General Counsel for**

**the truth of the matter asserted. Secondly, it is contrary to the record testimony of Uchofen at the hearing.**

*(ALJ 10:47-52 fn. 6; Emphasis Added)*

The General Counsel argues that the ALJ's reasoning for discounting Uchofen's affidavit as hearsay appears to be that Uchofen's trial testimony and his affidavit sufficiently contradict such that it renders Uchofen's testimony not credible. *(GC Cross-Excep. Pg. "8")*

The Board has consistently held that "established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Hempstead Lincoln Mercury Motors Corp.*, 351 NLRB 1149 fn.1 (2007); citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The General Counsel does not deny the fact that Uchofen is not a credible witness. In fact, the ALJ had previously made a credibility determination in his Order Regarding Proposed Amendments to the Complaint wherein the ALJ had dismissed one of General Counsel's amendments based on the possibility that the new allegation might have been a "recent fabrication" by Uchofen:

**The General Counsel proposes to amend the Complaint to allege that in October 2008, Elisa Arias told Cesar Uchofen that he was not getting charter or other extra work "because he is a union person." **Apart from the possibility that his testimony on this point might be a recent fabrication, [footnote omitted] this allegation has not been fully litigated and the Respondent would have the right to further cross examine Mr. Uchofen about this issue and to present Elisa Arias or other persons to testify about the alleged transaction.****

*(GC Exh. 115; Emphasis Added)*

In point of fact, the fabrication made by Mr. Uchofen undoubtedly goes against his character and his credibility as a witness throughout the length of the hearing.

If Uchofen's affidavit is found not to be hearsay, the uncorroborated testimony would be insufficient to support the allegation. In the matter of *Delmas Conley*, 349 NLRB 308, 313 (2007), the Board affirmed that:

**Where an allegation in the complaint is supported *solely* by a statement in Thompson's affidavit, and the record is devoid of *any* corroboration that supports the likelihood of the truth of the statement, then I have determined that allegation fails due to the lack of sufficient evidence, without regard to credibility resolutions. See *National Telephone Directory Corp.*, supra [319 NLRB 420 (1995)], citing *Blue Flash Express*, 109 NLRB 591, 592 (1954)**

*(Emphasis Added)*

In the event that Uchofen's affidavit is admitted as an exception to the hearsay rule, Uchofen's statements made within his affidavit are uncorroborated and insufficient to support the allegation claimed.

Additionally, the General Counsel speciously argues that "a cursory reading of Uchofen's trial testimony shows that English was not his first language . . ." (*GC Cross-Excep. Brief pg. 9*) The General Counsel is estopped from making this argument because the General Counsel specifically refused to have a translator present for Uchofen and insisted that he did not need one. (*Tr. 857*)

2. **The ALJ Properly Dismissed the Alleged Threat of Assault on June 16, 2008**

Uchofen testified that he had gone to see Gillison in his office on June 16, 2008 and that Gillison had told him to “please get out.” Uchofen further testified that Gillison had made repeated requests to have Uchofen leave his office. After Uchofen insisted that he would not leave, Gillison allegedly came toward him and demanded that he leave. (*Tr. 890-892*)

It appears that the ALJ did not credit the testimony given by Uchofen, and even if he had, the alleged actions by Gillison did not rise to the level of a threat:

**In my opinion, even if I completely accepted Uchofen’s version, the actions of Gillison did not rise to the level of a legally prohibited threat. At most, it shows an irritated and angry Gillison . . . But it does not show much more than that. I therefore shall dismiss this allegation.**

*(ALJ 13:1-4; Emphasis Added)*

Clearly this is another credibility finding that the ALJ had made regarding Uchofen’s testimony. As stated above, the Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Hempstead Lincoln Mercury Motors Corp.*, 351 NLRB 1149 fn.1 (2007); citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

Furthermore, the cases cited by the General Counsel have no bearing as to the level of a legally prohibited threat. Therefore, the ALJ's finding that Gillison's alleged actions were not threatening should not be disturbed.

**3. The ALJ Properly Found that the Allegations Made Regarding Uchofen on September 8, 2008 Were Unsupported**

The General Counsel claimed that Uchofen was allegedly threatened with unspecified reprisals and told that it was futile for the Union to bring grievances. (*ALJ 29:35-37*) The ALJ held that Uchofen's testimony does not support the claims made by the General Counsel:

**To support this allegation, the General Counsel relies on the testimony of Uchofen . . . regarding a conversation that Uchofen had with Gillison in early September. In my opinion, **nothing in this conversation supports the allegations that Gillison made statements of futility or that he threatened Uchofen with unspecified reprisals. At most, this testimony shows that Gillison was annoyed by the Union and that he was merely asserting his status as Uchofen's boss.****

*(ALJ 29:39-44; Emphasis Added)*

Uchofen's alleged threats are clearly exaggerated for the very fact that he is desperate to regain control of the Respondent's employees who clearly do not want the Union as their representative. (*R Exh. 6a & 6b*) The fact that Uchofen is an interested witness in the matter makes his credibility a determinative factor. *Roundout Electric, Inc.* 329 NLRB 957, 962 (1999) The ALJ's determination that Uchofen may have fabricated an incident described on

the witness stand clearly has a negative impact on his credibility as a witness. (*GC Exh. 115*) In consideration of the factors weighing against Uchofen's credibility, the ALJ determined from Uchofen's unsupported statements that the Respondent was not in violation of the Act. (*ALJ 29:39-44*) The ALJ's credibility finding in regards to Uchofen's testimony should not be overruled. *Hempstead Lincoln Mercury Motors Corp.*, 351 NLRB 1149 fn.1 (2007); citing *Standard Dry Wall Products* , 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

**B. THE EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT ELISA ARIAS AND ROSA VILELLA ARE NOT SUPERVISORS AND THEIR ACTIONS WERE NOT VIOLATIVE OF THE ACT**

On October 15, 2009, Gillison testified to the job classifications of his employees, such as drivers, monitors, mechanics, yard personnel, office personnel, and dispatch employees. (*Tr. 113*). Gillison specifically classified Rosa Vilella as an employee (*Tr. 413*) and Elisa Arias as a dispatcher (*Tr. 126*). Furthermore, Mr. Gillison answered a series of questions based on Section 2(11) of the National Labor Relations Act, which revealed that none of the employees possessed supervisory responsibilities such as hiring and firing, transferring employees, suspending or discipline, laying off and so forth. (*Tr. 491-494*). In fact, the General Counsel had subpoenaed the employees Vilella and Arias and choose not to call them to the witness stand. It is clear that the unmistakable inference is that the General Counsel's allegations would not be supported by the employees, Vilella and Arias, if they had been called.

1. **Arias and Vilella's Agency Status Is Unsupported in the Record**

The General Counsel bears the burden of proving supervisory/agency status of an employee. *See Phoenix Processor Limited Partnership*, 348 NLRB 28, 31 fn. 6 (2006); citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). The ALJ properly found that the General Counsel failed to meet its burden of proof by stating that the evidence did not establish that either Rosa Vilella or Elisa Arias are supervisors within the meaning of Section 2(11) of the Act. (*ALJ 34:46-48 fn. 12*)

The Board has held that “[i]f the employee acted with the apparent authority of the employer with respect to the alleged unlawful conduct, the employer is responsible for the conduct.” *D&F Industries, Inc.*, 339 NLRB 618, 619 (2003) The Board also stated in *Waterbed World*, 286 NLRB 425, 426-427 (1987) that the test for determining whether an employee is an agent of the employer is whether, **under all the circumstances**, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. The employee in *Waterbed World* was found not to be an agent of the respondent because there was no evidence that the employee was privy to management decisions:

In this case, no evidence was adduced that at the time of the alleged unlawful statements (an interrogation and a threat of discharge) on 21 April that the Respondent had held Torres out as being privy to management decisions or as speaking with management's voice about these alleged unlawful matters of that employees perceived him as having such a role.

(*Waterbed World, supra* )

As in the case at bar, the General Counsel has not produced any evidence to the effect that the Respondent held Arias and Vilella out as being privy to management decisions or that the employees viewed them as management's voice among the employees. The ALJ concurred that the evidence does not suggest that any dispatcher is authorized, on their own account, to speak about company policy. (*ALJ 30:41-43*)

**2. The ALJ properly Dismissed the Allegation Regarding Elisa Arias in December 2008**

Uchofen testified that in December of 2008, he allegedly heard Arias speaking to a group of employees telling them that "the people who was complaining to the Union don't got any summer work . . ." (*Tr. 964*).

The ALJ dismissed Uchofen's unsupported statements by stating in pertinent part:

**This alleged statement, testified to by Uchofen, was not corroborated by any other person. Moreover the evidence does not suggest that Arias was a supervisor within the meaning of the Act. Although the dispatchers do communicate between Gillison and the employees on the road, the evidence does not suggest that Arias or another dispatcher is authorized, on their own account, to speak about company policy. I therefore shall recommend that this allegation be dismissed.**

*(ALJ 30:39-44; Emphasis Added)*

In addition to the statements made by Uchofen which were not supported in the record, not one employee testified that they were under the impression that Arias had the authority to withhold summer work. There is no evidence that the employees had understood Arias' alleged statements as speaking for management. Therefore, the Respondent should

not be held responsible for the alleged conduct of the employee and the allegation should be dismissed as held by the ALJ.

3. **Arias and Vilella's Alleged Statements in May 2009  
Were Not Coercive Under the Act**

The General Counsel relies on rank hearsay for the proposition of establishing that Arias and Vilella had allegedly asked employees if they had signed a decertification petition that was being solicited by other employees in the bus yard. (*Tr. 1065*) Assuming *arguendo* that the employees were agents of the Respondent and also assuming that Vilella and Arias were asking employees if they had signed the petition, these actions do not rise to the level of being legally coercive. The ALJ held in favor of the Respondent stating in pertinent part:

**The General Counsel produced a single witness, (out of more than 200 employees), who gave uncorroborated testimony to the effect that Rosa Vilella 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. Nor would I view this one time question as being coercive under *Rossmore House*, 269 NLRB 1176 (1984).**

*(ALJ 34:44-48 fn.12; Emphasis Added)*

The General Counsel speciously argues that the questioned employees in *Rossmore House*, 269 NLRB 1176 (1984) were active supporters of the union, whereas in the case at bar there is no evidence that the questioned employees were active supporters, and therefore the statements allegedly made by Vilella and Arias were coercive. (*GC Cross-Excep. Pg. 16-*

17) The General Counsel's baseless conclusion is not supported by the Board's case law which states that the totality-of-the-circumstances test set forth in *Rossmore House* is applicable even in cases where the employees questioned are not active union supporters:

We reject the judge's statement as inconsistent with the totality-of-the-circumstances test set forth in *Rossmore House*. In that case, the Board announced that deciding whether an interrogation is unlawful requires an evaluation of all of the circumstances to determine whether the questioning reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. 269 NLRB at 1177. **This analysis applies, for example, even where the questioning seeks to probe the union views of employees who are not open and active union supporters, *Sunnyvale Medical Clinic*, 277 NLRB 12717 (1985), or to discover the union views of employees other than the employee being questioned, *Gardner Engineering*, 313 NLRB 755 (1994), enf. in relevant part 115 F.3d 636 (9th Cir. 1997). In short, all allegations of coercive interrogation must be evaluated in light of the totality of the circumstances, as *Rossmore House* holds.**

*(John W. Hancock Jr., Inc., 337 NLRB 1223 (2002); Emphasis Added)*

Clearly the General Counsel correctly defeats his own argument made in his Cross-Exceptions by stating that "the interrogation does not run afoul of the holding in *Rossmore House*." (*GC Cross-Excep. Pg. 16*) Unlike the General Counsel, the ALJ understood the totality of the circumstances test was applicable when he made it clear to the General Counsel that the questions allegedly asked were made after seeing employees soliciting a petition in an open area outside the trailer:

JUDGE GREEN: . . . there's a big difference between asking somebody to sign a piece of paper and asking somebody if they had signed a paper;

**especially where the paper is being solicited  
openly and notoriously right outside the  
trailer. . . .**

\* \* \*  
MS. BRESLIN: **– I have other questions, Your Honor.**

*(Tr. 1077-1078; Emphasis Added)*

Furthermore, the General Counsel could not produce one witness who was allegedly asked if they had signed the petition, never mind if they felt coerced or fearful of the interrogation. In fact, the General Counsel's witness, Guillermo Sanchez, an employee, was the only witness who testified that he had allegedly overheard the questions being posed to the other employees. *(Tr. 1075)* Sanchez clearly stated on the record twice that the reason why Vilella and Arias were allegedly asking the employees if they signed the petition was because it was being solicited right outside the trailer:

A. **They weren't asking them to sign the paper. They were asking them if they had signed the paper. Because the three people were outside collecting. Carmen, Luis Maceira and the person who speaks Portuguese. *(Tr. 1075-76; Emphasis Added)***

\* \* \*  
A. **They were asking if they had signed the paper because outside there were people asking for the signatures. *(Tr. 1077; Emphasis Added)***

It is clear that the circumstances surrounding the alleged questions show that the questions were not made in a coercive atmosphere but rather in the mist of the working environment. Therefore, the ALJ properly held that the alleged questioning was not coercive under *Rossmore House*. *(ALJ 34:44-48)*

**C. THE ALJ PROPERLY HELD THAT UCHOFEN'S DISRUPTIVE ACTIONS DURING A STATE MANDATED MEDICAL EXAMINATION WERE NOT PROTECTED BY THE ACT THUS JUSTIFYING HIS TERMINATION**

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Rosie Clayton, an employee called by the General Counsel, 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*) Clayton testified that Uchofen was distracting the employees while they were supposed to be listening to Gillison. (*Tr. 1109-1110*) Uchofen had not only distracted the employees, but had interrupted the eye examinations so much so that the employees were not able to see the eye chart:

JUDGE GREEN: And what happened then?

THE WITNESS: Then Tom said he wanted him out of there.

JUDGE GREEN: And what did Cesar do, if anything?

THE WITNESS: **He kept saying "I'm not doing anything. You keep on doing what you was doing. But he couldn't do what he was doing because he needed them to sit down so that they could see the chart for our eyes. We couldn't see it.**

*(Tr.1114; Emphasis Added)*

Furthermore, Clayton's testimony affirmed that Gillison asked Uchofen to leave "three or four times" (*Tr. 1113*). The ALJ held that Uchofen's conduct in interfering with a State mandated health examine resulted in a loss of protection under the Act and therefore dismissing the allegation:

**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 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; Emphasis Added)*

**1. The ALJ Properly Applied the *Atlantic Steel* Test**

The ALJ properly cited *Atlantic Steel*, 245 NLRB 814, 816 (1979) in determining whether Uchofen had lost the protections of the act when he solicited the Union survey in the mist of a State mandated health examination:

**There are cases where an employee's otherwise concerted or union activity loses its protection because of the way it is carried out. In *Atlantic Steel*, 245 NLRB 814, 816, the Board established a balancing test for these types of situations. In determining if the employee's conduct lost the protection of the Act the Board will take into account and balance the following factors; (a) the place of the discussion; (b) the subject matter of the discussion; (c) the nature of the employee's outburst and (d) whether the outburst was provoked by the Employer's unfair labor practices.**

*(ALJ 15:37-43; Emphasis Added)*

The General Counsel speciously argues that the ALJ did not discuss how each factor in the *Atlantic Steel* test weighs or not in favor of Uchofen having lost the Act's protection. (*GC Cross-Excep. pg. 20*) Contrary to the General Counsel's opinion, the ALJ correctly identifies the factors in his decision as set forth below. (*ALJ 15:50-16:7*)

(a) Place of discussion: The ALJ acknowledged that Uchofen had intruded on the business grounds while the Employer was conducting State mandated health examinations that are necessary for the employees to do their jobs. (*ALJ 15:45-50*) Furthermore, the General Counsel also agrees that the place of discussion weighs against Uchofen's protection of the Act:

**[t]he place of the discussion here arguably weighs against the protection because 20-30 employees were exposed to Uchofen's refusal to leave the trailer. See Starbucks Corp., 354 NLRB No. 99 slip op. \*3 ('[t]he location of an employee's conduct weighs against protection when the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees regardless of whether those employees are on or off duty. The question is whether there is a likelihood that other employees were exposed to the misconduct') (citing Postal Service, 350 NLRB 441, 459 (2007).)**

(*GC Cross-Excep. pg. 22; Emphasis Added*)

(b) Subject matter discussion: The Union surveys that Uchofen had passed out the day of the examinations was the same survey (*GC Exh. 80*) that had been passed out two months prior with the management's knowledge and without interference:

BY MS. BRESLIN:

Q Mr. Uchofen, prior to this day, had you handed out the document that's marked General Counsel's Exhibit Eighty?

A Yes, I do.

\* \* \*

JUDGE GREEN: All right. We don't need all this. It's not necessary. Did you -- **did you distribute these leaflets to other employees before this event with the physicals?**

THE WITNESS: **Yes, I did, sir.**

\* \* \*

BY MS. BRESLIN:

Q **Had managers seen you handing out the flyers before?**

A **All the time.**

*(Tr. 948-952; Emphasis Added)*

The management had seen Uchofen circulating these identical surveys throughout the yard, and not once did Uchofen state that there was any dispute relating to the circulation of these surveys outside the 19-A examinations. *(Tr. 948-952)*

(c) Nature of employee's outburst: The testimony by Rosie Clayton, an employee, was relied upon by the ALJ to clearly show that Uchofen's conduct had interfered with the State mandated eye exams so much so that the employees could not see the eye chart. *(Tr.1114)* Clayton's testimony also showed that Gillison asked Uchofen to leave "three or four times" but Uchofen refused to leave. *(Tr. 1113)* Clearly Uchofen's conduct before the employees undermined the management before the employees and should not be condoned.

(d) Employer provocation: Clayton's testimony shows that Gillison had repeatedly asked Uchofen to leave the examinations and nothing further. There was absolutely no

testimony to the effect that Gillison in anyway had provoked Uchofen's conduct. In fact, Clayton affirms that Uchofen had been talking about the Union and taking the employee's attention away from Gillison when there were supposed to be looking at the eye chart for their examination. (*Tr. 1109*)

Based upon the ALJ's proper analysis of *Atlantic Steel*, Uchofen's conduct forfeited his protection under the Act and therefore, his termination was justified.

**2. An Analysis Under *Wright-Line* Would Also Prove That Uchofen's Termination was Justified**

The General Counsel argues on page "25" of his Cross-Exceptions that Uchofen's termination was unlawful if the discharge were analyzed using the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must show that the **protected conduct** was a motivating factor in the employer's adverse action. Using the standard set forth in *Wright Line*, the General Counsel must first establish (1) **protected activity**, (2) employer knowledge of the employee's protected activity, (3) employer took adverse action against the employee, and (4) animus against that protected activity. *Amersino Marketing Group, LLC*, 351 NLRB 1055, 1061 (2007), citing *Southside Hospital*, 344 NLRB 634 (2005); *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), *revd.* 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 971 (1985) decision on remand 281 NLRB 882 (1986), *affd.* 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

The General Counsel incorrectly argues that even if the ALJ had properly applied *Atlantic Steel*, Uchofen's discharge was unlawful based on an analysis under *Wright Line*. (*GC Cross-Excep. Pg. 17*) In reality, the ALJ's determination under *Atlantic Steel*, that Uchofen's activity was not protected under the Act, is a prerequisite for the standard used in *Wright Line*. The standard set forth in *Wright Line* requires that protected activity be proven, which has not been done. In the matter of *Washington Adventist Hosp.*, 291 NLRB 95, 102 (1988) the Board affirmed the ALJ's finding that the General Counsel failed to meet its initial burden of establishing protected activity:

**Rather than decide the case on the question, under *Meyers Industries (I)* supra, of Respondent's knowledge or the question whether the activity was concerted, I conclude that, in any event, the conduct in which Driver was engaged was not "protected" within the meaning of Section 7 of the Act, and that the General Counsel, therefore failed to prove a prima facie case under *Meyers I*.**

*(Washington, Id.; Emphasis Added)*

It is clear that since the General Counsel failed to meet its initial burden to show that Uchofen's conduct was protected by the Act, it was unnecessary for the ALJ to set forth the standard under *Wright Line*.

In the event that Uchofen's conduct is found to be protected under the Act, the General Counsel's argument would still fail because management held no animus toward Uchofen's protected activity. As the record shows, Uchofen was able to conduct his Union business of passing out surveys without any interference from management. (*Tr. 948-952*)

There is no proof as to why management would take adverse action against Uchofen's conduct which had been previously condoned.

**D. RESPONDENT'S CHARTER ROUTES COME ABOUT ON AN *AD HOC* BASIS AND THEREFORE THE ALJ PROPERLY DETERMINED THAT CHARTER ROUTES ARE IMPOSSIBLE TO BID FOR**

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The ALJ properly found that the Respondent did not violate Section 8(a)(5) and 8(d) of the Act by not posting all charter routes that come about on an *ad hoc* basis. (*ALJ 26:8-9*)

The ALJ stated in pertinent part:

**A literal reading of the contract would seem to require that all of these routes be subject to a bidding procedure at any time that the situation presents itself. I have already indicated my misgivings about the practicality of having an ongoing bidding process throughout the year to deal with changes or to charter routes which come in on an ad hoc, daily or weekly basis. Put another way, an argument can be made that such a literal application of the contract would be impossible of performance. And in fact, the arbitrator seems to have recognized this problem when he stated that all extra work must be posted and bid by seniority *when possible*. As is at least an arguable position that the Respondent could take with respect to the assignment of these limited types of routes, it seems to me that this involves an issue of contract interpretation that should, (and was), resolved by the arbitration process.**

*(ALJ 25-26:46-4; Emphasis Added)*

The General Manager, Thomas Gillison testified that some routes may change due to factors which are beyond his control, such as a driver calling out sick, a vehicle being repaired, or the school may cancel or change a route. (*Tr. 268-273*) Gillison further testified

that in addition to the regular school bus routes, the Company contracts with schools for charter routes, which are athletic trips and other after school activities. *(Tr. 278)* Gillison further explained that the charter routes could be changed at any minute, for example, if the bus route is scheduled for an athletic game, the game may be canceled because of rain. *(Tr. 279, 421)* The changing of charter routes is not controlled by the Employer but rather by the school districts. *(Tr. 424-425)*

The General Counsel attempts to mischaracterize the record by citing pages 267 and 273 of the transcript to show that “Gillison admitted that, following the August 2008 route pick, new routes came available, route compositions changed and no additional route pick was held for the school year 2008-2009.” *(GC Cross-Excep. Pg. 30)* Contrary to the General Counsel’s assertion, Gillison explained how some of the routes may be canceled and rescheduled or a driver may call in sick, all of which are factors that the Employer does not have control over. *(Tr. 424-425)* Gillison further testified that the drivers who ultimately drove the charter routes were based on seniority. *(Tr. 427)*

Furthermore, the General Counsel cites Simino’s uncorroborated testimony in which allegedly described the bidding process at another bus company. *(GC Cross-Excep. Pg. 31)* Over the objection of Respondent’s counsel, Simino speciously described the bidding process at White Plains Bus Company. *(Tr. 836)* Simino’s description was in such detail, but when asked for the name or phone number of a company supervisor to determine whether his

account of the process was accurate or not, Simino could not produce a single name or telephone number of someone at the company. (*Tr. 841-842*)

The General Counsel's exclusive reliance on uncorroborated testimony of a single interested witness makes the witness' credibility a determinative factor. *Roundout Electric, Inc.* 329 NLRB 957, 962 (1999) It is clear that Simino's title of Union representative makes him an interested witness in this matter. Simino's unsupported statement about another bus company's bidding process was a desperate attempt to regain control over employees that clearly do not want his Union to represent them. (*R Exh. 6a & 6b*) It is important to note that Simino was one of the Union representatives involved in the anti-Semitic conduct displayed by the Union in December 2007. (*Tr. 353-354*) Simino also filed grievances that were alleged in the Complaint, all of which were unsupported by any of the employees at the company. (*Tr. 708-710*) Simino's involvement in anti-Semitic behavior, his filing of unsupported grievances, and his inability to name a company supervisor at White Plains Bus Company when the testimony of the bidding process was so detailed, are all factors of which the ALJ may use in his credibility findings. As may be seen *supra*, established policy is not to overrule an Administrative Law Judge's resolutions; therefore, the ALJ's decision to discount the testimony given by Simino should not be disturbed.

**E. THE RESPONDENT DID NOT BARGAIN IN BAD FAITH WHEN HE MET WITH THE UNION**

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. *(GC Exh. 85)* The Respondent, through his attorney, requested that Uchofen, a Union representative who had been terminated in January 2009, not be present at the negotiations due to his misconduct previously exhibited in the work place:

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; Emphasis Added)*

Gillison testified that in March 2008 and in January 2009 he had to call the police to remove Uchofen from the business grounds *(Tr. 378, 386-388)*, which was corroborated by Uchofen *(Tr. 881, 1022-1023)* and Simino *(Tr. 581, 640-641)*. 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.

The Respondent and Union met on June 18, 2009 to discuss the collective bargaining agreement which was to expire on June 30, 2009. *(Tr. 534, 544)* Present at the meeting were the representatives from the Union, Cesar Uchofen, Sean Connolly, Gilbert Hodge, Yolanda

Gomez, and the Union's attorney, Ursula Levelt, and representatives from the Company, Gideon Tiktin, Thomas Gillison, and the Respondent's attorney, Anthony J. Pirrotti. (*GC Exh. 88, Tr. 522-523*) The Union representative, Hodge, began by reading off a list of the Union's demands. (*GC Exh. 88*) After a reading of the demands, Respondent's counsel requested a list of the demands that were being read aloud, but the request was refused by the Union representatives. (*GC Exh. 88*) As testified by Connolly, a Union representative present at the meeting, "most everyone" had a copy of the demands that were being read aloud, except for the Company representatives. (*Tr. 539-541*) As may be seen by the list of demands that was sent by the Union after the session had ended, the Union's attorney lists more than forty demands that were read aloud at the meeting. (*GC Exh. 89*) The Union's conduct begs the question, how was the Respondent to bargain in good faith when the Union refused to supply a list of demands but expect to orally read more than 40 demands and have the Employer meaningfully bargain?

**1. The Union's Counsel Was Informed That a Decertification Petition Had Been Signed by 193 Out of 220 Employees**

On June 22, 2009, Pirrotti informed Levelt that he had seen a decertification petition signed by a vast majority of the employees and, therefore, refused to bargain with the Union that no longer held majority status amongst the employees:

This is to confirm the conversation we had yesterday. . . You said that you had seen a decertification petition signed by 193 or 196 employees out of 219 employees at Ardsley and that you therefore needed to confer with you client because you were afraid that **it would be an unfair labor practice charge to**

**negotiate with the Union when there was a decertification petition pending.**

*(GC Exh. 87; Emphasis Added)*

There is no evidence in the record to suggest that the Respondent had no intention to meaningfully bargain in good faith with the Union. The Respondent did in fact meet with the Union representatives and wanted to know the Union's demands, which the Union repeatedly refused to supply. *(Tr. 539-540)*

**F. THE GENERAL COUNSEL FOR THE FIRST TIME ASSERTS THAT THE RESPONDENT SHOULD BE IN VIOLATION OF SECTION 8(D) FOR ALLEGEDLY NOT MEETING WITH THE UNION REGARDING GRIEVANCES, WHICH IS BELIED BY THE GRIEVANCE CLAUSE IN THE COLLECTIVE BARGAINING AGREEMENT**

The ALJ held in favor of the General Counsel when he found a violation of Section 8(a)(1) and (5) of the Act in regards to the step two grievances. *(ALJ 18:30-35)* The General Counsel for the first time alleges that the Respondent also violated Section 8(d) of the Act. In the Complaint, when referring to the allegations regarding the step two meetings, the General Counsel alleged, in paragraph 29 of the Complaint, that the Respondent had been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act.

Furthermore, the General Counsel's post-hearing brief also does not allege a violation of Section 8(d) of the Act which states, "[a]ccordingly, by refusing to hold Step Two grievance hearings on these matters, Respondent violated Section 8(a)(1) and 8(a)(5) of the

Act.” (*GC Post-Hearing Brief pg. 109*) The General Counsel did not pursue the Section 8(d) violation in the Complaint or in his post-hearing brief and, therefore, should be estopped from making such an argument in his exceptions.

In any event, a strict interpretation of the grievance clause in the collective-bargaining agreement would reveal that the Respondent is not obligated to hold a step two meeting. The collective-bargaining agreement states in pertinent part:

Any grievance of either party which cannot be adjusted with the head of the department in which the grievance arose, may be submitted in writing to the President of the Company who shall thereupon hear same himself, or designate a representative to hear the same, together with the appropriate Union Officer. Within ten (10) days after the receipt of said submission, a **second level hearing *should be held***, notice of which shall be given to the employee involved and the appropriate Union Officer, Vice President or his/her designee, together with the grievant.

*(GC Exh. 53; Emphasis Added)*

The term “should” is suggestive rather than an obligation as opposed to the words “must” or “shall.” The grievance clause of the collective-bargaining agreement does not make it a requirement to meet for a step two meeting, therefore, Respondent was under no “obligation” to conduct same and is not in violation of Section 8(d) of the Act.

**G. IN THE EVENT THAT THE ALLEGATIONS EXCEPTED TO BY THE GENERAL COUNSEL ARE FOUND TO BE VIOLATIONS, THE UNFAIR LABOR PRACTICES DID NOT TEND TO INFLUENCE 193 EMPLOYEES TO FILE THEIR PETITION TO DECERTIFY THE UNION**

The ALJ erred in finding that any of the alleged violations were a proximate cause for any disaffection that the employees may have had with the Union. (*ALJ 39:12-14*) In the

event that the allegations excepted to by the General Counsel are found to be violations, there is no evidence to show that the unfair labor practices had a tendency to cause employee disaffection.

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.

1. **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 were a proximate cause for any disaffection that the employees would have had with the Union. (ALJ 39:10-14) The ALJ provided the Respondent with absolutely no reason as to how the violations could so strongly influence 193 employees into circulation and signing a decertification petition.

2. **Master Slack 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.* In the case at bar, this was not done.

Moreover, the United States Court of Appeals for the District of Columbia 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)*

**3. None of the Alleged Violations Influenced 193 Employees to Sign a Petition to Decertify 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 Exh. 6b; Emphasis Added)*

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 Exh. 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 Maceira — 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. In fact, the Union's conduct was the sole determining factor in the employees' decision to insist that the Union be removed as their bargaining agent and the reason for the 193 employees signing the Petition to Decertify.

**4. 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 annexed to Respondent's Exceptions*). 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"*). 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*).

**H. THE BOARD SHOULD NOT DEVIATE FROM ITS CURRENT PRACTICE OF AWARDING SIMPLE INTEREST ON MONETARY AWARDS**

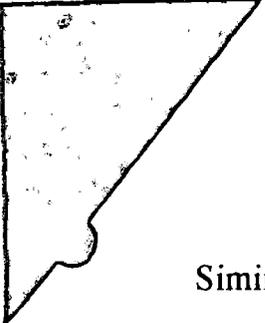
The General Counsel admits in his cross-exceptions on page 40 that it is common practice to award simple interest on backpay and other monetary awards as opposed to compounding interest. The cases cited by the General Counsel are inapplicable to the case at bar before the Board.

In view of the evidence, there should not be any monetary award given. In the event that the allegations are found to be violations, the Board should continue its current practice in awarding simple interest on monetary awards. *San Juan Teachers Assn.*, 355 NLRB No. 28, slip op. 1 fn. 3 (2010) citing *Cardi Corp.*, 353 No. 97, slip op. at 1 fn. 2 (2009); *Rogers Corp.*, 344 NLRB 504, 504 (2005)

**CONCLUSION**

The Cross-Exceptions made by the General Counsel should be denied in all respects.

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 of 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 solicitation 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.

Dated: Ardsley, New York  
May 10, 2010

Respectfully submitted,



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