

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

**A.D. CONNER, INC., GAS CITY, LTD.,  
HEIDENREICH TRUCKING COMPANY,  
MCENERY ENTERPRISES, MCENERY  
TRUCKING & LEASING, LLC, AND WJM  
LEASING, LLC AS SINGLE EMPLOYERS  
AND/OR CONNER, INC. AND  
HEIDENREICH TRUCKING COMPANY AS  
ALTER EGOS AND/OR SUCCESSORS**

**and**

**CASES 13-CA-46359  
13-CA-46360**

**TRUCK DRIVERS, OIL DRIVERS, FILLING  
STATION AND PLATFORM WORKERS  
UNION, LOCAL 705, an affiliate of the  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS**

**and**

**TRUCK DRIVERS, OIL DRIVERS, FILLING  
STATION AND PLATFORM WORKERS  
UNION, LOCAL 142, an affiliate of the  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING  
BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this Answering Brief in Response to Respondent's Exceptions to the Administrative Law Judge's Decision in this matter.<sup>1</sup>

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<sup>1</sup> Hereafter the National Labor Relations Board will be referred to as the "Board" and the National Labor Relations Act as the "Act." Respondent A.D. Conner will be referred to as "Conner;" Heidenreich Trucking Company will be referred to as "Heidenreich;" and collectively they will be referred to as "Respondent." International Brotherhood of Teamsters, Local 705 will be referred to as "Local 705" while the International Brotherhood of Teamsters, Local 142 will be referred to as "Local 142" and collectively the two Local Unions will be referred to as "the Unions." With respect to the record developed in the case, the transcript will be designated as "Tr.;" the General Counsel's exhibits as "GC Ex;" and references to the ALJ's decision will be designated "ALJD" followed by the page and, if

## I. INTRODUCTION

An examination of the record does not support Respondent's exceptions to the June 24, 2011, decision of Administrative Law Judge Paul Buxbaum. Rather, the record contains credible evidence which fully supports the ALJ's findings that: **1)** as of the shutdown of Respondent Conner, Respondent Heidenreich became an alter ego of Conner<sup>2</sup> (ALJD p. 4, ln. 40-43 and pg. 48 ln. 40-44); **2)** Respondent unlawfully threatened closure of Conner and instructed employees to decertify their Unions on September 21, and 28, 2010,<sup>3</sup> in violation of Section 8(a)(1) of the Act (ALJD p. 49, ln.5-9); **3)** on October 18 Respondent ceased business operations, discharged employees, and transferred operations because of employees' activities on behalf of their Unions in violation of Section 8(a)(3) of the Act; and **4)** Respondent failed and refused to bargain in good faith with the Unions regarding wages, hours and working conditions of the respective Local 142 and Local 705 units, and dealt directly with their employees concerning the terms and conditions employment in violation of Section 8(a)(5) of the Act.<sup>4</sup>

## II. RESPONDENT'S EXCEPTIONS FAIL TO ADHERE TO BOARD RULES AND MUST BE REJECTED IN THEIR ENTIRETY

As an initial matter, Respondent's exceptions do not meet the minimum requirements set forth in Section 102.46 of the Board's Rules and Regulations, and as such should be rejected as

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applicable, the lines of the page. Respondent's Exceptions Brief will be identified as "Respondent's brief" followed by the page, if applicable.

<sup>2</sup> The ALJ also found that along with Conner and Heidenreich, Respondents McEnery Enterprises, Gas City, Ltd., WJM Leasing, LLC constitute a single integrated business enterprise and are a single employer within the meaning of the Board's precedents. ALJD p. 4, ln. 40-43. Respondent made no exception to that portion of the ALJD, and thus any argument to such a finding is deemed waived due to Board Rule 102.46(b)(2)'s admonition that "any exception... which is not specifically urged shall be deemed to have been waived." ACS, 345 1080, 1083 fn. 3 (2005).

<sup>3</sup> All dates hereafter are 2010 unless indicated otherwise.

<sup>4</sup> As above, Respondent waived its rights under Board Rule 102.46(b)(2) to file any exception concerning the ALJ's findings that Respondent violated Section 8(a)(5) by: 1) failing to respond with reasonable promptness to information requests from Local 705; 2) repudiating their contractual obligations to both Local Unions; and 3) refusing to recognize both Unions. ALJD pg. 49, line 22-25. As such, those issues will not be discussed as they were not raised by Respondent.

defective. Respondent failed to file a separate document required in Board Rule 102.46(a), specifying the part (or parts) of the ALJD to which Respondent objected. Nowhere in the Respondent's deficient brief does counsel identify that part of the decision to which the objections are made, or specify the precise citation of page the portions of the record relied upon to make Respondent's arguments, or provide with any particularity the ground for the exception. Rule 102.46(b)(1). Instead, Respondent's brief merely makes vague references to the ALJD, unsubstantiated assertions regarding the record, and nonsensical arguments concerning the previously imposed injunctive relief ordered by the U.S. District Court.

In these circumstances, the Board has found that the party's exceptions should be disregarded. *One Stop Kosher Supermarket*, 355 NLRB No. 211, \*1 fn. 2 (2010); *Metropolitan Transportation Services*, 351 NLRB 657, 657 fn. 5 (2007); *Conley Trucking*, 349 NLRB 308, 308 fn. 2 (2007), enfd. 520 F.3d 629 (6th Cir. 2008). A complete rejection of Respondent's exceptions is warranted in this case and should be applied to the filing submitted on August 23, 2011.

However in the instance that Respondent's brief is accepted, the arguments contained within it also lack merit because the ALJ's findings of fact, credibility resolutions, and conclusions of law appropriately rely upon the evidence and have ample legal support. The ALJ was well within his discretion to make accurate credibility determinations and fairly judged Respondent's complete lack of critical documentary proof as insufficient to rebut the General Counsel's case. Accordingly, Respondent's brief has not raised any issues of fact or law which call for a different decision than that reached by the ALJ. Thus the recommendations of the ALJ should be adopted in their entirety.

### **III. RESPONDENT’S ARGUMENT THAT HEIDENREICH IS NOT AN ALTER EGO OF CONNER IS CONTRARY TO COPIOUS RECORD EVIDENCE AND REASONED ANALYSIS.**

Respondent asserts that Heidenreich is not the alter ego of Conner because Heidenreich is a “legitimately non-unionized pre-existing national business” which had “little overlapping business” with Conner, a “defunct, struggling, local business.” Respondent’s brief at pg. 13. Board law is clear, however, that an employer cannot avoid its obligations under the Act by using one corporate entity to replace another where the new entity is in reality only a “disguised continuance” or alter ego of the old employer. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942).

Alter ego status is found where the two enterprises have “substantially identical” management, business purpose, operation, equipment, customers, and supervision, as well as ownership. *Fallon-Williams, Inc.* 336 NLRB 602 (2001); *Advance Electric, Inc.*, 268 NLRB 1001 (1984), enfd. as modified, 748 F.2d 1001 (5<sup>th</sup> Cir. 1984); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Respondent’s exceptions to the ALJD attempt to make much about the different business purposes, operations, equipment, customers, management, and supervision between Conner and Heidenreich. Yet for the same reasons as found by the ALJ, the distinctions are differences without significance.

For example, Respondent claims that Heidenreich and Conner were in vastly different businesses. Yet, this characterization paints too fine a brushstroke. As the ALJ noted, whereas in the past Conner may have focused more upon local retail fuel delivery and Heidenreich may have had a wider distribution network and clientele, after the shut down, Heidenreich’s business objectives were changed and they took on Conner’s local component. Specifically, after October 18, Heidenreich took over Conner’s remaining retail gas clients without hiatus. ALJD pg. 32,

lines 40-46. Although Respondent makes much about the number of clients that differed between Heidenreich and Conner before the shutdown, the composition of Heidenreich's work was altered to accommodate McEnergy's brash closing of Conner. For example, Heidenreich assumed all Gas City work which had been shared between the two companies before the shutdown and Gas City alone comprises a sizeable list of accounts. To put this in perspective: in 2010, Conner and Heidenreich serviced between 54 to 58 accounts named "Gas City" or "GC." GC Ex. 49 and 50. Thus while there may have been accounts lost at Conner, the Gas City work was simply moved from one company's spreadsheet to another. And, contrary to Respondent's argument concerning the national versus local scope of the two businesses, where, as here, a portion of a company's business is transferred to the new company this is cogent evidence of alter ego status. See, e.g. *Stardyne, Inc.*, 313 NLRB 170 (1993), *Standard Commercial Cartage Inc.*, 330 NLRB 11 at 14 (1999), *Eckert Fire Protection*, 332 NLRB 198, 201 (2000).

All of Respondent's contentions about a "complex vetting process that made it difficult for Heidenreich to simply inherit Conner's clients" and assertions that Gas City's "bankruptcy status discouraged all other carriers from agreeing to service them" amount to little more than the unsupported arguments of Respondent's attorney. Respondent's Brief pg. 12, 7, and 6, respectively. Respondent introduced no documentary evidence to prove any of these bare assertions and therefore they should be rejected.

Next, in terms of common supervision and management, the arguments made by Respondent are specious. Record evidence confirms that Christopher was the lone management contact for the Unions insofar as labor negotiations and was at the reigns for all supervisory and managerial decisions for Conner's unit employees during the critical period immediately prior to and following the shutdown. ALJD pg. 32, lines 31-34. Tr. 469, 471, 474, 487-88, 667.

Documentary evidence also bears this out: on October 13, Dave Christopher wrote, “as far as wages and benefits, I would like all of them to fill out an application for Heidenreich...I need to see how the work is going to shift from AD Conner to Heidenreich.” GC Ex 13.

As to McEnery, testimonial evidence abounds that he played a decisive role in the allocation of work between Conner and Heidenreich both before and after the shutdown. As credited witness and former Conner dispatcher Robert Lofrano testified without contradiction, every Saturday prior to the shutdown, McEnery “would always ask me how many loads I dispatched to Heidenreich. I would tell him three or four, he’d say give them five, give them six.” ALJD pg. 7, lines 47-50, Tr. 310-311. This evidence negates Respondent’s contention that Bob Heidenreich and Pete Casper “ran the show.” Tr. 667. Even though there was no exact explanation of what McEnery meant by that vague assertion, he admitted that both Casper and Heidenreich reported to him. Tr. 667. Furthermore, Heidenreich was no longer employed as of the Fall 2010, i.e., around the time of the transfer of operations from Conner to Heidenreich. Tr. 667-68. Additionally, the record contains no evidence that Casper played any role in the hiring former Conner employees to work for Heidenreich. As the ALJ put it, “counsel attempts to draw too fine a distinction” by claiming that the supervision drastically differed as it pertains to the Local 705 unit and Local 142 unit employees. ALJD pg. 32 line 25. Rather, the supervision was identical from Conner to Heidenreich as it relates to the relevant unit employees of Locals 705 and 142.

Finally as to the mode of operations following the shutdown, drivers gave cogent testimony that to remaining employees and customers, operations were nearly identical after Conner’s shutdown. Those employees hired to work at Heidenreich testified that they were not required to submit new tax or I-9 forms when they were initially hired. Tr. 196, 284, 485. They

were not given any kind of orientation upon being hired to Heidenreich. Tr. 295. They continued to work from the same locations,<sup>5</sup> utilized the same trucks, performed the identical job duties for the nearly identical customers as they had prior to October 18. Drivers consistently testified that the trucks they drove after the shutdown simply had Conner stickers ripped off and replaced by Heidenreich stickers. Tr. 67, 180, 275. The drivers even used the same keys to operate their vehicles. Tr. 295. As the ALJ noted, the registration document from driver Greg Knorr's truck demonstrates the extent of the disguised continuance listing the owner of the vehicle as "Heidenreich Trucking Company/AD Conner." ALJD p. 18, ln. 32-34, GC Ex. 7. These drivers also testified that after being rehired by Heidenreich they utilized the same method for getting vehicle repaired and the same forms, including the central dispatch sheet. Tr. 112, 114, 196, 289. In short, to the relevant drivers, the operations were nearly identical.

Another relevant factor considered by the Board in determining alter ego status is whether one entity was created to enable another to avoid its obligations under the Act. *Fallon-Williams Srvs., and Mercury Mech. Srvs., Inc*, 336 NLRB 602 (2001); *APF Carting Inc.*, 336 NLRB 73 fn. 4 (2001); *DuPont Dow Elastomers L.L.C.*, 332 NLRB 1071 fn. 1 (2000). As will be discussed below, during McEnery and Christopher's coercive meeting with employees on September 21 and 28 when they demanded economic concessions, blamed the unions for their woes, and encouraged employees to decertify their representatives, the drivers refused to comply with management's demands. When the employees did not agree to relinquish their right to be represented by their unions, McEnery ceased operating as Conner and utilized Heidenreich to

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<sup>5</sup> Credited employees Greg Knorr and David Pippen testified that after being rehired by Heidenreich, they reported to the same facility located at 160 S. LaGrange Road in Frankfort, Illinois. Tr. 92, 178. In direct contradiction to Respondent's argument that employees of Porter, Indiana reported to a different location after the shutdown, credited Local 142 driver Darin Meadows testified that after being rehired by Heidenreich, he reported to the same trailer as he had before. Respondent's brief pg. 7, Tr. 274. Indeed Darin Meadows specifically testified that the method for the Porter drivers obtaining their central dispatch sheets from the fax machine inside the Gas City also did not change after the shutdown. Tr. 284-87.

shed the union contractual obligations that he found so onerous, all in two weeks' time. The Board has found attempts to transfer unit work from one entity to another as part of a scheme to withdraw recognition and reduce labor costs to be unlawful. See *Naperville Ready Mix, Inc.*, 329 NLRB 174, 185 (1999), enforced, 242 F.3d 744, 758 (7th Cir.), cert. denied 534 U.S. 1040 (2001); see also *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1315, 1321-23 (7th Cir. 1986).

It is clear that the ALJ correctly found that Conner and Heidenreich are alter egos insofar as they have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership and Respondent's arguments to the contrary fail.

**IV. THE ALJ DID NOT ERR IN FINDING THAT RESPONDENT VIOLATED SECTION 8(a)(1) BY THREATENING EMPLOYEES AND DEMANDING THEY DECERTIFY THEIR UNIONS.**

With respect to the 8(a)(1) factual findings, Respondent simply attacks the ALJ credibility determinations without legal or factual support. Alternatively, Respondent makes wildly unsupported legal conclusions about the testimony proffered by the General Counsel's witnesses.

First, Respondent mischaracterizes as "uncorroborated" the record evidence of threats and demands to decertify the Unions made by McEnergy and Christopher at the September 21 and 28 meetings as testified to by employees David Phippen, Greg Knorr, James McClelland and Darin Meadows. Respondent's brief pg. 9. Nothing could be further from the truth. The ALJ accurately noted that as to Knorr and Phippen who testified about September 21, "Phippen's testimony matched that of Knorr as to every significant detail regarding the meeting." ALJD pg. 13, line 5-6. Even more damning, the ALJ noted that while "Christopher provided a less colorful account of McEnergy's conduct and statements at this meeting...in its essentials, Christopher's version served to confirm and corroborate the descriptions provided by the drivers that 'he

needed concessions.” ALJD pg. 13, line 22, Tr. 822.<sup>6</sup> Neither Christopher nor McEnery ever denied the threats and solicitations to decertify were made at that meeting. Tr. 822-25, 594-95.

Regarding the testimony of drivers James McClelland and Darin Meadows about September 28’s events, the ALJ noted, “Meadows largely confirmed McClelland’s account, including Christopher’s demand for a ‘reduction in pay, or something, benefits to help the company survive.’” ALJD pg. 14, line 43, Tr. 265. By contrast, Christopher did not testify regarding this meeting and so the ALJ credited “the detailed and generally consistent account of the two drivers.” ALJD p. 14, fn. 20.

In sum, the Board should reject Respondent’s preposterous suggestion that because not *all* employees testified about the events of September 21 to which Respondent clearly invited only a select group of drivers<sup>7</sup> or September 28, it cannot be considered corroborated. Had General Counsel attempted to call every employee witness who was present at those meetings it would have been cumulative evidence under Federal Rule of Evidence 403 as well as an objectionable waste of Board resources.

Alternatively, to the extent that Respondent is attempting to rely on the testimony of its own witnesses over that of the General Counsel’s, this argument must be rejected under well-settled Board law. *Standard Drywall Prods.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 361 (3d Cir. 1951). 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 indicates that the ALJ was incorrect. *Id.* In this case Respondent’s presentation of evidence and argument does not approximate the quantum of evidence needed to meet this standard. The General Counsel presented twice the number of witnesses for each of the 8(a)(1) allegations as Respondent did,

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<sup>6</sup> McEnery simply claims that he didn’t know whether he was at the meeting. Tr. 594-95.

<sup>7</sup> GC Ex. 2 provides the list of those who were invited to the September 21 meeting.

and each of those witnesses were credited to the extent that their testimony differed from that of the biased version offered by McEnery and Christopher. In addition, the General Counsel presented multiple exhibits prepared by Respondent that corroborated the testimony of employees Pippin, Knorr, Meadows, and McClelland. GC Exs. 3, 4, and 5. Thus, Respondent's arguments concerning the ALJ's credibility resolutions hold no weight.

As to the legal effect of the remarks, Respondent makes a similarly ridiculous argument concerning McEnery's comments that there would be "no more fucking Union at Conner" and "if [drivers] wanted to keep working that [they] would have to decertify from the Union and go to work for him for less money" and, if they refused, "he was going to shut the doors." Tr. 83, 167-68. Respondent characterizes these statements as not threats or solicitations to decertify the Unions and argues these remarks merely "expressed [McEnery's] frustration" as is permitted under Section 8(c). Respondent's brief pg. 9. The Supreme Court has held that while "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union" such comments may "not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). See also *Ben Masri, Inc.*, 319 NLRB 437, 439 (1995), *Ideal Basic Industries*, 298 NLRB 248, 252 (1990), *Dlubak Corp.*, 307 NLRB 1138, 1144 (1992). One can think of no more direct threats than those of McEnery's. As the ALJ remarked, "McEnery's statements at this meeting constituted direct and obvious threats to shutdown Conner and terminate its workforce if the employees decided to maintain their membership in the Union." ALJD p. 27 ln. 18-20. Furthermore, the ALJ aptly concluded that "McEnery made an over and explicit solicitation to those employees to initiate the process of decertifying their bargaining representative." ALJD p. 27, ln. 22-24.

The fact that Christopher's statements on September 21 were "more subtle and nuanced" does not make them lawful. ALJD pg. 27, line 25. In fact, it is reasonable to assume that Christopher made no less of an impact when he told drivers that they would have to take a pay and benefits reductions and that if such was not done "the company would have to close." Tr. 223. He then directly linked the problems the company was having to the contractual benefit package. Tr. 224. As the ALJ properly concluded, the legal effect of Christopher's remarks in "consideration of the totality of circumstances surrounding the event persuades me that his statements must be reasonably construed as threatening closure of the Company and loss of employment due to the drivers' continued participation in the Union and solicitation of the drivers to discontinue such participation." ALJD pg. 27 and 28, lines 46-48 and 5-6 respectively.

This elucidates the ridiculousness of Respondent's suggestion that "not one witness" testified that McEnergy threatened drivers, required them to decertify, or said they would lose their jobs. Respondent's brief pg. 9. Indeed, out of the other side of its mouth, Respondent admits that "[i]solated, the incident seems damaging..." Respondent's brief pg. 15. Whatever McEnergy's motive in making these remarks, it is clear that a reasonable employee would find those statements coercive. So, the Board should wholly adopt the findings of fact and credibility determinations of the ALJ as they pertain to McEnergy and Christopher's threats and demands to decertify their Unions in violation of Section 8(a)(1) of the Act. *Scripps Mem'l Hospital Encinitas*, 347 NLRB 52 (2006), *Double D Const. Group*, 339 NLRB 303 (2003).

**V. THE ALJ CORRECTLY FOUND THAT RESPONDENT VIOLATED SECTION 8(a)(3) BY DISCRIMINATORILY DISCHARGING EMPLOYEES AND TRANSFERRING WORK.**

With respect to the violations of Section 8(a)(3), Respondent's counsel asserts that his client was "not attempting to destroy or circumvent the unions" and did not engage in

“retaliatory behavior to punish the Conner employees for refusing to decertify their unions.”

Respondent’s brief pg. 14. Opposing counsel turns Board law regarding evidence of timing on its head when he argues that “there is nothing suspect about the timing of events” when in fact on October 18, Respondent carried through on his threats by shutting down Conner and, in so doing, shed both of its union contracts just two weeks after drivers refused to accede to his demands to take deep wage and benefit reductions. It is well settled that the timing of an employer’s action in relation to known union activity can supply reliable and competent evidence of unlawful motivation. *Gaetano & Assocs.*, 334 NLRB 531 (2005), *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004); *Equitable Resources Energy Co.*, 307 NLRB 730, 731 (1992).

The Board has also found that an alter ego or single integrated enterprise violates Section 8(a)(3) of the Act when it shuts down its operations, transfers existing work, and terminates or lays off employees in order to avoid obligations of a union-represented workforce. *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993); *Dahl Fish*, 279 NLRB 1084, 1088 (1986); *Southeastern Envelope Co.*, 246 NLRB 423, 427 (1979). The Board has similarly noted that the discharge of employees to discourage union support or in retaliation for the protected activity under the Act violates Section 8(a)(3). *J. T. Slocumb Co.*, 314 NLRB 231, 241 (1994).

Here, the ALJ found that the General Counsel met its burden by its factual presentation demonstrating with “compelling evidence...that unlawful antiunion animus was a predominating motive for the shutdown of Conner and transfer of operations to Heidenreich.” ALJD pg. 35, line 10-11. Following the General Counsel’s case, the ALJ determined that Respondent did not have sufficient evidence to rebut this showing under *Wright Line*. 251 NLRB 1083 (1980). In particular, the ALJ noted that whereas “the record rarely affords ‘smoking gun’ evidence, particularly regarding the intent and motivation of parties to lawsuits,” this case was the

exception to the rule insofar as Christopher's email<sup>8</sup> to Ted Lowery explained "not only what the Respondents did, but why they did it." GC Ex. 13, ALJD pg. 16, fn 22. The ALJ also found that the testimony evidence presented by McEnergy was not reliable noting that "It is difficult to place reliance on McEnergy's testimony given that it ranged from passionate intensity and sharp focus to blithe inference and professed ignorance of basic information." ALJD pg. 6, fn. 12.

Respondent's less than feeble economic defense was also rejected because it lacked any documentary support whatsoever and instead was solely based on the self-serving and unreliable "word" of William McEnergy and Dave Christopher. On exception, Respondent's brief repeats this same refrain that Conner closed because it "could not fiscally continue operations under the terms in place." Respondent's Brief pg. 14-15. Such arguments were already cogently addressed by the ALJ as being against the manifest weight of the evidence. To be precise, the ALJD gave Respondent's unreliable witnesses the benefit of the doubt when he pointed out that while there may have been alternative motives for shutting down Conner, "additional legitimate motives for management's actions [do] not lessen the significance of the strong antiunion component underlying those acts." ALJD p. 23-24. He also aptly noted that Respondent never produced one scintilla of evidence to show the extent of Conner's loss of business. So, the ALJD accurately applied an adverse inference and adjudged that "the persuasive evidence consisting of the statements made by McEnergy and the concrete steps he took to rid himself of the unions while continuing to operate in the local fuel delivery business firmly support a finding that he engaged in unlawful discrimination against his bargaining unit employees..." ALJD p. 30-31, ln. 38-41 and 5, respectively.

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<sup>8</sup> In this email, Christopher described the shifting of work from Conner to Heidenreich, told Lowery that he was to explain to drivers that the company was still deciding how many drivers were needed, but also cautioned him that such information could not be put "into a formal letter due to union issues." GC Ex. 13.

For these reasons, the ALJ's recitation of facts and analysis sum up the correct assessment that not only did General Counsel meet its *prima facie* case, but that Respondent did not meet its burden of showing that the same action would have taken place even in the absence of protected conduct. *Wright Line*, 251 NLRB 1083 (1980). Consequently, Respondent's arguments on exception must fail.

**VI. RESPONDENT'S EXCEPTIONS CONCERNING THE ALJ'S FINDINGS OF SECTION 8(a)(5) VIOLATIONS ARE WITHOUT MERIT AND AGAINST THE WEIGHT OF THE EVIDENCE.**

**A. THE ALJ CORRECTLY FOUND THAT RESPONDENT DEALT DIRECTLY WITH EMPLOYEES ON SEPTEMBER 21 AND 28**

To counter the ALJ's findings with respect to the 8(a)(5) allegations that McEnery and Christopher dealt directly with employees during the September meetings, Respondent attempts to portray the meetings as nothing more than "informational session[s]" and argues they were "not set in a threatening environment" and thus cannot be seen as direct dealing. Respondent's brief at pg. 10. However the record evidence reveals that McEnery and Christopher took wage and benefit proposals directly to the employees and demanded that they be met. By so doing, Respondent bypassed its employees' collective-bargaining representative and dealt directly with bargaining unit members in violation of Section 8(a)(5) and (1) of the Act. *Permanente Med. Group*, 332 NLRB 1143, 1144 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995); *Obie Pacific Inc.*, 196 NLRB 458, 459 (1972).

The traditional criteria for unlawful direct dealing includes, but is not limited to direct employer communication with unit members intended to affect wages, hours, or other terms and conditions of employment, or seeking to undercut the union's bargaining role, and the union's exclusion from the communication. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000);

*Southern California Gas Co.*, 316 NLRB 979, 982 (1995); *Obie Pacific Inc.*, 196 NLRB 458, 459 (1972).

In context, the record reveals that as of the end of September, neither Local had begun to bargain about the terms of the next collective-bargaining agreement because both were attempting to determine the severity of the Respondent's stated economic position by conducting audits of the Company's books.<sup>9</sup> Tr. 551-53. While it is acknowledged that Christopher issued a wage proposal via email to Local 705 on August 5, the parties had never sat down to discuss that proposal, or any other proposal, from June through October 18. GC Ex. 30. Tr. 553.

If Respondent truly believed that the Unions were engaged in dilatory tactics, it could have filed its own unfair labor practice charges for alleged bad faith bargaining. Instead, Christopher and McEnery's attempted an "end run" around the Unions, taking their terms directly to the employees. As GC Exhibits 3, 4, and 5 demonstrate, Respondent was determined to get its concessions directly from employees, rather than bargaining with their lawful representatives about such critical terms as wages, health insurance, and retirement benefits.<sup>10</sup> In GC Exhibit 5, Christopher wrote:

"We tried taking a group of select senior drivers to meet with. We felt that meeting with several drivers would be more productive vs. getting in front of our entire group of Frankfort and Porter drivers. During the meeting, it was reiterated to the drivers the importance of getting concessions passed through due to the financial condition of A.D. Conner. *A proposal was also put onto the table regarding what we were looking at from a wage and benefit reduction.*" (Emphasis added.)

In Christopher's own words he and McEnery were undeniably presenting "proposals" to employees and had specifically targeted "select" employees who they hoped would hold sway

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<sup>9</sup> Neil Messino testified that within a week after August 6, he was reviewing Company records and that an audit was undertaken immediately after his August 19 meeting with Christopher. Tr. 549, 552.

<sup>10</sup> Christopher had the opportunity to clarify what drivers' recalled as a spreadsheet listing the amounts of money that Respondent was losing, but he never did. Thus, an adverse inference was drawn due to this failure to produce such exculpatory evidence. ALJD pg. 30, lines 25-38.

with others. As the ALJD notes, when viewed through the lens of the additional unlawful solicitations of decertification and threats of business closure at these same meetings, McEnery's and Christopher's direct dealing about proposed changes to employees' terms and conditions were absolutely calculated to undermine the Unions' position as their exclusive collective-bargaining representatives. ALJD pg. 44, *Modern Merchandising*, 284 NLRB 1377, 1379-1380 (1987); *In re Full Srv. Beverage Co. of Colorado*, 331 NLRB 945, 948 (2000).

In conclusion, Respondent's conduct "contains all of the hallmarks of unlawful direct dealing in violation of Section 8(a)(5)." ALJD pg. 44, line 46-47. Consequently, Respondent's exception regarding the 8(a)(5) direct dealing allegation should be rejected.

**B. THE ALJ CORRECTLY FOUND THAT RESPONDENT FAILED TO BARGAIN OVER ITS DECISION TO SHUTDOWN CONNER AND TRANSFER OF EMPLOYEES**

Demonstrating a fundamental lack of understanding of the law respecting an Employer's duty to bargain over its decision to shutdown, Respondent argues that it "never refused to bargain and in fact, persistently attempted to negotiate in good faith beginning in February, 2010." Respondent's brief pg. 17.

However, it is undisputed that on Monday, October 11 Local 705 Representative Neil Messino called Christopher with the news that drivers had agreed to change course and accept the wage and benefit reductions that the Company said were so necessary. Tr. 904. Two days later Messino first learned of the shutdown through employees.<sup>11</sup> Tr. 540-45. Les Lis testified that he first heard of the shutdown on Wednesday, October 13 at an employee meeting. Tr. 495. It is undisputed that at no time were the Unions permitted to bargain about, for example, who

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<sup>11</sup> It is insufficient to simply notify employees of bargainable changes such as these. In fact, doing so "disparages the collective-bargaining process and improperly undermines the status of the Union as the designated and recognized collective-bargaining representative. . . ." *Hecks, Inc.*, 293 NLRB 1111, 1118 (1989); *NLRB v. Walker Constr. Co.*, 928 F.2d 695, 696 (5<sup>th</sup> Cir. 1991).

would be selected to transfer from Conner to Heidenreich, what those workers' wages would be, or whether there would be any carryover of seniority at Heidenreich.

In its exceptions, Respondent argues that it had been attempting to engage the Unions as far back as February to attempt to get wage and other benefit concessions. Respondent also argues that as such, it cannot be said that they failed to bargain in good faith. However, such argument misses the point entirely. The violation alleged, and proven, is that Respondent never bargained with either union *about the shutdown*. The course of conduct between the parties concerning bargaining over a successor collective-bargaining agreement, an entirely different topic, is plainly irrelevant to the question of whether Respondent bargained with the Unions about the shutdown.

In sum, Respondent failed to notify and bargain with both Local Unions over the effects of the decision to shutdown Conner in violation of Section 8(a)(5) of the Act. *Midwest Precision Heating & Cooling*, 341 NLRB 435 (2004); *Sea Jet Trucking Corp.*, 327 NLRB 540, 544 (1999).

## VII. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Respondent's Exceptions be overruled and that the ALJ's decision, including his findings, conclusions, and recommendations, be adopted by the Board in their entirety.

**DATED** at Chicago, Illinois, this 1st day of September, 2011.



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 1st day of September, 2009 the **Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** has been electronically filed with the Board's Office of Executive Secretary and that, pursuant to Section 102.114 of the Board's Rules and Regulations as revised, true and correct copies of that document have been served upon the following parties of record via certified mail and electronic mail to the e-mail address listed below on that same date:

Certified Mail & Electronically served

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