

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

IN THE MATTER OF: )  
)  
OS TRANSPORT LLC and HCA )  
MANAGEMENT, INC., )  
)  
Respondents, )  
) NLRB Case Nos. 32-CA-25100  
and ) 32-CA-25399  
) 32-CA-25490  
)  
TEAMSTERS LOCAL UNION NO. 350, )  
INTERNATIONAL BROTHERHOOD OF )  
TEAMSTERS, CHANGE TO WIN, )  
)  
Charging Party. )  
\_\_\_\_\_ )

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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## I. STATEMENT OF THE CASE

The Consolidated Complaint in this matter alleged that OS Transport, LLC (hereinafter “OS Transport”) and HCA Management, Inc. (hereinafter “HCA”) violated Sections 8(a)(1) and 8(a)(3) of the Act. After hearing the matter, Administrative Law Judge Gerald Etchingham (hereinafter “the ALJ”) issued his decision on August 15, 2011 (citations to the decision shall be denoted as “ALJD at p. \_\_, lines \_\_”). The ALJ found that Respondent violated the Act as alleged in the Complaint. The Respondent has excepted to some of the ALJ’s findings, conclusions and remedies as set forth more fully below.

Respondent operates a trucking company devoted solely to hauling waste and recyclables to and from various locations in Northern California. OS Transport owns the trucks and operates a yard in San Martin, California, where the trucks are parked. OS Transport utilizes drivers which it pays to drive the various routes on a flat fee schedule, based on the route and the load. HCA handles the invoices to the primary customer for hauling services, Greenwaste, and is paid on the invoices. OS Transport invoices and is paid by HCA for the hauling services. The ALJ found that OS Transport and HCA (hereinafter “Respondent”) constitute a single employer under the Act.<sup>1</sup>

The companies are owned primarily by Hilda Andrade (Andrade): she is the sole owner of HCA and owns OS Transport with her two children, Oscar Sencion, Jr. and Crystal Sencion. The children’s father (who is not married to Andrade), Oscar Sencion, Sr. (Sencion, Sr.), was involved with operations of the predecessor companies to Respondent. In addition to drivers,

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<sup>1</sup> Respondent does not except to this finding.

Respondent also utilizes mechanics to fix the trucks, including mechanic Felipe Campos (Campos).<sup>2</sup>

In April of 2010, some of the drivers began organizing with Teamsters Local 350 (hereinafter “the Union”). In early May, a letter signed by many of the drivers protesting certain working conditions was provided to Respondent. (G.C. Ex. 4) In addition, the Union filed a petition for an election and certain drivers testified at the hearing on the petition held in May. There was no other evidence of union or protected concerted activities by any of the drivers following these activities in May.

In his decision, the ALJ found that a number of statements that violated Section 8(a)(1) were made by Andrade and Sencion, Sr. in the timeframe of late April and early May of 2010. While Respondent does not except to most of the findings, Respondent has excepted to the conclusion that Sencion, Sr. violated the Act by telling driver Miguel Reynoso (Reynoso) that he would not rehire an employee who resigned, Julio Escobar, because of his union activity. As set forth more fully below, Reynoso testified that Sencion, Sr. never said anything about the union in connection to Escobar, and therefore did not make the unlawful statement ascribed to him by the ALJ.

Respondent also excepts to the ALJ’s conclusions that it violated the Act by reducing the workload and earnings of ten prounion drivers following the onset of union activity in early May. For six of the ten drivers, the ALJ set forth no findings of fact or reasons for his conclusion, and there was insufficient evidence to establish that any of these drivers suffered any adverse

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<sup>2</sup> Respondent does not except to the ALJ’s findings that Sencion, Sr. was a supervisor and Campos an agent within the meaning of the Act.

employment action sufficient to establish a prima facie case of discrimination in violation of Sections 8(a)(1) and 8(a)(3).

Respondent terminated driver Jesus Garcia Marquez (Marquez) on October 14, 2010, after he failed to report to work for a period of over two weeks following the end of an approved leave of absence. The ALJ ruled that Respondent terminated Marquez because of his union activities six months prior, finding that Respondent failed to establish that Marquez would have been terminated even in the absence of his union activities. Respondent excepts to many of the findings underpinning the ALJ's conclusion, and submits that it met its rebuttal burden and established that Marquez was not terminated on account of union activities.

Respondent also terminated driver Alberto Pisano on November 19, 2010 because he had accumulated too many points on his driving record and Respondent's insurance company had decided to exclude him from coverage. The ALJ held that Respondent terminated Pisano for his union activities back in April and May, and found that Respondent did not establish that it would have terminated Pisano even in the absence of union activities. As with Marquez, Respondent excepts to many of the findings underpinning the ALJ's conclusion, and submits that it met its rebuttal burden and established that Pisano was not terminated on account of union activities.

## **II. ISSUES PRESENTED**

1. Respondent contends that the ALJ erroneously found Respondent violated Section 8(a)(1) by stating that former employee Julio Escobar would not be rehired (**Respondent's Exception No. 19**)
2. Respondent contends that the Decision does not comply with Section 102.45(a) of the Board's Rules and Regulations because the ALJ did not set forth specific findings of fact and

reasons for his conclusion that drivers Enedino Millan, Jose Velasquez, Efrain Gutierrez Najera, Jose Urias, Ceferino Urias Velasquez, and Primitivo Guzman suffered loss of hours and earnings and changes in work assignments **(Respondent's Exceptions Nos. 7 and 13)**

3. Respondent contends that there was insufficient evidence of adverse employment action, in the form of deliberate reduction in hours and earnings or changes in work assignments by Respondent, with respect to Millan, Velasquez, Najera, Urias, Urias Velasquez, and Guzman, and the ALJ therefore erred in finding a violation of the Act **(Respondent's Exceptions Nos. 1, 2, 3, 4, 10, 13, 18, 20, 27, 32, and 35)**

4. Respondent contends that it met its burden of establishing that it would have terminated Jesus Garcia Marquez even in the absence of union or protected concerted activities for failing to report to work, and the ALJ therefore erred in finding a violation of the Act **(Respondent's Exceptions Nos. 8, 9, 11, 12, 15, 16, 21, 22, 23, 24, 33, and 34)**

5. Respondent contends that it met its burden of establishing that it would have terminated Alberto Pisano even in the absence of union or protected concerted activities for failing to report to work, and the ALJ therefore erred in finding a violation of the Act **(Respondent's Exceptions Nos. 5, 6, 8, 9, 11, 12, 17, 25, 26, 27, 28, 29, 30, 31, 33, and 34)**

### **III. ARGUMENT**

1. The ALJ Erred in Concluding that Sencion, Sr. Unlawfully Stated that Julio Escobar Wouldn't be Rehired Because of Union Activity

The ALJ concluded that Respondent violated Section 8(a)(1) when Sencion, Sr. told Miguel Reynoso (Reynoso) that he would not rehire an employee who previously voluntarily quit, Julio

Escobar, “because of his union support.” (ALJD, p. 29, lines 1-4) Respondent excepted to this finding on the grounds that there is no evidence that Sencion, Sr. said or did anything to connect a refusal to rehire Escobar with union activity.

The ALJ’s conclusion is based upon Reynoso’s account of the conversation during direct testimony: “Oscar [Sencion, Sr.] told me during the conversation we had in his office that Julio was asking for his job back. And Oscar said to him, yes. I will give it back to you and—but Oscar told me that wasn’t true; that he would never give him back—give him work.” (Tr. at 259). When counsel asked whether he remembered if Sencion, Sr. said why he wouldn’t give Escobar his job back, Reynoso testified that Sencion, Sr. “didn’t make any comment....” (Tr. at 259) Reynoso said he believed it was because of the union, but that was merely speculation on his part and was not based on anything Sencion, Sr. said during the conversation. (Tr. at 259)

In his decision, the ALJ stated that Sencion, Sr. actually told Reynoso that Escobar would not be rehired “because of his union support.” (ALJD, p. 29, lines 1-2) This conclusion completely mischaracterizes Reynoso’s testimony, since he explicitly denied that Sencion, Sr. said anything about why he wouldn’t rehire Escobar. The ALJ imputed a statement to Sencion, Sr. that he didn’t make. Reynoso’s subjective belief that Sencion, Sr. had unlawful motives cannot be the basis for finding that Sencion, Sr.’s ambiguous statement violated Section 8(a)(1). See California Cooperative Creamery, 290 NLRB 355, 359-360 (1988) (statement that two applicants wouldn’t be hired because they were “bad eggs” and “troublemakers,” without any reference to union activity, too ambiguous to violate Section 8(a)(1))

2. The ALJ Erred in Concluding that Respondent Unlawfully Decreased Wages and Changed Work Routes and Hours Worked of Enedino Millan, Jose Velasquez, Efrain Gutierrez Najera, Jose Urias, Ceferino Urias Velasquez, and Primitivo Guzman

- a. The ALJ's Findings and Conclusion of Law that Respondent Violated the Act by Changing Work Assignments and Reducing the Hours and Earnings of These Drivers Does Not Conform to the Board's Rules and Regulations

Section 102.45(a) of the Board's Rules and Regulations requires that an ALJ's decision contain "...findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record..." The Board has held that the failure to comply with this requirement is grounds for a meritorious exception to the decision, requiring remand to the ALJ. See Aramark Corp., 353 NLRB 993 (2009); Bullock's, 247 NLRB 257 (1980).

Respondent's Exceptions Nos. 7 and 15 are based upon the ALJ's failure to set forth any findings of fact or specific basis for his conclusion that above-named drivers suffered reductions in their total wage, work assignments, or work hours on account of their union activity. The ALJ discussed evidence regarding other drivers, but the decision does not contain any discussion of the facts regarding these specific drivers. The ALJ merely cites the wage records contained in G.C. Ex. 46, but failed to address Respondent's contentions that the wage records in G.C. Ex. 46 demonstrated that these drivers did not suffer any substantial loss in pay or work assignments compared to the same period in the prior year, and that any small differences between their pay in 2010 versus 2009 were attributable to factors unrelated to any union activity. Instead, the decision contains a conclusory paragraph on page 30 that "Consistent with my factual findings set forth above..." Respondent reduced the hours and pay of all ten drivers named in the

Complaint. There are no factual findings or reasoning set forth in the decision regarding the allegations with respect to these five drivers, and therefore Respondent's Exceptions to this conclusion are meritorious.

b. The ALJ's Conclusion that the Six Drivers Suffered Reductions in Pay and Work Hours and Change in Work Assignments is Erroneous Because There is Insufficient Evidence of a Violation of the Act

One of the elements that must be initially proven under Wright Line, 251 NLRB 1083 (1980), is that the employee(s) suffered some adverse employment action. Where there is insufficient evidence that the employee's terms and conditions were changed by action of the employer after learning of union activity, the prima facie case fails, and the employer does not bear the burden of proving that it would have taken the same action in the absence of union activity. In such circumstances, the Board has consistently found Section 8(a)(3) allegations must be dismissed. For example, in Animal Human Society of South Jersey, 287 NLRB 50 (1987), it was alleged that an employee lost hours due to the unlawful reassignment of two other employees. The pay records showed, however, that his hours did not differ significantly after the reassignment, and the Board therefore found no violation. A similar allegation of reduction in hours was dismissed in Action Mining, 318 NLRB 652, 676 (1995). According to the Judge, a prima facie case was not established because there was no evidence the employee's hours were reduced for reasons other than his return to his original classification, which was unrelated to any union activity. See also Simmons Co., 314 NLRB 717, 725 (1994) (no prima facie showing that employer took adverse action to reduce employee's earnings); Great Plains Coca-Cola Bottling Co., 311 NLRB 509, 516 (1993) (no unlawful denial of overtime where records show employee worked as much or more overtime than other employees).

In the present case, four of the six drivers at issue (Millan, Velasquez, Najera and Urias) did not testify at the hearing. Urias Velasquez testified that he did not experience any changes to his work hours after the onset of union activity, and Guzman's testimony conflicts with the ALJ's generalized conclusion that he was denied work while his truck was being repaired, as discussed more fully below. The ALJ glossed over this lack of direct testimony that any of them were subjected to an adverse employment action, and instead cited only the wage and hour records summarized in G.C. Ex. 46 as justification for his conclusion that Respondent discriminatorily cut their hours and pay.

This generalized finding that prounion drivers' compensation was decreased after May 2010, according to the ALJ, is based on a comparison with the wages they earned in May-November of 2009, and a comparison with the wages of nonunion drivers such as Victor Vargus. (ALJD, p. 10, lines 14-19). The records in G.C. Ex. 46, however, do not establish that the five drivers at issue lost significant hours or pay after signing the protest letter in late April (G.C. Ex. 4), which was the only evidence establishing protected concerted activity by these drivers. Further, any subsequent variations in their hours or pay can be attributed to other factors, rather than deliberate action on the part of the Respondent. Without direct testimony from any of the five drivers that their hours or earnings were reduced by actions of the Respondent, it is impossible to any nexus between fluctuations in their hours or earnings reflected in G.C. Ex. 46 and discriminatory action by Respondent.

In the present case, there is similarly insufficient evidence to sustain a prima facie showing that any of the six drivers suffered adverse employment action, as set forth more specifically below regarding each driver:

i. Enedino Millan

Neither of these comparisons hold true with Millan, however. Millan only started working for the company in December of 2009, so there is no way to compare his 2010 wages against the previous year. (ALJ Ex. 4(f); G.C. Ex. 46) Moreover, Millan earned more in 2010 (\$51,862) than Vargus or any other driver working with the Company, except for Rafael Martinez (Martinez also had the highest earnings in 2009). (G.C. Ex. 46) This fact completely eviscerates the ALJ's generalized inclusion of Millan in the list of drivers with lost earnings.

The only evidence of union activity by Millan was his signature on G.C. Ex. 4, which was revealed to the Company in early May. Nevertheless, Millan's hours and earnings did not decrease in May. He earned \$4,845, only \$45 less than what he earned in April. If Respondent truly was motivated to cut his hours and earnings, it stands to reason that such retaliation would have manifested itself immediately. Moreover, his average earnings in subsequent months were in line with his average earnings in the early part of the year, with the only exception being June. His lower than average earnings that month can be explained, however, by his absence for three workdays, June 22-24. (ALJ Ex. 4(f)) Given the absence of evidence that this absence was due to some action on the Employer's part, the isolated deviation from his average earnings in June cannot establish adverse employment action.

Similarly, there was no evidence that Millan was denied the opportunity for Saturday work after May. In fact, Millan worked every Saturday in May and three Saturdays in July. Again, the ALJ's conclusion that Respondent deliberately withheld Saturday work from him to retaliate for signing G.C. Ex. 4 cannot be squared with the evidence that he continued receiving such work immediately after signing. While he did not work any Saturdays in June or some later months,

there was no evidence that the Respondent deliberately did not call him in to work. There are myriad possible reasons why he did not work certain months, including the possibility that he turned the work down. Without testimony from him, there is no basis for the ALJ's holding that Respondent was the moving party, and therefore no basis for the conclusion that he was the victim of an adverse employment action.

ii. Jose Velasquez

Like Millan, there are no earnings from 2009 for Velasquez for comparison, because he did not start driving for Respondent until March 30, 2010, a fact completely ignored in the decision. (ALJ Ex. 4(f); G.C. Ex. 46) Consequently, the ALJ's conclusion that his wages were reduced along with other prounion drivers based on a comparison with his earnings in 2009 is undeniably flawed. Moreover, Velasquez's hours and earnings only declined slightly from April to May 2010. During these two months of his employment, he did not miss a single day of work, but he missed two days in June (Monday the 7th and Tuesday the 8th), which explains the decline in his earnings that month. (ALJ Ex. 4(f); G.C. Ex. 45) In July, his earnings declined significantly because he was absent Thursday and Friday, July 22 and 23, and the entire week of July 26 through July 30. (ALJ Ex. 4(f); G.C. Ex. 45) His earnings were similarly lower in August due to four absences, but they increased back to average thereafter. (G.C. Exs. 45 and 46) There was no evidence from Velasquez or any other source indicating that Respondent had anything to do with these absences. See C.I. Whitten Transfer Co., 309 NLRB 610, 623, 627 (1992) (no violation where alleged reduction in earnings explained by employee's absence from work). Moreover, the route sheets in evidence do not show any significant decrease in the number of daily routes driven by Velasquez following his signature on G.C. Ex. 4. There was consequently

no evidence to support the ALJ's conclusion that Velasquez's hours and earnings were reduced by the Employer in retaliation for union activity.

There was also insufficient evidence to support the conclusion that Velasquez was denied Saturday work. Since Velasquez only started at the end of March 2010, he had no pattern of working Saturdays with which to draw a comparison. He did work on a Saturday in May and July, but there was no evidence to establish that Respondent deliberately denied him opportunities to work other Saturdays. Velasquez could have chosen to decline opportunities to work. Without any testimony from him or other evidence to establish that he wasn't offered work, the mere fact that he didn't work Saturdays during some months does not prove that an adverse employment action was taken.

iii. Efrain Gutierrez Najera

Since Najera did not testify, there was no direct evidence that his routes were changed or his work load lessened by the Employer after he signed G.C. Ex. 4. Najera's income for May 2010 was \$3800, only slightly less than the same month in 2009 and close to his average earnings. (G.C. Exs. 46 and 47) While his earnings were lower in July and August in particular, this is the result of his absence from work for over two weeks in July and the first week in August. (G.C. Exs. 45 and 47) There was no evidence that this absence was the result of any action of the part of the Respondent, either due to truck repair or any other cause. Likewise, there was no evidence establishing that Gutierrez was denied Saturday work by Respondent, as opposed to Gutierrez choosing not to work those Saturdays. Mere conjecture that Respondent was responsible is not enough to carry the burden of establishing a prima facie case of discrimination. Consequently, the ALJ erroneously found that the wage and hour records, standing alone, were sufficient to prove that adverse employment action was taken against Gutierrez because he signed G.C. Ex. 4.

iv. Jose Urias

Urias did not earn substantially less in 2010 as compared to the prior year. (G.C. Ex. 46) The differential was only \$873, which could be attributed to myriad factors outside the Respondent's control. Consequently, the ALJ's mere assertion that comparison was the prior year's earnings demonstrates adverse employment action does not hold true for Urias. Moreover, there was no immediate reduction in his hours or earnings in May, as his monthly earnings were higher that month compared to May 2009. (G.C. Ex. 46). His earnings in July were likewise higher than in 2009. While they were lower in June than the previous year, this fact alone, without testimony from Urias that Respondent took some action to reduce his wages, is not sufficient to establish adverse employment action, particularly when this month is sandwiched between two months that he earned more compared to the prior year. There is also no evidence that his average number of routes per day or the routes he was assigned changed after he signed G.C. Ex. 4. (ALJ Ex. 4 (f); G.C. Ex. 45) There is insufficient evidence that Urias's earnings or hours were deliberately reduced by Respondent, and therefore no prima facie showing of discrimination. There is similarly no evidence to support the conclusion that Urias was denied the opportunity for Saturday work. He worked a Saturday in May, immediately following the revelation of G.C. Ex. 4 to Respondent, but did not work Saturdays thereafter until August, when he resumed regularly working Saturdays. Since Urias didn't testify, however, there is no evidence that he was denied Saturday work for that time period. As with other employees, he could have turned down the opportunity, or some other reason may have prevented him from working. It was General Counsel's burden to establish that he was denied the opportunity, not merely that he didn't work those days. The ALJ failed to recognize the failure of General Counsel to meet that burden, and therefore his conclusion that Urias was denied hours is flawed.

v. Ceferino Urias Velasquez

Urias Velasquez was the only one of the five drivers at issue to testify at the hearing. Contrary to the ALJ's findings, however, Urias Velasquez stated on direct that his work load didn't change after G.C. Ex. 4 was turned over to Respondent:

BY MS. BERBOWER:

Q. In May of 2010, after this letter was turned in, was there a change in the amount of work you did?

A. For me personally there was no change.

(Tr. at 345) The ALJ specifically found that it was unlikely Urias Velasquez' would give false testimony, given that he was a current employee of Respondent when he testified, and he credited his testimony throughout the decision. (ALJD, p. 9, n.22, lines 51-53) The ALJ did not directly address this above-cited testimony by Urias Velasquez, but he completely contradicted himself by generally discounting Urias Velasquez' testimony later in his decision. (ALJD, p. 16, lines 21-24)

The ALJ's failure to address or credit Urias Velasquez' denial that he experienced any change after the beginning of May was clearly erroneous, particularly since the earnings and hours data supports his testimony. His 2010 earnings were \$47,760, over \$1000 higher than 2009. (G.C. Ex. 46) While his earnings in May 2010 were lower than the previous year, it wasn't due to a reduction in the amount of work he was performing, but instead was due to his absence from work from Friday, May 14 through Wednesday, May 19. (ALJ Ex. 4(f)) He also was absent a day in June, but earned considerably more in July than in the previous year. (ALJ Ex. 4(f); G.C. Ex. 46). He was also absent Monday, August 2 through Thursday, August 5, which explains the discrepancy with the prior year's earnings for that month, especially since his earnings in

September reverted to comparability with the prior year. (G.C. Exs. 45 and 46) There was no testimony from Urias Velasquez attributing these absences to any action by the Respondent. Consequently, the ALJ was wrong to assign culpability to Respondent for the lower earnings of Urias Velasquez resulting from his absences.

Urias Velasquez also did not experience any decline in Saturday work. He worked on a Saturday immediately after G.C. Ex. 4 was given to Respondent, and he again worked on a Saturday in June, and then worked every Saturday in July. (G.C. Ex. 46) This averages out to two Saturdays a month for that three month period, same as his average for the months prior to May. (G.C. Ex. 46) Furthermore, during 2009 he didn't work any Saturdays in May or June, and only one Saturday per month in July through September. (G.C. Ex. 46) It was therefore not out of the ordinary when he worked only one or zero Saturdays in 2010. There was consequently insufficient evidence that Urias Velasquez' hours or earnings for Saturday were reduced by Respondent, as opposed to other factors outside Respondent's control.

Based on Urias Velasquez' own testimony and the evidence which substantiated his denial of any adverse impact from his signing G.C. Ex. 4, the Complaint allegation that his hours and pay were unlawfully reduced should have been dismissed by the ALJ.

vi. Primitivo Guzman

The only factual finding made by the ALJ with respect to loss of hours or earnings by Guzman was his reference to him missing work due to repairs on his truck, along with Reynoso, Marquez and Pisano. (ALJD, p. 11, lines 38-42) The ALJ found that in the past, trucks were repaired quickly and drivers were allowed to use spare trucks, while after the onset of union activity, Guzman and the drivers missed weeks waiting for the repairs, while spare trucks were available for them to drive. This conclusion with respect to Guzman fails to address the evidence that

Guzman's absence had nothing to do with his truck, but instead was caused by damage to the trailer he was hauling.

On June 22, 2010, Guzman drove his truck under some telephone cables, which he had previously been instructed not to do, and the cables snagged on the trailer tarp, pulling down the cables and damaging the trailer tarp motor. (Tr. at 1062; Res. Ex. 7) Respondent's customer, Greenwaste, owned the trailers, as recognized by the ALJ. (ALJD, p. 4, n. 9, lines 50-51) Any major damage to the trailers, including the damage caused by Guzman's accident, was not repaired by the Respondent. (Tr. at 1064-1065) Guzman could not work during that period while his trailer was being repaired, because Respondent did not own the trailers and there was not an extra trailer for him to use. (Tr. at 1064-1065) Guzman was off work from June 23 until July 6 while the trailer was being repaired.

The ALJ's conclusion that Respondent was responsible for Guzman's lost work time and earnings is predicated on his conclusion that Respondent deliberately delayed the repair of the trucks and didn't allow spare trucks to be used by the prounion drivers. This reasoning undeniably does not apply to Guzman's situation, since Respondent didn't control the repair of the trailer, and the availability of spare trucks for him to drive was irrelevant because there were no spare trailers. Furthermore, the accident that caused the damage was clearly Guzman's fault, so the fact he was off work for that time period is in no way related to his participation in union activities.

3. The ALJ's Conclusion that Respondent Violated the Act by Terminating Jesus Garcia Marquez was Erroneous

Respondent does not except to the ALJ's conclusion that General Counsel established a prima facie case under Wright Line. However, the ALJ's conclusion that Respondent failed to

establish that it would have terminated Marquez even in the absence of union or protected activity is based upon erroneous findings, which is the basis for Respondent's Exceptions 23 -26. Respondent established that Marquez was terminated on October 14 because he failed to show up for work for a two week period following the end of his approved leave of absence on September 27. After September 30, Marquez never contacted Andrade or Campos, either by phone or by coming to the yard, to inquire about returning to work. Despite this lack of communication from Marquez, Andrade did not terminate him immediately, but instead waited over two weeks before finally terminating him. Furthermore, six months had elapsed between Respondent learning of Marquez' union activity and his termination, and there was no evidence that he had engaged in any union activities, or that the Respondent knew of any such activities, in the intervening period. This gap in time is strong evidence that Respondent was not motivated by unlawful intent and instead would have terminated Marquez no matter his union affiliation. See Consolidated Biscuit Co., 346 NLRB 1175, 1180 (2006) (5 month gap between employee's union activity and termination "does not support an inference of unlawful motive")

The ALJ nevertheless discounted both Respondent's lack of haste in terminating Marquez and the gap in time between his union activity and the termination, based on plainly invalid reasons. First, the ALJ found that Andrade had unlawful motivation to punish Marquez in October because she was scheduled to give testimony in a Board proceeding on September 13 and 14, and she canceled his Nextel phone around that time period.<sup>3</sup> There was no evidence, however, that Marquez was directly involved in the proceedings in September or that that he engaged in any union or protected activities at that time. The ALJ provided no explanation why Andrade being called to testify one month prior to the termination had anything to do with Marquez.

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<sup>3</sup> The testimony was a deposition related to the ongoing R case proceedings.

Thus, the ALJ's reliance on the mere fact that Andrade testified in September to disregard the passage of time between Marquez' union activity and his termination was clearly erroneous.

Next, the ALJ asserted that Marquez was subjected to disparate treatment, because Reynoso and Guzman were also out while their trucks were being repaired, but were not terminated for job abandonment. This reasoning completely misconstrues Board precedent regarding disparate treatment as evidence of unlawful motivation. In the typical case, discriminatory intent is inferred because a union supporter is treated differently from other employees who don't support the union. In the present case, however, both Reynoso and Guzman were open union supporters. The fact that they weren't terminated during absences that occurred after May 2010 proves the opposite of what the ALJ concluded, namely that the Respondent was not motivated to retaliate against union supporters. Furthermore, the situations with Reynoso and Guzman were entirely different from Marquez. Both of them were out at the direction of the Respondent (Guzman because he damaged a trailer that then needed to be repaired). Reynoso testified he called in during his absence to find out when he would be returning. (Tr. at 272) Marquez, however, failed to call or check in with anyone after he picked up his check on September 30.

The ALJ also found that Andrade's failure to investigate by asking Marquez about his absence on September 30 was evidence of discriminatory intent. Failure to investigate can be evidence of unlawful motives in situations where the employer hastily terminates an employee for wrongdoing without looking into whether the employee was culpable, such as in the case cited in the Decision, Hewlett Packard, 341 NLRB 492 (2004), but the present case is distinguishable. In Hewlett Packard, the employee was terminated almost immediately after it was reported that he was out of his work area to solicit other employees, without any investigation. Since the employee was accused of wrongdoing, the Judge found that the failure to conduct an

investigation to determine whether he had legitimate reasons to be out of his work area was evidence of discriminatory intent. Id. at 498.

In the present case, Marquez wasn't accused of committing any wrongful act; he simply did not show up for work for an extended period of time. There was nothing to investigate. The ALJ reasons that Andrade should have taken active steps to find out why Marquez was not at work, but an affirmative duty to check in on AWOL employees has never been required in similar cases. See King David Center, 328 NLRB 1141, 1162 (1999)(no unlawful termination where employee returning from leave failed to contact employer for five weeks after not seeing her name on the schedule). The present case also cannot be analogized to Hewlett Packard because Andrade did not terminate Marquez immediately after he did not return from leave on September 27, or after he picked up his check on September 30. Instead, Andrade waited until over two weeks had elapsed, with no contact from Marquez. Unlike the employer in Hewlett Packard, Respondent did not act hastily in a seeming attempt to get rid of a union supporter, which not only contravenes the ALJ's reliance on the supposed lack of investigation, but also further proves that Marquez would have been terminated even if he was not a union supporter. Given all the evidence, including the Respondent's restraint in waiting two weeks before terminating Marquez despite his failure to contact Respondent, and the gap in time between his union activity and termination, the ALJ's conclusion that Respondent failed to prove that it would have terminated Marquez even in the absence of union activity was wrong and should be reversed.

4. The ALJ's Conclusion that Respondent Violated the Act by Terminating Alberto Pisano was Erroneous

Respondent does not except to the ALJ's conclusion that General Counsel established a prima facie case under Wright Line. However, the ALJ's conclusion that Respondent failed to establish that it would have terminated Pisano even in the absence of union or protected activity is based upon erroneous findings, which is the basis for Respondent's Exceptions Nos. 27-32. Respondent terminated Pisano because he had accumulated numerous points on his driving record, the most recent because of a speeding ticket, to the point where the insurance carrier determined that he was no longer insurable. This is clearly legitimate grounds for termination. The ALJ found, however, that Respondent's real motivation was to retaliate for his union activities seven months previous.

The primary basis for the ALJ's conclusion was a report from the CHP exonerating Pisano from fault for an accident that occurred in 2009, which would have removed points from his record and maintained his insurability. The ALJ found that Respondent had possession of the report, because during their testimony, neither Andrade nor Sencion Sr. denied having a copy of the CHP report. (ALJD, p. 34, lines 38-40) This finding is incorrect. Andrade specifically denied during her testimony that Pisano never gave her the report at any time, and she had never seen it before it was introduced at trial. (Tr. at 1143) Sencion, Sr. testified earlier in the trial, before Pisano was called as a witness by General Counsel and the CHP report entered into evidence, so he was never asked about it, and the lack of a denial in his testimony is not probative.

Furthermore, there was no evidence that Sencion, Sr. played any part whatsoever in the decision to terminate Pisano. Consequently, the ALJ's finding that Respondent had a copy of the CHP report is based on mischaracterization of the evidence. The ALJ then used this flawed finding to conclude that Andrade failed to provide the exonerating information to the insurance broker, and therefore Respondent did not prove it would have terminated Pisano in the absence of his union

activities. (ALJD, p. 35, line 47 – p. 36, line 3) The conclusion is therefore invalid and must be reversed.

The ALJ also discounted Respondent's asserted reason for terminating Pisano, his poor driving record, on the grounds of disparate treatment. The ALJ specifically found that in the past, an insurance company refused to cover other drivers with poor driving records, but Andrade asked that they be covered as "probationary" drivers. (ALJD p. 35, lines 15-20) The situation involving Pisano, being excluded from coverage for accumulating too many points, was entirely different from the above situation. There were no drivers placed on "probation" by Respondent's current carrier after accumulating too many points. Instead, as explained by the representative from the insurance brokerage, Christina Bettancourt, when she was soliciting proposals from insurance companies for coverage for Respondent, some carriers would respond that if they issued coverage to Respondent, certain drivers would be considered probationary because of their driving record. (Tr. at 1115-1128) When Respondent obtained coverage from Scottsdale in December 2009 (the carrier that later determined Pisano should be excluded), they did not designate any of the drivers for exclusion, so there was no need to get around the exclusion by designating them as probationary. (Tr. at 1128) Consequently, Respondent never in fact persuaded any carrier to actually cover a driver with a poor record as probationary. In Pisano's case, on the other hand, there was no evidence that Respondent could have asked for or obtained probationary status for him during an ongoing coverage period. Accordingly, there was no basis for the ALJ to conclude that Pisano was subjected to disparate treatment.

The ALJ also left out a critical piece of testimony from his recitation of the conversation between Andrade and Bettancourt regarding Pisano's exclusion from coverage. At two different points in the Decision, the ALJ quotes Bettancourt's testimony that Andrade told her she didn't want to

employ Pisano anymore and did not want to give him opportunity to provide proof of non-fault for the 2009 accident. (ALJD p. 14, lines 26-30; ALJD p. 35, lines 32-34) The ALJ left out the beginning of Andrade’s statement, as recounted by Bettancourt, that Pisano “had too many points.” (Tr. at 1115) This prefacing remark gives the context and meaning behind Andrade’s statement she didn’t want to employ him anymore and didn’t want him notified regarding proof of non-fault; not because of his union activity, but because of his poor driving record. In short, it establishes lawful motivation, yet the ALJ excised it from his recitation of the testimony and failed to address it in his decision. His conclusion that Respondent did not prove it would have terminated Pisano absent union activity was based in part on this excised testimony, and was therefore invalid.

In order to carry its burden under Wright Line, Respondent is not obligated to prove that Pisano’s union activity played no part in the decision to terminate him, only that it would have terminated him even if he didn’t support the union. The ALJ essentially found that Respondent had an affirmative duty to save him from exclusion from insurance coverage, and thereby save his job. Such a finding is inconsistent with the Wright Line analysis and should be reversed.

## V. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that its Exceptions to the portions of

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the ALJ's Decision be granted and the Conclusions of Law, Remedy and Order be modified accordingly.

DATED: September 12, 2011

Respectfully submitted,

THE AMERICAN CONSULTING GROUP, INC.

A handwritten signature in black ink, appearing to read 'Erick J. Becker', with a long horizontal flourish extending to the right.

Erick J. Becker  
CEO

## PROOF OF SERVICE BY ELECTRONIC MAIL

I, Erick Becker, am a resident of Orange County, over eighteen years of age, and I am not a party to this action. My business address is:

23361 Madero, Suite 220  
Mission Viejo, California 92692

On September 12, 2011, I served the RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE and RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in Case Nos. 32-CA-25100, 32-CA-25399, and 32-CA-25490 on the following parties to this action by sending a file including the documents by electronic mail to the following address:

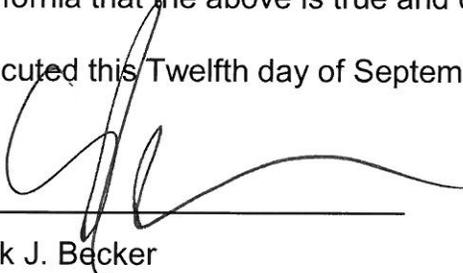
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this Twelfth day of September, 2011 at Mission Viejo, California.



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Erick J. Becker