

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

McCLAIN & CO., INC.

and

Case 22-CA-29792

CRAIG LIVINGSTON, An Individual

BRIEF ON BEHALF OF THE GENERAL COUNSEL
IN REPLY TO RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Bernard S. Mintz
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place
Newark, New Jersey

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I. STATEMENT OF THE CASE:

On January 13, 2011 a charge was filed in this case by Craig Livingston, an Individual, herein Charging Party, which was served on McClain & Co., Inc., herein Respondent, on January 14, 2011(GCX 1(a) and 1(b)).¹ On March 25, 2011 a Complaint and Notice of Hearing issued (GCX 1(c)). On April 7, 2011, Respondent filed an Answer to the Complaint (GCX 1(e)).²

A hearing was held in this matter in Newark, New Jersey and in New York, New York before Administrative Law Judge Eleanor MacDonald on March 24 and June 2, 2011, respectively. On October 17, 2011, a Decision issued in this matter wherein the Administrative Law Judge found that Respondent, by its actions, violated Section 8(a)(1) and (3) of the Act (ALJD p.22, II. 38-48).

III. STATEMENT OF THE FACTS

Nature of the Business

Respondent is engaged in the rental of under-bridge access and aerial equipment, and in the provision of traffic control services. Its main office is in Culpepper, Virginia. It has other offices, including an office in Lyndhurst, New Jersey, involved herein, as well as offices in Danbury, Connecticut and in Binghamton, New York. (Tr. 12-13).

At its Lyndhurst, New Jersey facility, Respondent employs approximately 20 to 25 traffic control technicians (TCT's) as well as several employees that work in a nearby yard. The TCT's set up traffic patterns for traffic control so that engineering companies can do bridge and sign inspections. Employees in the yard maintain Respondent's motor

¹ GCX " will be used to designate an exhibit of General Counsel. "RX" will be used to designate an exhibit of Respondent. "Tr." will be used to designate the transcript page. "ALJD" will be used to designate the Administrative Law Judge's Decision.

² Allegations of the filing and service of the charge, commerce, labor organization status and supervisory status were either admitted by Respondent in its Answer or stipulated to at the hearing (Tr. 5, GCX 1 (e)).

vehicles as well as other equipment used by Respondent. Employees are sent out to jobs as part of teams. The lead person in the team is called a team leader. The team leader receives assignments from Respondent via email for the jobs the team is to do the next day, and he will then call his crew and notify them when they are to report to work. All employees report to the yard before they go out on their job assignments and they return to the yard after their job assignments are completed. (Tr. 14-17, 63, 106-107).

Alleged Discriminatees Frank Bruno, Ivan Casiano and Danny Brattoli

Frank Bruno had been employed by Respondent as a TCT from about December 2007 until about August 25, 2010³ when he was laid off. He had been the senior-most TCT. Bruno was hired as a team leader since he had related experience, and remained a team leader throughout his employment with Respondent. Additionally, Bruno had a commercial driver's license (CDL) and was trained and qualified to drive special equipment not operated by all of the other employees such as high rail equipment and under bridge (UB) inspection trucks. (Tr. 12-14).

Ivan Casiano had been employed by Respondent as a TCT from about March 10, 2009 until about August 25 when he also was laid off. During the period from about the end of April to the end of June, however, he worked for Respondent in the yard. He also was one of the more senior TCTs at the time of his layoff. Like Bruno, Casiano had a CDL. He also had experience driving special equipment for Respondent such as a 90 foot Elliot and high rail equipment. (Tr. 62-64, 66).

Danny Brattoli had been employed by Respondent as a TCT from about March 5, 2009 until about August 25, when he also was laid off. Like Bruno and Casiano, Brattoli was one of the most senior employees at the time of his layoff. (GCX 9, Tr. 97).

Changes in Terms and Conditions of Employment, Employees' Concerted Complaints and Respondent's Threats of Reprisal

In about March, Respondent brought in a new regional manager for its Lyndhurst facility, Matthew Pasquale. Also, in about April, Joseph Ferrer became the new project manager. (Tr. 18). Soon thereafter, the more senior employees, including Bruno, Casiano, and Brattoli, noticed that the amount of shifts that they were assigned each week was being decreased as new TCT's were being hired, and were receiving more shifts than they were. They also observed favoritism. The senior employees discussed this matter among themselves, as it was a matter that affected all of them and was of great interest to them. Thereafter, Bruno, Casiano and Brattoli, as well as others, began to complain to Alan Ladd, the equipment and yard supervisor, about it. Sometimes they spoke to him alone and at other times in the presence of other employees. Bruno testified that he heard other employees complain to Ladd about this matter, as did Casiano, who testified as to a conversation he heard between Ladd and employee DeCarlo, with other employees also being present, discussed below, in which the subject of having a union was raised. Ladd, in turn, notified Ferrer about the employee complaints that he was receiving.

As a result, Ferrer, on July 21, sent an email to all TCT's working out of the Lyndhurst facility. In the email, among other things, he stated that he had been getting numerous complaints from Ladd that some of the employees were complaining to him about their shifts and who was getting work instead of them. He indicated that they should mind their own business. He also threatened that if they continued to complain to Ladd so as to aggravate him, and Ladd then aggravated Ferrer over this, Ferrer would take them off of the work schedule (GCX 2, Tr. 19-23,73-74,94-95,100 -101).

³ All dates are in 2010 unless otherwise indicated.

In about July, Ladd had a mandatory meeting with all TCTs, to discuss new rules of operation. Also present at the meeting were Ferrer and Pasquale. Ladd passed out sheets at the meeting detailing rules that he intended to enforce. Among them were that, as of that day, if an employee received three write-ups, he would be terminated. Ladd explained that, with respect to employees who had already received previous write-ups, their slates would be wiped clean, and that the total of three would begin to be counted anew. (GCX 4, Tr. 25-28).

As the employees were not getting any positive response to their complaints, Brattoli told them that he would call Dan McClain, Respondent's owner who worked out of the Virginia office, to complain about the matter. Brattoli called McClain sometime in about July and informed him that the senior employees were getting less work while the new employees were being given more work than them. He also told McClain that he was not the only employee upset about the lack of work being given to them. McClain said that he would come up to Lyndhurst and straighten the matter out. That, however, did not happen. Bruno also followed up with a call to McClain, but his call was never returned. (Tr. 23-25, 77, 100-102, 127).

By email to employees dated August 30, Ferrer notified them that a call had been made to the Virginia office in which complaints had been raised. Ferrer went on to state that, as a result, and on the directions of Virginia, Ladd (who worked in the yard and had previously regularly received work schedules that employees could have seen) would no longer be getting copies of the work schedules. He also stated that from then on, no one was allowed to come to the office to raise work related issues with him, and that if anyone came to the office unannounced, they would be taken off of the schedule. (GCX 3).

Respondent's Expression of Union Animus and Employees' Subsequent Union Activities

Casiano testified that one day when he was still working in the yard,⁴ he overheard a conversation between David DeCarlo, a TCT, and Ladd. About three or four other employees were also present at the time. DeCarlo was complaining about the fact that newer employees who had just started were getting more shifts and more higher paying prevailing rate jobs than him. He also made reference to his belief that the employees were not getting paid correctly. DeCarlo then remarked that he wondered whether things like that would be happening if the employees had a union. Ladd responded that unions really do not do anything other than take employees' money for dues, and that they do not protect employees. He then went on to state that if Respondent became unionized, Dan McClain would, most likely, close the New Jersey operation and run it, instead, out of their Connecticut office. Casiano testified that he was only about three to five feet away from DeCarlo and Ladd when he overheard their conversation. About three to four other employees were also present at the time. Shortly thereafter, as their shift was done, the employees left the yard. (Tr. 70-73). Respondent did not call Ladd to testify as to this, or any other matter, and its failure to do so was not explained.

Union Meeting and What Transpired Being Quickly Disseminated

Employees Frank Bruno, Ivan Casiano and Danny Brattoli testified as to a union meeting that they attended on August 25 with Bob Bellick, a representative from Local 210, Teamsters. The meeting took place at the Meadowlands Diner. Also present were two other employees of Respondent, Alex Lopez and Mike Alvarez. Alvarez, who had previously worked for Highway Technologies, a similar company that he had helped to

⁴ As noted above, Casiano worked in the yard from about the end of April to the end of June.

unionize, made arrangements for the meeting and notified employees about it. A shop steward from Highway Technologies was also present. The meeting, which began at about 7:00 or 7:30 p.m., lasted for about an hour and a half. During the meeting, Bellick described what a union did and how a union could help them. He also asked Respondent's employees to speak to other employees and see if they were interested in having a union. While no union authorization cards were signed at the meeting, such cards were given to Alvarez to distribute. At that meeting, a follow-up meeting was scheduled for two weeks later, on September 8.

Bruno testified that on the evening after the meeting or on the next day, he spoke to several employees who had not attended the meeting and informed them as to what was said. Word of the meeting spread very quickly, as is evidenced by the fact that an employee whom Bruno had not spoken to about the meeting called him the next day and suggested that he not pursue a union further, predicting that if he were to do so, he would lose his job. Brattoli also testified that the morning after the meeting, everybody at work knew about it. (Tr. 36-41, 78-80, 104-106).

Layoff of Bruno, Casiano and Brattoli Following the Union Meeting

The scheduled follow-up union meeting never took place because, following the initial union meeting, Bruno, Casiano and Brattoli did not receive any work assignments from Respondent, nor did Alvarez. Respondent's records show that Bruno was laid off on August 25 for lack of work, and that Casiano, Brattoli and Alvarez were laid off on August 26 for the same reason. Thus, four out of the five employees of Respondent who attended the union meeting were laid off immediately thereafter. Respondent's witnesses, Pasquale and Ferrer, testified that there had been no prior history of layoffs of employees by Respondent at the Lyndhurst facility. Prior to the entry of a Consent Injunction in

these cases,⁵ Bruno, Casiano and Brattoli were not recalled to work at their former position.⁶ (GCX 9, CPX 1, Tr. 39-40, 80-81, 116,225, 278).

Reasons Offered by Respondent for Layoffs

While Pasquale and Ferrer both testified at the hearing as to the reasons for the layoffs, Ladd was not called by Respondent to testify. Pasquale and Ferrer testified that in about mid-August, they had communicated with each other about the need to layoff employees in Lyndhurst because work was slow. No records were presented at the hearing to establish that, in fact, work had been slow at the time. Nor were any records, such as emails or other written communication, or notes from oral communications, presented to establish that Pasquale and Ferrer had, in fact, communicated about this matter at that time. The record reflects that, despite Respondent's assertion that layoffs of Bruno, Casiano and Brattoli were necessary because work was slow, it nevertheless hired several new TCTs shortly thereafter, namely, Richard Lynch, hired on September 8, Angelbert Garcia, hired on September 13, Thomas Howard, hired on September 15, Massimiliano Giglio, hired on September 22 and Joaquin Ferrer, hired on October 28. (GCX 9, Tr. 207-208,257-259).

Ferrer testified that after determining that layoffs had to be made, he consulted with Ladd as to whom to select, and then prepared a handwritten list of six TCTs to be laid off. That list, which was never produced and offered into evidence, assertedly

⁵ On April 28, 2011, the Board filed a Petition for Temporary Injunctive Relief in The U.S. District Court for the District of New Jersey, pursuant to Section 10(j) of the National Labor Relations Act, seeking an Order enjoining Respondent from engaging in certain acts in violation of Section 8(a)(1) and (3) of the Act, pending final disposition of the matters before the Board. Thereafter, on May 5, 2011, Respondent entered into a Consent Agreement, approved by a U.S. District Court Judge on May 9, 2011, providing, among other things, for the reinstatement of the discriminatees.

⁶ Although Brattoli testified that he had been offered a one time assignment after August 25 to drive equipment from New Jersey to Virginia, he had been given insufficient notice to enable him to accept that assignment. Further, it appears that he had been offered that job for the purpose of paying off a previous debt owed to Respondent. (Tr. 111, 119)

included Bruno, Casiano, Brattoli, Alvarez, Alex Martinez and Jeff Hart. Pasquale testified that he approved the list. In deciding whom to choose for layoff, Pasquale and Ferrer both testified that they followed Respondent's handbook which provided the criteria as to whom to choose when there are layoffs. The handbook provides that "when a reduction in force is necessary,... employees will be identified for layoff after evaluating the following factors: 1. Company work requirements; 2. Employee's abilities, experience, and skill; 3. Employee's potential for reassignment within the organization; and 4. Length of service."⁷ Ferrer testified that in preparing the list, he took employees' work records into account, including their accidents and write-ups. Both Pasquale and Ferrer denied that union considerations played any part in their decision as to whom to layoff. (RX 8, p. 15, Tr. 205-208,212, 223-224).

Although Pasquale testified that Alex Martinez and Jeff Hart, two of Respondent's employees who did not attend the union meeting, were selected to be laid off and were laid off at the time that Bruno, Casiano and Brattoli were laid off, Respondent's own records did not substantiate this assertion. Thus, Respondent's payroll records for Martinez show that he worked for Respondent during the weeks of August 15 -21, August 22 -28, August 29 -September 4, September 12 -18, September 19 -25, September 26 - October 2, October 3 -9, October 17 -23, October 24 -30, October 31 -November 6, November 7 -13, November 14 -20, November 21 -27 and December 5 -11. Respondent's Employee List also shows that Martinez was not laid off until December 7. That Employee List also show that Hart, an employee who worked both as a TCT and in the

⁷ The handbook also provides that "the immediate supervisor will personally notify employees of a layoff and that, after explaining the layoff procedure, the employee will be given a letter describing the conditions of the layoff such as the effect the layoff will have on his or her anniversary date at time of call back ... and the company's role in assisting employees to find other work." Bruno, Casiano and Brattoli were not given such notification.

yard, was laid off for lack of work on August 20, before Bruno, Casiano and Brattoli were laid off. There is no evidence in the record as to whether the lack of work in his case pertained to yard work or work as a TCT. (GCX 9, GCX 13).

(a) Layoff of Bruno

With respect to Bruno, Pasquale testified that he was selected for layoff mainly because of his accidents. Ferrer testified that it was because of his accidents and warning notices. (Tr. 208, 260).

On August 13, Bruno was involved in an accident while driving a pickup truck, when he was close to the yard returning from an assignment. His vehicle hit a curb. A tire blew and the vehicle pulled to the right, causing an arrow board being transported in a trailer behind him to fall and become dented in a corner. Bruno testified that it was a very hot day and he had been drinking some water to safely remain hydrated. While drinking, he started to cough and choke, which precipitated his vehicle hitting the curb. After the accident, he called the office and notified Ladd. Another employee was sent to assist. After returning to the yard, Ladd went with Bruno to see the site of the accident, and he also inspected the damage to the tire and the arrow board. Bruno offered to come in on his own time to fix the arrow board but Ladd declined his offer. He also told Bruno not to worry about it, as he would not write him up.⁸ Despite that assurance, however, Bruno received an employee warning notice for the incident which was signed by Ferrer. The warning had two boxes checked, one for "substandard work," and the other for "willful disregard for equipment." It described the infraction as "negligent driving and unsafe movement. Extensive monetary damage." Bruno estimated that it would have taken about an hour or two to fix the arrow board in the yard, but Ferrer testified that it took about

eight hours to do so. Bruno and Casiano testified that other employees have damaged arrow boards or had blown tires. No employees have been discharged for these occurrences. (GCX 5, GCX 6, Tr. 29-35, 68).

The record also reflects that Bruno received two warnings on May 25. One of them was for the crew that he was leading showing up late on a job, and, as a result, the traffic lane closure being completed over an hour late. The other written warning was for returning a vehicle to the yard with the crash cushion wrapped in branches and debris. After receiving these warnings, Bruno discussed them with Pasquale and pointed out that there were problems on the job. He mentioned that he had not been given enough manpower to complete the job in the time scheduled. He also complained that the vehicles to be taken out to the job had not been pre-filled with gas when last used, as was the practice, and that they had to be filled before going out to the job, causing a delay. Following this conversation, it is undisputed that more manpower was put on the job.

Bruno also testified that he had done a post-trip inspection (reporting a missing gas cap) but had not noticed the debris, which was high up on the vehicle. (RX 6, RX 7, Tr. 158,163, 184-186).

Also, on April 26, Bruno was involved in an accident when he was driving in the middle lane to avoid a low point of a bridge. A car on his side suddenly cut him off. To avoid a collision, he moved his vehicle over, but in doing so, caught the corner of the crash cushion on the end of the bridge. Bruno then secured the cushion and called Ladd to report the incident. Apparently, Respondent did not consider that accident to be his fault, as he did not receive any write-up for this occurrence. (RX 5, Tr. 183).

⁸ As noted above, Ladd was not called by Respondent to testify at the hearing.

In conversations that Bruno had with both Pasquale and Ferrer following his layoff wherein the reasons for his layoff were discussed, described below, neither the warning notices of May 25 nor the accident of April 26 were raised as being factors in this determination. The only accident referred to was the one that occurred on August 13, and the only warning notice discussed was the one that followed the August 13 accident.

(b) Layoff of Casiano

Casiano testified that from about the end of April to the end of June he worked in the yard, as Ladd's helper, instead of on the road as a TCT. He had been asked by Ladd to do this and, although reluctant at first, he agreed after Ladd assured him that if he did not like it and wanted to return to work as a TCT, he would be allowed to do so. Both Pasquale and Ferrer, however, testified that there had been an agreement between Ladd and Casiano that if things didn't work out in the yard and he wanted to go back to work as a TCT, he would not be allowed to do that. Neither Pasquale nor Ferrer had any direct knowledge of the agreement reached between Casiano and Ladd, and Ladd, who would have had such knowledge, did not testify.

In about the end of June, when Casiano asked to go back to working as a TCT, Respondent allowed him to do so, assertedly because it needed a TCT who had a CDL license to work on a project at that time. No documentation of this need was presented. Casiano's special skill and ability as a commercial driver, which allegedly caused Respondent to keep him on at that time, were not enough to prevent him from being laid off in August, after he attended a union meeting (Tr. 69, 212, 269).

As justification for his selection for layoff, Respondent introduced a warning notice dated July 6 that Casiano signed and admitted receiving, as well as a warning notice dated August 17, that Casiano did not sign and denied receiving. The July 6

warning notice was for his not emptying a vehicle when it was returned to the yard after completion of an assignment. As noted below, other members of his crew, namely Gabriel Scianna and Patrick Thornton, received the same written warning for the same reason, but they were not selected for layoff. Casiano's statement on the warning notice, in response thereto, indicated that the vehicle had cones in it when he took it out on an assignment and that he thought that he was supposed to return it in the same condition that he had taken it. The warning dated August 17 was allegedly given to him for arriving 15 minutes late in the yard prior to going out on his assignment. Besides denying that he ever received that notice, Casiano also denied that he had been late on the day in question. The August 17 warning was signed by Ferrer, who worked in the office and would not have had direct knowledge of such an occurrence. As noted above, Ladd, who worked in the yard and would have had direct knowledge of any such occurrence, was not called to testify. (RX 1, RX 2, Tr. 86-89).

(c) Layoff of Brattoli

Ferrer testified that the main reason that Brattoli was laid off was because he stormed into the office and "flipped out," raising his voice and complaining about not getting many work assignments on the schedule. Additionally, he testified that Brattoli had received write-ups in the past. There is no evidence of Brattoli ever receiving a written warning for allegedly "flipping out" in the office, as alleged by Ferrer. Furthermore, while Ferrer believed that the "flipping out" incident had occurred sometime in August, significantly, he couldn't say for sure whether it had occurred before or after Brattoli's layoff. Although Pasquale testified that the incident occurred on August 17, he provided no documentation of such. (Tr. 210-211, 267-268).

Respondent introduced into evidence a warning that Brattoli received dated

“7/29,” without any year indicated, for not showing up to work that day. The warning indicated that it was a first warning. Brattoli admitted to not showing up for a particular assignment he had been given as it had slipped his mind. However, he was unsure whether the warning had been given in the year 2010 or 2009, and no clarification was provided anywhere else in the record. Respondent also introduced into evidence another warning given to Brattoli, dated August 6, for not doing a post-trip inspection on his return to the yard that day (RX 4). Brattoli, however, testified that he had done a post trip inspection of the vehicle during the lengthy period of time that he was filling it up with gasoline at a gas station near the yard, prior to his return. Brattoli also testified that after receiving the warning, he called Dan McClain to complain about receiving it and explained the circumstances to him. McClain told Brattoli that it should not be considered a strike against him. McClain, who was present at the hearing, was not called to testify concerning this matter, or any other matter, and its failure to do so was not explained. (RX 3, RX 4, Tr. 113-114).

Work Records of Other Employees Who Were Not Laid Off

Records obtained from the personnel files of other TCT employees who had not been selected for layoffs at that time show that several of them had received written warnings for various infractions and/or for being involved in an accident. For example, Michael Ruas received three written warnings. The first warning, dated March 10, was for not following company procedure for filing an accident report, a second warning on the same date was for driving a company vehicle with an expired drivers license, and a third warning dated July 5 was for arriving 15 minutes late to work (GCX 10(a)); Antonio Ruiz received two written warnings, the first on March 5, 2009, for not checking the gas gauge in his vehicle and running out of gas when returning from a job, and the second on

July 9 (with two boxes checked), for failing to have a customer sign after returning a rented vehicle with less than a full tank of gas and for violating company policy by being rude to another employee (GCX 10(b)); Michael Santa Lucia received five written warnings, the first on May 20, 2009 for lateness, a second on January 12 for coming 45 minutes late to work, a third on May 25 for violating company policy by driving a vehicle that he had not been assigned, a fourth on July 21 (with two boxes checked) for not fueling up a vehicle the day before and for not arriving on time, and a fifth on July 22 for not doing a post-trip inspection of equipment and also for falsifying paperwork as to the time that work was completed (GCX 10(c)); Gabriel Scianna was involved in an accident on April 1, 2009 that damaged his arrow board, and received a warning on April 7, 2009 for failing to do a pre-trip inspection, a second warning on January 15 for taking a photograph of an internal office document with his camera phone and then showing the photo to other employees, a third warning on July 6 for not emptying certain vehicles when they were returned from a job (the same warning that was also received by Casiano), and a fourth warning on August 6 (with a box for violation of company policies checked twice) for not doing a post-trip inspection when returning to the yard and for not returning the vehicle fueled up (GCX 10(d)); Scott Terwilliger received two written warnings, the first on June 22 for arriving late to work, and the second on July 28 for not making it in to his shift (GCX 10(e)); Patrick Thornton received a warning on July 6 for not emptying certain vehicles when they were returned from a job (the same warning also received by Casiano) (GCX 10(f)); and, Dwayne Webster received a warning on August 13 for not returning his vehicle full of fuel (GCX 10(g)).

September 7 Conversation Between Bruno and Ferrer Following Bruno's Layoff

Bruno met with Ferrer on Sept. 7 in Respondent's office. Bruno had requested

this meeting to learn why he was not being given any assignments. This was the first time that Ferrer was available to meet with him. Bruno tape recorded their conversation. A transcript of the conversation was received in evidence. (GCX 8(b)).

In their conversation, Ferrer mentioned that Respondent considers Bruno to have two strikes against him, referring to the warning notice he received on August 13 following equipment damage and on which two boxes had been checked. Bruno protested, asking why it was considered two strikes when it was only one incident, and also noting that Ladd had said that he would not write him up for the incident. Ferrer stated that it was he who had written Bruno up, and not Ladd. He provided no explanation as to why it was considered two strikes, when it was one incident, or why he had written Bruno up, when Ladd said that he would not. Ferrer stated that Virginia had determined that Bruno should get a pink slip. Ferrer also asserted that that since Bruno had a CDL, he is held to a higher standard.⁹ Bruno protested that he was not getting paid any more because of his CDL and that he shouldn't be held to a higher standard. Bruno also protested that he was being laid off when guys who had only been working for a short period of time were not being laid off. Ferrer stated that there was nothing he could do about it. Bruno then left the office and went to speak to Ladd in the yard. (GCX 8(b)).

September 7 Conversation Between Bruno and Ladd Following Bruno's Layoff

Bruno also tape recorded his conversation with Ladd, and a transcript of that conversation was received in evidence. (GCX 8(a), pp. 2-11). In their conversation, Bruno complained about the fact that Ladd had told him that he would not write him up for the August 13 incident, yet he received two write-ups for that. Ladd responded that

⁹ Bruno testified that, prior to being let go, he had never been told that because he had a CDL, he was held to a higher standard than other drivers who did not have a CDL. (Tr. 168)

Ferrer, not he, wrote Bruno up, and that it was considered two write-ups because two boxes had been checked. Bruno protested that he had not done anything wrong, that he had had been drinking something and inadvertently started coughing and choking, which caused him to hit the curb. He also protested that others had damaged trucks repeatedly and broke things, yet they were not written up. Ladd noted that if you receive three write-ups you're gone. Bruno stated that he had received two and he was gone, to which Ladd responded that Virginia had selected six employees to be laid off, and he was one of them. Bruno noted that he had been there for almost three years, and should not be laid off for receiving two write-ups for one incident. Ladd denied that he had anything to do with it and maintained that the decision had been made by Virginia. Bruno questioned the fairness of his layoff, since he didn't rob from Respondent, get high on the job or engage in other misdeeds, while others who crash vehicles, get high on the job and cause all sorts of problems were not laid off. The conversation continued, as follows:

Ladd [without Bruno ever mentioning the union]: "I'm sure [emphasis added] the union didn't [expletive deleted] help it."

Bruno: What union?

Ladd: The union meeting **you guys** [emphasis added] went to. That didn't help it.

Bruno: What union meetings?

Ladd: The Union meeting **you guys** [emphasis added] went to. **I'm sure** [emphasis added] that didn't help it.

Bruno: I don't know what you're talking about.

Ladd: Okay. Well, then, **people are lying** [emphasis added]

Bruno: What people? What? What?

Ladd: I don't know. **Whoever went to the meeting. There's another one on the eighth, right, tomorrow?** [emphasis added]

Bruno: I don't know nothing. I don't know what you are talking about. (GCX 8(a), pp. 9-10).

* * *

Bruno: So let me ask you a question. Because of this [expletive deleted] supposedly union meeting, that's why I got laid off? So who was here? Jeff

Stuckey [a representative from Virginia] was here listening to this shit about the union meeting?

Ladd: No. **Everything got back to Virginia** [emphasis added].

Ladd: I don't know.

Bruno: Yeah, nobody knows nothing around here. (GCX 8(a), pp. 10-11).

September 13 Conversation Between Bruno and Pasquale Following Bruno's Layoff

Following up on his conversations with Ferrer and Ladd, Bruno also had a conversation with Pasquale on September 13 in the office. Bruno also tape-recorded this conversation, and a transcript of the conversation was received in evidence (GCX 8(a), pp. 12-22).

In their conversation, Bruno asserted that no one seems to have answers for him and that he doesn't understand why he was not working. Pasquale noted that he had had an accident involving an arrow board and that was "pretty much" why he was not working. As noted above, he did not make reference to any other accidents or written warnings. He also said that there had not been a lot of work. Bruno asked why other employees who had only been working for a couple of weeks or a couple of months were kept on while he was being let go. Pasquale mentioned that it was because he had an accident, and that he should have known better. Bruno protested that it had not been done intentionally. Pasquale questioned whether Bruno had been driving fast, and Bruno said that he had not, and then explained about his coughing and choking having precipitated the accident.

Bruno mentioned that he had been given a different reason by Ladd for being laid off, namely, because he had gone to a union meeting. Pasquale did not deny that that was the reason, but questioned, "All right, did you go to a union meeting?" Bruno denied that

it had been a union meeting, to which Pasquale further queried, "What was it?" Bruno responded that it had just been a bunch of guys talking. When Bruno mentioned again that Ladd had told him that that was the reason why he had been laid off, Pasquale responded, "**Okay. That could play into it** [emphasis added]," and suggested that "if you're so jacked on the union, go join the union!" Bruno again insisted that no one was joining the union at the meeting that he attended, that he only went to listen to what someone was saying and that it wasn't a union meeting. Bruno again asked if that was why he wasn't working, to which Pasquale responded, "**Might be part of it** [emphasis added]."

Bruno protested that he had worked for the company for almost three years, that he did a lot of things for the company to get it going in New Jersey, that he had done work for free and that it was unfair that he and others who did the same were now out of work while employees who did nothing were still working. Bruno also reiterated that what happened with his vehicle had been an accident, that he wasn't drunk or high like half the guys around there, and that he should not be penalized. He also mentioned the rule that after three write-ups an employee is terminated, and that he didn't have three write-ups. Pasquale did not deny that, but stated that he had to hold Bruno to a higher standard because he had a CDL. Bruno objected that he was not being paid more for having a CDL and that he shouldn't be held to a higher standard. He also mentioned that he had been in a pickup truck (which did not require a CDL). Bruno also reiterated that he had not hit the curb on purpose, he wasn't drunk, he wasn't high and he wasn't speeding. Pasquale agreed, and said that he knew that.

Bruno then mentioned that based on what Ladd had said about the union meeting and now Pasquale confirming that the union meeting may have played into it, even though

he only went to hear what some guy had to say, it obviously had affected his job. In response, Pasquale asked if it had been a union guy whom Bruno went to hear. Bruno confirmed that it had been a union guy, but stressed he had been invited to the meeting, that it had not been at a union hall, that he had only gone to hear the pros and cons and had not signed a union card, yet he was being told that that was why he was not working. He asked what he should do, to which Pasquale's only suggestion was that he should apply for unemployment.

IV. ARGUMENT

1. The Record Supports a Finding that Respondent's Employees Engaged in Protected Concerted Activities When They Complained about Working Conditions (Respondent's Exception 1)

Respondent took exception to the Administrative Law Judge's finding that its employees had engaged in protected concerted activities when they complained about scheduling issues. Contrary to Respondent's assertion that they had not, the record reflects that Respondent's more senior employees had discussed among themselves their dissatisfaction with the fact that less senior employees were getting more assignments than they were and that favoritism was being shown in assignments. This was an important concern for all of them, a problem that they were all experiencing, and a problem that all of them wanted to have remedied by Respondent. As a result, they then initiated group action by complaining about these working conditions to Ladd and to Ferrer. Sometimes these complaints were voiced alone and sometimes they were voiced in the presence of other employees. Brattoli also told employees that he would speak to McClain in Virginia to see if he could resolve this problem on their behalf. Brattoli did call McClain to complain about how assignments were being made, and he mentioned that other employees were also upset about this matter. Casiano also testified that he

overheard DeCarlo voice complaints about this matter, in the presence of other employees, and raise the idea of bringing in a union to help. As they had discussed this issue among themselves, they were engaging in these discussions with, or on the authority of other employees, and not solely on their own behalf. As such, their complaints are considered to be concerted activity. *Meyer Industries*, 268 NLRB 493, 497 (1984).

Concertedness can also be established even though the individual was not "specifically authorized" to act as a group spokesperson for group complaints. *Herbert F. Darling, Inc.* 287 NLRB 1360 (1988). Further, as noted in *In re Cibao Meat Products*, 338 NLRB 934 (2003), "an employee ... who protests, in the presence of other employees, a change in an employment term affecting all employees .. is engaged in the 'initiation of a group action. '" In each case, the complaints raised, even if by individual employees, bore a direct relationship to concerns held by other employees. In *Rock Valley Trucking Co, Inc.*, 350 NLRB 69 (2007) the Board found that a truck driver who spoke with his co-workers and supervisors about his view that certain employees received preferential treatment in assignments had engaged in concerted activity. See also *NIRB v Washington Aluminum Co.*, 370 U.S. 9, 15 (US 1962), where the Supreme Court found that "spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration" were still protected under Section 7 of the Act.

Based on the above, the record clearly supports a finding that Respondent's employees were engaging in protected concerted activities when they voiced complaints about working conditions to Respondent.

2. The Record Supports Findings that Respondent, by Emails from its Supervisor, Joseph Ferrer, on July 21 and also on August 30, Threatened its Employees with Loss of Work in Retaliation for Their Concerted Complaints about Working

Conditions, in Violation of Section 8(a)(1) of the Act (Respondent's Exceptions 11 and 12)

Respondent took exception to the Administrative Law Judge's finding that an email sent by Ferrer to employees on July 21, in response to employees' concerted complaints to Ladd about favoritism and inequitable work assignments, threatened them with loss of work because of those complaints. Respondent argues that they had not been engaged in concerted activity when they had made complaints, an incorrect assertion dealt with above. The email itself also clearly shows that employees were being threatened with loss of work if they continued to complain to Ladd about these matters. In the email, Ferrer notified employees that Ladd had complained to him about complaints that he had received from some employees about shifts and who was getting work. After making a reference to his belief that they should be minding their own business, he states that if they continue to aggravate Ladd (about this matter), and he then aggravates him about it, "I take you off schedule." Simply put, if you choose not to mind your own business but instead, continue to complain to Ladd about your shifts and the distribution of work, you will be out of work.

In addition, Respondent took exception to the Administrative Law Judge's finding that Ferrer's August 30 email to employees threatened them with loss of work because of their concerted complaints. Respondent again asserts that the employees had not been engaged in concerted activity when they had made their complaints. For reasons detailed above, the record and case law show otherwise. Further, the August 30 email shows a causal connection between employees' complaints to Ladd, which had been conveyed to the corporate headquarters in Virginia, and Virginia's direction that Ladd no longer receive copies of the work schedules (that employees had previously been able to see

when in the yard), as well as that from then on, “no one is allowed to come up to [Ferrer’s] office” to discuss work-related issues, and that if they do, “they will be taken off the schedule.”

By threatening employees with loss of work as a result of their protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

3. The Record Supports a Finding that Supervisor Alan Ladd’s Comment to Employees about a Union is Evidence of Anti-Union Animus on the Part of Respondent (Respondent’s Exception 2)

Respondent took exception to the Administrative Law Judge’s finding that a remark made by Ladd to employees about a union, described above, evidenced anti-union animus that could be imputed to Respondent. Casiano had testified that he heard Ladd tell employee DeCarlo, in response to his complaint about the unfair distribution of work and his remark that he wondered if this would be happening if the employees had a union, that union’s don’t do anything for employees except take their money and that, “in the event [the employees were to unionize], Dan McClain would most likely pack up and run the operation out of [their] Connecticut location.” This remark was made in front of several employees. While Respondent argues that there is no evidence that Ladd’s remark was disseminated further, that is irrelevant as to whether the remark evidenced anti-union animus on the part of Respondent, which it clearly did.

4. The Record Supports Findings that Respondent’s Representatives in New Jersey and in Virginia knew of the Union Meeting Attended by its Employees Prior to Deciding Whom to Lay Off (Respondent’s Exceptions 3 and 4)

Respondent took exception to the findings of the Administrative Law Judge that Ladd knew all about the union meeting attended by Respondent’s employees when he helped decide who was to be laid off. It also took exception to the Administrative Law

Judge's finding that Respondent's managers in New Jersey and Virginia were aware of the union meeting when the layoff list was compiled.

In his conversation with Bruno on September 7, after Bruno came to find out why he wasn't being given any work, Ladd initiated reference to a union meeting, stating, "**I'm sure** the union didn't [expletive deleted] help." He then went on to explain that he was referring to the union meeting that "**you guys** [emphasis added] went to." When Bruno then feigned ignorance of attending any union meeting, Ladd remarked, sarcastically, that people [who told him about it] must have been lying. Ladd knew all about the union meeting and what happened there, as he made reference to "whoever went to the meeting" having told him about it and also noted that another union meeting was scheduled for September 8th. Ladd also noted, in reference to the union meeting, that "**Everything got back to Virginia** [emphasis added]."

As found by the Administrative Law Judge, Ladd's remark that "you guys" attended a union meeting and that "everything got back to Virginia," shows that the identities of the employees who attended the meeting were well known by Respondent. The record does not disclose the exact date that Respondent first learned of its employees' attendance at a union meeting. However, it is reasonable to assume that Respondent learned of the meeting shortly after it occurred and before any decision was made as to whom to layoff. Word of the meeting was widely and immediately disseminated. Ladd told Bruno that someone who was at the meeting told him about what had happened. Given the wide and quick dissemination of the information among the employees, it is also likely that he learned of the meeting from an employee at about the same time.

Although both Ferrer and Pasquale both testified that they decided to lay off Bruno, Casiano and Brattoli before they knew that about a union meeting, the Administrative

Law Judge found Ferrer to be an unreliable witness. She discredited his statement that he did not know about the union meeting until September 7, and that he only spoke to Ladd about the union after the layoffs. She also found that Pasquale was not a credible witness and she did not credit his testimony that he did not hear about the union meeting until Bruno mentioned it to him on September 7. The Board gives great weight to the credibility resolutions made by the Administrative Law Judge. *Standard Dry Wall Products, Inc.*, 891 NLRB 544, enf. 188 F. 2d 362 (C.A.3). Respondent has failed to demonstrate that the credibility findings of the Administrative Law Judge are contrary to the clear preponderance of the evidence and has set forth no grounds warranting their reversal.

Based on the above, it is clear that the record supports a finding that Respondent's representatives in New Jersey and Virginia knew of the union meeting attended by its employees prior to deciding whom to layoff.

5. The Record Supports a Finding that Respondent Did Not Prepare a Layoff List for the Reason that Work was Slowing Down (Respondent's Exception 5)

Respondent took exception to the Administrative Law Judge's finding that the evidence did not support its position that a layoff list was compiled for the reason that work was slowing down. Respondent's witnesses Ferrer and Pasquale testified that they had communicated with each other in about mid-August about the need to have layoffs because work was slowing down. Ferrer also testified that, after consulting with Ladd, he prepared a layoff list then, which supposedly included the names of six employees, including two employees who did not attend the union meeting. No documents were presented by Respondent showing that work was, in fact, slowing down at that time or even that there had been any communications between Ferrer and Pasquale then

concerning the need for a layoff or who should be laid off.. Further, no layoff list containing the names of the employees mentioned was ever introduced in evidence. Additionally, Respondent's assertion that a slow down in work necessitating the layoffs of the alleged discriminatees (who were not recalled before the Consent Agreement was entered into in May 2011) is belied by the fact that Respondent hired five new TCTs shortly after the alleged discriminatees' layoffs. Respondent never explained this inconsistency. Thus, the record amply supports a finding that Respondent did not prepare a layoff list because work was slowing down.

6. The Record Supports Findings that Respondent Laid Off Ivan Casiano Because He Attended a Union Meeting and That Its Assertion the It Did So Because Casiano Did Not Want to Continue as Ladd's Helper Was a Pretext (Respondent's Exceptions 6 and 7)

Both Pasquale and Ferrer , whom the Administrative Law Judge did not credit, testified that when Casiano went to work in the yard, he had an agreement with Ladd that he would take over his position, but that if things didn't work out, he would not be able to go back to work as a TCT. They assert that, because of that agreement, Casiano's failure to continue as Ladd's helper in the yard was the primary reason why he was laid off. Casiano, however, whom the Administrative Law Judge credited, testified that he agreed to work in the yard, and did so from about the end of April until the end of June, only after he was assured by Ladd that if things didn't work out, he would be allowed to go back to working on the road as a TCT. It should be noted that neither Pasquale or Ferrer had any direct knowledge as to the agreement they asserted was entered into between Casiano and Ladd, and Ladd, who would have had knowledge of any such agreement, was not called to testify. An adverse inference can be drawn from Respondent's failure to call Ladd to testify as to this matter. *International Automated Machines, Inc.*, 285 NLRB 1122 (1987).

Further support for Casiano's assertion that there was no understanding that he would not be able to return to work as a TCT, should he desire to do, is found by the fact that, indeed, the Employer did take him back to work as a TCT in about the end of June and he continued working as a TCT until his layoff in August, after his attendance at a union meeting. While Pasqual testified that "he believed" Casiano was taken back as a TCT because he was needed for a job because he had a CDL license, no documentary evidence of this requirement for the job that Casiano was sent to was ever introduced. Further, even if that had been the case, no explanation was given as to why that ability and skill that he possessed as a result of his CDL license was arguably enough to negate any "agreement" with Respondent about returning to work as a TCT but not enough to keep him on after he attended a union meeting.

Respondent, in its brief in support of its exceptions, also argues that the ALJ failed to consider two warnings that Casiano received after he returned to work as a TCT and before his layoff, that would be additional justification for his being selected for layoff. The first warning, dated July 6, was for failing to empty a vehicle after it was returned to the yard. Casiano wrote on the warning, by way of explanation after it was received, that since the vehicle had cones on it when taken, he thought that he was supposed to return it in the same condition. Additionally, it is undisputed that other members of his crew received the same written warning for the same reason and they were not laid off. Casiano denied receiving another "warning", dated August 17, for allegedly arriving 15 minutes late in the yard before going out on an assignment, and denied that he had been late. It should be noted that Ferrer, who signed the "warning", worked in the office and would not have had any direct knowledge of whether Casiano had arrived late while Ladd, who worked in the yard, was not called to testify. Further, although the "warning" was

allegedly also signed by another employee, Michael Alvarez, as a witness, both Ferrer and Alvarez signed with a date of August 17, 1981. While Ferrer explained his use of that date as an error, caused by the fact that it was his birth date, no such explanation would appear to apply to Alvarez, which makes the entire “warning” suspect. In deed, the Administrative Law Judge declined to give any weight to that “warning.”

Respondent also took exception to the Administrative Law Judge’s finding that Casiano was discharged because he attended a union meeting. The basis for its argument, in that regard, is that the General Counsel had not established anti-union animus or knowledge by Respondent that Casiano had attended a Union meeting. The discussion in Point 3, above, demonstrates that Ladd had shown anti-Union animus, which can be imputed to those agents of Respondent who made the determination as to which employees should be laid off. *Bruce Packing Co., Inc.* 357 NLRB. No. 93(2011). With respect to knowledge that Casiano had attended a union meeting, it is true that Casiano’s name did not come up in the conversations that Bruno had with Ladd or Pasquale when attendance at a union meeting was mentioned. However, the Administrative Law Judge found that Ladd’s remark that “**you guys** [emphasis added] attended a union meeting” and that “**everything** [emphasis added] got back to Virginia” shows that Respondent knew the identities of the employees who attended the meeting. Further, Ladd’s acknowledgement in his conversation with Bruno concerning his layoff that “**I am sure** [emphasis added] the union didn’t [expletive deleted] help it,” and Pasquale’s comment to Bruno that attending a union meeting “could play into [why he was let go]” and “might be part of [why he wasn’t working]” would clearly support a finding that Casiano, who was known to have attended the same union meeting, was similarly laid off because of his attendance.

It should be noted that the fact that four of the five employees who attended the union meeting were laid off immediately thereafter is more than a coincidence. Rather, it supports a finding that the layoffs were unlawfully motivated. See *e.g.*, *Manorcare Health Services-Easton*, 356 NLRB No. 39 at p.3, 25 (2010) (discipline of employee “Just days” after her first public support for the union is indicative of unlawful motivation). *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003), *citing La Gloria Oil*, 337 NLRB 1120 (2002).

Based on the above, it is clear that the record supports findings that Casiano was laid off because of his attendance at a union meeting and that the primary reason given by Respondent for the layoff, namely, because he did not want to continue working in the yard, was a pretext.

7. The Record Supports Findings that Respondent Laid Off Danny Brattoli Because He Attended a Union Meeting and Not Because He Stormed into Joseph Ferrer’s Office (Respondent’s Exceptions 8 and 9)

Ferrer testified that Brattoli was selected for layoff mainly because he stormed into his office and “flipped out” over the fact that he was not being given any work. However, he also testified, significantly, that although he believed the incident occurred in August, he could not say for sure whether it had occurred before or after Brattoli was laid off. Although Pasquale testified that the incident occurred on August 17, he provided no documentation of the same. Further, despite the alleged egregiousness of Brattoli’s actions, he was never written up for this incident, and Respondent offered no explanation for not having done so.

The Administrative Law Judge found that the alleged flipping out incident had occurred after Brattoli was laid off and, therefore, could not have been a reason for the layoff. He based that finding on the fact that Ferrer could not recall whether it had

occurred before or after Brattoli was laid off and also on the fact that, without any explanation by Respondent and despite the fact that the evidence showed that Ferrer issued many written warnings, Brattoli was never written up for this incident. Thus, it is clear that the Administrative Law Judge's finding is supported by the evidence.

However, even if the alleged incident had occurred before Brattoli was laid off, the fact that he had not been written up for it, even though the evidence shows that Ferrer was prone to write employees up for all kinds of infractions, demonstrates that it was not as serious of an infraction as Respondent would have us believe. Additionally, Brattoli's complaint was an action in furtherance of employees' concerted activities protesting the unfairness of work assignments. As such, his asserted outburst, while engaging in Section 7 activity, would not necessarily lose its protection under the Act. *See, e.g., Atlantic Steel Co.*, 245 NLRB 814 (1979). Further, Brattoli had a good disciplinary record with Respondent. With respect to the warning he received dated "7/29," the record does not disclose the year that it was received and the Administrative Law Judge refused to consider that document. Her action was appropriate, especially considering the unrefuted testimony that Ladd had told employees at a mandatory meeting in about July 2010, among other things, that if they had received write-ups before then, their slate would be wiped clean. Additionally, Brattoli testified that the only other written warning he received, dated August 6, for allegedly not doing a post-trip inspection, was countermanded by McClain. Respondent did not produce any evidence to contradict Brattoli's assertion and McClain, who was present throughout the hearing, was not called to testify. As noted above, an adverse inference can be drawn from McClain not being called. *International Automated Machines, Inc., supra*. Further, the record shows that other employees had received warnings for infractions that were as serious or more

serious and/or more numerous than those allegedly committed by Brattoli, and they were not laid off.

Respondent also took exception to the Administrative Law Judge's finding that it laid off Brattoli because he attended a union meeting, making the same arguments that it made with respect to the Administrative Law Judge's finding that it laid off Casiano because he attended a union meeting. For the same reasons as discussed in point 6 above, it is clear that the record supports the Administrative Law Judge's finding in that regard.

8. The Record Supports Findings that Supervisor Allan Ladd Coercively Interrogated Frank Bruno on about September 7 and Created the Impression that the Employees' Union Activities Were Under Surveillance, in Violation of Section 8(a)(1) of the Act (Respondent's Exceptions 10 and 13)

The transcript of the September 7 conversation between Ladd and Bruno, which was introduced in evidence, shows that Ladd first initiated the discussion about Bruno having attended a union meeting, indicated that it surely didn't help him when Respondent was considering whom to layoff, and coercively questioned him about that meeting. He wanted to know if there was still going to be another meeting the next day, on September 8, as had been discussed at the first union meeting. Bruno, who was not an open and active union supporter, showed his discomfort to the questions being asked by not answering honestly, and instead, responding that he knew nothing about the union, or a union meeting. Ladd would not accept that, and coercively continued his interrogation, asking Bruno if he wanted him to believe that people who went to the meeting were lying about it. Besides coercively questioning Bruno, Ladd also intentionally created the impression that employees' union activities were under surveillance by letting Bruno know that he knew about the union meeting that Bruno and other employees had attended, and what had happened at the meeting, including that another meeting had been

scheduled. By these actions, Respondent engaged in coercive interrogation of Bruno as to his union activities and also created the impression that employees' union activities were being surveilled, in violation of Section 8(a)(1) of the Act. *Manorcare Health Services - Easton, supra* at 17 ; *Eagle-Picher Industries*, 331 NLRB 169 (2000); *The Union National Bank of Pittsburgh*, 276 NLRB 84 (1985); *88 Midwest Electric Manufacturing, Inc.*, 260 NLRB 174, 175-176 (1982).

9. The Record Supports a Finding that Supervisor Matthew Pasquale Coercively Interrogated Frank Bruno on about September 13, in Violation of Section 8(a)(1) of the Act (Respondent's Exceptions 14 and 15)

In the transcript of the conversation between Pasquale and Bruno that occurred on September 13, which was admitted into evidence, Pasquale asked Bruno several questions about the union meeting that he had attended. That questioning, coming from the highest ranking official at the facility, to an employee who had not previously revealed any union sympathies, was coercive. Bruno clearly showed his discomfort to the questioning by denying that it had been a union meeting that he had attended, asserting that it had only been a bunch of guys talking, that he only went to listen to what someone was saying, and that no one joined the union at the meeting. When Pasquale continued his coercive interrogation by questioning him further as to whether it had been a union guy whom he went to hear, Bruno admitted that it had been, but, so as to minimize his activity, stressed that he had been invited to the meeting, that it had not been at a union hall, that he only gone to hear the pros and cons of unionization and that he had not signed a union card. By asking these questions to Bruno, Pasquale unlawfully interrogated Bruno as to his union activities, in violation of Section 8(a) of the Act. *See, e.g. Demco New York* 337 NLRB 850, 851 (2002).

V. CONCLUSION:

Based on the above, it is submitted that the Board adopt the findings, conclusions and recommendations of the Administrative Law Judge in their entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bernard S. Mintz". The signature is written in a cursive style with a large, sweeping initial "B".

Bernard S. Mintz
Counsel for General Counsel

Dated at Newark, New Jersey this 17^h day of January, 2012.

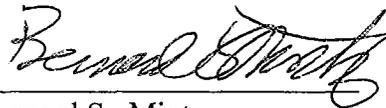
CERTIFICATION OF SERVICE

This is to certify that General Counsel's Brief in Reply to Respondent's Exceptions to the Administrative Law Judge's Decision has been served today on the parties by electronic mail, as follows:

Douglas S. Zucker, Esq.
Bauch, Zucker, Hatfield, LLC
8781 Mountain Avenue, Suite 200
Springfield, NJ 07081
dsz@bzh-law.com

Craig H. Livingston, Esq.
Livingston, Siegel, DiMarzio, LLP
661 Franklin Avenue
Nutley, NJ 07001
clivingston@workplacelawyers.com

Dated at Newark, New Jersey this 17th day of January, 2012



Bernard S. Mintz
Counsel for General Counsel