

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

D&J AMBULETTE SERVICE, INC.

and

Case No. 02-CA-040254

**ANGEL MORENO,
An Individual**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN
SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

**Dated at New York, New York
This 24^h day of July, 2012**

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PRELIMINARY STATEMENT

Pursuant to a charge in Case No. 02-CA-040254 filed by employee Angel Moreno against D & J Ambulette Service, Inc., herein called Respondent, on December 10, 2010, and amended on January 20, 2011, and again on March 31, 2011, the Regional Director issued a Complaint against Respondent on October 31, 2011. (GC Exh. 1).

Respondent transports wheelchair-bound adults and disabled children to facilities throughout New York City. (Tr. 576). Respondent has a fleet consisting primarily of vans and buses as well as a tow truck. (Tr. 420-21). At all material times, Respondent utilized an outside towing service, Crown Towing Service, to tow its vehicles when its in-house tow truck operator, Angel Moreno, was unavailable. (Tr. 49, 430, 432, 438-39, 446, 448-89, 452, 457-60, 469, 595, 606, 621).

The president and vice-president of Respondent are Joseph Gallitto and Steven Squitieri. Gallitto and Squitieri did not testify during the hearing. Carlo Sacco is the general manager of Respondent while Joseph ("Skip") Davoli is Respondent's fleet manager.

The Complaint alleges that Eli Talvy and Luis Montas are supervisors and agents of Respondent and that they, along with Skip Davoli, made numerous statements to employees in violation of Section 8(a)(1) of the National Labor Relations Act, herein the Act. The Complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Angel Moreno, Carlos Valentin, Christopher Rodriguez and Yhou Tejada because of their activities on behalf of Local 854, International Brotherhood of Teamsters, herein the Union. (GC Exh. 1).

The case was litigated before Administrative Law Judge Raymond P. Green on January 17 through 19, and March 5 through 7, 2012.

On June 12, 2012, the ALJ issued a decision and recommended order in the above-referenced case, dismissing all Complaint allegations. The ALJ found that the record failed to establish that Luis Montas and Eli Talvy were statutory supervisors or agents of the Respondent and therefore that the Section 8(a)(1) violations attributable to them should be dismissed. The ALJ further determined that there was insufficient evidence that Respondent violated the Act by discharging Angel Moreno, Christopher Rodriguez, Yhou Tejada or Carlos Valentin.

Counsel for the Acting General Counsel contends that the ALJ ignored the substantial weight of the evidence, failed to apply Board precedent properly, and made findings of fact unsupported by the record, including erroneous credibility determinations based, in part, on such tainted findings of fact. Thus, the undersigned seeks reversal of the ALJ's findings and the issuance of a Decision finding that Respondent violated the Act, as charged, and an appropriate remedial Order providing for: (1) the immediate reinstatement of employees Angel Moreno, Carlos Valentin, Christopher Rodriguez and Yhou Tejada to their former positions with the Respondent at their prior wages and other terms and conditions of employment, displacing if necessary, any workers contracted for, hired or reassigned to replace them, or if their former positions are no longer available, to substantially equivalent positions of employment without prejudice to their seniority or any other rights or privileges previously enjoyed; (2) the making of Angel Moreno, Carlos Valentin, Christopher Rodriguez and Yhou Tejada whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful

conduct with interest, as a result of Respondent's violations; (3) the removal from Respondent's personnel files of any reference pertaining to the discharges of Angel Moreno, Carlos Valentin, Christopher Rodriguez and Yhou Tejada and to notify them in writing that this has been done and that these personnel actions will not be used against them in any way; (4) the posting of an appropriate notice in English and Spanish; and (5) compliance with any other just and proper remedy deemed appropriate.

ISSUES PRESENTED

1. Whether the ALJ erred in failing to find that Luis Montas (“Montas”) and Eli Talvy (“Talvy”) were statutory supervisors or agents of the Respondent.
2. Whether the ALJ erred in failing to find that Respondent violated Section 8(a)(1) of the Act through comments made by Montas and Talvy to employees Yhou Tejada (“Tejada”), Carlos Valentin (“Valentin”) and Christopher Rodriguez (“Rodriguez”).
3. Whether the ALJ erred in failing to find that Talvy and supervisor Skip Davoli (“Davoli”) interrogated and threatened Jurjo over his participation in the Region’s investigation.
4. Whether the ALJ erred in failing to find that Respondent violated Section 8(a)(3) of the Act when it discharged Angel Moreno (“Moreno”), Tejada, Valentin, and Rodriguez.

ARGUMENT

A. Luis Montas and Eli Talvy are Supervisors and Agents of the Respondent

1. The ALJ Erred By Failing to Find that Luis Montas is a Supervisor and an Agent of Respondent

The ALJ incorrectly found that Montas was a lead mechanic and not a supervisor and an agent of Respondent.

The evidence supporting Montas's status as an agent of the Respondent is compelling. When examining agency status, the Board applies common law principles of agency. Agency must be established based on either actual or apparent authority to act on behalf of the employer. The Board has held that apparent authority exists when there has been some "manifestation" by the employer to employees that creates a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the acts in question. *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998) (department heads found to be "conduits" to, and agents of, management), *Southern Bag Corp.*, 315 NLRB 725 (1994) (lead man found to be agent). Thus, agency status is established if it is determined that under the facts of a particular case, the person alleged to be an agent was placed in a position by the employer such that employees would reasonably believe that the person in question spoke for the employer. Accordingly, translators regularly used as conduits between management and its workforce are commonly found to be agents. See *Cream of the Crop*, 300 NLRB 914, 916 (1990) (designation of employee to interpret matters concerning terms and conditions of employment to bilingual coworkers is sufficient to find agency); *Great American Products*, 312 NLRB 962, 963 (1993) (bilingual employee introduced as a supervisor who employees looked to for job assignments, breaks, information about

production quotas, and requests for time off found to be agent, though not 2(11) supervisor); *K.G. Knitting Mills*, 320 NLRB 374, 377 (1995) (bilingual employee “only source of information and instruction” for Spanish-speaking employees found to be an agent); *Ella Industries*, 295 NLRB 976 (1989) (employee used as a translator and conduit to relay information for management to Spanish-speaking employees was placed in strategic position where employees could reasonably believe that he spoke on management’s behalf). It is unnecessary to conclude that the agent’s actions in question were either authorized or subsequently ratified by the employer. See also *A.D. Conner, Inc.*, 357 NLRB No. 154, *21 (2011) (apparent authority results where principal intends to cause third person to believe agent is authorized to act for him, or should realize his conduct is likely to create such a belief).

The ALJ erred when he concluded that Montas only translated between management and the Spanish-only speaking mechanics “from time to time” whereupon Montas’ own testimony was that he relayed work-related instructions “all the time.” (ALJD pg. 2, Ins. 51-52 – pg. 3, Ins. 1-2; Tr. 41, 71, 112, 203, 383, 494, 506, 531). Furthermore, Montas testified that he relayed work assignments from Fleet Manager Skip Davoli to both Spanish and English-speaking mechanics and that the Spanish-speaking mechanics would ask him to speak to Davoli “all the time.” (Tr. 506, 531). Davoli testified that all work assignments were given orally and that he used Montas to assign work to the Spanish-speaking mechanics. (Tr. 382, 405).

The ALJ further erred by concluding that there was no evidence Montas was asked to translate on any matters dealing with employment issues. (ALJD pg. 3, Ins. 10-16, fn. 2). The record clearly indicates that Montas was used by the mechanics to

relay job assignments and other instructions and requests between management and the mechanics – all of which are “employment issues.”

Additionally, the ALJ appears to be attempting to create new law by focusing on the lack of an anti-union campaign and upon the fact that Montas was not used to distribute anti-union propaganda among the mechanics. (ALJD pg. 3, Ins. 11-17). There simply is no requirement that an employee must be used as a conduit for anti-union propaganda for that person to be found an agent of an employer and the ALJ cites no Board law to support that position. Instead, he merely states in a footnote that ALJ Fish in *AFL Web Printing*, JD(NY)-16-12, analyzed agency in that decision and had concluded the employee was, in fact, an agent, though not a supervisor. (ALJD pg. 3, fn. 2.). Moreover, in *AFL Web Printing*, many of the cases that ALJ Fish relied upon support Montas’s status as an agent. See *AFL Web Printing*, 2012 WL 1029461 (Div. of Judges, March 27, 2012) (citing to at least four cases where the Board found a lead man to be an agent where he acted as a conduit of orders and instructions from management). Indeed, ALJ Fish remarked, “I conclude that Respondent vested Kanniard with sufficient apparent authority to conclude that Kanniard served as a conduit between management and employees and that employees would reasonably believe that Kanniard was ‘speaking and acting for management’ in his comments to employees.” *Id.* at 48, Ins. 4-7.

ALJ Green opined that he does not believe an individual used to translate routine day to day work can be a basis for finding that person to be a Section 2(13) agent. (ALJD pg. 3, fn. 2). The GC submits that the standard articulated in the ALJD is erroneous and that ALJ Green ignored settled law finding conduits, in cases similar to

the one at bar, to be agents. In sum, the uncontroverted evidence shows that management held out Montas as a supervisor, that Montas regarded himself as a supervisor, and that Montas served as a conduit for employment issues from fleet manager Skip Davoli, to all the mechanics, especially the ones who spoke Spanish. Based upon these facts and the record as a whole, Montas is clearly an agent of Respondent acting on its behalf and the ALJ erred in not finding so.

The ALJ mistakenly ignored evidence that Montas was a supervisor within the meaning of Section 2(11) of the Act.

Employees are statutory supervisors if they hold the authority to engage in any one of the twelve listed supervisory functions and their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." *NLRB v. Kentucky River Community Care*, 532 U.S. 710, 713 (2001).

In "borderline cases" the Board will consider secondary indicia of supervisory status and in this respect, there is no doubt that the secondary indicia in this matter clearly support a finding that Montas is a supervisor under the Act. See *Baby Watson Cheesecake*, 320 NLRB, 779 (1996); see also *Palagonia Bakery Co.*, 339 NLRB 515, 534 (2003) (perception of employees supports 2(11) determination). These "actions on the ground" strongly weigh in favor of finding Montas to be a supervisor within the meaning of the Act.

The ALJ erred by not considering testimony demonstrating that Montas had and exercised the authority to grant time off. The uncontroverted evidence shows that Tejada asked for and received permission from Montas to take a day off to attend his grandmother's funeral, which is "a well-established secondary indicia of supervisory

status.” (Tr. 211). *Bredero Shaw*, 345 NLRB 782, 784 (2005). Furthermore, the record shows that Montas assigned work to the mechanics and spent most of his day checking their work.¹ (Tr. 109; Tr. 204-211; Tr. 506, 531).

The most compelling fact which demonstrates Montas is a supervisor was his role in discharging Yhou Tejada, which the ALJ wholly failed to address despite the record testimony. (ALJD pg. 13, Ins. 2-6). The record establishes that, without any input from Davoli, Montas repeatedly and emphatically directed Tejada to go home because Tejada refused an order from Montas to put air in the tires of a vehicle. (Tr. 221-240-420; Tr. 519-20). In this regard, Davoli underscored Montas’s authority by directing Tejada to turn in his uniform based on the incident, which Davoli admitted he did not witness. (Tr. 211-222, 248; Tr.396, 492-93).

In this situation, Tejada, Davoli, and Montas acted in a fashion consistent with Montas’s 2(11) authority: Tejada went “home” as directed, and Davoli affirmed Montas’s discharge of Tejada by directing Tejada to turn in his uniform.

2. The ALJ Erred By Failing to Find that Eli Talvy is a Supervisor and an Agent of Respondent.

The record shows that Eli Talvy, the Respondent’s operations manager, was a statutory supervisor within the meaning of the Act. (Tr. 144, 548). The record shows that Talvy hired employees, assigned them work, made changes to their work schedules and authorized leave. *See Bredero Shaw*, 345 NLRB 784 (granting of time off on one occasion corroborated supervisory authority of lead/charge hand).

¹ Concededly, the extent to which Montas exercised independent judgment in assigning tasks to the other mechanics versus relaying such directions from Skip Davoli is difficult to determine from the record. Tejada’s testimony that Montas spent most of his day checking the work of other mechanics is consistent with Montas’s admission that he became a supervisor because he could no longer do heavy work. Accordingly, it is evident that Montas’s supervisory work constituted more than 15% of his working day, a threshold affirmed by the Board in *Oakwood Healthcare*, 348 NLRB 686, 694 (2006).

Talvy testified that he was the operations manager of the Respondent. (Tr. 144, 548). Despite Talvy's own testimony that he was Respondent's operations manager, the ALJ decided that "there was evidence that [Talvy] was one of several individuals who performed dispatch functions." (ALJD pg. 2, Ins. 39-40.) The only evidence presented that mentions Talvy was a dispatcher is the testimony of Eduardo Jurjo who the ALJ noted was "a reluctant witness who testified after being compelled to do so by a United States District Court," and whose "answers were vague and evasive." (ALJD pg. 5, Ins. 1-3). Because of Jurjo's obvious concern over testifying against his current employer and his "vague and evasive" answers to the General Counsel, the ALJ implicitly discredited all of Jurjo's testimony except for Jurjo's single statement that Talvy was a dispatcher even though Jurjo testified that he did not work for Talvy and further testified that he called Talvy a supervisor in his Board affidavit. (Tr. 317, 318; GC Exh. 14). The ALJ's conclusion that Talvy was a dispatcher and not the Respondent's operations manager is based solely on a single statement by a witness that even the ALJ clearly found to be unreliable and is in direct contradiction with Talvy's own testimony that he is the operations manager of Respondent.

Talvy testified that he is responsible for ensuring that drivers are matched with vehicles and that the drivers make their scheduled runs. (Tr. 544, 548-49). Like Fleet Manager Skip Davoli, Talvy reported to General Manager Carlo Sacco and had an office located in the interior of the garage. (Tr. 146, 185-86).

The undisputed evidence shows that Talvy hired Parking Attendant Christopher Rodriguez and that he assigned Rodriguez various other duties such as washing vehicles and cleaning Respondent's nearby empty lot. (Tr. 27; Tr. 144-45, 157-58, 160,

171; Tr. 339-40; Tr. 551). Rodriguez stated that Talvy increased his work schedule to include weekends. (Tr. 147). Rodriguez further testified that he witnessed Talvy hire and fire matrons and drivers in his office. (Tr. 144). This testimony was not contradicted by Talvy or Sacco; in fact, counsel for Respondent did not even question any of their witnesses on Talvy's 2(11) duties. The record also shows that Davoli relayed Talvy's permission to Moreno to punch out on the sole occasion he was asked to be excused from a late tow call. (Tr. 86).

Consistent with his title as "operations manager," the uncontroverted testimony of Rodriguez further establishes that Talvy hired and fired matrons and drivers. There is no better evidence of supervisory authority. *See All Seasons Construction*, 336 NLRB 994, 1001 n.1 (2001) (power to hire, fire, assign work, discipline, and other such powers, was uncontradicted); *Oakwood Heath Care*, 348 NLRB at 714 (possession of one of primary indicia sufficient to establish supervisory authority); *see also RCC Fabricators*, 352 NLRB 701, 743 n.47 (2008) (secondary indicia, such as the title of supervisor, properly considered in conjunction with primary indicia).

Based on the preponderance of the evidence, Counsel for the General contends that Operations Manager Eli Talvy is a supervisor of Respondent within the meaning of Section 2(11) of the Act and the ALJ erred in failing to consider all of the evidence when concluding he was merely a dispatcher.

3. **Based Upon His Findings that Luis Montas Was Not a Supervisor or Agent of Respondent, the ALJ Erred by Dismissing the Allegations that Respondent, by Montas, Violated Section 8(a)(1) of the Act by: Interrogating Valentin, Threatening Valentin and Tejada; Giving Valentin the Impression Employees' Union Activities Were Under Surveillance; and by Informing Tejada that Moreno Had Been Fired for Organizing the Employees.**

The ALJ summarily dismissed the following statements by Luis Montas which are alleged to violate Section 8(a)(1):

- a. Montas interrogated Yhou Tejada as to whether he signed a card for the Union;
- b. Montas threatened Tejada regarding signing cards for the Union;
- c. Montas threatened Tejada and Carlos Valentin by telling them that employees who had signed cards for the Union would be fired;
- d. Montas “created the impression of surveillance” by informing Valentin on different occasions that Respondent was investigating employees, knew they had signed cards for the Union, and was going to fire them; and
- e. Montas informed Tejada that Respondent discharged Angel Moreno because he signed a card for the Union.

(ALJD, pg. 3, Ins.19-21 and pg. 13, Ins. 9-12).

Significantly, the ALJ noted that “Montas was clearly aware of the organizing because he was directly solicited by Moreno.” (ALJD, pg. 4, Ins. 22-23).

The testimony of witnesses for the General Counsel clearly support these allegations.

Montas clearly hated the idea of joining the Union. When Angel Moreno asked him to sign a Union card, Montas ripped the card up in Moreno’s presence. (Tr. 540). Not satisfied with this display of hostility towards Moreno’s organizing activities, the record shows that Montas proceeded to actively discourage others from joining the Union.²

On Monday, August 2, Carlos Valentin and Yhou Tejada signed the Union cards given to them by Moreno. (GC Exhs. 8 and 9). A day or two later, Valentin testified that

² Montas’s blanket denial of any mention of the Union by him or others is not credible. Montas’s obvious antipathy towards the Union, the timing of his interrogation and threats relative to the organizing activities of Moreno, and the multiple statements testified to by both Valentin and Tejada all show that Montas was lying when he denied making the 8(a)(1) statements attributed to him by Valentin and Tejada.

Montas declared in Spanish that Valentin and others present were “crazy” for signing Union cards and that Respondent would “kick” them out. (Tr. 112). Similarly, and around the same time period, Tejeda testified that Montas came up to him while he was alone and asked Tejeda if he had spoken to the tow truck driver “about a card that he’s promoting” and warned Tejeda to “be careful if you sign it.” (Tr. 215-16).

The ALJ erred in concluding that Tejeda and Valentin had recounted differing versions of conversations with Montas, in which Montas made these unlawful threats. (ALJD pg. 5, ln. 31-39). As the testimony reflects, Tejeda and Valentin were testifying about two separate conversations involving Montas. (Tr. 111-13, 115, 215, 217).

These statements by Montas clearly violate Section 8(a)(1). There was no evidence that either Valentin or Tejeda initiated conversation with Montas about the Union or that they were open Union adherents. Moreover, given Montas’s daily role as a conduit for Valentin and Tejeda, who did not speak English, Montas entreaties were of special concern to them. In such circumstances, Montas’s questioning of Tejeda as to whether he had spoken to Moreno about signing a Union card is clearly an unlawful act of interrogation in violation of Section 8(a)(1) of the Act. See *Webco Industries*, 334 NLRB 608, 608 n.2, 618 (2001), *enfd.* 90 Fed. Appx. 276 (10th Cir. 2003) (probing of views relating to the Union reasonably tends to interfere with the free exercise of employee rights); see also *Michigan Roads Maintenance Co.*, 344 NLRB 617, 618 (2005) (subsequent threat reinforced coercive nature of interrogation).

Inasmuch as there is no evidence Valentin or other employees revealed to Montas that they had signed Union cards, Montas’s remark to the employees present that they were “crazy” for doing so unlawfully created the impression the employees’

union activities were under surveillance by Respondent in violation of Section 8(a)(1). See *Ichikoh Mfg.*, 312 NLRB 1022, 1023 (1993) (statement about covert union-related meetings unlawful), *enfd mem.*, 41 F.3d 1507 (6th Cir.1994); *United Charter Service*, 306 NLRB 150, 151 (1992); *Robert F. Kennedy Medical Center*, 332 NLRB 1536 (2000) (by letter); *Flexsteel Industries*, 311 NLRB 257 (1993) (supervisor informed employee he heard rumor employee was passing out union cards).

As argued, *supra*, Montas statements to Valentin and Tejeda carried the ring of authority, for he was their intermediary to their undisputed boss, Skip Davoli. As the voice of Respondent, Montas's pronouncement to Valentin that employees would be "kicked out" for signing Union cards constitutes a direct threat by Respondent to discharge employees for engaging in union activities in violation of Section 8(a)(1). See *W.D. Manor*, 357 NLRB No. 128, *40 (2011) (anybody caught signing the card would be gone); *Seton Co.*, 332 NLRB 979, 981 (2000) (warning to employee if he was caught talking about the Union he could be fired). Similarly, the statement by Montas to Tejeda to "be careful" if he signed a Union card was an implied threat of reprisal in violation of Section 8(a)(1) because it was coupled with a coercive statement that he should be careful signing and that all who signed would be fired. See *Leather Center*, 308 NLRB 18 (1992) (manager's statement to employee that he knew she was talking to employees about the union and that she should be careful constituted a veiled threat of possible repercussions); see also *SKD Jonesville Division*, 340 NLRB 101 (2003) (statement to employee that it was "not in [employee's] best interests to get involved with the Union" found to be coercive).

Subsequently, Montas approached Valentin and said that the company was trying to find out – investigating – which employees had signed Union cards. (Tr. 113-15). This was, indeed, a credible threat inasmuch as all the mechanics had recently been solicited by Moreno to sign Union cards. On the day before Moreno's discharge, Montas told Valentin that Respondent had found out who signed the Union cards. (Tr. 115). Valentin further testified that Montas said, "The seven ... who have signed the card were going to be fired." (Tr. 132). As discussed above, these statements by Montas violated Section 8(a)(1) because they had the tendency to create the impression that Respondent was monitoring employees' Union activities and that Respondent would retaliate by discharging Union adherents. *See, e.g., United Charter Service*, 306 NLRB 150, 151 (1992) (manager's statements that he knew of employees' organizing efforts reasonably suggested to employees that the employer was closely monitoring their activities); *see also W.D. Manor, supra*.

After Respondent fired Moreno, Montas delivered more chilling news. Montas searched out Tejada while he was working and informed him that Respondent had fired the "tow truck driver" because he signed a Union card and that everyone else who signed a card would be fired too. (Tr. 218). These statements clearly violate Section 8(a)(1). *See D&F Industries*, 339 NLRB 618, 620 (2003) (telling employees other employees were fired because they signed union authorization cards); *see also W.D. Manor, supra*.

Based on the foregoing, it is submitted that a preponderance of the evidence establishes that Luis Montas is a supervisor or agent of Respondent and that Respondent, by Montas, violated Section 8(a)(1) of the Act by: interrogating employees

about their union activities; threatening to discharge employees and making an unspecified threat of reprisal against employees because of their union activities; creating the impression employees' Union activities were under surveillance and by informing employees that an employee had been discharged because of his Union activities.

4. Based Upon His Findings that Eli Talvy Was Not a Supervisor or Agent of Respondent, the ALJ Erred by Failing to Find that Respondent, by Eli Talvy, Violated Section 8(a)(1) of the Act by Interrogating Eduardo Jurjo as to Whether Jurjo Had Signed a Union Card and by Telling Him to Lie if Owners Joseph Gallitto or Steve Squitieri Asked.

Without making a credibility determination, the ALJ blithely dismissed the following statements by Eli Talvy which are alleged to violate Section 8(a)(1):

Eduardo Jurjo, a mechanic, testified that Talvy asked Jurjo if he had signed a Union authorization card. When questioned whether Talvy stated "that if Joseph Gallitto or Stephen Squitieri asked me I should tell them I did not know what I was signing," Jurjo reluctantly admitted that Gallitto and Squitieri were mentioned by Talvy but then testified that Talvy "was trying to say" it was no one else's business. (Tr. 287-88, 319-20).

Talvy denied the entire conversation. (Tr. 550).

Based upon his erroneous finding that Talvy was not a supervisor or agent of Respondent, the ALJ did not determine whether Talvy actually made the unlawful statements attributed to him by Jurjo. Nonetheless, the ALJ erroneously refused to accord any weight to the Board affidavit from Jurjo, stating:

Since the affidavit was taken and executed about seven months after the events described, it cannot be considered to be an example of a past recollection recorded. Rule 803

(5) includes as a hearsay exception a “memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(ALJD, pg. 5, fn. 6, pg. 3, Ins. 19-21; pg. 13, Ins. 9-12).

At the threshold, as argued *supra*, the ALJ erred by failing to find that Talvy was a supervisor and agent of Respondent, and therefore that the above statements made by Talvy violated Section 8(a)(1) of the Act.

Secondly, it is submitted that the ALJ erred by not considering the statements made by Jurjo in his Board affidavit as “past recollection recorded” exceptions under Federal Rules of Evidence § 803(5) to the rule against hearsay.

An administrative law judge has considerable discretion under the Act’s guidance to apply the Federal Rules of Evidence “so far as practicable,” to rely on hearsay evidence as substantive evidence, where corroborated, to allay concerns over witness intimidation. *Conley Trucking v. NLRB*, 520 F.3d 629 (6th Cir. 2008), *enfg.* 349 NLRB 308, 309–13 (2007) (upholding the admission into evidence of the pretrial affidavits of a recanting witness and his reliance on the affidavits as credited substantive evidence where corroborated). In *Conley*, the trial judge admitted into evidence the Board affidavit of a witness for the truth of the matters asserted therein because his “demeanor convinces me of the very opposite of the design of his testimony; it convinces me that his affidavits are more trustworthy than his testimony at the hearing, and that his testimony at the trial, in fact, was part of an effort to avoid the impact on Respondent

that he knew would result if he repeated the statements in his affidavits at trial and was believed.” 349 NLRB at 312.

In the instant matter, the ALJ incorrectly concluded that Jurjo’s signed and sworn Board affidavit was not admissible as past recollection recorded pursuant to Federal Rule of Evidence 803 (5). The Board has a history of affirming or adopting the decision of an administrative law judge to rely on a witness’ sworn statement as a past recollection recorded when that witness testified at trial. See e.g., *Rome Electrical Systems, Inc.*, 2010 WL 4929678, at *2 (Nov. 24, 2010); *Dickens, Inc.*, 352 NLRB 667, 669 (2008); *Three Sisters Sportswear Co.*, 312 NLRB 853, 865 (1993); *New Life Bakery, Inc.*, 301 NLRB 421, 426 (1991); *Alvin J. Bart & Co.*, 236 NLRB 242, 242-43 (1978). In *Rome Electrical*, the Board affirmed the decision of an administrative law judge to admit a sworn statement (deposition testimony) as a past recollection recorded under Federal Rule of Evidence 803(5). 2010 WL 4929678, at *2. In *Bart*, the Board affirmed an administrative law judge’s decision to credit a witness’ sworn statement (pretrial affidavit) where the sworn statement conflicted with the witness’ oral testimony. 236 NLRB at 242-43.

In *Three Sisters*, the Board adopted the finding of an administrative law judge who based part of his finding on a witness affidavit. 312 NLRB at 865. The witness in *Three Sisters*, Aura Funez, swore to an affidavit but was reluctant to testify, to the point where it was necessary to subpoena Funez and enforce the subpoena in Federal Court. *Id.*; *id.* at 865 n. 21. At trial, Funez claimed to not remember the events detailed in her affidavit or even having given the affidavit. *Id.* at 865. The judge considered Funez’s affidavit to be substantive evidence as a past recollection recorded under Federal Rule

of Evidence § 803(5) and chose to credit Funez's affidavit over her oral testimony, believing that Funez was frightened of testifying given her employer's unfair labor practices. *Id.*

Similarly, in *New Life Bakery*, the witness, Maria Thigpen, "immediately established that she did not want to testify and was hostile to the General Counsel for requiring her to do so." 301 NLRB at 426. Thigpen was ordered by the judge to answer questions, but she claimed to "not remember anything," though, when questioned by the General Counsel, Thigpen acknowledged "that the affidavits were true at the time she gave them." *Id.* The judge noted that when the Respondent cross-examined Thigpen she answered his questions "without difficulty." *Id.* The Board adopted the administrative law judge's decision to admit Thigpen's affidavit in evidence as an exception to hearsay under Federal Rule of Evidence 803(5) and credit Thigpen's affidavit over her oral testimony.

The Board adopted the decision by the administrative law judge in *Dickens* to accept a witness affidavit given eight months after the events described and credit the witness' sworn affidavit over that witness' oral testimony. 352 NLRB at 669. The witness in *Dickens*, Miaona Wu, went to the NLRB to give an affidavit on May 22, 2007. *Id.* Her affidavit dealt with events that occurred on Sept. 29, 2006—eight months after the event described. *Id.* At trial, Wu claimed not to recall clearly the events of Sept. 29. *Id.* The judge credited Wu's account from her affidavit of the events described which took place on Sept. 29 over her oral testimony, and relied on Wu's affidavit as substantive evidence. *Id.*

The decision of the Administrative Law Judge in the instant case to reject Jurjo's affidavit because of the length of time between when the events described occurred and when the affidavit was given is inconsistent with Board precedent. Had the ALJ followed *Dickens*, the seven month gap could not have been used to find the Jurjo affidavit inadmissible. 352 NLRB at 669.

In the instant case, as in *Three Sisters* and *New Life Bakery*, Jurjo's sworn affidavit should be credited in conjunction with his oral testimony. Jurjo gave a sworn affidavit to the Board's Manhattan regional office, but later on, as the ALJ noted in the ALJD, Jurjo was a reluctant witness and the Region was forced to obtain an order from United States District Court Judge Rakoff compelling Jurjo's appearance at trial. (ALJD pg. 5, Ins. 1-2; Tr. 288-89; GC Exh. 13-14). The ALJ concluded that, as a witness, Jurjo was evasive and failed to recall significant facts in his Board affidavit when questioned by the General Counsel. (ALJD pg. 5, In. 3). However, he testified freely for the Respondent. Notably, Jurjo's oral testimony did not contradict his affidavit. For example, in his oral testimony, Jurjo recalled discussing "the case that Angel brought up" with Davoli but claimed that he could not remember anything else about the conversation. (Tr. 291-94). In contrast, Jurjo's affidavit contained a more detailed account of the conversation. (GC Exh. 14, at 3, Ins. 42-49). Jurjo also testified that his memory of the events described in the affidavit was better when he gave the affidavit than when he testified at trial. (Tr. 286).

Moreover, when Jurjo gave his affidavit to the Board Agent in 2011, it was in a confidential environment. By contrast, when he testified on the stand, he was in the

presence of Carlo Sacco – his employer at both D&J and Clove Coach – who sat feet away and looked directly at him during his testimony. (Tr. 274-75).

Accordingly, the ALJ erred in not finding that Jurjo's affidavit should be accepted as a past recollection recorded and relied on as an accurate description of events despite Jurjo's obvious reluctance to testify, his evasive testimony in response to the General Counsel's questions, and his claimed failure to remember certain details which he did remember at the time he gave his affidavit.

Moreover, Jurjo's testimony about Talvy's interrogation should be credited; it was straightforward, entirely consistent with his affidavit, and close in time to Moreno's solicitation of the shop. There was no evidence Jurjo initiated the conversation about the Union or that he was on friendly terms with Talvy about such matters.

Talvy, on the other hand, had a reason to lie. As discussed above, Talvy had a real incentive to lie about his Union-related conversations with Rodriguez and Jurjo - he was still employed by Respondent and, unlike Jurjo, was not bound by any pre-trial statements. Moreover, as Talvy must have realized, any admission by him would be potentially fatal to Respondent's defense for it establishes knowledge of Union activities and certainly destroys its case with regard to the discharge of Rodriguez.

Jurjo's testimony that Talvy warned Jurjo not to tell Squitieri and Gallitto about the fact that he signed a Union card should be credited as well because it was against his interest as a current employee and consistent with his affidavit. Jurjo's reluctance to mention the names of the owners of Respondent is understandable inasmuch as he is still employed by Respondent and works selected weekends for Sacco's company,

Clove Coach.³ Furthermore, when Jurjo gave his affidavit, he was well aware of the fact that the other four employees who signed Union cards, the alleged discriminatees, were fired, and that the employees who did not sign cards remained employed. Though compelled to do so, Jurjo clearly testified against his best interests and his testimony should be given due regard in such dire circumstances. *See Dodge of Naperville*, 357 NLRB No. 183 (2012). Talvy's admonition makes no sense otherwise because Jurjo had nothing to fear from other employees except for the likely possibility that word about his Union sentiments could leak back to the owners.⁴ However phrased, Talvy's warning to Jurjo constitutes an implied threat of unspecified reprisal. *See Leather Center and SKD Jonesville Division, supra*.

Based on the foregoing, it is submitted that the ALJ erred by failing to find that Respondent, by Talvy, violated Section 8(a)(1) of the Act by interrogating Eduardo Jurjo as to whether he had signed a Union card and by impliedly threatening him by telling him to deny signing a Union card doing if asked by Joseph Gallitto or Steve Squitieri. *See Webco Industries and Michigan Roads Maintenance, supra; Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1192 (2004) (questioning employee with unknown sentiments about union violates Section (8)(a)(1)).

B. Respondent Violated Section 8(a)(1) and (3) of the Act by Terminating Angel Moreno.

1. The Record Shows that Respondent Discovered Moreno

³ In his affidavit, Jurjo stated, "Eli came to me and told me that Carlos (sic) Sacco had talked to the bosses so I would not be terminated.... Carlos and I have a good relationship. Whenever Carlos needs something he calls me. I do everything he needs me to, including getting him coffee, fixing the van, etc., which is the reason why he would talk to the bosses, so I would not get fired. (GC Exh. 14, pg. 3, Ins. 4-10).

⁴ Indeed, Jurjo's affidavit reveals that another employee informed him that Carlo Sacco told the employee that Sacco could not believe Jurjo had "stabbed [Respondent or Sacco] in the back" by signing a Union card. GC Exh. 14, pg. 2, Ins. 30-34. This statement is not cited for the truth of the matter asserted but to establish that Jurjo was aware of this rumor.

Organized the Mechanics and Fired Him For Doing So.

The ALJ erred by failing to find Moreno was terminated in violation of Section 8(a)(3) of the Act. The record establishes a strong prima facie case that: (a) Angel Moreno solicited employees to sign Union authorization cards; (b) Respondent became aware of Moreno's activities; and (c) Respondent, through acts of interrogation and threats, direct and implied, exhibited animus towards Moreno's attempts to organize its employees.

Moreno, a tow truck driver, was hired by Respondent in February 2009. Moreno solicited Montas, all the mechanics, and the parking attendant to sign cards for the Union on July 30 and August 2, 2010. On August 11, Respondent fired Moreno. (Tr. 387).

Luis Montas refused to sign the card given to him by Moreno and ripped it up in Moreno's face. (Tr. 543). Prior to Moreno's discharge, the record shows that Montas told Mechanic Carlos Valentin that the company was trying to find out who signed the cards and would fire them. (Tr. 112-15). Montas proceeded to interrogate Mechanic Yhou Tejada, a new employee, about signing a Union card and warned him to be "careful." (Tr. 215-16). Similarly, Talvy successfully interrogated Mechanic Eduardo Jurjo and warned him not to disclose the fact that he had signed a card to the owners of the company, Steven Squitieri and Joseph Gallitto. (Tr. 284-88, 319-20; GC Exh. 14, Ins. 25-27).

On August 11, Montas declared that the company had discovered which employees had signed cards and was going to fire them. (Tr. 115, 132). Moreno was "laid off" by his supervisor, Skip Davoli, the next day.

This chain of events leaves little doubt that Respondent fired Moreno because he attempted to organize the shop. Respondent was certainly aware of Moreno's Union activities. Among other things, Montas, a supervisor and agent of the Employer, had first-hand knowledge of Moreno's organizing activities, knowledge not refuted by either principals Steve Squitieri or Joseph Gallitto. See *Clark & Wilkins Industries*, and *Hunter Douglas, Inc.*, *supra*; see also *Grey's Colonial Boarding Home*, 287 NLRB 877, 882 (1987) (employee who refused to sign an authorization card for union, "might well have been the source" of employer's knowledge). Indeed, as discussed *supra*, Respondent subsequently fired Valentin and Tejada for pretextual reasons. Any remaining doubt about management's knowledge of the Union activities afoot in the mechanics bay was erased by: (1) Operations Manager Eli Talvy who interrogated Jurjo and warned him not to disclose the fact that Jurjo had signed a card for the Union; and (2) by Luis Montas who told Tejada that Moreno had been fired because he signed a Union card.

2. Respondent's Defense that it "Laid Off" Moreno for Economic Reasons Is Not Supported by the Record and Is Pretextual.

In all ways, Respondent has failed to carry its burden to show that Moreno was laid off for economic reasons.

The ALJ erred in failing to consider record evidence that establishes using outside towing services was significantly more costly than using Moreno. The evidence shows that every tow by Moreno saved Respondent money. Moreno was directly employed by Respondent and was paid \$14 per hour. (Tr. 28, 32-34, 65, 67, 442, 453, 457; GC. Exh. 17). Assuming, based on Davoli's testimony, that a tow usually took between half an hour and one hour, at most the cost to Respondent for a tow by Moreno was between \$7 and \$14.

By contrast, the cost of a Crown Towing tow was much higher. The Crown Towing invoice adduced by Counsel for the Acting General Counsel showed that the towing charges for April and May 2009 ranged from \$60 to \$407 and averaged \$168 per tow. (GC Exh. 17). Thus, Respondent saved \$150 on average, per tow, by using Moreno instead of Crown Towing.

Viewed another way, Moreno's fixed cost to the Employer at the time he was discharged was \$112 per day.⁵ At an average of three tows per day, the cost to use Crown Towing per day would equal approximately \$504.⁶

The ALJ erred in failing to consider record evidence that establishes Moreno's refusal to go out in the tow truck "on at least one and probably more occasions" was not a consideration in Respondent's decision to park the tow truck. (ALJD. pg. 12, Ins. 15-16; Tr. 600). Respondent, by its witnesses, claims that Moreno cost Respondent money because he refused to go out on tow calls. Davoli asserted that Moreno did this from the inception of his employment but that he did not fire or replace Moreno because "I needed a tow truck driver." (Tr. 438-440, 386). When asked why he did not look for a replacement driver, Davoli replied that he just thought Moreno was having a "bad day." (Tr. 438-49). This, of course, is ridiculous. Respondent did not show that there was a shortage of tow truck drivers, nor did it produce any documents to show that Moreno refused calls (Moreno admitted doing so only once),⁷ and it certainly did not punish him. Even assuming Moreno expressed reluctance to respond to some calls late in his shift

⁵ Montas worked approximately 8 hours per day at \$14 per hour.

⁶ Moreno and Davoli guessed that Moreno towed between four to six and zero to six vehicles per day, respectively. (Tr. 31; Tr. 468).

⁷ On the record, the ALJ incorrectly recalled that Moreno's testimony that he only refused to go out on the tow truck once because it was late in the afternoon. Instead, the ALJ claimed that Moreno admitted to refusing to go out on multiple occasions, which Moreno did not. (Tr. 454).

because of the EMT course he attended, he completed the course in June well before he was fired. Additionally, Respondent, by Skip Davoli, admitted that it did not consider Moreno's refusal to go out on calls when making the decision to cut the tow truck position. (Tr. 600).

The ALJ erred in failing to consider record evidence that Respondent gave Moreno a raise only one month prior to terminating him. (Tr. 67, 442). Respondent granted Moreno a \$2 per hour pay raise in July, yet terminated him less than one month later for "economic reasons." (Tr. 442). First, this pay raise occurred more than one year after the Respondent claimed Moreno consistently refused to go out on tow jobs, showing the Respondent condoned Moreno's alleged insubordination, or perhaps more likely, made it up. If Respondent was so perturbed by Moreno's alleged refusal to do his job, it would not have continued to employ him, let alone promote him. Second, Respondent granted Moreno's raise before it learned of the Union organizing drive. However, once it got wind of Moreno's involvement, it cut the very position it had just agreed to enhance. Notably, Moreno was fired on August 11, nine days after he solicited employees to sign cards for the Union, and less than one month since receiving a raise.

The ALJ erred in failing to draw an adverse inference into Respondent's failure to produce any towing statements or other documents that would support their defense that they laid Moreno off for economic reasons. "Failure of an employer to produce relevant evidence particularly within its control allows an adverse inference that such evidence would not be favorable to it." *Meyer's Transport of New York*, 338 NLRB 958 (2003) (quoting *Shelby Hospital*, 1 F.3d 550, 563 (7th Cir. 1993)); see also *Commercial*

Cabinets, 2002 WL 31758368 (N.L.R.B. Div. of Judges), *enfd* 89 Fed.Appx. 511 (6th Cir. Feb 09, 2004) (an adverse inference may still be drawn from the Respondent's failure to provide such evidence, which would be expected to be in their possession and to shed light on the issue). Although General Manager Carlo Sacco claimed the bills from Crown Towing were "astronomical," Respondent did not adduce any Crown Towing bills, which it had within its control. (Tr. 595). Thus, Respondent's failure to produce these invoices should lead to a conclusion that the invoices would not have supported its position.

Instead of producing documentary evidence within its control, Respondent simply adduced the hearsay testimony of those who were told of the decision to terminate Moreno rather than the testimony of the management officials who actually made the decision to terminate Moreno. Failure to call the decision-maker to the stand has been held to be "crippling, if not fatal, to Respondent's case." *Yellow Enterprise Systems*, 342 NLRB 804, 830 (2004); *Meyer's Transport of New York*, 338 NLRB 958, 973-84 (2003) (it can be assumed that the testimony of the decision-maker would not have supported the hearsay evidence respondent presented at trial); *see also United States v. Philatelic Leasing Ltd.*, 601 F.Supp. 1554 (S.D.N.Y.1985), *aff'd* 794 F.2d 781 (2d Cir.1986) (the production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse (citations omitted)). Davoli testified that the owners, Steve Squitieri and Joseph Gallitto, directed him to "park the truck" and lay off Angel Moreno. However, Squitieri and Gallitto failed to testify at the trial, which the ALJ failed to consider. *See Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 (2011)

(additional record evidence (and the absence of certain evidence), not addressed by the judge, also undermines his findings of a discharge decision).

Furthermore, the testimony provided by those only privy to the decision to terminate Moreno was unconvincing. For example, Davoli testified to the decisive meeting with the owners of Respondent, where Steve Squitieri said that Respondent was “spending a little bit more than normal” on Crown Towing bills. By contrast, Sacco claimed that the Crown Towing bills were “astronomical.” (Tr. 595). Neither Davoli nor Sacco provided detailed testimony about these meetings with the owners where they discussed cost-cutting measures. Both testified that the bulk of the meetings were devoted to the cost of automotive parts, not the tow truck position. Davoli admitted that he did not review any invoices during his meeting. Similarly, though Sacco testified that he reviewed invoices, he did not say from which months or year. Sacco minimally testified that the owners were not “seeing a real savings” with Moreno. (Tr. 593). Based on this testimony, it appears that Respondent did not actually review any towing invoices, but rather decided to use this nebulous claim of “cost savings” to shield its real reasons for terminating Angel Moreno: his Union organizing activities.

The ALJ erred in concluding that the Respondent “has replaced and continues to replace a substantial number of its older vehicles with new vehicles, thereby reducing the number of breakdowns that are likely to occur.” (ALJD pg. 12, Ins. 16-18). Respondent produced no such evidence. Respondent did produce R. Exh. 3, which evidences that it purchased 40 new vehicles in 2008, 27 new vehicles in 2009, and only 7 vehicles in 2010. What R. Exh. 3 actually shows is that even after purchasing 40 new vehicles in 2008, the Respondent still made the decision to hire a tow truck driver,

Moreno, in 2009 because, as Respondent admitted, it still needed a tow truck driver. Notably, Respondent did not introduce any documentary evidence showing that it sold, discarded, or otherwise retired any vehicles between 2008 and 2010, and the ALJ erred in concluding that it had retired and replaced vehicles.

The ALJ erred in concluding that the only evidence introduced into the record demonstrated that the two truck had not been used outside the facility. (ALJD pg. 7, fn. 9). The ALJ ignored record testimony that the tow truck had been spotted outside of Respondent's facility subsequent to Moreno's termination. (Tr. 61, 170) and that Respondent had renewed the insurance and registration on the vehicle. (Tr. 387, 475).

The ALJ also erred in concluding that Respondent offered Moreno a position as a van driver at the time of his leaving thus mitigating any inference of Respondent's "bad motive." (ALJD pg. 7, ln. 9; pg. 12, lns. 26-27). Moreno actually testified that he couldn't recall the date he was offered a position as a van driver and Sacco testified only that Respondent made the offer at some time after Moreno's discharge and Sacco wasn't even involved in the matter, just that he heard about it from someone else. (Tr. 75, 616). Again, the ALJ incorrectly read the record and made a conclusion based on facts not in evidence. The timing of the offer of employment is significant because the inferences that can be drawn from the offer differs depending on whether the offer was made at the time of Moreno's discharge or whether it was made after the charge was filed.

As Moreno testified, he was a tow truck driver and did not have a commercial driver's license that permitted him to carry passengers. It is wholly inappropriate for the ALJ to conclude that "it is not particularly difficult or time consuming to obtain the

necessary certification to be a van driver.” (ALJD pg. 7, Ins. 12-13). There was absolutely no evidence in the record establishing the ease or difficulty in obtaining the necessary certifications that would have permitted Moreno to become a certified passenger van driver in New York and this is not the type of information upon which the ALJ may take judicial notice of. (ALJD pg. 3, Ins. 30-32; Fed. R. Evid. 201(b)).⁸ What is established in the record is that Moreno was offered a position at some point after he was terminated but before the hearing and he was not qualified to accept the position.

The ALJ further erred in refusing to find animus based on the timing of the discharges because Respondent has a collective bargaining relationship with a different union over a different group of employees and because Respondent had recently participated in an NLRB election after which it recognized the Union as the representative for about 60 matrons. (ALJD pg. 11, In. 31-34). Furthermore, the ALJ concluded that because Respondent offered Moreno a job in a unit of already-organized employees (the drivers by Local 124), it could not have targeted him for his support in the instant case for Local 854. This conclusion is not supported by any record evidence and is not the type of fact of which a judge may take judicial notice. Fed. R. Evid. 201(b). What is more, employers often favor one union over another if that union is known to be more cooperative or management-friendly.

The foregoing evidence demonstrates that Respondent failed to meet its burden to establish its affirmative defense that it laid off Moreno for economic reasons, and that the defense it offered was pretextual. Thus, the evidence adduced at trial clearly

⁸ Federal Rule of Evidence 201(b) states that a judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

establishes that Respondent violated Section 8(a)(3) of the Act discharging tow truck driver Angel Moreno.

C. Respondent Violated Section 8(a)(1) and 8(a)(3) of the Act by Discharging Carlos Valentin.

1. The Record Shows that Respondent Determined Valentin Supported the Union and Fired Him For Doing So.

The ALJ erred in failing to find that Valentin was terminated in violation of Section 8(a)(3) of the Act. The evidence establishes that: (a) Carlos Valentin signed a Union authorization card; (b) Respondent became aware of Valentin's activities; and (c) Respondent, by Luis Montas, exhibited animus towards Valentin by creating the impression employees' Union activities were under surveillance and by threatening Valentin.

On August 2, Valentin, a mechanic, signed a Union authorization card given to him by Angel Moreno. (Tr. 41-43, 104, GC Exh. 8).

A day or two later, the "floor supervisor" Luis Montas, told Valentin that he and others were "crazy" for signing Union cards and that Respondent would "kick" them out. (Tr. 108, 112, 139). Later that week, Montas approached Valentin alone and said that the company was trying to find out which employees had signed Union cards. (Tr. 113-15). On the day before Respondent fired Angel Moreno, Valentin testified that Montas declared that the company had found out who signed the Union cards and was going to fire them. (Tr. 115, 132).

These acts of intimidation by Montas are entirely consistent with the testimony of Yhou Tejeda, another Spanish-speaking mechanic who was threatened by Montas in

the same manner. (Tr. 216-16). Aside from the animus evident by such statements, it is clear that Montas directed his ire towards Valentin and Tejada because he suspected they had signed cards for the Union, and in fact, knew Tejada had signed because Tejada admitted to having done so. The fact that Montas bragged to Valentin that Respondent was going to fire everyone who signed Union cards the day before Angel Moreno was fired, clearly warrants a finding that Respondent knew or strongly suspected that Valentin had signed a card for the Union. See *Clark & Wilkins Industries*, and *Hunter Douglas, Inc. v. NLRB*, *supra*.

2. Respondent Did Not Carry its Burden to Show that it Discharged Valentin for Legitimate Reasons.

First, Respondent claims Valentin was discharged for poor work performance. During Valentin's 10-week stint as a mechanic for Respondent, a reasonable estimate shows that he worked on approximately 50 to 250 vehicles. (Tr. 98, 421). Davoli testified that Valentin's work "always" had to be redone, but recalled only two such occasions. On one occasion, Davoli stated that Valentin failed to properly replace an alternator, which resulted in the van being towed back to the facility. (Tr. 392, 478-79). Davoli could not recall the date of this incident, Montas, his second-in-command did not corroborate the incident, and Respondent adduced no records to substantiate Davoli's testimony. Davoli also asserted stated that Valentin failed to repair brakes on a van and claimed that the van rolled off the lift and almost crashed into another van. (Tr. 392-93). Davoli did not recall the date of this incident either. (Tr. 477, 480). Montas simply recalled that the van was placed on a lift where Montas discovered that the brake calipers were upside down. (Tr. 515-16, 543-44). Montas failed to corroborate Davoli's assertion that the van almost crashed or was otherwise a problem. Although Davoli

testified that he retained work order sheets involving “heavy” jobs, such as brake jobs, if anything went wrong, Respondent adduced no documents of any kind to substantiate its claim that Valentin was a poor mechanic. (Tr. 408-09). To the contrary, Valentin stated that he was never disciplined or asked to redo a job. In fact, Valentin testified that Davoli, Talvy and Sacco complimented him, particularly with regard to the speed at which he worked. (Tr. 117-118).

The ALJ erred in concluding that Valentin was unqualified to perform his job functions because he failed to complete a mechanic’s course. (ALJD pg. 8, Ins. 10-17.) Though Davoli and Montas paint Valentin as an unqualified mechanic, Davoli offered Valentin the mechanic position after watching him work for about a month and noticing his potential. As Valentin testified, he had years of relevant training; through a professional diesel mechanics program in Puerto Rico and his experience performing brake jobs, transmissions changes, and other work on cars of friends, neighbors, and family.⁹ Davoli obviously saw this experience when promoting Valentin to mechanic. Moreover, Carlo Sacco testified that mechanics’ experience ran the gamut, from those who only knew how to change oil to those who could do entire engine jobs (Tr. 625), and that their pay was adjusted accordingly. Based on Sacco’s testimony, it is clear that some mechanics were more experienced than others, and even if Valentin was not the most skilled mechanic in the shop, he was obviously qualified to hold a mechanic position at D&J.

⁹ The ALJ concluded that because Valentin did not complete the one-year program, he was unqualified, yet Respondent produced no evidence to show any of the other mechanics it employed had completed a mechanic program or had taken mechanic courses at all. In making this conclusion, the ALJ ignored the record evidence showing Valentin’s experience prior to working for Respondent and during his time with Respondent.

Despite the alleged verbal counseling, Respondent continued to employ Valentin up until it learned of his involvement in the Union campaign. Thus, this counseling and alleged poor workmanship cannot be used as a legitimate justification for terminating Valentin. It was only after it learned of the organizing drive that it terminated Valentin, thus, showing Valentin's union activities were the motivating factor in his termination.

It is clear from the record that Respondent did not make a habit of keeping unskilled mechanics on its payroll. Particularly, Valentin testified about another mechanic who was terminated during his tenure for doing shoddy work on a van (Tr. 119-21). That mechanic was fired on the spot. However, Respondent allowed Valentin to continue his employment – alleged poor work and all – until after it learned of the Union organizing drive.

Valentin signed a Union authorization card and was fired 11 days later, almost immediately after the main employee organizer Angel Moreno. Moreover, Valentin was told by Luis Montas that Respondent had found out which employees had signed cards and was going to fire them. Five employees signed cards and four of them, including Valentin, were fired. Conversely, Respondent claimed that Valentin inadequately performed two repairs out of perhaps 250. In either case, there was no damage and no punishment of any kind.

The foregoing demonstrates that Respondent failed to meet its burden to show that it discharged Carlos Valentin for legitimate reasons. Thus, the prima facie evidence adduced at trial by Counsel for the Acting General Counsel establishes, by a preponderance of the evidence, that Respondent violated Section 8(a)(3) of the Act by discharging Carlos Valentin.

D. Respondent Violated Section 8(a)(1) and (3) of the Act by Terminating Christopher Rodriguez.

1. The Evidence Shows that Respondent's Defense Is Pretextual and that Respondent Discharged Rodriguez Because It Suspected that He Signed a Union Card.

The ALJ erred in failing to find that Rodriguez was terminated in violation of Section 8(a)(3) of the Act. The evidence establishes that: (a) Christopher Rodriguez signed a Union authorization card; (b) Respondent suspected Rodriguez had signed a Union card; and (c) Respondent, by Eli Talvy, informed Rodriguez that he had been fired for signing a Union card.

Rodriguez, a parking attendant, signed the Union authorization card given to him by Angel Moreno on July 30. (Tr. 156-57, GC Exh. 6).

On August 16, Respondent fired Rodriguez. (Tr. 164, 166-67, 352). When Rodriguez proceeded to Carlo Sacco's office to discuss the matter, Squitieri told Rodriguez that he was fired and refused to speak further with him. (Tr. 166). Squitieri did not testify and Sacco did not refute the conversation. (Tr. 612). John Olivieri, the self-styled, unpaid security/payroll employee, testified that he called Squitieri at home on Saturday and told him that he had fired Rodriguez because he had left the facility unsecure the previous Saturday, had disappeared, and then had arrogantly refused to answer Olivieri's questions regarding his whereabouts. (Tr. 351, 353-54). Squitieri did not testify and therefore failed to corroborate this hearsay testimony.¹⁰ Accordingly, Counsel for the Acting General Counsel was denied the opportunity to examine Squitieri concerning this alleged conversation and it should be disregarded entirely.

¹⁰ Counsel for the Acting General Counsel repeatedly objected to the conversation. (Tr. 353).

As discussed in more detail, *infra*, because this is a mass discharge where all card signers with the exception of Jurjo were terminated, Respondent's knowledge of Rodriguez's union-activity can be inferred.

Olivieri's testimony concerning his conversation with Steve Squitieri should not be credited. It was not corroborated by Squitieri. Indeed, Respondent presented an entire case without the testimony of Joseph Gallitto and Squitieri, the latter apparently directly involved in the decisions to discharge Angel Moreno and Rodriguez. Respondent offered no explanation for their non-appearance. Standing alone, Olivieri's testimony is worthless.

Third, notwithstanding the foregoing, Olivieri was good friends with Squitieri, and despite his testimony to the contrary, would have known through Squitieri of suspected Union activities at the facility. In that regard it is quite suspicious that Olivieri and Squitieri did not contact Talvy, Rodriguez's supervisor, to determine what Talvy knew or to solicit his views concerning any discipline of Rodriguez. (Tr. 556) Indeed, no one even allowed Rodriguez to explain his version of the events which took place on Saturday. (Tr. 166, 612-13).

The Board has found that such a "failure to conduct a meaningful investigation or to give the employee an opportunity to explain has been regarded as an important indicia of discriminatory intent." *K&M Electronics*, 283 NLRB 279, 291 n.45 (1987); see also *All Pro Vending*, 350 NLRB 503, 514 (2007) ("Enforcement of rules against employees without sufficient prior investigation of their alleged misconduct, including withholding from the accused details of the accusation and denying them an opportunity to explain or deny their alleged misconduct, is evidence of unlawful motive"); *Diamond*

Electric Mfg, 346 NLRB 857, 860 (2006) (“the failure to conduct a meaningful investigation or to give the employee an opportunity to explain may, under appropriate circumstances, constitute an indicia of discriminatory intent.”). Here, there was no probative testimony as to why Rodriguez was not given a chance to explain his side of the story. See also *Amptech, Inc.*, 342 NLRB 1131, 1146 (2004), *enfd.* 165 Fed. Appx. 435 (6th Cir. 2006) (“failure to inquire of [disciplined employee] as to what had occurred constituted a rush to judgment attributable to Respondent’s unlawful motivation to take adverse action against the leading pro-union employee on the premises”).

According to Board law, Respondent’s failure to investigate or provide Rodriguez with an opportunity to explain himself should lead to a conclusion that Respondent had an ulterior motive for terminating Rodriguez. The record demonstrates that Squitieri seized upon Olivieri’s report to justify Rodriguez’s termination. Thus, the foregoing evidence establishes that Respondent discharged Christopher Rodriguez because he engaged in activities in support of the Union, thereby violating Section 8(a)(1) and (3) of the Act.

E. Respondent Violated Section 8(a)(1) and (3) of the Act by Discharging Yhou Tejada.

1. Contrary to Respondent’s Assertions, The Record Shows that Yhou Tejada Did Not Quit and that Respondent Discharged Him for Signing a Union Card.

The ALJ erred in concluding that the General Counsel failed to establish a prima facie violation regarding Tejada’s termination. (ALJD pg. 13, Ins. 1-2). The record evidence establishes that: (a) Yhou Tejada signed a Union authorization card; (b) Respondent by Luis Montas, exhibited animus towards Tejada by interrogating and threatening him; and (c) that Tejada did not quit, but rather was fired Respondent.

On August 2, Tejeda signed a Union authorization card he received from Moreno. (Tr. 41-43, 213, 247; GC Exh. 9). On or about August 4, Montas, who also received a card from Moreno, approached Tejeda and asked him if he had spoken to the tow truck driver. Tejeda asked, "About what?" Montas replied, "It's about a card that he's promoting. Be careful if you sign it." (Tr. 215-16). On August 11, Respondent fired Moreno. On the day of Moreno's termination, Montas told Tejeda that Respondent had fired the tow truck driver because he signed a Union card and that everyone else who signed a card was going to be fired too.

Montas statements comprise unlawful acts of interrogation, an implied threat of reprisal, a threat to discharge, and the creation of the impression of surveillance of employees' union activities in violation of Section 8(a)(1) of the Act.

On September 21, the evidence shows that Montas repeatedly (four times) directed Tejeda to "punch out" and "go home" after Tejeda allegedly refused to follow Montas' orders to put air into a tire because he was working on a motor. (Tr. 221, 240-42). Then, Montas went into Davoli's office. In short order, Davoli, who did not witness this incident, came out and told Tejeda to turn in his uniform. (Tr. 221-22, 248). It is clear from Montas's and Davoli's testimony that Respondent ordered Tejeda to punch out and turn in his uniform.

Furthermore, Respondent's version of the events is not logical. Particularly, Montas claimed that when Tejeda arrived to work at 2 p.m. that day, he refused to do a job. It is difficult to conceive that Tejeda – who had no prior disciplines or reported insubordination – would refuse to commence work in the beginning of his shift. It also does not follow that Tejeda would so brazenly refuse work assigned by Montas, the

man who helped him get his job, and from whom he took work orders from on a daily basis.

There are further inconsistencies in Respondent's case. Particularly, Respondent concocted a story about Tejeda's second job, but adduced no evidence that he actually had another job and presented conflicting testimony on the matter. For example, Montas testified that Tejeda said he was leaving for another job. However, Davoli failed to corroborate any mention of a second job, testifying only that he asked Tejeda what he was doing and that Tejeda responded that he was leaving. (Tr. 396).

The ALJ erred in concluding that there was no credible evidence to show that Tejeda was terminated in retaliation for his Union activity. (ALJD pg. 13, Ins. 5-7). While the ALJ concluded that Tejeda's termination was too far removed from the terminations of the other discriminatees, it is clear Respondent seized upon the first opportunity available to terminate Tejeda, as it did with the other discriminatees. Even if his termination was temporally removed from the others, as is discussed more fully below, the action should still be found unlawful under a mass discharge theory.

In sum, the evidence shows that Tejeda signed a Union card, and that he was the target of several Section 8(a)(1) statements by Luis Montas, which revealed knowledge or suspicion of Union activity by Respondent as well as animus. Then Tejeda, a good employee, was discharged under dubious circumstances. Respondent's attempt to show that Tejeda quit is clearly pretextual. Even the most generous view of Respondent's case does not reveal any evidence sufficient to rebut the prima facie case established by Counsel for the Acting General Counsel. In fact,

testimony from General Counsel's witnesses and Respondent's witnesses alike is devoid of evidence indicating Tejeda quit his job.

Accordingly, the record establishes that Respondent discharged Yhou Tejeda because he engaged in activities in support of the Union, thereby violating Section 8(a)(3) of the Act.

F. Knowledge of Each Employee's Union Activity is Not Needed to Find Unlawful Termination Under Mass Discharge Theory.

Given the pretextual reasons for the layoffs, the evidence supports a finding that the Respondent knew or suspected that the laid-off employees were engaged in union activities, but, even if the Respondent did not know or suspect each individual discriminatee of engaging in union activity, the General Counsel has still met the initial *Wright Line* burden through application of mass discharge theory. See e.g., *Evenflow Transp., Inc.*, 358 NLRB 1, 3-4 (2012); *Delchamps, Inc.*, 330 NLRB 1310, 1315 (2000). If layoffs are intended to discourage union support or in retaliation for union activity then the Board has found it unnecessary for the General Counsel to directly prove an employer's knowledge of each individual employees' union activities. See, e.g. *Evenflow*, 358 NLRB at 3-4 (concluding employer's decision to discharge employees was motivated by a desire to send an antiunion message); *ACTIV Industries, Inc.*, 277 NLRB 356, 356 n.3 (1985). In mass discharge cases, the Board has focused on "the Employer's motive in ordering mass discharges, rather than the pro-union or anti-union status of particular employees." *Delchamps*, 330 NLRB at 1317; see also *Evenflow*, 358 NLRB at 3 ("In cases like this involving a mass discharge, the Board has held that the crux of the violation is the employer's motivation for undertaking such a broad action.").

In *Evenflow*, the Board found the layoffs of five employees constituted a mass discharge. 358 NLRB at 3. There, the union began organizing in July 2010 and in September 2010, the employer terminated five employees, only three of whom had engaged in union or protected activities. The Board found this constituted a mass discharge that met the initial *Wright Line* burden. *Id.* at 3. The Board defined the General Counsel's burden in a mass discharge case as "establish[ing] that the Respondent ordered the mass layoff to discourage union activity altogether or in retaliation for the union activity of *some* of the employees." *Id.* (emphasis added).

The court has upheld the Board's application of mass discharge theory in the case of an employer who proffered different reasons for laying off employees. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168-69 (D.C. Cir. 1993). In *Davis Supermarkets*, the employer laid off eight employees, six of whom had signed union cards. *Id.* The employer gave differing reasons for the six layoffs. The court upheld the Board's finding that the six employees were laid off as part of a mass discharge, despite the varying reasons for their layoffs. *Id.* at 1168-69.

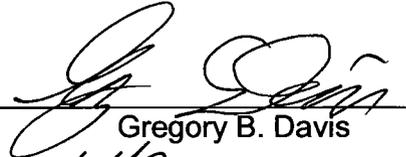
The Board has also treated employees discharged on different dates as part of the same mass discharge. See e.g., *Guille Steel*, 303 NLRB 537 (1991) (finding a mass discharge where the employer fired four employees on Jan. 19, 1989, nine more employees the following day, and seventeen more employees by Jan. 31); *Majestic Molded Products, Inc. v. NLRB*, 330 F.2d 603 (2d Cir. 1964) (finding a mass discharge occurred where the employer laid off eight employees on July 10, 1962, and five more on July 12).

Mass discharge is appropriate in the instant case because the Respondent first made the decision to lay off employees suspected of engaging in Union activities in order to rid the plant of such Union supports and to send a message to employees generally. The Respondent here laid off each employee as soon as a pretextual reason to do so became available. The Respondent was able to quickly find pretextual reasons to lay off Moreno, Valentin, and Rodriguez; the three were laid off within four days of each other and nine days after the union authorization cards were signed. When the Respondent could not find a reason to fire Tejada, the Respondent forced the issue and claimed Tejada quit. Though Jurjo was not terminated, he was the only employee who signed a Union card who did not, and based on his demonstrated failure to cooperate throughout the trial, he clearly got Respondent's message that unionization was unacceptable.

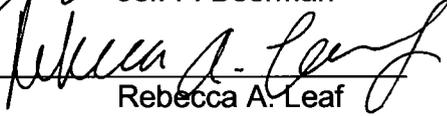
As in *Evenflow*, these employees were all connected by virtue of being residual employees not yet represented by a union, whose layoffs were motivated by the Union activity that had taken place. In the instant case, the Respondent has advanced different reasons for firing each of the four employees: Moreno for economic reasons, Valentin for poor performance, Rodriguez for insubordination, and the Respondent claims Tejada quit. However, as in *Davis Supermarkets*, it is appropriate for the Board to find these layoffs constitute a mass discharge even though each layoff was for a different reason "if the dismissal is part of a mass layoff for the purpose of discouraging union activity," as occurred in the instant case. *Id.* at 1168 (internal quotation marks omitted) (citing *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985)). While the Employer waited to lay off Tejada, Tejada was part of the

mass discharge because his layoff sprung from the same decision to retaliate against Union activity that led to the layoffs of the three other employees. Even if the Board were to find in the instant case that the time period between the initial layoffs and the later Tejada layoff was significant, the Board should still find a mass discharge in the case of the initial three layoffs.

Dated at New York, New York
This 24th day of July, 2012


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Affidavit of Service

This brief has been served on July 24, 2012, according to the Board's Rules and Regulations, as indicated below:

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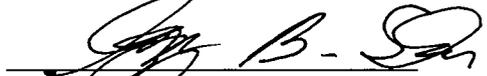
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I have read the above affidavit of service and to the best of my knowledge, information and belief, believe the statements contained therein to be true.



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