UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GREEN FLEET SYSTEMS, LLC

and Cases 21-CA-100003
21-CA-115910
21-CA-119154
21-CA-121368

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PORT DIVISION

Lisa E. McNeill & Cecelia Valentine, Esqs.,
for the General Counsel.
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for the Respondent Company.[1]
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for the Charging Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. In early 2012, the Teamsters Union began a campaign to organize the truck drivers at Green Fleet Systems, Inc. (GFS), a drayage (short-haul freight-transport) company operating around the Ports of Los Angeles and Long Beach, California. The Union sought to organize, not only the approximately 95 drivers that GFS had hired as employees (hereafter, "company drivers"), but also the approximately 35 drivers that GFS had retained through so-called "lease and transportation" agreements as "independent contractor[s]" (hereafter, "lease drivers").[2]

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[1] On January 12, 2015, after post-hearing briefs were filed, Attorney Lenz filed a Notice of Withdrawal of Counsel stating that the law firm no longer represents the Respondent.

[2] GFS does not itself use the term "lease driver." However, as indicated by the General Counsel and the Union, the term accurately reflects that the subject drivers signed "lease and transportation" and "vehicle lease" agreements with GFS and continued to lease their trucks from the Company during the period when the alleged unfair labor practices occurred. Further, unlike the term used by GFS—"Independent Owner Operator" (IOO)—it does not imply one way or the other whether they are actually independent contractors, a primary issue in this case.

The Union initially contacted or met with the company drivers and lease drivers away from the Company's facility—at the drivers' homes, at the ports, or at other locations. However, in late January 2013, the Union formally notified the Company of the campaign by presenting it with a letter signed by 14 drivers on the organizing committee. Thereafter, beginning around May 2013, the Union began leafleting outside the facility on a regular basis. It also subsequently conducted two brief strikes at the facility, in August and November 2013. Approximately 30–40 company drivers participated in each of the strikes. Two lease drivers, Mateo Mares and Amilcar Cardona, likewise participated in both strikes. Around the same time, in July 2013, Mares and Cardona also filed wage claims with the California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) alleging that the Company had misclassified them as independent contractors.

The complaint in the instant proceeding alleges that the Company committed approximately 50 unfair labor practices during the foregoing period—from February 2013 through February 2014—in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. Among other things, the complaint alleges that the Company encouraged drivers to harass and provoke union supporters and to report their union activity, condoned a driver's assault on a union supporter, threatened drivers with various reprisals, including discharge and plant closure, if they supported the Union, interrogated drivers about their union sympathies and solicited them to sign antiunion petitions, restricted drivers' access to the facility after their shifts, and threatened to sue drivers who gave affidavits to the NLRB in support of the foregoing allegations. In addition, it alleges that the Company unlawfully discriminated against two prounion company drivers by issuing one a written warning after the August strike and by deliberately assigning the other inferior trucks and delaying giving him a truck key after the November strike. Finally, the complaint also alleges various violations with respect to lease drivers Mares and Cardona, including refusing to assign Cardona work and removing the mobile fuel RFID tags from both of their leased trucks after the November strike, threatening to sue and to terminate them if they did not withdraw their DLSE wage claims against the Company, and ultimately terminating them in January 2014 because of their support for the Union and DLSE wage claims against the Company.[3]

The Company denies that it committed any of the alleged violations. Moreover, with respect to the allegations involving Mares and Cardona, it asserts that they were properly classified as independent contractors rather than employees, and were therefore not even covered or protected by the Act.[4]

A hearing to address the foregoing allegations and defenses was held over 17 days from August 25 through September 17, 2014, in Los Angeles.[5] Thirty-four witnesses testified,

[3] See the June 18, 2014 consolidated complaint (GC Exh. 1(au)). The General Counsel withdrew four of the allegations, set forth in paragraphs 9(b), (c), (d), and 11(a) of the complaint, on the first day of hearing (Tr. 6–7).

[4] The Board's commerce jurisdiction is undisputed and well established by the record.

[5] The General Counsel's unopposed motion to correct the hearing transcript is granted.

including 17 company drivers and 8 lease drivers. Thereafter, on October 22, 2014, each of the parties—the General Counsel, the Charging Union, and the Respondent Company—filed briefs.[6]

FINDINGS OF FACT

As in many cases of this kind, the record is "fraught with conflicting testimony" (*Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1317 (7th Cir. 1989)), requiring frequent credibility judgments. Making such credibility judgments is not an exact science. See, e.g., *NLRB v. Hasbro Industries, Inc.*, 672 F.2d 978, 985 (1st Cir. 1982); *U.S. v. Harrison*, 296 F.3d 994, 1006 (10th Cir. 2002), cert. denied 123 S.Ct. 919 (2003); and *Morales v. Artuz*, 281 F.3d 55, 61–62 (2d Cir. 2002), cert denied 123 S.Ct. 152 (2002). Nevertheless, a number of factors are traditionally considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). All such factors have been considered here. Language and translation difficulties have also been taken into account (22 of the 25 company and lease drivers testified through a Spanish-language interpreter), as well as the effects of age and time on memory, particularly of details such as dates that might have no importance to the witnesses themselves.

As fully discussed below, with few exceptions the General Counsel's witnesses proved to be more credible or reliable than the Company's witnesses. Accordingly, as the credited testimony and other evidence amply supports most of the complaint allegations under extant Board law, I find that the Company violated the Act substantially as alleged, including with respect to lease drivers Mares and Cardona, who I find were "employees" protected by the Act during the relevant period.[7]

I. ALLEGED UNFAIR LABOR PRACTICES INVOLVING COMPANY DRIVERS

A. Alleged 8(a)(1) Statements and Conduct

1. Labor Consultant Ricardo Pasalagua

The complaint alleges that most of the unlawful coercive statements were made by Ricardo Pasalagua, a nonattorney labor consultant. GFS retained Pasalagua in February 2013, shortly after the Union notified it of the organizing campaign, to help educate the workforce and

[6] In the meantime, the General Counsel petitioned the local federal district court for preliminary injunctive relief under Section 10(j) of the Act, which the court (Philip S. Gutierrez, J.) granted in part and denied in part based on the affidavits and exhibits filed by the parties. See *Garcia v. Green Fleet Systems, LLC*, 2014 WL 5343814 (C.D. Cal. Oct. 10, 2014). The Company's unexplained request for judicial notice of a YouTube video that was posted following the court's order is denied.

[7] Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive.

defeat the union campaign. Beginning the following month, and continuing through early 2014, Pasalagua conducted a series of meetings with the drivers. Although unscripted, the meetings always addressed the union campaign or related topics such as the strikes and unfair labor practice charges. And only those drivers who were not open union supporters were invited or allowed to attend.[8]

Several (at least six–eight) of the meetings were relatively large meetings in the drivers' room (which could accommodate about 30–35 drivers) or the warehouse (which could accommodate at least 60–70 drivers). They were usually held on Saturday mornings, during the first hour of the workday. In addition to Pasalagua, several company managers and supervisors attended, including Owner and President Gary Mooney, HR and Safety Director Darlene Stevens, General Manager Toby Slayman, and Safety Supervisor Giselle Rodriguez. Stevens and Mooney usually opened the meetings with brief remarks. As neither spoke Spanish, and most of the drivers were not fluent in English, their remarks were translated by Pasalagua. Pasalagua then himself addressed the drivers. The meetings were then opened up to the drivers to comment and ask questions. (Tr. 1698, 2035, 2371, 2409–2410, 2580.)

Pasalagua also held numerous meetings with smaller groups of drivers in a company conference room during this same period. These meetings were typically held on weekdays (Monday–Friday), in the mid-to-late afternoon, during the changeover from the day to evening shift, when drivers were at the facility to either finish or begin their shift. Unlike the large meetings, no managers or supervisors attended these meetings. (Tr. 2024–2025, 2029–2030, 2203–2205, 2471, 2580, 2644, 2758.)

Beginning in April 2013, and continuing through the end of the year, Pasalagua also interviewed driver applicants during the initial hiring process. He typically interviewed the applicants in a conference room after Stevens and Rodriguez had already met and interviewed them. He then orally provided his recommendation to Stevens, and Stevens and Rodriguez then

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[8] See Tr. 1695, 1939, 1946–1947, 2029–2031, 2219–2221, 2264–2269, 2496–2497, 2500, 2636–2639, 2642, 2656, 2658, 2661–2662. All of the management witnesses called by the Company were reluctant to admit that Pasalagua was retained, and that his meetings were held, even in part to help dissuade the drivers from supporting the union campaign. Indeed, Pasalagua himself specifically denied during cross-examination that he was retained to ensure that GFS remained union free. He also denied that he informed the drivers about reasons not to support the Union at the meetings, and that he cared whether the drivers ultimately chose to support or oppose the Union. (Tr. 2631–2634.) However, Pasalagua had admitted during earlier cross-examination that Mooney "absolutely" told him he wanted GFS to remain nonunion (Tr. 2571). See also Tr. 2625 ("Union avoidance – I mean that's one of the things that we could – how could you – union prevention, union avoidance, yeah. If you are proactive, absolutely. If not, shame on you."). Pasalagua also admitted that he made a PowerPoint presentation to the drivers in May 2013 and February 2014 (R. Exh. 63; Tr. 2471–2473), which included several legal quotations that would reasonably tend to discourage union representation (and none that would tend to encourage it). Finally, it is undisputed that Mooney and Stevens met with Pasalagua before the large meetings to "discuss strategy" about how they would address the campaign at the meetings (Tr. 2201–2202), and that Mooney, Stevens, and other managers wore antiunion shirts at some of the meetings (Tr. 1987, 2273).

discussed the matter and made the hiring decision. (Tr. 2112–2117, 2228–2230, 2614–2615, 2628–2629.)[9]

a. Instructing employees to harass and provoke union supporters (complaint par. 10(b), (d), (e))

The complaint alleges that, on various dates in July, August, and September 2013, Pasalagua unlawfully instructed employees to harass union supporters, direct derogatory remarks and gestures to them, and provoke them into fights to justify discharging them. The General Counsel presented four drivers to testify about these allegations: Yasser Castillo, Carlos and Paco Sanchez,[10] and Martin Herrera.

Castillo testified that Pasalagua made such statements at two meetings in the drivers' room. The first was in July 2013. Pasalagua told the drivers they should harass and provoke the union supporters into a fight so that the Company would have a reason to discharge them. The second was a meeting in mid-September 2013 where Pasalagua talked about a recent demonstration the union supporters had conducted against GFS outside Skechers, one of GFS' biggest accounts. Pasalagua said the demonstration had put everyone's job in jeopardy and that they should continue harassing the union supporters. (Tr. 641–643, 734–737, 827.) Castillo testified that Pasalagua also made similar statements at the small meetings he attended, suggesting that they try to provoke the union supporters by cutting their trucks in front of them when they were in line at the ports (Tr. 635–637).

Herrera likewise testified that Pasalagua made such statements at two large meetings. At one, Pasalagua said the Company was trying to find a way to discharge the union supporters. At the other, Pasalagua urged the drivers to pressure and bother the union supporters. Like Castillo, Herrera testified that this second meeting was the same one where Paslagua talked about the union demonstration at Skechers. (Tr. 856–860.) Herrera also testified that, during the August strike, while he was waiting in the drivers' room to begin his shift, he observed Pasalagua tell four drivers in the hallway, Ada Juarez, Ana Rodriguez, Jose Santos, and another antiunion

[9] Rodriguez denied that Pasalagua interviewed applicants, and testified that, if he did so, she did not know about it (Tr. 2751–2758). I discredit this testimony as it is contrary to the overwhelming weight of the evidence. Pasalagua himself testified that he personally interviewed seven applicants at the facility between April 3 and December 16, 2013. Further, three of the applicant-drivers he admittedly interviewed—Yasser Castillo, Carlos Sanchez, and Reina Hernandez—testified that Rodriguez escorted or directed them to their interviews with Pasalagua (Tr. 608, 1024, 1113–1114). Castillo and Hernandez also testified that, after the Pasalagua interviews were finished, they discussed the interviews with or in the presence of Rodriguez (Tr. 609–610, 1115). I credit the drivers' foregoing testimony as it was both credible and consistent with the record as a whole, which indicates that Rodriguez is the drivers' primary supervisor and the only supervisor or manager who is fluent in Spanish. Finally, as indicated above, Stevens testified that, after receiving Pasalagua's oral recommendation, she and Rodriguez discussed all the available information before they made the final hiring decision. It is highly unlikely that Stevens would never have mentioned Pasalagua's interviews or recommendations during those discussions. And Stevens never denied that she did so.

[10] Paco and Carlos Sanchez are brothers. They are also Castillo's uncles.

driver named Amado,[11] to give the picketers the middle finger and call them names like "pigs" or "trash" (Tr. 867–871, 912–916).

Paco and Carlos Sanchez provided similar testimony. Paco testified that Pasalagua told the drivers at a large meeting in September 2013 to provoke the union supporters into fighting, suggesting that they call them names and cut in front of them at the ports. (Tr. 952–953, 996–997). Carlos also testified that he heard Pasalagua tell drivers at one of the meetings in the drivers' room to harass and provoke the union supporters so that they could be discharged. He testified that Pasalagua made the comment after the formal meeting was finished, while standing off to the side with a group of antiunion drivers, including Xiomara Perez Barragan, Guillermo Amaya, Amado, and two other drivers named Jesus and Porfirio. (Tr. 1037–1040.)

I credit the foregoing testimony. While there are some differences in the details, the accounts are substantially similar and corroborative. Further, all four drivers initially opposed the union campaign, and their signatures appear on at least two of the three antiunion petitions or letters that were circulated among the drivers (CP Exh. 25; R. Exh. 22; GC Exh. 27).[12] As discussed more fully below, Castillo even made some antiunion posters for his fellow antiunion drivers to put in their car windows. It is also undisputed that all four were invited to and attended the meetings with Pasalagua before they became open union supporters.[13]

Moreover, there are substantial reasons to discredit the contrary testimony by the Company's witnesses. Pasalagua himself was a particularly poor witness. He frequently strayed from and failed to answer the questions asked, and, as discussed elsewhere, his testimony on other significant matters was clearly contradicted by the record as a whole.

There are also good reasons to discount or doubt the testimony of the Company's managers and supervisors who attended the large meetings. As indicated above, neither Mooney nor Stevens speak Spanish. Although both testified that they "huddled" with Pasalagua's assistant during the meetings, who "whispered" translation of Pasalagua's remarks, they admitted that it was sometimes inaudible or difficult to follow (Tr. 1943–1944, 2209–2210). See also Pasalagua's testimony, Tr. 2496, 2581. Further, as discussed, infra, Stevens and Mooney proved to be an unreliable witnesses regarding other significant matters.

Slayman likewise is not fluent in Spanish. Further, he admitted that he did not huddle with Mooney and Stevens (Tr. 2437–2439). He testified that, instead, he relied on another interpreter or Pasalagua himself, who would translate everything from Spanish into English for the entire group. However, this was corroborated by only one other company witness, driver Juan Carballo, who vaguely testified that he "got lost" trying to follow what Pasalagua said because there was "a translation in English for some of the drivers" (Tr. 3182). Further, the

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[11] See Tr. 2919 (Amado is on the antiunion committee). The terms "antiunion" and "prounion" are used throughout this decision as a simple way to distinguish employees who opposed the union campaign from those who supported it. The terms do not necessarily mean that the particular employees opposed all unions or supported all unions.

[12] Herrera and the Sanchez brothers recalled signing only the first two petitions or letters. However, Herrera's and Paco Sanchez' signatures also appear on the third.

[13] Castillo and Herrera began supporting the Union during the November 2013 strike. The Sanchez brothers did so sometime after February 2014.

testimony makes no sense. The record indicates that all of GFS' approximately 95 company drivers are Hispanic and speak Spanish as their first language, with the exception of only 2 drivers who are Filipino or Vietnamese (Tr. 1939, 1945, 2020, 2267, 2472). And there would have been no need for Pasalagua's assistant to whisper translation to Mooney and Stevens if someone was translating out loud for everyone.

As for Rodriguez, while she is bilingual, she admitted that she did not pay much attention to what Pasalagua said at the meetings (Tr. 2763). Moreover, as discussed elsewhere, like Pasalagua and Stevens, her testimony on other significant matters was clearly contradicted by the record.

There are also substantial reasons to discredit the testimony of the four drivers who testified for the Company regarding the allegations: Xiomara Perez Barragan, Ada Juarez, Juan Carballo, and Salvador Sandoval.[14] Barragan—who the complaint alleges acted as an agent for the Company in opposing the union campaign—was a particularly poor historian. For example, she denied that she spoke at any of the meetings, testifying that she only asked questions (Tr. 2849–2851, 2927–2929). She also denied that she ever encouraged drivers to oppose the Union (Tr. 2931–2932), or expressed her views against the Union to other drivers (Tr. 2976). But, even the management witnesses testified otherwise. See Mooney's testimony, Tr. 1699–1700, 1943–1944 (Barragan was "fairly outspoken" and expressed her views about the Union at a lot of the meetings); Stevens testimony, Tr. 2032–2035, 2218–2219, 2267 (Barragan was "pretty vocal" and both spoke and asked questions at the meetings); and Slayman's testimony, Tr. 2372–2373, 2415–1417 (Barragan was "verbal" and both spoke and asked questions in at least three of the meetings).[15] Further, it is undisputed that Barragan drafted and circulated all three of the antiunion petitions or letters (Tr. 2856, 2917–2918, 2921–2924).

Juarez, Carballo, and Sandoval were also poor witnesses. For example, all three denied that Barragan spoke or even asked any questions at the meetings (Tr. 3174, 3181, 3183, 3308, 3314, 3357, 3362).[16] Further, both Carballo and Sandoval testified that the only large meetings

[14] None of the other six driver-witnesses identified by Herrera and Carlos Sanchez were called to testify by the Company.

[15] The only management witness who denied that Barragan spoke at the meetings was Rodriguez. Indeed, she initially testified that she has never heard Barragan speak about the Union at all, either to her or to the drivers. (Tr. 2680–2681). However, she later confirmed on cross examination that Barragan is "very vocal" in her opposition to the Union and says that it is her right not to support the Union (Tr. 2763).

[16] Juarez eventually admitted on further cross-examination that Barragan said "the same thing I said one time that I stood up, that we're not in agreement with the Union" (Tr. 3362). It is clear that both Juarez and Sandoval knew about the complaint allegations regarding Barragan prior to testifying. The Union's charges specifically alleged that Barragan acted as a company agent (see GC Exh. 1(a), (f)). And it is undisputed that Pasalagua read all of the charges to most of the drivers, including Juarez and Sandoval, at one or more of the large and small meetings (Tr. 2515–2516, 2598, 2600–2601, 3329, 3381). As for Carballo, he denied ever attending such a meeting. He also denied any recollection of signing a "declaration" against the charges that Pasalagua prepared for him and other drivers to sign just 5 months earlier (Tr. 2651–2653). However, he acknowledged that his signature appears on the declaration. See Tr. 3201–3203; and CP Exh. 26.

they attended were in the warehouse; indeed, Carballo testified that he was not even aware that there were any meetings in the drivers' room (Tr. 3195–3196, 3306). However, Mooney, Rodriguez, and Barragan testified, consistent with the General Counsel's witnesses, that most of the large meetings were in the drivers' room rather than the warehouse (Tr. 1698, 2760, 2848, 2926–2927).[17] And, as indicated above, the General Counsel's witnesses specifically testified that the alleged statements were made at meetings in the drivers' room. Moreover, like Rodriguez, Sandoval admitted that he did not pay attention at the meetings (Tr. 3316–3317, 3330).

Finally, there is substantial evidence that antiunion drivers did, in fact, harass and attempt to provoke prounion drivers. Several drivers, including Castillo, Herrera, Paco and Carlos Sanchez, Hildebrando Mejia, and Agustin Ramirez, credibly testified that Barragan frequently called the prounion drivers "rats," "dogs," "pigs," and other derogatory names (Tr. 768–769, 774–775, 860–862, 955–956, 998, 1045–1046, 1083–1084, 1088, 1302, 1360). Although Barragan and other drivers and managers denied that she did so, I discredit their testimony for essentially the same reasons stated previously.

Castillo and Herrera credibly testified that Barragan and other antiunion drivers, including Guillermo Amaya, Armando Rivas, and Jose Santos, also frequently harassed them at the ports by taking pictures of them with their cell phones for no apparent reason (Tr. 643–644, 761, 774, 877–878).[18] Indeed, Barragan never denied that she took such pictures (she was never asked), and Amaya, Rivas, and Santos were not called by the Company to testify.

Evidence was also presented regarding several specific incidents, including the following:

(1) Mejia, who became an open union supporter in April 2013, testified that, in July 2013, Barragan and another antiunion driver named Blanca, referred to the union supporters who were in the drivers' room waiting to start their shift as "motherfuckers," and their prounion shirts and buttons as "shit" and "garbage" (Tr. 1308–1309).[19] I credit Mejia's testimony. Blanca was not called by the Company to testify. And while Barragan generally denied making any derogatory comments about prounion drivers, as discussed above her testimony was not credible.

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[17] I therefore discredit Pasalagua's testimony that only one of the large meetings was held in the drivers' room (Tr. 2484–2485).

[18] Herrera filed a written complaint about Rivas taking such pictures in December 2013. HR Director Stevens responded that the Company could not do anything about it because Rivas denied it and she could not ask to see his personal cell phone to verify whether he had done so. (GC Exh. 22; Tr. 879–881, 2098).

[19] See also Tr. 2919 (Blanca is on the antiunion committee). Mejia filed a written complaint about the incident with Stevens, but never heard back from her about it. Stevens testified that she investigated but took no action because Barragan and Blanca denied it. (GC Exh. 24; Tr. 1309, 2111–2112.) However, this was not corroborated by either Barragan (she was never asked) or Blanca (who was not called to testify). And while General Manager Slayman testified that he sat in on Stevens' investigations and took notes, he could not recall any details about the investigation of Mejia's complaint (Tr. 2383, 2407), and his notes were never introduced.

(2) Castillo testified that, in November 2013, after he became a union supporter, antiunion drivers Rivas and Santos confronted him while he was waiting in line at the port, yelled profanities at him, threatened to beat him up, and falsely reported to the dispatcher that he was sleeping in the bathroom. Again, Castillo's testimony was both credible and uncontroverted. As indicated above, neither Rivas nor Santos was called by the Company as a witness.[20] See also the discussion in section I.A.6 below regarding the subsequent, February 2014 incident between Castillo and Amaya in the company parking lot.

(3) Herrera and Ramirez, who became an open union supporter in May 2013, credibly testified that Barragan and Amaya harassed them in December 2013 by following them around after they finished their shift, referring to them as "pigs" and "garbage". When Ramirez got upset about it, Amaya challenged him to a fight. (Tr. 874–875, 1353–1358).[21] I credit this testimony as well. As indicated above, Amaya was not called by the Company to testify. And while Barragan denied that the incident occurred (Tr. 2879), as discussed above she was not a credible witness. Further, she clearly had animosity toward Ramirez, as the second antiunion petition she drafted and circulated in July 2013 specifically complained about him campaigning for the Union during working hours (R. Exh. 22; Tr. 2921–2922).

The Company argues that all of the foregoing direct and circumstantial evidence supporting the allegations should be rejected because it is "illogical to believe" that Pasalagua, an experienced labor consultant, would have made the alleged unlawful statements (Br. 11). However, what is logical or illogical to believe an agent would do on behalf of the principal may depend on more than just the extent of the agent's knowledge and experience. Other factors, including the strength of the agent's and the principal's perceived self interests and the severity of the potential penalties or other remedial consequences of not complying with the law, may be equally or more important. See, for example, *Portola Packaging, Inc.*, 361 NLRB No. 147, slip op. at 18–20 (2014); *Jensen Enterprises, Inc.*, 339 NLRB 877 fn. 3 (2003); *Mead Corp.*, 256 NLRB 686, 692 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983); and *Monroe Auto Equipment Company*, 230 NLRB 742, 750 (1977), where the Board found that the employers' labor consultants committed clear 8(a)(1) violations notwithstanding their extensive knowledge and experience.[22]

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[20] Castillo filed a written complaint about the incident with the HR department, but never heard back from the Company (Tr. 668–672, 758–761; GC Exh. 20.) Stevens testified that she did not take any action on Castillo's written complaint because she was on vacation at the time and never saw it (Tr. 2118–2119). However, Castillo credibly testified that he also spoke to Stevens about the incident and that she told him she would investigate and get back to him.

[21] Herrera filed a written complaint about the incident with Stevens. However, Ramirez credibly testified that Stevens never interviewed him about the incident. And Stevens later informed Herrera that the Company could not do anything because Barragan and Amaya denied it and Amaya had not actually physically attacked Ramirez. (Tr. 879–881, 1358, 2098–2099; GC Exh. 22.)

[22] See also *Connecticut General Life Insurance Co. v. New Images of Beverly Hills,* 482 F.3d 1091 (9th Cir. 2007); and *In re Sealed Case*, 754 F.2d 395, 401 fn. 5 (D.C. Cir. 1985) (discussing why severe sanctions are necessary to punish and deter deliberate discovery violations and abuse by litigants and their counsel). It is well established that the NLRB may order only remedial and not punitive relief. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940). As discussed more fully below, the Board's standard affirmative remedy where an employer's managers,

In any event, as discussed above, inherent probability is only one of many factors to consider in assessing credibility. And while it is an important factor, it obviously does not trump the actual evidence in every case. Here, I find that Pasalagua's experience as a labor consultant does not outweigh the General Counsel's evidence for several reasons. First, as discussed above, only those drivers who the Company believed opposed the Union were invited to and attended the meetings. As Rodriguez testified, "Whoever has been at the meetings does not want the Union" (Tr. 2765). Thus, Pasalagua had no reason to believe at the time that the drivers would report his comments to the Union or the NLRB. Second, it is undisputed that he did not follow a script in any of his meetings (Tr. 2656–2658). Nor were any contemporaneous minutes or notes of the meetings offered into evidence. Third, as discussed above, Pasalagua was a particularly poor witness; his testimony was frequently evasive and/or clearly contradicted by the record as a whole. Fourth, unlike the General Counsel's witnesses, the witnesses called by the Company to corroborate Pasalagua's testimony were also not credible or reliable.

Accordingly, as there is no dispute that Pasalagua acted as the Company's agent, I find that the Company violated the Act as alleged. Cf. *Fry Foods, Inc.*, 241 NLRB 76, 81 (1979), enfd. 609 F.2d 267, 270–271 (6th Cir. 1979) (employer unlawfully instructed supervisors to harass returning strikers, suggesting that the supervisors try to get the strikers angry, start arguments with them, and incite them to curse back at them so that they could be discharged); *T&T Machine Co.*, 278 NLRB 970, 974 (1986) (employer unlawfully suggested to an antiunion employee that he provoke a fight in the shop with a prounion employee so that the union supporter could be fired for starting a fight); and *St. Francis Medical Center*, 347 NLRB 368 (2006) (employer unlawfully condoned abusive behavior toward a union supporter by rejecting her request to remove flyers posted all over the facility by employees that called her an "idiot" and suggested she quit if she was unhappy there), and cases cited therein.

b. Threats of job loss and/or plant closure (par. 7(a)–(c), (e))

The complaint also alleges that, at one or more of the meetings between April and December 2013, Pasalagua unlawfully threatened drivers with job loss and/or plant closure if they engaged in union or concerted activities. Three company drivers provided testimony supporting these allegations: Yasser Castillo, Martin Herrera, and Reina Hernandez.

As indicated above, Castillo testified that, at a meeting in the drivers' room in September 2013, Pasalagua said that the union supporters had put the drivers' jobs in danger by conducting a demonstration against GFS outside Skechers, one of GFS' biggest accounts. Pasalagua stated that, if GFS lost the account, all the drivers would lose their jobs. (Tr. 643, 737.) Herrera likewise testified that, at one of the large meetings prior to November 2013, Pasalagua stated that the union supporters were bothering Skechers, one of GFS' strongest accounts, and the account could be lost and the Company could close as a result (856–858).[23] Hernandez testified that, at a

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supervisors, or agents make unlawful coercive statements during a union organizing campaign is an order requiring the employer to post a notice to employees stating that it will not make such statements again.

[23] Driver Carlos Sanchez testified that Pasalagua also stated—at both a large meeting and at a small meeting that he, his brother Paco, and Castillo attended—that GFS would lose customers like Skechers if the Union came in (Tr. 1041, 1079–1080, 1092). However, this testimony was

small meeting she attended with three other antiunion drivers in late 2013, Pasalagua stated, without any explanation, that the Union was not going to come in, but if it did, Mooney would close the company. (Tr. 1122–1124, 1134, 1146–1148, 1157).

I credit all three drivers' testimony. As indicated above, both Castillo and Herrera initially opposed the union campaign, and it is undisputed that both were therefore invited to and attended the large and small meetings with Pasalagua before they began openly supporting the union campaign during the November 2013 strike.

Moreover, Pasalagua admitted on cross examination that he talked about Skechers during at least one of the large meetings. Safety Supervisor Rodriguez likewise testified that Pasalagua did so.[24] Although both denied that he said the account was in jeopardy, I discredit their denials. As discussed elsewhere, neither was a credible or reliable witness. Indeed, Pasalagua initially denied that he said anything about Skechers, and only admitted that he did so under continued cross-examination. And, as indicated above, Rodriguez admitted that she did not pay much attention to what Pasalagua said at the meetings.

Further, it is undisputed that 68 company and lease drivers signed a letter to send to Skechers and other GFS customers around the same time, which expressed concern that the Union's "negative comments about Green Fleet Systems" would "hurt GFS[']s business" and cause "detrimental consequences for all of us and our families," and asked the customers to "please ignore any negative propaganda the Teamsters may send you" (GC Exh. 27; Tr. 2923–2924). See also the testimony by company witness Santos Carpio, one of the lease drivers who signed the letter. Carpio admitted on cross examination that, at a meeting with lease drivers in September 2013, Pasalagua translated a similar statement by Mooney that GFS was at risk of losing customers because of the Union bothering them (Tr. 3081–3084).

As for Reina Hernandez, who was not hired until late August 2013, she also initially opposed the union campaign and signed an antiunion petition (CP Exh. 25). Further, it is undisputed that the Company knew that she did not support the Union, and that she was therefore likewise invited to and attended meetings with Pasalagua at least through February 2014.[25]

Moreover, the Company never presented any evidence specifically refuting Hernandez' testimony about the meeting. Neither Pasalagua nor Ada Juarez, the only one of the three identified antiunion drivers called by the Company to testify, was ever specifically asked about the meeting.[26] Both were asked only generally whether any such threats to close were made. And, again, while both denied it, I discredit their denials for the same reasons discussed earlier.

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not corroborated by Castillo or Paco (they were never asked) or any other witness. Under the circumstances, I find that it is insufficient to satisfy the General Counsel's burden of proof.

[24] Tr. 2566, 2583–2584, 2761–2762. Accordingly, I discredit the testimony of company witnesses Juan Carballo and Salvador Sandoval that Pasalagua and other managers never talked about Skechers or other customers or clients at the meetings (Tr. 3197, 3315–3317).

[25] Hernandez testified that she eventually signed a union card in January 2014 (Tr. 1144). However, there is no record evidence that the Company knew this at the time.

[26] The other two drivers identified by Hernandez were Ricardo Banos, who is her relative, and Ana Rodriguez. It is undisputed that both oppose the union campaign, and that the Company knows this (Tr. 2177, 2611–2612, 2634–2635, 2784).

In agreement with the General Counsel and the Union, I also find that Pasalagua's statements were unlawful. It is well established that an employer has a protected right to express opinions or views about unionization or union activity. However, because they can be highly coercive, predictions of adverse economic consequences such as plant closure "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [the employer's] control." *NLRB v. Gissel Packing*, 395 U.S. 575, 618 (1969). By this standard, Pasalagua's statement in the small meeting with Hernandez that Mooney would close the facility if the Union came in was clearly unlawful, as Pasalagua provided no explanation whatsoever for the statement. See, e.g., *Smithfield Foods, Inc.*, 347 NLRB 1225, 1228 (2006); and *T&H Investments, Inc.*, 291 NLRB 409 (1988), enfd. mem. 899 F.2d 19 (9th Cir. 1990), and cases cited there.

Pasalagua's statement at the larger meeting that GFS could lose the Skechers account and go out of business because of the union demonstration arguably presents a closer issue. Pasalagua did not say GFS "would" lose the Skechers account and go out of business, only that it "could" do so, as a result of the demonstration. And it is certainly hypothetically possible that a company, faced with demonstrations outside its facilities against another employer, might decide to terminate its contract with that employer, effectively causing the employer to go out of business.

However, the same legal standard applies regardless of whether an employer says it "would" or "could" (or "will" or "may") close. See *Fleming Companies, Inc. v. NLRB*, 349 F.3d 968, 974 (7th Cir. 2003), citing *Gissel*, 395 U.S. at 618–619. Thus, the mere hypothetical possibility of closure is not enough to protect such statements; the employer must have a reasonable belief based on objective fact beyond the employer's control that closure is a probable consequence of the union activity. See, e.g., *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659–660 (6th Cir. 2005); *Michigan Roads Maintenance Co*, 344 NLRB 617, 622–623 (2005); and *President Riverboat Casinos of Missouri*, 329 NLRB 77 (1999).

Here, there is no evidence that the Union or its supporters actually urged Skechers to terminate its contract with GFS. The record indicates that they simply urged Skechers to contact GFS and demand that it stop violating labor laws. See lease driver Mares' testimony, Tr. 305–307 ("we went to Sketchers to protest so that Sketchers could come and talk to Gary, so that he would stop violating the law"); and a related "Justice for Port Drivers" article and attached petition, R. Exh. 12 (urging the public to petition Skechers to use its "power to demand that its vendor [GFS] stop violating workers' rights and U.S. labor laws"). As indicated by the Union (Br. 151), there is also no evidence that Skechers actually made such a demand on GFS or threatened to terminate the contract. Accordingly, as Pasalagua's statement to the drivers suggested the opposite, and would reasonably tend to coerce them in deciding whether to support or oppose the Union, the statement was unlawful. [27]

[27] General Manager Slayman testified that President Mooney at some point "assure[d]" the drivers that Skechers was supporting GFS in the labor dispute (Tr. 2413). And driver Barragan, who drafted the letter to send to Skechers, testified that it was never actually sent (Tr. 2923–2924). However, the Company does not contend that this testimony is sufficient to establish that Pasalagua's unlawful statement about Skechers was effectively cured or repudiated. And it clearly is not sufficient under extant law. See *Passavant Memorial Area Hospital*, 237 NLRB

c. Interrogations and threats of reprisals (par. 7 (d), (f)).

The General Counsel also alleges that Pasalagua twice unlawfully interrogated driver Reina Hernandez about her union sympathies and activities and/or implicitly threatened her with unspecified reprisals if she did not oppose the union campaign: the first time in August 2013, and the second time in January 2014.[28]

August 2013 conversation

As noted above, Hernandez is related to Ricardo Banos, one of the antiunion drivers. She previously worked at GFS for a brief, 2-month period in late 2012. She reapplied in 2013, and was interviewed in late August, around the time of the first strike. According to Hernandez, she met first with Rodriguez, who then sent her to Pasalagua. Pasalagua told her that the Company was going to rehire her because she was a good driver and had a good reputation. He then said,

> As you can see outside there are some men who want to bring the Union into the company. Since you have been recommended by Ricardo Banos, please stay away from them, don't speak to them, don't sign anything. I know that you're going to be with the Company, because you were recommended by Ricardo Banos. If . . . the guys from the Union . . . continue to bother you, just remind [them] that you're protected under Section 7 [of the National Labor Relations Act].

(Tr. 1113–1115, 1156.)

Pasalagua admitted that he interviewed Hernandez. However, he denied that he mentioned the Union or said that she should not sign anything. He also denied that he mentioned the fact that Banos had recommended her. Indeed, he denied that he ever mentioned the Union to any of the drivers he interviewed, or that a particular driver had recommended them. He testified that, at HR Director Stevens' request, he simply asked the applicants a few questions from a "Behavioral Interview Guide" he prepared, such as why the applicant was interested in joining the Company at that time, what the applicant liked most and least about his/her last job, and how the applicant would respond to certain situations, such as an accident. (Tr. 2553–2557, 2563, 2614, 2633–2634; R. Exh. 68.)

I credit Hernandez. As discussed above, Pasalagua was not a credible or reliable witness. Further, his testimony that he never mentioned to any of the driver-applicants that they had been referred by a particular driver is clearly contradicted by the record as a whole. It is undisputed that the Company hires primarily based on referrals from other drivers (Tr. 2113, 2260). And, like Hernandez, drivers Castillo and Carlos Sanchez testified that Pasalagua specifically mentioned during their interviews that they had been referred by other drivers who did not

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138 (1978); and *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003) (discussing requirements for an effective repudiation of unlawful conduct).

[28] Paragraph 7(d) and (f) of the complaint alleges that Pasalagua interrogated and threatened "employees," and that the first incident occurred in October. However, consistent with the evidence, the General Counsel's posthearing brief contends that only Hernandez was interrogated and threatened by Pasalagua and that the first incident occurred in late August.

support the Union (Tr. 609, 1025). Even antiunion driver Ada Juarez, one of the Company's own witnesses, admitted on cross examination that Pasalagua mentioned that another driver, Ana Rodriguez, had referred her (Tr. 3379–3380).[29]

Moreover, Stevens acknowledged that GFS already employed someone, Director of Operations Hassing-Allen, who regularly did standard "behavioral" interviews when hiring office staff (Tr. 2116, 2227). Stevens never explained why she wanted Pasalagua, rather than Hassing-Allen, to do such interviews of the drivers. In the absence of any such explanation, it is a reasonable inference that the Company wanted Pasalagua, who was retained to address the union campaign, to focus the "behavioral" interviews on behavior relevant or related to the union campaign.[30] As noted by the General Counsel, the inference is supported by and consistent with the results; it is undisputed that every one of the drivers Pasalagua interviewed (including Hernandez) opposed the union campaign, at least initially, after they were hired (Tr. 2634–2635).[31]

I also find that Pasalagua's statements were unlawful. It is well established that an employer cannot tell its employees to stay away from union supporters, to not talk to union supporters, or to not sign a union card. See, e.g., *Pratt (Corrugated Logistics), LLC*, 360 NLRB No. 48, slip op. at 9 (2014); *Hearst Corp.*, 281 NLRB 764, 777 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988); *Nice-Pak Products, Inc.*, 248 NLRB 1278 (1980), affd. mem. 654 F.2d 724 (7th Cir. 1981); and *Boatel Alaska, Inc.*, 236 NLRB 1458, 1464 (1978). As indicated by the General Counsel, such statements carry an implicit threat of reprisal, particularly, as here, in the context of other unfair labor practices.

January 2014 conversation

As discussed earlier, drivers Castillo and Herrera eventually switched sides and became open union supporters during the November 2013 strike. Nevertheless, Hernandez continued to talk to them and other prounion drivers such as Ramirez. As previously noted, she also eventually signed a union card herself in January 2014, but there is no evidence that she openly supported the Union at the time.

Hernandez testified that, on one day in January 2014, she was talking to Castillo, Herrera, and Ramirez in the drivers' room before her shift, when she noticed Pasalagua looking at her. A short while later, she passed by Pasalagua in the hallway. Pasalagua said, "I saw you talking to the guys from the Union." She said, "Yes, what's the problem?" Pasalagua said, "No, no, I just want to be sure that you are 100 percent with the Company. That you won't betray us." She said, "Don't worry. It's okay. I'm with the Company." Pasalagua said, "Okay, that's fine." (Tr. 1126, 1128–1130, 1151.)

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[29] As noted above (fn. 26), Ana Rodriguez is also a known opponent of the union campaign.

[30] An alternative explanation might be that Hassing-Allen does not speak Spanish. But, there is no actual evidence of that. And the record indicates that it was common practice for Safety Supervisor Giselle Rodriguez or one of the dispatchers to sit in and translate when a non-Spanish speaking manager met with a non-English speaking driver or applicant (Tr. 2754, 2310).

[31] I therefore discredit Stevens' testimony to the extent it suggests that the decision to have Pasalagua do the "behavioral" interviews of the driver-applicants had nothing to do with the union campaign (Tr. 2116).

Pasalagua denied that this conversation ever occurred (Tr. 2531). However, for essentially the same reasons stated above, I credit Hernandez. In agreement with the General Counsel, I also find that Pasalagua's comments to Hernandez constituted unlawful interrogation, as they impliedly questioned her about protected concerted activity, and under all the circumstances would reasonably tend to restrain or coerce an employee in the exercise of such activity. See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); and *Beverly California Corp. v. NLRB*, 227 F.3d 817, 835 (7th Cir. 2000).[32]

d. Statements and threats regarding the Union's unfair labor practice charges (par. 7 (g), (h))

The General Counsel also alleges that, around February 2014, Pasalagua made statements to drivers Reina Hernandez and Paco and Carlos Sanchez about the Union's unfair labor practice charges that unlawfully created the impression of surveillance and threatened to sue or take other unspecified reprisals against drivers who gave affidavits supporting the charges.

As indicated above, it is undisputed that, in addition to the large meetings in the drivers' room and warehouse, Pasalagua frequently held relatively small meetings in the conference room, sometimes with just one or two drivers at a time. It is also undisputed that Pasalagua spoke to the drivers at several of those meetings about the unfair labor practice charges that had been filed against the Company.

Hernandez testified that she attended one such meeting with Pasalagua by herself in February 2014. Pasalagua had a paper in his hand and said he had called her in because he had received 39 allegations, and one of the drivers making allegations was her friend Castillo. Pasalagua said that many of Castillo's allegations were against him and were lies. He said that when he won, he was "going to go against [Castillo] to sue him for everything he had said." Hernandez responded that she was not aware of the allegations and asked how she was supposed to help Pasalagua. Pasalagua said he was just "venting" and wanted her to convey the message to Castillo and distance her friendship from him. He also mentioned Paco and Carlos Sanchez, saying he was sure they were on Castillo's side. (Tr. 1131–1133, 1152–1153.)

Paco and Carlos Sanchez testified that they likewise met with Pasalagua in such a meeting around the same time. Paco testified that Pasalagua said he knew who had given statements to the Labor Board; that he had a list of everyone who did so. He specifically mentioned Castillo, who he knew was their nephew. Pasalagua said that Castillo's allegations against him had compromised or damaged his name; that Paco and Carlos were witnesses; and that he wanted them to testify that Castillo's allegations were false. He said he was going to file a countersuit against all of them if they did not do so, noting that they could be fined $10,000 or sentenced up to a year in jail. He told them that if Castillo dropped the charges, "everything

[32] The General Counsel argues, consistent with the complaint, that Pasalagua's earlier statements to Hernandez in August 2013 also constituted unlawful interrogation, as they were designed to gauge her union sympathies (Br. 132). However, it is unnecessary to reach this issue as such a finding would be cumulative and not affect the remedy. *Modern Management Services, LLC*, 361 NLRB No. 24 fn. 3 (2014).

would be okay," but if not, "hold on for the consequences, because I'm coming with everything." (Tr. 961–965, 1000.)

Carlos Sanchez essentially corroborated Paco's testimony. He testified that Pasalagua said he had called them into the meeting because their nephew Castillo had filed charges; that he wanted them to testify against Castillo; and that, if they did, "everything would be fine," but, if they did not, they should "hold on for the consequences." (Tr. 1057–1059).

Pasalagua admitted that he met and discussed the unfair labor practice charges with Hernandez and the Sanchez brothers; that he knew the Sanchez brothers were related to Castillo; and that he primarily focused on the allegations against himself (such as telling drivers to harass and provoke union supporters). Pasalagua also admitted that he asked the Sanchez brothers if they would give an affidavit saying the alleged incidents never happened, and that he read the bottom of the charge form to them where it says, "Willful false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, section 1001)." However, Pasalagua testified that he advised the Sanchez brothers of their *Johnnie's Poultry* [33] rights, i.e. he made clear to them that the meeting was voluntary, and asked them to give an affidavit and mentioned possible fines and imprisonment for making false charges only after they agreed that the allegations were false and asked how someone could file such false charges. Further, he denied that he specifically mentioned Castillo in either meeting or told Hernandez and the Sanchez brothers that he was going to sue Castillo or anyone else, or that they should "hold on for the consequences" if the allegations were not withdrawn. (Tr. 2524–2525, 2529, 2598–2601, 2605–2608, 2618–2619.) In support, Pasalagua produced typed summaries of the two February meetings, which he said were prepared based on notes taken during the meetings by his assistant. See R. Exh. 66; and Tr. 2531–2540, 2605.

I credit Hernandez and the Sanchez brothers. As discussed above, Pasalagua was not a credible or reliable witness. Further, he clearly knew that Castillo was involved as of February 2014 because the most recent unfair labor practice charges filed the previous December had identified him as an alleged disciminatee (GC Exh. 1(s), (y)). As discussed above, Pasalagua also knew that Hernandez talked to Castillo and that the Sanchez brothers were related to him. Thus, there is every reason to believe their testimony that Pasalagua mentioned Castillo during the meetings about the charges.

As for the written summaries Pasalagua proffered, those summaries are obviously not contemporaneous or complete transcriptions of the meetings. Indeed, the summary of the meeting with the Sanchez brothers makes no mention whatsoever of Pasalagua's admitted comment about potential fines or imprisonment for filing false charges. (Pasalagua testified that his assistant must have "forgot" to include it, Tr. 2648.) Rather, on their face, the summaries appear to be self-serving documents prepared in anticipation of litigation. Moreover, it is not clear when the summaries were prepared. Although Pasalagua testified that he and his assistant usually prepared such summaries at the end of each week, no date appears on the summaries. Nor are they signed or attested by his assistant (who was not called by the Company to testify). Accordingly, I give the summaries no weight. See *Dandridge Textile*, 279 NLRB 89, 91–92 (1986). See also *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1046 (9th Cir. 1999) ("Courts

[33] 146 NLRB 770 (1964).

are rightfully wary when parties create self-serving documents and seek to offer them as business records").

In agreement with the General Counsel, I also find that Pasalagua's statements—that he knew and had a list of everyone who gave affidavits to the NLRB, and that he would sue Castillo and/or the Sanchez brothers if the allegations were not dropped—were unlawful. See *North Electric Co.*, 225 NLRB 1114, 1116–1117 (1976), enfd. mem. 588 F.2d 213 (6th Cir. 1978) (employer's unqualified statement indicating that it had access to affidavits employees had given to the NLRB was unlawful because it incorrectly created the impression that such affidavits were available to the employer, and would reasonably tend to discourage employees from providing such affidavits); and *Postal Service*, 350 NLRB 125 (2007), reconsideration denied 351 NLRB 205 (2007), affd. 526 F.3d 729 (11th Cir. 2008) (supervisor's statement that employee was "going to be sorry" he filed a charge against him and "had better get a good attorney because he was going to sue" was unlawful as it would reasonably be construed as a threat of retaliation and was not incident to contemplated litigation).

2. Safety Supervisor Giselle Rodriguez

The complaint also alleges that Safety Supervisor Rodriguez committed several unfair labor practices.[34] It is undisputed that Rodriguez is the company drivers' direct supervisor. She works in a partitioned cubicle next to the dispatch office. Although her cubicle is inside the closed office area, it has a large sliding window on one wall that faces the drivers' room directly across the hallway. One of her primary responsibilities is assigning a truck to each of the night-shift company drivers and giving each a key to the assigned truck when the day shift driver has returned with it. She notifies each night-shift driver that the assigned truck is ready by calling out the driver's name through the open window. She then hands the key to the driver through the window.

a. Soliciting employees to sign an antiunion petition (par. 6(a))

The General Counsel alleges that, about February 2013, shortly after the Union notified the Company of the organizing campaign, Rodriguez solicited driver Jaime Moreno to sign the first antiunion petition.[35]

Moreno was hired in April 2012 and worked the night shift through most of 2013. He testified that, in February 2013, he was waiting to get his first assignment from the dispatcher

[34] Several of the alleged violations by Rodriguez were initially resolved pursuant to a bilateral informal settlement dated September 26, 2013 (R. Exhs. 35, 36). However, the General Counsel subsequently set aside that settlement and reinstated the allegations based on the Company's alleged continuing unfair labor practices (GC Exh. 1(au)). Although the Company's answer asserts that there was no valid basis to set aside the settlement, as discussed herein I have found the Company did, in fact, commit numerous postsettlement unfair labor practices. Accordingly, the settlement was properly set aside. See *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 43 (2006), and cases cited there.

[35] Paragraph 6(a) of the complaint alleges that Rodriguez solicited "employees" to sign an antiunion petition. However, the General Counsel's posthearing brief contends that only Moreno was solicited by Rodriguez to do so.

when he heard Rodriguez call out to driver Barragan, who was in the drivers' room. Rodriguez told Barragan that HR Director Stevens was waiting for her. Barragan then walked over to the door leading to the management offices, and Stevens opened it for her to come in. When Barragan went in she did not have anything in her hands. However, about 5 minutes later, she came back out of the office area holding an open folder, and she proceeded to walk outside to the parking lot with it. A few minutes later, the dispatcher gave him his assignment. On his way out, he asked Rodriguez what Barragan had gotten from the office. Rodriguez said it was a list to get signatures against the Union. Rodriguez asked him if he would sign it. She said he was a good worker and she would not want him on the other side; she wanted him to be "on her side." However, he said no, he would not sign it. He asked Rodriguez why Barragan had been selected to do it. Rodriguez said that Barragan was "an untouchable, impeccable person." As he had experienced problems with Barragan in the past, he replied that he did not think of her the same way. (Tr. 1169–1175, 1198–1200).

I credit Moreno's testimony.[36] Although Rodriguez denied that this conversation ever occurred (Tr. 2735), as discussed above she was not a credible or reliable witness. Further, as previously mentioned, it is undisputed that Barragan drafted and circulated all three of the antiunion petitions or letters. Although Barragan denied that any of the petitions were ever kept in the office area while being circulated, as fully discussed infra with respect to Barragan's alleged agency status and unlawful conduct, I find that a preponderance of the credible evidence establishes otherwise.

In agreement with the General Counsel, I also find that Rodriguez' solicitation or encouragement of Moreno to sign the antiunion petition was coercive and unlawful. See generally *Placke Toyota, Inc.*, 215 NLRB 395 (1974). See also *Mid State Sportswear, Inc.*, 168 NLRB 559, 658 (1967), enfd. in part 412 F.2d 537 (5th Cir. 1969).[37]

b. Interrogating and soliciting grievances from employees
(par. 6(b), (c), (d), (e))

The General Counsel also alleges that, between March and December 2013, Rodriguez unlawfully interrogated and/or solicited grievances from three company drivers: Juan Huerta, Paul Quinto, and Reina Hernandez.

[36] Based on the record as a whole, it is possible that the conversation actually occurred somewhat later, in March 2013. However, it is unnecessary to decide which month the conversation occurred, as it would not affect my overall credibility resolutions.

[37] The General Counsel does not allege or argue that Rodriguez thereby also unlawfully interrogated Moreno. Accordingly, I have not addressed that issue.

The complaint alleges that Rodriguez also assisted in circulating an antiunion petition on January 8, 2014 (par. 6(f)). However, the only evidence of this is testimony that she was nearby in the hallway talking to driver Blanca when Barragan was in the drivers' room soliciting a new driver (Winter) to sign a petition on that date (an incident more fully discussed infra). Further, neither the General Counsel nor the Union address the allegation in their post-hearing briefs. Accordingly, the allegation is dismissed.

March 2013 conversation with Huerta

Huerta was hired in 2011 and worked the day shift. He began going to union meetings in November 2012, but did not begin openly supporting the Union until April or May 2013. He testified that about a month or two before that, in March 2013, he was in the hallway returning his paperwork at the end of the shift when Rodriguez called to him through her window and asked to speak to him. When he came over, Rodriguez said, "What is it that the drivers want? Everything here is fine. The drivers already have good benefits such as medical and sick days and vacations." She also mentioned that the Union was bothering one of the drivers by going to his house, and asked if the Union was going to his house too. He told her no. Rodriguez also told him the Union only wanted his money and could not guarantee anything. She also said that if the Union went on strike he would have to support it, and the Company could bring more drivers in to replace him. (Tr. 1274–1279, 1284–1287).

Rodriguez denied that the conversation ever occurred (Tr. 2725–2727). However, I discredit her denial for all the reasons previously discussed. In agreement with the General Counsel, I also find that Rodriquez' questions were unlawful under the circumstances. First, they constituted unlawful interrogation. Rodriguez was Huerta's direct supervisor and initiated the conversation, Huerta was not an open union supporter at the time, and the questions indirectly probed for information about his union sympathies. See *Rossmore House*, supra; and *Beverly California Corp.*, supra. See also *Cold Heating Co.*, 332 NLRB 956, 974 (2000); *Jackson Rock Spring Stages, Inc.*, 324 NLRB 588, 598 (1997); and *Lott's Electric Co.*, 293 NLRB 297, 303 (1989), enfd. mem. 891 F.2d 281 (3d Cir. 1989). Second, they unlawfully solicited grievances. Given the ongoing union organizing campaign, and the absence of any evidence that Rodriguez had ever previously solicited employee complaints, they carried an implicit promise to remedy the grievances. See *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004).[38]

July 2013 conversation with Quinto

Quinto was hired in 2009 and likewise worked the day shift. Around July 2013, he began wearing a union pin on the baseball cap he wore to work. He testified that Rodriguez noticed the pin one day when he was in the hallway returning his paperwork after his shift. It was around 4:30 in the afternoon, and union supporters were passing out flyers at the front gate at the time. Rodriguez asked him if "those guys"—gesturing toward the union supporters—were his "friends." He said no. She asked him why, then, he was wearing the union pin. He left without responding. (Tr. 1215–1221, 1234.)

Again, Rodriguez denied that this conversation ever occurred (Tr. 2725). However, as discussed above, Rodriguez was not a credible or reliable witness. Further, there is no reason on this record to disbelieve Quinto's testimony that he had a conversation with Rodriguez about his union pin. Thus, I discredit Rodriguez' denial that no such conversation occurred. As for the details of the conversation, there might be good reason to doubt Quinto's version if Rodriguez

[38] The record indicates that, at Stevens' recommendation, GFS retained a consultant in the fall of 2012 to conduct a formal survey to determine what the employees liked and did not like about the Company. However, Stevens testified that the formal survey was done because the Company had recently expanded and relocated from another facility, and there is no evidence that GFS had ever previously done such surveys.

had offered a different version. Quinto exhibited poor memory of details and admitted that he has hearing problems. See also the discussion below regarding the alleged unlawful warning he received following the August strike. However, Rodriguez did not offer a different version; instead, as indicated above, she falsely denied that any conversation even occurred. Moreover, there is nothing inherently improbable or incredible about the details described by Quinto. Accordingly, I find that Quinto's testimony about the conversation is essentially accurate.

However, considering all the circumstances, I find that Rodriguez' questions did not constitute coercive interrogation. Quinto was obviously an open union supporter at the time, and Rodriguez' questions did not seek information about other employees' union sympathies or contain any explicit or implicit threats of reprisal. Compare *A. Montano Electric*, 335 NLRB 612, 618 (2001), and *Keystone Lamp Mfg. Corp.*, 284 NLRB 626, 626 (1987), with *Norton Healthcare, Inc.*, 338 NLRB 320 (2002), and *Acme Bus Corp.*, 320 NLRB 458, 474, 477 (1995).[39] Accordingly, the allegation is dismissed.

December 2013 conversation with Hernandez

As discussed above, Hernandez was not herself an open union supporter after she was hired in August 2013, but she openly talked to drivers who were. Hernandez testified that, one day in December 2013, she had a conversation with Rodriguez very similar to the one she had with Pasalagua the following month. When she went to Rodriguez' window to get her truck key, Rodriguez commented that she had been told that Hernandez was "talking to the guys in the Union." Hernandez said it was true. Rodriguez said, "I just want to make sure that you are with the Company." Hernandez said she was. Rodriguez said, "Okay, there's no problem." (Tr. 1126–1128, 1150.)

Rodriguez denied that this conversation occurred as well (Tr. 2724). However, I discredit her denial for all the reasons previously discussed. I also find that, like Pasalagua's comments, Rodriguez' comments constituted unlawful interrogation.

3. HR Director Darlene Stevens

The complaint alleges that HR Director Darlene Stevens also committed several unfair labor practices.

a. New off-duty access rule (par. 8(a))

The General Counsel alleges that, in April 30, 2013, Stevens unlawfully issued a memo instituting new rules limiting the drivers' access to the facility. The April 30 memo was entitled "New Security Procedures" and addressed to all GFS employees (and "independent owner operators"). It listed several such procedures that would "be implemented immediately" and remain "in effect until further notice," including the following:

[39] Neither the General Counsel nor the Union address this Board precedent in their post-hearing briefs.

> To avoid excess gate congestion and the safety risk of congestion at the GFS facility, once you have completed your shift, please exit GFS immediately. If you need to visit GFS during your non-working time, contact [Safety Supervisor Rodriguez] so she can inform security of your arrival. (Jt. Exh. 3(h).)

The General Counsel contends, and I find, that the foregoing new rule is unlawful under the well-established test for off-duty access rules set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976). In that case, the Board held that an employer's rule barring off-duty employees' access is valid only if it (1) is clearly disseminated to all employees, (2) limits access solely to the interior of the plant and other working areas, unless a broader limitation is justified by business reasons, and (3) applies to access for any purpose, not just to union activity.

Here, the rule on its face requires the drivers to exit, not only the interior of the facility, but also the outside parking lot, immediately after their shift. Although much of the parking lot is a work area (the trucks and containers pass through it to get into the yard), it is undisputed that there is a large striped no-parking area just outside the drivers' entrance that is designated for the drivers to congregate or smoke (Tr. 2157, 2395–2399; R. Exhs. 45(g)). The Company has failed to establish any business reasons justifying a new rule barring the drivers from remaining in that area after completing their shift.[40] The need to avoid congestion in the parking lot during the changeover from the day shift to the night shift—the reason cited by both Stevens and General Manager Slayman (Tr. 2050, 2382)—is unsupported by the record. Stevens acknowledged that there has always been congestion during the afternoon changeover between the day and night shifts and that not a lot of day-shift drivers ever hang around after work (Tr. 2048, 2250–2251).

Further, the rule on its face is not limited to the changeover from the day to the night shift. It also applies to the end of the night shift, when there is no evidence of any similar congestion. See President Mooney's testimony, Tr. 1752–1755, 1759 (the night shift drivers are usually back between 2 and 4 am, at least an hour and a half before the first day-shift drivers show up). Indeed, openly prounion driver Mejia, who worked the night shift until August 2013, credibly testified that, prior to the April 30 memo, he would stay and socialize with other drivers for about 30 minutes a few days a week; however, after the April 30 memo, the security staff twice ordered him to leave the premises after he completed the night shift (Tr. 1314–1317). See also night-shift driver Ramirez' testimony, Tr. 1352–1353 (he used to stay every day to talk and drink coffee with other drivers after the shift, but he has not done so since the April 30 memo).

Moreover, while the rule prohibits off-duty access for any purpose, it indicates that Rodriguez has unlimited discretion to permit such access on an individual basis. And, in fact,

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[40] The Union argues (Br. 157) that the drivers' room is also a nonwork area. And there is no evidence that the drivers' room is actually used for any work activity before the day shift or after the night shift. See *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000) (an employer cannot declare its entire property to be a "work area" simply because some nonproduction work that is incidental to the employer's main function occurs there). The only time the drivers' room is arguably used for work activity on a daily basis is during the afternoon shift change, when the night shift drivers wait there on the clock, i.e. during paid time, for Rodriguez to call out for them to get their truck key. However, given that part of the exterior parking lot is clearly a nonwork area, I need not address whether, under *Tri-County*, the Company must also have a business reason to justify barring off-duty drivers from the interior drivers' room.

Rodriguez frequently asked antiunion day-shift drivers to stay after their shift during the relevant period to meet with Labor Consultant Pasalagua about the union campaign (Tr. 2471, 2644–2646, 2758, 3314). Thus, the rule fails the third prong of the *Tri-County* test as well. See *Casino San Pablo*, 361 NLRB No. 148, slip op. at 5 (2014) (likewise finding that a broad managerial-approval exception to the employer's rule prohibiting employees from being in the back of the house more than 30 minutes before or after their shifts rendered the rule unlawful under *Tri-County*).

The General Counsel also contends, and I find, that the rule is unlawful under the standards generally applicable to work rules set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In that case, the Board held that a work rule is unlawful, even if it does not expressly restrict union activity, if (1) employees would reasonably construe it to prohibit union activity, (2) the rule was promulgated in response to union activity, or (3) it has been applied to restrict union activity.

Here, the record as a whole leaves little doubt that the rule was promulgated in response to union activity. First, as found herein, the Company committed numerous other unfair labor practices in response to the union campaign. Second, as indicated above, the record does not support the Company's cited reason for the new rule. Third, Stevens and Rodriguez gave inconsistent responses when they were specifically asked whether the rule was prompted by union activity. Stevens denied that it was prompted by union activity or confrontations between pro and antiunion drivers (Tr. 2049). However, Rodriguez, who assists and reports directly to Stevens, answered to the contrary, testifying that the rule was promulgated because there had been arguments about the union campaign between the pro and antiunion drivers in the drivers' room (Tr. 2803–2805). See also Mooney's testimony, Tr. 1697 ("its been a full-time job to try to keep [the pro and antiunion drivers] separate and keep them working together"). The Company in its posthearing brief fails to address this conflict between its own witnesses, and cites only Stevens' testimony. However, as indicated above, Stevens' testimony about the reason for the rule is unsupported by the record. I therefore discredit her testimony.[41] Moreover, I find that her false testimony further supports the inference or conclusion that the new rule was promulgated in response to union activity,[42] and was therefore unlawful under *Lutheran-Heritage*. See also *Casino San Pablo*, above, at fn. 6 (finding that the broad managerial-approval exception to the rule in that case rendered the rule unlawful under *Lutheran-Heritage* as well as *Tri-County*).

b. Asking employees to report union activities (par. 10(a))

The General Counsel also alleges that, in June 2013, both Stevens and Pasalgua asked drivers to make a record of the union activities of other drivers and report them to the Company.

[41] Although not directly at issue, I also discredit Stevens' testimony that the other new security procedures set forth in the memo were prompted by too many interruptions from unannounced solicitors and other security concerns (Tr. 2046–2048). Again, Rodriguez testified to the contrary (Tr. 2801–2805, 2831).

[42] Cf. *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 227 (6th Cir. 2000) (manager's false testimony supported inference of discriminatory motive for employee's termination). See also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (employer's proffer of a false reason for its employment decision permits an inference that the actual reason was unlawful, at least where the surrounding facts tend to reinforce that inference).

The General Counsel presented four drivers to testify concerning this allegation: Castillo, Herrera, and Carlos and Paco Sanchez.

Castillo testified that, at one of the large Saturday meetings in the drivers' room in June 2013, Stevens told them to notify the Company if certain named drivers, including known prounion night-shift drivers Jaime Moreno and Agustine Ramirez, wasted their time by talking to them about the Union. Pasalagua then spoke and likewise told them to report to Stevens and Rodriguez when prounion drivers were bothering them by talking about the Union on work time, so that the Company would have a reason to get rid of them. (Tr. 639, 730–732.)

Herrera similarly testified that, at one of the large Saturday meetings, Stevens told them to be vigilant and report the union supporters to the dispatcher if they were wasting time by talking to them about the Union. Stevens did not mention any particular prounion drivers by name, but she referred to the drivers on the night shift, and he knew she was referring to certain prounion drivers, including Moreno and Ramirez. Herrera testified that Pasalagua likewise told them at several meetings to keep the Company informed of what the union supporters were doing or where they were. (Tr. 854–856, 858, 896, 923–924.)

Carlos Sanchez testified that Stevens told them at three or four large meetings that they should report to the Company if union supporters spoke to them (Tr. 1038). And Paco Sanchez testified that Pasalagua repeatedly told them at the large meetings that if any of the prounion drivers tried to speak to them about the Union they should note their names, and what time and where it occurred, and report it to the Company (Tr. 952).

I credit the foregoing testimony. Again, while there are some differences in the details, the accounts are substantially similar and corroborative. Moreover, the testimony is supported in part by the Company's own witnesses. Stevens acknowledged that both she and Pasalagua told the drivers in at least one meeting around April or May 2013 that if prounion drivers campaigned or harassed them during working time they should provide her with names, dates, and times so she could investigate (Tr. 2210–2211, 2216–2217). Pasalagua and Slayman also confirmed that Stevens told the drivers to provide her with facts so she could investigate complaints about union campaigning or harassment during working time (Tr. 2373, 2418–2419, 2486).[43]

Although Stevens, Pasalagua, and Slayman testified that such statements were made only because drivers had generally complained about campaigning and harassment by prounion drivers during working time, I discredit that testimony for all the reasons previously discussed. In any event, it does not really matter. The credited testimony establishes that Stevens and Pasalagua told the drivers to report whenever a prounion driver talked to them about the Union during working time. Such statements would reasonably be interpreted by employees to mean that any discussion about the Union during working time was prohibited. Moreover, there is no evidence that the Company prohibited employees from discussing other nonwork related matters during working time. Accordingly, the statements were unlawful. See *Conagra Foods*, 361 NLRB No. 113 (2014); and *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003).

[43] I therefore discredit the testimony of the Company's other witnesses, including Rodriguez, who testified that Stevens never said anything about keeping notes or reporting union supporters (Tr. 2703–2704), and drivers Barragan and Sandoval, who testified that Stevens never even spoke at the meetings (Tr. 2849, 3308).

4. General Manager Toby Slayman

The General Counsel alleges that General Manager Slayman also committed an unfair labor practice; specifically, that he unlawfully engaged in surveillance by taking a picture of union supporters leafleting outside the facility in mid-May 2013 (par. 9(a)).

Much of the relevant facts are undisputed. As indicated above, in May 2013, the Union began leafleting from the sidewalk outside the Company's front gate during the afternoon shift change. Shortly thereafter, Slayman began carrying a digital camera when he went outside in the afternoon to have a cigarette in the designate smoking area of the front parking lot. And on May 15 or 16, he used it to take a picture of a nonemployee union organizer who had walked over to greet a night-shift driver who had briefly stopped his car at the gate on the way into the parking lot.

The primary factual dispute is whether the union organizer was on the Company's property at the time. Slayman testified that he was; that the organizer had stepped off the sidewalk and into the property entrance to greet the driver, and that this was the reason he took the picture. He thereafter gave the picture to Stevens, which the Company used as evidence to support an unfair labor practice charge against the Union for trespassing. (Tr. 2366–2368, 2395–2402, 2433–2435.)[44]

Although Slayman was not always a reliable witness, I credit his testimony on this point. The General Counsel argues that Slayman's testimony is refuted by the testimony of the union organizer (Carlos Santamaria), the night-shift driver who stopped his car to greet him (Byron Contreras), and prounion driver Agustine Ramirez, who was leafleting with Santamaria at the time. However, while both Santamaria and Ramirez (in response to a leading question) testified that they were leafleting from the sidewalk (Tr. 1349, 1573), neither was asked whether Santamaria was still on the sidewalk or had stepped inside the driveway entrance when he greeted Contreras. And Contreras, who admitted that at least part of his car had crossed the sidewalk, was inside the car and thus would likely have the least knowledge of exactly where Santamaria was standing when he stepped over to greet him. Further, there is no other apparent reason on this record, which indicates that the Union regularly leafleted outside the gate, why Slayman would have taken that particular picture.[45]

In agreement with the Company, therefore, I find that Slayman did not engage in unlawful surveillance by taking the picture. See *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974) (employer did not engage in unlawful surveillance by taking pictures of handbilling that occurred in part within its property line); and *Summitville Tiles*, 300 NLRB 64, 70 (1990) (employer did not unlawfully take pictures of a union rally where the purpose was to establish that the participants had been trespassing or demonstrating on company property). See also *Town &*

[44] I take administrative notice that the Company's charge (21-CB-131614) was settled in October 2014 pursuant to an informal nonadmission settlement agreement.

[45] The picture itself (R. Exh. 60) is inconclusive due to its poor quality and the angle and distance. However, based on the testimony of Slayman, who personally observed the incident and is familiar with the parking lot and entrance, I am persuaded that Santamaria did, in fact, step off the sidewalk and onto company property.

Country Supermarkets, 340 NLRB 1410, 1415 (2004); and *Saia Motor Freight Line, Inc.*, 333 NLRB 784 (2001). Accordingly, the allegation is dismissed.

5. Driver Xiomara Perez Barragan

The General Counsel also alleges that antiunion driver Barragan committed several unfair labor practices acting as an agent of the Company. The alleged violations include circulating antiunion petitions, encouraging employees to harass and provoke union supporters, making various coercive statements or threats to employees, and providing financial assistance to employees to oppose the union campaign.

Barragan's Alleged Agency Status

The General Counsel contends that Barragan was the Company's agent with respect to the union campaign under the doctrine of apparent authority. As summarized by the Board in *Pan-Oston Co.*, 336 NLRB 305, 306 (2001),

> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994) (and cases cited therein). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82 (1988) (citing Restatement 2d, *Agency*, § 27 (1958, Comment a)). The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World,* 286 NLRB at 426-427 (and cases cited therein).

The General Counsel contends that the foregoing test is satisfied by the following: (1) the Company solicited drivers to sign Barragan's antiunion petition and directed newly hired drivers to meet with her; (2) the Company permitted Barragan to stand with the managers at the large antiunion meetings in the drivers' room or warehouse and answer questions; and (3) unlike with other drivers, the Company allowed Barragan frequent and unrestricted access into the closed area where the supervisors' and managers' offices are located.[46]

(1) *Soliciting drivers to sign Barragan's petition and directing new hires to meet with her.* As discussed above, the credited evidence establishes that Rodriguez solicited driver Jaime Moreno to sign Barragan's antiunion petition in or about February or March 2013. In addition, three drivers—Yasser Castillo, Carlos Sanchez, and Reina Hernandez—testified that they were directed to meet with Barragan shortly after they were hired in May, June and August 2013, respectively.

[46] The General Counsel and the Union also cite some of Barragan's own statements about her authority as evidence of apparent authority. However, apparent authority is created by the words or actions of the principal, and is not established by the alleged agent's own statements. *Ready Mix, Inc.*, 337 NLRB 1189 (2002).

Castillo testified that Rodriguez told him on his first day of work to wait for Barragan in the drivers' room. He asked why, and Rodriguez told him Barragan would tell him. A few minutes later, Barragan came in and introduced herself. She said she was the leader of the antiunion drivers, and that she was circulating a petition opposing the union campaign. She showed him the petition and said that by signing it he would show that he did not support the Union and was with the Company. He signed it. He noticed that Rodriguez was watching them through her open office window at the time. (Tr. 611–617, 710–714, 824.)

Sanchez testified that he was likewise directed by Rodriguez on his first day of work to wait for Barragan before going to his truck. He subsequently met with Barragan in the hallway outside the drivers' room. As with Castillo, Barragan told her she was the leader of the antiunion workers, showed him the petition, and told him to sign it to prove that he did not support the Union. He signed it. Barragan then walked through the door leading into the management offices. (Tr. 1027–1031, 1076.)

Hernandez testified that Pasalagua told her on her second day of work to go see Barragan. She subsequently found Barragan in the drivers' room. As with Castillo and Sanchez, Barragan showed her a petition and told her that signing it would prove that she was 100 percent with the Company. She signed it. (Tr. 1116–1119, 1133, 1147–1148, 1154).

I credit the foregoing testimony. All three drivers were credible witnesses; their testimony was consistent and corroborative; their signatures do, in fact, appear on the antiunion petition (CP Exh. 25); and there is no dispute that they signed right after they were hired (Tr. 2957). Further, although Rodriguez and Barragan denied that the conversations ever occurred, as discussed above, both were particularly poor and unreliable witnesses.[47]

(2) *Allowing Barragan to stand with managers and answer questions at meetings.* It is undisputed that Pasalagua and the managers stood together at the front of the room during the large meetings, and that Pasalagua would take and answer drivers' questions. There is conflicting evidence, however, regarding whether and where Barragan sat or stood, and whether she also answered drivers' questions.

The General Counsel's four witnesses—drivers Castillo, Martin Herrera, and Paco and Carlos Sanchez—all testified that, after April 2013, Barragan always stood in front with

[47] Barragan denied that she even brought any of the three petitions into the facility; testifying that she always kept them in her car and collected signatures in the parking lot or on the street (Tr. 2856–2857, 2860, 2921–2922, 2925). However, several drivers credibly testified that Barragan asked them to sign a petition inside the facility, including not only Castillo, Hernandez, and Carlos Sanchez, but also Martin Herrera (Tr. 844–849), Jaime Moreno (Tr. 1169–1175, 1181–1182, 1198–1201), and Hildebrando Mejia (Tr. 1302–1304). Barragan also gave inconsistent testimony about whether she ever approached drivers and asked them to sign. She initially testified that she sometimes approached other employees and asked them to sign, but subsequently denied that she did so, testifying that she did not ask anyone to sign (Tr. 2951–2955). However, driver Juan Carballo, one of the Company's own witnesses, testified that Baragan approached him in his car and asked him if he would sign the antiunion petition (Tr. 3177–3719). I find that Barragan did, in fact, approach drivers and ask them to sign the antiunion petitions, both outside and inside the facility.

Pasalagua and the managers during the meetings. See Tr. 638–639, 642, 813–816 (Castillo); Tr. 853–854 (Herrera); Tr. 950, 954,994, 997–998 (Paco Sanchez); and Tr. 1038, 1042 (Carlos Sanchez).[48] Castillo also testified that, at one meeting in July, Pasalagua specifically referred a question to Barragan to answer. Pasalagua had said the drivers should harass and provoke the union supporters so the Company could fire them. When the drivers asked how, Pasalagua said Barragan would give some examples. Barragan then said they should make fun of the union supporters and their t-shirts, vests, and pins. (Tr. 641–642, 734–736, 816, 827.) See also Herrera's testimony, Tr. 858–860 (confirming that Barragan made these statements while standing together with Pasalagua).

The Company's witnesses offered various different accounts. Barragan testified that she always sat (Tr. 2850), and this was confirmed by Mooney (Tr. 1698–1699), Rodriguez (Tr. 2704), and driver Ada Juarez (Tr. 3358). However, Stevens and Slayman testified that Barragan stood when there were not enough seats available or she was speaking (Tr. 2033–2034, 2152–2153, 2372–2373, 2437, 2444–2445, 2448). As for where Barragan sat or stood, driver Juan Carballo testified that she was always in the back (Tr. 3186). However, Pasalagua and Barragan herself testified that she sometimes sat in back, sometimes in front, wherever there was space (Tr. 2495, 2659, 2850). And Mooney testified that Barragan always sat in front, off to his right (Tr. 1698–1699). Finally, Stevens denied that Barragan answered any questions from the drivers (Tr. 2218), and all of the Company's witnesses denied that Barragan suggested that the drivers make fun of union supporters.

For all the reasons previously discussed, I credit the General Counsel's witnesses over the Company's witnesses.

(3) *Allowing Barragan access into the managers' office area.* As indicated above, the office area is a separate and closed area across the hallway from the drivers' room. The drivers do not need to enter the area to perform their jobs, as Rodriguez and the dispatchers give them their truck keys and first assignments through open windows, and they return their manifests and inspection reports to a box located outside the office area. The drivers therefore are not normally allowed to enter the area unless they need to talk to Stevens about a personnel issue or are requested or invited to enter the area to meet with Stevens or Pasalagua in a back office or conference room.

However, Herrera testified that he witnessed Barragan entering and exiting the office area daily during 2013, often with Pasalagua and carrying a notebook or folder (Tr. 929–930). Castillo and Paco Sanchez likewise testified that they have witnessed Barragan entering the management office area on a daily basis (Tr. 663, 667, 1001). Hernandez similarly testified that Barragan is always "running to the office" (Tr. 1137).

Further, as indicated above, Carlos Sanchez testified that Barragan immediately walked into the management office area with the antiunion petition after he signed it. Castillo likewise testified that he witnessed Barragan taking an antiunion petition into the management office area in January 2014 (Tr. 661–663). Castillo also testified that, in June 2013, Barragan took a sample

[48] Herrera, the only one of the four who was hired before April 2013, testified that Barragan initially sat with the drivers at the first meetings, but stood with Pasalagua at subsequent meetings.

antiunion poster he made into the office area (Tr. 632, 723–724). And driver Moreno testified that Barragan once came out of the office area and called for two other antiunion drivers to come into the office with her for a meeting (Tr. 1183–1186, 1202).

Again, I credit the foregoing testimony. Although Rodriguez testified that Barragan did not enter the office area any more frequently than other drivers (Tr. 2831), I discredit her testimony for all the reasons previously discussed.

In agreement with the General Counsel, I also find that, considered together, the Company's foregoing conduct is sufficient to establish that Barragan had apparent authority to act on the Company's behalf with respect to the union campaign. Cf. *The Independent*, 319 NLRB 349, 363 (1995) (employer told employees to "make sure" to see the antiunion employee and otherwise encouraged employees to sign her antiunion petition); *Dentech Corp.*, 294 NLRB 924 (1989) (employer allowed the antiunion employee to solicit signatures for an antiunion petition on company time and to answer employee questions at meetings); and *Community Cash Stores*, 238 NLRB 265 (1978) (employer told an employee to go up to the company meeting room where the antiunion employee would give him a statement withdrawing his union authorization card); and *Scherer & Sons, Inc.*, 147 NLRB 1442, 1445–1449 (1964), enfd. per curiam 370 F.2d 12 (5th Cir. 1966), cert. denied 88 S.Ct. 46 (1967) (employer gave antiunion employee unrestricted access to the plant and offices and directed employees to sign her legal complaint against the union's picketing).[49]

Barragan's Alleged Unlawful Conduct

a. Soliciting signatures on antiunion petitions (pars. 12(c) and 13).

As discussed above, Hernandez credibly testified that Pasalagua told her on her second day of work to go see Barragan, and that Barragan then presented an antiunion petition to her to sign.[50] Castillo testified that he witnessed Barragan likewise solicit newly hired driver Winter Herrera (hereafter referred to as Winter to distinguish him from Martin Herrera) to sign an antiunion petition in the drivers' room in January 2014 (Tr. 660–667, 754–756, 770–772). Castillo's testimony was corroborated by Carlos Sanchez, who testified that he was passing by in the hallway and heard Barragan introduce herself in the usual way (as the antiunion leader) and ask Winter to sign (Tr. 1053, 1088–1099). It is also corroborated by a picture of the incident that Castillo took with his personal cell phone, which shows Winter seated in the drivers' room with Barragan standing over him holding an open folder (GC Exh. 19), and by the antiunion petition itself, which contains Winter's signature (CP Exh. 25).

[49] The General Counsel also cites additional evidence that company managers or supervisors were present during or aware of Barragan's alleged unlawful conduct but took no action to disavow it or discipline Barragan, and that Barragan's conduct was consistent with similar conduct by company managers and supervisors. I have addressed this additional evidence below in discussing whether Barragan's alleged unlawful conduct was within the scope of her apparent authority.

[50] Although the complaint alleges that this occurred in October, as noted earlier the record evidence indicates that Hernandez was hired in late August.

Barragan and Winter, however, denied that she solicited him to sign an antiunion petition in the drivers' room. They testified that the picture shows her soliciting him to contribute money for a fellow driver whose relative had passed away (Tr. 2863–2864, 3144, 3147, 3154). Winter testified that he asked Barragan if he could sign the petition, and that he signed it in the parking lot (Tr. 3132–3135).

I credit Castillo and Carlos Sanchez. As discussed above, Barragan was a particularly unreliable witness. Indeed, she initially testified that she always waits in her car, and never goes into the drivers' room, before her shift begins (Tr. 2926). It was not until after she was shown Castillo's picture of her in the drivers' room with Winter, that she admitted going into the drivers' room before work "where I am collecting money or to speak with the drivers" (Tr. 2944, 2947).

There is also good reason to question Winter's credibility or reliability as a witness. For example, it is undisputed that he signed an April 2014 "declaration" that Pasalagua drafted for him addressing the Union's unfair labor practice charges. The declaration listed the various unlawful statements and threats the Union alleged the Company's managers and agents had made during the 2013 meetings, and swore that the alleged statements and threats never happened. When asked on cross examination how he could sign such a declaration, given that he was not hired until January 2014, Winter admitted that he did not read the declaration and was "not paying attention" when he signed it.[51]

In agreement with the General Counsel, I also find that the foregoing alleged conduct was unlawful. See *SKC Electric, Inc.*, 350 NLRB 857 (2007). See also *The Independent* and *Dentech*, supra.[52]

b. Encouraging employees to harass and provoke union supporters (par. 10(c)).

As previously discussed, Pasalagua's statement at the July 2013 meeting that the drivers should harass and provoke the union supporters was clearly unlawful. The General Counsel alleges that Barragan's subsequent statement at the same meeting suggesting that the drivers do so by making fun of the union supporters and their t-shirts, vests, and pins was equally unlawful.

As indicated above, I credit the testimony of Castillo and Herrera and find that Barragan did, in fact, make the statement. I also find that, given Barragan's apparent authority to act for the Company with respect to the union campaign generally, as well as Pasalagua's similar statement at the meeting, her statement was clearly within the scope of her apparent authority

[51] Tr. 3149–3153, 3156–3159. For similar declarations signed by other antiunion drivers, see CP Exhs. 26–28.

[52] As discussed above, Barragan also solicited signatures from Castillo and Carlos Sanchez themselves, after Rodriguez told them to see her, when they were hired in May and June, respectively. However, the complaint does not allege that these incidents violated the Act. See also GC Br. at 113 fn. 51 (stating that the incidents are not alleged as violations because the evidence did not surface until after the Section 10(b) 6-month limitations period had expired). Nor does the complaint allege that Barragan violated the Act by soliciting drivers Martin Herrera, Jaime Moreno, and Hildebrando Mejia to sign the petition (see fn. 47, above).

and therefore attributable to the Company. See *Pan-Oston*, 336 NLRB at 306 (fact that alleged agent's statements or actions were consistent with those of the employer supports finding of apparent authority). See also *Dentech*, 294 NLRB at 926 (apparent authority found where antiunion employee's statements were consistent with management's message and made in the presence of management).

Accordingly, in agreement with the General Counsel, I find that, like Pasalagua's statement, Barragan's statement was unlawful.

c. Telling employees that the union supporters deserved to die (par. 10(f))

The General Counsel also alleges that Barragan unlawfully told employees on various occasions between April and December 2013 that the union supporters should or deserved to die. Four drivers provided testimony in support of this allegation: Castillo, Paco and Carlos Sanchez, and Martin Herrera.

Castillo testified that he heard Barragan say union supporters should "die" at least a couple times in the drivers' room, when talking to other antiunion drivers (Tr. 775–778). Paco Sanchez likewise testified that he heard Barragan say that union supporters were "rats that did not deserve to live." He said he heard Barragan say this and other derogatory things about the prounion drivers at meetings, in the parking lot, and at the ports. (Tr. 955–956, 998.)

Carlos Sanchez testified that he also heard Barragan say union supporters were "rats" and "should die," once in the drivers' room and another time outside the building. He said Barragan also compared the prounion drivers to anti-government guerillas, saying that if they were in her home country (Nicaragua), they would not be around. (Tr. 1046–1048, 1051, 1083–1084, 1088.) Herrera testified that he likewise heard Barragan make statements that union supporters would be dead in her country; once in a meeting and several times in the drivers' room or in the parking lot (Tr. 872–873, 896, 910–911).

I credit the foregoing testimony. Although Barragan and other company witnesses denied that she ever made such statements, I discredit their testimony for all the reasons previously discussed.[53] Accordingly, I find that Barragan did, in fact, tell drivers that the union supporters deserved to die and that they would be dead if they were in her country.

I also find that Barragan's statements are properly attributable to the Company. As discussed above, the Company clothed Barragan with apparent authority to speak on its behalf regarding the union campaign generally. Further, the credited testimony indicates that Barragan made some of the statements at meetings, in the presence of Pasalagua. Indeed, Paco Sanchez testified that Pasalagua just laughed when Barragan made such statements (Tr. 955). And, as previously discussed, Pasalagua and managers made various unlawful statements themselves.

[53] As previously mentioned, Barragan even denied that she ever called the union supporters "rats" or any other derogatory names; however, several drivers, including Castillo, Herrera, Paco and Carlos Sanchez, Hildebrando Mejia, and Agustin Ramirez, credibly testified that she did so frequently.

Finally, in agreement with the General Counsel, I find that the statements were coercive and unlawful. Cf. *North Hills Office Services*, 344 NLRB 1083, 1090, 1098 (2005) (manager impliedly threatened bodily harm by telling prounion employee that "in El Salvador, a person who joins a union sometimes dies").

d. Providing financial assistance to employees to oppose the Union (par. 12(a))

The General Counsel also alleges that Barragan unlawfully provided financial assistance to the antiunion effort by giving Castillo money from the Company to make antiunion posters for the drivers to display in their car windows.

Castillo testified that, in early June 2013, shortly after he started working at GFS, he noticed that some of the union supporters had posters in their cars. He talked to Barragan and offered to make some posters for the antiunion drivers. Barragan agreed that it was a good idea, and told him to make one and show it to her. A couple days later, he made a poster on his computer showing a donkey with a sign saying "no union." He took a picture of it with his cell phone camera and showed it to Barragan. However, Barragan said she wanted to see it on paper. So he had one made and showed it to her a couple days later. Barragan said she liked it and asked how much it would cost for 150 of them. He said $1000 or more. She said that was too much, and asked how much 30 would cost. He said $300. Barragan said she would ask Mooney and Pasalagua to see if they could pay for it, if the price was okay, and took the poster with her into the office area. A couple days later, Barragan told him that Mooney and Pasalagua had said the poster looked good and that they would pay the $300. So he had the posters made and met with Barragan a couple days later. At Barragan's suggestion, they met before work, on a nearby street. Barragan said she wanted to meet there because she did not want anyone to see her giving him the money. Barragan arrived with her husband and Castillo arrived with his uncle, Paco Sanchez. He gave Barragan the posters and she gave him the $300. (Tr. 629–633, 723–727.)

Paco Sanchez confirmed that he was present and saw Barragan give Castillo money for the posters on the street (Tr. 1001). Barragan herself also admitted that she and her husband met with Castillo on the street to give him the money for the posters. She also admitted that she talked to Pasalagua about the posters. However, she testified that she only asked Pasalagua if it was legal for the drivers to put antiunion posters in their cars. She also contradicted Castillo on various other significant details, testifying that she bought 20 rather than 30 posters; that she and driver Guillermo Amaya put up $100 each for them; and that she never told Castillo that Mooney or the Company was paying for them (Tr. 2843–2844, 2847). As for Pasalagua, he similarly testified that Barragan (and several other drivers) simply asked him if it was legal to display the posters, and that the Company had nothing to do with them (Tr. 2545). Mooney also denied that Barragan ever asked him to pay for the posters or that he gave her any money for them (Tr. 1712).

I credit Castillo. As discussed above, Castillo was openly against the Union at the time. Thus, as indicated by the General Counsel, there was no reason for Barragan not to share with him that the Company had put up the money for the antiunion posters. Further, the Company never called Amaya as a witness to corroborate Barragan's contrary testimony that they had put up the money for the posters. Finally, as previously discussed, Barragan and Pasalagua were particularly unreliable witnesses.

I also find that Castillo's testimony, which was offered and received without objection, is sufficient to establish that the Company did, in fact, pay for the antiunion posters. As discussed above, Barragan had apparent authority at that time to act on the Company's behalf with respect to the union campaign. And Barragan's actions with respect to the antiunion posters were within that general area of authority and consistent with the Company's antiunion conduct and message. Accordingly, her statement to Castillo that the Company agreed to pay for the posters constitutes a nonhearsay statement or admission by a party opponent under FRE 801(d)(2)(D). See generally *Times Union*, 356 NLRB No. 169, slip op. at 1 fn. 1 (2011), and cases cited there.[54]

Nevertheless, I find that the General Counsel has failed to establish that the Company violated the Act. There are two ways of interpreting the Company's conduct. One interpretation is that the Company purchased the antiunion posters from Castillo so that the Company could make them available to the antiunion drivers. This interpretation is consistent with the General Counsel's underlying theory, and my finding above, that Barragan acted as the Company's agent. The second interpretation is that the Company gave direct financial support to the antiunion employees by paying the cost of making their antiunion posters. This interpretation is consistent with the way the allegation is stated in the complaint and argued in both the General Counsel's and the Union's posthearing briefs.

Board precedent, however, does not support a violation under either interpretation. There is no prohibition against employers purchasing and making available antiunion posters or other paraphernalia for its employees to display. On the contrary, it is well established that the Act permits employers to do so. See *Circuit City Stores, Inc.*, 324 NLRB 147 (1997); and *Black Dot, Inc.*, 239 NLRB 929 (1978), and cases cited therein.[55] There is no apparent reason why this precedent is not controlling here. Although the Company purchased the antiunion posters from Castillo, one of its own employees, the General Counsel and the Union cite no legal authority prohibiting such conduct.[56] Nor do they cite any authority prohibiting an employer from giving direct financial support to antiunion employees by paying the cost of their antiunion posters or paraphernalia. The only cases they cite—*Overnite Transportation Company*, 334 NLRB 1074, 1113 (2001), and *H. Treffinger Repair Services*, 281 NLRB 516, 519–520 (1986)—do not even address the issue, much less find a violation. And compare *Ranco, Inc.*, 109 NLRB 998 (1954) (finding that the employer did not unlawfully assist antiunion employees by paying $186 to cover the cost of reproducing their antiunion literature), distinguishing *Cleveland Trust Co.*, 102 NLRB 1497 (1953), enf. denied in relevant part 214 F.2d 95 (6th Cir. 1954). Accordingly, the allegation is dismissed.

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[54] The sole theory of violation is that the money for the antiunion posters came from the Company. The General Counsel and the Union do not argue that a violation should be found even assuming that all of the money came from Barragan and Amaya. See GC Br. 130–131; and U. Br. 140, 159.

[55] Although Board precedent limits how an employer may distribute the antiunion paraphernalia, there is no evidence or allegation here regarding how the antiunion posters were distributed to drivers.

[56] There is no evidence or allegation that the Company paid Castillo more than the fair value of the antiunion donkey posters.

6. Driver Guillermo Amaya

The General Counsel also alleges that the Company unlawfully condoned an assault on Yasser Castillo by antiunion driver Guillermo Amaya in February 2014, after Castillo became a union supporter (par. 10(g)).

The subject incident occurred on Saturday, February 15, around 7 am, when the drivers usually start the Saturday shift. Castillo, Paco Sanchez and Martin Herrera were in the parking lot walking toward the facility entrance, when Barragan and Amaya came out and headed over to Amaya's car. When they passed, Amaya said, "Here come the faggots." Castillo turned and said, "Hey dude, what's your problem?" Amaya then pushed Castillo, making him fall against the outside wall/window next to the entrance. Castillo stood back up, but Amaya then pushed him again. At that point, Sanchez and Herrera intervened and stepped between them, allowing Castillo to walk away. Juan Garduno, the dispatcher, then also came out and walked Amaya over to his car. In the meantime, Castillo called the police on his cell phone. An officer subsequently arrived and conducted a brief investigation. When it was completed, the officer told Castillo that it was a "he said, she said" situation and that if he took Amaya to jail, he would have to take Castillo as well. So no further action was taken at the time.[57]

However, Castillo filed a written report/complaint with Stevens the following Monday, February 17. He also met personally with both her and Slayman the same day and explained what had happened. Stevens subsequently investigated and concluded that Amaya had, in fact, "physically moved or pushed" Castillo during the incident. Accordingly, on February 25, 2014, she issued a written counseling notice to Amaya. The notice stated that Amaya would be suspended for 1 day, effective February 26. The notice also "strongly caution[ed]" Amaya not to repeat such conduct, and that any future such incidents "will result in additional suspensions or

[57] The foregoing summary is based on the testimony of Castillo (Tr. 672–679, 762–764), Herrera (Tr. 886–893, 921), and Sanchez (Tr. 957–959), which I credit to the extent the accounts are consistent, as well as Castillo's written report/complaint about the incident (GC Exh. 21). I discredit entirely the contrary testimony by Barragan and Stevens. Barragan essentially reversed the situation, testifying that Castillo said "bitch" as he walked by; Amayo replied, "Are you talking to me?"; Castillo said, "Yes, I'm talking to you bitch," spit on Amaya, and said "hit me bitch." Barragan also testified that it was she who intervened, and that Amaya never hit Castillo. (Tr. 2876–2878.) However, her testimony was not corroborated by Amaya, who, as previously noted, was not called by the Company to testify. Further, as discussed above, Barragan was an extremely unreliable historian generally. As for Stevens, she similarly testified that Castillo had instigated the incident or provoked Amaya by saying "hit me, hit me, hit me." Stevens indicated that this was confirmed by videotape of the incident, which she obtained from the surveillance camera outside the facility. However, after the videotape was produced and reviewed at the hearing the following day, Stevens acknowledged that nothing in the video showed Castillo provoking Amaya or saying "hit me, hit me, hit me." (The surveillance camera did not record audio.) Stevens also testified that Castillo actually admitted to her that he said "hit me, hit me, hit me" during the incident; that she documented his admission in her notes; and that she gave Castillo a verbal warning not to do it again. However, no supporting documentation, of either the admission or the verbal warning, was offered into evidence. Further, it is undisputed that she did not put any record of the verbal warning in Castillo's file. (Tr. 2100–2103, 2196–2199.)

terminations based on the investigation results." However, the notice stated that the incident would "drop off" his record after 6 months.[58]

Stevens subsequently informed Castillo that the Company had disciplined Amaya. However, she did not notify any other employees that Amaya had been disciplined for his conduct. Further, she refused to tell Castillo what the discipline was. (Tr. 2103–2104, 2253). And there is no evidence that he or the other drivers were otherwise aware that Amaya had been suspended. Even Barragan, an admitted friend of Amaya's, testified that she was not aware that he had been suspended (Tr. 2879, 2943–2944).[59]

Unlike with Barragan, the General Counsel does not contend that the Company is accountable for the foregoing incident because Amaya was acting as its agent. Rather, as indicated above, the General Counsel contends that the Company is accountable because it had previously condoned such actions by unlawfully encouraging the antiunion drivers to harass and provoke union supporters and failing to discipline them when the union supporters filed complaints about such harassment. The General Counsel further argues that, even if the Company later "quietly disciplined" Amaya, that was not enough to mitigate the effects of the incident. (Br. 143–144.)

As previously discussed, a preponderance of the credible evidence establishes that company agents Pasalagua and Barragan did, in fact, unlawfully encourage the antiunion drivers to harass and provoke union supporters. As noted (nn. 19–21), a preponderance of the credible evidence also indicates that Stevens failed to fully investigate prior complaints filed by Castillo and other union supporters alleging that Amaya and other antiunion drivers had harassed and physically threatened them. In agreement with the General Counsel, I find that, under these circumstances, the Company effectively condoned Amaya's conduct. See generally *Newport News Shipbuilding*, 236 NLRB 1499, 1506–1507 (1978); and *Brewton Fashions, Inc.*, 145 NLRB 99, 127 (1963), enfd. 361 F.2d 8 (5th Cir.), cert. denied 87 S.Ct. 95 (1966), and cases cited there.

I also agree and find that the private or confidential discipline the Company issued to Amaya was insufficient to mitigate the Company's prior conduct. Cf. *Taylor Machine Products*, 317 NLRB 1187, 1209 (1995), enfd in part 136 F.3d 507 (6th Cir. 1998) (employer unlawfully condoned antiunion employees' harassment of union supporters by publicly congratulating them, notwithstanding that it subsequently put a memorandum in their personnel file documenting that

[58] R. Exh. 50. The notice is signed by both Stevens and Amaya. Although it does not state that the 1-day suspension was without pay, Stevens testified that it was (Tr. 2103). Regarding the provision for expungement after 6 months, Stevens testified that, unlike discipline for other matters, such as accidents (18 months), and attendance (6 months), there is no standard period for expunging discipline for physical violence in the workplace; that it is a discretionary management decision depending on the circumstances (Tr. 2291–2293, 2297–2298).

[59] Driver Carlos Sanchez testified that Barragan and Amaya are together all the time, in the yard, at the dispatch office, and when they pull out in their trucks (Tr. 1070, 1078). I credit his testimony, as it is consistent with the record as a whole, including the three antiunion petitions, which indicate that Barragan and Amaya signed right before or after each other. See CP Exh. 25 (Amaya #3, Barragan #4); R. Exh. 22 (Barragan #1, Amaya #2); and GC Exh. 27 (Amaya #17, Barragan #18).

they had been given a verbal warning for continuing to engage in such conduct); and *Champagne Color Inc.*, 234 NLRB 82 (1978) (employer's unlawful failure to act when an antiunion employee approached a prounion employee in the workplace and loudly berated him for his union attitudes was not mitigated by its subsequent mild and private censure or reprimand of the antiunion employee).[60]

B. Alleged 8(a)(3) discrimination

As previously indicated, the complaint also alleges that the Company unlawfully discriminated against Yasser Castillo and another prounion driver, Paul Quinto, in violation of Section 8(a)(3) and (1) of the Act.

1. Alleged discrimination against Yasser Castillo

The General Counsel alleges that the Company has discriminated against Castillo since he became an open union supporter during the November 2013 strike by assigning him different trucks in poor condition and deliberately delaying issuing him a truck key (par. 15(b)).

The General Counsel argues, and I find, that the appropriate test for evaluating this allegation is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (citations omitted). Applying the foregoing test, for the reasons set forth below, I find that the Company unlawfully discriminated against Castillo as alleged.

As mentioned above, Safety Supervisor Rodriguez is responsible for assigning trucks to the night-shift drivers. It is undisputed that she normally assigns the drivers to the same truck every shift as it is both safer and more comfortable for the drivers to use a truck they are familiar

[60] In light of the foregoing findings, it is unnecessary to reach whether the Company actually suspended Amaya for a day without pay. Nor is it necessary to address whether the suspension was an ineffective deterrent given its short length and the 6-month expungment provision, or whether, as contended by the Union (Br. 72, 147), Amaya should have been discharged for the incident.

with. The only time she normally will not assign a driver his/her usual truck is if it is unavailable because of a breakdown or it has not returned from the port. (Tr. 2671–2673, 2830–2835.)

Rodriguez is also responsible for giving the drivers the truck key when the day-shift driver has returned with their assigned truck. The night-shift drivers are on the clock, i.e. they are paid an hourly rate, while waiting for Rodriguez to give them a truck key. Thus, the Company normally tries to minimize waiting time, as it is neither productive nor economical, i.e. the Company cannot bill a customer for that time. Waiting time also disadvantages the drivers, because they make more money the more actual assignments or moves they complete during a shift. Thus, the longer they have to wait to get a truck key, the less money they will make. (Tr. 1918–1923, 2065–2069, 2235–2236, 2674, 2737, 2833–2834.)

Castillo testified that, before the November strike, he was typically assigned truck #42, one of the best trucks in the fleet, every shift, and that he had to wait only occasionally to get the key to the truck. However, since the strike, he is no longer assigned truck #42, even when the day-shift driver has returned with it. Instead, he is assigned whatever other truck is left outside, and is often made to wait to get the key. Further, the different trucks he has been assigned, particularly truck #26, have frequently had mechanical or maintenance problems, such as no air conditioning or bad tires. Although he repeatedly complained to Rodriguez about the problems, nothing was done. (Tr. 650–653, 658–659, 743, 747–751.)

Castillo's daily worksheets or manifests (Jt. Exh. 8) confirm that Rodriguez began assigning him a different truck after the November 2013 strike. Thus, during the entire 3 months preceding the strike, Castillo was assigned truck #42 on all but two of his shifts. However, over the next 2 months, in December and January, he was assigned three different trucks (#17, 26 or 36) on five of his shifts. And in February alone, he was assigned six different trucks (##10, 16, 17, 26, 36, or 37) on 14 shifts. He was also assigned seven different trucks (##1, 4, 8, 16, 17, 26, or 27) on 16 shifts in March; six different trucks (##16, 17, 26, 34, 36, or 37) on 18 shifts in April; five different trucks (##11, 16, 34, 36, 39) on 16 shifts in May; three different trucks (##16, 26, or 36) on 19 shifts in June; and seven different trucks (##8, 14, 17, 26, 34, 36, or 37) on 13 shifts in July.

The manifests also confirm that in the 3 months prior to November 2013, Castillo only had to wait once or twice each month, for 60–90 minutes, to get a truck key. However, in just the week following the November strike, he had to wait four times, for 45–90 minutes, to get a key. And in December, he had to wait eight times, for 1–2 hours, to get a key. The manifests for 2014 reveal similar results, showing that Castillo had to wait for a truck key nine times for 60 – 90 minutes in January; 10 times for 30–60 minutes in February; eight times for 30–60 minutes in March; 10 times for 15 minutes–2 hours in April; seven times for 15–60 minutes in May; 11 times for 15–60 minutes in June; and 11 times for 30–60 minutes in July.

Rodriguez offered a number of explanations for these statistics. Regarding truck assignments, she testified that sometimes she gives a driver a different truck because the day-shift driver has not timely returned with his/her usual truck (Tr. 2671). However, as indicated above, Castillo credibly testified that he has been assigned a different truck even when truck #42 is sitting in the parking lot. Further, the Company failed to present documentation supporting Rodriguez' explanation. Although it presented a few manifests from the day-shift driver of truck #42 in November, December, and January (R. Exh. 41(a)–(e)), as indicated above Castillo

was still being assigned truck #42 on most of his shifts in those months.[61] And the Company failed to present any manifests whatsoever from the day-shift driver of truck #42 in February through July when the number of times Castillo was assigned different trucks rose dramatically.

Rodriguez also testified that truck #42 broke down in December 2013. However, she admitted the truck was only in the shop for a couple weeks. (Tr. 2672, 2825.) As for Castillo's testimony that there were often problems with the other trucks he was assigned, Rodriguez admitted that Castillo complained that one of the trucks lacked air conditioning (Tr. 2673). Although Rodriguez testified that she always addressed any of the mechanical or maintenance problems Castillo raised, I discredit her uncorroborated testimony for all the reasons previously discussed.

With respect to waiting for the truck key, Rodriguez testified that the waiting time varies with the season, with less wait time during slow months like February and March, and more in busier months like November (Tr. 2671). However, as indicated above, the manifests show that the number of times Castillo had to wait remained unusually high in February and March. Rodriguez also testified that Castillo is not the only driver who has to wait for their keys (Tr. 2669–2671). However, she cited only a few very recent examples. And the limited documentary evidence presented by the Company likewise failed to show that any other drivers had to wait anywhere near as often as Castillo throughout the relevant period. See R. Exh. 53(a)–(b).[62] See also the testimony of night-shift dispatcher and company witness Juan Garduno, Tr. 2343–2344 (acknowledging that the number and frequency of times Castillo had to wait was "very unusual").

Rodriguez also testified that Castillo tends to sit in the back of the drivers' room, and that she has to yell two or three times or ask another driver to get him (Tr. 2779–2780). However, this was not corroborated by any other witness except General Manager Slayman, who acknowledged that he only occasionally fills in for Rodriguez when she is on vacation (Tr. 2387, 2423). Moreover, there is no evidence that this only became a problem after November 2013.

Based on all the foregoing and the record as a whole, I find that the General Counsel has adequately established that union animus was a substantial or motivating factor in why Rodriguez assigned Castillo different and inferior trucks and made him wait more often for his truck key. There is no dispute that Castillo changed sides and began openly supporting the Union during the November 2013 strike, and that the Company knew this. Further, the Company's strong union animus is well established by the unlawful antiunion statements and conduct of its managers, supervisors, and agents before and during the same period. Moreover, as discussed above, Rodriguez' explanations for her actions were unsupported by the facts or evidence. See, e.g., *Bally's Park Place, Inc.*, 646 F.3d 929, 937 (D.C. Cir. 2011); and *Healthcare Employees Local 399 v. NLRB*, 463 F.3d 909, 922 (9th Cir. 2006) (employer's

[61] Moreover, the Company introduced the manifests for the day-shift driver of truck #42 through Stevens, who has nothing to do with assigning trucks or handing out keys, rather than Rodriguez. And Stevens acknowledged that she did not really know whether Castillo was assigned a different truck for any of the shifts in November, December, and January because the day-shift driver was late returning. (Tr. 2071–2080).

[62] Again, this limited documentary evidence of other drivers' waiting times was presented through Stevens, rather than Rodriguez (Tr. 2180–2182).

unsupported explanations are strong circumstantial evidence supporting an inference of unlawful motive). Finally, the Company failed to show that Rodriguez would have taken the same action even absent Castillo's decision to support the Union. Accordingly, I find that the Company unlawfully discriminated against Castillo as alleged.

2. Alleged discrimination against Paul Quinto

The General Counsel alleges that the Company unlawfully discriminated against Quinto by issuing him a written warning for failing to notify the dispatcher that he would be absent during the August 2013 strike (par. 15(a)). Again, the General Counsel's primary theory, as articulated both at the hearing and in the posthearing brief, is that the disciplinary warning was unlawful under *Wright Line*, i.e. that it was discriminatorily motivated by Quinto's union support and activity.

As with the allegations involving Castillo, I find that the General Counsel has satisfied the initial burden of showing that union animus was a substantial or motivating factor in the discipline of Quinto. Quinto testified that he openly participated in the strike, and the Company's posthearing brief does not dispute this or that he was a known union supporter when the disciplinary warning was issued. Further, as indicated above, the Company's strong union animus is well established by the record. See *Print Fulfillment Services, LLC*, 361 NLRB No. 144, slip op. at 3 fn. 14 (2014) (such a showing is sufficient to satisfy the General Counsel's initial burden under *Wright Line*).

However, I find that the Company adequately established that it would have disciplined Quinto anyway, regardless of his union activity. There is no dispute that the drivers are required to call in and notify the dispatcher if they will be absent for any reason, and that the Company had previously disciplined drivers for violating the policy.[63] Nor is there any dispute that, unlike the other strikers, Quinto did not call in. Although both Quinto and another driver, David Chavez, testified that he personally informed Mooney, the company owner and president, at the end of the previous day's shift that he would not be working during the strike, I discredit their testimony. First, it was markedly different. Quinto testified that Mooney asked him if he wanted to or was going to work the following day, and that he replied no because it was too dangerous. Quinto repeatedly testified that this was all he said, nothing else. (Tr. 1224, 1236).[64] However, Chavez testified that Quinto replied, "Hell no, I want to support my co-drivers outside" (Tr. 1254–1259). Moreover, both testified that Chavez witnessed the conversation because they had finished their post-trip inspections and were dropping their paperwork off at the same time. However, their manifests show that Chavez finished his post-trip inspection over an hour before Quinto that day (R. Exhs. 25, 26). Finally, Mooney denied that Quinto ever stated during their conversation that he was not coming in (and that Chavez was present during the conversation). Mooney testified that when he asked Quinto if he was coming in, Quinto just said, "well, its kind

[63] See R. Exh. 49. The written policy says that the drivers must call their "supervisor" no later than 2 hours before the start of the shift. However, Quinto acknowledged that the usual procedure, which he had always followed in the past, is to call a specific number at the office and tell the dispatcher (Tr. 1225–1228, 1241–1242).

[64] Quinto later retracted his prior testimony and testified that he also told Mooney that he wanted to support the strike; however, he gave this testimony only after the Union showed him his prehearing affidavit (Tr. 1238).

of crazy out there, you know," and asked if it was safe to work during the strike, and he told Quinto how to avoid any problems. (Tr. 1707–1709.) On balance, I find that Mooney's testimony about the conversation is more credible than Quinto's and Chavez'.

Perhaps because of the foregoing evidentiary problems with the *Wright Line* theory, the General Counsel's posthearing brief offers an alternative legal theory for finding a violation. Specifically, the General Counsel argues that it is immaterial whether Quinto notified Mooney he would not be working during the strike because it is well established that, absent a compelling business justification, employers may not lawfully require employees to give prior notice of striking, citing *Savage Gateway Supermarket*, 286 NLRB 180, 182 (1987), enfd. 865 F.2d 1269 (6th Cir. 1989).[65]

The General Counsel, however, never articulated this theory at the hearing. On the contrary, as indicated by the colloquy below, the General Counsel stated on the seventh day of hearing (September 3) that the sole theory was that Quinto had, in fact, informed Mooney he would not be working during the strike:

> JUDGE WEDEKIND: What is the General Counsel's theory of this violation?
> . . . . .
> MCNEILL: The theory is that Quinto was a known [u]nion supporter and that he participated in the August 2013 strike. And he, consistent with company policy, notified the Company that he was not going to come to work in order to support those on the strike line and also to participate himself. And he was written up for it.
> JUDGE WEDEKIND: Okay. So you're not challenging the company policy. You're saying it's a legitimate company policy to require employees to notify them before they go on strike.
> MS. MCNEILL: No. It's my understanding that that's not the policy, to notify before you go on strike. The policy is to simply notify that you're not going to come into work.
> JUDGE WEDEKIND: Okay. [B]ut you're not challenging that policy.
> MS. MCNEILL: We don't have a problem with the policy itself. And actually, I don't want to go so far as to say the Company has a written policy. [] I guess they'll put something on in their case in chief. We have copies of what may or may not be a policy. So they'll testify about that. But in terms of the policy being overly broad or maybe unlawfully implemented, no, that's not our theory.
> JUDGE WEDEKIND: Okay. . . . So your theory is he did notify them, the Company, through Mr. Mooney.
> MS. VALENTINE: Yes.
> MS. MCNEILL: That's right.
> JUDGE WEDEKIND: Okay. And you're basing this on the testimony of these two individuals that just testified?
> MS. MCNEILL: Yes.[66]

[65] The Union's posthearing brief likewise asserts this alternative theory.

[66] Tr. 1262–1264. See also the General Counsel's earlier opening statement, Tr. 14 ("Respondent disciplined employee Paul Quinto for not coming to work during the strike"). I take administrative notice that the General Counsel's August 7, 2014 brief in support of the

Not surprisingly, therefore, the Company did not thereafter put on any evidence about its business justification for applying its call-in policy to Quinto and the other August 2013 strikers. Nor did the Company address the General Counsel's alternative *Savage Gateway* theory in its posthearing brief. In these circumstances, I find that it would deny the Company due process to now find a violation based on that theory. See *Buonadonna ShopRite,* 356 NLRB No. 115 (2011); and *Laborers Local 190 (VP Builders, Inc.)*, 355 NLRB 532, 534 (2010).[67]

Accordingly, the allegation is dismissed.

II. ALLEGED UNFAIR LABOR PRACTICES INVOLVING LEASE DRIVERS

The complaint also alleges that the Company committed various 8(a)(1) and (3) violations involving its lease drivers, in particular lease drivers Mateo Mares and Amilcar Cardona, who participated in both the August and the November 2013 strikes and otherwise openly supported the union campaign.

As previously mentioned, unlike the company drivers, the lease drivers were hired by GFS pursuant to a so-called "lease and transportation" agreement (LTA). The LTA, which was drafted for GFS by a law firm retained for that purpose, described the lease drivers as "independent contractor[s]," and set forth various terms governing the parties' relationship. The Company presented the LTA (in English) to each lease driver for signature at the time they were retained, and all of the lease drivers signed it without any negotiation or changes. See Jt. Exhs. 6(a) and 7(a), the LTAs signed by Cardona and Mares in 2008.

According to Mooney, GFS's owner and president, he made a deliberate business decision in 2008, when he purchased the drayage company, to retain such lease drivers in addition to company drivers. He had followed the same business model in the past, and found it more profitable to use a combination of company drivers and lease drivers. At least in part, this was because the business was not evenly balanced between the day and night shifts, and thus only a certain number of company-owned trucks could be fully utilized by "slip-seating" company drivers on both shifts. Retaining lease drivers who owned their own trucks enabled the Company to perform the extra work without making the extra capital investment.

However, approximately a year after Mooney purchased the business, the Ports of Los Angeles and Long Beach implemented a so-called "clean truck" program to reduce air pollution, which effectively required the lease drivers to purchase new trucks to continue operating out of the ports. Mooney was aware that the clean truck program would be implemented when he

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10(j) injunction petition likewise asserted only a *Wright Line* antiunion-motive theory with respect to the Quinto allegation; and that it was not until September 8, when the General Counsel filed its reply to the Company's opposition to the 10(j) petition, that the General Counsel asserted a similar alternative theory in that proceeding.

[67] The district court reached essentially the same conclusion in the 10(j) proceeding. See the court's October 10 order, 2014 WL 5343814 at *21 (rejecting the General Counsel's alternative theory because "that is not the issue at hand . . . [the issue is] whether Petitioner has provided evidence that Respondent's action of issuing a written warning was motivated by anti-union animus").

purchased the business; indeed, he bought it because he anticipated that the new program would put some of the competing drayage companies out of business. But, he thought the lease drivers, who owned older trucks at the time, would be able to purchase new trucks on their own, either through government grants or with other financing. As it turned out, however, they were unable or failed to do so.

So Mooney created TKS Leasing, LLC (named after his three sons, Todd, Kyle, and Sean) to obtain the necessary financing to purchase and lease new trucks to the drivers.[68] Each driver was given the option of choosing among different makes and models of trucks (e.g. a Mack or Volvo) that had a capacity of 80,000 lbs and complied with the clean truck program, and TKS then purchased and leased that truck to the driver pursuant to an "equipment lease agreement." Although the trucks cost about $100,000 each, the Port of Los Angeles offered a $20,000 incentive, which reduced the cost to about $80,000. Under the terms of the agreement, the driver was required to make a "nonrefundable deposit" of $6000 towards this cost (which the driver could cover by selling his/her old truck to TKS for scrap or by making installment payments over time). The driver was then required to make regular monthly payments of $750 over the next 5 years (the same term as the truck warranty). At the end of the 5-year period, the driver would then have the option of purchasing the truck by making a single "balloon payment" of $16,400 or paying off/financing the same amount over 24 months. Like the LTA, the Company presented the equipment lease agreement (in English) to each lease driver for signature, and all signed it without any negotiation or changes. See Jt. Exh. 6(b), the equipment lease agreement signed by Cardona (Tr. 381–382, 537).

Both the LTA and the equipment lease agreement were subsequently revised by the Company in late 2011. The LTA was revised primarily to further emphasize that the lease drivers were "nonemployee independent contractor[s]." The equipment lease agreement (which was now called a "vehicle lease agreement") was revised to provide that GFS and TKS were, collectively, the lessor of the truck, and to expressly incorporate by reference the LTA between each driver and GFS. Although an attachment to the revised LTA stated that the driver was the "registered and/or legal owner" of the truck, the revised equipment lease agreement stated that it was a "true 'lease'"; that the truck remained the property of GFS/TKS and the driver had no ownership interest in the truck until he/she acquired it; and that the terms of the LTA were subordinate to the vehicle lease agreement.[69] It further provided that the vehicle lease agreement would immediately terminate if the LTA was terminated for any reason, and that, "subject to" the right/option to purchase the truck where the 5-year lease period had expired, the driver had to immediately return the truck to GFS/TKS. Like the original agreements, the Company presented the revised agreements (again in English only) to each lease driver for signature, and all again signed them without any negotiation or changes. See Jt. Exhs. 6(f),(g), 7(e),(f), the revised 2011 LTAs and vehicle lease agreements signed by Cardona and Mares.

[68] Mooney initially testified on direct examination that TKS is "a separate company" (Tr. 1720). However, he subsequently acknowledged on cross examination that TKS "is owned by us . . . it's the same thing . . . we just put the trucks there as—but it's all part of the Company" (Tr. 1918).

[69] Compare R. Exhs. 7, 18, the December 2013 California DMV vehicle registrations for the trucks leased by Mares and Cardona, which identified the "registered owner" as both TKS (as the "lessor") and Mares and Cardona (as the "lessee").

At the time of the relevant events here, Mares and Cardona were near or at the end of the 5-year lease period, and had indicated that they intended to purchase the truck, but had not yet done so. There is also no substantial evidence that other lease drivers had purchased their leased trucks prior to or during the relevant period.

A. Employee vs. Independent Contractor Status

As indicated earlier, the threshold issue is whether, notwithstanding that they are described as "nonemployee independent contractors" in the LTA, Mares and Cardona and the other GFS lease drivers were actually employees covered by the Act during the relevant period when the alleged unfair labor practices occurred.[70] The General Counsel and the Union allege that they were. The Company contends that they were not.

The applicable principles were recently restated in *FedEx Home Delivery*, 361 NLRB No. 55 (2014). The party asserting independent contractor status has the burden of proving it. In evaluating whether that burden had been met, the Board considers all the incidents of the relationship in accordance with common-law agency principles. Specifically, the Board considers the following nonexhaustive common-law factors set forth in the Restatement (Second) of Agency §220 (1958):

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
> (d) The skill required in the particular occupation.
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
> (f) The length of time for which the person is employed.
> (g) The method of payment, whether by the time or by the job.
> (h) Whether or not the work is part of the regular business of the employer.
> (i) Whether or not the parties believe they are creating the relation of master and servant.
> (j) Whether the principal is or is not in the business.

The Board also considers, as a separate factor, whether the individual is, in fact, rendering services as an independent business, i.e., whether the individual has a significant actual (as opposed to merely theoretical) entrepreneurial opportunity for gain or loss, a realistic ability to work for other companies, a proprietary or ownership interest in the work, and an ability to control important business decisions such as scheduling, hiring, selection, and assignment of

[70] The appropriate timeframe for evaluating independent-contractor status is the period surrounding the unfair labor practices. See *Aljoma Lumber, Inc.*, 345 NLRB 261, 270 (2005); *Lakes Pilots Assn., Inc.*, 320 NLRB 168, 173–174 (1995); and *Fugazy Continental Corp.*, 231 NLRB 1344, 1348 (1977). Compare also *CNN*, 361 NLRB No. 47, slip op. at 8 (2014) (joint-employer status).

employees, purchase and use of equipment, and commitment of capital. However, the Board does not treat this or any other factor as decisive.[71]

As discussed below, although there is some evidence that the lease drivers were independent contractors under the above analysis, the clear weight of the evidence indicates that they were employees during the relevant period.[72]

(a) Extent of the Company's ability to control the lease drivers' work

Work schedule. Although section 2 of both the original and the revised LTA provided that the lease drivers could work "at the times and during the periods which [the driver] alone chooses," in practice the Company determined which shift, day or night, each lease driver worked. The drivers were assigned to one of the two shifts and could not work the other shift. (Mares was assigned to the day shift and Cardona to the night shift during the relevant period.) However, unlike the company drivers, who were assigned a start time and had to work until the dispatcher stopped making assignments (subject to DOT hour limits), the lease drivers were not required to show up at a particular time and could stop working whenever they wanted. Although the lease drivers normally showed up at the same time every shift, they did so for other reasons—for example, because the ports opened and closed at particular times and the drivers could make more money the more hours and assignments they completed—not because the Company required them to.[73] Indeed, the lease drivers did not have to show up at all. Although they typically worked a full 5-day week, they could choose not to work on a particular day.[74] And, while they usually notified the dispatcher as a courtesy, they were not required to give advance notice or obtain the Company's approval before taking a day off.[75] The only time a

[71] See also *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015). As noted by the Board in *FedEx*, the Ninth Circuit has applied a similar approach. See *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014); and *Slayman v. FedEx Ground Package System, Inc.*, 765 F.3d 1033 (9th Cir. 2014).

[72] Much of the testimony and other evidence regarding independent-contractor status is undisputed. Where there are clear conflicts regarding significant facts, I have addressed them. To the extent other testimony by one or more witnesses could be interpreted as contrary to my findings, that testimony has been rejected as contrary to the weight of the evidence.

[73] Although both Mares and Cardona testified that they could not start their shifts whenever they wanted, they never explained why (they were never asked). As indicated above, the weight of the testimonial and documentary evidence establishes that the Company did not require them to show up at a particular time.

[74] Mares testified that Mooney told him in 2009 that it was his responsibility to work 5 days a week. However, he could not recall if Mooney told him why he needed to work a full schedule. (Tr. 63–64, 227, 336.) I credit Mooney's testimony that he explained to Mares and the other lease drivers that they needed to do so because the Port of Los Angeles required a new truck to make a minimum of 300 trips into the port a year to qualify for the $20,000 incentive, and that the drivers would have to pay the incentive back if they failed to meet the minimum. (Tr. 1837–1838, 1840.)

[75] I discredit day-shift driver Patricia Lozano's testimony that Rodriguez told her she had to call in if she was going to be absent, even if just for a day or two (Tr. 1520). No other drivers testified that they were told this by Rodriguez. Even Lozano's husband Walter, who worked the day shift at GFS from 2008 until mid-2011 (see below), testified that no one told him he had to

lease driver had to submit a prior "request" was if he/she would be out for a week or more, and the purpose of the request was to authorize GFS to deduct the driver's lease payments for that period before the driver left. See GC Exh. 11 and the discussion of the payment method, below. Thus, I find that the Company controlled the lease drivers' shifts, but did not otherwise control their work schedule.

Work assignments. The Company determined the work that both the company drivers and the lease drivers performed through the dispatch process. The dispatcher provided the drivers with their work assignments throughout the day; when the driver finished one assignment, he/she called in to get another assignment from the dispatcher. Unlike the company drivers, the lease drivers could reject an assignment; indeed, sections 2 and 8 of both the original and the revised LTAs specifically so stated.[76] And, in practice, the dispatchers sometimes offered lease drivers an alternative assignment if one was available.[77] However, this practice

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call in. Rather, he testified that he simply believed he had to call in because he did not do so once soon after he started and the dispatcher gave him undesirable assignments the next day (Tr. 1448, 1484, 1487–1488).

[76] Two drivers testified that they were specifically told they could not reject assignments: Mares and Patricia Lozano. Mares testified that Mooney told him in 2009 that he had to accept all assignments (Tr. 160). However, Mares later clarified that Mooney told him he needed to work 5 days a week, and that he *interpreted* this to mean he had to accept all assignments (Tr. 336–337). I find that Mooney never told Mares that he had to accept all assignments. Lozano testified that General Manager Toby Slayman told her in 2012 that she could not reject assignments after she complained to Slayman that the dispatchers had failed to give her an alternative assignment after she rejected one because the pay rate was too low. Specifically, she testified that Slayman said "Hey, you are here. You have to do the assignment, so you don't have a chance to reject the assignment. . . .If you don't want to do the assignment, you can go home." (Tr. 1511–1514.) Although Slayman did not deny this (he was never asked about it), Lozano admitted that she can speak only "a little" English and that no interpreter was present when she spoke to Slayman. Further, Lozano acknowledged that she returned to work the next day and has continued to work at GFS since. Based on the record as a whole, I find that Slayman simply told Lozano that she had no right to receive an alternative assignment if she rejected one.

[77] The record also indicates that at least some dispatchers offered at least some lease drivers a couple options for the first assignment of the day. However, until recently, dispatchers also offered company drivers options. According to night-shift dispatcher Juan Garduno, Stevens directed him to stop offering choices to the company drivers about 2 months before the hearing in this proceeding. He initially testified (on cross examination) that Stevens did not tell him why (Tr. 2354–2355, 2359–2360). However, he subsequently testified (on redirect) that Stevens told him to stop because one of the company drivers (Ada Juarez) was getting upset if she did not get her choice (Tr. 2360–2362). I give no weight to Garduno's latter testimony, at least not as evidence of Stevens' reason for changing the practice. It was not only inconsistent with his initial testimony, but it was not corroborated by Stevens, who did not testify about the matter. Further, Garduno was not always a reliable or credible witness. For example, he gave inconsistent testimony about when the lease drivers arrive for work. He initially testified on direct examination that he does not know when they will show up (Tr. 2304); later admitted on cross examination by the General Counsel that he expects the lease drivers to arrive at a certain time on certain days based on past experience, and counts on it (Tr. 2339–2341); but later again denied on cross examination by the Union that they typically come in about the same time every

varied depending on the dispatcher and driver. And the dispatcher had no obligation to provide a lease driver with an alternative assignment if the first was rejected; indeed, section 2.1 of the 2011 LTA specifically stated that the agreement "should not be construed as a commitment to offer any shipment(s)" to the lease driver, and that if the driver did not accept tender of a shipment, GFS could "re-offer such shipment to another [lease driver] under contract with GFS." Nor could a lease driver bypass the dispatcher and solicit assignments directly from GFS' customers (e.g. Skechers). Moreover, both the original and the revised LTA provided, without condition or limitation, that the Company reserved the right to unilaterally terminate that agreement with 24 hours notice (which, as indicated above, also effectively terminated the vehicle lease agreement). And a preponderance of the credible evidence indicates that the Company exercised this right in mid-2011 and terminated one of the lease drivers (Walter Lozano) because he refused to accept any assignments involving a particular run that all the drivers considered undesirable, and the Company therefore rotated, due to the long distance, heavy cargo weight, and high wind conditions.[78] There is no credible or substantial evidence that the Company's policy or position regarding such matters subsequently changed, i.e. there is no evidence that the Company would not have likewise terminated the LTA if a lease driver refused to take any assignments on a particular run under similar circumstances during the relevant period. Accordingly, I find that the Company controlled the lease drivers' work assignments.

Work performance. Section 1.1 of the 2011 LTA specifically provided that, "except as required by federal statute and regulation . . . GFS shall have no right to, nor shall exercise, control over the manner or prescribe the means used or method of accomplishing" the work. Similarly, section 5.3 of the LTA stated that "subject only to the requirements imposed by law," the lease driver "alone shall direct, in all respects, the manner and means of operation of the vehicle(s) used" in performing the work, including, inter alia, the selection of routes, making stops for breaks, lunch, etc., and where the vehicle is maintained, repaired, or fueled. Consistent with the foregoing, the 2011 vehicle lease agreement stated that the lease driver had the option,

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day (Tr. 2358). He also testified that he never saw Barragan circulate a petition (Tr. 2318). However, his signature appears on the first antiunion petition (CP Exh. 25, #34), and Barragan testified that she is the one who solicited his signature (Tr. 2951–2952).

[78] I credit Walter Lozano's testimony about the termination. Specifically, I credit his testimony that he met alone with Mooney and Rodriguez (who translated for him and Mooney) about the run, and that Mooney became frustrated, refused to discuss the matter anymore, and told him he was "fired" and to return the keys to his leased truck after he told Mooney he would only do the run if the Company sent him in one of its own trucks and paid him like a company driver (Tr. 1437–1433, 1478–1481, 1490–1491, 1497–1498). I discredit Mooney's testimony that Patricia Lozano and Kadir Saveedra likewise refused to do the run; that they were also present during the meeting; and that he simply told them they might not be offered alternative assignments if they refused to do the run (Tr. 1761–1764, 1889–1892). Mooney's testimony in this regard was not corroborated by Rodriguez, who denied ever meeting with Lozano about the run (Tr. 2741), any other company witness (Mooney never identified who translated at the meeting), or Patricia Lozano or Saveedra. For these and all the other reasons previously discussed, I also discredit Mooney's and Rodriguez' testimony that Lozano thereafter "quit" or said, "I'm done [and] don't want my truck anymore," when he dropped off the truck keys (Tr. 1890–1891, 2687).

but was not required, to obtain maintenance through a mechanic provided by the Company. However, it restricted the lease driver's ability to modify the truck in any way that might void the manufacturer's warranties.

The LTA and the vehicle lease agreement also expressly contemplated that the lease drivers could hire employees, including other drivers. Section 4 of the LTA stated that GFS would exercise powers with respect to hiring such employees only to the extent required to comply with federal statutes or regulations, and that the lease driver otherwise assumed full responsibility regarding any such employees. Section 3.5 of the vehicle lease agreement added only that any drivers employed by the lease driver must be "duly qualified." See also the "Acknowledgment of Independent Contractor" form that the Company had the lease drivers sign in 2008, R. Exhs. 1, 13 ("I further acknowledge that I shall provide a Worker's Compensation Policy for any and all of my drivers/employees as required by law.")

The Company generally acted consistent with the foregoing provisions during the relevant period. Although the LTA expressly permitted the Company to place a GPS in the lease driver's truck for various purposes, and the Company did so, the GPS was used primarily for pay and billing purposes. (See discussion of payment method, below.) Consistent with the LTA, like company drivers, the lease drivers could choose the routes they took. And while they were typically given an appointment time to pick up cargo at the ports, most such loads could be delivered at any time. Regarding fuel services, the record indicates that, consistent with the LTA, the lease drivers could choose where to get the trucks fueled. As for maintenance and repair, the Company required the lease drivers to use a qualified or certified mechanic as mandated by federal and state regulations and/or the truck warranty, but did not otherwise control where the drivers had the services performed.[79] Similarly, the Company told the lease drivers that certain conditions had to be satisfied to hire employees or other drivers, but did not absolutely prohibit them from hiring employees or other drivers.[80] Accordingly, I find that the Company did not exercise substantial control over how the lease drivers' performed the work.

Work policies. The Company often circulated memos to both the company drivers and the lease drivers (usually by attaching them to their checks) notifying, reminding, or cautioning them about various matters, including accidents, misdeliveries, and company safety, security,

[79] See, e.g., GC Exh. 4. Prior to August 2013, the Company retained a certified mechanic to perform maintenance and repair services on its trucks onsite, and made this service available to the lease drivers as well. Although Mares and Walter and Patricia Lozano testified that they were required to use the onsite mechanic during that time, several other drivers testified otherwise. Based on the record as a whole, I find that the Company did limit where the lease drivers could take the leased trucks for maintenance or repair both before and after August 2013, but only to ensure that the drivers used a qualified or certified mechanic as required by DOT and California Highway Patrol regulations and/or the truck warranty.

[80] Although Mares and Patricia Lozano testified that they believed or were told that they could not hire anyone else to drive the truck, other drivers testified that they believed or were told that they could do so provided they obtained insurance on the employee and he/she had a good driving record for at least 2 years. Based on the record as a whole, I find that the Company did tell the lease drivers that certain significant requirements had to be satisfied in order to hire anyone to drive the truck. However, I find that the Company did not tell the lease drivers that they were prohibited from hiring anyone to drive the truck.

and parking procedures. One particular memo in April 2011 about picking up containers reminded the drivers to report in if they were unable to pick up a container for any reason, and stated that the failure to do so would "result in disciplinary action" (CP Exh. 24). Although the disciplinary action was not specified in the memo, Mooney testified that a company driver would be written up and that a lease driver would not be paid for the trip (Tr. 1981). Another memo in April 2010 dealing with accidents stated that any company driver who had an accident would be suspended the next day, and any lease driver who had an accident would not be offered a dispatch the following day (Jt. Exh. 3(a)).[81] Although Mooney testified that this is no longer company policy—that the Company does not discipline lease drivers for having accidents—he never specified when or how the Company changed the policy or notified the drivers of the change. Further, he admitted that the Company might terminate the LTA if a lease driver had one or more accidents. He said the Company might do so because the lease driver technically leases the truck back to GFS, the truck carries the Company's DOT number, and any accidents with the truck adversely affect the Company's DOT CSA (compliance, safety, accountability) score, which customers consider when evaluating whether to contract with GFS. Finally, as indicated above, the LTA authorized the Company to terminate that agreement at will (and thereby also the vehicle lease agreement) with 24 hours notice. Accordingly, I find that the Company required the lease drivers, on pain of "discipline" or termination, to adhere to company work policies during the relevant period.

(b) Whether lease drivers were engaged in a distinct occupation or business

There is no evidence that any of the lease drivers actually incorporated, hired any employees, or performed work for any other company. The lease drivers worked solely for GFS and relied completely on the Company's dispatchers to obtain their assigned work. There is also no evidence that they publicly advertised themselves or operated in any way as a separate business. The Company required all of the trucks, including those operated by the lease drivers, to display both its DOT number (which the carrier is required to display by law) and the GFS logo. Although the Company did not require any of the drivers, company or lease, to wear a uniform or display its logo on their clothing, there is no evidence that any lease driver wore an alternative uniform or displayed his/her own logo. Accordingly, I find that the lease drivers were not engaged in a distinct occupation or business.

[81] See also GC Exhs. 29, 30, documents signed by Mares and Cardona in 2008, which set forth "company accident procedures," and stated that failure to follow certain of those procedures (not reporting the accident to the Company, not completing the preliminary accident report, or not taking pictures at the scene if possible) "will result in disciplinary measures and or discharge depending on the severity of the incident." The LTA also specifically addressed the lease driver's duty to notify GFS of any accidents. However, it appears that such notification and reporting procedures were required because the Company itself had a legal duty to report any accidents by trucks carrying its DOT number. See generally *Precision Bulk Transport*, 279 NLRB 437 (1986), and cases cited there (government-imposed regulations do not constitute evidence of company control).

(c) Whether the type of work in the locality was usually done under the direction of an employer or by a specialist without supervision.

There is no record evidence that the type of work performed by the lease drivers around the Ports of Los Angeles and Long Beach was usually performed without direction from an employer. Although there is testimony that there were many drivers working at the ports who were classified as "independent contractors" for many years, there is little or no evidence regarding the type or degree of direction they received from the contracting company. Further, the record indicates that, at GFS, the lease drivers received essentially the same direction from the Company as the company drivers. As indicated above, they obtained their assignments from the same company dispatchers. They also reported to the same company supervisor (Rodriguez), and submitted their daily manifest and truck inspection forms to the Company in the same manner at the end of their shift. In addition, as discussed above, they were required to comply with the same company policies. Accordingly, I find that the type of work in the locality was usually done under the direction of an employer.

(d) The skill required as a lease driver

The record indicates that all of the lease drivers had a Class A commercial driver's license (CDL), which authorized them to operate trucks of such a large size and capacity. And some of them had taken and passed additional tests to obtain the special endorsements necessary to transport tanks, doubles/triples, and hazardous materials. (There is no evidence that Mares and Cardona had any special endorsements.) However, company drivers also had a Class A CDL, and some likewise had special endorsements. Accordingly, I find that the lease drivers had special skills,[82] but that they were no different than the company drivers' skills.

(e) Whether the Company or the lease drivers supplied the instrumentalities, tools, and the place of work

As discussed earlier, the Company purchased trucks meeting its specifications and leased them to the lease drivers with an option to buy after 5 years. In addition, it supplied each of the drivers with a computer "tablet" to keep in the truck, which contained the GPS device discussed above, and was used by the dispatchers to notify drivers of their assignments. The Company provided dollies to qualified lease drivers for use on overweight moves as well. The Company also provided the lease drivers with a place to park the leased trucks at the facility between shifts; indeed, it required the drivers to park the leased trucks there.[83] The Company charged the

[82] See *Narayan v. EGL, Inc.*, 616 F.3d 895, 903 (9th Cir. 2010), and cases cited there. See also *Luxama v. Ironbound Express, Inc.*, 2013 WL 3286081 at *7 (D. N.J. 2013); *Carroll v. Kamps*, 795 F.Supp2d 794, 808 (N.D. Ind. 2011); and *DeSouza v. EGL Eagle Global Logistics LP*, 596 F.Supp.2d 456, 465 (D. Conn. 2009).

[83] I credit the testimony of Mares, Cardona, and Walter Lozano that Rodriguez told them they could not park the leased truck at home or anywhere else for safety and insurance reasons. Their testimony in this respect was consistent with the testimony of one of the Company's own witnesses, lease driver Santos Carpio, who likewise testified that he was not allowed to park the leased truck elsewhere (Tr. 3008). Although Carpio subsequently changed his testimony, first saying he did not know (Tr. 3008–3009), and then saying Rodriguez told him he could (Tr. 3009–3010), I credit his initial answer. Carpio struck me as a witness very anxious to testify in

lease drivers about $13–$15/week for the parking, which it deducted from their weekly checks. The Company also made a mobile fueling service, a truck washing service, and an inspection service (to perform 90-day inspections required by the California Highway Patrol) available to the lease drivers onsite, the costs of which it likewise deducted from their weekly checks.[84] Finally, it also provided collision and liability insurance to the lease drivers through its commercial insurance policy (at a cost of 10 percent of the driver's earnings), which satisfied the minimum coverage requirements specified in the LTA and vehicle lease agreement.[85] Accordingly, I find that the Company provided the lease drivers with the instrumentalities, tools, and place of work.

(f) Length of time lease drivers were employed

The 2011 LTA provided that the term of the agreement would be effective "as of the date hereof and for successive ninety (90) day periods thereafter, unless terminated by either party per the terms of this Agreement." Thus, by its terms, the LTA automatically renewed every 90 days. Although the Company and the lease drivers nevertheless formally executed extensions of the LTA every 90 days (see Jt. Exh. 6(h)), according to Rodriguez this was required by the California Highway Patrol (Tr. 2694–2696). And, in fact, most of the lease drivers worked for GFS for several years. Accordingly, I find that, like company drivers, lease drivers were retained by GFS for an indefinite period and not on a job-to-job basis.

(g) Method the Company paid the lease drivers

Like company drivers, lease drivers were paid weekly. Although the LTA stated that the driver's "contract charges" would be payable upon satisfactory completion of "each singular service," it stated that GFS would actually pay the driver a "settlement" of those charges "weekly." And that is how the Company actually paid them. The way the Company determined the amounts to pay the company drivers and the lease drivers was also similar. The Company

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the Company's favor, which made such initial answers favoring the General Counsel and the Union all the more compelling. Further, while some of the other drivers testified that they believed they were allowed to park the leased truck at home or elsewhere, neither they nor any other drivers did so. Accordingly, I discredit Mooney's and Rodriguez' testimony that there were no restrictions on the lease drivers parking their leased trucks at home or elsewhere.

[84] As previously noted (fn. 79), the Company used to make a maintenance service available to the lease drivers onsite as well, but stopped offering this service to the lease drivers in August 2013.

[85] Rodriguez provided an insurance election form to each lease driver along with the LTA and other documents at the time they were hired. The form (which, like the other documents, was in English only) stated that, by signing it, the drivers agreed to use the commercial insurance offered by the Company. See Jt. Exhs. 6, 7; R. Exhs. 2, 16; and GC Exh. 26. Mares, Cardona, and Walter Lozano testified that Rodriguez told them or led them to believe (by marking or taping where to sign the documents) that they had to sign the form. And Patricia Lozano testified that Rodriguez told her shortly after she was hired that she could not buy her insurance elsewhere. I credit this testimony. Although Rodriguez and other lease drivers called by the Company contradicted it, and the form itself stated that the drivers were "free to accept or reject" the Company's insurance, all of the lease drivers in fact signed the form. And no lease driver has used a different commercial insurance policy since.

paid both company drivers and lease drivers a higher or lower rate for each assignment based on certain factors, such as the destination or distance. Thus, their pay would vary from week to week depending on the type and number of assignments they completed. The Company also paid both company drivers and lease drivers an hourly rate for waiting over a certain time (1.5–2 hours) for a load at the port. Unlike company drivers, however, the Company did not pay lease drivers an hourly rate for the time it took them to complete their DOT-mandated pre and post-trip truck inspections.[86] On the other hand, the Company did pay them a "clean truck" fee and fuel surcharge, which the company drivers did not receive. Further, as with company drivers, all rates and payments to the lease drivers were unilaterally determined by the Company; the Company did not negotiate with each individual driver over them.[87] As for benefits, unlike with company drivers, the Company did not provide the lease drivers with paid health insurance, holidays, vacations, or sick leave. Finally, the Company also did not deduct taxes from the lease drivers' weekly checks. Accordingly, I find that there were substantial similarities in how the Company determined the pay rates and paid the company and lease drivers for the work performed, but substantial differences with respect to benefits and tax withholding.

(h) Whether the lease drivers' work was part of the Company's regular business

The record clearly establishes, the Company's posthearing brief does not dispute, and I find, that, like the work performed by the company drivers, the work performed by the lease drivers was a central part of the Company's drayage business.

(i) Whether the Company and lease drivers believed they were creating an independent contractor relationship

As discussed above, both the original and the revised LTAs executed by the Company and the lease drivers stated that the lease drivers were "independent contractors" rather than employees. Further, the "Acknowledgment of Independent Contractor" form signed by the lease drivers when they were initially hired specifically stated that the Company would not withhold taxes and that the lease drivers were responsible for paying them as independent contractors. See R. Exhs. 1, 13. Consistent therewith, the lease drivers filed tax returns as independent business, deducting business expenses from their gross income. See R. Exhs. 73, 74.[88] However, as discussed above, the lease drivers had no realistic opportunity to negotiate over the terms of the LTAs and related documents. Further, none actually incorporated, hired any employees,

[86] As previously discussed with respect to Castillo, the night-shift company drivers were also paid an hourly rate for time spent waiting for the day-shift driver to get back with the truck. As the night-shift lease drivers did not slipseat their trucks, they never had to wait for them.

[87] The record indicates that lease drivers have collectively requested changes on one or two occasions since 2008, including changes in certain pay rates, some of which the Company agreed to implement in 2010 or 2011 and sometime around or after April 2014. One lease driver (Juan Batres) testified that he has also successfully challenged rates he received on the ground that they were out of date and incorrect. However, there is no evidence that the Company has ever negotiated with a lease driver individually over the pay rates he/she would receive.

[88] I therefore find that the lease drivers knew the Company considered them to be independent contractors and intended to treat them as such for legal and tax purposes, notwithstanding that the Company presented them with only an English version of the original and revised LTAs and equipment/vehicle lease agreements and related documents.

advertised or operated as a separate business, or performed work for any company but GFS. Moreover, since at least 2011, several lease drivers have filed wage claims with the California Division of Labor Standards Enforcement (DLSE) specifically alleging that GFS had misclassified them as independent contractors. In February 2013, the DLSE ruled in favor of several lease drivers who had filed such claims, finding that they were employees rather than independent contractors under a multifactor test similar to that described above, and that the Company's deductions for the truck lease, insurance, parking, etc. were therefore unlawful (GC Exhs. 15–18). Mares and Cardona subsequently filed similar DLSE wage claims against GFS in or about July 2013, which remained pending throughout the relevant period and at the time of the hearing in this proceeding. See GC Exhs. 8, 13; and CP Exhs. 9, 10.[89] Accordingly, I find that, while the Company believed that the lease drivers were independent contractors, the record indicates that Mares, Cardona, and other lease drivers did not.

(j) Whether the Company was in the same business as the lease drivers.

As indicated above, there is no dispute that, like the company drivers, the lease drivers performed the core of the Company's drayage business. Further, although the Company also provided related or ancillary services such as warehousing to its customers, the Company's posthearing brief does not contend that the Company and the drivers were in a different business. Accordingly, I find that the Company and the lease drivers were in the same business.

(k) Whether the lease drivers actually rendered services to the Company as independent businesses

Both the original and the revised 2011 LTA contained a "non-exclusivity" clause stating that nothing therein prevented or precluded the lease driver from "performing other contracts for the same or similar work on behalf of others." The 2011 LTA, however, added provisions stating that, if the lease driver did so, he/she was required to (1) first obtain authorization from GFS; (2) abide by any terms imposed on GFS by any port with which GFS has an agreement; and (3) reimburse GFS for any charges, liabilities or fees imposed on GFS as a result of such use, including any and all incentive funds required to be returned to the Port of Los Angeles.

As for the 2011 vehicle lease agreement, section 3.10 ("Other uses") similarly stated that the lease driver "may use the vehicle(s) for purposes other than providing services as described in the LTA."[90] However, like the LTA, it stated that, if the truck was used other than for the drayage business in and around the Ports of Los Angeles and Long Beach, the lease driver was required to reimburse GFS for any funds it had to return to the Port of Los Angeles as a result of such use, including the incentive money that it received to reduce the original purchase price of the truck.

There were also a number of other limitations on the lease drivers' actual ability to work for other companies. First, as indicated above, the Company required the drivers to park the

[89] The delay was apparently due, at least in part, to GFS' motion in state court to compel arbitration of the claims.

[90] But see the opening "Recitals" and section 3.1 ("Use of vehicle(s)"), which stated that the truck would be "operated in conjunction with Green Fleet's contracts" and that the lease driver could not "sublease, directly or indirectly," the truck to anyone else.

trucks in the yard between shifts. Second, the lease drivers worked 50–60 hours a week for GFS, and thus would not have been able to perform any significant work for other companies without violating DOT hour limits. Third, the drivers would have been required—or at least were told by management that they would be required—to obtain separate insurance and cover the GFS logo on the truck to work for another company.[91]

Not surprisingly, therefore, no GFS lease driver ever worked for another company. Nor, as previously discussed, did any lease driver employ other drivers or employees or otherwise operate as a business. Further, they had no involvement in setting the rates charged or received for their work at GFS and no significant proprietary interest in that work other than their investment in the leased truck. Accordingly, I find that, in every real sense, they were neither independent nor businesses. Rather, they were dependent drivers.

In sum, there are some factors of varying significance supporting independent contractor status: the Company did not control the lease drivers' work schedule or how they performed the work; the lease drivers had special skills; and the Company paid the lease drivers somewhat differently than company drivers and did not provide them with fringe benefits or withhold taxes from their checks. However, there are many more factors supporting employee status: the Company controlled what shift and assignments the lease drivers worked and required them to adhere to company policies; the lease drivers were not engaged in a distinct occupation or business; the type of work the lease drivers performed was usually done in the locality under the direction of an employer; the lease drivers' skills were identical to the company drivers' skills; the Company provided the lease drivers with the instrumentalities, tools, and place of work; the lease drivers were employed by the Company for an indefinite period; there were substantial similarities between how the Company paid the lease drivers and the company drivers; the lease drivers' work was a central part of the Company's business; many of the lease drivers did not believe they were independent contractors; the lease drivers and the Company were in the same business; and the lease drivers did not render services to the Company as independent businesses.

Accordingly, I find that the Company has failed to carry its burden, and that the lease drivers were "employees" protected by the Act during the relevant period. Compare *FedEx*, supra; *Time Auto Transportation,* 338 NLRB 626 (2002), affd. 377 F.3d 496 (6th Cir. 2004); *Slay Transportation Co.*, 331 NLRB 1292 (2000); and *Roadway Package System,* 326 NLRB 842 (1998), with *Diamond L Transportation*, 310 NLRB 630 (1993); *Precision Bulk Transport*, 279 NLRB 437 (1986); and *Don Bass Trucking*, 275 NLRB 1172 (1985). See also *Taylor v. Shippers Transport Express,* 2014 WL 7499046 at *9–17 (C.D. Cal. Sept. 30, 2014).[92]

[91] Both Patricia Lozano and Santos Carpio, a witness for the Company, testified that Rodriguez told them they would have to purchase separate insurance to work for another company (Tr. 1510, 1536, 1544–1545, 3038–3039). Remberto Argueta, also a company witness, likewise testified that it was his understanding that he had to get separate insurance to work for another company (Tr. 3270–3272.) I therefore discredit Rodriguez' testimony that she told Mares and other lease drivers that there was "no problem" with them working for another company (Tr. 2713).

[92] As indicated above, this conclusion is consistent with the February 2013 rulings of the California DLSE. It is also consistent with the rulings of the California Employment Development Department (EDD), which awarded unemployment benefits to Mares and Cardona

B. Alleged Unfair Labor Practices

1. Preventing Cardona from working (par. 16(a))

The General Counsel alleges that the Company refused to give any work assignments to Cardona when he arrived to begin the night shift on November 19, 2013, shortly after the strike ended, because he had supported the strike and filed a DLSE wage claim against the Company, in violation of Section 8(a)(1) and (3) of the Act.

As indicated above, Cardona and Mares filed DLSE wage claims against the Company in July 2013 alleging that the Company had misclassified them as independent contractors.[93] The following month, the Union conducted the first strike against the Company. Cardona and Mares were the only two GFS lease drivers to participate in that strike. Thereafter, in November 2013, the Union conducted a second strike against the Company. The strike began early on the 18th and ended about 36 hours later, at 3 pm on the 19th. Again, Cardona and Mares were the only two GFS lease drivers to participate in the November strike. Mares, who as noted above worked the day shift, picketed outside the facility for about 10 hours on both the 18th and the 19th. However, Cardona, who was scheduled to work the night shift on the 19th, only picketed for about 8 hours on the 18th, and came out for only the last half hour on the 19th, from 2:30–3 pm.

Sometime during the morning of the 19th, the Company's attorney, Thomas Lenz, emailed the Union's staff attorney, Michael Manley, about when the striking employees would return to work. Lenz advised Manley that it was GFS' understanding that the striking "employees" would make an offer to return at about 3:30 pm, and "request[ed]" that the "employees" report to work the next day, Wednesday, November 20 "as normally scheduled." Manley thanked Lenz for the email and replied, "The line will come down as planned and employees will be advised to report to work in accordance with their normal schedule on Wednesday" (R. Exh. 31). The Union thereafter told both the day-shift and the night-shift striking drivers that they should not report to work until the following day, November 20 (Tr. 519).

However, because Cardona had not been on the picket line all day the 19th, the Union told him to call the Company to see if he could work. So Cardona called in and asked one of the night-shift dispatchers, Joe Vasapolli, whether he could work. Vasapolli said "yes," but then told him to "hold on" and put Rodriguez on the phone. Cardona then asked Rodriguez the same question. Rodriguez replied that she was not a dispatcher, that he should call the dispatcher, and hung up. Accordingly, as Vasapolli had already said he could work, Cardona went in to work.

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after the Company terminated them (CP Exhs. 3, 16). In accordance with Board policy, I have considered those rulings, but have not afforded them controlling weight. See *Cardiovascular Consultants of Nevada, MI*, 323 NLRB 67 fn. 2 (1997); and *Fugazy Continental Corp.*, 231 NLRB 1344, 1347 (1977).

[93] It is undisputed that Mares and Cardona went together to the DLSE and filed their wage claims against GFS at the same time (Tr. 107, 423–424). Accordingly, their actions clearly constituted "concerted activity" for "mutual aid and protection" within the meaning of the Act, as alleged in the complaint (par. 14(a)). See generally *Murphy Oil USA, Inc.*, 361 NLRB No. 72 fn. 14 (2014); and *Fresh and Easy Neighborhood Market*, 361 NLRB No. 12 (2014), and cases cited therein. Indeed, the Company's posthearing brief does not contend otherwise.

He arrived at about 5 pm as usual and informed Vasapolli that he was there and ready to work. Vasapolli thereupon handed Cardona a manifest, and the other dispatcher, Juan Garduno, told him to check the computer tablet in the truck for his assignment. However, as Cardona was getting into his car to drive over to his truck, Garduno came out and told him he could not work; that his work was cancelled. Cardona asked why, but Garduno said he could not say; that Cardona had to talk to Mooney or Rodriguez about it the next day.

When Cardona got to work the next day, he asked Rodriguez why his work had been cancelled. Rodriguez said it was because he was "awake 2 days outside," indicating that he had not had enough sleep during the strike. Cardona told Rodriguez that was not true. The conversation then ended and Cardona proceeded to get his assignment.[94]

I find that the General Counsel has satisfied the initial burden under *Wright Line* of showing that Cardona's union and other protected concerted activities were a substantial or motivating reason for the Company's refusal to assign him any work on November 19. Mooney admitted that the Company received formal notice from its attorney of Cardona's and Mares' DLSE wage claims that very same day (Tr. 1808). Indeed, as discussed below, it is undisputed that the Company removed the mobile fuel RFID tags from Cardona's and Mares' leased trucks the following day at least in part because they had filed the DLSE wage claims. There is also no dispute that the Company was aware of Cardona's and Mares' support for the Union and participation in the strike (Tr. 2823). Further, as discussed above, the Company's strong union animus is well established by its numerous unfair labor practices before and after the strike.

I also find that the Company has failed to satisfy its burden of showing that it would have denied Cardona any assignments on November 19 even absent his DLSE claim and support for the strike. The Company's sole argument is that the email exchange between Lenz and Manley on the morning of the 19th constituted an "agreement" that the striking employees would not return to work until the following day, November 20 (R. Br. 38–39). However, there are at least three problems with this argument.

First, the Company has at all times taken the position that lease drivers such as Cardona are not "employees" and had no protected right to strike or otherwise support the Union. It has therefore been careful to distinguish between company drivers and lease drivers (aka "Independent Owner Operators" (IOOs)) in its communications and correspondence. See, e.g., Jt. Exh. 3. Further, as discussed above, unlike the company drivers, the lease drivers were not required to work a particular schedule or number of hours. Thus, even assuming that the Company reasonably believed that it had an agreement with the Union regarding when the company drivers could report,[95] it is unlikely the Company believed the agreement applied to Cardona.

Second, the Company never mentioned the agreement at the time as the reason for denying Cardona assignments on November 19. Although Rodriguez testified to the contrary, I

[94] The foregoing summary of the conversations between Cardona, dispatchers Vasapolli and Garduno, and Rodriguez on November 19 and 20 is based on Cardona's credible testimony (Tr. 430–433, 514–515, 518–519, 557–559).

[95] There is no contention that the Union did not have the authority to reach a strike termination agreement with the Company on behalf of the striking drivers.

discredit her testimony. Rodriguez testified that she told Cardona over the phone on November 19 that he could not work because she was advised that the drivers would not come back until the following day and all the loads had already been dispatched. However, her testimony that all the loads had already been dispatched was not corroborated by either Vasapolli (who did not testify) or Garduno (who was not asked anything about the events). Further, Rodriguez later admitted on cross examination that she had no idea whether the dispatchers had any available assignments when Cardona arrived (Tr. 2742–2743). Moreover, if Rodriguez really had told Cardona over the phone that he could not work because all the loads had already been dispatched, there would have been no reason for Cardona to come into work. Finally, as previously discussed, Rodriguez was an extremely poor witness generally.

Third, the Company has never provided any reason or explanation for applying the agreement to Cardona. Although Cardona testified that Rodriguez expressed concern that he had not had enough sleep, Rodriguez denied that she said any such thing to Cardona (Tr. 2723). And the Company does not contend that its decision to deny Cardona any assignments was based on a reasonable belief that he had not had enough sleep.

Accordingly, I find that the Company violated the Act as alleged. See generally *Metropolitan Transportation Services*, 351 NLRB 657, 662–663 (2007), and cases cited there (an employer's proffer of pretextual reasons for its actions both evinces its unlawful motive and fails by definition to meet its rebuttal burden under *Wright Line*).

2. Removing the mobile fuel RFID tags from Mares' and Cardona's leased trucks (par. 16(b),(c))

The General Counsel also alleges that the Company violated Section 8(a)(1) and (3) of the Act by removing the mobile fuel RFID tags from Mares' and Cardona's leased trucks on November 20, 2013, the day after the strike, thereby effectively preventing them from continuing to use the onsite mobile fuel service. Again, the General Counsel alleges that the Company did so both because they had filed DLSE wage claims against the Company and because they had participated in the strike.

There is no dispute that the Company removed the mobile fuel RFID tags from Mares' and Cardona's leased trucks on November 20. Nor is there any dispute that it did so because Mares and Cardona had filed DLSE wage claims against the Company; the Company admits this. (Tr. 1809, 1957–1958, 2405–2407, 2432, 2718, 2750, 2823.) The Company, however, argues that it removed the RFID tags, not to retaliate or discriminate against Mares and Cardona for filing the DLSE claims or supporting the strike, but because the DLSE claims alleged that the Company's deductions for the mobile fuel service were unlawful, and the Company "needed to take steps to mitigate its exposure" in the event the DLSE agreed with the allegation (Br. 40).

Again, there are at least two significant problems with the Company's argument. First, if the argument were accepted, the Company could lawfully take away, not only the mobile fuel service from Mares and Cardona, but the trucks themselves (since Mares and Cardona likewise alleged that the deductions for the trucks were unlawful), thereby effectively terminating them. (As discussed below, this is essentially what the Company subsequently did.) The Company

cites no legal authority permitting it to "mitigate" a DLSE wage claim in this manner, which would obviously have a substantial chilling effect on the filing of such claims.[96]

Second, the Company failed to present any evidence that it removed the mobile fuel RFID tags from the trucks of the other lease drivers who have filed similar DLSE claims. It is undisputed that two such lease drivers (Roberto Sandoval and Julio Salamanca) still worked at GFS as of the hearing (Tr. 251, 550–551, 1827–1829, 1970, 1988–2000). Thus, given the timing of the Company's action immediately after the strike, and the Company's numerous other unfair labor practices, it is a reasonable inference that the Company also removed the tags from Mares' and Cardona's leased trucks at least in part because they had supported the strike.

Accordingly, applying the same *Wright Line* analysis described above, I find that the Company violated Section 8(a)(1) and (3) of the Act as alleged.

3. Threatening and terminating Mares and Cardona (pars. 14(b)–(e), 16(d), (e)).

The General Counsel alleges that the Company also subsequently violated Section 8(a)(1) and/or (3) of the Act by threatening to sue and to terminate Mares and Cardona if they did not withdraw their DLSE wage claims, and by thereafter terminating them because they refused to do so and because of their support for the union campaign.

On January 2, 2014, after the 5-year lease period under Mares and Cardona's truck lease agreements had expired, Mooney met separately with each of them to discuss the options for purchasing the trucks. Mooney met with Cardona first and then Mares, during or shortly after the afternoon changeover between shifts. HR Director Darlene Stevens and Mooney's son Kyle, GFS' chief financial officer (CFO), also sat in on the meetings. Mooney began by saying that he had received their DLSE wage claims, and that he was "pissed" because he thought he had given Cardona and Mares a good deal. He said the Union had "lied" to them, and that they were independent contractors not employees. He then told them that they had three options with respect to their leased trucks. First, they could purchase the truck by making a single "balloon payment" of $16,400. However, they could choose this option only if they dropped their DLSE claims. Second, they could pay off/finance the same amount over 24 months. But, again, they could choose this option only if they dropped their DLSE claims. Third, if they refused to drop their claims, they could still purchase the truck, but they would have to pay fair market value (about $55,000), and they could no longer work for GFS.

Mares and Cardona both told Mooney that they would not drop their claims. Mooney, however, told them to take several days to think it over, and gave them a document to review entitled "First Amendment to Vehicle Lease Agreement." The amendment set forth the payment terms of the second (finance) option. It also contained a provision amending section 3.8 of the

[96] There were other possible ways the Company might have mitigated its potential financial liability for the alleged unlawful deductions that would not have deprived Mares and Cardona of a truck, mobile fueling, or other services provided to other drivers. For example, it could have ceased making the deductions and converted Mares and Cardona to company drivers by, inter alia, paying them the same load and hourly rates and fringe benefits as company drivers. As discussed below, I find that the Company never offered them this option.

vehicle lease agreement to state that, in the event they ever claimed that they were or are an employee rather than an independent contractor, the vehicle lease agreement would immediately terminate and their only option would be to purchase the truck at fair market value. (Jt. Exhs. 6(i), 7(h).)

Several days later, on January 8, Mooney met separately with Cardona and Mares again. As on January 2, the meetings were held during or after the afternoon shift change, Mooney met first with Cardona and then Mares, and Stevens and Mooney's son Kyle were also present. At each meeting, Mooney asked if they had made a decision. Both replied that they wanted to finance the payoff amount for the trucks over 2 years, but they would not withdraw their DLSE wage claims. Mooney said that was not an option; that they were therefore being terminated; and that they should turn in their truck and gate keys. Both Cardona and Mares thereupon gave Mooney their keys and left the premises. As Mares was leaving, Mooney said the Union was "brainwashing" him; that he was "not going to get away with it"; and "I will sue you back." Mares replied, "I'll see you in court."[97]

In agreement with the General Counsel, I find that Mooney violated Section 8(a)(1) of the Act at the January 2 and 8 meetings by conditioning Cardona's and Mares' continued employment on withdrawing their DLSE claims. See generally *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975), supplemental decision 227 NLRB 792 (1977), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 98 S.Ct. 3143 (1978) (employer unlawfully threatened

[97] Mooney, Stevens, Cardona, and Mares testified about the January 2 and 8 meetings. (Mooney's son Kyle did not testify.) Night-shift dispatcher Garduno, who testified that he was a translator at the January 2 meetings, also testified about those meetings. To the extent there are inconsistencies, I credit Cardona (whose testimony was the most detailed and consistent with the record as a whole) and Mares. For example, I discredit Mooney's testimony that he never told Cardona and Mares that they could not continue working as an owner operator for GFS if they chose the third option and did not withdraw their DLSE claims (Tr. 1991). Stevens herself testified that Mooney told Mares that he could not claim that he is an employee and be an owner operator for GFS at the same time (Tr. 2247). Further, although the record indicates that two other lease drivers who filed DLSE claims have continued to work at GFS (Sandoval and Salamanca), Mooney testified that Sandoval did not file a DLSE claim until after he signed the amendment, and the Company did not receive his claim until late March 2014, after the January 28 unfair labor practice charge was filed alleging that Mares and Cardona were unlawfully terminated (GC Exh. 1(ae). As for Salamanca, Mooney testified that he is still within the 5-year lease period, and they have not yet had the same discussion about the purchase option. (Tr. 1805, 1827, 1829, 1988.)

I also discredit Mooney's testimony that he offered Mares and Cardona another option at the January 8 meetings—to "fill out an application" to be a company driver (Tr. 1823–1824). See also Steven's testimony (Tr. 1965), and the Company's June 19, 2014 (post-unfair labor practice charge) memo to all employees (CP Exh. 21). Both Mares and Cardona credibly denied that they were ever offered that option (Tr. 331–332, 527–528). Further, Mooney admitted that he was angry at the January 8 meeting with Cardona, and told him, "if you are not going to sign anything, you just need to turn in your key" (Tr. 1829). Finally, it is highly unlikely on this record that Mooney would have offered either Mares or Cardona employment as company drivers given their strong and open support for the Union and participation in both the August and the November strikes.

employees with discharge if they refused to withdraw punitive damages claim in their state court civil suit for lost wages). Like Pasalagua's February 2014 threat to sue company drivers Yasser Castillo and/or Paco and Carlos Sanchez if they did not withdraw their unfair labor practice allegations, I find that Mooney's threat to sue Mares if he did not withdraw his DLSE claim at the January 8 meeting also violated Section 8(a)(1) of the Act.[98] See *Three D, LLC*, 361 NLRB No. 31, slip op. at 1 fn. 3 (2014) (employer unlawfully threatened employees with legal action in retaliation for their protected concerted activities). Finally, for essentially the same reasons previously discussed regarding the Company's removal of the mobile fuel RFID tags, I find that the Mooney unlawfully terminated Mares and Cardona on January 8 both for filing the DLSE claims and for supporting the union campaign, in violation of Section 8(a)(1) and (3) of the Act. See also the discussion below regarding company agent Barragan's subsequent statements and threats.

4. Threatening other drivers with termination (par. 12(b)).

The General Counsel finally alleges that, after Cardona and Mares were terminated, antiunion driver/company agent Barragan threatened that other prounion drivers would be terminated as well, in violation of Section 8(a)(1) of the Act. Several drivers provided testimony supporting these allegations: Castillo, Carlos and Paco Sanchez, Agustin Ramirez, Martin Herrera, and Reina Hernandez.

Castillo testified that he was in the drivers' room waiting for his key on January 8, when he saw Stevens open the office door and let Cardona out.[99] About 10 antiunion drivers, including Barragan, were standing in the hallway at the time, and began cheering after Cardona walked out. Barragan also began dancing around, and said, "We're just getting rid of the rats, one of the rats just got fired." (Tr. 681–682, 780–784, 824.) Carlos Sanchez likewise testified that, when he walked in to begin work on January 8, he saw Barragan dancing around and saying that they had "run off the first rats" and would "fire the rest" too. (Tr. 1054–1057, 1066).

Paco Sanchez testified that he witnessed Barragan dancing around and saying the "dogs from the Union" had been fired on both January 8 and the following Saturday (Tr. 973–975). Ramirez similarly testified that, a few days after Cardona and Mares were terminated, he witnessed Barragan in the drivers' room dancing and saying, "The first two dogs had fallen and the rest were going to fall in the same way" (Tr. 1365).

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[98] The complaint alleges that Mooney threatened to sue "employees" (i.e. both Mares and Cardona) on January 8. However, while Mooney admittedly told Cardona that he was in breach of their contract, there is no evidence that Mooney explicitly threatened to sue Cardona as he did Mares. Further, the General Counsel's posthearing brief only contends that Mooney unlawfully threatened to sue Mares. See GC Br. at 108–109. The complaint also alleges that Mooney had threatened to sue Mares and Cardona on January 2. However, again, the General Counsel's posthearing brief appears to rely only on Mooney's threat to sue Mares on January 8. In any event, it is unnecessary to address whether Mooney's "breach of contract" statements on January 2 and/or 8 constituted unlawful threats, as any such findings would be cumulative and not affect the remedy.

[99] Castillo's manifest for January 8 (Jt. Exh. 8) confirms that he waited from 4 to 5 pm for a truck key.

Herrera testified that, at some point after Cardona and Mares were terminated, he heard Barragan in the drivers' room say that Cardona and Mares had been fired because they were "stupid to support the Union when they didn't have the right" to do so, and that they would not be coming back. (Tr. 882–884.) Hernandez likewise testified that at some point she heard Barragan in the drivers' room say that they had fired Cardona and Mares for supporting the Union. (Tr. 1135–1136, 1153–1156.)

I credit the forgoing testimony. Again, while there are some differences in the details, the accounts are substantially similar and corroborative.[100] Further, although Barragan and other company witnesses denied that she ever danced around or made such statements after Cardona and Mares were terminated, as discussed above they were exceptionally poor historians.[101] Accordingly, as Barragan's statements and threats were clearly unlawful on their face and/or in context, I find that the Company violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Instructing employees to harass union supporters, direct derogatory remarks and gestures at them, and provoke them into fights to justify discharging them.

b. Telling employees that the union supporters deserved to die or would be dead if they lived in Nicaragua.

c. Condoning an employee's assault on a union supporter.

d. Threatening to discharge union supporters.

e. Threatening employees with job loss and/or plant closure if they support the Union.

f. Threatening employees with unspecified reprisals if they support the Union.

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[100] The General Counsel alleges (par. 11(b)) that Stevens also made a similar threat on January 8. In support, the General Counsel cites Castillo's testimony that, when Barragan made her comment about getting rid of the rats, Stevens was still standing by the door and said, "We just got rid of one problem and we are getting ready to get rid of the other one." However, no other drivers testified that Stevens made this statement (which Stevens herself denied), notwithstanding that, according to Castillo, several other prounion drivers were present at the time. Indeed, Carlos Sanchez testified that, when he walked in and saw Barragan dancing on January 8, no other managers were around (except Rodriguez who, as usual, was in her office cubicle). I find that the General Counsel has failed to prove this allegation by a preponderance of the evidence. The allegation is therefore dismissed.

[101] Barragan's manifest for January 8 confirms that she worked on that date, beginning at 4 pm (R. Exh. 48). Although she wrote on the manifest that she was performing her pre-trip inspection from 4 to 4:15 pm and left to do a load immediately thereafter, I find that this is insufficient to refute the testimony of Castillo, Carlos and Paco Sanchez, Ramirez, Herrera, and Hernandez that she made the subject statements on January 8 and/or subsequent dates.

g. Soliciting employees to sign antiunion petitions.

h. Soliciting grievances from employees and impliedly promising to remedy them.

i. Interrogating employees about whether they support the Union.

j. Restricting access to the facility by off-duty employees.

k. Telling employees to notify the Company whenever a union supporter talks to them about the Union during working time.

l. Telling employees that it has a list of everyone who gave affidavits to the NLRB in support of the Union's unfair labor practice charges against the Company.

m. Threatening to sue employees who gave affidavits to the NLRB in support of the Union's unfair labor practice charges.

2. The Respondent Company also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Telling employees Amilcar Cardona and Mateo Mares on January 2 and 8, 2014 that their continued employment was conditioned on withdrawing their DLSE wage claims against the Company.

b. Threatening to sue Mares on January 8, 2014 if he did not withdraw his DLSE wage claim against the Company.

3. The Respondent Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act by taking the following actions against employees Amilcar Cardona and Mateo Mares because they filed DLSE wage claims against the Company and supported the Union:

a. Refusing to assign Cardona any work on November 19, 2013.

b. Removing the mobile fuel RFID tags from Cardona's and Mares' leased trucks on November 20, 2013.

c. Terminating Cardona and Mares on January 8, 2014.

4. The Respondent Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by assigning employee Yasser Castillo different and inferior trucks and delaying issuing him a truck key since November 19, 2013 because of his support for the Union.

5. The Respondent Company did not otherwise violate the Act as alleged in the consolidated complaint.

REMEDY

The appropriate remedy for the 8(a)(1) and (3) violations found is an order requiring the Company to cease and desist from such conduct and to take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Company will be required, inter alia, to offer Amilcar Cardona and Mateo Mares immediate reinstatement to their former positions and to make them whole for any loss of earnings and other benefits as a result of their unlawful terminations on January 8, 2014. The Company will also be required to make whole Cardona and/or Mares for its previous refusal to assign Cardona any work on November 19, 2013 and for removing the mobile fuel RFID tags from their leased trucks on November 20, 2013.

In addition, the Company will be required to offer Yasser Castillo his former truck (#42), or, if it is no longer in service, a substantially similar truck, and regularly assign that truck to him in the same manner as before November 19, 2013. The Company will also be required to make whole Castillo for any loss of earnings and other benefits as a result of its refusal to assign him truck #42 and its delay in issuing him a truck key since that date. See *Corliss Resources, Inc.*, 362 NLRB No. 21, slip op. at 4 fn. 17 (2015).

Backpay shall be computed for the terminations in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and for the other violations in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). See *OS Transport LLC*, 358 NLRB No. 117, slip op. at 1 fn. 2 (2012), reaffd. 362 NLRB No. 34 (2015). Interest on backpay shall be computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). As set forth in *Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Company must also compensate the employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

Consistent with Board policy and precedent, the Company will also be required to post a notice to employees, in both English and Spanish, stating that it will not continue to engage in the same or any like or related unlawful conduct and that it will affirmatively remedy its unlawful conduct as ordered. As the record indicates that the Company regularly distributes notices with the employees' weekly checks, the Company will also be required to distribute the English/Spanish notice in this manner to employees, including both company drivers and lease drivers. See *Nickey Chevrolet Sales, Inc.*, 142 NLRB 23 (1963).

In agreement with the General Counsel and the Union, I also find that two additional, special remedies are appropriate. Specifically, I shall order company owner and president Mooney or, if he chooses, a Board agent in his presence, to also read the remedial notice aloud to the employees, including both company and lease drivers, at one or more mandatory meetings scheduled during working time to ensure the widest possible attendance. Labor Consultant Pasalagua, Supervisor Rodriguez, or another Spanish-language interpreter, must be present as well to translate the reading for employees who are not fluent in both English and Spanish. In addition, I shall order the Company to furnish the names and addresses of its current employees, including both company and lease drivers, to the Union on request. I find that these two special

remedies are appropriate under Board precedent given the number and severity of unfair labor practices committed by the Company's various managers, supervisors, and agents, including at numerous large and small company meetings during working time, over a 12-month period. See *OS Transport*, above.[102]

The General Counsel and the Union also request a third special remedy; specifically, that the Company be required to allow the Union access to its bulletin boards and all other places where notices to employees are customarily posted. However, I find that the facts and circumstances here are insufficient to support such a remedy under current Board precedent. See *id*; and *Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83 (2014).[103] The request is therefore denied.

Accordingly, based on the above findings of fact and conclusions of law and the entire record, I issue the following recommended[104]

ORDER

The Respondent, Green Fleet Systems, Carson, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to harass union supporters, direct derogatory remarks and gestures at them, and provoke them into fights to justify discharging them.

(b) Telling employees that union supporters deserve to die or would be dead if they lived in another country.

(c) Condoning assaults on union supporters.

(d) Threatening to discharge union supporters.

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[102] The September 2013 informal settlement in Case 21-CA-100003, which as noted above (fn. 34) was subsequently set aside due to the Company's continuing unfair labor practices, required Stevens to read the stipulated notice. See R. Exh. 35. In agreement with the Union, and consistent with *OS Transport*, I find that it is appropriate to require Mooney himself to read the attached notice.

[103] None of the foregoing three special affirmative remedies were included in the October 10, 2014 interim injunction issued by the district court. The court's interim order did, however, require the Company to rescind its April 2013 policy limiting off-duty employees' access to the facility. See 2014 WL 5343814 at *26. A similar requirement is included in the final order here. See, e.g. *Print Fulfillment Services, LLC*, 361 NLRB No. 144 (2014).

[104] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Threatening employees with job loss and/or plant closure if they support the Union.

(f) Threatening employees with unspecified reprisals if they support the Union.

(g) Soliciting employees to sign antiunion petitions.

(h) Soliciting grievances from employees and impliedly promising to remedy them.

(i) Interrogating employees about whether they support the Union.

(j) Restricting access to the facility by off-duty employees.

(k) Telling employees to notify the Company whenever a union supporter talks to them about the Union during working time.

(l) Telling employees that it has a list of everyone who gave affidavits to the NLRB in support of unfair labor practice charges against the Company.

(m) Threatening to sue employees who gave affidavits to the NLRB in support of unfair labor practice charges against the Company.

(n) Threatening to sue employees who filed DLSE wage claims against the Company.

(o) Conditioning employees' continued employment on withdrawing their DLSE wage claims against the Company.

(p) Refusing to assign employees work because they support the Union and/or filed DLSE wage claims against the Company.

(q) Removing the mobile fuel RFID tags from employees' trucks because they support the Union and/or filed DLSE wage claims against the Company.

(r) Terminating employees because they support the Union and/or filed DLSE wage claims against the Company.

(s) Assigning employees different and inferior trucks and/or delaying issuing them a truck key because they support the Union.

(t) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's order, rescind, in writing, the restrictions on off-duty employees' access to the facility set forth in the Company's April 30, 2013 memo.

(b) Offer Yasser Castillo his formerly assigned truck (#42) or, if it is no longer in service, a substantially similar truck, and regularly assign that truck to him in the same manner as before November 19, 2013.

(c) Make Castillo whole for any loss of earnings and other benefits suffered as a result of the refusal to assign him truck #42 and the delay in issuing him a truck key since November 19, 2013, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, offer Amilcar Cardona and Mateo Mares full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Cardona and Mares whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of the Board's Order, remove from the Company's files any reference to the unlawful terminations of Cardona and Mares, and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.

(g) Make Cardona whole for any loss of earnings and other benefits suffered as a result of the refusal to assign him any work on November 19, 2013, in the manner set forth in the remedy section of the decision.

(h) Make Cardona and Mares whole for any loss of earnings and other benefits suffered as a result of the removal of the mobile fuel RFID tags from their leased trucks on November 20, 2013, in the manner set forth in the remedy section of the decision.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Carson, California, copies of the attached notice marked "Appendix"[105] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of the paper English/Spanish

[105] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, the notice shall be distributed to the employees, including both company drivers and lease drivers, with one of their weekly pay or settlement checks. The notice shall also be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2013, including both company drivers and lease drivers.

(k) Within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance by employees, including both company drivers and lease drivers, at which the attached notice will be read aloud by the Respondent's owner and president, Gary Mooney, or, at the Respondent's option, by a Board agent in Mooney's presence, with translation provided by Labor Consultant Ricardo Pasalagua, Supervisor Giselle Rodriguez, or another Spanish-language interpreter for employees who are not fluent in both Spanish and English.

(l) Supply the union, on its request, with the names and addresses of all unit employees, including both company drivers and lease drivers (so-called "independent owner-operators"), updated every 6 months, for a period of 1 year or until a certification after a fair election.

(m) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 9, 2015

Jeffrey D. Wedekind
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT instruct employees to harass union supporters, direct derogatory remarks and gestures at them, and provoke them into fights to justify discharging them.

WE WILL NOT tell employees that union supporters deserve to die or would be dead if they lived in another country.

WE WILL NOT condone assaults on union supporters.

WE WILL NOT threaten to discharge union supporters.

WE WILL NOT threaten employees with job loss and/or plant closure if they support the Union.

WE WILL NOT threaten employees with unspecified reprisals if they support the Union.

WE WILL NOT solicit employees to sign antiunion petitions.

WE WILL NOT solicit grievances from employees and impliedly promising to remedy them.

WE WILL NOT interrogate employees about whether they support the Union.

WE WILL NOT restrict access to the facility by off-duty employees.

WE WILL NOT tell employees to notify the Company whenever a union supporter talks to them about the Union during working time.

WE WILL NOT tell employees that the Company has a list of everyone who gave affidavits to the NLRB in support of unfair labor practice charges against the Company.

WE WILL NOT threaten to sue employees who gave affidavits to the NLRB in support of unfair labor practice charges against the Company.

WE WILL NOT threaten to sue employees who filed California DLSE wage claims against the Company.

WE WILL NOT condition employees' continued employment on withdrawing their DLSE wage claims against the Company.

WE WILL NOT refuse to assign employees work because they support the Union and/or filed DLSE wage claims against the Company.

WE WILL NOT remove the mobile fuel RFID tags from employees' trucks because they support the Union and/or filed DLSE wage claims against the Company.

WE WILL NOT terminate employees because they support the Union and/or filed DLSE wage claims against the Company.

WE WILL NOT assign employees different and inferior trucks and/or delay issuing them a truck key because they support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind, in writing, the restrictions on off-duty employees' access to the facility set forth in our April 30, 2013 memo.

WE WILL offer Yasser Castillo his formerly assigned truck (#42) or, if it is no longer in service, a substantially similar truck, and regularly assign that truck to him in the same manner we did before November 19, 2013.

WE WILL make Castillo whole for any loss of earnings and other benefits suffered as a result of our refusal to assign him truck #42 and our delay in issuing him a truck key since November 19, 2013.

WE WILL, within 14 days from the date of the Board's Order, offer Amilcar Cardona and Mateo Mares full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful termination of Cardona and Mares on January 8, 2014, and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.

WE WILL make Cardona and Mares whole for any loss of earnings and other benefits suffered as a result of our unlawful termination of them on January 3, 2014.

WE WILL also make Cardona whole for any loss of earnings and other benefits suffered as a result of our prior refusal to assign him any work on the evening of November 19, 2013, after the strike had ended.

WE WILL also make Cardona and Mares whole for any loss of earnings and other benefits suffered as a result of our unlawful removal of the mobile fuel RFID tags from their leased trucks on November 20, 2013.

GREEN FLEET SYSTEMS, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-100003 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.