UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

In the Matter of:

UNITED PARCEL SERVICE, Inc. **Case No. 06-CA-143062**

and

ROBERT C. ATKINSON, JR.

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE GEOFFREY CARTER

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I. INTRODUCTION[1]

Respondent United Parcel Service, Inc. ("UPS" or "Company") has filed Exceptions to the Decision and Order ("Decision") of Administrative Law Judge Geoffrey Carter ("ALJ"), which issued in the above-captioned case on November 25, 2016. *See* JD–112–16. Stated briefly, UPS excepts to certain factual findings, evidentiary rulings, and legal conclusions of the ALJ, including but not limited to his ultimate holdings that the Company violated Section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA") by discharging Charging Party Robert C. Atkinson, Jr. ("Atkinson") on June 20, 2014, and on October 28, 2014; and that the Company thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the NLRA. (ALJ, pp. 54-55.) Because UPS denies all liability, the Company further excepts to the Applicable Remedies and Order proposed in the Decision. (ALJ, pp. 56-58.) Should the Decision be upheld on the issue of liability, however, UPS agrees with the ALJ that reinstatement would not be an appropriate remedy but excepts to the proposed cutoff date for Atkinson's backpay award as June 21, 2016. (ALJ, pp. 55-56.)

[1]Joint Exhibits, General Counsel Exhibits, Charging Party Exhibits, and Respondent Exhibits are parenthetically referenced as "JX-___," "GC-___," "CP-___," and "RX-___," respectively. Transcript pages are parenthetically referenced as "Tr. ___." Pages from the Decision are cited parenthetically as "ALJ, p. ___." Because JX-5 contains stipulated definitions of the most common acronyms used in this case, including "DIAD," "EDD," "PCM," "OJS," and "SPORH," those acronyms will not be defined in this Brief, which will instead simply cite to JX-5.

II. STATEMENT OF FACTS

A. Introduction

This proceeding came before the ALJ on June 20-24, 2016, and August 22-25, 2016, in Pittsburgh, Pennsylvania. The General Counsel for the National Labor Relations Board ("Board") issued a Complaint and Notice of Hearing ("Complaint") based on Atkinson's Unfair Labor Practice Charge No. 06-CA-143062 ("Charge"). (ALJ, p. 1; GC-1(a); GC-1(c).) Contrary to the ALJ's Decision, UPS did not discharge Atkinson on June 20, 2014, or October 28, 2014, due to any protected concerted activity. Rather, Atkinson was discharged when—despite multiple efforts to rehabilitate his performance—he repeatedly refused to follow UPS methods, procedures, and instructions ("340 Methods"). (Tr. 1101-15, 1186-93, 1315-19, 1327-28, 1350-53, 1424-27, 1520-26, 1529-42, 1632-34, 1650-52; GC-23; RX-3; RX-17.) This is the same way other employees have been treated for similar misconduct, despite their lack of NLRA-protected activity. (Tr. 279-80, 878, 947-52, 1115-16, 1181-85, 1526-28, 1542-47, 1634-35, 1659-63; RX-7; RX-14; RX-15; RX-56; RX-65.) Moreover, many employees engaged in as much or more protected concerted activity than Atkinson, yet they remained employed with little to no discipline. (Tr. 305-16, 819-21, 1006-35, 1680-81; RX-15; RX-58; RX-66.) For the forthcoming reasons, UPS submits that the Complaint is without merit and should be dismissed.[2]

B. General Background Information

Atkinson was formerly employed as a UPS package car driver at the New Kensington Center ("Center") in North Apollo, Pennsylvania. (ALJ, p. 6; Tr. 44-45; RX-2, p. 1.) The Center is one of more than 30 facilities that comprise the Company's West Pennsylvania Area ("WPA"), where a total of about 3,000 bargaining unit employees work ("Unit employees"). (Tr. 870.) WPA, in turn, is one of many geographic subsections in the Company's Mid-Atlantic District ("District"), where more than 70 facilities house about 13,000 Unit employees. (Tr. 789.)

Unit employees nationwide, including drivers, are represented by the International Brotherhood of Teamsters ("IBT") and its affiliated local unions. (ALJ, p. 3; Tr. 661.) The Center's Unit employees are part of

[2] As explained in further detail in the Argument Section of this Brief, even if some remedy were to be ordered, UPS contends that reinstatement would not be an appropriate part of that remedy because Atkinson's post-discharge misconduct has rendered him unfit for future service.

IBT Teamsters Local 538 ("Local 538"), headed by Business Agent Betty Rose Fisher ("Fisher"). (ALJ, p. 6; Tr. 45, 190, 822.) Their employment is governed by the National Master UPS Agreement ("Master Agreement") effective August 1, 2013, through July 31, 2018, as well as the WPA Supplement effective for the same period. (ALJ, p. 3; Tr. 45, 87-88, 676-77; JX-1, p. 1; JX-2, p.1.) Atkinson served as one of the Center's union stewards from 1997 to 2014, and he was well-versed in the terms of the Master Agreement and WPA Supplement. (ALJ, p. 6; Tr. 45-47, 86-90.)

Atkinson worked effectively with the UPS Labor Department on grievances and other labor-related matters for many years. At the time of his October 2014 discharge, he had worked with Labor Manager Tom McCready ("McCready") since at least 2010 and with District Labor Manager Rob Eans ("Eans") since at least 2007. (Tr. 319, 788, 807-08, 869, 875-76.) Atkinson also interacted frequently with Center management while serving as a union steward at PCMs, investigatory interviews, disciplinary discussions, and grievance hearings. (ALJ, p. 6; Tr. 81, 189-91, 228-34, 255-56, 264, 318-19; JX-5.)

C. The "Vote No" Campaign

The Master Agreement is negotiated on a national level. (ALJ, p. 3; Tr. 88; JX-1, p. 1.) It covers about 225,000 Unit employees in UPS package operations throughout the nation. (ALJ, p. 3; Tr. 88; JX-1, p. 2.) While negotiating the Master Agreement, UPS also bargains with Teamsters locals across the country for over 36 supplements and riders that cover more local working conditions in specific areas. (ALJ, p. 3; Tr. 88, 672-73; JX-2.) The IBT membership votes separately on the Master Agreement and any supplements or riders. (ALJ, p. 3; Tr. 88-89, 388, 673-74; JX-1, p. 4.) Despite separate votes on these contracts, the Master Agreement, supplements, and riders are all considered one combined labor agreement, historically implemented all at once. (ALJ, p. 3; Tr. 495-96, 672-73; JX-1, p. 4.)

In the 2013 Master Agreement negotiations, UPS and the IBT agreed to transfer about 140,000 employees from UPS healthcare plans to Taft-Hartley plans offered by Central States.[3] (ALJ, p. 6; Tr. 668-71, 689; JX-1, p. 82-83.) The new healthcare plan, known as "TeamCare," was expected to reduce Company healthcare expenses without raising costs for employees. (ALJ, p. 6; Tr. 669-70.) The healthcare transfer

[3] Many Unit employees were already covered by a Taft-Hartley plan, so the transfer would have little effect on them. (Tr. 668-70.)

was negotiated in the Master Agreement and was not subject to modification by subordinate supplements or riders. (Tr. 671-72; JX-1, p. 82-83; RX-47, p. 1.) The change was strongly disfavored by Unit employees forced to transfer to TeamCare, and vocal activists nationwide expressed outrage over the issue. (ALJ, p. 7; Tr. 683-84, 794-98; GC-38; GC-53; RX-1; RX-51.) The Master Agreement was ratified in April 2013 by a narrow majority of Unit employees, but about 15 supplements and riders were rejected in this initial vote. (ALJ, p. 7; Tr. 675-76; RX-41, p.1; RX-47; RX-48.)

For the rest of 2013, UPS met with Teamsters locals to renegotiate the rejected supplements and riders. (ALJ, p. 8; Tr. 676, 678; RX-48; RX-52.) Renegotiations continued through early 2014, and most supplements and riders were ratified on the second or third vote. (ALJ, p. 10; Tr. 682, 684, 794; RX-48; RX-49.) But three were never ratified: the Louisville Supplement, the Philadelphia Local 623 Supplement, and the WPA Supplement.[4] (ALJ, p. 10; Tr. 303, 682-83, 793; JX-2; RX-51.)

Through research, outreach, and communication, it became clear that employees' primary motive for rejecting the supplements was to avoid TeamCare, which would begin as soon as the Master Agreement took effect.[5] (Tr. 319-21, 370, 588, 670-71, 678-79, 683-84, 799; CP-2; CP-5; CP-6; CP-9; GC-38; RX-1; RX-22; RX-47; RX-50, p. 3; RX-51; RX-52; RX-58.) Thousands of employees—and entire Teamsters locals—voiced tremendous opposition over the transfer away from UPS healthcare. (ALJ, p. 7; Tr. 683-84; CP-1; CP-2; CP-3; CP-5; CP-6; CP-9; GC-19(a); GC-38; GC-53; RX-1; RX-4; RX-22; RX-47; RX-51; RX-58.) They knew that, because the Master Agreement and all supplements and riders are considered one labor agreement and contingent on one another, none could take effect until all contracts were ratified. (ALJ, pp. 3, 7; Tr. 88, 673; JX-1, p. 4.) Thus, by repeatedly voting down supplements, employees could prevent

[4] Unlike Louisville and Philadelphia Local 623, WPA had a long history of "voting no" in every initial ratification vote since 1993, hoping to "hold out" and get "something better" later down the road. (ALJ, p. 7 at fn.9; Tr. 303-04, 690, 700, 790-91, 799, 1205-06; CP-6, p. 36.) The 2007 "Vote No" Campaign in WPA was "very, very vigorous," so vigorous, in fact, that even on the second ratification attempt, the WPA Supplement passed by a narrow margin of only 15 votes. (Tr. 689-90.) Consequently, WPA's 2013 "Vote No" Campaign came as little surprise, and it received far less attention than the Louisville and Philadelphia Local 623 Campaigns, which involved some of the largest facilities in the country. (Tr. 203-04, 682-84, 791, 799; RX-51; CP-6, p. 64.)

[5] Atkinson readily admitted this overarching motivation in his NLRB Affidavit dated June 8, 2014. At the hearing in this case, Atkinson, Robert Larimer ("Larimer"), and Mark Kerr ("Kerr") claimed they voted against the WPA Supplement because they were also concerned about "local conditions," which they identified as excessive overtime, starting and top pay rates, technology-related discipline and Telematics, and healthcare contributions. (Tr. 355, 370-71, 550, 588-91, 600, 665-67). But these issues, too, were covered by the already-ratified Master Agreement and could not be changed by the subordinate supplements. (Tr. 667, 670-72, 684, 720-22; RX-47; JX-1, pp. 19, 69, 82-85, 92-94, 128-32, 152-57.)

implementation of the Master Agreement, which in turn would delay the healthcare change. (ALJ, pp. 3, 7; Tr. 447, 796-800; RX-1, p. 1, 8; CP-2.)

UPS had no economic or operational reason to be concerned about the "Vote No" Campaign because it posed no credible threat. (Tr. 756-57, 777-79, 823, 1657.) The Company's position—with which the IBT agreed—was that ratification of the Master Agreement resolved the issue, so healthcare was not subject to renegotiation in the supplements or riders.[6] (Tr. 678-79, 684; JX-1, p. 82-85, 92-94; RX-47; RX-50.) Despite employees' refusal to ratify the last three supplements, the IBT Executive Board eventually implemented the Master Agreement and all supplements and riders in late April 2014, pursuant to an amendment to the IBT Constitution. (ALJ, pp. 14-15; Tr. 684-85; RX-49.) The IBT issued memoranda to all Teamster locals explaining the decision. (Tr. 687; RX-49; RX-50.)

D. The Center Team

The Center had high-level oversight from Division Manager Keith Washington ("Washington"), who was responsible for package operations in part of the District. (ALJ, p. 5; Tr. 1131-32, 1225, 1422, 1625-26, 1629.) The Center was led by a Business Manager who had responsibility for the entire operation (and sometimes others) and who answered directly to Washington. (ALJ, p. 5; Tr. 1023, 1048, 1088, 1348, 1422-24, 1429, 1440, 1513, 1545, 1554, 1558, 1575-75, 1625-30.) The Business Manager supervised the Preload Supervisor, the Dispatch Supervisor, and the On-Road Supervisor, each of whom had direct responsibility only for his own operational specialty. (ALJ, p. 5; Tr. 592, 715-16, 1063-64, 1094, 1348-49, 1630-31.) That is, the Preload Supervisor oversaw employees who unloaded, sorted, and reloaded package cars; the Dispatch Supervisor planned routes and managed package volume; and the On-Road Supervisor oversaw drivers who made deliveries and pickups at customer locations. (ALJ, p. 5; Tr. 239, 415, 488, 592, 1091, 1094, 1256-57, 1348-49.) The Business Manager had authority over all Center employees, but Supervisors generally had methodical knowledge of only their specialty and authority over only those employees who worked within their area of responsibility. (Tr. 570, 592, 1087-88, 1091, 1256-57, 1373.) Collectively, the Business

[6] Some Unit employees claimed they wanted to renegotiate better local economic terms to compensate for the healthcare plan transfer. However, the Master Agreement's healthcare language expressly established a very limited way in which wage increases and/or pension contributions could be reallocated to offset TeamCare. (JX-1, pp. 93-94.) Beyond this optional, one-time reallocation, the Master Agreement emphasized that its language ""shall supersede any provisions on the same subject in any Supplement, Rider, or Addendum . . . ." (JX-1, p. 93.)

Manager, Preload Supervisor, Dispatch Supervisor, and On-Road Supervisor comprised the "Center Team." (Tr. 890, 1357.)

The Center Team changed periodically, as managers transferred between different UPS facilities to meet business needs. (Tr. 1421-22, 1631.) Like most workplaces, UPS has some managers who are more lenient or strict than others. (Tr. 472-73, 592-93.) Among the managers rotating through the Center, former On-Road Supervisor Bob Clark, former Business Manager John Lojas ("Lojas"), and Dispatch Supervisor Ray Alakson ("Alakson") were known as "softies" when it came to discipline.[7] (Tr. 472-73, 592.) In contrast, former Business Manager Jeremy Bartlett ("Bartlett"), former On-Road Supervisor Matt DeCecco ("DeCecco"), and Washington were known as "drill sergeants" and "sticklers" for the rules.[8] (ALJ, pp. 9, 18; Tr. 472-74, 593; CP-5, pp. 12, 16-17.) Their "firm" approach was viewed as militaristic and "prickly," but it improved employee performance. (Tr. 473-74, 593, 1231-32, 1627-29.) Bartlett, in particular, had a long-standing reputation for "turning inefficient operations into efficient operations." (Tr. 1627-29.) UPS regularly relocates him to facilities most in need of improvement.[9] (Tr. 1628.) Once Bartlett rehabilitates a facility, he is off to the next project.[10] (Tr. 1628-29.)

E. The Center's 2013-2014 Performance

UPS has over 80,000 IBT-represented drivers whose workdays are spent on-the-road, without direct supervision. (Tr. 257, 351, 433, 549-50, 701, 710.) Efficiency and sustainability are common concerns, so UPS uses its 340 Methods to assess and improve driver performance throughout the nation. (ALJ, p. 3; Tr. 702, 1503, 1524; JX-3; JX-4.) The Center Team is expected to teach and enforce the 340 Methods in order to ensure a successful and efficient package operation. (ALJ, p. 3 at fn.5; Tr. 730-31, 804, 842-43, 872-73, 962, 1357, 1436-38.)

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[7] Clark was the On-Road Supervisor at the Center from January 1, 2013, through July 29, 2013. (JX-6, p. 3.) Lojas was the Business Manager at the Center from August 1, 2014, through January 1, 2015. (JX-6, p. 2.) Alakson has been the Dispatch Supervisor at the Center since January 1, 2013. (JX-6, p. 3.)

[8] Washington was the Division Manager for the Center from January 1, 2013, through March 31, 2016. (JX-6, p. 2.) Barlett was the Business Manager for the Center from April 1 to August 1, 2013, and from April 1 to August 1, 2014. (Tr. 1550, 1569-71.) DeCecco was the On-Road Supervisor at the Center from January 15, 2014, through March 29, 2016. (JX-6, p. 3)

[9] In addition to rehabilitating the Center, Barlett was also relocated at different times to improve the Downtown Center and the Zelienople Center in Pennsylvania, the Roanoke Center in Virginia, and the Savannah Center in Georgia. (Tr. 1421-22, 1628-29.)

[10] This is precisely why Bartlett was assigned as the Center Business Manager for parts of 2013 and 2014, after efficiency had noticeably declined. (Tr. 256, 1569-71, 1628-29.)

Bartlett was first brought to the Center in April 2013 to help improve operational efficiency. (Tr. 1422, 1550-51, 1569, 1628-29.) During both periods that Bartlett was the Business Manager for the Center, he was also the Business Manager for the Zelienople, Pennsylvania, facility. (ALJ, p. 5; Tr. 1569-71; JX-6.) Bartlett spent "99% of [his] time" managing the Zelienople facility, which was twice the size of the Center, as well as 75 minutes away. (Tr. 1088, 1348, 1422-23, 1539.) Bartlett visited the Center only once every few weeks, but he nevertheless improved the Center's 2013 performance. (Tr. 1088, 1248, 1348, 1423, 1539, 1553, 1569-71.) The Center was ranked 59th in efficiency out of 79 District facilities by the end of 2013. (Tr. 955.)

From August 1, 2013 to March 30, 2014, Bartlett went on assignment to Roanoke, Virginia, where the need for efficiency was more dire. (Tr. 1422, 1569-70, 1628.) He came back to the Center as Business Manager on April 1, 2014, and resumed efforts to improve production.[11] (Tr. 1054, 1558, 1571.) Bartlett quickly noticed upon his return that, in his absence, year-over-year productivity had steeply declined, and all gains made in 2013 had been lost. (ALJ, p. 15; Tr. 922-23, 1117-19, 1356; RX-24.) Drivers were spending far more time running their same routes in 2014 than they did in 2013, as reflected in the Center's collective increase in over-allowed hours. (ALJ, p. 15; Tr. 922-23, 1117, 1356, 1430, 1432, 1435, 1553-54; RX-24.)

In mid-April 2014, Bartlett and DeCecco set out to increase drivers' SPORH, which in turn reduces over-allowed hours.[12] (ALJ, p. 21; Tr. 361, 516, 1430-34, 1554, 1564-65; JX-5.) These statistics reveal important information about the efficiency of drivers and loaders, as well as the effectiveness of the 340 Methods. (Tr. 184-85, 613-14, 1639-40; RX-24.) UPS could find no logical explanation for the sudden decline in Center performance, although the blatant sarcasm and emoji in recent social media postings

[11] Bartlett also resumed responsibility for the Zelienople facility at the same time. (Tr. 1423, 1539, 1553, 1569-72.)

[12] UPS believes that over-allowed hours are a more reliable indicator of productivity than SPORH because each driver's planned day is uniquely calculated to account for specific variances in delivery and pickup volume, stop count, trace, mileage, and historical weather and traffic patterns for a particular route on a particular day. (ALJ, p. 21 at fn.30; Tr. 731-34.) UPS management can simply review a facility's combined over-allowed hours to identify any large-scale production problems, so this is usually where an efficiency analysis begins. (Tr. 1117-18; RX-24.) But the IBT has never accepted the Company's concept of "planned days" or "over-allowed hours" for individual drivers, as the IBT does not want drivers held to "one-size-fits-all" production standards determined by computers rather than individual performance. (ALJ, p. 21 at fn.30; Tr. 475-76, 1682-84.) The IBT does, however, recognize SPORH as an objective measure of a driver's individual performance. (ALJ, p. 21 at fn.30; Tr. 1522-23, 1525, 1682-84.) The IBT also recognizes the Company's 340 Methods as legitimate management directives, compliance with which may significantly impact SPORH. (Tr. 1524.) Consequently, while the IBT will not accept performance-related discipline based on over-allowed hours (a hypothetical time limit calculated by UPS), the IBT will accept performance-related discipline based on SPORH sustainability (an objective productivity standard exhibited by each individual driver). (Tr. 734, 941-42.) UPS therefore identifies efficiency problems by reviewing over-allowed hours, but for discipline purposes, UPS can only hold drivers to their SPORH. (Tr. 731-34, 738-39; RX-66.)

strongly suggested drivers were slowing down intentionally.[13] (ALJ, pp. 16-17; Tr. 259-60, 264-65, 441-46, 1564-65; RX-55, p. R01781.) Whatever the cause, UPS was determined to improve Center efficiency. (Tr. 710, 740-41, 1117-19; RX-24.)

UPS initially tried to address the Center's production problem informally by enlisting the Union's cooperation in early April 2014. (ALJ, pp. 15-16; Tr. 256, 613-14, 813-14, 922-23, 1226-29, 1430-33.) Bartlett first approached Atkinson individually—in his capacity as the union steward—about the Center's excessive over-allowed hours. (Tr. 1430-31.) Bartlett and DeCecco later asked Atkinson and Dan Morris ("Morris") for help in cutting "15 minutes per driver," but neither driver responded.[14] (ALJ, p. 16; Tr. 613-14, 1226-29, 1431-32.) Alakson thrice informed Robert Larimer ("Larimer") that "things were going to get bad . . . [at the Center] unless drivers' numbers went up." (ALJ, p. 16; Tr. 586-87.)

In late April 2014, Bartlett, McCready, and Eans told Atkinson and Fisher about the Center's declining performance and requested support in encouraging drivers to reverse this trend. (ALJ, pp. 15-16; Tr. 613-14, 617, 813-14, 847, 854, 1431-32.) These UPS managers emphasized that they would be forced to conduct OJS rides if efficiency did not improve. (ALJ, p. 16; Tr. 256, 813-14, 854, 923, 1432-33; JX-5.) In addition, Bartlett thereafter held a PCM to suggest ways to reduce drivers' over-allowed hours. (ALJ, p. 15; Tr. 1430-31, 1433-34.) Some drivers inquired about their individual performance, but most did not respond to the Company's call for help, despite repeated requests and *quid pro quo* offers of compromise.[15] (ALJ, pp. 15-16 at fn.23; Tr. 1226-27,1432-34.) UPS was thus compelled to take more formal action. (Tr. 744, 804, 813, 922-23, 1117, 1435; RX-24.)

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[13] The Master Agreement requires "a fair day's work for a fair day's pay" and prohibits national strikes or slowdowns, except as authorized by the IBT in response to the Company's failure to follow a decision of the National Grievance Committee, make healthcare or pension contributions, and/or pay contractual wage rates. (JX-1, pp. 22, 128.) The WPA Supplement similarly prohibits all local strikes or slowdowns that commence prior to exhaustion of "all possible means of a settlement," without authorization from the designated local union official, and/or without approval of the International Director of the Eastern Conference of Teamsters. (JX-2, pp. 186-88.) In further support of these restrictions, the Master Agreement emphasizes that union stewards "have no authority to take strike action or any other action interrupting the Employer's business, except as authorized by official action of the Local Union;" and that, while UPS must ordinarily "impose proper, nondiscriminatory discipline, including discharge" on union stewards, "in the event the [union steward] has led, or instigated or encouraged unauthorized strike action, slowdown or work stoppages . . . he/she may be singled out for more serious discipline, up to and including discharge." (JX-1, pp. 12-13.)

[14] Atkinson admits that, on the second day of his OJS ride, Bartlett expressed continuing concern about over-allowed hours and asked for Atkinson's help in cutting "15 minutes" from drivers' routes, to get the Center back on track." (ALJ, p. 16; Tr. 325, 366, 1512-13, 1558.)

[15] For example, at separate times, DeCecco and Washington each told Morris that UPS may be willing to reduce a former employee's discharge if drivers would collectively commit to voluntarily improving their performance. (ALJ, pp. 15-16 at fn.23; Tr. 613-14, 617-18, 620, 1229, 1443.)

F. The OJS Blitz

The Company has developed highly structured techniques to train drivers on its 340 Methods. (Tr. 409-10, 523-25, 581, 610, 613, 702, 898-907, 1524; GC-3; JX-3.) One of the most effective training tools is an OJS ride, where a Business Manager or On-Road Supervisor rides along with a driver on his or her route.[16] (Tr. 702-06, 744, 804.) To quickly assess and improve the efficiency of an entire package operation, UPS sometimes conducts multiple, simultaneous OJS rides with several drivers in the same facility. (ALJ, p. 19; Tr. 709-11, 736, 806-07.) These multiple OJS rides occur without prior notice so that drivers cannot plan for them in advance. (ALJ, p. 22; Tr. 806, 1429-30, 1444-45, 1637.) Because UPS needed a quick turnaround at the Center in 2014, it decided to use this training strategy—called an "OJS Blitz" by the Company, but called an "OJS Hit Squad" by the IBT—to rehabilitate drivers' performance. (ALJ, p. 19; Tr. 709-11, 806-07, 1508-10, 1636-39.)

The Center Team examined the statistics of each regular bid route at the Center to see where the greatest gains could be made in the shortest time. (Tr. 731-32, 842-43, 1122-31, 1357-58, 1436; RX-25.) Some routes were less efficient for reasons beyond anyone's control, such as extreme weather, poor road conditions, rural delivery areas, unexpected changes in package or stop volume, and leaves of absence. (ALJ, pp. 19-20; Tr. 1117, 1122, 1126-31.) But DeCecco, Alakson, and Bartlett identified six routes where drivers should be able to quickly improve their SPORH and reduce their over-allowed hours, if they complied with the 340 Methods. (ALJ, p. 21; Tr. 1117-31, 1357-58; RX-25.) The Center therefore scheduled an OJS Blitz for June 3-5, 2014. (ALJ, p. 22; Tr. 1120, 1143-44; RX-64.)

The drivers chosen for the OJS Blitz were Atkinson, Ron Schick ("Schick"), Rich Behning ("Behning"), Bill Lange ("Lange"), Shawn Hetler ("Hetler"), and Doug Hankey ("Hankey"). (ALJ, pp. 19-21; Tr. 924, 1123-27, 1130-31; RX-3; RX-11; RX-25.) Bartlett and DeCecco selected these drivers based on their relative opportunity for improvement. (Tr. 1122-23, 1638-39.) This did not necessarily mean that drivers with the most over-allowed hours were chosen, as some routes reflected "time study issues" or other

[16] OJS rides may occur for many reasons, including training and orientation, annual safety certification, post-accident reinstatement, and performance sustainability. (ALJ, pp. 21, 28; Tr. 62-63, 129, 176, 285-86, 552-53, 701-06, 709-11, 741-45, 804-07, 842.)

factors outside management's control.[17] (ALJ, pp. 19-20; Tr. 1122-23, 1638-40.) Instead, Bartlett and DeCecco considered a variety of factors in selecting drivers, such as year-to-date production, driver comments about routes, and changes in historical package volume. (ALJ, pp. 19-20; Tr. 1122-23, 1126-27, 1638-40; RX-25.) Ultimately, Atkinson and Hetler were chosen due to their year-to-date average over-allowed hours; Hankey was chosen to test his claimed inability to service Next-Day Air ("NDA") packages; and Lange, Behning, and Schnick were chosen because they ran very light routes, and UPS wanted to verify whether they could handle more volume. (ALJ, pp. 19-20; Tr. 1122-23, 1126-27.) None of the selected drivers filed a grievance to challenge the OJS ride, which would postpone the OJS ride pending the grievance process. (ALJ, p. 22 at fn.33; Tr. 274-75; JX-1, p. 132.)

Once drivers were selected, Washington assigned Business Managers and On-Road Supervisors from other WPA facilities to help conduct the rides, and Bartlett decided which supervisor would ride with each driver. (ALJ, p. 22; Tr. 1132, 1439-41, 1640-41.) The pairings were based largely on scheduling availability, although Bartlett and Washington also considered whether drivers and supervisors shared comparable levels of skill and stature.[18] (ALJ, p. 22; Tr. 1132, 1440-42, 1640-41.) The Labor Department then held a conference call for all management participants to ensure the OJS rides were conducted in accordance with contractual rights and to provide dispute resolution strategies in case a confrontation arose. (ALJ, pp. 21-22; Tr. 1136-43, 1642-43; RX-33.)

In advance of the OJS Blitz, Alakson asked all six selected drivers to "clean up" their EDDs by entering a preferred route pickup and delivery order into their DIADs.[19] (ALJ, p. 21 at fn.29; Tr. 211-12, 1298-99, 1369-72; JX-5.) This "clean up" allows drivers to develop a more efficient planned day by tracing

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[17] For example, some drivers with high over-allowed hours were not selected because their routes were too rural, too variable, too unfamiliar to the Center Team, and/or too easily affected by weather to expect immediate gains. (ALJ, pp. 19-20; Tr. 1128.) Other drivers, who had little to no area knowledge, or who were on disability leave for part of the year, were also not selected because their statistics did not reflect a fair and objective measure of their overall performance. (ALJ, pp. 19-20; Tr. 1128-30.) In addition, regular temporary drivers, known as "reg-temps" or "cover drivers," were not considered for the OJS Blitz because they worked part-time and ran many routes throughout the year, filling in for full-time drivers on vacation, leave of absence, or otherwise unavailable. (ALJ, pp. 20-21 at fn.28; Tr. 605-06, 1124-25.) Because cover drivers do not run regular routes, it would make little sense to validate their performance for routes they may never run again. (Tr. 606, 1124-25.)

[18] Atkinson was a "veteran driver" and a well-respected employee who communicated often with other drivers, particularly (but not exclusively) in his capacity as a union steward. (ALJ, p. 22; Tr. 1440.) Bartlett rode with Atkinson because, as a "sphere of influence," Atkinson was in a better position than less experienced or less involved drivers to engage in meaningful back-and-forth discourse with the Business Manager during the OJS ride. (ALJ, p. 22; Tr, 1440, 1471.) Bartlett also felt he and Atkinson shared a similarly high skill level, which was important because supervisors should always have at least as much knowledge and ability as the drivers they are evaluating. (ALJ, p. 22; Tr. 1441, 1641.)

[19] At that time, ORION had not been implemented, so EDD did not always download stops in the most efficient order. (Tr. 1366-67.)

their own route. (Tr. 1298-99, 1370-72.) Atkinson never complied with the request to "clean up" his DIAD,[20] but Alakson nevertheless planned the OJS rides to track each driver's typical workload during the base period. (ALJ, pp. 21-22; Tr. 1165-67, 1357-59, 1363-67, 1372; CP-8; RX-34; RX-64.)

On the first day of the OJS ride, half the drivers (i.e., Atkinson, Lange, and Schick) complained that they did not run their "normal" route.[21] (ALJ, p. 24; Tr. 171-73, 326-29, 333, 359-60, 1364-65, 1390-92.) When Atkinson raised this concern, Barlett directed Alakson to include every possible pickup and delivery stop on Atkinson's route for the rest of the OJS ride.[22] (Tr. 172-73, 1495-97.)

The OJS Blitz was a great success. UPS judged all six drivers on compliance with the 340 Methods, coached them on opportunities for improvement, and commended them for methods well-executed. (Tr. 1159, 1472-73, 1531.) All drivers completed their OJS rides without incident, although supervisors flagged certain methods for each of them to follow going forward. (Tr. 925-26, 1157-63, 1181; RX-27, RX-28; RX-29; RX-30; RX-31; RX-32. All drivers finished their planned day in less time than allotted—thus eliminating their over-allowed hours—each day of the OJS ride.[23] (Tr. 925-26; 1120-21, 1178, 1508-11, 1644-45; RX-11; RX-27; RX-28; RX-29; RX-30; RX-31; RX-32; RX-34; RX-35; RX-36; RX-37; RX-38; RX-39; RX-40.) The drivers also greatly increased their SPORHs, including Atkinson, who made more

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[20] Atkinson seems to suggest there was something sinister or ill-intentioned about the Dispatch Supervisor asking drivers to help review their own routes and inform the Company whether and where they could improve efficiency. (Tr. 211-12.)

[21] Atkinson believed that the route he was assigned to drive during the OJS ride was different from his regular route. (ALJ, p. 24; Tr. 171, 359-60.) He insisted that it did not include NDA packages that were outside of his normal pathway, which he claimed would be more time-consuming. (ALJ, p. 24; Tr. 171, 359-60.) He also complained it did not include any of his extended rural delivery sections, where houses were farther apart than in urban routes. (ALJ, p. 24; Tr. 171, 359-60.) Additionally, Atkinson claimed his regular route was a "big circle big," whereas the OJS ride only covered a "small circle big." (Tr. 172.) However, Alakson planned the OJS ride routes in the same fashion he planned the drivers' regular routes. (Tr. 1363.) He used an average of their daily routes, including days when they did and did not have rural areas or make NDA deliveries. (Tr. 773.) Atkinson's normal route included sections that were rural; but his route was also very commercialized and industrialized. (Tr. 1128.) The entire beginning of his route, as well as the pickup and evening sides of his route, were out of industrialized parks, and he did not experience long distances in between each stop. (Tr. 1128.) Moreover, whether a route included NDA shipments was entirely depending on the customer. (Tr. 1360, 1366.) Atkinson did, in fact, make several NDA deliveries during the OJS ride. (Tr. 1360-63.).

[22] Just as he did any other day, for the OJS Blitz, Alakson removed sections from and/or added sections to each route depending on the stops needed for each driver's average planned day. (ALJ, p. 22; Tr. 1363.) Thus, Alakson did remove one rural "Bird" section from Atkinson's route on the first day of the OJS ride, although it was not removed the next two days. (Tr. 1364-65, 1499.) As soon as Atkinson complained, Bartlett talked to Alakson to ensure Atkinson's route included every possible section and stop. (Tr. 172-73, 1495-99.)

[23] A snapshot of Atkinson's performance leading up to the OJS Blitz, which served as his base level unsupervised performance against which his future supervised performance was measured, revealed that Atkinson's route averaged 85 stops per day. (RX-34.) His average paid day was 11.1 hours, which was 1.49 hours longer than his average base-period planned day. (Tr. 1508-10; RX-34). On Day 1 of the OJS Blitz, Alakson assigned Atkinson a planned day of 84 stops. (Tr. 1496; RX-34.) Atkinson completed the route in 8.0 hours, 3.1 hours faster than his base-period average with 85 stops. (RX-34.) Moreover, he travelled only 117 miles and made 14.3 SPORH on the first day of his OJS ride compared to his base-period average of 139 miles and 10.26 SPORH while unsupervised. (RX-34.) The dramatic improvement in Atkinson's performance, combined with a complaint that his route had not included one section he sometimes serviced, prompted Bartlett and Alakson to add all possible work onto his route for the next two days of the OJS ride. (Tr. 1508-10; RX-34.) Nevertheless, Atkinson continued to finish his route in less time than his planned day. (Tr. 1508-10; RX-34.)

stops than Alakson thought possible. (Tr. 276, 285, 360-61, 925, 1163, 1177-78, 1276-79, 1299-1300, 1365, 1508-10, 1644-45; GC-23; GC-34; GC-39; GC-40; GC-41; GC-42; RX-3, p. 5; RX-40.) Some drivers showed lasting improvement, while others—like Atkinson and Schick—regressed to their old ways. (Tr. 1119-21, 1181-85, 1266; GC-32; GC-36; GC-47; GC-48; GC-49; GC-50; RX-34; RX-35; RX-36; RX-37; RX-38; RX-39; RX-40.) But ultimately, the OJS Blitz helped improve productivity so that the Center ranked 9th in efficiency out of 79 District facilities by the end of 2014. (Tr. 955-56.) The Center continued its improvement the following year, ranking 1st in efficiency out of 79 District facilities by the end of 2015. (Tr. 956.)

G. Atkinson's 2014 Methods Infractions

Despite his 17 years of experience and admitted ability to meet UPS standards, in 2014, Atkinson committed a whole host of methods infractions. (Tr. 44, 248-50; RX-3.) For example, on January 27, 2014, Atkinson got a warning letter for failing to follow 340 Methods related to international, overweight NDA packages.[24] (ALJ, pp. 9-10; GC-5; RX-3; JX-3, p. 51-52.) He picked up a 70+ pound NDA package bound for Canada, but he left the NDA package on his truck all day rather than removing it for timely processing. (Tr. 96-98, 321-22, 1096-97; GC-5; RX-3.) International NDA shipping is among the Company's most expensive services, and excessive weight only adds to this premium cost, so it was critical for UPS to deliver the NDA package on time. (Tr. 247, 1096, 1587.) Due to Atkinson's negligence in forgetting the NDA package, UPS had a service failure, requiring a refund to the customer and damaging the Company's reputation. (Tr. 1096-97.) Atkinson did not file a grievance over this warning, and he admits it was not discriminatorily motivated. (ALJ, p. 10; Tr. 248, 321-22, 877.)

On April 1, 2014, Atkinson got a documented talk-with for failing to follow 340 Methods related to delivery notices. (ALJ, p. 13; Tr. 1102-04; GC-6; RX-3, p. 2; JX-3, p. 36.) He scanned a previously-used delivery notice on a follow-up delivery attempt, which can mislead a customer about the number of attempts already made versus left to be made. (ALJ, p. 13; Tr. 98-99, 248-49, 1102-07, 1288-89; GC-6; RX-3, p. 2.)

[24] In 2014 and 2015, UPS disciplined seven other drivers and one supervisor for NDA failures, with five employees getting warning letters, two being suspended, and one being discharged. (ALJ, p. 10; Tr. 877-78; RX-7.) NDA discipline increased when DeCecco became the On-Road Supervisor, as he "placed a higher level of emphasis on UPS rules and methods infractions than other previous supervisors." (ALJ, p. 9 at fn.12.)

UPS could have issued Atkinson a three-day suspension for this infraction by progressing to the next step in the discipline process. (ALJ, p. 13; Tr. 249, 875, 930, 1106-07, 1112-13, 1439, 1519.) But Atkinson instead received a non-disciplinary talk-with, for which he did not file a grievance. (ALJ, pp. 13-14; Tr. 431, 616-17, 707, 770, 803, 875, 1103, 1519.)

On May 19, 2014, Atkinson got a three-day suspension for failing to timely complete mandatory DIAD training.[25] (ALJ, p. 17; Tr. 1424; GC-7; RX-3.) Atkinson admitted he did not take the DIAD training when directed, despite being instructed several times. (Tr. 111-15, 890.) DeCecco was more of a "stickler" for the timely completion of DIAD training than past supervisors. (ALJ, p. 18; 432-33.) Atkinson was the only driver who—after an initial verbal instruction at a PCM on May 14th—was reminded three more times to take the training.[26] (Tr. 112-14, 1108-11, 1424-25, 1516-17; RX-8.) He was also the only driver working that week who did not complete it by Friday, May 16th. (Tr. 1516-17.) During the grievance process, the WPA Grievance Panel ("Panel") reduced Atkinson's suspension to a warning letter. (ALJ, p. 40; Tr. 893, 984; GC-14(b).) The Board deferred to the Panel's decision, in which the NLRA allegations were considered and denied. (ALJ, p. 45; RX-54, p. 1.)

On May 22, 2014, Atkinson received a documented talk-with for failing to follow UPS Appearance Standards ("Standards") by reporting to work unshaven. (ALJ, p. 18; Tr. 894, 1113-15, 1633-34; RX-3, p. 4; RX-44; JX-3, p. 3.) Atkinson was clearly aware of the Standards, as he was reminded of them just a few days before. (ALJ, p. 18; RX-10.) If UPS was "out to get" Atkinson, Washington could have moved to the next step in the progressive discipline process and terminated him based on this infraction. (Tr. 811, 875, 894-96, 930, 1112-13, 1439, 1519, 1633.) But Washington instead addressed the issue informally, in another documented talk-with that did not constitute formal discipline or otherwise prompt Atkinson to file a

[25] A DIAD is a computer board that drivers carry to organize and simplify the pickup and delivery process for each stop, and it is the device on which customers provide their signatures for packages. (Tr. 48, 57-58.)

[26] UPS presented emphatic testimony that all Center drivers were initially instructed to complete the DIAD training during a PCM on May 14th, although Atkinson said that he did not recall any such verbal instruction. (Tr. 251-53, 884, 1108-10.) (Tr. 251.) UPS issued a ten-day suspension to another driver in August 2013, when he failed to complete DIAD training (after receiving three reminders) because he was "too heavy" on the day the third reminder. (Tr. 1354-55.)

grievance.[27] (ALJ, pp. 18-19; Tr. 254-55, 811, 770, 803, 875, 885, 894-96, 951-52, 984, 1008, 1050, 1103, 1439, 1519, 1633; RX-3, p. 4.)

On June 16, 2014, Atkinson received a ten-day suspension due to an avoidable accident causing property damage. (ALJ, p. 26; Tr. 816, 927-28, 1517-19; GC-9; RX-3, p. 6.) Specifically, he did not remove the fuel nozzle after putting gas in his package car, and he drove off with the fuel nozzle still in the fuel tank. (ALJ, p. 26; Tr. 121-23, 927, 1517-19; GC-9; RX-3, p. 6; RX-12.) This pulled the fuel line off the gas pump, causing an increased "Tier 1" risk assessment by the Company's insurance carrier. (Tr. 928-29.) During the grievance process, the Panel reduced Atkinson's ten-day suspension to a three-day suspension. (ALJ, p. 40; Tr. 930-31; GC-15; RX-9, p. 3.) The Board deferred to the Panel's decision, in which the NLRA allegations were considered and denied. (ALJ, p. 45; RX-54, p. 1.)

H. Atkinson's June 19th Discharge

Bartlett conducted a "Blended Ride" with Atkinson on June 18, 2014, his first day back after the accident. (ALJ, p. 28; Tr. 945-46, 1525-36; GC-32; RX-34.) A Blended Ride serves the dual purpose of a required post-accident safety ride and a post-OJS follow-up ride. (Tr. 945-46, 1529-39.) Bartlett seized the opportunity to conduct this Blended Ride because (1) Atkinson exhibited sustainability problems after the OJS ride that only Bartlett could fairly assess, given that he was the only supervisor on-road with Atkinson; and (2) Bartlett only visited the Center every few weeks and was scheduled to be in the Center on June 18th, after which he would return to Zelienople and not have another opportunity for a post-OJS follow-up ride with Atkinson for a while. (Tr. 1423, 1539-40, 1553, 1569-72, 1575.)

On June 19, 2014, Atkinson was discharged for his lack of sustainability based on his supervised versus unsupervised performance. (ALJ, pp. 29-30; Tr. 1184-85, 1525, 1542, 1602; GC-10; RX-3, p. 7.) Specifically, during his June 2014 OJS ride, Atkinson proved he was capable of meeting—and even exceeding—performance standards while supervised. (Tr. 1184-85, 1520-26; GC-10; GC-23; RX-3, p. 5;

[27] Notably, the very next day, on May 23, 2014, Fischer forwarded McCready an email containing a Facebook post from Atkinson, wherein he discussed visiting Asbury Graphite on May 22nd to talk with non-UPS members of Local 538 about his campaign for union office and his visions for the union. (CP-4.) Charging Party's counsel insinuates that Fischer was attempting to bait McCready into tracking Atkinson's whereabouts during the workday by commenting "Hum, wonder if his 'time' at Asbury while [sic] he was delivering?" (Tr. 863-64; CP-4.) Drivers found to be stealing time by engaging in personal endeavors while on-the-clock can be discharged immediately for the cardinal sin of dishonesty, with no right to continue working during the pendency of the grievance process. (Tr. 864.) Thus, if UPS was truly on a "witch hunt" to oust Atkinson, the Labor Department and/or Center Team surely would have followed up on this lead by comparing Atkinson's time records with his Telematics, but it is undisputed that no such effort was made. (Tr. 56-57, 352, 478, 666-67, 863-65, 1232, 1559, 1675.)

RX-3, p. 7.) Yet he failed to perform anywhere near this level in the days after his OJS ride, while working alone. (Tr. 1184-85, 1520-26, 1602; GC-10; GC-32; RX-3, p. 7; RX-34.) On his Blended Ride, Atkinson once again exceeded the Company's performance expectations while supervised. (ALJ, p. 29; Tr. 945-46, 1525-36; GC-32; RX-34.) He was therefore discharged for failing to sustain his supervised performance while unsupervised.[28] (ALJ, pp. 29-30; Tr. 1602, 1649; GC-10; RX-3, p. 7.) Atkinson filed a grievance to challenge his June 19th discharge, and he remained working as permitted by the Master Agreement.[29] During the grievance process, the Panel reduced Atkinson's June 19th discharge to a 45-day suspension and final warning. (ALJ, p. 40; Tr. 943; GC-16.) The Board deferred to the Panel's decision, in which the NLRA allegations were considered and denied. (ALJ, p. 45; RX-54, p. 1.)

I. Atkinson's June 20th Discharge

On June 20, 2014, Atkinson was discharged for failing to follow certain 340 Methods on which he was repeatedly trained during his OJS ride.[30] (ALJ, pp. 30-31; Tr. 945, 1529; GC-11; RX-3, p. 8.) That is, when Bartlett conducted Atkinson's June 18th blended OJS ride, Atkinson continued the same methods infractions that he had previously exhibited and been warned about, including failure to use safe work methods/not coming to a complete stop at a stop sign; missing or unable to locate packages/30-inch area not utilized; signature required/no delivery notice; failure to follow the one-look habit; duplicate scans; get signature first; failure to move out without delay; and, failure to plan ahead.[31] (ALJ, pp. 28-29; Tr. 1102-07, 1113-16, 1186-91, 1318, 1327-28, 1351-53, 1424, 1529-42, 1633, 1651; GC-26; RX-3, p. 5; RX-27, pp. 10-12.) Atkinson filed a grievance to challenge his June 20th discharge, and he remained working as permitted by the Master Agreement. (ALJ, p. 31; Tr. 952; GC-17(a); JX-1, p. 20.) Ultimately, the Panel was

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[28] Four of the other OJS drivers were also selected for follow-up rides and were also disciplined or discharged for their lack of sustainability. (Tr. 935, 947, 1181-84, 1526-28; RX-14, pp. 2, 4-5, 7-8, 10-11.)

[29] Under the Master Agreement, discharged employees usually remain working during the pendency of the grievance process, so long as they are not terminated for a cardinal offense. (JX-1, p. 20.) This concept is referred to as a "working discharge." (Tr. 250.)

[30] Atkinson's June 19th discharged was based on Atkinson's unsupervised results. At the time of the June 19th discharge, Bartlett had not yet reviewed and compared Atkinson's results from the follow-up ride to his results from the three-day OJS ride, so Bartlett was not sure at the time of the June 19th discharge that the same methods infractions would be found. (Tr. 783, 1185, 1525, 1527-28, 1542-43, 1604-05, 1622-23, 1646.) Once he reviewed and compared Atkinson's results from both rides, then he talked to the Labor Department about the second discharge. (Tr. 816-19, 947, 1525-26, 1603, 1617, 1649.)

[31] Four of the other OJS drivers were also selected for follow-up rides and were also disciplined or discharged for continuing methods infractions demonstrated during those follow-up rides. (Tr. 286, 330-35, 947-50, 1473, 1528; RX-14, pp. 1, 3-11.)

"deadlocked" on Atkinson's June 20th discharge grievance, which was referred for arbitration. (ALJ, p. 40; Tr. 943; GC-16.) The arbitration never occurred. (Tr. 954.)

During the pendency of the grievance process, UPS offered Atkinson two different settlements, either of which would have reduced his June 19th and 20th discharges and his May 19th and June 18th suspensions. (Tr. 1668, 1672-74.) The first offer was to reduce all of Atkinson's pending discipline and discharges to a 30-day suspension and last chance agreement—the very same offer made to and accepted by another Center driver, Ben Clark ("Clark"), who lacked any history of protected concerted activity.[32] (ALJ, pp. 15-16 at fn.23; Tr. 1686.) Atkinson balked at this proposal, so UPS extended a revised offer to reduce all Atkinson's pending discipline and discharges to a 15-day suspension with no last chance agreement—a far more favorable settlement than offered in other cases. (Tr. 1667-74, 1686-88.) Atkinson rejected both settlement offers. (Tr. 1673-74.)

J. Atkinson's October 28th Discharge

On October 28, 2014, Atkinson was discharged for failing to follow 340 Methods related to EDD downloads. (ALJ, pp. 36-37; Tr. 290, 964, 1311-28; JX-4, p. 4; RX-17, 3-4.) EDD tells drivers all their deliveries and pickups, as well as the order and location of packages on their truck. (Tr. 1186, 1298-99, 1304, 1311-12, 1371.) The EDD download function is a simple task that the DIAD itself prompts drivers to complete. (Tr. 958-59, 1318.) It is highly inefficient to run a route without EDD, which must be downloaded at UPS. (Tr. 959, 1186, 1199, 1293, 1371; RX-18; RX-19; JX-9 ¶ 2-3.) Thus, drivers never leave without getting EDD.[33] (Tr. 959-60, 1186-87, 1199, 1329, 1377, 1393-94, 1546-47, 1654, 1682.)

On October 27th, Atkinson failed to download EDD before leaving on his route. (ALJ, p. 35.) He then had Larimer report the issue specifically to Alakson and request a new DIAD be brought to him.[34] (ALJ, p. 35; Tr. 289-90, 295, 408-09, 580, 602, 964, 1311-28, 1373.) Thus, Atkinson not only

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[32] The existence of a last chance agreement did not prevent Clark (and would not prevent Atkinson) from challenging any future discharge through the grievance and arbitration process. (Tr. 1686-87.)

[33] Bartlett is the only UPS manager to know of any other driver who ever forgot to get EDD before leaving on his or her route. (Tr. 960, 1000, 1186-87, 1329, 1377, 1393-94, 1408-09, 1546, 1654.) Despite working for UPS in Ohio, North Carolina, South Carolina, Pennsylvania, Virginia, and Georgia, Bartlett knew of only one other employee—a new driver—who asked for another DIAD because he forgot to download EDD, and he was disqualified. (Tr. 1421-22, 1546-47, 1609.)

[34] It was common knowledge that Alakson, as the Dispatch Supervisor, had no direct supervisory responsibility for drivers, who reported to the On-Road Supervisor. (Tr. 592.) It was also common knowledge that Alakson was very lenient and far less likely than DeCecco to issue discipline for

interfered with his own day and that of any supervisor forced to bring him a new DIAD, but he also interrupted a fellow driver who was on-the-clock. (ALJ, p. 36; Tr. 290, 602, 604, 960, 1373.) When Alakson took the call, Larimer initially stated only that Atkinson needed a new DIAD. (Tr. 1373.) Alakson did not ask why Atkinson needed a new DIAD, as there are sometimes legitimate reasons that a replacement is needed. (Tr. 1000, 1373, 1378-79, 1408, 1653.) It was only when DeCecco directed Alakson to inquire that Larimer disclosed Atkinson needed a new DIAD because he "did not have EDD in his board." (Tr. 142-45, 408, 579-80, 1187-88, 1373.) Alakson told Larimer that management would bring Atkinson a new DIAD. (Tr. 1374.)

Alakson and DeCecco drove together to bring a new DIAD to Atkinson, which took about an hour. (ALJ, p. 35; Tr. 1189-90, 1374.) When they arrived, DeCecco asked Atkinson what happened. (ALJ, p. 35.) Atkinson said he tried to download EDD before leaving the Center and had not realized that the download was unsuccessful due to a transmission error. (ALJ, p. 35; Tr. 960-61, 963, 1067, 1190-91, 1197, 1375-77.) DeCecco looked at Atkinson's original DIAD and confirmed it did not have EDD. (ALJ, p. 35; Tr. 1190.) Although DeCecco did not see a transmission error, he could not verify whether Atkinson had received one or not because such errors may be cleared with a particular keystroke. (Tr. 1190-91.) DeCecco gave Atkinson a new DIAD and told him to keep both DIADs with him because their delivery and pickup data would have to be consolidated at the end of his day. (Tr. 1191, 1379.)

Atkinson's failure to download EDD was "the last straw" after a history of legitimate, nondiscriminatory discipline for methods infractions.[35] (ALJ, pp. 36-37; Tr. 961-62.) He had many chances to improve and received hands-on OJS training for four days in 2014. (ALJ, p. 36; Tr. 961-62.) But Atkinson continued to disregard the 340 Methods, so he was discharged on October 28th.[36] (Tr. 428-29, 962,

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methods infractions, especially because Alakson's job did not require "in-depth" knowledge of the 340 Methods. (Tr. 472-74, 592, 1373.) When Larimer's call was transferred to DeCecco, Larimer intentionally disguised his voice to hide his identity so that DeCecco could not identify or question him. (Tr. 602-03, 1373.)

[35] It cannot be disputed that the January 22nd warning was legitimate and nondiscriminatory, as several other employees were treated the same way, and Atkinson never grieved the warning nor believed it discriminatory. (Tr. 248, 321-22, 877-78; RX-7.) It is also beyond dispute that the May 19th suspension, June 18th suspension, and June 19th discharge were legitimate and nondiscriminatory, as the Panel found no discrimination and merely reduced and consolidated all the discipline into a 48-day suspension and "final warning," a decision to which the Board deferred. (ALJ, p. 40; Tr. 943; GC-16b; RX-54, p. 1.)

[36] It was equally troubling that Atkinson did not own up to his forgetfulness and instead tried to cover up his misconduct by fabricating an unsuccessful EDD download attempt. (Tr. 957, 964, 971-72, 1312-29, 1682.) But because Atkinson was already discharged by the time UPS

1311-28; RX-3.) Atkinson filed two grievances to challenge his October 28th discharge, alleging NLRA violations in each grievance. (ALJ, p. 37; Tr. 954, 962-63, 995; RX-9, p. 8; RX-20, pp. 6-7.)

K. Atkinson's Concerted Activities

Atkinson touts his union stewardship as the main NLRA-protected activity motivating his June 20th and October 28th discharges. (Tr. 45-46, 167, 179, 231-32, 287-89, 291-93, 295; CP-17(a); RX-9, p. 6; RX-20, pp. 1-2.) But Atkinson was a union steward for almost two decades, and despite zealous advocacy, he enjoyed a good relationship with the Labor Department and the Center Team for several years. (Tr. 319, 788, 807-08, 869, 875-76, 1350, 1631-32.) There is simply no evidence of anything "special" about Atkinson's stewardship in 2014 that might suddenly cause the Labor Department or Center Team to treat him any differently than in the past.

In addition to his stewardship, Atkinson was one of thousands of UPS employees nationwide who actively opposed ratification of the Master Agreement and supplements. (Tr. 690-91, 1012-13, 1206-07, 1379-80, 1656; RX-4.) From March 2013 until March 2014, Atkinson posted on a national "Vote No" website; created and posted on a local "Vote No" website; created and hung "Vote No" signs in employee vehicles; and created and hung "Vote No" literature in the Center locker room.[37] (Tr. 91-92, 151, 153, 156-57, 190, 209-10, 296, 389, 568-69, 571, 1218-21, 1382-84, 1547, 1551, 1654-56; GC 19(a); GC-19(b); GC-38; RX-4; RX-51; RX-55.) UPS admittedly saw "Vote No" social media postings from Atkinson (and

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completed the testing needed to conclusively confirm his dishonesty, and because he was already off work serving the 48-day suspension imposed by the Panel for previous discipline, there was no further adverse action to be taken. (ALJ, p. 41; Tr. 972.)

[37] The General Counsel presented testimony suggesting UPS discriminatorily enforced the Bulletin Board Posting Policy and the Non-Solicitation and Non-Distribution Policy with respect to the safety board in the locker room. But it is undisputed that the Center Team never saw any posting violations on that board until DeCecco found "Vote No" Campaign flyers posted a month after he arrived at the Center. (Tr. 1210-11, 1384-85.) The General Counsel's witnesses testified that raffle tickets, "gun bash" flyers, fundraisers, and spaghetti dinners were posted on the safety board. But on cross examination, they admitted any such postings were infrequent and—to the extent they recalled any time period—that non-safety postings occurred years before DeCecco came to the Center (e.g., 1996-2008). (Tr. 531, 561-64, 594.) The witnesses also admitted they had no personal knowledge of whether UPS management saw any non-safety postings; they just "assumed" management knew of all postings because they "assumed" management used the restroom in the men's locker room. (Tr. 341, 500-01, 569-71.) However, UPS presented unanimous, unrebutted testimony that UPS management almost exclusively used the women's restroom next to the Center's second-floor office and very rarely (if ever) used the men's restroom that was outside, in an unconnected structure housing the men's locker room. (Tr. 1213-15, 1385-86, 1555-56, 1658-59.) As soon as DeCecco discovered non-safety material posted to the safety board in February 2014, he removed it and addressed the issue with the drivers. (Tr. 1210, 1215-18.) DeCecco informed employees of the Bulletin Board Posting Policy as it related to the safety board and the union board. (Tr. 1216-18.) That is, DeCecco explained that only UPS-approved safety information could be posted on the safety board, and postings on the union board must "be confined to official business of the Union and on the Union's official letterhead," per the Master Agreement. (Tr. 481-82; JX-1, p. 64.) It is undisputed that both Center managers and union stewards had key access to the locked union bulletin board. (Tr. 1217.) UPS has consistently enforced its Bulletin Board Posting Policy and Non-Solicitation and Non-Distribution Policy, and no evidence in the record suggests otherwise. (Tr. 1210-1211, 1384-85, 1554-57, 1658.) Moreover, employees were never restricted from posting on social media, hanging signs in their windshields, posting on the union board on union letterhead, or distributing literature in non-working areas on non-working time. (Tr. 316-318, 446-448, 450-51, 531-32, 574-75.)

countless others), and the Center Team recognized Atkinson's car as one of many with a "Vote No" sign in the windshield. (Tr. 797, 821-23, 1015-16, 1205, 1207, 1218-21, 1222, 1380, 1382-84, 1547, 1551-53, 1557, 1605, 1656-57; GC-19(a); GC-19(b); RX-4; RX-55.) UPS also found "Vote No" literature posted in several facilities, which was removed pursuant to the Company's content-neutral Bulletin Board Posting Policy and Non-Solicitation and Non-Distribution Policy. (Tr. 154-55, 1016, 1028-32, 1204, 1210; RX-58.) However, there is no evidence that UPS knew or suspected that Atkinson created "Vote No" websites, windshield signs, or literature. (Tr. 297-301, 315-16, 1207, 1382-83.) Nor is there evidence that UPS viewed Atkinson as more of a "leader" in the "Vote No" Campaign than other outspoken employees in the Center and throughout WPA.[38] (Tr. 154, 1006, 1028-32, 1204-05, 1207, 1222, 1328-29, 1384, 1552-53, 1557, 1643-44, 1656.) In fact, the unrebutted evidence reflects that Eans identified Mark Kerr ("Kerr")—not Atkinson—as the "ringleader" who created local "Vote No" websites, and he described Kerr—not Atkinson—as the person Fisher "c[ould]n't stand." (Tr. 857; CP-1, pp. 1-2.)

Finally, in 2014, Atkinson ran for the office of business agent of Local 538. (Tr. 45-46, 140.) He announced his candidacy in April 2014 and met with Local 538 members at various locations. (Tr. 46; CP-4.) UPS managers were aware of Atkinson's candidacy, but they were indifferent about it. (Tr. 1381-82, 1551, 1656.) The Labor Department and the Center Team had no reason to care who served as business agent for Local 538. (Tr. 798-800, 1006, 1206, 1328-29, 1381, 1470-71, 1551, 1560, 1644, 1656, 1663.) Neither the General Counsel nor the Charging Party presented evidence that Atkinson's candidacy motivated his June 20th or October 28th discharges. Indeed, the Center Team and Labor managers gave unanimous and unrebutted testimony that Atkinson's run for office had no influence on any action taken against him. (Tr. 820, 1003-04, 1008, 1206, 1382, 1551, 1656.)

L. Atkinson's Comparators

Atkinson was not the only employee to participate in this protected activity, nor was he thought to be the Center's "Vote No" campaign "leader." (Tr. 857; CP-1, pp. 1-2.) "Vote No" and dissident activity

[38] Again, WPA always put on a "Vote No" Campaign in every negotiations cycle, in an attempt to "hold out" for better contract terms. (Tr. 303-04, 700, 790-91, 799, 1205-06.) UPS and the IBT fully expected opposition to and rejection of the WPA Supplement because, by initially voting it down, employees could force the parties back to the bargaining table. (Tr. 296-97, 301-04, 489-90, 662, 673-679, 697-98, 791.) This historical context is essential for understanding the relative importance (or lack thereof) of WPA's "Vote No" activity, which was nothing new.

spread across the country, and some WPA locals and employees were known by the Labor Department to be even more involved than Local 538 or Atkinson. (Tr. 852-53, 1007-08.)

- Mark Kerr, Driver in New Kensington Center: distributed "Vote No" leaflets (Tr. 188, 440, 797, 821, 1015, 1209; CP-1, p. 2; RX-1, p. 9), solicited signatures while circulating union "consent decree" petitions and "Vote No" petitions at the Center (Tr. 416-17, 452-53, 1209-10, 1295), ran for the office of union trustee on the executive slate with Atkinson (Tr. 415-16), posted "Vote No" signs in locker room (Tr. 440, 449-50), created "Vote No" window signs (Tr. 400, 452), put "Vote No" sign in car windshield (Tr. 399-400, 452, 1015), belonged to "Vote No" webpage (Tr. 444-45, 448; RX-4, p. 7), posted on social media about UPS and/or the "Vote No" Campaign, including suggestions of potential slowdowns (Tr. 441-44, 821, 1015; RX-4, pp. 2-3; RX-22, pp. 12-13; RX-55, pp. R01779, R01783), served as assistant union steward in late 2013 and 2014 (Tr. 92, 124, 133, 137, 168, 187, 330-31; GC-13, p.1), submitted union information requests (Tr. 214-15), and filed an unfair labor practice charge (Tr. 557-58); yet, in 2013-2014, received only a warning and a one-day suspension (Tr. RX-15, p. R01642).

- Robert Larimer, Driver in New Kensington Center: supported the "Vote No" campaign (Tr. 307), put "Vote No" sign in car windshield (Tr. 590, 1015), posted on social media about UPS and/or the "Vote No" Campaign (Tr. 582, 591, 821, 1015; CP-5, pp. 46-47, 49-50; RX-4, p. 4; RX-22, p. 10), belonged to "Vote No" webpage (RX-4, p. 10), ran for the office of union trustee on the executive slate with Atkinson (Tr. 600-01), and coordinated a union steward election (Tr. 601); yet, in 2013-2014, received only a warning letter (RX-15, p. R01644).

- Gary Piso, Driver in Parkway / Thornburg Center: posted on social media about UPS and/or the "Vote No" Campaign (Tr. 1015; RX-22, pp. 12-13; RX-55, p. 1), elected by Teamsters Local 249 to serve as a vote observer for the ratification vote counts in Washington, D.C. (Tr. 1029), posted photo of himself in Hoffa's chair on TDU website (Tr. 314-15, 1013-14, 1028-29; RX-16, p. 3; RX-58, p. R02355; CP-2, p. R01830), served as union steward (Tr. 1006, 1014), interviewed by Pittsburgh Tribune Review while advocating "Vote No" walkout (CP-2, p. R01830), and filed an unfair labor practice charge against UPS (CP-2, p. R01830); yet only discipline ever received were five warning letters issued between 1999 and 2007 (Tr. 1030; RX-58, p. R02356).

- Rich Siget, Driver in Aliquippa: hung "Vote No" signs and distributed "Vote No" leaflets in UPS facilities (Tr. 821, 1017; RX-58, pp. R02370-R02372), publicized his cell phone number as a point of contact for more information on "Vote No" campaign (Tr. 821, 1017; RX-58, p. R02370), belonged to "Vote No" webpage (RX-4, p. 10), and posted on social media about UPS and/or the "Vote No" Campaign (Tr. 821); yet only discipline ever received was one warning letter in 2007 (Tr. 1033; RX-58, p. R02360).

- Kevin Musgrove, Preload Employee in New Stanton Center: coordinated "Vote No" rallies and circulated "Vote No" petitions in UPS facilities and parking lots (Tr. 834-35, 1017-18; CP-6, p. 8; RX-22, pp. 2-3, 15), distributed "Vote No" leaflets (Tr. 821), and served as union steward (Tr. 1006); yet never had any discipline at any time (Tr. 1681).

- Daniel Morris, Driver in New Kensington Center: put "Vote No" sign in windshield (Tr. 625-27), served as assistant union steward from late 2011-early 2014 (Tr. 611-12), and was admittedly "outspoken" in the Center (Tr. 616); yet never had any discipline at any time (Tr. 616; RX-15).

- Bill Lange, Driver in New Kensington Center: put "Vote No" sign in car windshield (Tr. 494, 533, 1015), served as union steward (Tr. 494, 549), and belonged to "Vote No" webpage (RX-4, p. 5); yet, in 2013-2014, received only a warning letter (RX-15, p. R01644).

- Jason Heasley, Driver in New Kensington Center: put "Vote No" sign in car windshield (Tr. 307), posted on social media about UPS and/or the "Vote No" Campaign (Tr. 1019), and belonged to "Vote No" webpage (RX-4, p. 8); yet never had any discipline at any time (RX-15).

- Anthony Sebak, Driver in New Kensington Center: posted on social media about UPS and/or the "Vote No" Campaign (Tr. 1019), and belonged to "Vote No" webpage (RX-4, p. 9); yet never had any discipline at any time (RX-15).

- Rich Nagle, Driver in Greensburg / New Stanton Center: served as union steward (Tr. 1006, 1018), and expressed displeasure with healthcare changes after grievance hearings (Tr. 1006, 1018-19); yet, in 2013-2014, received only two warning letters (Tr. 1680; RX-66, p. 4).

- Rocco DiFlippo, Preload Employee in Beaver Avenue Center: served as union steward (Tr. 819, 1006), and expressed general displeasure with healthcare changes after grievance hearings (Tr. 1017); yet never had any discipline at any time (Tr. 1680-81).

- Mark Hoenig, Preload Employee in Beaver Avenue Center: hung "Vote No" leaflets on UPS bulletin boards (Tr. 1032; RX-58, pp. R02374-R02375); yet never disciplined at all (Tr. 1033).

- Dave McElfresh, Driver in New Kensington Center: complained to Alakson about displeasure with healthcare changes (Tr. 1380); yet no discipline prior to March 2016 (RX-15, p. R01644).

- Josh Bobby, Driver in Zelienople Center: distributed "Vote No" leaflets (Tr. 821), posted on social media about UPS and/or the "Vote No" Campaign (Tr. 821; RX-22, p. 9; RX-55, p. 6), and belonged to "Vote No" webpage (RX-4, p. 7); yet, in 2013-2014, received only one warning letter (Tr. 1680-81; RX-66, p. 1).

Like Atkinson, these employees were vocal "Vote No" advocates, stewards, and/or candidates for union office, and they dealt with the same Labor managers (and some of the same center managers, as Bartlett had two centers). But unlike Atkinson, they remained employed with little to no discipline.

M. The January 2015 Panel

On January 14, 2015, Atkinson's October 28th discharge grievances went to the Panel, which is comprised equally of Union and Company representatives from another geographic area with no knowledge of the dispute. (ALJ, pp. 4-5, 42; Tr. 151, 293-94, 943, 975-76, 1002; RX-17; RX-21.) Fisher represented Atkinson at the hearing, and she specifically referenced the grievances' unfair labor practice allegations and cited the NLRA. (Tr. 290-91, 954, 981, 995; RX-20, pp. 6-7.) The Panel asked questions about the nature of Atkinson's NLRA-protected activity, and he cited only his "vigorous" union stewardship (particularly his

representation of Clark) and the union pin worn on his uniform. (Tr. 287-89, 292-93, 295-96, 337-38, 954, 995, 1002-04.) He made no mention of his participation in the "Vote No" Campaign or his candidacy for Local 538. (Tr. 293, 996, 1003-04.) Atkinson also argued that Morris, Larimer, and Kerr were not disciplined when they allegedly failed to download EDD, but he presented no evidence of any specific time this allegedly occurred. (Tr. 143, 408, 960, 999-1001.) In any event, none of these employees had the same history of (admittedly nondiscriminatory) progressive discipline for methods infractions.[39] (Tr. 877-78, 881-82, 1098-99; RX-7; RX-15.)

Witnesses for both sides testified at length about the circumstances leading to Atkinson's October 28th discharge. (Tr. 981-82, 1002-03.) After an unusually long and detailed examination and deliberation, the Panel denied both grievances, finding that Atkinson's October 28th discharge resulted in "no violations of any contract articles." (ALJ, p. 42; Tr. 978, 982, 1004; RX-21.) Because Atkinson's grievances and Case File expressly cited and discussed the NLRA, as well as Master Agreement Article 37 (prohibiting discrimination for Union activity), the Panel was obviously presented with the 8(a)(1) and 8(a)(3) issues. (Tr. 290-91, 954; RX-9, pp. 7-8; RX-21.) Given the Panel's specific inquiries into the nature of Atkinson's NLRA-protected activity, as well as the reference in its decision to more than one contract article, the Panel clearly considered the statutory issue in denying the grievances. (Tr. 293, 954, 995-96, 1002-04.) At that point, Atkinson's October 28th discharge became final. (Tr. 1005-06.)

III. QUESTIONS PRESENTED

UPS submits the following questions for review, based on the Company's Exceptions: (A) Whether the ALJ erred in finding that Atkinson's June 20th discharge violated NLRA Sections 8(a)(1) and 8(a)(3); (B) Whether the ALJ erred in upholding the decision not to defer to the contractual grievance procedure for the October 28th discharge; (C) Whether the ALJ erred in finding that Atkinson's October 28th discharge violated NLRA Sections 8(a)(1) and 8(a)(3); and, if liability is found, (D) Whether the ALJ erred in ordering search-for-work expenses and failing to cut off liability before June 21, 2016.

[39] In 2014, Morris had no discipline at all, whereas Kerr had only a warning and one-day suspension. (Tr. 877-78; RX-7; RX-15.)

IV. ARGUMENT

The record as a whole does not contain a preponderance of evidence that UPS discharged Atkinson on June 20th or October 28th based on NLRA-protected activity. Moreover, the Panel's affirmation of the October 28th discharge meets the deferral standard in *Babcock & Wilcox Construction Co*, 361 NLRB No. 132 (2014), so the ALJ erred in failing to defer to the contractual grievance procedure. Finally, even if UPS did discharge Atkinson in violation of NLRA Sections 8(a)(1) and 8(a)(3), the ALJ erred in ordering interim search-for-work expenses, as well as in ordering backpay until June 21, 2016, long after Atkinson's post-discharge misconduct occurred and became known to UPS.

A. The record as a whole does not contain a preponderance of the evidence that Atkinson's June 20th discharge violated Sections 8(a)(1) and 8(a)(3) of the NLRA. (Relates to Exceptions 1-13, 15, 22, 25-37, 40, 42, 44, 46, 47-49)

The General Counsel has not carried her burden of proving either an 8(a)(1) or an 8(a)(3) violation. To establish a Section 8(a)(1) violation, there must be objective evidence that the employer engaged in conduct that may reasonably tend to "interfere with, restrain or coerce" employees in the free exercise of NLRA Section 7 rights. *See, e.g., Dover Energy, Inc.*, 361 NRLB No. 48 (2014) (*enforcement denied on other* grounds). To establish a Section 8(a)(3) violation, there must be objective evidence that the employer took adverse action (or threatened to do so) because of NLRA-protected activity. *Wright Line*, 251 NLRB 1083 (1980), *approved* in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), *as modified in Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276-78 (1994). The General Counsel must show (1) the existence of protected concerted activity; (2) the employer's awareness of the activity; and (3) a causal nexus demonstrating the activity was a substantial or motivating reason for adverse action. *Wright Line*, 251 NLRB at 1089. If a *prima facie* case is established, the employer has an opportunity to prove it would have taken the same action even in the absence of protected activity. *See, e.g., Merillat Indus., Inc.*, 307 NLRB 1301, 1303 (1992).

As a threshold matter, the "Vote No" Campaign lost NLRA protection once it became a mission to derogate the IBT and usurp the voting power of the Unit majority. But even if all "Vote No" activities were protected, UPS saw nothing "special" about the WPA "Vote No" Campaign, which was an expected part of

the ratification cycle for every contract bargained over 20 years. Nor did UPS see anything "special" about Atkinson or his activities that would motivate the Company to treat him differently than equally-active union dissidents who suffered no adverse action. The fact is, Atkinson had a history of undisputedly nondiscriminatory discipline (some of which was converted into a 48-day suspension and "final warning"), and his June 20th discharge was simply the next step in progression. Atkinson was only discharged when, despite undisputed concerns about the Center's performance, he continually failed to follow the 340 Methods to ensure efficiency. The General Counsel presented no evidence of pretext or disparate treatment, so the ALJ had no basis to find the June 20th discharge unlawful.

1. Not all of Atkinson's concerted activity was protected by the NLRA.

While admittedly concerted activity, the "Vote No" Campaign lost NLRA protection the moment a majority of IBT members ratified the Master Agreement in April 2013. (Tr. 664.) The right of employees to engage in concerted activity under NLRA Section 7 is limited by NLRA Section 9(a), which requires that "[r]epresentatives designated . . . for the purpose of collective bargaining by the majority of employees . . . be the exclusive representatives of all the employees in such unit." The Board and the courts have long-recognized that the national labor policy of strength through organization "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees." *NLRB v. Allis-Chalmers Mfg. Corp.*, 338 U.S. 175, 180 (1967); *see also Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975) (no NLRA protection for union dissidents who demanded to bargain over minority terms and announced picket and boycott to enforce minority demands).

This national labor policy confirms that the NLRA generally does not protect "dissident activity," which would put employers in an untenable position of having to "placate self-designated minority groups, while . . . attempting to meet the demands of the duly elected bargaining representative." *Energy Coal Partnership*, 269 NLRB 770, **1 (1984); *see also NLRB v. Shop Rite Foods, Inc.*, 430 F.2d 786, 789 (5th Cir. 1970) ("[s]ince the employer is required to bargain with the representatives . . . it must have some assurance, first, as to the identity of that agent" and "must be able to deal with that agent as the responsible

spokesman," as "[t]here cannot be bargaining in any real sense if the employer has to deal with individuals or splinter groups"); *NLRB v. Kearney & Trecker Corp.*, 237 F.2d 416, 420 (7th Cir.1956) ("when the minority group attempts to control the actions of the majority, its action is not protected"). The exception is that the NLRA protects dissident activity "which is in support of, and does not seek to usurp or replace, the certified bargaining representative." *Energy Coal Partnership*, at **2; *see also Edmonds Villa Care Ctr.*, 249 NLRB 705, 706 (1980) (unauthorized walkout protected only where newly-certified union, no negotiations yet, and employees' demands were not "contrary to any bargaining position of the union"). The Board explained this limited exception as follows:

> The question . . . is whether "the action of the individuals or a small group [is] in criticism of, or opposition to, the policies and actions theretofore taken by the organization[.] Or, to the contrary, is it more nearly in support of the things which the union is trying to accomplish? If it is the former, then such divisive, dissident action is not protected . . . . If, on the other hand, it seeks to generate support for and an acceptance of the demands put forth by the union, it is protected . . . ." *Id.*

Here, the "Vote No" Campaign lost NLRA protection once a majority of Unit employees ratified the Master Agreement. The IBT—as the duly-elected representative—negotiated the Master Agreement, including the transfer of 140,000 employees to TeamCare, the same healthcare plan already covering much of the Unit. (Tr. 668, 671.) This controversial change was the overriding reason and but-for cause of the "Vote No" Campaign, which launched an indirect attack on the Master Agreement by strategically rejecting its supplements.[40] (Tr. 319-21, 678-79, 684.) The motive for the "Vote No" Campaign is perhaps best reflected in the following flyers distributed in WPA facilities in late 2013 and early 2014:

> Vote NO to TEAMCARE
>
> It is time to vote once again on our renegotiated contract. Let's all send a clear message that we do not want a Central States run healthcare. The last contract, we paid dearly in our raises to help rejuvenate a defunct pension fund and now they want to run our medical benefits.
>
> Make it known to Ken Hall & Jimmy Hoffa that we earned what is ours and we will not vote for an unstable benefits plan. We were already told too many lies and this time around we are being forced in to something we don't want.

[40] UPS corporate labor relations managers testified that "[t]here was no hiding it with respect to any of those three [unratified supplements in Louisville, Local 623, and WPA] . . . . all kinds of stuff about how we are not voting this contract in ever, ever, ever if this healthcare provision stays there . . . ." (Tr. 684.)

The master is renegotiable and Mr. Hall needs to go back to the table and renegotiate the master agreement as prescribed in the IBT Constitution.

VOTE NO

You can save your healthcare by voting down this supplemental. Don't give in to the lies of the IBT. If you don't receive your ballot in a timely manner, call your local union! Save our healthcare, vote no!!!

(RX-58, p. R02373; CP-6, pp. 3-5, 11-12, 16-22 (Emphasis added).)

CAN YOU REALLY AFFORD TEAMCARE?

You might want to think twice before you give in to the lies that you read or heard. TeamCare is an unstable healthcare plan that is riddled with out of pocket costs. This plan is so unpredictable that in the proposed contract the union that had been lying to you the last four months can take your hard earned raise or small increase in your pension.

There is no need to tell you about Central States Healthcare. We all know about the pension that we had to bail out last contract. What pension was that you ask? It was Central States Pension. Now the International Brotherhood of Teamsters want to force you in to their healthcare plan.

Do you need reminded that UPS made 5 billion dollars in profits (a record year). So why do we need to suffer with having to pay doctor bills we never paid in the past? Something is wrong here. If you or a family member have a chronic illness you will suffer the most.

So what can you do? Simple; Ask questions of your paid officials. Ask them where they stand on TeamCare (support it, or fighting it?). If they do support it or refuse to give a reasonable answer, you need to tell them you will be voting no again. It is now known that the master contract will not be valid without us voting for our supplement. The ball is in your court and they know it. Our fate is dependant [sic] on your vote. If we vote yes, we forfeit our good healthcare.

Call TeamCare at 1-800-323-5000 Mon. - Fri. 8:00 AM till 4:00 PM. and ask them if we are in the plan January 1, 2014, and they will tell you it is dependant [sic] on the master contract being ratified. Be sure to get a name and you may even record the call so as long as the call. taker acknowleges [sic] and gives permission. Don't give in to the lies and threats that you will lose your benefits. That has been proven false. You will still have medical benefits after January 1st and it won't be TeamCare.

TEAMCARE WILL COST YOU DEARLY.

(RX-58; CP-6, pp. 23-26 (Emphasis added and footnotes omitted).)

It is clear, from these and countless other WPA communications, that the "Vote No" Campaign was focused on the healthcare provisions of the Master Agreement. But the WPA Supplement was negotiated by duly-elected agents of WPA Teamsters locals, and it addressed purely local working conditions. (Tr. 364, 371-72, 374, 976; JX-2.) The WPA Supplement did not and—other than via the limited reallocation option in the Master Agreement—could not address healthcare or otherwise "compensate" for healthcare changes through better economic terms. (Tr. 671-72, 678-69; JX-1.) Thus, contrary to the ALJ's findings (ALJ, p. 52, footnote 51), Atkinson's (and others') "Vote No" activities lost protection in mid-2013, when they began

derogating the IBT by aiming to paralyze the Master Agreement that was negotiated for, and already ratified by, a majority of Unit employees. (RX-58; CP-6.)

Atkinson also engaged in other dissident activities that lacked NLRA protection. For example, he directly violated Articles 4, 8, and 37 of the Master Agreement and Article 49 of the WPA Supplement by proudly publicizing his over-allowed hours and encouraging unauthorized slowdowns. (Tr. 259, 262, 265-66, 1564-65; RX-55, pp. R01782, R01783.) Atkinson's blatant contractual defiance was all the more egregious given his high-profile role as a union steward, as it emboldened other Unit employees to join an unlawful cause. Atkinson's willful misconduct was expressly punishable under the Master Agreement, which emphasizes that union stewards who induce unauthorized slowdowns may "be singled out for more serious discipline, up to and including discharge." (JX-1, pp. 12-13, 22, 128; JX-2, pp. 186-88.) Accordingly, although UPS did not seize the opportunity to take adverse action against Atkinson due to his slowdown-related activities, the Company certainly could have done so (if management was "out to get him") because his contractual violations of the Master Agreement and WPA Supplement were not protected by the NLRA. *See, e.g., Food Fair Stores, Inc. v. NLRB,* 491 F.2d 388, 394 (3d Cir.1974) (dissident activity unprotected when it violated labor agreements and "was in part to protest against certain substantive portions of the agreement concerning seniority to which the union had assented"); *Harnischfeger Corp. v. NLRB,* 207 F.2d 575, 578 (7th Cir.1953) (no NLRA protection where "a comparatively small number of discontented employees undertook . . . to take charge of and direct the actions of their chosen bargaining representative in negotiation with their employer").

2. *UPS was not aware of Atkinson's alleged origination or founding of the "Vote No" Campaign in WPA, so the Company saw nothing "special" about his concerted activity that distinguished him from other union dissidents.*

Assuming (for the sake of argument) that all Atkinson's concerted activity was protected by the NLRA, the ALJ erroneously made baseless and highly prejudicial assumptions about the extent of the Company's knowledge of Atkinson's activity. *See, e.g., Metro. Reg'l Council of Carpenters,* 358 NLRB 325, 325 fn.1 (2012) (affirming dismissal of complaint but refusing to accept ALJ's "speculative" findings regarding employees' actual awareness, or likelihood of future awareness, of questioners' union affiliation

in the absence of record evidence to support such findings); *Atl. Mills Servicing Corp.*, 155 NLRB 853, 857 (1965) (rejecting ALJ inferences because they assumed facts not in the record); *Metal Arts Co.*, 148 NLRB 183, 183 (1964) (adopting "conclusions of the Trial Examiner which are based upon the credited testimony" but rejecting "opinions . . . which assume facts"); *Great Atl. & Pac. Tea Co.*, 110 NLRB 918, 924 (1954) (rejecting ALJ inference where no record evidence supported it).

It is undisputed that UPS knew Atkinson engaged in many of the same concerted activities as other Unit employees. Specifically, UPS knew Atkinson posted on social media about UPS and/or the "Vote No" Campaign, belonged to a "Vote No" webpage, hung "Vote No" signs in his car, served as a union steward, joked about and encouraged slowdowns, and ran for union office. (Tr. 807, 819-20, 856, 860, 875-76, 1008-09, 1206-08, 1379-83, 1551-52, 1564-65, 1632, 1656-57; RX-55.) But contrary to the ALJ's findings, there is no evidence that UPS knew that Atkinson personally "started" or "led" the Center's "Vote No" Campaign; served as a "ringleader" on social media; "establish[ed]" a "Vote No" or Local 538 webpage; "post[ed] and/or distribut[ed]" literature; "creat[ed]" signs for other employees' windshields; or "urg[ed]" employees to hang his signs (which conflicts with Atkinson's own testimony that "[o]ther drivers approached [him]" asking for signs). (ALJ, pp. 7, 9-10, 34, 40, 52-53; Tr. 156, 316 (Emphasis added).) The ALJ cannot simply assume UPS had knowledge of the full extent of Atkinson's alleged founding, origination, and participation in the "Vote No" Campaign without concrete evidence to support his findings.[41] *See, e.g., Iku-Usa, Inc.*, E 7-CA-37577, 1996 WL 33321434 (July 31, 1996) (dismissing 8(a)(3) allegation due to "lack of evidence Respondent was specifically aware of the union activities of all specific B-Team employees who may have engaged in them" and because "evidence that the B-Team actually was more active than other teams, and was known to be so, is also tenuous").

Indeed, the record in this case reflects that UPS had "no idea" whether Atkinson personally created any webpages or windshield signs, posted or distributed literature, or fit the description of someone whom

[41] Atkinson obviously fancies himself a "martyr" and wants to believe that everything somehow revolves around or relates back to him. In this vein, some of the General Counsel's witnesses testified that Atkinson personally created "Vote No" webpages and car signs, maintained the Local 538 webpage, and posted "Vote No" literature. (Tr. 151-53, 156, 190, 199, 297-300, 315-17, 395, 399-400, 485, 488, 496-98, 568.) But that testimony falls far from establishing that UPS knew Atkinson had such a high level of personal responsibility for originating "Vote No" propaganda. Indeed, there is no evidence UPS ever saw or heard of Atkinson personally creating or displaying such materials, and there is affirmative evidence that UPS either did not know who was responsible for various "Vote No" propaganda or attributed it to other employees. (Tr. 154, 316-17, 341, 445-47, 450, 498-99, 530, 1216-17.) Without proof that UPS viewed Atkinson was the "ringleader" ultimately responsible for the "Vote No" activity in WPA, there is no evidence to suggest that the Company singled him out from countless other "Vote No" activists.

Fischer "hate[d]" or "c[ould]n't stand." (Tr. 861, 865, 1207, 1216-17, 1222, 1382-84, 1552-53, 1557, 1657.) In fact, the unrebutted evidence proves UPS believed Kerr was the "ringleader" of the Center who passed out "Vote No" flyers, created "Vote No" websites, and engaged in other activities Fischer "c[ould]n't stand." (Tr. 797, 857; RX-1, pp. 01871-01872; CP-1.) These undisputed facts beg the question: In the face of a multi-state "Vote No" Campaign, what makes Atkinson so special? The ALJ's circular and unsupported reasoning fails to provide an answer. (ALJ, p. 53.)

The truth is, other UPS employees in WPA and/or the Center engaged in just as much—or more—concerted activity as Atkinson. (*See* Section II(L), above.) These comparators dealt with the same Labor Department and/or Center Team during the same time period, yet they remained gainfully employed with little or no discipline. (*See* Section II(L), above.) Perhaps the closest comparisons are made to Kerr, Larimer, and Gary Piso ("Piso"). For example, UPS knew that—like Atkinson—Kerr, Larimer, and Piso were all very active in the "Vote No" Campaign and were all either running for, or already holding, an elected position with their local union. (*See* Section II(L), above.) And UPS was aware that—like Atkinson—Kerr and Piso had served as union stewards, filed unfair labor practice charges, and encouraged a Unit slowdown or walkout. (*See* Section II(L), above.) But UPS also knew that Kerr and Piso engaged in other concerted activities that Atkinson never did, such as circulating consent decree petitions and "Vote No" petitions at UPS facilities, taking "sarcastic" photos sitting in Hoffa's chair and posting them on the TDU website, and providing interviews to the Pittsburgh Tribune Review about the "Vote No" Campaign. (*See* Section II(L), above.)

The ALJ hastily charts some of this comparator evidence in his Decision but provides absolutely no discussion of its import. (ALJ, pp. 37-40, 53, fn.53.) *Oaktree Capital Mgmt., LLC & Tbr Prop., LLC, A Single Employer, d/b/a Turtle Bay Resorts, & Benchmark Hosp., Inc. & Unite Here! Local 5,* 353 NLRB 1242, 1243–44 (2009) (finding ALJ did not properly analyze and consider record evidence). If the Company's comparator evidence was actually analyzed, it would compel the conclusion that UPS saw nothing "special" about Atkinson that would motivate the Company to treat him worse than Kerr, Larimer, Piso, or countless other "Vote No" activists who suffered no adverse action. *See, e.g., Nichols Aluminum,*

LLC v. NLRB, 797 F.3d 548, 554-555 (8th Cir. 2015) (denying enforcement of 361 NLRB No. 22 (2014) ("Simple animus toward the union is not enough. While hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, general hostility toward the union does not itself supply the element of unlawful motive" (alterations and internal quotations omitted).)

The Company's lack of animus is further evident from the fact that UPS twice tried to resolve the grievances related to his June 19th and 20th discharges and his May 19th and June 18th suspensions. (Tr. 1668, 1672-74.) The first offer was to reduce everything to a 30-day suspension and last chance agreement—the same offer accepted by Clark.[42] (ALJ, pp. 15-16 at fn.23; Tr. 1686.) Atkinson balked at this offer, so UPS instead agreed to reduce everything to a 15-day suspension without a last chance agreement. (Tr. 1667-74, 1686-88.) If UPS wanted to "get rid" of Atkinson, the Company would not have offered to reinstate him—particularly on terms more favorable than offered to employees who did not serve as union stewards, participate in the "Vote No" Campaign, or run for union office. Hence, the ALJ erred by concluding the General Counsel made a threshold showing of animus toward Atkinson.[43]

3. Even if some animus were shown, UPS met its burden of proving it would have discharged Atkinson on June 20th regardless of his concerted activity.

A proper analysis of the Company's affirmative defense starts with recognition that Atkinson's January 22nd warning letter,[44] April 1st and May 22nd talk-withs,[45] May 19th three-day suspension, June

[42] The existence of a last chance agreement did not prevent Clark (and would not prevent Atkinson) from challenging any future discharge through the grievance and arbitration process. (Tr. 1686-87.)

[43] The ALJ relied on the alleged statements of three UPS managers in finding animus towards Atkinson, but this testimony was easily discredited. McCready allegedly said to Atkinson: "I see you are putting signs in your cars . . . I guess you can do whatever you want," and Alakson allegedly warned several drivers (including Atkinson) to watch what they posted on Facebook. (ALJ, p. 53.) However, McCready and Alakson denied these alleged threats and warnings, which (even if true) were too ambiguous, broadly worded, and widely applicable to establish animus toward Atkinson. (Tr. 1027, 1390.) In addition, on July 5, 2014, Preload Supervisor Matt Blystone ("Blystone") allegedly called Atkinson and Kerr in the middle of the night to say he heard Bartlett, DeCecco, and Alakson call Atkinson a "troublemaker" and plot to "get rid of him." (ALJ, pp. 33-34, 53.) Bartlett, DeCecco, and Alakson denied making such comments and/or being influenced by Atkinson's "Vote No" activities, union stewardship, and union candidacy. (Tr. 1206-07, 1381-83, 1389, 1392-93, 1551-53, 1656-57.) Incredibly, Atkinson said nothing about Blystone's alleged remarks in his first Board affidavit on July 7, 2014, two days after Blystone's alleged phone call. (Tr. 656-57.) In his second Board affidavit on January 11, 2015, Atkinson merely alleged Blystone said he heard Bartlett, DeCecco, and Alakson "discuss the need to end [his] employment on several occasions." (Tr. 343-44, 356-57.) Even if Blystone's alleged statement is accepted as true, the term "troublemaker" does not necessarily mean "union troublemaker," and union animus cannot simply be inferred when there are legitimate nondiscriminatory reasons that an employer may wish to end someone's employment. *See, e.g., Bosk Paint & Sandblast Co.,* 266 NLRB 1033, 1038–39 (1983) (recognizing that manager's "description [of employee as a 'troublemaker'] could well be derived from the alleged failure of [employee] to repay [manager] for the $100 loan, [employee's] absenteeism even, or [employee's] improper failure to turn over union funds").

[44] It is beyond dispute that the January 22nd NDA warning was legitimate and nondiscriminatory, as several employees were treated the same way, and Atkinson neither grieved the warning nor believed it discriminatory. (ALJ, p. 10; Tr. 248, 321-22, 877-78; RX-7.)

18th ten-day suspension, and June 19th discharge have already been deemed lawful and nondiscriminatory under the NLRA.[46] These employment actions—whether considered in original form or as reduced by the Panel—have already been conclusively validated as legitimate business decisions and thus cannot be viewed as unlawful, retaliatory, or sinister. The Board deferred to the November 2014 Panel decision that Atkinson's June 19th sustainability discharge was just and nondiscriminatory, so logic dictates that the lawfulness of the underlying June 18th blended ride is likewise beyond dispute.[47] The ALJ failed to accept this fundamental premise, which led to findings and conclusions inherently irreconcilable with those of the Panel to which the Board has already deferred. (ALJ, pp. 53-54.)

The ALJ cannot simply ignore express or implied findings or conclusions resulting from a deferral decision when common questions remain in the statutory issues before the Board. *See The Liberal Mkt., Inc.*, 264 NLRB 807, 817 (1982) ("the fact that 'differing inferences' might be drawn by the Board does not justify intervention by the latter where that drawn by the arbitrator relates reasonably to the facts before him"); *see also Diamond Elec. Mfg. Corp.*, 346 NLRB 857, 858–59 (2006) (ALJ erred by relying on informal settlement agreement as "background evidence of the Respondent's anti-union animus," where agreement settled alleged violations on which ALJ relied to find animus). After all, it would hardly promote the national labor policy for the Board to issue decisions inconsistent with those of the contractual grievance process to which it previously deferred. When the November 2014 Panel decision is considered in conjunction with the record evidence, it is clear UPS would have discharged Atkinson on June 20th even absent his concerted activity.

Atkinson was discharged for admittedly exhibiting repeated methods infractions during his admittedly lawful June 18th blended ride. (Tr. 701, 800, 819, 1006, 1009, 1206-07, 1381-83, 1551-53, 1560-

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[45] Atkinson also did not grieve his April 1st and May 22nd documented talk-withs, as talk-withs were commonplace, were not part of the contractual discipline process, and did not further his disciplinary progression. (Tr. 249-50, 431.)

[46] The Panel found that the May 19th suspension, June 18th suspension, and June 19th discharge were legitimate and nondiscriminatory, and merely reduced and consolidated all the discipline into a 48-day suspension and "final warning," a decision to which the Board deferred. (ALJ, p. 40; Tr. 943; GC-16; RX-54, p. 1.)

[47] If Atkinson's June 18th blended ride was unlawful, then UPS would have no legitimate, nondiscriminatory reason to conduct the post-OJS sustainability analysis that led to his June 19th discharge—which would mean the Panel's decision to uphold that discharge would be "repugnant to the purposes and policies of the [NLRA]" under *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955).

61, 1656; RX-54, p. 1.) Contrary to the ALJ's findings, regardless of whether Bartlett, McCready, or any other UPS managers harbored animus toward Atkinson, their personal biases did not automatically "taint" every adverse action they took against him. (ALJ, pp. 53-54.) Stated differently, UPS is not required to prove its decision-makers were completely free from anti-union animus. The Company need only prove that, despite any animus, the same decision would have been made regardless of Atkinson's concerted activity. It is well-settled that employers can still prevail on their affirmative defense despite that specific supervisors known to harbor anti-union animus were responsible for the allegedly discriminatory employment decisions. *See, e.g., Gallup, Inc.*, 349 NLRB 1213, 1278 (2007) (because supervisor's anti-union animus prompted her initial investigation of employee, the General Counsel established a *prima facie* case, but once supervisor's investigation revealed time falsification, her involvement did not taint the discharge decision); *Diamond Elec.*, 346 NLRB at 862 (discharge of known union supporter not unlawful despite fact that supervisor with anti-union animus played a role in decision); *Iku-Usa, Inc.*, 1996 WL 33321434 ("even if . . . [supervisor] was partially motivated by the general union activities of [employees], . . . for justifiable business reasons, she would have taken the same disciplinary action in the absence of those activities"); *Merillat Indus.*, 307 NLRB at 1305, 1307-08 (inference of partial unlawful motivation was warranted where Supervisors Welsh and Stein unlawfully threatened union officials and supporters like Burns, but this initial inference of animus did not preclude Supervisors Welsh and Stein from lawfully discharging Burns for theft).

4. There is no evidence the June 20th discharge was a pretext for discrimination.

The General Counsel can rebut the Company's defense only by proving that Atkinson's June 20th discharge was pretextual. To establish pretext, the General Counsel must prove that the Company's stated reason for Atkinson's June 20th discharge had no basis in fact, was too trivial to motivate the discharge, or did not actually motivate the discharge. *See, e.g., Bosk Paint & Sandblast Co.*, 266 NLRB 1033, 1039 (1983). The ALJ's Decision briefly mentions pretext but fails to identify any facts to establish it. (ALJ, pp. 51-52.) This omission is no accident; the record contains no evidence of pretext.

Atkinson violated several methods on his June 18th blended ride, such as handling packages excessively, rolling through a stop sign, and bypassing a scheduled stop. (ALJ, pp. 28-29; Tr. 1530–39,

1697–1700, 1706–08, 1711–13; GC-26.) Some violations involved the same methods cited in his OJS Letter of Record, so it is clear the June 20th discharge for repeat methods infractions had a basis in fact. (RX-3, p. 5; RX-27.) There is also no evidence that Atkinson's violations—especially rolling through a stop sign his first day after an accident—were too trivial to justify discipline. The record is replete with progressive discipline for repeat methods infractions, especially when Bartlett and DeCecco ran the Center. (Tr. 950-51; RX-14; RX-15.)

Bartlett and DeCecco each took the 340 Methods very seriously, and despite any lax enforcement in the past, each made it clear upon his arrival at the Center that there was "a new sheriff in town." (Tr. 472-74, 592-93, 1231.) There was nothing unlawful about Bartlett and DeCecco placing greater emphasis on methods enforcement than past Center Teams, so long as they enforced the methods consistently as to all similarly situated employees. *See, e.g., Maine Med. Ctr.*, 248 NLRB 707, 723 (1980) ("differences and inconsistencies . . . between the standards and modes of discipline used by [different] supervisors in regulating the work activity and conduct of employees each was respectively assigned . . . would not give rise to an inference that [a particular supervisor's] standards were unlawfully discriminatory," unless the supervisor imposed "a higher standard of performance" or "a harsher method of discipline" on union activists than other unit employees).

In fact, given the Center's undisputed decline in productivity from mid-2013 to mid-2014, and the flurry of social media suggesting a slowdown, UPS had a lawful business justification to increase monitoring and enforcement of the 340 Methods and hold drivers accountable, even if some infractions were treated more leniently in the past. *See, e.g., Tricil Envtl. Mgmt., Inc.*, 308 NLRB 669, 676 (1992) (no 8(a)(3) violation despite sudden increase in rules enforcement and discipline during union organizing campaign from May - August 1990, because supervisors noticed steady increase in absenteeism and safety violations from January - May 1990, and supervisors had right to address these problems, despite admittedly lax rules enforcement in the past, and notwithstanding coincidental timing with union organizing campaign); *Serv. Spring Co.*, 263 NLRB 812, 812-13 (1982) (need to improve operational efficiency was valid justification for stricter enforcement of attendance and production rules, and employer's business considerations were not

pretext for retaliation, despite timing of stricter enforcement as following union organizing campaign); *Penn-Mor Mfg. Corp.*, 136 NLRB 647, 652 (1962) (where production suffered during union campaign, new manager reasonably sought stricter enforcement of production rules, and reasonably felt restrained in taking vigorous disciplinary action until after union election; thus, delay in stricter enforcement until after election was not evidence of anti-union animus).

Finally, no evidence suggests the June 20th discharge was not actually motivated by Atkinson's June 18th methods infractions. Bartlett confirmed Atkinson's lack of sustainability before realizing his repeat methods infractions, so Bartlett discussed each violation with McCready separately, in two different phone calls. (Tr. 1601-05, 1615-18, 1622-23.) That is, Bartlett immediately identified Atkinson's lack of sustainability based on daily statistics, so he recommended (and McCready and Eans approved) the discharge for sustainability late-day on June 18th, which was issued early-morning on June 19th. (Tr. 133, 817, 934-35, 1604-05.) Bartlett did not identify Atkinson's repeat methods violations until he found and compared the two Greenbars on June 19th, at which time he recommended (and McCready approved) the discharge for methods infractions, which was issued early-morning on June 20th.[48] (Tr. 137, 944-47, 1605, 1622-23; RX-27.) Atkinson's back-to-back discharges were consistent with the Company's unrebutted evidence that post-OJS follow-up rides commonly result in two separate disciplines: one for lack of sustainability, and one for methods infractions.[49] (Tr. 783-84, 935-42, 947-50, 1542-44, 1604-05, 1618, 1623, 1649-50; RX-14.)

In sum, the General Counsel failed to adduce any evidence—and the ALJ failed to find any facts—to suggest that Atkinson's June 20th discharge was pretextual. The ALJ's only explanation is that, because "the June 18 blended ride is tainted, [so] is the June 20 discharge that resulted from methods infractions that Bartlett identified in that ride." (ALJ, p. 53.) But the ALJ cannot issue findings and conclusions

[48] It was reasonable for UPS to impose discharge—as opposed to some lesser form of discipline—because (as discussed above) Atkinson had a history of admittedly nondiscriminatory discipline, the next step of which was discharge. (RX-3.) This would be true whether the discipline was considered in its original form or in its reduced form, which collectively became a 48-day suspension and "final warning." (Tr. 943; GC-16.)

[49] The failure to sustain a demonstrated level of efficiency or productivity (i.e., SPORH and over-allowed hours) is considered a separate offense from methods infractions (i.e., failure to follow one or more of the 340 Methods), although there is an undeniable correlation between the two (i.e., a lack of sustainability is usually caused by methods infractions). (Tr. 784.) A lack of sustainability is easily recognized by simple comparison of a driver's daily statistics, so sustainability discipline is usually issued first. (Tr. 133, 817, 934-35, 1604-05.) Repeat methods infractions take longer to investigate, as the supervisor who conducts the ride must compare the driver's original OJS ride records with his or her post-OJS follow-up records to determine whether the driver struggled with the same methods during both rides. (Tr. 137, 944-47, 1605, 1622-23; RX-27.) If both rides reflect common methods infractions, then methods discipline will be issued shortly after the sustainability discipline. (Tr. 783-84, 935-42, 947-50, 1542-44, 1604-05, 1618, 1623, 1649-50; RX-14.) The level of discipline issued for these non-cardinal offenses depends on where the employee stands in the progressive discipline process. (Tr. 1438-39.)

diametrically opposed to those underlying the Panel decision previously accepted by the Board. *See The Liberal Mkt., Inc.*, 264 NLRB at 817; *Diamond Elec.*, 346 NLRB at 858–59. Accordingly, the Decision is unsound as to Atksinson's June 20th discharge, for which there is no evidence of pretext to overcome the Company's affirmative defense.

B. The ALJ erred in affirming the decision not to defer to the grievance process with respect to Atkinson's October 28th discharge. (Relates to Exceptions 23-24, 48)

The Board should defer to the grievance procedure as to the October 28th discharge alleged in Paragraph 7(b) of the Complaint. UPS cited *Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB No. 132 (Dec. 15, 2014) as controlling precedent in its opening statement at trial. (Tr. 39; RX-54, p. 2.) UPS then adduced myriad evidence to show that the Panel's decision met *Babcock's* post-arbitration deferral standard. (Tr. 39, 143, 151, 287-96, 337-38, 408, 877-78, 881-82, 943, 954, 960, 975-76, 978, 981-82, 995-96, 999-1006, 1098-99; RX-7; RX-9, pp. 7-8; RX-15; RX-17; RX-20, pp. 6-7; RX-21.) That is, UPS showed that (1) the Panel procedures were fair and regular, and the parties agreed to be bound; (2) the Panel was explicitly authorized to decide the unfair labor practice allegations; (3) the Panel was presented with and considered the statutory issues; and (4) Board law "reasonably permits" the Panel's decision. Thus, the ALJ should have deferred to the Panel's decision on Atkinson's October 28th discharge.

1. *The "fair-and-regular"/"agree-to-be-bound" prong of the post-arbitration deferral standard was not affected by* Babcock.

The ALJ erroneously concluded that, "because [UPS] relies on case law that pre-dates (and thus does not account for) the modifications to the post-arbitration deferral standard . . . set forth in *Babcock*," a finding that "the [October 28th discharge] grievance panel hearing was 'fair and regular'" is not warranted. (ALJ, pp. 49-50 at fn.50.) It is abundantly clear that *Babcock* had no effect on the traditional "fair-and-regular"/"agree-to-be-bound" analysis, which remains applicable under any deferral standard. *See, e.g., Babcock,* 361 NLRB No. 132, *7 at fn.10 ("These traditional requirements [of a fair-and-regular proceeding and an agreement to be bound], articulated in *Spielberg,* 112 NLRB at 1082, are not in controversy and need no further explanation."); *see also Murray Am. Energy, Inc.*, JD-26-16, 2016 WL 1359359 at fn.24 (Apr. 5, 2016) ("These requirements [of a fair-and-regular proceeding and an agreement to be bound] traditionally set

forth under *Spielberg* and *Olin* were not affected by the *Babcock* decision."); *Subject: Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, & Grievance Settlements in Section 8(a)(1) & (3) Cases,* MEMORANDUM GC 15-02, 2015 WL 1120322, at *1 fn.7 (Feb. 10, 2015). ("These requirements [of a fair-and-regular proceeding and an agreement to be bound] traditionally set forth under *Spielberg* and *Olin* were not affected by the *Babcock* decision."). Accordingly, the ALJ erred by hastily rejecting the Company's deferral argument because it relied on pre-*Babcock* case law to establish the fair-and-regular prong required for deferral.

In this case, the January 2015 Panel hearing was fair and regular in all respects, and national labor policy "has long favored arbitration as a vehicle of promoting industrial peace." *Botany 500,* 251 NLRB 527, 533 (1980) (citing the *Steelworkers Triology*). The Board's decision in *Botany 500* is particularly relevant here due to its closely analogous facts. There, the Board deferred to the grievance process based on the following facts: (a) charging party personally initiated arbitration, during which the union attempted to secure her reinstatement; (b) despite charging party's campaign for union business agent, no conflict existed; (c) charging party's protected concerted activity was fully aired at arbitration; (d) charging party's supervisors testified that she was discharged in conformity with the company's long-standing policy; (e) despite claims that charging party was fired for campaign leafleting and an angry confrontation with her supervisor in connection therewith, the arbitrator found charging party's poor performance to be the actual reason for her discharge, as she received two prior warnings; and (f) despite claims that the arbitrator had a vested interest in ensuring the incumbent union officials remained in power, the alleged bias was too remote to forfeit the arbitration when in all other respects it was fair and regular, and the decision was not repugnant to the NLRA. *Id.* at 533-35.

Here, just as in *Botany 500*, the January 2015 Panel proceeding was fair and regular. (Tr. 982.) UPS and the IBT contractually agreed to be bound by the Panel. (JX-2, pp. 188-90.) Atkinson filed grievances over his October 28th discharge, which he agreed for the Panel to decide instead of exercising his contractual right to skip to arbitration before a private arbitrator. (Tr. 952; RX-9; JX-2, p. 190.) The Panel was comprised equally of Union and Company representatives from another geographic area with no knowledge

of the dispute.[50] (ALJ, pp. 4-5, 42; Tr. 151, 293-94, 943, 975-76, 1002; RX-17; RX-21.) Atkinson's Panel hearing lasted longer than most due to extensive questioning of many witnesses (i.e., Atkinson, Fisher, Kerr, Alakson, DeCecco, and McCready), detailed discussions of Atkinson's NLRA allegations, and lengthy Panel deliberations. (Tr. 978, 981-82, 1002-04.) Fisher herself testified before the Panel on Atkinson's behalf, thus demonstrating that no conflict of interest existed between Atkinson and Local 538 or the IBT.[51] (Tr. 981.) Moreover, Atkinson never claimed Fischer or the Panel were biased. In fact, he acknowledged having a full and fair opportunity to present his grievances and receiving proper representation from Fischer. (Tr. 980-82.) The striking similarities between *Botany 500* and the case at bar reveal that Atkinson received fair and regular treatment under the contractual grievance process and that all parties agreed to be bound by the Panel's decision.

2. *The Panel was expressly presented with and actually considered Atkinson's statutory NLRA allegations.*

In attempting to apply the *Babcock* deferral standards, the ALJ erroneously concluded that "UPS did not show that the grievance panel considered the statutory issue of whether Atkinson's discharge violated the NLRA;" that "[t]he grievance panel's decision . . . only . . . (at best) leaves one to speculate as to whether the panel's decision implicitly includes a finding that Atkinson's discharge was not discriminatory or retaliatory within the meaning of the NLRA;" and that such a "level of ambiguity is not sufficient to justify post arbitration deferral." This is not a case like *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004), where there were no written briefs or other evidence to demonstrate which facts and arguments were presented in the grievance proceeding. See *Babcock,* 361 NLRB No. 132, *6 (citing *Airborne Freight* as an example of where it would be impossible to determine whether or not the statutory issue was considered).

It is undisputed that the Master Agreement and WPA Supplement expressly authorized the Panel to decide Atkinson's NLRA allegations. (ALJ, p. 49; JX-1, pp. 12-14, 20-28, 66, 127-28; JX-2, pp. 188-90, 205-06.) It is further clear, from a review of the record as a whole, that the Panel was expressly presented

[50] It is true that both union business agents who presided over Atkinson's Panel also sat on the WPA negotiations committee. However, all WPA Teamsters local business agents sit on the WPA negotiations committee, so there were no business agents who did not participate in negotiations who could have presided over the Panel instead. (Tr. 976-77.)

[51] The fact that the Regional Director dismissed Atkinson's unfair labor practice charge against Local 538 likewise suggests the absence of any conflict of interest.

with and actually considered Atkinson's statutory claims. Fischer represented Atkinson at the Panel, and she specifically referenced his grievances' unfair labor practice claims and cited specific statutory provisions of the NLRA. (Tr. 290-91, 954, 981, 995; RX-20, pp. 6-7.) Both McCready and Fischer submitted detailed Case Files to the Panel, which included extensive discussion and argument on Atkinson's discharge and NLRA allegations. (Tr. 982, 992; RX-17; RX-20.) The Panel asked detailed questions about the nature of Atkinson's NLRA-protected activity, and in response, Atkinson cited only his "vigorous" union stewardship (particularly his representation of Clark) and the union pin worn on his uniform. (Tr. 287-89, 292-93, 295-96, 353, 337-38, 954, 995, 1002-04.) Atkinson made no mention of his participation in the "Vote No" Campaign or his run for union office. (Tr. 293, 996, 1003-04.)

Because Atkinson's grievances and Case Files expressly cited and discussed the NLRA, as well as Master Agreement Articles 21 and 37 (expressly prohibiting discrimination for union activity or other protected concerted activity), the Panel was obviously presented with the statutory issues. (Tr. 290-91, 954; RX-9, pp. 7-8; RX-21.) And given the Panel's specific inquiries into the nature of Atkinson's concerted activity, as well as the Panel decision's reference to multiple contract provisions, the Panel clearly considered Atkinson's NLRA allegations in denying the grievances and finding "no violations of any contract articles."[52] (ALJ, p. 42; Tr. 293, 954, 995-96, 978, 982, 1002-04; RX-21 (emphasis added).)

3. The Panel's January 2015 decision is reasonably permitted by Board law.

The last *Babcock* prong—that "Board law reasonably supports the arbitral award"—requires that the arbitral decision "constitute a reasonable application of the statutory principles that would govern the Board's decision." *Babcock,* 361 NLRB No. 132, slip op at 11. The fact-finder "need not reach the same result the Board would reach, only a result that a decision maker reasonably applying the Act could reach." *Id.* (Emphasis added.) In deciding whether to defer, "the Board will not engage in the equivalent of *de novo* review of the arbitrator's decision" but will instead simply "defer if the party opposing deferral fails to show that the award is 'clearly repugnant to the Act,' i.e., 'palpably wrong' or 'not susceptible to an interpretation

[52] If the Panel had decided only the contractual "just cause" issue governed by Master Agreement Article 52, it would have no reason to refer to "contract articles" in the plural context. (RX-21 (emphasis added).) It is clear this plural reference describes Master Agreement Articles 21 and 37, which are the primary contract provisions cited in Atkinson's two grievances and discussed in his Case File. (RX-20, pp. 6-7.) Indeed, it appears from the grievances that Atkinson added the reference to Article 52 as an afterthought. (RX-20, pp. 6-7.)

consistent with the Act.' *Id.* Deferral is essentially mandatory "unless there is no conceivable reading of the facts in a given case that would support the arbitrator's decision." *Id.*

Here, it is undeniable that a reasonable fact-finder presented with Atkinson's October 28th discharge case could reach a decision that none of the cited "contract articles" were violated, including Master Agreement Articles 21 (Union Activity) and 37 (Management-Employee Relations) and WPA Supplement Article 52 (Discharge or Suspension). Atkinson admittedly violated the 340 Methods by failing to download EDD, and he thereafter lied about unsuccessful EDD download attempts in hopes of mitigating his misconduct. (ALJ, p. 35 at fn.40; Tr. 428-29; 964-69, 1312-14; RX-16; RX-59; RX-62.) In addition, even if only considering his discipline prior to June 20th, Atkinson had a history of admittedly nondiscriminatory discipline, the most recent of which was a 48-day suspension and "final warning" issued by the very same Panel two months earlier. Under these circumstances, the Panel's decision finding of just cause for discharge and no discrimination for union-related activity is "reasonably permitted" by Board law.

C. The record as a whole does not contain a preponderance of the evidence that Atkinson's October 28th discharge violated Sections 8(a)(1) and 8(a)(3) of the NLRA. (Relates to Exceptions 1-11, 14- 22, 25-42, 44, 46-48)

The ALJ's findings and conclusions about Atkinson's October 28th discharge suffer from many of the same flaws as his analysis of the June 20th discharge, including the assumption of facts, the refusal to accept the implications of the November 2014 Panel, the complete omission of any comparator or pretext analysis, and the irrelevant, inconsistent, unreliable, and self-serving testimony about post-discharge statements allegedly made by UPS managers. (*See* Section IV(A), above.) But there are additional errors that plague the ALJ's analysis of the second discharge as well.

1. There is no temporal proximity to suggest a causal nexus.

The ALJ emphasizes the fact that "the June 20 and October 28 discharges occurred roughly within four months of each other." (ALJ, p. 54.) But the test for temporal proximity is not how close together in time various adverse employment actions fall. The relevant inquiry is how much time elapses between the protected concerted activity and each individual adverse employment action that is alleged to be discriminatory. Under the correct measurement, it is clear that any semblance of temporal proximity

between Atkinson's concerted activity and his October 28th discharge is utterly lacking. To suggest even an inference of discrimination, an employer's adverse action must generally take place within just a few days of the employee's NLRA-protected activity. *See, e.g., NLRB v. Adams Delivery Service,* 237 NLRB 1411, 1420 (1978) (causal nexus where employee fired one day after complaint); *Novelty Prod. Co.*, 170 NLRB 466, 469 (1968) (causal nexus where employees fired just two days after interrogation about union activity); *Dee's of New Jersey, Inc.*, 161 NLRB 204, 205 (1966) (causal nexus where employee/union-organizer laid off eight days after union demand for recognition); *Council Mfg. Corp.*, 143 NLRB 101, 106 (1963) (causal nexus where employee fired same day he met with union organizer). Atkinson claims UPS first learned of his "Vote No" involvement in fall 2013. (Tr. 299-301.) The vast majority of Atkinson's concerted activity occurred months before his June and October 2014 discharges, which in turn occurred months after the IBT's decision to implement the new Master Agreement and supplements.[53] (Tr. 90-91, 1379; JX-5; JX-8; GC-4.) This lack of temporal proximity does not support an inference of discrimination.

Because temporal proximity is nonexistent as to the October 28th discharge, the ALJ strains to reason that "UPS's animus towards Atkinson was still present in October 2014" because "Blystone admitted in July 2014, that Bartlett, DeCecco and Alakson were aiming to get rid of Atkinson because of [his] union and protected activities; and Lojas told Atkinson in December 2014 that he agreed the Vote No window signs put Atkinson on the radar (thereby indicating that the animus persisted throughout the relevant time period)." (ALJ, p. 54.) As explained previously, Blystone's alleged statements are completely incredible given Atkinson's and Kerr's shifting testimony in-person and by affidavit, and given Company managers' emphatic testimony that they never made the underlying statements Blystone allegedly claimed to have "overheard." (*See* Section IV(A)(2), above.) But even if accepted as true, Blystone's alleged statements are only closely correlated with—and thus only serve to shed light on—Bartlett's June 20th discharge decision. The ALJ found Bartlett to be the sole instigator of the June 20th "tainted" discharge, a decision that involved neither Alakson nor DeCecco. (ALJ, p. 53.) Bartlett left the Center on July 31, 2014, and there is absolutely

[53] For example, by the time the Master Agreement and all supplements and riders were implemented by the IBT on April 25, 2014, the only discipline Atkinson had received was the January 22nd warning letter. (Tr. 1097; RX-3.)

no evidence whatsoever that Blystone overheard Alakson and DeCecco attempting to plot against Atkinson past July 5, 2014. (ALJ, p. 34; JX-6, p. 3.)

With regard to the claim Lojas said he "definitely agree[d]" that the windshield signs in January-March 2014 "put [Atkinson] on the radar," Lojas did not even work in the Center until August 2014, many months after the windshield signs disappeared. (JX-6, p. 2.) Prior to coming to the Center, Lojas worked in the New Stanton facility, 45 minutes away, so he would have no knowledge of the Center's windshield signs.[54] (Tr. 834, 1667; CP-6, p. 8.) In any event, post-discharge statements reflecting anti-union animus on the part of the employer cannot convert a for-cause termination into unlawful retaliation where the employer would have discharged the employee even absent his union activity. *See, e.g., Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (post-discharge statement reflecting anti-union animus on part of decision-maker did not convert for-cause termination into unlawful retaliation where employer would have discharged employee even absent his union activity). Thus, Lojas's alleged post-discharge statement in December 2014 does nothing to establish temporal proximity or undermine the legitimacy of Atkinson's October 28th discharge for failing to download EDD.

2. *Even if some animus were shown, UPS met its burden of proving it would have discharged Atkinson on October 28th regardless of his concerted activity.*

On October 28, 2014, Atkinson was discharged for failing to follow 340 Methods related to EDD downloads. (ALJ, pp. 36-37; Tr. 290, 964, 1311-28; JX-4, p. 4; RX-17, 3-4.) Failing to download EDD is an undisputed methods infraction. (Tr. 428-29.) Atkinson's failure to download EDD was "the last straw" after a history of legitimate, nondiscriminatory discipline for methods infractions. (RX-3.) He had many chances to improve and received hands-on OJS training for four days in 2014. (ALJ, p. 36; Tr. 961-62.) It was equally troubling that Atkinson did not own up to his forgetfulness and instead tried to cover up his misconduct by fabricating an unsuccessful EDD download attempt. (Tr. 957, 964, 971-72, 1312-29, 1682.)

[54] Based on the inconsistent testimony and questionable circumstances surrounding the alleged statements attributed to these UPS managers, the ALJ's finding of animus should be carefully reviewed. The ALJ is in no better position than the Board to assess inherent probabilities of substantive testimony, and the Board is not bound by credibility determinations based on such assessments. *In re Betances Health Unit, Inc.*, 283 NLRB 369, 370 (1987) (reversing credibility determinations based "on [the ALJ's] assessment of the inherent improbability that [a particular] statement . . . was made"); *S&G Concrete Co.*, 274 NLRB 895, 897 (1985) (rejecting credibility determinations because "the Board is just as capable as the hearing officer of evaluating the inherent probabilities of the testimony"). Credibility determinations are entitled to deference only when they are based on "demeanor or conduct at the hearing." *Kelco Roofing*, 268 NLRB 456, 456 (1983).

This assertion was conclusively proven false by the Company's DIAD records. (Tr. 295, 963-66, 971-72; RX-62.) Through DIAD testing and diagnostics, UPS can see whether and when informational signals are sent to or from any DIAD. (Tr. 964, 1311, RX-16 p. 4.) UPS can therefore determine whether (and when) EDD was successfully downloaded onto a DIAD. (Tr. 964, 1311, 1317-19, 1322, 1327-28, RX-16, JX-9 ¶ 4.) If EDD has not downloaded properly, the driver cannot access a host of information necessary to run the route, including the location of each stop, the number of packages for pickup or delivery, the placement of packages in the truck, any specific commit times or service requirements, and other pickup and delivery information. (Tr. 1311-12.)

Atkinson insisted at his Local-level grievance hearing that he had tried but failed to download EDD before leaving the Center, and McCready asked Project Manager Dan Thrailkill ("Thrailkill") to examine Atkinson's first DIAD to determine the truth of his story. (Tr. 963-69, 971, 1307-08, 1312; RX-62.) Using the date, the DIAD dispatch identification number, the route number, and the Center number, Thrailkill was able to pull the DIAD Summary Report and the DIAD Detail Report for Atkinson's first and second DIAD.[55] (Tr. 964-69, 1312-14; RX-16; RX-59; RX-62.) Based on these Reports, Thrailkill determined that Atkinson had attempted to download EDD onto his DIAD twice on October 27th, and both attempts failed. (Tr. 963-69, 1314; RX-16, p. 2; RX-62.) However, Thrailkill also determined that Atkinson's failed EDD download attempts were not initiated until 2:34 p.m. and 5:16 p.m., almost six hours after Atkinson left the Center and almost five hours after he began using his new DIAD. (Tr. 973, 1318; JX-16; JX-59; JX-62.) Thrailkill further concluded that Atkinson made no attempt to download EDD on the morning of October 27th, otherwise his failed download attempt would have also appeared on the DIAD Summary Report. (Tr. 1318, 1322, 1325, 1327; RX-16; RX-59; RX-62; JX-9 ¶ 4.) Finally, Thrailkill confirmed that Atkinson's first DIAD was working properly on the morning of October 27th. (Tr. 1327; RX-16, p.4.) The DIAD's functionality is apparent from the fact that certain daily automatic downloads, including delivery and

[55] The first page of RX-16 shows Atkinson's Route ID (27E) and clock-in or "Report" time of 8:13 a.m., as well as the time that he left the building at 8:35 a.m. (RX-16, p. 1.) The fifth page shows the DIAD Report Identifier Number (5010025) for Route 27E, which was Atkinson's route. (RX-16, p. 5.) The fourth page shows a DIAD Report with Atkinson's Identifier Number (50100250) where three downloads were successful at 8:14 a.m., but where two EDD downloads were unsuccessful at 4:34 p.m. and at 5:16 p.m. (JX-16, p. 4.) The seventh and ninth pages show where Atkinson was at 4:34 p.m. and at 5:16 p.m., respectively, at Stops 102 and 116. (JX-16, p. 7-9.) And finally, the eighth and tenth pages show how far Atkinson was from the UPS facility at the time of the unsuccessful EDD downloads. (JX-16, p. 8, 10.)

intercept information, had successfully occurred at 8:14 a.m. on October 27th, right when Atkinson logged in. (Tr. 1318, 1327; RX-16, p. 4.) Had Atkinson unsuccessfully attempted to download EDD at that time, he would have received an error message on his DIAD screen within two minutes, which is the longest any command can be given to the DIAD without receiving some result. (Tr. 1328; RX-18; RX-19; JX-9 ¶ 4.)

The ALJ expressly "d[id] not credit" Atkinson's story about his unsuccessful EDD download attempt on the morning of October 28th. (ALJ, p. 35 at fn.40.) The ALJ further recognized that UPS presented credible evidence that the only unsuccessful download attempts occurred in the afternoon, that Atkinson denied those download attempts at trial, and that it was "plausible" that Atkinson had lied. (ALJ, p. 35 at fn.40.) But despite recognizing Atkinson's obvious fabrication—both before the Panel in January 2015, and under oath before this tribunal in June 2016—the ALJ held that Atkinson's veracity (or lack thereof) "is not material to [his] analysis." UPS begs to differ with the ALJ's conclusion that Atkinson's blatant dishonesty is irrelevant, as his dishonesty itself was yet another independent reason for his discharge to be upheld.

3. There is no evidence the October 28th discharge was pretextual.

Just as with the June 20th discharge, the General Counsel presents no evidence and the ALJ makes no finding that Atkinson's October 28th discharge was pretextual. It is undisputed that Atkinson actually committed the method infraction for which he was terminated, so there is no argument that the reason for his termination lacks a basis in fact.

There is likewise no evidence that Atkinson's failure to download EDD was insufficient to justify his discharge. The simple fact is, the 340 Methods are applied across the nation, and the methods-related discipline and discharges Atkinson received are no different than those received by other employees in the Center and throughout WPA.[56] (Tr. 55, 246-47, 523-24, 610, 702, 730, 768; JX-3; JX-4; RX-7; RX-14; RX-

[56] While the Board in *Handicabs, Inc.*, 318 NLRB 890, 897-98 (1995), stated that "[a]n employer's failure to discriminate against every union supporter does not disprove a conclusion that it discriminated against one of them," the special circumstances underlying the Board's decision are noticeably absent in the case at bar. For example, at the time the charging party was terminated in *Handicabs*, he was the only employee that the employer could identify as a union supporter. *Id.* at 897. Moreover, the employer refused to provide the charging party any information about the customer complaint that purportedly justified his discharge and even failed to ask the employee about his side of the story. *Id.* at 891, 897-98. These factual distinctions make *Handicabs* inapplicable to this case, where Atkinson was one of many "Vote No" activists known personally to Center supervisors and UPS Labor Department managers. (Tr. 1380, 1383-84, 1552-53, 1563-64.) In addition, Atkinson received a full explanation of all infractions of which he was accused, an opportunity to explain his side of the story, and a written letter for all discipline and discharges. (RX-3.) While a failure to discriminate against all employees may not alone conclusively disprove Atkinson's allegations, the utter lack of retribution toward other vocal activists in the same Center and WPA—coupled with the obvious (and seemingly intentional)[56] decline in Atkinson's performance at the same time that a strict new Center Team was aggressively trying to improve the Center's overall efficiency—compels but one conclusion: Atkinson was disciplined and discharged in 2014 due to poor performance. The mere fact that Atkinson's substantial decline in performance coincided with (or

15; RX-65; RX-66.) At least two other employees in the Center were also fired by DeCecco in 2014 for repeat methods infractions, including Schick and Clark, yet they were not union stewards, did not participate in the "Vote No" Campaign, and did not run for union office. (Tr. 120, 248, 280-81, 307, 326, 333-35, 823-24, 940, 1432-34, 1558, 1646, 1662.) These comparisons belie any claim that Atkinson's methods infraction was insufficient to justify his discharge. In fact, the General Counsel presented no evidence—and the ALJ made no findings—of similarly-situated comparators who were not union stewards, "Vote No" supporters, and/or candidates for union office and who were treated more leniently than Atkinson.[57] Without comparator evidence, Atkinson's disparate treatment claim automatically fails.[58] *See, e.g., Monon Trailer, Inc.*, 217 NLRB 257, 267 (1975).

Finally, there is no evidence that Atkinson's failure to download EDD did not actually motivate his October 28th discharge. The ALJ held that "UPS does not have an established track record of disciplining drivers for not downloading EDD," which apparently played a part in his finding of discrimination. (ALJ, p. 54.) But the ALJ also recognized that this particular method violation is extremely infrequent and is usually cured by the drivers themselves before it ever comes to management's attention. It is axiomatic that an employer can only impose discipline for known violations of policy. It is likewise beyond dispute that an employer can take adverse employment action against an employee for a "violation of first impression"—one

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perhaps was even motivated by) an uptick in his concerted activity does not invalidate the Company's legitimate, nondiscriminatory business decision to terminate his employment.

[57] The only comparators suggested by the General Counsel as being treated more favorably than Atkinson are Kerr, Larimer, Morris, and Lange—all of whom were also actively involved in union stewardship, "Vote No" Activity, and/or the 2014 Teamsters Local 538 election campaign. (Tr. 92, 124, 133, 137, 168, 187-88, 214-15, 307, 330-31, 440-45, 448-50, 452, 494, 533, 549, 582, 590-91, 601, 611-12, 625-27, 797, 821, 1015; CP-1, p. 2; CP-5, pp. 46-47, 49-50; GC-13, p. 1; RX-1, p. 9; RX-4, pp. 2-5, 7, 10; RX-22, pp. 10, 12-13; RX-55, pp. 1, 6.) Moreover, every time one of these "comparators" claimed to have committed an offense similar to Atkinson but received no discipline, cross examination quickly revealed that the alleged offenses occurred in different time periods; under different supervisors with varying management styles and levels of authority; under readily distinguishable factual circumstances, and/or in situations that were never actually discovered by UPS management. (Tr. 435, 472-74, 532, 534, 559, 586, 592-93, 599.) For example, Larimer admitted that all instances where he was not disciplined for missing NDA packages or failing to timely complete DIAD training occurred before DeCecco's arrival at the Center. (Tr. 586, 599.) Larimer further admitted that Alakson is the only supervisor to ever bring him a new DIAD because he failed to download EDD; that this occurred when he had two DIADs for a double-trip run, and thus still had one DIAD from which to make deliveries while a replacement for the other DIAD was brought out to him; and that he has no idea whether the issue came to DeCecco's attention. (Tr. 603-04.) Lange admitted that all instances where he was not disciplined for missing NDA packages or double-scanning delivery notices occurred before DeCecco's arrival at the Center. (Tr. 532, 534.) Lange also admitted that, when he was not disciplined for forgetting to download EDD, it was because he quickly returned to the Center to download EDD before starting his route, thereby avoiding management's involvement altogether. (Tr. 553-55, 559.) Kerr's testimony proves that he was treated the same way as Atkinson, in that he also received warning letters when he forgot NDA packages on his package car. (Tr. 329-31.) Finally, Morris did not testify to committing any of the offenses that Atkinson did; in fact, he has never forgotten NDA packages or received any other discipline—just a documented talk-with due to his unprofessional tone and language toward DeCecco. (Tr. 616, 1226.)

[58] But even so, it is certainly worth noting that Atkinson received even more chances—and more lenient treatment—than WPA's standard progressive discipline procedure allows, which includes (1) a warning letter, (2) a three-day suspension, (3) a ten-day suspension, and (4) a discharge. (Tr. 875, 930, 935, 1439, 1519.) The Center Team did not strictly follow this progression here, as Atkinson was given only documented talk-withs on two occasions when UPS could have progressed to the next disciplinary step. (Tr. 249, 894, 1104, 1106-07, 1113-15, 1633; GC-6; RX-3, pp. 2, 4; RX-44; JX-3, pp. 3, 36.) If the progressive discipline schedule had been applied strictly to all Atkinson's methods infractions, his first discharge would have been on May 22nd when he reported for work unshaven.

that has never been committed before and may never be committed again. *See, e.g., St. George Warehouse, Inc.*, 349 NLRB 870, 878-79 (2007) (citing *National Steel Supply*, 344 NLRB 973, 975 (2005) and explaining that "the absence of other discipline for over-weight containers does not show disparate treatment;" when an employee's conduct is "unprecedented," then "a particular form of discipline is not necessarily unlawful solely because an employer has imposed it for the first time").

D. The ALJ erred in ordering interim search-for-work expenses and in failing to cut off all liability before June 21, 2016. (Relates to Exceptions 2, 43-47)

Although UPS excepts to the ALJ's findings that Atkinson was unlawfully discharged, the Company agrees that—should any liability be found—the remedy should not include reinstatement of employment because of Atkinson's post-discharge discriminatory comments about protected characteristics of UPS management. (ALJ, pp. 55-56.) Post-discharge misconduct may warrant denial of reinstatement, depending on the nature of the misconduct and the "likelihood that it will lead to future strained relations on the job if the employee is returned to work." *Hillside Avenue Pharmacy,* 265 NLRB 1613, 1622 (1982). When an employee is unlawfully discharged, reinstatement and backpay are appropriate remedies unless the employer can show subsequent conduct, or discovery of conduct, that would have resulted in a lawful discharge. Under well-established Board precedent, if an employer establishes that an employee engaged in misconduct for which the employer would have discharged any employee, reinstatement is not ordered, and backpay ends on the date that either the employee engaged in the misconduct, *Colorado Forge Corp.*, 260 NLRB 25, 37 (1982), or when the employer first acquired knowledge of the misconduct, *John Cuneo, Inc.*, 298 NLRB 856-857 (1990).

The UPS Professional Conduct and Anti-Harassment Policy ("Anti-Harassment Policy") prohibits discrimination because of age, race, religion, sex, disability, sexual orientation, gender identity, military status, pregnancy, national origin, or veteran status. (RX-6.) The Anti-Harassment Policy precludes employees from engaging in conduct that has either the intended purpose or the unintended effect of unreasonably interfering with another employee's job or creating an intimidating, hostile, or offensive environment for the individual. (RX-6.) UPS has historically demonstrated "zero tolerance" for violations of the Anti-Harassment Policy, meaning that a first offense results in automatic

On May 9, 2015, four months after his October 28th discharge was upheld at the State Panel, Atkinson made a post to a facebook group. The posting stated as follows:

> Here's a couple more names for people to watch out for:
>
> Rob Eans.....this piece of garbage is the District Labor manger that insinuated [sic] himself into every step of my discipline.....a condescending, self righteous little man who's creepy demeanor will just plain make your skin crawl.....I have to say I have never seen a man sit in a chair and cross his legs in a more dainty and effeminate way, he legitimately looks like he should be sitting on a tuffet eating his curds and whey!..... he definitely gives off the impression that he's trying to compensate for something....my guess, erectile dysfunction :)
>
> Tom McCready.....this knuckle dragger is the Division Manager who buffones [sic] his way along trying to do his master Rob Eans bidding.....he's a cross between Barney Rubble, Shrek, and Captain Caveman....listening to him talk is actually quite humorous, it sounds like he's chewing on cotton balls and marbles.....I've yet to hear him ever say one intelligent thing, but then again, it'd be difficult to decipher it if he did :)

(Tr. 1039-43; RX-5.)

These comments disparage UPS employees based on gender stereotypes, perceived sexuality, and perceived disabilities, in violation of the Company's Anti-Harassment Policy, and render Atkinson unfit for future service at UPS. While in some cases, the Board has ruled that the utterance of discriminatory comments by a discharged employee do not necessarily render the employee unfit for future service, the mitigating circumstances in those cases are not present here. In *C-Town*, 281 NLRB 458 (1986), a discharged employee made racially derogatory comments when, the day after her unlawful discharge, she returned to the workplace and witnessed her replacement already at work. In *J.W. Microelectronics Corp.*, 259 NLRB 327 (1981), a group of black employees were subjected to repeated racially-motivated attacks over the course of two summers in a predominantly white community. During a meeting where the black employees confronted the employer over its failure to address the problem, one black employee stood up and shouted: "Why should we listen to these people? We know all Caucasians are animals." The Board found that, while the employee's conduct was regrettable and not to be condoned, it was understandable given the two years of ongoing racial harassment and not so egregious as to render her unfit for future service. But here, Atkinson's comments were not made in the immediate aftermath of his discharge and were not provoked by any similar mocking of his own protected characteristics. In fact, Atkinson's discriminatory conduct occurred many months after his discharge, and it was completely unrelated to any exchange he ever

had with Eans or McCready, therefore extinguishing any "heat-of-the-moment" justification. Clearly, allowing Atkinson to return would be a "threat to the efficiency of the workplace," as his bigoted and discriminatory conduct effect the managers who will be forced to oversee his productivity and labor-related concerns. *Owens Illinois,* 290 N.L.R.B. 1193 (1988), *enforced without opinion,* 872 F.2d 413 (3d Cir. 1989).

Although the ALJ properly determined that reinstatement is an inappropriate remedy, he erred by ignoring the record evidence of when UPS learned of Atkinson's post-discharge misconduct and instead setting June 21, 2016 (i.e., the date when UPS introduced evidence of Atkinson's post-discharge misconduct at trial) as the liability cutoff date. The following exchange occurred during McCready's direct examination:

Q: Mr. McCready, since January 2015 at the state panel when they upheld Mr. Atkinson's October 28th discharge, have you heard anything from Mr. Atkinson?

A. Not personally or directly, but more indirectly.

Q. What do you mean by that?

A. Sometime after -- four or five months later after the panel decision, there was a post Mr. Atkinson--

[At which time, the General Counsel objects as to relevance.]

(Tr. 1038-39.)

The General Counsel's improper objection as to the relevance of an already-admitted document was improper and devious. Perhaps as intended, it interrupted the undersigned counsel's train-of-thought, and the witness's train-of-testimony, after a long week of trial. Nevertheless, the short passage above proves that McCready himself "indirectly heard from" Atkinson through a social media posting four or five months after the January 2015 Panel. The ALJ erred by recognizing that McCready had already answered the specific question about the appropriate liability cutoff date, which in any event, is commonly left for compliance. *See, e.g., Berkshire Farm Ctr. & Servs. for Youth,* 333 NLRB 367 (2001) (backpay cutoff date, if any, shall be determined in compliance); *Marshall Durbin Poultry Co.,* 310 NLRB 68, 71 fn.7 (1993) (recognizing that, although evidence of post-discharge misconduct may be introduced at the liability phase to preclude the remedy of reinstatement, "[t]he specific backpay period and the consequent amount owed to . . . are matters that [left] to the compliance stage").

Furthermore, as the record reflects, UPS produced thousands of documents pursuant to a pretrial subpoena from the General Counsel. It is undisputed that the Company's initial document production to its undersigned counsel occurred on June 10, 2016, as reflected in many forwarded documents that were inadvertently not redacted before production to the General Counsel. (Tr. 195, 202, 651, 1072; CP-4; CP-5, pp. 1-3, 5, 10, 12, 14-16, 109, 113.) If UPS had any doubt whatsoever about whether an appropriate record had been adduced about the date McCready first learned of Atkinson's misconduct, the Company could have introduced the email of another UPS manager who received a screen shot of Atkinson's same posting, admittedly several months later. This cover email was duly produced (along with the attached screenshot reflected in RX-5) to the General Counsel and Charging Party's Counsel in June 2016—prior to trial—and it appears at Bates R01837. Given the dated subpoena production materials, it is disingenuous, at best, for the General Counsel and Charging Party to suggest that UPS first learned of Atkinson's bigoted posting on the day it was introduced into evidence. Accordingly, UPS respectfully requests that—to the extent McCready's testimony is not deemed clear as to the date of discovering Atkinson's May 2015 post—the Board permit the Company to adduce additional evidence (which has already been produced to all parties, and thus, comes as no "surprise") in compliance.

Finally, it is well settled that the Act's "make-whole" remedy does not allow for consequential damages, and none of the cases cited by the General Counsel demonstrate otherwise. To the contrary, these cases, including *Virginia Electric & Power* and *Phelps Dodge*, merely affirm the principle that direct harm is not limited to the loss of a job or wages. When asked to directly address the question of consequential damages, time and again, the Board has expressly found that such damages are not a proper remedy and has declined to award them. *See, e.g., Guy Brewer 43 Inc.,* 363 NLRB No. 173, *3 at fn.2 (Apr. 28, 2016) (recognizing that a make-whole remedy that includes reasonable consequential damages would involve a change in Board law and would be inappropriate); *see also Advancepierre Foods, Inc.,* JD-58-16, 2016 WL 3519322, at *2, n.58 (June 27, 2016) (same). This is because consequential damages are entirely speculative and contrary to existing law. While the Board may have held in *King Soopers, Inc.*, 364 NLRB No. 93 (2016) that "search-for-work" expenses can be awarded, that new decision is clearly erroneous. Search-for-

work expenses are simply another form of consequential damages—equally speculative and equally inappropriate under current Board law. *See Advancepierre Foods*, 2016 WL 3519322, at *2, n.58 ("In any event, as with the search-for-work expenses, the request for consequential damages as part of the remedy does not reflect extant law.").

V. CONCLUSION

For the reasons stated above, the Company's exceptions should be granted, the ALJ's ruling should be reversed, and the General Counsel's Complaint should be dismissed the record as a whole does not contain a preponderance of evidence that UPS discharged Atkinson on June 20th or October 28th based on NLRA-protected activity; the Panel's affirmation of the October 28th discharge meets the deferral standard in *Babcock & Wilcox Construction Co*, 361 NLRB No. 132 (2014), so the ALJ erred in failing to defer to the contractual grievance procedure. Finally, even if UPS did discharge Atkinson in violation of NLRA Sections 8(a)(1) and 8(a)(3), the ALJ erred in ordering interim search-for-work expenses, as well as in ordering backpay until June 21, 2016, long after Atkinson's post-discharge misconduct occurred and became known to UPS.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2017, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

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