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BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED PARCEL SERVICE, INC. Respondent, and ROBERT C. ATKINSON, JR., Charging Party.	Case No 06-CA-143062 **CHARGING PARTY'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

The Charging Party Robert Atkinson agrees with the core analysis of the Administrative Law Judge: that the Employer violated the Act because it used "methods procedures and instructions" to get rid of a troublesome union dissident. However, the Charging Party respectfully submits exceptions concerning four aspects of the ALJ's decision.

First, the Charging Party excepts to the ALJ's decision not to order reinstatement. The ALJ applied the wrong legal standard to the Facebook posting at issue. Second, the Charging Party agrees that deferral would be inappropriate under *Babcock & Wilcox*. However, to the extent necessary for the Board to rule on deferral, the Charging party excepts to the ALJ's failure to rule on two additional reasons why deferral was inappropriate. Third, the Charging Party agrees that the factual findings made by the ALJ were more than sufficient to support his *Wright Line* analysis. However, to the extent necessary for the Board rule on the Employer's violations, he excepts to the failure of the ALJ to make additional findings of fact that would have further supported his analysis. Finally, the Charging Party asks for a modification to the Notice to Employees that will enable lay readers to understand the rights at issue in this case.

The ALJ found that the Charging Party engaged in protected concerted activity by, among other activities, leading a "Vote No" campaign that twice blocked ratification of a national contract between the Employer and the Teamsters Union. ALJ Decision, p. 6-7, 9-10, 52. Both the Employer and Atkinson's union, Teamsters Local 538, supported ratification. ALJ Decision, p. 6-9, 11 FN 14, 14-15. Eventually the International Brotherhood of Teamsters had to amend its constitution to implement the contract without a successful ratification vote. *Id.*

Atkinson also ran for office against Betty Fischer, the principal officer of Local 538. ALJ Decision, p. 14-15, 34.

The Employer issued a series of disciplines against the Charging Party for violating its "methods, procedures and instructions" – a massive collection of rules including "340 methods" for conducting deliveries. ALJ Decision, p. 3-4, 9-10, 13-14, 17-19, 26, 29-31, 36-37. At issue in this case are the final two disciplines, terminations issued on June 20, 2014 and October 28, 2014.[1] The Employer bases the first on claims that Atkinson violated various methods during a supervised "blended ride" and the second on the fact that he forgot to download information onto his handheld device one morning. ALJ Decision, p. 53-54.

The ALJ found abundant evidence of animus, which he summarized in part as follows:

> Shortly after employees (at Atkinson's urging) began displaying Vote No signs in their vehicles, [Labor Manager] McCready confronted Atkinson by saying that he saw the Vote No signs and telling Atkinson, "I guess you can do whatever you want." Consistent with McCready's sentiment, [Center Manager] Lojas agreed (in December 2014) with Atkinson that the Vote No signs put Atkinson "on the radar." As for the social media postings, [Supervisor] Alakson gave Atkinson and his coworkers several friendly but ominous warnings that they should watch what they posted on Facebook. And perhaps most directly, in July 2014, [Supervisor] *Blystone told Atkinson that [Center Manager] Bartlett, [Supervisor] DeCecco and Alakson were singling Atkinson out and trying to get rid of Atkinson because of Atkinson's activities* (such as generally being a troublemaker and orchestrating the Vote No signs that employees posted in their vehicle windows.

ALJ Decision, p. 53 (citations and footnotes omitted, emphasis added).

The ALJ concluded that this "unlawful plan to use its rules to single out and get rid of Atkinson" tainted the Employer's decision to terminate Atkinson based on methodical infractions. ALJ Decision, p. 54. The decisions involved supervisor discretion, and "[t]he fact

[1] The Employer actually terminated the Charging Party three times, but the first is not before the Board. ALJ Decision, p. 53, FN 54. The reason multiple terminations were possible was that the collective bargaining agreement entitles employees to keep working while their grievances are processed for a "working discharge" such as one based on methods, procedures and instructions. ALJ Decision, p. 5.

remains that UPS (through Bartlett and other supervisors) unlawfully had its thumb on the proverbial scale when it decided to discharge Atkinson." ALJ Decision, p. 53.

In addition, the ALJ made other factual findings that reinforce his holdings concerning animus. These include findings:

- that UPS monitored the Vote No campaign, *see, e.g.*, p. 7-8, 14; that DeCecco demanded the Charging Party tell him who was posting Vote No literature, p. 11;
- that Alakson, Bartlett, and DeCecco photographed cars with Vote No signs in them and forwarded them to Labor Relations, p. 12-13;
- that when the Charging Party asked DeCecco why he was doing this, DeCecco responded "This is my parking lot. I can take pictures of whatever I want. Labor [is] interested in what's going on right here and it's my right to send them these pictures, p. 12;
- that the first day Bartlett visited the New Kensington center as its new manager, supervisors briefed him on the Vote No campaign and Charging Party role in it, p. 13;
- that DeCecco warned Atkinson he "could have every driver on a working discharge" for violating methods, procedures and instructions, p. 14;
- that the Charging Party and District Labor Manager Rob Eans had such a strong disagreement about a grievance that the Charging Party was pulled from the case, p. 15 FN 23; and
- that Joe Iaquinta, a supervisor from another facility, forwarded Facebook posts by the Charging Party to Bartlett and then on the day of the OJS ride that lead to the Charging Party's discharge warned him "You don't want me in this building," while refusing to identify himself, p. 16, 23.

The Charging Party agrees that the fact findings already made by the ALJ were more than sufficient to support his analysis. It is quite remarkable that supervisors repeatedly and explicitly admitted their animus and even their plan to act on it. That said, there is additional evidence that further supports the ALJ's findings regarding the Employer's reasons for discharging the Charging Party. Therefore, to the extent necessary for the Board to rule in this case, the Charging Party excepts to the ALJ's failure to make findings on that evidence. The particular facts at issue are set out in Exceptions 5 and 8 through 19 and discussed in Section IV, below.

Although he found the Employer violated the Act by terminating the Charging Party, the ALJ did not order the Charging Party's reinstatement. ALJ Decision, p. 43-44, 55-58, Appendix A. The Employer raised a defense to reinstatement based on a single Facebook post mocking the Labor Relations managers who terminated the Charging Party. *Id.* The ALJ applied the incorrect standard to this defense – he treated it as after-acquired evidence of conduct occurring during the discriminatee's employment whereas the post was made after Atkinson was no longer working for UPS. *Id.* The correct burden is much heavier – the Employer must show the discriminate engaged in conduct "so flagrant as to render the employee unfit for further service or a threat to efficiency in the plant." The Facebook post at issue does not even come close. This is Exception 1 and is discussed in Section II, below.

The ALJ also held that the Employer failed to meet its burden under *Babcock & Wilcox* to show that deferral to arbitration would be appropriate. The Charging Party agrees that the ALJ's analysis under *Babcock* was correct and sufficient to preclude deferral. However, the Charging Party also raised two additional arguments against deferral in his post-hearing brief: that two and a half years after his termination, an arbitration hearing has not even been scheduled and that conflicts of interest prevented a fair and regular process at the Joint Panel. To the extent necessary for the Board to resolve the issues in this case, the Charging Party excepts to the ALJ's failure to rule on these additional theories. These issues are discussed in Exceptions 2 through 7 and Section III, below.

Finally, the Charging Party requests that the Board modify slightly the language of the Notice to Employees. The modifications he proposes will make clearer to lay readers the particular rights at issue in this case. This is Exception 20, discussed in Section IV, below.

II. THE ALJ SHOULD HAVE ORDERED REINSTATEMENT.

Exception 1

The Charging Party objects to the ALJ's finding that reinstatement was inappropriate because the ALJ applied the standard for pre-discharge misconduct rather than the substantially higher standard for post-discharge misconduct. The ALJ should have asked whether Atkinson's conduct was "so flagrant as to render the employee unfit for further service or a threat to efficiency in the plant." *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 406 (1969). The Employer cannot meet this burden.

The ALJ found that Atkinson made a Facebook posting on May 9, 2015 mocking two high-ranking Labor Relations managers involved in his discharge. ALJ Decision, p. 55-56. Atkinson regrets the posting and made it because he believed the two had lied about him and taken away his career. ALJ Decision, p. 43. The ALJ has, indeed, found that Atkinson's termination violated the Act. ALJ Decision, p. 50-55. The posting occurred after Atkinson's discharge was final, and Atkinson was no longer working for UPS. ALJ Decision, p. 43 (*Compare* Section DD *with* Section EE.)

In finding that the Employer "would have discharged any employee," the ALJ applied the wrong standard – he applied the standard for after-acquired evidence of *pre*-discharge misconduct to a defense based on post-discharge misconduct. ALJ Decision, p. 55 *citing Tel Data Corp.*, 315 NLRB 34, 367 (1994), *reversed in part on other grounds*, 90 F.3d 1195 (6th Cir. 1996); *Marshall Dublin Poultry Co.*, 310 NLRB 68, 69-70 (1993), *reversed in part on other grounds*, 39 F.3d 1312 (5th Cir. 1994); *John Cuneo, Inc.*, 298 NLRB 856-57 (1990).

All of the cases relied upon by the ALJ concern an employee's conduct prior to discharge. *Tel Data Corp.* concerned an employer that learned after discharging an employee

that, prior to his discharge, the employee had over reported eight hours on a timecard. 315 NLRB at 367. In *Marshall Dublin Poultry Co.*, the Employer learned after the discriminatee's discharge that, prior to his discharge, he had "engaged in repeated on-the-job sexual misconduct." 310 NLRB at 69-70. Finally, in *John Cuneo, Inc.*, the employer's defense was based on an alleged false statement in the discriminatee's application for permanent status. [2]

Instead of relying on these cases, the ALJ should have applied the standard for post-discharge misconduct, namely that the employer "has the burden of providing misconduct so flagrant as to render the employee unfit for further service or a threat to efficiency in the plant." *O'Daniel Oldsmobile, Inc.*, 179 NLRB at 406; *see also Fund for Public Interest*, 360 NLRB 877, 877 (2014); *George A. Hormel*, 301 NLRB 47, 47 (1991). Only an "extraordinary situation" can meet this high bar. *Timet*, 251 NLRB 1180, 1180 (1980); *enforced*, 671 F.2d 973 (6th Cir. 1982).

Just how heavy the Employer's burden is can best be seen from an ALJ's recent collection of examples where it had been met:

> My examination of the relevant precedent reveals that generally this stringent standard necessary to disqualify discriminatorily discharged employees from reinstatement is met by conduct involving threats of violence or bodily harm or actual acts of violence.
>
> - *Hadco Aluminum & Metal Corp.*, 331 NLRB 518, 521 (2000) (employee threatened another employee over the phone by stating "you're going to be dead");
> - *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992) (threat made to employee at home by discriminatee that she should strike "if you valued your life," held to be threat of bodily harm);
> - *Family Nursing Home*, [295 NLB 923, 923 (1989)] (assault against employer's director of nursing);

[2] The ALJ also cited *Bob's Ambulance Service* for a procedural holding to which the Charging Party does not except, namely that it was appropriate to consider the Employer's defense at this time rather than during compliance proceedings. ALJ Decision, p. 55, *citing Bob's Ambulance Service*, 183 NLRB 961, 961 (1970).

- *Roure Bertrand Dupont*, 271 NLRB 443, 444-445 (1984) (unlawfully discharged strikers throwing nails at truckdriver by employee of different employer; Board concludes that reinstatement should not be awarded to employee, who "purposefully disregards the safety of employees and non-employees and intentionally attempts to injure them and the public at large");
- *Fairview Nursing Home*, 202 NLRB 318, 322 fn. 36 at 325 (1973) (discriminatee rammed a shopping cart into side of car of employee).

Connecticut Humane Society, 358 NLRB 187, 216 (2012) (bullet point formatting added); *see also Fund for Public Interest*, 860 NLRB at 877 (collecting additional examples, all involving violence, threats of violence, or the use of blackmail to influence Board testimony).

The Employer does not accuse Atkinson of anything remotely resembling this kind of conduct. The ALJ found the Facebook post at issue "questioned Eans' masculinity and whether Eans was compensating for having erectile dysfunction, and described McCready as a knuckle dragger who sounds as if his mouth is full of cotton balls." ALJ Decision, p. 55. There is nothing that even hints at any sort of physical confrontation. ALJ Decision, p. 42-43, 55-56. This is the far cry from the death threats, blackmail and assaults that are have been held "so flagrant as to render the employee unfit for further service" in the past.

The same point can also be seen from considering cases in which the Board has held employers fell short of the "so flagrant" burden. Discriminatees have repeatedly been reinstated despite making racial slurs as well as despite saying a manager was "exploited by his Jewish boss to oppress his own countrymen"; calling a supervisor a "stupid f-cking bi-ch" in front of customers; saying an employer's product can kill people; and telling parents the employer fed their children spoiled food, drove them in unsafe busses and had them sleep on dirty cots. *Connecticut Humane Society*, 358 NLRB at 216 (collecting these examples and more). *See also Fund for Public Interest*, 360 NLRB at 877 (ordering reinstatement of employee to fundraising position despite newspaper interview in which he said that employer was engaged in a Ponzi

scheme and citing examples of an employee reinstated despite an attempted assault and another despite a racial slur unaccompanied by threats). Thus, Atkinson's post was inappropriate, it is not as severe as many other examples where the Board ordered reinstatement.

Finally, the ALJ erred by giving no weight to the fact that Atkinson's Facebook post was protesting the very termination that the ALJ found to have violated the Act. ALJ Decision, p. 42; RX 5. It was made in the context of a discussion between union members as to whether filing charges at the NLRB was futile.[3] RX 5. Atkinson begin the post by warning others to "watch out for" Eans who "insinuated himself into every step of my discipline." *Id.*

Even when applying the remarkably high standard discussed above, the Board also considers whether the conduct or statements at issue protest an Unfair Labor Practice. *Connecticut Humane Society*, 358 NLRB at 216; *Hawaii Tribune-Herald*, 356 NLRB 661, 662 (2011); *Timet*, 251 NLRB 1180, 1180-81 (1981); *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), *enforced*, 548 F.2d 391 (1st Cir. 1977). One reason for this is that protesting an unlawful discharge is itself protected concerted activity. *Timet*, 251 NLRB at 1181. Another long-recognized reason is that:

> Simply put, employees who are unlawfully fired, like Bishop, often say unkind things about their former employers. As the board explained in *Trustees of Boston University* . . . an 'evaluation of postdiscahrge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge.' Employers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims' natural human reaction to the unlawful acts.

[3] At the time of the post, the Regional Director had dismissed the charges at issue and the General Counsel had not yet reinstated them. *Compare* ALJ Decision p. 43 (postings made May 9, 2015) *with id.* at 44 (RD dismissed charges March 30, 2015; GC sustained appeal December 24).

Hawaii Tribune-Herald, 356 NLRB at 662 *quoting Trustees of Boston University*, 224 NLRB at 1409.

III. ADDITIONAL THEORIES PRECLUDE DEFERRAL.

A. There are three reasons deferral is inappropriate.

The Charging Party argued in his post-hearing brief that deferral would be improper because (1) *Babcock & Wilcox* precludes it; (2) two and a half years after the first discharge the Union and Employer have not even scheduled an arbitration hearing; and (3) conflicts of interest prevented "fair and regular" proceedings. The Administrative Law Judge held that deferral was inappropriate for the first reason and therefore did not reach the second and third. ALJ Decision, p. 48-50. To the extent necessary for the Board to resolve the issues before it, the Charging Party excepts to the failure of the ALJ to rule that deferral was inappropriate for the second and third reasons and to make some of the factual findings necessary to do so. Those factual findings not already made by the ALJ can be made from uncontested evidence.

Note that any one of the reasons listed above is sufficient to preclude deferral of both discharges. If two claims are factually related and one is deferrable and the other is not, then the Board proceeds on both charges. *Clarkson Industries*, 312 NLRB 349, 352 (1993); *see also Arvinmeritor, Inc.*, 340 NLRB 1035, 1035 FN1 (2003). Thus, for example, the Employer's failure to schedule arbitration for the June 20, 2014 discharge precludes deferral both on that discharge and on the closely related October 28, 2014 discharge.

B. The Employer has delayed arbitration for years.

Exception 2

The simplest reason why deferral is inappropriate in this case is that two and a half years after the June 20, 2014 discharge, the Employer and Union have not yet even scheduled an arbitration hearing. Tr. 5:954 (McCready). The Board has long required that deferred cases be "submitted promptly to arbitration." *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971). The General Counsel will remove a case from deferral if it will not be completed within one year. General Counsel Memorandum 12-01, p. 8-9; *see also Babcock & Wilcox*, 361 NLRB No. 132, 13 FN 36 (2014). The Employer cannot seriously ask that the Board defer this case to an arbitration it has not bothered to even schedule for two and a half years.

C. Conflicts of interest prevented a fair and regular hearing.

Exception 3[4]

Deferral is also inappropriate in this case because the Joint Panel to which the Employer seeks deferral for the October 28 discharge was not a "fair and regular" process. Atkinson was represented by a political opponent who tried to get him fired in front of a panel of negotiators whose contract he had helped defeat.[5]

Since the early days of the Board's deferral policy, it has limited post-arbitral deferral to proceedings that were "fair and regular." *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955). "Where the interests of the charging party grievant conflict with the interests of his or her union representative, the arbitral proceedings are not fair and regular, and the Board does not

[4] Exceptions 4 through 7 are offered in part to support Exception 3.

[5] Similarly, because Atkinson would be represented by Fischer in an arbitration, the pre-arbitral deferral sought by the Employer for the June 20 discharge is also inappropriate.

defer to arbitration." *Roadway Express, Inc.*, 355 NLRB 197, 203 (2010), *enf'd Roadway Express, Inc. v. NLRB*, 427 F.3d Appx. 838, 190 LRRM 3166 (11th Cir. 2011).

The Board applied the same standard in the pre-arbitration context in *United Technologies*:

> The standard [the Board] has used is reasonable belief that arbitration procedures would resolve the dispute in a manner consistent with the criteria of *Spielberg*. Thus, it has refused to defer where the interests of the union which might be expected to represent the employee filing the unfair labor practice charge are adverse to those of the employee . . .

United Technologies Corp. 268 NLRB 557, 560 (1984)(citations and quotations omitted).

Most recently, in *Babcock & Wilcox*, the Board reconfirmed the "fair and regular" requirement. *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, p. 5 (2014). The Board specifically endorsed reliance on the requirement to address the concerns that arise when "union dissidents" are represented by their political opponents. *Id.* at p. 5 FN 10.

The Board also applies the "conflict of interest" standard as a bar to pre-arbitral deferral. *United Technologies Corp.* 268 NLRB at 560; *see also Waste Management of New York, LLC*, 2001 NLRB Lexis 398, *23-*25 (ALJ 2001)(collecting cases relevant to union dissidents and supporters of rival slates); *NLRB v. Iron Workers Union, Local 433*, 767 F.2d 1438, 1438-39, 1442-43 (9th Cir. 1985)(upholding denial of pre-arbitral deferral "where the interests of the aggrieved employee are in apparent conflict the interests of the parties to the contract" and "there was no assurance" they "would fairly represent the aggrieved party"); *United Parcel Service*, 228 NLRB 1060, 1060 (1977)(Panello and Walther, concurring).

The conflict of interest need not be certain – "apparent conflict" is enough.[6] *Iron Workers Union, Local 433*, 767 F.2d at 1438-39, 1442-43 (upholding denial of pre-arbitral deferral "where the interests of the aggrieved employee are in apparent conflict the interests of the parties to the contract" and "there was no assurance" they "would fairly represent the aggrieved party"); *American Medical Response of Connecticut, Inc.*, 359 NLRB No. 144, FN 2 (2013) ("apparent conflict of interests"); *vacated under Noel Canning and reconfirmed*, 361 NLRB No. 53 (2014); *enf'd NLRB v. American Medical Response of Connecticut, Inc.*, 627 Fed. Appx. 40 (2nd Cir. 2016).

A conflict of interest between a grievant and either his union representative or panel members will preclude deferral, and in the case at hand both exist.

For an example of a conflict with a panel, consider *Herman Brothers*. *Herman Brothers*, 252 NLRB 848, 848 FN 3 (1980); *Herman Brothers, Inc. v. NLRB*, 658 F.2d 201, 203, 207 (3rd Cir. 1981). In that case, the Board considered a driver whose termination was upheld by a joint panel whose members supported a contract he opposed. *Id*. As here, the charging party distributed a letter to fellow drivers opposing ratification of a contract. 658 F.2d at 203. The Board refused on alternate grounds to defer to a joint panel decision allowing his discharge, and the Third Circuit upheld only that based on the composition of the panel:

> The arbitration panel consisted only of union and management representatives, both of whose interests appeared to be aligned against Stief. Normally, the Union representatives would adequately represent Stief's interest. Here, however, Stief

[6] The Board did not directly address in *Babcock* which party bears the burden on the "fair and regular" requirement. *Babcock & Wilcox*, 361 NLRB No. 132 at 5, 5 FN 10, 10. The Board did note that deferral is an affirmative defense, and that as a general rule the proponent of an affirmative defense has the burden of establishing it. *Id.* at 10. The "fair and regular" requirement is an element of that defense. *Id.* at 5, 5 FN 10. Thus, it is incumbent upon the Employer to demonstrate its proceedings were "fair and regular" rather than upon the General Counsel to show they were not. In any event the very nature of the "apparent conflict" standard weighs against deferral in cases of doubt.

> actively opposed adoption of the proposed collective bargaining agreement which was supported by the Union as well as the Company. Stief had had several disagreements with the Union leadership which further aggravated the relationship between Stief and the Union.

685 F.2d at 206-07 (footnotes omitted).

Exception 4

In the case at hand, all four members of both joint panels that upheld the disciplines against Atkinson were members of the bargaining committee that negotiated the contract he helped defeat in a 3-to-1 vote. Tr. 1:206-07, 5:975-76; CPX 7.

Exception 5

Unknown to Atkinson, Co-Chair Dennis Gandee was also deeply involved in monitoring and attempting to limit Atkinson's protected activity. *See, e.g.*, Tr. Tr. 1:189, 5:976, CPX 1; CPX 2; CPX 5, pp. 46, 48; RX 1, p. 11. For example, when Atkinson and his coworkers first put the Vote No signs in their cars, Eans forwarded them to Gandee. RX 1, p. 11 of PDF. Gandee forwarded them to a top corporate official – Mike Rosewater, who is in charge of the labor function on the corporate level and served as the chief UPS spokesperson for the contract negotiations nation-wide. RX 1, p. 11 of PDF; Tr. 4:663, 838. Gandee asked, "Do we have to allow this and/or do we have any recourse?" RX 1, p. 11 of PDF. The response is that they have to allow "the usual Vote No propaganda," and "We need to be very careful about any kind of discussion or discipline . . . we had a recent 'near miss' with the NLRB on this very topic." Gandee in turn instructs the managers below him to keep an eye on the activity. *Id.*

Gandee also sought further details when Eans forwarded him a Vote No flyer, learning that the "ring leader in this building is one of the ones that apparently has a vote no web site out there. . . Betty [Fischer] can't stand him." CX 1. He forwarded a news article about the Vote No campaign to Rosewater as well. CX 2. For additional examples, see CX 4, p. 45-46 (inquiring

about Facebook posts), 47-49, 81-82 (asking for rumors on a parking lot meeting and receiving update on Atkinson's activity); RX 1, p. 1, 5, 6, 7.

The Board should not entrust to the contract's authors and defenders the question of whether he was disciplined for causing its defeat.[7]

For an example of a conflict with a union representative, consider *Roadway Express*. 355 NLRB at 197. In that case, as here, the grievant was a steward who had a history of political rivalry with the incumbent business agent. 355 NLRB at 198. The business agent represented him before a regional grievance committee similar to that in this case, which upheld his discharge. *Id.* at 198-99. Unlike this case, there was in *Roadway Express* apparently no evidence of the political alignment of the panel members themselves. *Id.* at 198-99, 203-04. Nonetheless, the conflict with the business agent was enough to defeat the requirement of *Spielberg* that arbitration proceedings be "fair and regular." *Roadway Express, Inc.*, 355 NLRB 197, 203-04 *citing Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955). "Where the interests of the charging party grievant conflict with the interests of his or her union representative, the arbitral proceedings are not fair and regular, and the Board does not defer to arbitration." *Id.*

Similarly, in *American Medical Response*, the Board found that an "apparent conflict" where the charging party had settled a ULP against the union and had a hostile relationship with his representative. 359 NLRB No. 144 at FN 2. "Considerations of elemental fairness" would preclude deferral under such circumstances. *Id.* (internal quotations and citations omitted).

[7] The Employer claims that it has to appoint members of the bargaining committee to the Joint Panel. Tr. 5:975. None of the cases discussed here suggest a party can support deferral by arguing its grievance machinery is designed in a way that makes a "fair and regular" proceeding impossible.

Exception 6

In the case at hand, Betty Fischer was responsible for representing Atkinson. Tr. 5:995; RX 20. He ran for office against her and earned 40% of the vote – not enough to win but enough to pose a threat. Tr. 1:45-46, 1:232-34. Atkinson. Tr. 1:232.

Exception 7

Atkinson also led the fight against the supplemental contract she helped negotiate. Tr. 2:206-07; CP 7. Atkinson posted strongly-worded Facebook messages criticizing Fischer – messages Fischer not only monitored but forwarded to management. ALJ Decision, p. 15; CPX 4; CPX 5. She even went so far as to speculate in writing to management that perhaps a meeting Atkinson mentioned in one post occurred while he was on the clock. CPX 4, p. 1. If that had been true, it would have been "dishonesty", a cardinal infraction, warranting immediate termination. Tr. 4:803. "Considerations of elemental fairness" preclude deferring to a grievance panel process in which the person responsible for representing saving Atkinson's job had just tried to get him fired. 359 NLRB No. 144 at FN 2.

Since Atkinson was represented by his political enemy before a panel whose contract he had twice helped defeat, the Joint Panel process was not "fair and regular."

IV. ADDITIONAL FACTS SUPPORT THE FINDING OF ANIMUS.

A. Additional statements and actions by supervisors show their animus.

As discussed above, the ALJ made a large number of factual findings that are more than sufficient to support his determination that the Employer's decision to terminate the Charging Party was tainted by its animus towards his protected concerted activity. *See* Section I, *supra.* They include several explicit admissions by supervisors that the Employer was targeting

Atkinson for his protected activity, as well as repeated warnings, threats and actions showing their animus.

That said, the ALJ could have made additional factual determinations that would have further supported his analysis. To the extent necessary for the Board to rule on the issues in this case, the Charging Party objects to the ALJ's failure to make those findings. They include findings regarding additional statements and actions by supervisors showing their animus, and additional ways in which the Employer manipulated the on-the-job supervision process to create and inflate methodical infractions.

Exception 8

With respect to the first category, the ALJ deemed "cumulative" testimony by two witnesses regarding two different occasions on which DeCecco and Alakson told them Labor Relations disapproved or would disapprove of the Vote No signs. ALJ Decision, p. 12 FN 17. Since the ALJ did not cite any other reason for failing to find the testimony accurate, the Board should rely on the testimony in the event that it questions the analysis regarding the Employer's motives that the testimony was offered to support.

Exception 9

Similarly, the ALJ failed to make findings on the question of whether DeCecco tried to rip a petition out of the hands of Mark Kerr, Atkinson's fellow Vote No activist. ALJ Decision, p. 10-13; Tr. 2:416, 2:452.

Exception 10

The ALJ did find that DeCecco told Atkinson DeCecco "'could have every driver on a working discharge' for failures to follow methods, procedures and instructions." ALJ Decision, p. 14. In so doing, he credited Atkinsons's testimony over DeCecco's because DeCecco's was

equivocal. ALJ Decision, p. 14 FN 20. Atkinson also testified that the conversation began by DeCecco telling Rob, "Hey Rob. I see that you can get back early on days that there's a union meeting." Tr. 1:101. The ALJ did not mention this point, but it provides further evidence that DeCecco's threat was aimed specifically at Atkinson's protected activity.

Exception 11

Similarly, the ALJ failed to make findings regarding the context of District Manager Keith Washington's questioning of questioning of the Charging Party about his grooming. ALJ Decision p. 18-19, 18 FN 27. The conversation began when Atkinson approached Washington asked what was going on at the center (regarding the labor relations climate). Tr. 1:119-21. Atkinson said it had to stop, and Washington responded by quizzing him about whether he had shaved. *Id.* Atkinson told Washington not to change the subject, and Washington said "I'm not changing the subject" and laughed. *Id*. Thus, not only did Washington respond to Atkinson's protected concerted activity by reminding Atkinson of Washington's power to discipline – he also reinforced the connection by denying that they were different subjects.

Exception 5 (repeated)

For another example, the Charging Party refers the Board to the discussion above of Joint Panel Co-Chair Gandee. Section III(C), *supra*. Gandee not only monitored but also bemoaned Atkinson's protected concerted activity. RX 1, p. 11 of PDF; RX 1, p. 1, 5, 6, 7; CX 1; CX 2; CX 4, p. 45-49, 81-81. He considered it important enough to send to one of the company's top labor relations officials, with nation-wide responsibilities. RX 1, p. 11 of PDF; Tr. 4:663, 838.

Exception 12

The ALJ found that UPS monitored Vote No activity. *See, e.g.*, ALJ Decision, p. 10-15, 52. He also found that on a local level, management was aware the Charging Party was running

against Business Agent Betty Fischer because Fischer emailed his Facebook posts to McCready, who forwarded them to others. ALJ Decision, p. 14-15. However, the Employer's own documents and witnesses also show that UPS instructed labor relations managers around the country to report on upcoming elections for officers of local unions. CPX 6, p. 74 (p. 80 of PDF); Tr. 4:751-54.

Atkinson immediately redirected his Facebook and organizing efforts from the Vote No campaign to his election campaign after the Teamsters imposed the UPS contract without ratification, and he garnered a significant fraction of the vote. ALJ Decision p. 14-15, 34; Tr. 1:232. The final discharge at issue in this case occurred shortly thereafter. ALJ Decision, p. 34.

Exception 13

As a final example of facts showing the Employer's animus, the Employer took measures to isolate Atkinson from the worksite after the first Joint Panel.

The ALJ found that the panel ordered a suspension of 48 days, and that the Charging Party learned of the second Joint Panel's decision the night before he was scheduled to return to work from the 48-day suspension. ALJ Decision, p. 41-42. The ALJ should also have found that this timing was an intentional effort to keep Atkinson out of the workplace.

McCready testified that Joint Panels meet every other month and are scheduled for a year in advance. Tr. 5:1063-65. Thus, at the time of Atkinson's first Joint Panel hearing, the members of the panel would have known how long a suspension it would take to keep him away from the workplace until the next one. This was exactly the length of suspension it issued – Atkinson was scheduled to return the day after his next Joint Panel hearing. ALJ Decision, p. 42; Tr. 1:150-51. Normally, Joint Panels issue decision ten days after the hearing, which would have allowed Atkinson to return to the workplace for ten days before his final removal. Tr. 5:980-81.

However, in this case he was told by phone the night of the decision, the night before he was due to return to work. ALJ Decision, p. 42; Tr. 1:150-51. The Board has recognized such isolation as an improper technique to quash concerted activity. *American Red Cross,* 347 NLRB 347, 348-49 (2006); *Dilling Mechanical Contractors, Inc.*, 318 NLRB 1140, 1146, (1995).

B. The Employer manipulated its termination process in additional ways.

The ALJ found that the Employer "unlawfully had its thumb on the proverbial scale" when its supervisors exercised their discretion to discipline Atkinson. ALJ Decision, p. 53. As with the Employer's animus, the Charging Party believes the ALJ's decision is more than supported by the facts on which he made explicit findings. ALJ Decision, p. 53-55. Here too, however, the ALJ could have found additional facts had he needed to. Therefore, to the extent necessary for the Board to resolve the issues before it, the Charging Party excepts to the failure of the ALJ to make still more findings regarding the ways in which the Employer's animus played into its termination decisions.

The Charging Party asks the Board to consider each piece of evidence both in relation to the specific decisions to which it directly pertains and as support for the Employer's overall plan to use methodical infractions to get rid of Atkinson. For example, the fact that on the "blended ride" Bartlett charged Atkinson for a methodical infraction because Bartlett's own instructions caused Atkinson's scanner not to work shows two things: first, that Atkinson did not commit that particular methodical infraction and second, that Bartlett's intent was not to accurately assess Atkinson's work performance but the document reasons to get rid of him – i.e. that Bartlett had his "thumb on the scale."

Exception 14

First, the ALJ found that Bartlett said he had selected himself to conduct Atkinson's OJS ride because Atkinson was a leader. ALJ Decision, p. 22. However he made no explicit finding about the fact that in telling Atkinson this, Bartlett referenced Atkinson being a steward and then said "you can write whatever you want in your little note pad" when the Charging Party wrote this statement down. ALJ Decision p. 22; Tr. 1:231, 2:417-18.

Exceptions 15

The ALJ could also have held more explicitly that Alakson removed rural areas from Atkinson's route for the OJS ride. The ALJ did summarize some of the evidence that the Employer removed slower, rural parts of the Charging Party's route to produce an artificially high productivity score. ALJ Decision, p. 24, p. 29 FN 3. The ALJ's discussion suggests he was crediting this evidence. *Id.* The evidence is clear and credible and should be considered in support of the ALJ's analysis if needed. CPX 8; Tr. 1:219-21, 1:225-26, 1:171-72, 3:734, 3:782-83, 4:741-44, 7:1358-59, 7:1363-65, 8:1495-97.

Removing rural sections from a route for an OJS ride would dramatically increase the productivity rating that the Employer requires the driver to maintain after the ride. The Employer measures productivity on an OJS ride using the SPOHR metric – the number of stops serviced divided by the hours the driver spends on the road.[8] Tr. 3:734, 782-83 (Marshall). Since the stops in rural areas are farther apart than in urban or residential areas, rural areas lower (worsen) a driver's SPOHR. Tr. 4:738. Vice President for Corporate Relations Marshall testified that it would not be appropriate to rig the results of an OJS by taking off rural sections. Tr. 4:741-44.

[8] A high SPOHR is good; a low one bad.

The Charging Party offered into evidence delivery records for his route for two days. CPX 8. The dates and page numbers can be seen in the lower right-hand corner. Pages one through ten of the PDF version of the exhibit are records from June 3, 2014 the first day of Atkinson's OJS ride.[9] Pages eleven through 19 of the PDF version are records from June 13, 2014, which was one of the non-OJS days on which the Employer based its first termination of Atkinson.

The delivery records for June 13 include three rural sections: Fox Hollow Road, Ponderosa Heights, and Walkchalk Road / Lemon Hollow Road. Tr. 1:219-220; CPX 8, p. 17-18. Fox Hollow includes the stops from 125 Toy Rd. on line 12 of page 17 of the PDF (p. 7 of that day's printout) to 109 Oriole Way on line 18. Tr. 1:220. Ponerosa Heights begins with 198 Carpenter Rd. on line 20 of page 17. Tr. 1:220. The Walkchalk Road or Lemon Hollow Road section begins with 140 Walkchalk Rd. on line 23 of page 17 and continues through 193 Walkchalk rd. on line 4 of page 18. Tr. 1:220-221.

None of these rural sections can be found on the June 3 delivery records. Tr. 1:225-26; CPX 8 p. 1-10 of PDF.

Atkinson testified for each of these sections that it was rare for them not to be included on his route. Tr. 1:220. The Employer did not attempt to rebut this testimony, and has access to extensive documentation with which it could have done so were Atkinson's testimony not accurate.

Alakson is somewhat contradictory about exactly how he prepared Atkinson's route for the OJS. At one point he claimed not to have done anything differently. Tr. 7:1363. At another point Alakson said he was given baseline average data and tried to select a route to match it. Tr.

[9] The PDF version includes an extra page at page 2, showing the court reporter's certification.

7:1358-59. He may have admitted taking off the Fox Hollow Section, but denied removing any rural sections. *Compare* Tr. 7:1364-65 *with* CPX p. 17 of PDF, lines 12-18.

Bartlett's testimony contradicts that of Alakson. Bartlett testified that the rural areas were taken off and that Alakson said this was because "if we would have had the rural delivery section, we would have been out there according to Ray until 10:00 at night." Tr. 8:1495-97; *see also* Tr. 1:171-72 (Atkinson testifies to telling Bartlett about missing sections); RX 27, p. 2 of PDF (Bartlett recording same on OJS notes).

Thus, there is clear documentary evidence that the Employer removed specific rural sections from Atkinson's route. The ALJ cited this evidence, and the Board should rely on it to the extent necessary to resolve the issues in this case.

Exception 16

As with the removal of rural portions of Atkinson's route, the ALJ cited the evidence that the Employer removed certain Next Day Air packages from Atkinson's route but did not explicitly find that this evidence was correct. ALJ Decision, p. 24, p. 29 FN 37. As with the rural sections, Employer's own documentary evidence shows that the Employer removed from Atkinson's route those Next Day Air packages that would hurt his SPOHRs.

Some but not all Next Day Air packages decrease a driver's SPOHR. The Next Day Air packages that decrease a driver's SPOHR are those that require the driver to break off from the most efficient route for their area. Tr. 1:223-24, 2:360. A Next Day Air package destined for a stop at the beginning of the driver's regular route would not. Tr. 1:224. If the driver is going to be at the stop by 10:30 A.M. anyway, they do not need to make a special trip. *Id.* Similarly, Next Day Air Savers have a late commit time – 3:00 P.M. for businesses on Atkinson's route. Tr. 1:223. These packages are also unlikely to affect a driver's SPOHR because the driver will

likely reach the destination before 3:00. *Id.* The number 13 at the beginning of a package's serial number indicates it is a Next Day Air Saver and has the later commit time. Tr. 1:223.

When drivers say they "don't have any airs," this is shorthand for saying they do not have any Next Day Air packages that will cause them to break from their normal pathway. Tr. 1:223-24, 2:360. These are the airs that drivers care about, the ones that affect how their day will go.

Atkinson testified without rebuttal that it never happens by chance that he "doesn't have any airs" in this sense. Tr. 1:217. Sometimes a supervisor takes airs off his route and gives them to someone else but it would not otherwise happen. *Id.*

On June 3, Atkinson "didn't have any airs" in the sense that he did not have any Next Day Air packages that required him to break off his most efficient route. This can be seen dramatically by comparing Atkinson's delivery records for June 13, on which he did have airs and those for June 3 on which he did not.

The first page of the June 13 records includes a number of Next Day Air packages with a 10:30 commit time – the packages on lines 2, 4, 5, 6, and 9 of page 11 of CPX 8 all have serial numbers beginning with 01. Tr. 1:216-17; CPX 8, p. 11 of PDF, lines 2, 4, 5, 6, and 9. Atkinson delivered these packages first, as can be seen from the times in the right-hand column, which range from 9:19 A.M. to 9:55 A.M. *Id.* He then went to the hospital, which as a 10:15 pick-up commit time – this means he must arrive at the hospital no earlier than 10:00 and no later than 10:30. Tr. 217-18; CPX p. 11 of PDF, line 10; *see also* CPX 8, p. 11 of PDF (addresses in same medical center as hospital). After that Atkinson proceeded to 222 North Park Drive, which would be his first stop if he did not have any airs. Tr. 1:218-219; CPX 8, p. 13 of PDF, line 8. He arrived at this stop at approximately 11:00. *Id.*

By contrast, the June 3 records show that Atkinson's first stop was 222 North Park Drive. Tr. 1:221, CPX 8, p. 1 of PDF, line 1. Instead of arriving at about 11:00, he arrived at 9:12. *Id.* Indeed, the elimination of airs from Atkinson's route sped it up so much he arrived too early for his pick-up time commitment at the hospital. Tr. 1:221-22; CPX 8, p. 1, line 19. Atkinson testified that this was a methodical infraction, and UPS tracks employees' success at making the commit window. Tr. 1:222. He arrived too early because Bartlett told him to. *Id.* Bartlett claimed that the commit window was just "A preferred time, hey I would like to be picked up around 5:00 if that's possible." Tr. 8:1513. This would certainly be out of character for UPS.

The Employer argues it did not pull airs off Atkinson's route for the OJS and points to the fact that the June 3 delivery records include many deliveries that are either Next Day Airs or Next Day Air Savers. Tr. 7:1361-63. This misses the point. Atkinson "didn't have any airs" in the sense that drivers use the phrase – he did not have any Next Day Air deliveries that caused him to deviate from his most efficient route. For every single June 3 air package that Alakson pointed to on direct, he admitted a reason on cross why it did not cause Atkinson to deviate from his route. Tr. 7:1411-14.

Exception 17

The ALJ held that Alakson removed slower portions from Bill Lang's route for his OJS and then kept them off after the OJS. ALJ Decision, p. 24-25. By contrast, the evidence discussed above shows that Alakson took rural areas and Next Day Air packages off Atkinson's route for the OJS – and then put them back on afterwards. The June 3 records discussed above that lack the slower areas and packages are those of the OJS, and the June 13 records that include them are from the post-OJS period – the period during which Atkinson had to maintain the OJS productivity score. CPX 8.

In other words, Atkinson had to achieve the productivity rating for the faster route while working the slower route. These manipulations demonstrate the Employer's intent to set Atkinson up for failure.

Exception 18

The ALJ also failed to make findings on the fact that the Employer withheld and made false statements about evidence that Atkinson could have used during the grievance process to prove the manipulations discussed in the prior three sections.

Shortly after the OJS, Kerr submitted an information request for the delivery records shown in CP 8. Tr. 1:214-15, 2:411-14; CPX 10 – CPX 14. He made three attempts to submit the information request and filed a grievance when it was denied, so there can be no doubt that the Employer knew well less than six weeks after the OJS that Kerr and Atkinson wanted the delivery records. *Id.* Based on Atkinson's complaints to Bartlett about the changes to his route, the Employer also knew why. Tr. 1:171-72, 8:1495-97; RX 27, p. 2 of PDF.

The Employer said it would not respond to the request unless it was on Union letterhead and did not provide any documents until months later. CPX 14. At that point it claimed that the delivery records were not available as they are destroyed after six weeks. *Id.* Atkinson did not obtain the records in time to use them to support his grievance at the Joint Panel. Tr. 1:214-15. Yet clearly the Employer still had access to them, since we have them today. CPX 8.

The Charging Party asks that the Board infer from the Employer's withholding of the delivery records that it intended to prevent Atkinson from using them to defend himself at the Joint Panel. He also asks that the Board infer from the withholding of evidence that the Employer sought to hide its inflate Atkinson's OJS SPOHR and facilitate his termination. The Board has long drawn such inferences from the withholding of evidence. *Southern New England*

Telephone Company, 356 NLRB No. 118 (2011) *citing Interstate Circuit v. United States*, 306 U.S. 208 (1939); *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 53 (2003); *Welcome-American Fertilizer Co*., 169 NLRB 862, 862, 870 (1968).

Exception 19

As a last example of how the Employer had its thumb on the scale against Atkinson, consider the facts underlying its claims of methodical infractions on Atkinson's "blended ride." The Employer's *Wright Line* defense for its June 20 discharge rests almost entirely on some X marks. The Employer offered Bartlett's testimony, but that testimony provides almost no factual information about what, if anything, Atkinson did wrong beyond the fact that Bartlett wrote the X marks. Atkinson's testimony provides great factual detail completely undermining the claimed infractions – and the Employer made no attempt to rebut those facts.

The Charging Party agrees that the ALJ did not need this level of detail to support his holding that Bartlett would not have terminated Atkinson but for his protected activity. However, should there be any question as to the adequacy of the ALJ's analysis, then the Charging Party asks that these additional facts be considered.

For example, consider a stop early in Atkinson's route at the loading dock of the hospital. RX 27, p. 10, lines 4-10; Tr. Tr. 8:1531-32, 9:1700-05. Bartlett testified that he marked infractions of do not record in car, duplicating scans, and cannot locate package. Tr. 8:1532. He gave no details whatsoever as to what had occurred at this stop – what Atkinson had done that violated these rules, for example. *Id.* Bartlett only stated why duplicate scanning and recording in the car would be bad, namely that they waste time. *Id.* The entirety of his testimony about what occurred at the loading dock is as follows:

> At the Medical Arts Building, at 10:30, the do not record in car, the verbiage is duplicating scans, and cannot locate[] packages goes along with the 10:30 stop;

thus, the arrow pointing. [Bartlett then states that a two-wheel dolly and get signature first comment are associated with a different stop.]

Q. What were the effects of these methods infractions, if any?

A. Any time that we have to duplicate scans in the car, it's – I mean, the method is do not record in car. Much less when you duplicate it, that's a waste of time. We have already accounted for the package. We have gone over through Days 1, 2, 3 on the OJS the importance of getting signature first [a violation not associated with this stop], which I gave an example of yesterday.

Q. So at 10:31, is this the second time that day that he is unable to locate a package?

A. Yes.

Tr. 8:1532. The only evidence that Atkinson did anything wrong is that Bartlett wrote down X marks. Bartlett really says nothing else. *Id.*

By contrast, Atkinson provided great factual detail as to what occurred at this stop:

It's the hospital dock specifically where I deliver the packages to . . . as I stand there at this point backed in, the back of these trucks don't line up sometimes with the dock where you could just walk straight out into the facility or onto the dock. You're standing down three to four feet below the dock, so maybe – in this case here it was maybe a little bit above my hip is where the dock would measure up to my body from where I'm standing.

There's an awning, and this torrential downpour is going on. Water is falling down between my truck and that dock like a waterfall. Just imagine somebody dumping buckets on your head all at once. I'm getting drenched clear down to my socks. I could feel the water in my socks. I'm completely wet.

I'm trying to take the packages from the back of the truck, put them up onto the dock and then – the method is to set several packages up on the dock and then you scan them, and when I say "onto the dock," there's a cart on the dock. I'm setting them on that. It's only a couple inches higher than the dock.

At this time, because of the situation, the extreme situation, I said I'm just going to throw all of these packages upon the dock and push them out of the waterfall area where I'm getting soaked right now scan them, and he says, no, that's not the method. You put them on the dock and you scan several at a time and you put some more up there. I said okay, so I tried.

I was attempting to do that, and you have a scanner and it's getting soaking wet, in addition to me. Water is collecting on the back of it. I don't know if you have

> ever used a scanner, but a laser beam shoots out of it, so that water, the water that's getting on that little glass window on the back of there is impeding that laser beam from shooting out correctly, so it's not scanning the packages. And then I wipe it with my thumb to, like squeegee it with my thumb to get that water off of there, and it will scan again.
>
> I'm trying to remember where I left off scanning in the middle of all this that's going on, so I duplicate scan a package. Once I do finally get a successful scan, I duplicate scanned one because I don't remember which one I scanned the last while I'm getting buckets of water poured on my head and wiping the screen off.
>
> And Jeremy is standing up there on the dock with a little bit of a smirk on his face. It kind of looks like he's a little bit bemused by the situation and my struggle. That's what I went through, and this is what he wrote on the paper.

Tr. 9:1701-03.

It hardly needs stating that these facts do far more to reinforce an inference of animus than prove that the Employer would have terminated Atkinson regardless of his protected activity. The Employer did not attempt to rebut Atkinson's testimony or cross examine him on this stop. Indeed Bartlett himself had noted the torrential downpour and standing water in the roadway a few lines above. RX 27, p. 10, lines 4 and 6.

In his rebuttal testimony, the Charging Party reviewed each alleged methodical infraction for the first half of the follow-up ride.[10] Tr. 9:1696-1713; *compare* RX 10, p. 10-11. The chart below summarizes each witness's testimony for each stop on the follow-up ride for which the witnesses differed.

[10] Reviewing the second half on a line-by-line basis would have been cumulative; the Board can reasonably infer the second half resembles the first. Certainly the quality of Bartlett's testimony is no stronger. *Compare* Tr. 8:1529-35 *with* Tr. 8:1535-39.

Atkinson	Bartlett
Stop 1, 9:43 AM, 593 Tartown Road	
During the half-hour, hilly, stop-and-go drive from the center to the first stop of the route, a small flat envelope for the first stop had gotten had gotten pinned by other packages to the front wall of the back of the truck. Atkinson located it in about ten seconds, but after five Bartlett started asking, "Is this how our day is going to start?" Tr. 9:1697-1700.	No testimony about length of or reason for search. Bartlett only states "we could not locate the Air package" and says it would have been sorted prior to leaving building. Bartlett scored three separate methodical infractions for the same alleged failure to locate. Tr. 8:1530.
Stop 9, 10:30, 1 Nolte Dr	
See body of brief	*See body of brief*
Stop 9, 720 Medical Arts – or – Stop 10 10:36, 439 Market	
The witnesses disagree about whether the X under Get Signature First on line 10 is associated with the stop on that line, 439 Market, or the stop on line 9, 720 Medical Arts. Bartlett would have marked the error on line 9 if that was where it had occurred, and the arrow he references likely indicates the comment to which it points "Requires 2w dolly" not the X that follows. Atkinson had the customer sign while he unloaded the packages at the hospital stops but did not have the customer pre-sign at the 439 Market stop. The customer at 439 Market will not sign for the packages until after they have been scanned; they want the number scanned in the DIAD to equal the number they are signing for. Tr. 9:1703-05.	Bartlett testified that the methods violation for "Get Signature First" was for the 1 Nolte Drive stop, even though it is on the line for the 439 Market stop, and that is where the customer refuses to sign first. Again, he gives no facts as to how violations occurred, only why they would matter. Tr. 8:1531-32; RX 27 p. 10.

Stop 12, 10:41, 210 "Market" (actually 210 Medical Arts)	
Atkinson brought a dolly with him because the customer has a practice of shipping out ARS packages. There is no advance notice of these packages, so Atkinson must bring a dolly with him or else risk having to go back to the truck to get one. Tr. 9:1705-06.	No testimony about why he scored a methods infraction. Tr. 8:1532-33. On cross Bartlett admits that it would be expected for a driver to bring a dolly to a stop that tended to have area pick-ups. Tr. 8:1590-91.
Stop 22, 11:20, 548 E Brady	
Atkinson had delivery notices in his left breast pocket as required. However, he had to get more because they had been soaked through by the rain. Atkinson is not aware of any UPS-approved raincoats that he could wear on his route, and no drivers wear raincoats. Tr. 9:1708-10; *see also* Tr. 9:1715-16 (winter vests and jackets are not water repellant and are too warm for June); RX 27, p. 10 (Bartlett noted "Heavy Rain" and "Standing Water in Roadway").	Claims that Atkinson did not have delivery notices on his person. Even new drivers know to carry delivery notices. Tr. 7:1534; *c.f.* RX 27, p. 10 (Bartlett noted "Heavy Rain" and "Standing Water in Roadway").
Stop 38, 13:44, 214 Allegheny	
Atkinson parked two houses away to be out of harm's way. The place Bartlett wanted him to park would have blocked traffic. Tr. 9:1710-11; *see also* Tr. 7:1458-59 (in describing "Park Close" method Bartlett testifies it includes not only minimizing walk path but "leaving themselves an out" and avoiding hazards.)	Scored a methods violation of "Park Close" because "we could have parked closer." Does not address the issue of blocking traffic. Tr. 8:1535.

Stop 40, 13:46, 340 Franklin	
There was a package for 340 Franklin on the floor in the back of the truck, apart from the other packages for that section. Based on its location, it likely fell off the shelf during travel. The method is to fine sort a section or two, not the entire truck. Thus Atkinson would not have included in his fine sort a package far away on the floor. Nor could he have known from his DIAD there was one package missing, because he is prohibited from taking the DIAD into the back of the truck with him to fine sort. Tr. 9:1711-13.	Bartlett provides no factual detail about particular package. He scored three methods violations for the package. His expectation is that after a fine sort the driver be able to find the package with one look. Tr. 8:1535. *Contrast* Tr. 8:1579 (Bartlett acknowledges packages not secured); Tr. 8:1577-79 (Bartlett, fine sort is limited to packages on shelves, not floor and to a particular section, not whole truck); Tr. 8:1610-11 (Bartlett, driver not expected to reference anything but packages themselves in performing fine sort).

Atkinson's testimony makes clear his actions on June 18 were not something the Employer would have terminated Atkinson for had he not engaged in protected activity. Bartlett's testimony does nothing to refute any of Atkinson's factual statements; it only reinforces the inference that Bartlett sought and is seeking to justify Atkinson's termination rather than objectively assess his performance.

V. THE NOTICE SHOULD SPECIFY THE RIGHTS AT ISSUE IN THIS CASE.

Exception 20

Finally, the Charging Party requests that the Board modify the language in the Notice to Employees posting in two ways. First, as discussed above, the notice should reflect a remedy of reinstatement. Second, it should more accurately reflect the activity for which the Charging Party was fired. Specifically, the Charging Party requests the underlined language below be added to the first of the paragraphs beginning "We will not":

> WE WILL NOT discharge employees because they support and assist, refrain from supporting and assisting, or actively oppose the policies of the International Brotherhood of Teamsters and/or Teamsters Local 538 and otherwise engage in protected concerted activities.

In proposing "precise language as to the particular violations involved," for the Notice in this case, the Charging Party is accepting an explicit invitation from the Board. *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 176 FN 8 (2001). There the Board held,

> We embrace the principle that notices will most effectively apprise employees of their right, and of the unlawful acts of respondent employers or unions, when they are written in clear laypersons' language. We further find that this principle comports with trends in the public and private sectors to ensure that legal documents are drafted so that they can be easily understood. Thus, while a Board Order must be precisely phrased so that it can be enforced by a circuit court of appeals, a Board notice is directed at an audience that is better served by clear laypersons' language. In our view, moreover, simplicity and clarity are certainly not inconsistent with precision.

Id. at 176 (footnotes omitted).

In the case at hand, the Charging Party believes it important that employees understand that the Act protects not only their right to sit on the sidelines while their union acts but also their right to actively organize for the purpose of changing what actions their union is taking. It is this active opposition, "union dissident activities," for which Atkinson was fired and which the ALJ found to be protected. ALJ Decision, p. 52-54.

A lay reader would likely understand a promise from the Employer not to terminate them because they "refrain from supporting and assisting" their union to be a promise not to terminate them if they sit on the sidelines. The paragraph appears silent on the question of active opposition. While a labor lawyer would understand "and otherwise engage in protected concerted activities" to include the active opposition at issue in this case, a non-specialist would not know whether it does.

Therefore, the Charging Party respectfully requests that the Notice be modified to make clear to employees the rights at issue in this case.

VI. CONCLUSION

For the reasons set out above, the Charging Party requests that the Board adopt the ALJ's findings that deferral is inappropriate and the Employer violated the Act by terminating the Charging Party. The Charging Party also respectfully requests that the Board order reinstatement in addition to the remedies ordered by the ALJ and modify the Notice as set out.

DATED this 23rd Day of January, 2017

Respectfully submitted,

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