JD(NY)–24–07
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

IBERIA ROAD MARKINGS CORP.

and Case No. 29-CA-27930

ALECC ORTIZ, AN INDIVIDUAL

IBERIA ROAD MARKINGS CORP.
Employer

and Case No. 29-RD-1070

ALECC ORTIZ, AN INDIVIDUAL
Petitioner

and

LOCAL 917, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
Intervenor

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 8-A-28A, AFL-CIO
Intervenor

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for the Intervenor

DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge. On October 2, 2006,[1] a petition for an election was filed by Alecc Ortiz (Ortiz or Petitioner) seeking to decertify Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

[1] All dates herein are in 2006 unless otherwise specified.

(Local 917) as the representative of certain employees of Iberia Road Markings Corp. (Respondent or the Employer). International Union of Painters and Allied Trades, Local 8A-28A, AFL-CIO (Local 8-A) intervened on the basis of a showing of interest.

Pursuant to a Decision and Direction of Election (the Decision) issued on October 19, an election by secret ballot was conducted on November 13 among the employees in the following unit:

> All full-time and regular part-time drivers who are engaged in driving kettle trucks transporting principally the road marking material to the application site, breaking block (can or bag), assisting thin loading material, feeding the kettle, loading the truck, in layout or traffic control and any other duties required as part of the crew operations, secretary, crew chiefs and laborers (stripes) employed by the Employer out of its 104 Lombardy Street, Brooklyn New York facility and excluding guards and supervisors as defined in the Act.[2]

There were determinative challenges to the ballots of six voters.[3]

Thereafter, on December 14, based upon a charge and first amended charge filed by Ortiz on October 3 and November 30 respectively, a Complaint and Notice of Hearing issued alleging that Respondent violated Section 8(a)(1)(3) and (4) of the Act by discharging Ortiz. On December 14, the Regional Director for Region 29 also issued a Report on Challenges, Order Consolidating Cases and Notice of Hearing (the Report) which sustained the challenges to the ballots of two voters on the basis that they were corporate officers and owners of the Employer, overruled the challenge to the ballot of one employee and directed that a hearing be conducted to resolve the challenges to the votes of Ortiz, Miguel Freire and Danny Travers. The hearing on challenges was consolidated for hearing with the unfair labor practice case. As regards the challenged ballots, the issues defined for hearing by the Report are (1) whether Ortiz was discharged for cause on October 2 or in violation of the Act; (2) whether Miguel Freire, as an employee-relative of the Employer's owner and President is "aligned with management" or has a sufficient community of interest with other bargaining unit members to warrant his inclusion in the unit and (3) whether Danny Travers was laid off on December 7, 2005 or voluntarily quit prior to the completion of the last job for which he was employed. I heard these consolidated cases on February 5 and 6, 2007 in Brooklyn, New York.[4]

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[2] Pursuant to the Petition, a hearing was held before a hearing officer. The Employer did not appear at the hearing, but had previously entered into certain stipulations for the record. At the hearing both labor organizations stipulated, and the Acting Regional Director found among other things, that the unit set forth above is an appropriate one for purposes of collective bargaining. The Acting Regional Director also found that the Employer is engaged in the construction industry and, therefore, in addition to employees who would be eligible to vote under the Board's traditional criteria, also eligible to vote are all unit employees who have been employed for a total of 30 working days or more within the 12 months immediately preceding the voter eligibility date, or who have had some employment during that period and who have been employed 45 days or more within the 24 months immediately preceding the election eligibility date. Employees who had been terminated or quit voluntarily prior to the last job for which they were employed would not be eligible to vote under this formula. See *Steiny & Co*., 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967). None of the parties involved herein exercised their right, under Section 102.67 of the Board's Rules and Regulations, to file a request for review of the Decision with the Board.

[3] The election resulted in a vote of six votes for Local 917, eight votes for Local 8-A with six challenged ballots.

[4] Local 917 did not enter an appearance herein.

On the entire record, including my observation of the demeanor or the witnesses, and after considering the briefs filed by the General Counsel, the Respondent/Employer and Local 8-A,[5] I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a domestic corporation with its principal office and place of business located at 104 Lombardy Street, Brooklyn, New York is engaged in the road marking business. During the past year, which period is representative of its annual operations generally, in the course and conduct of its business operations, Respondent purchased and received at its Brooklyn facility road marking material valued in excess of $50,000 directly from suppliers located outside the State of New York. Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The record establishes, and I find that Local 917 and Local 8-A are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent's Business Operations

Respondent is a small privately-owned corporation whose primary business is painting lines on public streets. Jose Freire (Freire), who has been the President of the company for the past 25 years, is one of five owners, each of whom owns 20% of the stock. He testified to an extensive tenure in this industry.[6] The company is also owned by Freire's brother and cousin. Jose Manuel Suarez (Suarez), who testified herein and is the shop foreman, is the Vice-President of the corporation, and a co-owner as well.[7] He is oftentimes referred to as "Manny."

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[5] On April 5, Local 8-A filed its brief with the undersigned. Briefs had been due on March 27. In a cover letter, copies of which were sent to the Employer and the General Counsel, Local 8-A represented that it had served its brief on the Regional Director in the mistaken belief that I was serving as hearing officer rather than as administrative law judge in this matter, and that they were only apprised of the error after Counsel for the General Counsel returned to the Regional Office after a vacation. In my view, Local 8-A has not sufficiently explained the basis for its confusion, as I am referred to in the brief by my correct title, and Local 8-A's request for an extension of time to file the brief in question was properly submitted to the Associate Chief Administrative Law Judge. Nevertheless, no other party has contested the timely service of the brief, and in the absence of an objection by any other party appearing at the hearing in this matter, I am accepting Local 8-A's brief and will consider the arguments raised therein to the extent it is appropriate to do so, as discussed below.

[6] Prior to assuming ownership of Respondent, Freire worked for Permaline Corporation, beginning as a laborer and winding up as Vice-President. Counsel for the Respondent elicited testimony that, during the 1978-1979 season, employees of the company went on strike for over two months, that hard feelings continued afterward and there were numerous instances where the company's equipment was sabotaged. The then-owner tired of the situation and put the company up for sale. Freire, together with certain coworkers and other investors, purchased the New York operations of this company.

[7] Suarez did not offer any testimony regarding his ownership interest in or position as Vice-President with Respondent. However, as is apparent from the Report, Suarez voted in the election, and his ballot was challenged by the Petitioner and Local 8-A. In sustaining the challenge to his ballot, the Regional Director noted that, "there is no dispute that Suarez is the Employer's Vice President . . . [and] owns 20% of the Employer's outstanding stock." Finding Suarez to be a corporate officer and owner, the Regional Director concluded that he was not eligible to vote in the election, and sustained the challenge to his

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Respondent's facility is located in the Greenpoint section of Brooklyn, geographically equidistant between the Queensboro (also known as the 59th Street) Bridge and the Williamsburg Bridge. Employees work in crews consisting of a foreperson, one or two laborers and a "kettle truck" driver.[8]

Respondent's business operates primarily on a seasonal basis, typically from March or April through November or December. At the end of each season, most of the employees are laid off. Two or three of the most senior employees are retained to maintain the equipment and work in the shop. Employees are recalled from lay off, as business allows, in the order of their seniority. During the period of their lay off, employees file for unemployment benefits and many seek other employment.

Local 917 has been the collective-bargaining representative of Respondent's employees for a number of years. The most recent collective-bargaining agreement was due to expire on September 30.[9] Article 14 of the agreement (Discharge) provides as follows:

> No employees shall be discharged except for good and sufficient cause. . . Examples of such good and sufficient cause include, but are not limited to: proven theft of money, goods or merchandise, proven drunkenness or proof of being under the influence of alcohol or drugs during working hours, calling an unauthorized strike or walkout, assault on Employer or its representatives, failure to report an accident of which the employee would normally be aware, proven recklessness resulting in a serious accident while on duty, the carrying of unauthorized passengers in the cab or truck while on duty, engaging in unauthorized transportation of merchandise or goods for personal gain during working hours and direct refusal to obey orders of the Employer which are not in violation of this agreement.

The Discharge of Alecc Ortiz

Ortiz was employed by the Respondent for approximately thirteen years, primarily as a laborer and occasionally as a foreman. His principal duties were to pour thermoplastic into the kettle drum to be melted, sweep debris out of the way and flag and direct traffic.

Ortiz's Prior Discipline

In November 2003, Ortiz was involved in an incident which led to his discharge, which was then converted into a one-week suspension. On this occasion, Ortiz had removed some propane tanks from their storage area and was preparing to load the kettle truck assigned to his crew. Shop foreman Suarez instructed Ortiz to give the tanks to another crew. Ortiz, who had previously injured himself lifting and carrying such tanks, became upset at this direction and began to argue with Suarez. Suarez left the area to get a cup of coffee, but Ortiz remained upset. His comments provoked coworker Jose Raymond Dominguez (Dominguez), the crew

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ballot. I take administrative notice of the Regional Director's findings as regards Suarez's ownership in and position with Respondent.

[8] The crew operates two trucks. These are known as the "kettle truck" and the "pickup truck." The kettle truck contains the equipment for melting the thermoplastic material which is used to "paint" the street lines. The pickup truck, which always follows the kettle truck, is driven by one of the laborers and is used for, among other things, monitoring the gauges on the kettle truck.

[9] On August 10, the Employer and Local 917 entered into a memorandum of agreement extending the collective-bargaining agreement for a six month period from October 2006 to April 2007.

chief on the truck which was designated to receive the propane, and Dominquez threw a punch at Ortiz, missing him. Suarez reported the situation to Freire, who came downstairs to the shop floor and fired both Ortiz and Dominguez. According to the accounts offered by both Ortiz and Dominquez and as set forth in a contemporaneous letter prepared by Freire and sent to Local 917 (based upon the events as reported to him at the time by Suarez),[10] Dominguez made one unsuccessful attempt to hit Ortiz, which he did not return.[11] Nevertheless, Ortiz was viewed as the provocateur and instigator of the incident. After both men were fired, the Union intervened and Dominguez was allowed to return to work on the following day. Ortiz's discharge was converted to a one-week suspension and, as a condition of returning to work, he was required to acknowledge by his signature a letter written by Freire to Local 917 official Paul Isaac which states, in pertinent part, as follows:

> As per our telephone conversation today's date I agree with you that Ray Dominguez can come back to work tomorrow November 5, 2003. However, since Alecc Ortiz was the instigator on this fight he will be suspended without pay for one working week. Therefore, this letter has to be signed by you and Mr. Ortiz that if he starts another fight or he gives any of his superiors problems he will be terminated.

Freire testified that his understanding of this letter was that Ortiz would be reinstated after his suspension, "with the condition that he would never be in problems again. . ." Ortiz similarly testified that he realized that if he engaged in any more misconduct, he would be terminated.

Ortiz received no other discipline during his employment with Respondent.

The Decertification Petition

In early September, Union representative Isaac met with employees and informed them that they might have to accept a reduction in pay and/or benefits. Employees were unhappy about these proposals and decided to try to decertify Local 917. Approximately six employees visited the Board's Brooklyn Regional Office and met with the information officer, who advised them to return in October, after the collective-bargaining agreement expired. The information officer further advised employees that it was not necessary for them all to return, that one or two individuals would suffice.

Ortiz subsequently prepared a petition stating, in essence, that employees no longer wished to be represented by Local 917, and all the current employees signed it. He returned to the Regional office on October 2.

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[10] This letter outlines the employees' misconduct as follows: "Alecc started to argue with Manny [Suarez] and getting his faced (sic) close to him and screaming. As the coffee truck pulls in Manny ignores him and went to get a cup of coffee. At that time Alecc approached Ray [Dominguez] screaming and insulting him and after a while Ray lost his patience and through (sic) a punch to Alecc. At that point Manny called me. I went down and heard what happened and at that moment I fired them both. I think that Ray would not have punched Alecc if he did not instigate him as he did."

[11] In his testimony, Suarez offered an account of events differing from that of other witnesses and from what he apparently reported to Freire on that occasion. He stated that the two men were fighting, although he did not see who threw the first punch. Later, Suarez testified that he saw Ortiz throw punches at Dominguez: "I saw him swinging at him, but I don't know if he really got to punch him or not but I know they were fighting."

Events of October 2

On October 2, Ortiz was working the night shift, which runs from 3:00 a.m. to 2:00 p.m.[12] The other members of his crew were Dominguez, who was the foreman, pickup truck driver Manuel Vazquez (Vazquez) and kettle truck driver Julio Rosas (Rosas).[13] The men were working on a project, extending over several days, painting lines along Fifth Avenue (in Manhattan) in cross streets ranging from the upper 60's to the lower 20's. On that day, the crew left the shop, stopped off for breakfast and then drove to the work site via the Queensboro Bridge. It appears from the testimony that the crew's work on that day was concentrated above 50th street.

Ortiz had the document containing employee signatures with him, and at the beginning of the work day he informed Dominguez that, if he had a chance, he would go to the Labor Board to drop it off. Vazquez testified that at some point Ortiz showed him an envelope and stated that he wanted to drop it off. He could not specifically remember when that occurred, but stated that it was "maybe during the traveling from – from where we had lunch, after that." None of the employees who testified herein provided testimony regarding further discussion of the petition or Ortiz's apparent plan to bring it to the Board that day.

Crews working the night shift frequently complete their work for the day prior to stopping for their lunch break, and this is what occurred on October 2. The crew worked straight through and stopped for the day at approximately noon. They then took their meal break from noon to 1:00 p.m. The testimony as to where the crew ate on that day is not consistent, but the record establishes that the location, a diner away and further downtown from the work site, was selected by foreman Dominguez, at a location where parking was easier. After the lunch hour was competed, the men got into the trucks and proceeded into Brooklyn via the Manhattan Bridge.[14] Again, the record establishes that this route was selected by Dominguez, with Rosas driving the kettle truck. Vasquez, driving the pickup truck with Ortiz as passenger, followed behind.[15] When asked why he made the decision to take the Manhattan Bridge as opposed to an uptown route, Dominguez was unable to provide a specific reason. He stated his decision to take the Manhattan Bridge rather than the Williamsburg Bridge (which is closer to Respondent's facility) was based upon a "road situation" near the latter. Rosas, who was driving the kettle truck, similarly observed some "police activity" on the street leading to the Williamsburg Bridge, but Vasquez failed to recall any such difficulty, and said he just followed the kettle truck. Dominguez stated that while working on this Fifth Avenue project, the crew had taken the Queensboro Bridge back to the shop on almost all occasions, except for once or twice when they were working downtown at about 20th Street. He additionally offered unrebutted testimony that he was never questioned about his selection of a route; that on other occasions had used

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[12] The record establishes that due to the flow of traffic or other unforeseen circumstances, employees will at times arrive either shortly prior or subsequent to the end time of their shifts. They are neither docked pay nor provided additional compensation for these variances in hours.

[13] All three members of the crew, current employees, were called to testify by the Respondent.

[14] The record establishes that there are four East River crossings available to a truck carrying propane: the uptown Triborough Bridge; the midtown Queensboro Bridge; the downtown Manhattan Bridge and the downtown Williamsburg Bridge. According to witness testimony, assuming traffic or other considerations are not at issue, the most direct route to the shop from a midtown location is via the Queensboro Bridge and the most direct route from a downtown location is via the Williamsburg or Manhattan Bridge.

[15] The record establishes that the usual practice is for the kettle truck to precede the pickup truck so that the crew on the pickup truck can monitor the gauges on the kettle truck.

downtown bridges to return to the facility and that there was never one particular route that the drivers were supposed to follow.

Once the men crossed the Manhattan Bridge, they stopped at a deli to get a drink. As Dominguez testified, it was a little early and there was no traffic. From the testimony of the employee witnesses, it appears that it was common practice for them to stop off to get a drink on the way back to the shop irregardless of the route they took back to the facility.[16] The deli the crew stopped at that day was located a few blocks from the Board's Brooklyn Regional Office, and Ortiz told Dominquez that he was going to drop off the employee petition. Vazquez drove Ortiz to the Regional Office, dropped him off and returned to the deli. Ortiz met with the information officer, submitted the paperwork and then ran back to the trucks. Dominquez and Rosas had already left for the shop. Vazquez and Ortiz were behind them by about fifteen to twenty minutes.[17] It is undisputed that the petition filed by Ortiz was time stamped at 1:48 p.m., which is during the course of his work day. It is also undisputed that the Region's offices were open on that day from 9:00 a.m. to 5:30 p.m.

Ortiz is Discharged

At about 2:20, Freire was in his office having lunch when Dominquez entered. The two men exchanged pleasantries. At approximately 4:00 p.m. Freire received a facsimile copy of the decertification petition filed earlier on that day, signed by Ortiz. Freire testified that he failed to understand the significance of the document at the time. In addition to a copy of the petition itself, the Regional Office sent a transmittal slip, containing the following information:

> Attached is an advance copy of a representation petition filed today with the National Labor Relations Board. This petition constitutes a request to this Agency to conduct a union representation election among the unit of employees described in paragraph 5 of the petition. This advance copy is being provided for your information. More detailed information is being forwarded to you today.
>
> PLEASE NOTE THAT A NOTICE OF HEARING, COPY ATTACHED IS ALSO BEING ISSUED TODAY FOR A HEARING TO BE CONDUCTED ON THE DATE SET FORTH IN THE NOTICE. THE HEARING WILL BE CONDUCTED ON THE DATE SPECIFIED UNLESS A POSTPONEMENT THEREOF IS REQUESTED PURSUANT TO THE ATTACHED INSTRUCTIONS. THE HEARING WILL BE CONDUCTED ON CONSECUTIVE DAYS UNTIL CONCLUDED.

According to Freire, he then called Dominquez, and started yelling at him over the phone, calling him a "son of a bitch" and asking him, "why do you take my trucks and time to the Labor Board on Flatbush Avenue and J Street, when you guys were supposed to take the 59th Street Bridge coming back to minimize the problems of having an accident."[18] According to Freire, Dominguez replied that he had told Ortiz "not to do it" because he was already getting

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[16] Rosas testified that employees typically stop for a drink on their way back to the shop, even if they have just recently finished lunch. Similarly, Ortiz testified that the crew usually stops for a drink of water or Gatorade.

[17] The record indicates that Dominguez and Rosas returned to the shop at approximately 1:45 and Ortiz and Vazquez returned at approximately 2:05 p.m.

[18] Freire testified that his concern with the longer route stemmed from the increased exposure to the possibility of getting into an accident. Freire further testified that in the past two years his trucks had three or four accidents which increased his insurance premiums.

into problems. Responding to specific questions by Respondent's counsel, Freire stated that Dominquez failed to mention anything about eating lunch downtown or police activity at the Williamsburg Bridge. Freire failed to present any other testimony regarding what the two might have discussed on this occasion. Dominquez offered no testimony regarding this telephone conversation and, in fact, was asked nothing about it when called to testify by Respondent.

Freire next attempted to contact Ortiz, was unable to reach him and left two messages on his voice mail. During the period of time when Freire was leaving these messages, Ortiz was at home, taking a shower. His wife informed him that his phone had been ringing. Ortiz saw that Dominquez had called, and called him back. Dominquez told Ortiz that Freire was "furious" and had "found out" what they had done that day. As Ortiz testified, he then called Freire who told him that he knew what he did that day. Ortiz replied that he had just dropped off a piece of paper. Freire told Ortiz he was fired. After Ortiz hung up he saw he had two messages. In these messages Freire stated that he knew Ortiz had gone to the Labor Board and that he was fired.

Freire was questioned pursuant to Rule 611(c) by Counsel for the General Counsel, and admitted that in one of the messages he left for Ortiz he identified himself, told Ortiz that it was very, very important that he call as soon as possible, stated that he knew Ortiz had gone to the Labor Board that day and further told Ortiz that "whatever he did that day at the Labor Board was going to get [him] fired." Freire subsequently left another message for Ortiz telling him not to bother to come in. Freire was also questioned regarding these phone messages by Counsel for Respondent. According to Freire, "[o]n the message I told him that what they were doing on Flatbush Avenue with my trucks, with my time. And that he was fired." When speaking with Ortiz, Freire stated that he repeated "basically the same thing. That they took the trucks away. He is on the last notice. He's fired." When asked specifically whether he stated the words "I know what you did," Freire replied, "I don't remember if I told him exactly that." Freire further testified that he did not recall whether Ortiz said anything in response and was so angry at the time that he really did not care what he said.

Respondent Meets with the Other Crew Members

On the following morning, Dominguez, Rosas and Vazquez were summoned to a meeting with Freire and shop foreman Suarez. Freire asked the employees why they had gone out of their way with the trucks on company time, with company money. According to both Freire and Suarez, these employees were told that if they did anything like this again, they would be fired. According to the employees present, Freire expressed anger that they had gone out of their way to do personal business when they were supposed to be working in Manhattan, and employees were told that they should not use working time to do other things. None of these employees, however, testified that they were told that they would be fired should there be any further infractions. On cross-examination, Suarez was asked if he knew what employees did when they "went out of their way," and stated: "Well I know they went to do something. Their personal business or whatever they went to do. I don't know what they went to do."

III. Analysis and Conclusions

The Unlawful Discharge of Alecc Ortiz

The complaint alleges that Respondent violated the Act by discharging Ortiz because he sought the assistance of the Board and filed a decertification petition, a contention which the Respondent denies. Respondent argues, in essence, that Ortiz was fired for on the job misconduct, while subject to what Respondent characterizes as a "last chance" agreement, by appropriating Respondent's employees, time and trucks to run a personal errand, in violation of

company policy. Respondent argues that the employees had no apparent valid reason for proceeding back to the shop by taking a downtown bridge and that the workers were obviously "in cahoots" with Ortiz to go to the Board on the way back to the shop. Respondent further asserts that the reason Ortiz's coworkers were not similarly discharged is twofold: unlike Ortiz, they were not subject to a last chance agreement and, moreover, Respondent determined that due to business concerns it could not afford to lose such a significant component of its workforce. Thus, Respondent argues, these employees were warned and threatened with discharge should they engage in a similar infraction in the future.

Section 8(a)(3) provides, in pertinent part, that it is "an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(4) of the Act provides that it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." To prove a violation of either Section 8(a)(3) or (4), the General Counsel must first show, by a preponderance of the evidence, that the employee's protected conduct was a substantial or motivating factor in the employer's adverse action. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management C*orp., 462 U.S. 393, 395 (1983); see also *American Gardens Management Co*., 338 NLRB 644, 645 (2002) (*Wright-Line* analysis applies to claims of discriminatory discharge under both Section 8(a)(3) and 8(a)(4)).

The General Counsel must establish the employee engaged in protected concerted activity, the employer was aware of that activity, and that such activity was a substantial or motivating reason for the employer's action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (citations omitted). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Robert Orr/Sysco Food Services,* 343 NLRB 1183 (2004), enfd. mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003); *Ronin Shipbuilding*, 330 NLRB 464 (2000). The Board has long held that, where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised. *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003), citing *La Gloria Oil*, 337 NLRB 1120 (2002), enfd. mem. 71 Fed Appx. 441 (5th Cir. 2003)(Table). Other factors which may similarly support such an inference include inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees compared with other employees with similar work records or offenses and deviation from past practice. *Embassy Vacation Resorts*, supra at 848.

Once the General Counsel has made out the elements of a prima facie case, the burden of persuasion then shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste*, *Inc*., 346 NLRB No. 50 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. To meet its *Wright Line* burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co*., 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). See also *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996).

In the instant case, I find that the General Counsel has met its initial burden under *Wright Line* of establishing that Ortiz's discharge was motivated, at least in part, by his protected conduct.

The Board's approach to Section 8(a)(4) of the Act "has been a liberal one in order to fully effectuate the section's remedial purpose." *General Services*, 229 NLRB 940, 941 (1977), relying on *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972). Section 8(a)(4), an essential aspect of the statutory scheme, is designed to "safeguard the integrity of the Board's processes." *Filmation Associates*, 227 NLRB 1721 (1977) (it provides a "fundamental guarantee" to those invoking the procedures of the Act; and the duty to preserve Board's process from abuse is a function of the Board and may not be delegated to the parties or an arbitrator).

Mindful of these principles and practical concerns, the Board and courts have found that Section 8(a)(4) is not limited to protecting an employee who has filed charges or given testimony. In *Precision Fittings, Inc*., 141 NLRB 1034, 1035 and fn. 3 (1963), the Board specifically held that the protections of that section of the Act would extend to employees who file decertification petitions. Thus, by filing the petition seeking to decertify Local 917, Ortiz engaged in conduct which is protected by the Act. Moreover, the record establishes that when Respondent received a copy of this petition, bearing Ortiz's signature, it then had knowledge of this protected conduct. This was subsequently reinforced during Freire's telephone conversation with Dominquez, where he asserted telling Ortiz "not to do it."[19] In this regard, I do not credit Freire's testimony that he failed to understand the significance of the decertification petition at the time. The petition was sent to Freire together with an attachment explaining the nature of the document and advising that procedures before the Board had been initiated, which included the possibility of a formal hearing. As noted above, Respondent's counsel elicited testimony from Freire regarding his prior experiences with unions and I conclude based upon this testimony, together with his long tenure in the industry, that Freire is not naïve in matters involving collective bargaining.

I further find that the record establishes animus toward Ortiz's protected conduct. As noted above, Respondent has had a long standing stable relationship with Local 917. I credit and give probative weight to Ortiz's testimony that Local 917 was amenable to concessions favorable to Respondent,[20] and find that these anticipated concessions together with a relatively settled relationship would have caused Freire to have concern regarding any possible decertification effort. In its brief, Respondent argues that Respondent would have been unaware of any potential intervening union at the time the petition was filed and, in this record, there is no evidence regarding when Local 8-A sought to organize employees or moved to intervene in this matter. Nevertheless, as noted above, I have found that Freire is knowledgeable about union-related matters and conclude that he would have been aware of the possibilities inherent in a decertification process.

Moreover, the General Counsel has set forth direct proof of Respondent's animus toward Ortiz's protected conduct by adducing Freire's admission that he told Ortiz that whatever he did that day at the Labor Board was going to get him fired. As noted above, this statement was made almost immediately after Freire learned that the petition had been filed, and accordingly constitutes strong evidence of Freire's motivation. *McClendon Electrical Services*, supra.

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[19] As discussed in further detail below, under the circumstances herein, I have concluded that this comment referred to the filing of the petition.

[20] Ortiz's testimony in this regard was not objected to by Respondent; nor was the underlying fact – that the Union was amenable to reductions in pay and benefits – rebutted by Respondent. Moreover, it is undisputed that all the employees in the shop signed the petition in support of decertification. This lends further support to a determination that Local 917 had announced such concessions.

Thus, I conclude that the General Counsel has established the elements of a prima facie case that Ortiz was discharged for his protected conduct. Accordingly, the burden now shifts to the Respondent to establish, by a preponderance of the evidence, that it would have discharged Ortiz notwithstanding any protected conduct in which he may have engaged.

As noted above, Respondent argues that Ortiz was fired after having previously been suspended and while subject to a last chance agreement, because he admittedly engaged in further misconduct by appropriating Respondent's employees, time and trucks to run a personal errand.

As Respondent notes, the Board has long recognized the legitimacy of an employer enforcing rules against the misuse of company vehicles. In *Stilley Plywood Co*., 94 NLRB 932, 980 (1951), cited by Respondent, the Board found that the employer lawfully discharged an employee who used a company vehicle to drive to a union meeting. Similarly in *Hertz Corp*., 195 NLRB 96, fn.2 (1972) and *Pepsi Cola*, 170 NLRB 1252, 1266 (1968), also cited by Respondent, the Board sustained the discharges of employees who were fired for using company vehicles to attend to personal matters during work hours in violation of company policy. I note however, that all of these cases were decided prior to *Wright Line*. For this, and other unrelated evidentiary reasons, I find such authority to be of limited value in assessing the strength of Respondent's rebuttal to the elements of General Counsel's prima facie case.

Nevertheless, I find that Respondent's stated concern with employee use of work time for personal errands, coupled with the unauthorized use of its vehicles, presents a facially legitimate basis for its determination to discharge an employee. However, it is Respondent's burden not merely to advance a cognizable reason, but rather to persuade, by a preponderance of the evidence, that this was in fact the real reason for the discharge under consideration. Here, Respondent has failed to meet that burden.

The most obvious evidentiary hurdle for Respondent to meet involves Freire's admission that in the message he left for Ortiz he specifically stated that what Ortiz had done at the Labor Board was going to get him fired. Under all the circumstances herein, including the "stunningly obvious" timing,[21] this constitutes powerful evidence that the real reason Ortiz was fired was because of his protected conduct, and not a because of a misappropriation of employer resources. Freire summarily terminated Ortiz without questioning him and I further note that Freire admitted that when finally speaking with Ortiz he was so angry that he could not recall whether Ortiz attempted to offer any excuse for his conduct and further stated that he did not care what Ortiz would have had to say, in any event. I infer that this demonstrable, heightened level of animosity stemmed from the fact that Ortiz had filed the petition.

Freire's account of his conversation with Dominguez, and specifically his testimony that, he demanded to know, "[w]hy do you take my trucks, my people and my time to the Labor Board on Flatbush Avenue and J Street when you guys were supposed to take the 59th Street Bridge to minimize the problems of having an accident" (which Freire characterized as his "exact words") simply did not have the ring of truth. Rather, the evidence suggests that Freire's discussion with Dominguez related specifically to his anger regarding Ortiz's filing of the petition. As Freire acknowledged, Dominguez responded that he had told Ortiz "not to do it." It is obvious from the context that this comment relates specifically to the filing of the decertification petition (which is the singular thing Ortiz did that the others did not), and Dominguez's attempt to deflect the responsibility for this undertaking onto Ortiz. Freire offered no other specific testimony

[21] *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970).

regarding anything else Dominguez may have reported to him during this discussion (except for some vague reference to Ortiz's getting into "problems"). In this regard, I note that although Dominguez was called as a witness by Respondent, he was not questioned regarding his conversation with Freire. Under these circumstances, where the content of this discussion is apparently relied upon by Respondent in support of its contentions regarding its motive for firing Ortiz, and where Dominguez, as a current and long-term employee, has a pecuniary interest in testifying favorably for his employer,[22] I draw an adverse inference from Respondent's unexplained failure to adduce corroborative testimony from Dominguez on this issue. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987). I infer, therefore, that had Dominguez been asked about this discussion and had testified truthfully, such testimony would have been adverse to Respondent's position herein, and conclude that Freire and Dominguez specifically discussed the filing of the petition during their conversation, and further, that Freire made his displeasure about this known to Dominguez.

When questioned by Respondent's counsel about what he said to Ortiz, Freire testified in essence that he questioned what they were doing on Flatbush Avenue with his trucks and his time; that Ortiz was on his "last notice" and was fired. Freire, however, did not offer this testimony in a convincing manner: he appeared hesitant and uncomfortable.[23] By Freire's own admission, he also told Ortiz that what he had done at the Labor Board was going to get him fired. In that statement there was no contemporaneous reference to any final notice or misappropriation of employer resources.

Respondent argues that the provisions of the collective-bargaining agreement establish that the unauthorized use of company vehicles for personal business is a dischargeable offense, and further cites to Freire's testimony that he is unaware of any other circumstances of such unofficial use. While it is not entirely clear to me that the express terms of the collective bargaining agreement lend support to this contention, I have acknowledged that Respondent has the prerogative to insist that its employees use its time and equipment for job-related assignments and, as the Board has often held, it is not within the purview of the trier of fact to substitute its business judgment for that of the employer. See *Super Tire Stores*, 236 NLRB 877, fn. 1 (1978). Nevertheless, the unrebutted record evidence establishes that the drivers used the trucks for personal matters: stopping for breakfast en route to work locations, driving to lunch during their work shift and stopping for a drink on the way back to the shop. Moreover, there is no evidence that such activities were out of the ordinary. Further, there is no evidence that these stops and detours were subject to company scrutiny, or that employees were ever told that they could not use the trucks for such a purpose. Moreover, Dominguez testified, without contradiction, that he was never questioned about his selection of a route; that on other occasions had used downtown bridges to return to the facility and that there was never one particular route that the drivers were supposed to follow.[24]

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[22] In finding that Dominguez would have the propensity to testify in a fashion favorable to his employer, I note that he is among the most senior of employees, who was not laid off in 2005. I also note that Dominguez and Ortiz have a prior history of work-related animosity and find this to be an additional reason why Dominguez would be favorably predisposed toward his employer and would not attempt to slant his testimony to benefit Ortiz.

[23] In this regard I note that Freire testified on several occasions during the course of the this consolidated hearing and his demeanor when offering this testimony stood in contrast to what it appeared to be on other occasions.

[24] Furthermore, there is no evidence that this has changed since the events described herein.

Additionally, there is the fact that only Ortiz, the signatory to the petition, was fired while the others were, at most, given a verbal warning. Respondent argues that this discrepancy in the level of discipline meted out stems from the fact that only Ortiz was subject to a "last chance" agreement and further that, due to business concerns, it could not afford to discharge an entire crew of employees. In this regard, Respondent places significant reliance upon the fact that employees were severely reprimanded for their conduct on the following day and threatened with discharge if they ever appropriated Respondent's time and trucks for personal errands again.[25]

As an initial matter, I do not credit the testimony, offered by Freire and Suarez, that employees were threatened with discharge during this meeting. As noted above, Suarez offered an exaggerated account of Ortiz's involvement and misconduct in the 2003 incident which led to his suspension, one which did not comport with the contemporaneous account he had provided to Freire. I further fail to credit Suarez's improbable assertion that he did not know the nature of the "personal business" that was being discussed with employees during the October 3 meeting. I find, therefore that Suarez, a co-owner of the company and long term business associate of Freire's, has a propensity to offer false testimony if he believes it will support Respondent's position herein. Moreover, not one of the three employees who testified regarding this meeting reported a threat of discharge. I find that this is precisely the sort of warning that employees would find of significance and would tend to recall. Again, I find such a lack of corroboration to be significant. Based upon the foregoing, I find that Respondent's assertion, as stated in its brief, that the three employees were "vehemently admonished" and "explicitly warned" that they would be fired if they engaged in such misconduct in the future is not supported by the evidence.

Thus, I find that the other employees who, like Ortiz, took Respondent's time and trucks on a detour allegedly for the purpose of running a personal errand were given scant discipline. Unlike Ortiz they were not discharged, they were not suspended, they were not issued a "last-chance" letter, no warning was placed in their file and they were not threatened with discharge. This lack of meaningful employee discipline stands in sharp contrast to Ortiz's termination. The disparate severity of his punishment raises a strong inference of pretext.

Respondent's counters this with reliance on Ortiz's so-called "last chance" letter. I find, however, that Respondent has failed to sustain its burden of establishing that this would have precipitated Ortiz's discharge had he not engaged in protected conduct, but simply had taken a longer route back to the shop and stopped for a drink with his coworkers in downtown Brooklyn,

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[25] In an apparent attempt to rationalize the disparate treatment of Ortiz as compared with his coworkers, Respondent contends that in "hindsight" it is obvious that the employees were "in cahoots" to go to the Board as there was no other valid reason for taking a downtown bridge on their way back to the shop, but further argues that Freire was not cognizant of their complicity at the time. This argument is based upon conjecture as there is no probative evidence that the employees, as a group, planned to detour to downtown Brooklyn to enable Ortiz to file the petition. Further, such an argument fails to lend support to Respondent's position herein. To the contrary, it highlights that there are significant factual deficits in Respondent's proffered defense. In particular, Freire offered scant testimony as to what Dominguez may have told him in their telephone discussion and, as noted above, none was adduced from Dominguez. In this regard, the fact that Freire called Dominguez in the first instance is indicative of the fact that he considered him, as foreman, responsible for the actions of the crew and the route that was taken. Moreover, contrary to Respondent's suggestion, there is no evidentiary basis for me to conclude that Freire somehow deemed or had any basis to consider that Ortiz was accountable for the route taken back to the shop on that occasion. In light of the fact that Respondent bears the burden of proof as to these matters, I find such evidentiary deficits to be significant.

as did they. Nor does it, in my mind, sufficiently explain the variance in the discipline meted out to employees.

In reaching this conclusion, I note that Ortiz admitted that he understood that by agreeing to the terms of the letter, he was acknowledging that he would be discharged if he engaged in subsequent misconduct. [26] However, this letter had been issued three years previously, without any intervening instances of wrongdoing. There are other factors which militate against a determination that this letter would have served as the basis for Ortiz's discharge absent his protected conduct. In particular, I note that Freire testified that he rarely discharged employees, and Respondent has presented no evidence regarding any other instances of employee discipline (other than the earlier incident involving Ortiz and Dominguez). [27] Further supporting this determination is the relatively light punishment meted out to the others coupled with Respondent's general lack of supervision of employees regarding routes taken or stops made during the work day.

Thus, while Respondent has presented what appears on its face to be a legitimate basis for its determination to discharge Ortiz, there is strong, direct and unrebutted evidence of unlawful motivation. This is coupled with a significant lack of corroboration with regard to two important aspects of Respondent's proffered defense, in particular regarding what Freire discussed with Dominguez in their initial conversation after the petition was filed and with respect to the manner of discipline issued to the other employees. Given these considerations, and the logical inferences to be drawn from the other facts and circumstances of this case, as discussed above, I conclude that Respondent has failed to sustain its burden of establishing that it would have discharged Ortiz regardless of his protected conduct. Thus, I find that Respondent has violated Section 8(a)(1) (3) and (4) as alleged in the complaint. Accordingly, I recommend that the challenge to Ortiz's ballot be overruled. See *Regency Service Carts*, 325 NLRB 617, 627 (1998).

IV. The Other Challenged Ballots

As noted above, Local 8A and the Petitioner challenged the ballot Miguel Freire (Miguel) and Petitioner challenged the ballot of Danny Travers (Travers).[28] Travers' ballot was challenged on the basis that he voluntarily quit his employment in December 2005 to accept another job. The stated basis for the challenge to Miguel's ballot was that, as the son of the President and co-owner of the Employer, he is aligned with management.[29]

At the hearing Local 8-A raised the following additional issues: (1) that the Employer is not in the construction industry and therefore the Regional Director applied the incorrect voter eligibility standard and (2) that a consideration of whether the challenge to Travers' ballot should be sustained properly involves an inquiry into whether Travers abandoned interest in continued

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[26] General Counsel argues that the terms of the letter are not as broad in scope as Respondent suggests. There is specific reference to termination for starting further fights or giving "any of his superiors problems."

[27] Cf. *Met West Agribusiness, Inc*., 334 NLRB 84, 89 (2001), cited by Respondent, where the Board found that the employer satisfied its rebuttal burden based upon a final warning issued to an employee. In that instance, however, the employee in question had two infractions within months of receiving the final warning. Moreover, the employer had a history of treating other employees in a similar fashion.

[28] Local 8-A contends that Travers is an ineligible voter herein, as well.

[29] It was additionally initially alleged that both Travers and Miguel performed bargaining unit work only intermittently.

employment by obtaining a job elsewhere while on layoff and whether he manifested an intent not to return to work for the Employer. In its post-hearing brief, Local 8-A raises additional arguments regarding the challenge to Miguel's ballot alleging that the challenge should be sustained because (1) between the time that he was last employed and the date of the election, Miguel had started his own sign hanging business, in competition with the Employer and (2) Miguel did not work at any time during the 12 month period immediately preceding the voter eligibility date, and is therefore ineligible to vote under the *Daniel Construction* formula applied by the Regional Director.

Local 8-A's Challenge to the Voter Eligibility Formula

At the hearing, Local 8-A sought to adduce evidence relating to additional Employer business operations including sign posting and sign painting. In response to an objection from the Employer,[30] I inquired as to the relevance of such testimony, at which time Counsel for 8-A made the following statement:

> It is our position that *Daniel Construction* is directed to construction. And what we believe is that this is a typical 9(c) operation, not a shape up or discrete jobs where crews are created and then let go for particular jobs. What we have here is a typical bargaining unit. A non-construction unit.

In its brief Local 8-A argues that even without being given the opportunity to develop the record as to any additional types of work performed by the Employer, it is clear from the testimony that the Employer has a core group of employees that come back year after year, and that there is no evidence of intermittent, as opposed to seasonal, employment or that a substantial number of the employees involved work for several different employer's during the year.[31]

Counsel for Local 8-A acknowledged, however, that no request for review of the Acting Regional Director's Decision and Direction of Election had been filed. Nor were objections to the election timely filed. Accordingly, I ruled that I would not allow relitigation of the voter eligibility formula in the instant proceeding, and hereby affirm that ruling. Cf. *Sitka Sound Seafoods*, 325 NLRB 685 (1998), where the Board affirmed the Regional Director's overruling of objections to an election which were, in essence, an attempt to relitigate the eligibility formula used therein, where the Board had previously denied review as to that issue.[32]

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[30] The objection was sustained.

[31] Local 8-A apparently relies upon this argument only insofar as it advances its position regarding the challenges under consideration herein. In this regard I note that the record shows that eight employees were recalled in 2006, and fourteen voters whose ballots were not challenged voted in the election. Accordingly, it would appear that approximately six additional voters cast their ballots while on layoff status, pursuant to the *Daniel Construction* formula. There is no contention by Local 8-A that any of the other voters who may have voted pursuant to this standard should be deemed ineligible to vote herein.

[32] I note that in *Steiny & Co*., supra at 1328 fn. 16, the Board, citing *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1416 fn. 10 (1978) stated that one exception to the application of the *Daniel Construction* formula in the construction industry exists where the employer clearly operates on a seasonal basis. Nevertheless, the time for Local 8-A to have raised such any such or related argument was during the underlying representation case hearing or in a request for review of the Acting Regional Director's Decision and Direction of Election.

The 2005-2006 Lay Off and Recall

As noted above, the Employer's employees are laid off during the winter season. In 2005, this took place as of December 7, and was announced by the posting of a notice to employees listing both those few employees who would remain employed and those being laid off, in order of seniority. This notice was prepared by Office Manger Maria Lago. Among those workers laid off on this occasion were Miguel and Travers. At the time, Miguel had the least seniority of all workers.[33] That following spring, Freire determined that, due to a downturn in business, he required fewer employees, and recalled only 8 of 17 employees listed on the layoff list. As with layoffs, recalls are done on the basis of seniority and neither Travers nor Miguel were recalled that spring, and were not recalled at any time prior to the election. At that time, based upon his position on the seniority list, Travers was the next employee subject to recall.

Miguel Freire

Miguel, who is Freire's son, also has a familial relationship with two other owners of the Employer. The Excelsior list submitted by the Employer indicates that during the time frame of the election, Miguel and Freire lived on the same street, but not at the same street address. Miguel attended college between 1999 and 2002 and worked only summers during this time. The record establishes, however, that he was not the only employee to have done so during this period. Miguel subsequently worked for the Employer on a seasonal basis, and it appears from the record that this was during 2004-2005. Miguel accrued no seniority during the years that he worked solely during his summer vacation periods and consequently, had the least seniority of all of the employees. While employed, Miguel's terms and conditions of employment were governed by the collective-bargaining agreement with Local 917, as well as other shop wide practices. Thus, he worked a regular shift, the same hours as other employees, earned the contractual wage rate and enjoyed contractual benefits. There is no evidence that he enjoyed special privileges such as reduced work hours or longer break or meal periods. The record additionally establishes that Miguel never worked as a foreman, had no supervisory or managerial authority and was a member of Local 917.

Ortiz alleged that Miguel was afforded special privileges such as: "[g]oing to Spain. When they need him, he comes whatever days he needs, like in the summer. When he used to go to school and when they need people, he calls his son." As noted above, however, there is undisputed record evidence that other laborers employed by the Employer have worked only during vacation periods while attending school. Moreover, Freire testified that notwithstanding the requirement in the collective-bargaining agreement that vacations be taken during winter months, he would allow employees to take vacation during the summer as long as no other employee was taking off at the same time.[34] In mid-October 2005, Miguel was granted a leave of absence to assist an injured older brother in running his business. There is no evidence that any other employee has been granted such a privilege; however the record does establish that other employees have taken sick leave in order to care for relatives. Miguel was subsequently laid off in December 2005, and has not been recalled since that time. In the summer of 2006, Miguel, together with a partner, started his own business installing street signs.

[33] As discussed in further detail below, Miguel had the least seniority despite an initial 1999 hire date because he worked primarily during summer vacations from college and according to the provisions of the collective-bargaining agreement was ineligible to accrue seniority for those years.

[34] Freire identified Ortiz, Dominguez and Vazquez as being among those employees who took vacations during the summer months, and Ortiz confirmed that this was the case as to him.

It is well settled that a "party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote." *Regency Service Carts, Inc*., 325 NLRB 617, 627 (1998) (quoting *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986)).

The Board "has long hesitated to include the relatives of management in bargaining units because their interests are sufficiently distinguished from those of other employees." *Palagonia Bakery*, 339 NLRB 515, 536 (2003); *R&D Trucking, Inc*., 327 NLRB 531, 532 (1999); *T.K. Harvin & Sons*, 316 NLRB 510, 533(1995). "The greater the family involvement in the ownership and management of the company, the more likely the employee relative will be viewed as aligned with management and hence included." *NLRB v. Acton Automotive*, 469 U.S. 490, 494-495 (1985); *Palagonia Bakery*, supra at 536. The Board however, does not exclude an employee simply because he or she is related to a member of management. *International Metal Products Co*., 107 NLRB 65 (1953). Rather, the Board considers a variety of factors in deciding whether an employee's familial ties are sufficient to align his interests with management and thus warrant his exclusion from the bargaining unit. In this regard, the Board utilizes an "expanded community of interest test" to determine whether relatives of owners of closely-held corporations should be excluded from the unit, weighing such factors as how high a percentage of stock the parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively engaged in management or holds a supervisory position, how many relatives are employed as compared with the total number of employees, whether the relative lives in the same household or is partially dependent on the shareholder. *Futuramik Industries, Inc*., 279 NLRB 185 (1986)(citing *NLRB v. Action Automotive*, supra). An employee-relative may be excluded from the unit even though he or she enjoys no special job related privileges, if other criteria establish that his interests are aligned with management, *NLRB v. Action Automotive*, supra at 495; see also *Palagonia Bakery*, supra at 536. In the instant case, Miguel is a relative of management; thus, it is need not be shown that he enjoys job-related privileges in order to find his interests more closely aligned with management and, therefore, that he does not share a community of interest with other bargaining unit employees. Id. (and cases cited therein).

Although it is not essential that job related privileges be shown it is, however, an important factor considered by the Board in assessing whether the employee in question shares a sufficient community of interest with other employees. In *Blue Star Ready Mix*, 305 NLRB 429, 430-431 (1991), the Board overruled the challenge to the ballot of the grandson of one owner (and nephew of another), finding that he shared a community of interest with other employees. In that instance, the employee in question was a college student who lived with his owner-grandfather.[35] Although he had started work at a slightly higher wage than other employees, he was otherwise subject to the same time, attendance and disciplinary procedures and received the same benefits. In the absence of any significant job related privileges, the Board found this relative of management shared a community of interest with other employees. Cf. *Luce & Sons, Inc*., 313 NLRB 1355, 1356 (1994); *R&D Trucking Co*., supra (relatives of management who enjoyed special job-related privileges excluded from unit.)

In the instant case, Miguel is the son of one, and related to two other owners of the Employer who collectively own 60% of the stock of the corporation. Moreover, Freire is apparently the highest ranking manager of the Employer. Nevertheless, there is insufficient probative evidence to establish that Miguel received any job-related privileges as a result of his relationship to Freire, or any of the other owners to whom he is related. Although Miguel was

[35] The employee in question additionally assisted in caring for his grandparents. The Board found that this assistance was voluntary and not related to the performance of his job duties.

able to work during his summer vacations from college, this option was also available to other employees. Similarly, although Miguel was apparently allowed to take vacation time during his work season, Freire's testimony, which was corroborated by the Petitioner, was that other employees could do so as well. Miguel was subject to the terms and conditions of employment set forth in the Local 917 collective bargaining agreement, including the contractual seniority rules. Although Miguel was apparently allowed to take a leave of absence to assist another family member who was recuperating from an injury, there is record evidence that other employees are allowed to take sick leave to care for themselves or other family members. Under all the circumstances, therefore, I do not view this as a job related privilege that would disqualify Miguel from eligibility in light of the other factors which would militate toward his placement in the unit. *Blue Star Ready Mix*, supra. I further note that although Freire testified that the two currently share a home, the *Excelsior* list submitted by the Employer showed that Miguel and Freire did not live together at the time of the election, although they resided on the same street. Nor is there evidence that Miguel was a dependent of Freire's at any relevant time. Cf. *Futuramik Industries*, supra at 186.

In its brief, Local 8-A apparently contends that the Regional Director erred in finding that Miguel met the *Daniel Construction* eligibility formula based upon December 2005 payroll records. Relying upon these and prior records, the Regional Director found that Miguel was employed for at least 45 days during the 24 months immediately preceding the October 19, 2006 voter eligibility date, and had "some employment" during the 12 months preceding that date, consisting of 40 hours during the payroll period ending December 10, 2005. As Local 8-A notes in its brief, the hours in question were listed under a different classification from that of other employees and at the hearing Office Manager Maria Lago testified that this payment was for accrued vacation time. The Employer's payroll records otherwise show that Miguel last worked during the payroll period ending October 15, 2005 (with a pay date of October 21), and that he worked 24 hours on unspecified days. Thus, Local 8-A argues Miguel was not employed during the twelve-month period immediately preceding the voter eligibility date and therefore he is an ineligible voter herein.

The issue of whether Miguel's work history satisfies the *Daniel Construction* voter eligibility formula, raised for the first time in Local 8-A's post-hearing brief, is not arguably encompassed by those issues set for hearing by the Regional Director. Moreover, although Local 8-A may have a valid claim that it would not have had access to the underlying evidence so as to enable it to frame such an argument as an initial matter, both the payroll records and Lago's testimony became part of the record during the course of the hearing. This newly-asserted basis for the challenge to Miguel's ballot was not raised by Local 8-A at any time where the other parties could be provided with notice or have an opportunity to respond or to present evidence in response to such assertions and thus, was not litigated herein. Local 8-A has provided no legal authority to persuade me that it would be proper to consider this issue under such circumstances. I conclude therefore, that even if I were to assume that the evidence would support Local 8-A's contentions in this regard,[36] it is not appropriate for me to consider this newly asserted and clearly not litigated basis for the challenge to Miguel's ballot. See e.g.

[36] The payroll records and other evidence relied upon by Local 8-A, establish that there is some ambiguity as to whether Miguel was employed or would be deemed to have been employed during the 12 month period immediately preceding the voter eligibility date. However, as noted above, as this issue was not litigated it remains an open question. In any event, Local 8-A, as the party asserting the basis for the challenge, would have the burden of proof on this matter.

J.K Pulley Co., 338 NLRB 1152, 1153 (2003) (citing *Precision Products Group*, 319 NLRB 640 (1995).[37]

Based upon the foregoing, I conclude that the Petitioner and Local 8-A have failed to meet their respective burdens of establishing that Miguel is not an eligible voter herein. Accordingly, I recommend that the challenge to his ballot be overruled.

Danny Travers

Travers had been employed as a laborer with the Employer since 2001. Freire, Lago and Ortiz all offered testimony that at the time of his layoff in December 2005, Travers had not quit his employment. He applied for unemployment benefits later that winter, and sought and obtained employment as a chef. Ortiz testified that, in April 2006, he heard "rumors" that Travers had quit. A few months later, during the summer, Ortiz and his fellow crew members had occasion to meet Ortiz for lunch. According to Ortiz, at this time Travers stated that he was going to culinary school and enjoyed being a chef. According to Freire, at no time did Travers notify the Employer that he did not intend to return to work. Travers did not testify herein, and there is no further substantive testimony regarding his status at any relevant time.

Petitioner challenged Travers' ballot on the grounds that he had voluntarily quit his employment prior to the election. At the hearing in this matter, Local 8A raised a secondary argument to the effect that Travers evinced an intention not to return to work for the Employer, and that this renders him an ineligible voter herein. In its brief, Local 8-A raises the further argument that the challenge to Travers' ballot should be sustained because he was not called back to work in December 2006 because of seasonal, weather-related issued but because of a downturn in business that necessitated fewer employees. Local 8-A argues that where there is a layoff caused by a decline in the amount of available work, the employer does not have an intent to recall the employee and there is no reasonable expectation of working in the same workplace in the future.

The record evidence establishes that Travers was laid off for the winter season in December 2005, along with most of Respondent's other employees. Both Freire and Lago testified that Travers never informed them that he had quit his employment. Ortiz stated on cross-examination that Travers never said that he was quitting in December 2005. Thus, there is no evidence that Travers voluntarily quit his employment prior to the last job for which he was hired, *Daniel Construction*, supra, or, for that matter, at any time prior to the election.[38]

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[37] Local 8-A additionally raises the argument that Miguel is ineligible to vote because, at the time of the election, he was the part-owner of a sign-hanging company. Again, this contention, based upon evidence adduced at the hearing, is plainly beyond the scope of those issues set for hearing and litigated herein. In any event, the mere fact that Miguel may have been the co-owner of another business does not render him an ineligible voter.

[38] At the hearing and in its brief, Local 8-A advanced the argument that Travers abandoned continuing interest by obtaining employment elsewhere while on layoff. The Board has long-held generally that the fact that an employee seeks, and obtains employment during a period of layoff does not render him an ineligible voter. *American Steel Scraper Co*., 21 NLRB 219, 220 (1940). Moreover, the Board has found that employees who are otherwise eligible to vote under the *Daniel Construction* formula do not forfeit this right simply because they have declined an employer's offer of recall. *MetFab, Inc*., 344 NLRB No. 6 (2005).

Based upon the record herein, I find that neither the Petitioner nor Local 8-A has come forward with sufficient probative evidence to meet their burden of proof to establish that Travers voluntarily quit his employment prior to the completion of the last job for which he was hired, as provided for in the *Daniel Construction* formula. I recommend, therefore, that the challenge to his ballot be overruled.[39]

Conclusions of Law

1. The Respondent/Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 917 and Local 8-A are each labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging Alecc Ortiz because he filed a decertification petition with the Board, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (4) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Ortiz, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Respondent, Iberia Road Markings Corp., its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[39] As noted above, in its brief Local 8-A further argues that the challenge to Travers' ballot be sustained because he did not have a reasonable expectation of recall due to economic exigencies. This argument is subsumed by the Regional Director's application of the *Daniel Construction* formula, which determines voter eligibility. Moreover, such an argument was not previously alleged by either the Petitioner or Local 8-A as a basis for a challenge to Travers' ballot, nor is it arguably encompassed by the stated basis for challenge and was not litigated herein. Accordingly, I find that this issue is not properly before me. *J.K. Pulley Co*., supra.

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

(a) Discharging or otherwise discriminating against employees to encourage or discourage membership in any labor organization or for soliciting or obtaining signatures or filing with the National Labor Relations Board any petition for decertification of a labor organization.

(b) In any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Within 14 days from the date of the Board's Order, offer Alecc Ortiz full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privilege previously enjoyed

(b) Make Alecc Ortiz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Ortiz in writing that this has been done and that the discharge will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Brooklyn, New York copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 2006.

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

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

IT IS FURTHER RECOMMENDED that the challenges to the ballots of Alecc Ortiz, Miguel Freire and Danny Travers be overruled and that they be opened and counted.

Dated, Washington, D.C., May 18, 2007

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Mindy E. Landow
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against employees to encourage or discourage membership in any labor organization or for soliciting or obtaining signatures or filing with the National Labor Relations Board any petition for decertification of a labor organization.

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

WE WILL Within 14 days from the date of the Board's Order, offer Alecc Ortiz full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privilege previously enjoyed

WE WILL make Alecc Ortiz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

WE WILL within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and WE WILL within 3 days thereafter notify Ortiz in writing that this has been done and that the discharge will not be used against him in any way.

IBERIA ROAD MARKINGS CORP.

(Employer)

Dated _____ By _____

(Representative) (Title)

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

Two MetroTech Center , 5th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.