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

FERGUSON ENTERPRISES, INC.
Respondent

and **Case 7-CA-52306**

JOSEPH LAPHAM, An Individual
Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Counsel for the General Counsel, Darlene Haas Awada, respectfully submits this answering brief to Respondent's exceptions to Administrative Law Judge Mark Carissimi's decision, which issued March 3, 2010.

I. SUMMARY OF ARGUMENT[1]

The ALJ correctly found and the record evidence overwhelmingly establishes that Respondent violated Section 8(a)(1) of the Act by suspending, then laying off, employees Joseph Lapham, David Hall, William Lewis, George Cook, and Miles Reynolds, Jr., because Lapham and Hall engaged in protected concerted activities, specifically filing prevailing wage claims against Respondent. Lewis, Cook, and Reynolds, Jr. were on the

[1] "ALJ" refers to Administrative Law Judge Mark Carissimi. "ALJD" refers to the ALJ's decision. "Br." refers to Respondent's Brief in Support of Exceptions to the ALJD. "Tr." refers to the transcript of the administrative hearing; JX," "GCX," and "RX" refer to joint exhibits, the General Counsel's exhibits, and Respondent's exhibits, respectively.

same crew as Lapham and Hall (Reynolds, Jr.'s crew) and were suspended and laid off as part of Respondent's pretextual reason for suspending Lapham and Hall.

Respondent's exceptions incorrectly claim that a statement attributed to admitted supervisor and agent Miles Reynolds, Sr. is hearsay. To the contrary, the statement in question is excluded from the definition of hearsay under FRE 801(d)(2). Moreover, Respondent failed to object to the statement at trial.

Respondent also excepts to the ALJ's credibility determinations with regard to Respondent's knowledge of the concerted nature of Lapham and Hall's filing of prevailing wage claims. However, the record amply supports the ALJ's findings and conclusions that Respondent knew of the concerted nature of Lapham and Hall's protected concerted activities.

The ALJ also correctly found that the suspensions and layoffs of Cook, Lewis, and Reynolds Jr. were done to mask Respondent's discriminatory motive for the suspensions and layoffs of Lapham and Hall.

Finally, the ALJ correctly concluded that Respondent's ***Wright Line*** defenses with regard to its suspension and layoff of Reynolds Jr.'s crew fail.

ARGUMENT

II. The ALJ correctly concluded that Counsel for the General Counsel established its prima facie case that Respondent suspended and laid off Reynolds Jr.'s crew in retaliation for Lapham and Hall's protected concerted activities. *(Respondent's Exceptions One and Two)*

In its first exception, Respondent excepts to the ALJ's credibility determinations with regard to the May 26[2] meeting at which Lapham, Hall, Reynolds Jr., and Lewis were issued suspensions. In its second exception, Respondent excepts to the ALJ's credibility determinations to support his finding that Respondent had knowledge of Lapham and Hall's protected concerted activities. The record and well-established Board law amply support the ALJ's well-reasoned findings and conclusion.

To prove an employer's adverse action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by preponderance of the evidence, (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. ***Benjamin Franklin Plumbing*** 352 NLRB 525, 536-537 (2008); ***Naomi Knitting Plant***, 328 NLRB 1279, 1281 (1999). Once the government makes this showing, the burden of persuasion shifts to the employer to prove its affirmative defense

[2] All dates refer to 2009 unless otherwise stated.

that it would have taken the same action even in the absence of the protected concerted conduct. ***NLRB v. Transportation Management Corp.***, 462 U.S. 393, 397, 401-03 (1983) (approving ***Wright Line,*** 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)).

The employer's motive may be inferred from the total circumstances provided and from the record as a whole. ***Coastal Insulation Corporation***, 354 NLRB No.70, slip op. at 32 (2009); ***Fluor Daniel, Inc.***, 304 NLRB 970 (1991). Evidence of suspicious timing, failure to adequately investigate alleged misconduct, departures from past practices, past tolerance of behavior for which the discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense, all support inferences of discriminatory motivation. ***Coastal Insulation Corporation***, supra; ***Adco Electric Incorporated***, 307 NLRB 1113, 1123 (1992); ***Electronic Data Systems Corp.***, 305 NLRB 219 (1991); ***Banta Catalog Group***, 342 NLRB 1311 (2004).

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." ***W.F. Bolin Co.***, 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996) (unpublished); ***Equitable Gas Co.,*** 303 NLRB 925, 928 (1991).

A. The ALJ's credibility determinations with regard to the May 26 meeting *(Respondent's Exception One)*

Respondent excepts to the ALJ's credibility determinations with regard to the May 26 meeting at which Lapham, Hall, Reynolds Jr., and Lewis were given their suspension notices.[3]

As an initial matter, Respondent repeatedly and incorrectly asserts throughout its Brief that Lapham's credited testimony that Reynolds Sr. stated "You guys know this has nothing to do with a safety violation; this has to do with you guys filing prevailing wage claims against Ferguson" at the May 26 meeting constitutes hearsay. As the ALJ noted (ALJD, p.2) Reynolds Sr. is an admitted supervisor within the meaning of Section 2(11) of the Act and an admitted agent of Respondent within the meaning of Section 2(13) of the Act. (GCX1) Thus, Reynolds Sr.'s statement is an admission by a party-opponent under Federal Rule of Evidence 801(d)(2) and does not constitute hearsay.

In addition, even if the statement did constitute hearsay, when Lapham testified regarding this statement, Respondent did not object. (Tr. 51) Probative value may be given to hearsay that is admitted without objection. ***Electronic Data Systems Corp.***, 305 NLRB 219, 219 fn.2 (1991); ***S.E. Nichols, Inc.***, 284 NLRB 556, 568 (1987).

Further, in crediting Lapham's testimony with regard to Reynolds Sr.'s statement, the ALJ thoroughly explained his reasoning. (ALJD p.12, lines 32-48, p.13, 1-5, p.13 fn.21, 23, 24) The ALJ found significant that Respondent did not call supervisor and agent Reynolds Sr., whom the record established was employed by Respondent at the

[3] Cook was on vacation, and his notice was mailed to him.

time of the hearing (Tr. 196) to rebut Lapham's testimony regarding Reynolds Sr.'s comments about the prevailing wage issue. This failure warrants an inference that, if called, Reynolds Sr.'s testimony would have been adverse to Respondent's case. ***Ready Mixed Concrete Company***, 317 NLRB 1140, 1143 fn. 16 (1995); ***International Automated Machines***, 285 NLRB 1122, 1123 (1987).

Likewise, Respondent's assertion that Young testified that Reynolds Sr. was not at the May 26 meeting (Br. p.5) is simply incorrect. As noted by the ALJ (ALJD p. 13, fn.21), although Young testified on Respondent's behalf, Respondent did not ask her any questions with regard to what was stated at or before the suspension meeting. Her only testimony with regard to the meeting was stating on cross-examination that she was present at the meeting. (Tr.639-640) She did not deny that Reynolds, Sr. said that the meeting pertained to the prevailing wage issue, nor did she deny that she failed to disavow the statement. Adverse inferences may be drawn based on the failure of a party to question its own witness about matters which would normally be thought reasonable where such an omission does not appear unintentional, and such adverse inferences are appropriate here with regard to Young's testimony. ***Colorflo Decorator Products, Inc.***, 228 NLRB 408, 410 (1977).

Thus, this is one of those rare cases where direct evidence and admissions demonstrate the Respondent's unlawful motive. See ***Wilson Trophy Co.***, 307 NLRB 509 (1992). Where, as here, there is direct evidence of unlawful motivation, such evidence may be overcome only if it is "so destroyed by other facts and circumstances that it cannot be credited as crucial . . . [T]he employer's explanation [must be] so

overwhelming that it [makes] this contrary evidence unacceptable as a matter of law." ***NLRB v. L.C. Ferguson and E.F. Von Seggern***, 257 F.2d 88, 92 (5th Cir. 1958). Accord ***NLRB v. John Langenbacher Co.***, 398 F.2d 459, 463 (2nd Cir. 1968).

B. The ALJ's conclusions that Respondent knew of the concerted nature of Lapham and Hall's activities is amply supported by the record. *(Respondent's Exception Two)*

Respondent mischaracterizes the ALJD in arguing that the ALJ relied "solely" on the "hearsay"[4] statement of Reynolds Sr. (Br. p. 9) in finding Respondent had knowledge of the concerted nature of Lapham and Hall's protected activities. Rather, the ALJD is replete with the ALJ's reasoning, amply supported by the record, for concluding Respondent had knowledge. As quoted by Respondent (Br. p.9), the ALJ states that he viewed several facts collectively, which he identifies specifically, in determining that Respondent knew of the concerted nature of the prevailing wage claims filed by Lapham and Hall before the suspension notices were prepared (ALJD, p.17, lines 25-50).

Specifically, the ALJ relied upon the following in making the determination that Respondent knew of Lapham and Hall's protected concerted activities: that Lapham and Hall worked together as the only nonunion employees on Reynolds Jr.'s crew; the Detroit water department's letter to Respondent identified Hall, Lapham and John Laginess (Laginess no longer worked at Respondent at the time); Lapham informed admitted supervisor and agent Reynolds Sr. of his intention to "pursue prevailing wage **claims**

[4] As discussed above (p.5), the statement is not hearsay, but an exclusion from hearsay under FRE 801(d)(2)—an admission by a party-opponent.

(emphasis added) (ALJD p.17, lines 36-37; Tr. 26);"[5] Reynolds Sr. did not testify so there is no record testimony to controvert Lapham's version of the conversation where he told of his intention to pursue prevailing wage claims; Reynolds Sr. did not testify to deny Lapham's statement that Reynolds Sr. admitted during the May 26 meeting that the suspension was due to the prevailing wage claims; Young did not testify with regard to Reynolds Sr.'s statement during the May 26 meeting; and the ALJ discredited Fred Erdman's denials that he knew nothing about the prevailing wage claims until a month before the hearing. (JX 1, Tr. 26, 29, 51, 494)

Moreover, even without the ALJ's detailed elucidation with regard to the additional facts and credibility determinations which led him to conclude Respondent was aware of Lapham and Hall's protected concerted activities, Reynolds Sr.'s failure to deny Lapham's testimony that Reynolds Sr. stated "You guys know this has nothing to do with a safety violation; this has to do with you guys filing prevailing wage claims against Ferguson" at the May 26 meeting constitutes an admission, as discussed above (p.5).

III. The ALJ correctly found that the suspensions and layoffs of Cook, Lewis, and Reynolds Jr. were done to mask Respondent's discriminatory motive for the suspensions and layoffs of Lapham and Hall. *(Respondent's Exception Three)*

Respondent inaccurately argues that the ALJ's conclusion that the suspensions and layoffs of Cook, Lewis, and Reynolds Jr. were done to mask Respondent's discriminatory

[5] While Respondent asserts that the ALJ relies on the fact that Lapham told Reynolds Sr. that he was going to file a [singular] prevailing wage claim, ALJD found and the record shows that Lapham also told Reynolds Sr. of his intention to "pursue prevailing wage claims [plural]." (ALJD p. 17, lines 32-33, lines 36-37; Tr. 26)

motive for the suspensions and layoffs of Lapham and Hall failed to meet the requirements of the Board's Rules and Regulations Section 102.45(a). In so arguing, Respondent cites a single paragraph (ALJD p. 18, lines 37-47), without acknowledging the ALJ's more detailed analysis throughout his decision in consideration of Respondent's failed *Wright Line* defenses (ALJD, p. 19-21).

In addition to direct evidence of unlawful motivation, evidence of suspicious timing, failure to adequately investigate the May 15 accident, departures from past practices, tolerance of behavior for which the alleged discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense, all support a finding that the Respondent acted with unlawful motivation in suspending Reynolds Jr.'s crew.

Suspicious timing supports an inference of illegal motivation. ***La Gloria Oil and Gas Company.***, 337 NLRB 1120, 1124 (2002), affd. 71 Fed.Appx. 441 (5th Cir. 2003); ***Detroit Paneling Systems, Inc.***, 330 NLRB 1170 (2000). The evidence establishes that Lapham and Hall filed their prevailing wage claims together on March 2, but the City of Detroit Contracts and Grants Department (DGCG) did not reveal their identities to Respondent until May 18 when it received DCGC's letter setting forth their names and the amount of their claims (JX1; Tr. 192). When the accident occurred on May 15, Respondent had no knowledge that Lapham and Hall filed prevailing wage claims and continued to allow Reynolds Jr.'s crew to work. Although Erdman expressed his consternation to White regarding the accident, it was only after learning of the prevailing wage claims that Respondent suspended the crew. The timing of the suspension supports

an inference that it was unlawfully motivated.

Similarly, Respondent failed to adequately investigate the conduct for which Reynolds Jr.'s crew was allegedly suspended. An employer's failure to conduct a meaningful investigation is regarded as an important indicium of discriminatory intent. ***New Orleans Cold Storage & Warehouse Co., Ltd.,*** 326 NLRB 1471 (1998), enfd. 201 F.3d 592 (5th Cir. 2000); ***Washington Nursing Home, Inc.,*** 321 NLRB 366, 375 (1996); ***K&M Electronics, Inc.,*** 283 NLRB 279, 291 fn. 45 (1987). The investigation of the alleged misconduct of the May 15 accident could barely have been more superficial and tendentious.

The uncontroverted evidence shows that Respondent only sought incident reports from Lauderdale's crew the Monday following the accident (the same day Respondent learned of the prevailing wage claims filed by Lapham and Hall). Respondent sought an incident report from Lauderdale himself, but only after complaint issued in this case, four months after the fact. Isaac Boyer, Respondent's safety inspector, submitted an incident report and photographs as part of his job duties, and Reynolds Jr. submitted an incident report and photographs on his own initiative. The only agent of Respondent that the record establishes reviewed the incident reports was Fred Erdman, Respondent's general superintendent, who reviewed it only after he made his recommendations regarding discipline to project executive Al White, and he did not disclose to White or anyone else the content of the incident reports. (Tr. 518-521) There is no evidence that anyone from Respondent reviewed witness statements collected by project manager Donald Spencer or photographs taken by Boyer and Reynolds Jr., or that anyone other than Erdman in his

after-the-fact review considered any of the incident reports. Respondent's "investigation" shows no real interest in discerning the truth of who, if anyone, was responsible for the May 15 accident.

In addition, the record reveals that the investigation process exercised by Respondent in the Livernois case deviated from standard practice. The uncontroverted evidence established that Boyer is the only person who conducts accident investigations, and he submits reports of safety violations, then human resources makes decisions as to whether discipline is appropriate. Here, Boyer testified that he did not report any safety violations related to the May 15 accident. (Tr. 580) While Boyer testified that others could report safety violations, the record is devoid of evidence that anyone other than he ever did so. Similarly, human resources director Young testified that she was not involved in the decision to suspend Reynolds Jr.'s crew. (Tr. 639) Despite the lack of prior disciplines for Reynolds Jr.'s crew, and despite the fact that Respondent maintained a progressive disciplinary policy, all received suspensions for this first offense.

Unrebutted evidence also established that Respondent previously tolerated accidents occurring on jobsites without reprisals. To that end, Reynolds Jr. testified that in about November 2008 his excavator hit a light pole in a car dealership lot, and the pole damaged a car. He informed the superintendent of the accident which cost Respondent $1,500, and the excavator in question was not disciplined. (Tr. 317, 318, 321) Lapham testified that he was unaware of anyone being disciplined for involvement in accidents prior to May 15, and he was not disciplined for property damage that he caused to a car. (Tr. 68-69)

Respondent's disparate treatment of Reynolds Jr.'s crew also creates a strong inference of unlawful motivation with regard to their suspensions. The uncontroverted evidence establishes that Lauderdale's crew set out the barrels changing the traffic pattern along with Reynolds Jr.'s crew on May 15. Lauderdale's crew was in close proximity to the site of the accident at the time it occurred, while Reynolds Jr.'s crew was nowhere near the accident site. Respondent issued no discipline to Lauderdale's crew for the May 15 accident. Evidence of disparate treatment is one of the more reliable hallmarks of unlawful discrimination. ***Avondale Industries, Inc.***, 329 NLRB 1064, 1066 (1999); ***The New Otani Hotel & Garden***, 325 NLRB 928 fn. 2 (1998).

Further, Respondent's false reasons asserted in its defense support an inference of unlawful motivation. Erdman, who admitted he was not the decision maker with regard to the determination to suspend Reynolds Jr.'s crew, stated that he held Reynolds Jr. responsible for the accident because he had failed to follow directions and had put the public and crew members in jeopardy. He stated that he based this assessment on what he saw of traffic control when he drove up to the jobsite. (Tr. 460, 492). Nonetheless, he did nothing to change the set up of the "unsafe" traffic control once he arrived. (Tr. 485) Moreover, Erdman testified that the reason Lapham, Hall, Lewis, and Cook were held responsible for the accident was because they were on Reynolds Jr.'s crew and they took part in setting up a situation on a project that was unsafe and negligent. (Tr. 467). However, Lauderdale and his crew took part in setting up the change in traffic control too, but were not disciplined. (Tr. 41, 111, 244-245, 307)

In sum, the ALJ's correctly concluded that Counsel for the General Counsel established its prima facie case that Respondent suspended and laid off Reynolds Jr.'s crew in retaliation for Lapham and Hall's protected concerted activities. The statement Respondent repeatedly and incorrectly refers to as "hearsay" is an exclusion from hearsay under FRE 801(d)(2), and constitutes an admission. In addition, the record amply supports the ALJ's specific and detailed conclusion that Respondent had knowledge of the concerted nature of Lapham and Hall's filing of prevailing wage claims.

IV. The ALJ correctly found that Respondent failed to establish that it would have suspended and laid off Reynolds Jr.'s crew in the absence of Lapham and Hall's protected concerted activities.

(Respondent's Exception Four)

A. The Suspension

The ALJ correctly found that suspending the entire Reynolds Jr. crew, when only Reynolds Jr. was involved in the decision to move the traffic barrels, establishes that Respondent's action in suspending the entire crew was a pretext and designed to disguise the fact that the motivation behind its action was the protected concerted activities of Lapham and Hall. (ALJD p. 21, lines 1-5)

The record failed to establish *who* made the decision to suspend Reynolds Jr. and his crew. Erdman testified that he made assessments about who was responsible for the May 15 accident, then communicated his assessments and recommendation regarding discipline to Al White. (Tr. 460, 488) Erdman then testified that the decision to suspend the crew was "between human resources and Al White." (Tr. 488) He then admitted that

he did not know who made the decision to discipline Reynolds Jr.'s crew. (Tr. 492) Young testified that she had no part in deciding to suspend Reynolds Jr.'s crew. (Tr. 639) Therefore, no witness with personal knowledge or competence to testify with regard to Respondent's asserted basis for the suspension testified, and Counsel for the General Counsel's case establishing that Lapham, Hall, Lewis, Cook and Reynolds Jr. were suspended due to Lapham and Hall's protected concerted activities remains unrebutted.

Moreover, even considering Erdman's speculations as to the asserted basis for suspending Reynolds Jr.'s crew, Respondent's ***Wright Line*** defense fails. As discussed above, no evidence was adduced at hearing that Respondent had disciplined employees for accidents in the past. Reynolds Jr. and Lapham both testified with regard to property damage that they caused in the past without suffering disciplines.[6] (Tr. 67-68, 317, 318, 321) Respondent chose not to suspend or give even lesser discipline to Lauderdale and his crew for the May 15 accident. (Tr. 307) In sum, the ALJ correctly found that Respondent failed to demonstrate, by a preponderance of the evidence, that its suspension of Reynolds Jr.'s crew would have taken place even in the absence of protected concerted activities.

B. The Layoff

With regard to the layoff, Respondent again misrepresents the ALJD. Respondent argues that the ALJ failed to consider "the dire economic factors at play" when Respondent decided layoffs were necessary. In fact, the ALJ found that the evidence

[6] Respondent has made no claim that prior accidents had any role contributing to the decision to suspend Reynolds Jr.'s crew.

supported a finding that Respondent may had had legitimate business reasons to lay off some employees on June 4, 2009. (ALJD p. 21, lines 39-40). However, the ALJ also found, correctly, that Respondent chose to layoff the employees they did—Lapham, Hall, Lewis, Reynolds Jr., and Cook—due to Lapham and Hall's filing of prevailing wage claims. (ALJD p. 21, lines 40-42) As the ALJ noted, the Board has held that even if there may be legitimate reasons for a layoff generally, if the selection of employees for layoff is based on a discriminatory motive, those layoffs are violative of the Act. ***W.F. Bolin Co***, 311 NLRB 1118, 1119 (1993), enfd 99 F.3d 1139 (6th Cir. 1996); ***Knoxville Distribution Co.***, 298 NLRB 688 (1990).

Similarly, Respondent's assertion that the ALJ failed to acknowledge Sherry Bonds' testimony regarding the reasons for the layoffs is another mischaracterization. Bonds testified that she played no part in deciding which employees would be laid off (Tr. 652), so she did not provide any testimony relevant to the selection of Reynolds Jr.'s crew for layoff.

Erdman, then, was the only Respondent agent who testified regarding the decision to lay off Reynolds Jr.'s crew. He testified that he, along with White and superintendents Reynolds Sr. and Cara Woods, decided to keep the most productive crews, based on a review of weekly production sheets. Erdman implied that Reynolds Jr.'s crew was the least productive crew. (Tr. 468, 469, 538-539) Respondent did not, however, enter any of these production sheets into evidence. As the ALJ correctly noted (ALJD p.22, lines 35-39), a party's failure to offer documentation in support of witness testimony warrants

an inference that the documentation would not support the party's position. See ***Thermal Masters, Inc.***, 318 NLRB 43 (1995); ***Bay Metal Cabinets, Inc.,*** 302 NLRB 152, 178-79 (1991).

Moreover, Erdman gave contradictory and internally inconsistent testimony with regard to how productivity was determined, and what period of time was used to assess productivity for layoff selection purposes. Erdman stated that they knew that they were going to layoff a utility crew, and the four of them sat down together and looked at the weekly production sheets for each crew. (Tr. 538) Erdman testified that production was measured by the amount of footage of pipe installed in the ground by day as taken from foremen' daily time sheets. (Tr. 523) It was established, however, that the foreman does not always put the footage installed on the daily time sheets, and that the sheets might not reflect lack of productivity due to bad weather and waiting for supplies. (Tr. 524-525)

Erdman then testified that when missing from the foremen' daily time sheets, Respondent obtains the footage of pipe installed from the city of Detroit Water Department inspector. (Tr. 544-545) However, he then testified that the inspector's report is only obtained by Respondent when requested and he did not know how often they were requested. (Tr. 545) Erdman stated that the inspector's report does not reflect variables such as bad weather, employees being sent home, etc. (Tr. 545) Again, as with the production sheets, Respondent offered no inspector's reports into evidence. .

Erdman also vacillated with regard to the time frame considered when selecting Reynolds Jr.'s crew for layoff. First he stated that their productivity was considered from about June 15, 2008. (Tr. 532) He then stated that productivity was considered from the

beginning of 2009. (Tr. 540). Finally, he stated that Respondent only considered production sheets for the week prior to layoff, when Reynolds Jr.'s crew was on suspension and performed no work. (Tr. 543) Erdman's inconsistent and contradictory testimony, unsupported by any actual documents allegedly used to determine productivity, shows that Respondent's claims that Reynolds Jr.'s crew were chosen for layoff because they were the least productive crew were pretextual and "furnishe[s] the excuse rather than the reason for [its] retaliatory action." ***Philo Lumber Company, Inc.,*** 236 NLRB 647, 650 (1978).

In addition, despite Respondent's claims of lack of work, the record is replete with examples of overtime worked by utility crews such as Reynolds Jr.'s crew after their layoff. (GCX17-45) The record also shows that Respondent hired employees doing the same type of work as Reynolds Jr.'s crew after their layoff. (GCX22; Tr. 409, 655-56) Although Respondent introduced into evidence layoff notices for other employees, it provided no context for those layoffs. (RX 5) None of the witnesses could identify in which divisions of the Respondent the laid off employees worked so the layoff notices are of scant probative value. (Tr. 629, 652)

Further, Reynolds Jr.'s crew was the only full crew laid off, and the only employees for whom productivity was allegedly used as the factor in determining their selection for layoff. (Tr. 537) Erdman testified that for the other employees laid off, Respondent looked at their "work ethic" in selecting them for layoff. (Tr. 537)

Accordingly, the record evidence amply supports the ALJ's conclusion that

Respondent failed in its burden of showing that Reynolds Jr.'s crew would have been laid off even in the absence of protected concerted activities.

CONCLUSION

Based upon the entire record in this case and upon the arguments recited above, it is respectfully requested that the Board deny Respondent's exceptions in their entirety. It is further requested that the Board affirm the ALJ's findings of facts, conclusions of law, and Recommended Remedy and Order.

Respectfully submitted this 12th day of July, 2010.

___/s/_Darlene Haas Awada_____
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CERTIFICATE OF SERVICE

I certify that on the 12th day of July, 2010, I electronically served copies of the Counsel for the General Counsel's Brief to the Administrative Law Judge on the following parties of record:

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