

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MIKLIN ENTERPRISES, INC. d/b/a
JIMMY JOHN'S

and

INDUSTRIAL WORKERS OF THE WORLD

Cases 18-CA-19707
18-CA-19727
18-CA-19760

CROSS-EXCEPTIONS
ON BEHALF OF THE ACTING GENERAL COUNSEL

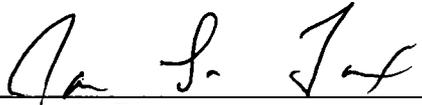
On April 20, 2012, Administrative Law Judge Arthur J. Amchan issued a Decision in this case. On May 21, 2012 (after receiving a brief extension of time for doing so), Respondent filed exceptions and a supporting brief. Acting General Counsel files these Cross-Exceptions, along with a Brief in Support of the Acting General Counsel's Cross-Exceptions. Acting General Counsel's cross-exceptions are:

1. To correct Judge Amchan's apparent inadvertent conclusion of law that Respondent violated Section 8(a)(3) of the Act when Respondent engaged in the conduct described in numbered paragraphs 1-4, in view of Judge Amchan's analysis preceding the conclusion, as well as Board law, which support a conclusion that Respondent's conduct described in paragraphs 1-4 violates only Section 8(a)(1) of the Act (ALJD 15:31-46).
2. To the dismissal of complaint allegations that Respondent, by its supervisors, unlawfully disparaged employees in certain Facebook postings. (ALJD 14:22-31).
3. To the dismissal of the complaint allegation that Respondent unlawfully interrogated an employee (ALJD 15:1-8).

4. To the refusal to find that Respondent discharged six employees in violation of Section 8(a)(3) by treating employees who were open Union supporters more harshly than employees who were not (ALJD 14, fn. 12).

Dated at Minneapolis, Minnesota, this 1st day of June, 2012.

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By: 
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**ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

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**ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, the Acting General Counsel files this brief in support of cross-exceptions. By separate filing, the Acting General Counsel also filed an answering brief to Respondent's exceptions.

In his April 20, 2012 Decision, Administrative Law Judge Arthur J. Amchan sustained certain allegations of the complaint in this matter, and dismissed other allegations. Specifically, Judge Amchan sustained the complaint allegation that Respondent illegally discharged six employees and disciplined an additional three employees because of the employees' protected concerted activities. In addition, Judge Amchan sustained certain complaint allegations related to Facebook postings involving admitted agents and supervisors of Respondent.

On the other hand, Judge Amchan concluded that certain other Facebook postings by Respondent's admitted supervisors and agents do not violate the Act. However, the Acting General Counsel contends that Judge Amchan misapplied Board law in dismissing these allegations. In addition, Judge Amchan dismissed an allegation that Respondent's owner illegally interrogated an employee. Again the Acting General Counsel contends that Judge Amchan misapplied Board law in dismissing this allegation. Judge Amchan also refused to conclude that Respondent terminated six employees because of their Union activity. The Acting General Counsel also excepts to this conclusion.

The Acting General Counsel does not except to any of Judge Amchan's factual findings. As will be evident herein, in Acting General Counsel's view, Judge Amchan's factual findings support opposite legal conclusions from those reached by Judge Amchan with regard to those complaint allegations that are the subject of these cross-exceptions.

The first section of this brief is in support of Acting General Counsel's exception to Judge Amchan's dismissal of complaint allegations related to certain Facebook postings by Respondent's supervisors and agents. The second section is in support of the exception to Judge Amchan's dismissal of the complaint allegation related to interrogation. The final section explains the Acting General Counsel's argument in support of the exception that Respondent violated Section 8(a)(3) of the Act by discharging six employees because the evidence demonstrates that they were discharged because of their support for the Union—not because their involvement in certain postings was unprotected.

I. ACTING GENERAL COUNSEL'S EXCEPTIONS TO JUDGE AMCHAN'S DISMISSAL OF ALLEGATIONS THAT RESPONDENT DISPARAGED EMPLOYEES IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

Judge Amchan dismissed certain 8(a)(1) allegations related to Respondent's disparagement of employees. The Acting General Counsel does not except to Judge Amchan's description of the record evidence of the disparagement. Thus, as found by Judge Amchan, this disparagement occurred on a Facebook page that could be accessed by anyone with a Facebook account; the Facebook page in question was maintained by an employee opposed to the Union effort; and the Facebook page had members who included both rank-and-file employees, assistant store managers, store

managers, and owner Rob Mulligan (ALJD 8:3-10). Judge Amchan also succinctly and accurately describes the content of the Facebook postings that Acting General Counsel alleges constitute disparagement (ALJD 8:22-27; 8:29-35). In essence, Respondent's supervisors/agents, including Owner Robert Mulligan, referred to Union supporter David Boehnke as the "Unibrowner"—an apparent reference to Boehnke's eyebrows and to "Unibomber" Ted Kaczynski; and Boehnke was depicted with feces on the bill of his cap in a separate Facebook post, which both an assistant store manager and store manager urged Respondent's employees to post everywhere.

Judge Amchan dismisses the disparagement allegations of the complaint solely because "the Act countenances a significant degree of vituperative speech in the heat of labor relations," quoting *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004). Judge Amchan further notes that "words of disparagement alone concerning a union, its officials or supporters are insufficient for finding a violation of Section 8(a)(1)," citing *Sears Roebuck Co.*, 305 NLRB 193 (1991) (ALJD 14:22-28).

The Acting General Counsel respectfully suggests that Judge Amchan misreads Board law with regard to the Board's views of employer disparagement of *employees* who engage in Section 7 activity. The *Sears Roebuck Co.* case is inapplicable because in that case the employer's labor relations manager disparaged not employees who supported a union, but disparaged a union official. As the Board noted in the case, "Words of disparagement alone concerning *a union or its officials* are insufficient for finding a violation of Section 8(a)(1)." 305 NLRB at 193 (emphasis added). Similarly, *Trailmobile Trailer* is inapposite. While the Board is not entirely clear, it appears that it focused on negative comments made by the employer directed at union officials, in

view of the Board's reference to the *Sears Roebuck* case. 343 NLRB at 95. The Board certainly does not suggest in the *Trailmobile Trailer* case that it is reversing years of Board law protecting employees engaged in Section 7 activities from disparagement by employers.

Thus, Acting General Counsel requests that the Board carefully reconsider Judge Amchan's conclusion that Respondent did not disparage employees. The allegations in the instant case differ from the cases relied on by Judge Amchan in view of Judge Amchan's recitation of the facts—which clearly shows that Respondent's disparagement was directed at its own employees. The Board affirmed in *Romal Iron Works Corp.*, 285 NLRB 1178 (1978), a decision by an administrative law judge in which he found that slurs and vulgarities impact “directly on a person's sensitivities and it is natural for one to avoid being made the object thereof.” *Id* at 1182. See also *Wal-Mart Stores, Inc.*, 350 NLRB 879, 880 (2007) (telling employee who supported union that he was not worthy of working for company constitutes 8(a)(1) disparagement); *Rankin & Rankin, Inc.*, 330 NLRB 1026, 1037 (2000) (labeling employees who support union as “fucking queers” constitutes disparagement in violation of Act). It is hard to imagine more disparaging conduct than labeling an employee engaged in concerted protected activity as being akin to a terrorist, or managers urging employees to post everywhere a picture of the same employee with excrement on his head.

II. ACTING GENERAL COUNSEL'S EXCEPTION TO JUDGE AMCHAN'S REFUSAL TO CONCLUDE THAT RESPONDENT ILLEGALLY INTERROGATED AN EMPLOYEE

The facts related to this allegation are as set out by Judge Amchan in his decision (ALJD 8: 40 - 9:4). Quite simply, Owner Michael Mulligan asked employee

Micah Buckley-Farlee if employee Mike Wilklow knew that Respondent was reimbursing Wilklow for damage to Wilklow's bicycle. Buckley-Farlee stated that he believed employee Wilklow was aware of the fact that he was being reimbursed. Mulligan then asked if Wilklow was happy about the reimbursement and "whether Wilklow was ready to support the Company now."

In dismissing that the above constituted an unlawful interrogation, Judge Amchan concluded that both Buckley-Farlee (the employee being questioned) and Wilklow (the employee who was not present but whom the conversation was about) were active Union supporters, and that therefore *Rossmore House*, 269 NLRB 1176 (1984), and *Norton Audubon Hospital*, 338 NLRB 320 (2002), suggest that Mulligan did not engage in unlawful interrogation. First, the Acting General Counsel respectfully notes that *Norton Audubon Hospital* (correctly cited as *In re Norton Healthcare, Inc.*) does not support Judge Amchan's conclusion because in that case the Board majority concluded the interrogation was unlawful.

More fundamentally, *Rossmore House* and subsequent cases applying it make clear that not all interrogation of known union supporters is lawful. Rather, the test is whether under all of the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act. 269 NLRB at 1177. Only one of the circumstances to consider is whether the employee being questioned is an open union supporter.

The Acting General Counsel concedes that employees Buckley-Farlee and Wilklow are open and known supporters of the IWW. However, other circumstances suggest that the interrogation is unlawful. First, the interrogation was by one of

Respondent's owners, not by a low-level supervisor. Second, Mulligan questioned one employee (Buckley-Farlee) about another employee's support for the Union. The Board has held that the fact that the interrogator sought information about other employees, and not simply about the Union views of the employee being questioned, supports finding a violation. *Cumberland Farms*, 307 NLRB 1479 (1992). Finally, Mulligan does not simply ask about Wilklow's continuing support of the IWW. Rather, he couches the question in terms that suggest that because Respondent assisted an employee financially, therefore the employee's attitude toward the company should change.

III. ACTING GENERAL COUNSEL'S EXCEPTION TO JUDGE AMCHAN'S REFUSAL TO CONCLUDE THAT RESPONDENT ILLEGALLY DISCHARGED SIX EMPLOYEES EVEN IF THEIR CONDUCT WITH REGARD TO THE POSTERS WAS UNPROTECTED

In footnote 12 on page 14 of his decision, Judge Amchan summarily rejects Acting General Counsel's argument that Respondent violated the Act by discharging six employees whether their involvement in the posters is unprotected or protected. To quote Judge Amchan, "I find no illegal discrimination in treating the employees who planned and organized the flyer postings more harshly than those 'foot soldiers' who did the posting. An analogous situation would be terminating an employee who fomented strike misconduct but did not participate in the misconduct." The Acting General Counsel respectfully submits that this conclusion by Judge Amchan is unsupported by the record and by Board law.

To begin with, it is Acting General Counsel's position that even if the posting related to sick leave is unprotected, the evidence compels a conclusion that

Respondent discharged the six employees for their involvement in supporting the Union—and not because of their involvement in the posting related to the sick leave issue. In fact, as demonstrated below, Respondent’s owner *admitted* in his testimony that Respondent singled out the six for discharge because of their leadership role throughout the IWW’s dealings with Respondent. The six employees discharged are Erik Forman, Mike Wilklow, Davis Ritsema, Max Spektor, David Boehnke and Micah Buckley-Farlee.¹

Unrebutted record evidence clearly supports a conclusion that the six discharged employees were linchpins in the IWW efforts to organize employees at Respondent’s stores. Erik Forman distributed authorization cards, organized Union meetings, signed and filed unfair labor practice charges against Respondent, drafted and distributed Union information, helped launch the Union’s website, wore Union buttons, and served as the Union’s observer at the Board election held in October 2011 (Tr. 88-93, 98-103; GC 30, 33, 36, 37). Mike Wilklow testified that he “pretty much breathed Jimmy John’s union for a long time.” (Tr. 144). He engaged in conduct similar to Forman, including wearing buttons, leafleting on behalf of the Union, and serving as the Union’s observer at the Board-conducted election (Tr. 143-145, 153, 162-163; GC 39, 47-50). Davis Ritsema was a member of the Union’s organizing committee; was a contact person for press releases; staffed the Union phone bank; and circulated petitions on behalf of the Union, among other open conduct in support of the Union (Tr. 167-172; GC 38, 44, 45). Max Spektor created and posted Union flyers, participated in fund raising and the

¹ Judge Amchan inadvertently misspelled employees’ names in his decision. The correct spellings are as indicated in this brief.

Union's phone bank, and urged coworkers to support the Union (Tr. 191-192, 199; GC 44, 52, 55). David Boehnke testified that he did "everything I could do to support the Union," including serving as a Union contact person for press releases, posting Union literature, and becoming a core member of the Union's organizing committee (Tr. 214-218; GC 32, 34). Boehnke is the employee clearly disparaged by anti-Union employees and Respondent's supervisors and agents. Finally, Micah Buckley-Farlee wore pro-Union buttons, posted Union literature, served as a contact person for Union press releases, and regularly discussed the merits of unionization with coworkers (Tr. 264-265; GC 38, 39, 55).

How is it that Respondent decided to terminate these six Union activists for their involvement in the sick pay posting, while merely issuing written warnings to three other employees? Record evidence suggests that it is because the six were the core leadership of the Union. First, of the six employees terminated, at least three were not even involved in actually putting up posters on March 20, 2011. These employees include Erik Forman, Micah Buckley-Farlee and Davis Ritsema (Tr. 119-120, 178-179, 268-269; GC 6, 9, 10(a) and 10(b)). In fact, even Judge Amchan notes at footnote 12 that "...it is possible that Micah Buckley-Farlee's involvement in planning the postings is too attenuated to justify his termination even if the posting was unprotected (citation omitted) ... Buckley-Farlee did not attend the March 10 meeting and did not participate in the flyer posting. *His only connection to this activity was being listed as a contact in a press release which mentioned the Union's intention to post the sick day flyers.*" (emphasis added).

It is precisely the point that Judge Amchan makes with regard to Buckley-Farlee that the Acting General Counsel is making in this exception. Respondent discharged the six employees not for their involvement in preparing or in posting unprotected material, but for their involvement in Union activity leading up to the posting. Further evidence in support of Acting General Counsel's argument is contained in the letters of discharge. The letters make repeated references to "the Union," including to Respondent's refusal to "talk with the Union," the "Union press releases to the media," and other references to "the Union." Thus, the termination letters themselves make clear that Respondent viewed the effort to obtain paid sick leave as a Union effort, and perceived the six employees ultimately terminated as being involved in activity on behalf of the Union.

In fact, it is fair to say that Respondent's brief in support of its exceptions, as well as its citations to the record regarding the Union activities of the six discharged employees, is all the Board needs to read to find ample evidence to support this exception. The entire brief is an indictment of the six discharged employees' Union activities and Respondent's claim that the six employees were really involved in a continuation of their activities on behalf of the IWW when they sought paid sick leave for employees in the spring of 2011. Thus, it is very clear from Respondent's brief that from Respondent's perspective it discharged the ringleaders of the Union effort. To quote Respondent's president Michael Mulligan:

...throughout this time period, the names of the individuals that we discharged were the names on the various correspondence, that were involved in various meetings, that whose (sic) names were on press releases and were clearly, in our view, the ones who had developed this plan and strategy and had for the most part executed it. The other individuals, we had not seen their

names on any of the correspondence. *They had not personally contacted us.* (emphasis added) (Tr. 287-288). We felt that they were simply ... people who, because they were sympathetic to the union, had been asked to help. But in our view, *the six people that we discharged were the developers and the leaders of the entire matter* (emphasis added).

(Tr. 287-288; see also Respondent' brief in support of exceptions, page 54).

To be clear, had Respondent discharged all nine employees, rather than discharging six and warning three, the Acting General Counsel would not be making this argument. However, Respondent chose to issue written warnings to the three employees it actually observed posting the sick day posters on March 20, whom it viewed as mere sympathizers of the Union, while discharging six employees who were leaders in the Union—some of whom were out of town on March 20 and therefore could not have been involved in the actual posting

Respondent (and perhaps Judge Amchan) maintains that the difference between the treatment of the six discharged employees and three disciplined employees is not involvement in Union activity, but the six employees' involvement in planning for putting up the "unprotected" posting. Judge Amchan analogizes the role of the six discharged employees to an employee who foments strike misconduct but does not engage in strike misconduct. However, Judge Amchan cites no Board law in support of his analogy. More importantly, nothing in the record suggests that Respondent discharged the six employees for fomenting unprotected activity. Rather, as clearly stated by Michael Mulligan, the six were discharged because they were developers and leaders of the entire matter. Respondent's own brief in support of its exceptions is very clear that Respondent's goal was to be rid of the leaders of the effort to obtain Union representation.

Finally, Board law has long established that it is important to determine the true underlying reason for discharge, and if that is the reason, it is no defense that

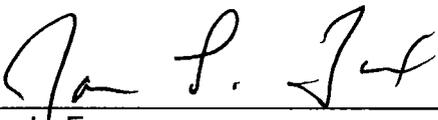
Respondent might have had a legitimate reason:

It has long been established that for the purpose of determining whether or not a discharge is discriminatory in an action such as this, it is necessary that the *true*, underlying reason for the discharge be established. *That is, the fact that a lawfully [sic] cause for discharge is available* is no defense where the employee is actually discharged because of his Union activities.

Shattuck Denn Mining Corp v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) (emphasis added), enforcing 151 NLRB 1328 (1965). Thus, it is Acting General Counsel's position that, even if the Board or a Court of Appeals were to conclude that the posters were unprotected, the evidence clearly supports a conclusion that the discharged employees—who were treated more harshly than three employees who participated in putting up the posters—were discharged because of their leadership of employee efforts to gain representation by the IWW.

Dated at Minneapolis, Minnesota, this of 1st day of June, 2012.

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By: 
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CERTIFICATE OF SERVICE

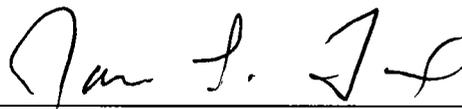
I hereby certify that the foregoing Cross-Exceptions on Behalf of the Acting General Counsel and Acting General Counsel's Brief in Support of Cross-Exceptions were electronically filed on the NLRB's website, and emailed to the parties listed below on June 1, 2012:

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