

**UNITED STATE OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MIKLIN ENTERPRISES, INC., D/B/A JIMMY JOHN'S,  Respondent,  and  INDUSTRIAL WORKERS OF THE WORLD,  Charging Party	Cases 18-CA-19707  18-CA-19727  18-CA-19760
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**RESPONDENT MIKLIN ENTERPRISES, INC.'S ANSWERING BRIEF  
TO CROSS-EXCEPTIONS AND SUPPORTING BRIEF OF  
ACTING GENERAL COUNSEL**

Dated: June 18, 2012

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**I. INTRODUCTION**

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Respondent MikLin Enterprises, Inc. ("Respondent" or "MikLin") files this Answering Brief to the Acting General Counsel's Cross-Exceptions to the April 20, 2012 decision of Administrative Law Judge Arthur Amchan and Brief in Support thereof.

Respondent MikLin agrees with Acting General Counsel's Cross-Exception 1 that Judge Amchan's conclusion that the actions referenced in numbered paragraphs 1-4 did not constitute a violation of Section 8(a)(3) was inadvertently erroneous and should be corrected.<sup>1</sup> The Acting General Counsel had alleged only that the conduct in question unlawfully interfered with employees' exercise of their Section 7 rights, a violation of Section 8(a)(1), but not that it constituted unlawful "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" as proscribed by Section 8(a)(3). Accordingly, and given that there is no evidence in the record to support, or even suggest, such a violation, MikLin supports the Acting General Counsel's position that Judge Amchan's conclusion in that regard was clearly inadvertent and intended to find only a violation of Section 8(a)(1) as alleged.

MikLin will answer the remaining cross-exceptions in the order set forth in the Acting General Counsel's Brief in Support thereof.

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<sup>1</sup> MikLin continues to maintain, however, that neither did those actions violate Section 8(a)(1).

## II. THE ALJ CORRECTLY DISMISSED ALLEGATIONS THAT CERTAIN FACEBOOK POSTINGS BY MIKLIN MANAGEMENT PERSONNEL UNLAWFULLY DISPARAGED EMPLOYEE DAVID BOEHNKE.

[Cross-exception 2: “To the dismissal of the complaint allegation that Respondent unlawfully disparaged employees in certain Facebook postings. (ALJD 14:22-31).]

The Acting General Counsel contends that the body of Board law cited by Judge Amchan as authority for his conclusion that “words of disparagement alone” are insufficient to support a finding of Section 8(a)(1) is limited to disparagement of a union or its “officials,” not employees. While the disparaging remarks in *Sears, Roebuck & Co.*, 305 NLRB 193 (1991) did relate to the Union as an organization, no union “official” was the specific target of that assertion. In that case, what the Employer’s Labor Relations Manager *actually* said was that “the *Union* might send *someone* out to break legs in order to collect dues.” While the status of the “someone” referenced was not specified, that general statement could have referred to an employee who supported the union, a union “official” or a hired thug, for that matter. Accordingly, the case does not stand for the proposition that disparaging words about an employee who supports the union ipso facto constitute a violation of Section 8(a)(1).

*Trailmobile Trailers*, 343 NLRB 95 (2004), decided some 13 years after *Sears Roebuck*, involved statements directed not only to non-employee “union officials,” but also to two employees who served as plant stewards. In that case, the Board rejected the ALJ’s finding regarding the key legal issue, that the statements violated Section 8(a)(1) because they were demeaning and conveyed the impression that the employees' union activities were futile.

While MikLin submits this point is not critical to the Board’s rejection of Cross-Exception 2, the Acting General Counsel offers no definition of “union official” in the context of this argument. David Boehnke, the target of the disparaging Facebook postings by co-workers for which the Acting General Counsel seeks to hold management personnel responsible, was a

member of the IWW “Organizing committee,” (Tr. 95, line 23). He was listed as the IWW contact person on the Union’s September 10, 2010 press release announcing the launch of the organizing campaign (GC-32)<sup>2</sup> and continued to be shown in this official capacity on numerous other press releases. (GC-33, GC-35, GC-36, GC-40; GC-41). He sent a text message to Rob Mulligan giving him a deadline for acceding to the Union’s demand for sick days or else suffer the consequences of the disparaging poster campaign, on which he signed off as “David Boehnke as a representative of the Jimmy John’s Workers Union” (GC-7). Aside from the fact that the cases cited by the Acting General Counsel do not expressly limit the “disparaging words alone” defense to disparaging comments about “union officials,” Boehnke’s clear leadership role qualifies him as such in this context. If David Boehnke is not a union “official” for purposes of this inquiry, then the “Jimmy John’s Workers Union/IWW” has no “officials” at all and, accordingly has no one who can act on its behalf in any capacity, which is clearly not the case.

The concededly distasteful postings on the Facebook page about David Boehnke found by Judge Amchan not to be a violation were not made in a coercive context. The election was October 22, 2010. As part of the January 10, 2011 settlement of prior unfair labor practice charges (with respect to which no Complaint issued) and objections to the election, the parties stipulated that the election results would be set aside, the Union withdrew the pending petition for an election, the critical period expired with the execution of the Stipulation, and it was agreed that no new critical period would commence unless and until a new petition were filed (GC-46). To date, there is no new petition. Thus, the context in which the Facebook comments were posted – including that they were not made in person to anyone, but electronically in cyberspace—must be considered. Moreover, Rene Nichols, Melissa Erickson and Robert

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<sup>2</sup> Exhibits received in evidence on behalf of the Acting General Counsel will be referenced as “GC-\_\_\_).”

Mulligan, all of whom had posted disparaging comments about prominent IWW supporters, all testified that they thought the Facebook page was private and that only “like-minded” people who opposed the Union would ever see it (Tr. 79, 84, 340).

Finally, The Acting General Counsel’s Brief in Support of Exceptions opines that “It is hard to imagine more disparaging conduct than labeling an employee engaged in concerned protected activity as being akin to a terrorist.”<sup>3</sup> In *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 708-709 (1992), enf. mem. 991 F.2d 786 (1<sup>st</sup> Cir. 1993) the Board noted, “Section 8(c) does not require fairness or accuracy, and does not seek to censor nastiness.”

MikLin submits it is no more disparaging than the litany of distasteful comments found lawful in numerous cases cited at page 60 of MikLin’s Post Hearing Brief to the ALJ: *Trailmobile Trailers*, 343 N.L.R.B. 17, (2004) (referring to union supporters as “monkeys,” people in the union or union representatives as “stupid,” “worthless,” “no good” and as a “fat ass”); *Evergreen America*, 348 NLRB 178 (telling employees that the union was related to gangsters); *Sears Roebuck*, 305 NLRB No. 23 (1991) (telling employees that the union might send someone out to break their legs in order to collect dues); *Salvation Army Residence*, 293 NLRB 944 (1989) (telling the employees that the union belonged to the mafia); *Camvac International*, 288 NLRB 816, 820 (1988) (informing employees about union officials’ reported connections to organized crime and criminal investigations of union pension funds); *Newsday Inc.*, 274 NLRB 86, 95 (1985) (telling employees that the union president was corrupt); *The Nestle Co.*, 248 NLRB 732, 737 (1980) (referring to union as “a bunch of crooks”); *Fayette Cotton Mill*, 245 NLRB 428 (1979) (stating that the union had “chickened out”); *North*

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<sup>3</sup> This an exaggerated reference to MikLin Vice President Rob Mulligan’s attempt at humor by referring to Mr. Boehnke on the Facebook page as the “Unibrowmer” – a made-up term combining a mocking reference to Mr. Boehnke’s heavy eyebrows with a portion of the name “Unibomber” given by the press to the deranged serial bomber Ted Kaczynski. Mr. Mulligan testified that this was “a joke.” (Tr. 52, lines 1-7).

*Kingstown Nursing Care Center*, 244 NLRB 54, 65 (1979) (stating that unions were “communistic”); *Poly-America, Inc.*, 328 NLRB 667 (1999), *affd.* in part and *revd.* in part 260 F.3d 465 (5<sup>th</sup> Cir. 2001) (stating that the Union was “no good,” that it had threatened burn the plant and that it would charge up to \$300 in monthly fees.)

Accordingly, the Board should reject the Acting General Counsel’s Exception 2.

**III. THE ALJ CORRECTLY DECLINED TO FIND THAT MICHAEL MULLIGAN UNLAWFULLY INTERROGATED MICAH BUCKLEY-FARLEE.**

[Cross-exception 3: “To the dismissal of the complaint allegation that Respondent unlawfully interrogated an employee (ALJD 15: 1-8).”]

MikLin agrees with the Acting General Counsel that the test of whether interrogation of a known union supporter is unlawful is “whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act.” *Rossmore House*, 269 NLRB 12176, 1177 (1984). However, MikLin also agrees with Judge Amachan’s rejection of the Acting General Counsel’s argument that the other factors<sup>4</sup> discussed in *Rossmore House* “suggest” that the interrogation was unlawful (Acting General Council’s Brief in Support of Cross-Exceptions at 5.)

The background of the conversation in this matter is that during a delivery run, employee Michael Wilklow had been in an accident in which his bicycle was damaged (Tr. 271, lines 11-14.) It has been MikLin’s practice to reimburse employees in similar situations for the cost of repairs (Tr. 278, lines 21-23; 299, lines 5-25.)

Micah Buckley-Farlee testified that in late January of 2011 (after the January 10, 2011 settlement), MikLin President Mike Mulligan initiated a conversation with him regarding MikLin’s reimbursement of Wilklow for the bicycle damage. Mr. Buckley-Farlee said the

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<sup>4</sup> The factors that may be considered include (a) the background, (b) the nature of the information sought, (c) the identity of the questioner, and (d) the place and method of the alleged interrogation. *Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217 (1985), citing *Rossmore House*.

conversation took place “in the front of” the Dinkytown store, and that “there were people around working,” but he could not recall who they were. He testified that Mr. Mulligan asked him if Mr. Wilklow knew MikLin would pay for the repairs to his bicycle. He said he told Mr. Mulligan he thought that Wilklow was aware of the impending reimbursement. It was Buckley-Farlee’s testimony, credited by the ALJ, that Mr. Mulligan then asked him if Wilklow was happy about that. Upon his reply to Mulligan that he thought Wilklow was happy, he said Mulligan then asked him if Wilklow was “ready to support the Company now.” Buckley-Farlee replied that he would have to ask Wilklow, but Mr. Mulligan asked him not to do so. Buckley Farlee further testified that he and Mr. Mulligan were not friends outside the store, that Mulligan may “have chuckled once” during the conversation, and that he not had extensive one-on-one conversations with Mr. Mulligan previous to this conversation (Tr. 270, lines 20-25; 271, lines 1-25; 272, lines 1-25; 273, lines 1-6.)

Thus, it is clear from the record that there was nothing about the background, time, place or dynamics of the conversation that created a coercive context. The conversation was related to a legitimate matter of employee relations, and the timing of the allegedly unlawful inquiry bore no relationship to a specific situation, i.e., an upcoming election. The casual conversation took place in the front of the Dinkytown store, in the presence of other employees, not in the coercive environment of a manager’s office. Moreover, not only was the information sought not the kind that could provide a basis for retaliation, it related to an employee other than the one with whom Mr. Mulligan had the conversation, and Mr. Mulligan specifically requested Mr. Buckley-Farlee not to pass on the inquiry to Mr. Wilklow. Furthermore, as the Board found in *Rossmore House*, the fact that Mr. Mulligan is an owner of MikLin Enterprises is not determinative, given that the essential inquiry is whether, under all the facts and circumstances, the interrogation would

reasonably tend to interfere with the free exercise of employee rights under the Act. Judge Amchan did not err in determining that Mike Mulligan did not violate Section 8(a) (1) by engaging in the conversation as related by Mr. Buckley-Farlee.

**IV. THE ALJ CORRECTLY DID NOT FIND THAT THE DISCHARGES OF “OPEN UNION SUPPORTERS” ERIK FORMAN, DAVIS RITSEMAN, DAVID BOEHNKE, MICHAEL WILKLOW, MAX SPECKTOR AND MICAH BUCKLEY-FARLEE CONSTITUTED UNLAWFUL DISCRIMINATION BECAUSE BRITTANY KOPPY, ISAIAH COLLINS, AND SEAN EDDINS, WHO WERE ALSO “OPEN UNION SUPPORTERS,” WERE MERELY ISSUED WRITTEN WARNINGS FOR THEIR DEMONSTRABLY LESSER ROLES IN THE DISPARAGING POSTER CAMPAIGN.**

[Cross-exception 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).]

As written, the implicit assertion in this cross-exception that Brittany Kopyy, Isaiah Collins and Sean Eddins were “not” “open union supporters” not only conflicts with the opening statement at the hearing by the Acting General Counsel,<sup>5</sup> it is at total odds with the record. Erik Forman testified that Brittany Kopyy and Isaiah Collins were among “the most consistent members” of the Organizing Committee at attending meetings from the beginning of the organizing campaign and were among those who were “primarily the most active members.” (Tr. 95, lines 16-25). When asked on direct examination about his activities in promoting the Union, Isaiah Collins responded that he was a “mover and a shaker” and “if a task needed to be done, I found myself willing to step in.” (Tr. 205, lines 8-25). He said his activities included “talking with co-workers, convincing them that unionizing is a good idea; attending and hosting meetings; wearing a Union button; using a “spoke card” with the Union logo on his delivery bicycle, and

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<sup>5</sup> “After the union went public with its campaign, the six terminated workers in this case: [names omitted here] along with the three disciplined employees, *Ayo Collins, Brittany Kopyy, and Sean Eddins*, were among the most vocal and active union organizers in the Jimmy John’s work place. They made no secret of their support for the union, often wearing pro-union buttons at work, and posting pro-union flyers at work site bulletin boards.” (Tr. 14, lines 13-21) [Emphasis added].

posting literature and posters in the stores. (Tr. 206, lines 1-18). Mr. Collins was listed as a Union contact person on the IWW press releases of October 1, 2010 (GC-33), October 18, 2010 (GC-35) and October 22, 2010 (GC-36). Brittany Kopyy accompanied Michael Wilklow when he went to sign his termination papers ((Tr. 157, lines 7-18). Sean Eddins did not testify at the hearing, and there was no testimony at all about the extent of his support for the Union. The only reference to such activity on his part was the brief reference in the Acting General Counsel's opening statement related in footnote 4 below.

The ALJ correctly states:

I reject the argument of the General Counsel and Charging Party that Respondent violated the Act even if the posters were unprotected. 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. (ALJD 14, note 12).

Judge Amchan ultimately determined that the terminations – and the warnings – were unlawful for the same reason, *viz.*, that the statements on the posters were not so disparaging as to lose the protection of the Act. He suggests that MikLin may have *made a mistake* in attributing to Micah Buckley-Farlee a greater role in the poster campaign than he actually played,<sup>6</sup> but this point goes only to whether his culpability should be in the same category as the "foot soldiers," rather than that of the employees "who planned and organized the flyer postings." It does not support the Acting General Counsel's argument that the six employees

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<sup>6</sup> "However, it is possible the Micah Buckley-Farley's [sic] involvement in planning the postings is too attenuated to justify his termination even if the posting was unprotected [citation omitted] . . . I do not believe I need to analyze whether or not this is so. Buckley-Farley 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." (ALJD, 14, n. 12) [Emphasis added.] The record shows, however, that Mr. Buckley-Farley was shown as a Union contact person on *two* press releases, those of March 10, 2011 (GC-38) and March 23, 2011 (GC-39.)

were discharged “not for their involvement in preparing or in posting unprotected material, but for their involvement in Union activity leading up to the posting.”

Moreover, the Acting General’s counsel’s argument in this regard actually relates to a separate point, one with respect to which no cross-exception has been filed, as required by Sections 102.46 (b) and (c) of the Board’s Rules and Regulations. Cross-exception 4 is based on the ALJ’s findings set forth in *footnote 12*, as cited in the cross-exception. The context and organization of Judge Amchan’s comments make it clear he was addressing the Acting General Counsel’s argument that Respondent violated the Act “even if the posters were unprotected” as asserting such a violation based on discriminatory, disparate discipline. The argument in the Acting General Counsel’s brief that the six employees were discharged “for Union activity leading up to the posting” appropriately would have been the subject of a cross-exception based on *footnote 4*, at page six of the ALJ’s decision:

The General Counsel argues in its brief the terminations and disciplinary warnings violate the Act even if the activities of March 20 were unprotected. I need not reach that argument and in any event, I find that Respondent fired the 6 and disciplined the 3 for posting the sick day posters near its stores on March 20.

No such cross-exemption was filed.

In any event, the argument on this point as set forth on pages 7-11 of the Acting General Counsel’s Brief in Support of Cross-Exceptions confuses correlation with causation and amounts to a logical fallacy. It is a fact that the *only employees* who were involved in the organizing, planning and execution of the poster campaign were IWW supporters. It is also a fact that *only IWW supporters* were involved in the poster campaign. This is why they were the ones MikLin accurately – not discriminatorily – identified as “. . . those 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” and “were the developers and leaders of the entire matter.” (Tr. 287-288). There was no one involved *other* than union supporters. After all, it was a *Union* effort; no serious argument can be made that, had union *opponents* or less ardent supporters been involved in the poster campaign, they would not have been discharged for disparaging MikLin’s products and reputation. There no evidence whatsoever of any pretextual reason for the discharges. On the contrary, the record is replete with credible evidence that MikLin elected to terminate the six employees solely because of their involvement in the posting campaign, and Judge Amchan properly so found. Their termination notices clearly set forth this conduct as the reasons for their discharges. (GC-6, GC-7, GC-8, GC-9, GC-10a, GC-10b, GC-11). At the hearing, counsel for the Acting General Counsel examined MikLin Vice President and Area Manager Robert Mulligan in detail, eliciting confirmation that the reasons stated on each of the termination notices were the *only* reasons the employees were terminated. (Tr., 43, lines 21-22; 44, lines 9-11; 44, lines 20-22; 45, lines 11-13; 46, lines 1-5; 47, lines 5-7.) Moreover, both Robert Mulligan and Michael Mulligan testified that the posters’ suggestion that customers could become ill from eating a MikLin Jimmy John’s sandwich was why they ordered the removal of the posters (Tr. 282, lines 24-25; 283, lines 1-7; 338, lines 12-13; 339, lines 9-13; 341, lines 17-21<sup>7</sup> lines. Conversely, there is *no evidence* they were terminated *for any other reason*, and any argument to the contrary is specious.<sup>8</sup>

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<sup>7</sup> Note that in MikLin’s Brief in Support of Exceptions, this last citation to the record was inadvertently shown as “Tr. 333,” rather than Tr. 341, lines 17-21).

<sup>8</sup> Without saying so, the Acting General Counsel appears to be suggesting indirectly that something in the nature of a *Wright Line* analysis is applicable to this case. Of course, as the Board stated in *Valley Hosp. Med. Ctr., Inc., 351 N.L.R.B. 1250, 1251 (2007) enforced sub nom. Nevada Service Employees Local 1107 v. NLRB, 358 Fed. Appx 783 (9<sup>th</sup> Cir. 2009)*:

*Wright Line* applies where the motive for a challenged employment action is in dispute. See, e.g., *CGLM, Inc.*, 350 NLRB No. 77, 2007 NLRB LEXIS 343, at fn. 2 (2007). Here, there is no dispute that Wells was discharged for making the statements outlined above. Thus, the sole issue here is whether, in making those statements, Wells enjoyed the Act’s protection. See, e.g., *Felix*

## V. CONCLUSION

The Board's established practice is not to overrule an administrative law judge's credibility determinations unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products, 91 NLRB 544 (1950)*, enf. *188 F.2d 362 (3d Cir. 1951)*. MikLin respectfully submits that a review of the record evidences no basis for reversing those findings which are the subject of the Acting General Counsel's Cross-Exceptions.

Dated June 18, 2012

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*Industries, 331 NLRB 144, 146 (2000)*, enf. denied on other grounds 346 U.S. App. D.C. 236, 251 F.3d 1051 (D.C. Cir. 2001). No such dispute exists in the matter at hand, none was found by Judge Amchan, and the bare assertion of such an argument without any supporting evidence does not create a viable issue.