

**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 CHARGING PARTY**

Dated: June 18, 2012

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**RESPONDENT MIKLIN ENTERPRISES, INC.'S ANSWERING BRIEF
TO CROSS-EXCEPTIONS AND SUPPORTING BRIEF OF
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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 Charging Party's Cross-Exceptions to the April 20, 2012 decision of Administrative Law Judge Arthur Amchan and Brief in Support thereof.

MikLin will answer the remaining cross-exceptions in the order set forth in Charging Party's Brief in Support thereof.

II. 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 WERE MERELY ISSUED WRITTEN WARNINGS FOR THEIR DEMONSTRABLY LESSER ROLES IN THE DISPARAGING POSTER CAMPAIGN.

[Cross-exception 1: "ALJ Decision p. 14, n. 12: The ALJ's failure to find that treating six employees perceived by management as Union "leaders" more harshly than three employees perceived as "foot soldiers" constituted unlawful discrimination in violation of Section 8(a)(3)."]

Charging Party's initial framing of the issue is inaccurate. The record supports Judge Amchan's factual finding that the three employees who received warnings were engaged in conduct *different* from that of the six who were discharged. All nine employees engaged in the same kinds of pre-discharge/discipline activity in support of the Union. As found by Judge Amchan, the different degrees of discipline validly were based on their respective degree of involvement – and thus culpability – in the disparaging poster *campaign*, not the extent of their

involvement in promoting the Union. The wording of the discharge (GC-6¹, GC-7, GC-8, GC-9, GC-10a, GC-10b, GC-11) and warning (GC-3, GC-4, GC-5) notices makes this clear. The testimony of MikLin President Mike Mulligan regarding the disciplinary action decisions went beyond the narrow quote set forth in Charging Party's Brief and explains the full context in which the decisions were made. Mr. Mulligan spoke *not* of the employees' respective and relative degrees of *support for the Union*, but to their relative degrees of *culpability in the disparaging poster campaign*:

. . . . throughout this time period, the names of the individuals that we discharged were the names that were on *various correspondence*, that were involved in various meetings, that whose 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 this correspondence. They had not personally contacted us. We felt like they were simply -- I don't know if the term "foot soldiers" is the right one, but 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 leaders *of this entire matter*.

(Tr. 287, lines 21-25; 288, lines 1-8) [Emphasis added].

The components of this initiative were numerous and far more complex than the simple act of putting up the posters, which, to MikLin's knowledge, was the extent of Kopyy's, Collins' and Eddins' involvement. The elements of the project included conceiving of the idea to enlist the support of the public for the Union's demand for paid sick days by maliciously telling consumers that they were at risk of contracting foodborne illness because MikLin's attendance policy "forced" them to work while ill. The idea was translated in action with (a) the design and production of the posters (GC-44, GC-45); (b) the preparation and presentation to Mike and Rob Mulligan of the March 10, 2011 letter and its global dissemination as part of the press release packet (GC-43); (c) the March 10, 2011 press release (GC-38) and various last minute communications of the ultimatum offering to refrain from disparaging MikLin's product and

¹ The Acting General Counsel's exhibits are referred to herein as "GC-___."

reputation in return for the Mulligans entering into bargaining over sick days; and (d) organizing and orchestrating the posting of the flyers. While the precise roles of each of the six employees who were discharged were not and could not be identical – like any group project, tasks were divvied up – their degree of involvement in the initiative was clearly far greater than that of the three employees who received warnings. Mike Mulligan believed that, unlike Messrs. Forman, Ritsema, Wilklow, Boehnke, Specktor, and Buckley-Farlee, Ms. Kopyy, Mr. Collins and Mr. Eddins did not “develop *this plan and strategy* and had for the most part executed it.” (Tr. 287-288).

Clearly, MikLin meant to rid itself of people who it believed had harmed the Company by developing and executing “this plan and strategy,” not simply people who supported the Union or were deeply involved in its activities. The fact that the six employees who were discharged for being “leaders” of the campaign of disparagement were also “leaders” of Union is irrelevant. The record reflects that Brittany Kopyy, Isaiah Collins and Sean Eddins² were very involved in promoting the Union, thus clarifying even further that the basis for the differential discipline was the degree of involvement in the poster campaign.

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

² Sean Eddins did not testify at the hearing, and there was no testimony at all about the extent of his support for the Union. However, he was referenced in the Acting General Counsel’s opening statement as being . . . “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].

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 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).

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,³ 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 Charging Party’s argument that “Respondent violated the Act by treating purported *union* ‘leaders’ more harshly for engaging in protected activity separate from the distribution of the sick day posters.” (CP Brief in Support of Exceptions, 5).

³ “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-Farlee was shown as a Union contact person on *two* press releases, those of March 10, 2011 (GC-38) and March 23, 2011 (GC-39.)

Moreover, Charging Party'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 1 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. Charging Party's contention that the six employees were discharged because they were "union leaders" 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 3-5 of Charging Party'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* orchestrated 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 IWW 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 masterminding 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, 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 17-21⁴ lines. Conversely, there is *no evidence* they were terminated *for any other reason*, and any argument to the contrary is specious.

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

[Cross-Exception 2: “**ALJ Decision p. 14:30-31:** The ALJ’s dismissal of the Complaint allegations regarding disparaging and harassing Facebook postings.”]

At the outset, MikLin calls the Board’s attention to the fact that the Facebook page in question (“Jimmy John’s Anti-Union”) was started by Garhett Wheeler, a store delivery driver who personally opposed the IWW’s efforts to organize MikLin’s employees (Tr. 48, lines 11-

⁴ 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).

18.) The three management representatives who testified about this matter at the hearing, Assistant Manager Rene Nichols, Store Manager Melissa Erickson and Vice President and Area Manager Robert Mulligan, all of whom had posted alleged disparaging comments about the IWW and its self-identified leaders, all testified 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). In addition, it was established at the hearing that despite it becoming apparent that the members of the Facebook were an “open group,” the IWW supporters who accessed the page necessarily had to exercise some initiative to do so by using their own Facebook passwords to go looking for it. (Tr. 25, lines 12-20).

Charging Party 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 violation 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, Charging Party 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 Charging Party seeks to hold management personnel⁵ 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) 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 Charging Party do not expressly limit the "disparaging words alone" defense to 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.

⁵ Charging Party's brief contains a glaring factual error. At page six, in relating an intemperate posting by MikLin employee Sam Alarcon, she is referred to as a "supervisor." The record shows that at the time she posted this comment, Ms. Alarcon was *not* a supervisor, but a "PIC," a position included in the unit of eligible voters in the October 22, 2010 election (Tr., 28, lines 14-18.) On adverse direct examination by the Acting General Counsel, MikLin Vice President and Area Manager Robert Mulligan testified that Ms. Alarcon was demoted to PIC on or about *January 18, 2011* (Tr., 34, lines 21-25; 35, lines 1-6). The quoted posting appears on page 10 of GC-1. The various pages of "screen shots" in GC-1 appear to be in reverse chronological order. On the last page (36), the dates of October 17, October 18 and October 20 appear beneath certain postings. The most recent specific date – April 7, 2011 – is shown beneath a posting on page four (although "April 17, 2011" appears somehow to have been superimposed on a posting on page seven.) The referenced posting by Ms. Alarcon appears in sequence between postings dated *April 10* on page nine and the postings on page four beneath which "*April 7*" appears. The altered photo of Mr. Boehnke referenced by Ms. Alarcon shows "*March 31*" beneath it.

The concededly distasteful postings on the Facebook page about David Boehnke found by Judge Amchan not to be a violation were not uttered 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. Moreover, as discussed above, the context in which the Facebook comments arises includes the fact that they were not made in person to anyone, but electronically in cyberspace, and, as discussed above, were posted with the expectation of privacy.

Charging Party's assertion that "MikLin supervisors made implicit and explicit threats of violence," specifically, the postings by Sam Alarcon, has no basis in fact; as explained in footnote 5, Ms. Alarcon was not a supervisor, which accounts for why "the ALJ failed to even analyze whether such statements violated the Act." (CP Brief in Support of Exceptions, 6). MikLin urges the Board to affirm Judge Amchan's implicit finding that Assistant Manager Rene Nichols' posting that she was "sick of working with 'them'" was nothing more than an expression of her views of the union's poster campaign disparaging her employer and contains no unlawful threat of reprisal.

Charging Party's reliance on *Regency House of Wallingford, Inc.*, 356 NLRB No. 86 (2011) and *Davis Elec. Wallingford Corp.*, 318 NLRB 375 (1995) in support of its Exception 2 illustrates its continued refusal to accept the fact that it is not the collective bargaining representative of MikLin's employees.

In both cases, the comments denigrated “*the Union*” – an actual, incumbent, lawful bargaining agent. They were made in the context of established ongoing collective bargaining relationships and arose under circumstances totally distinguishable from the instant matter. As noted above, when the cases say that “mere words of disparagement” cannot constitute a violation of Section 8(a)(1), it means that for employer comments to lose their protection as Constitutionally-protected free speech under Section 8(c) the words must have been uttered in a coercive context. The context in which *Regency House* arose included (a) ongoing collective bargaining for a successor agreement with an established union; (b) a pending decertification election, (c) the Employer’s refusal to rescind an unlawful unilateral wage increase as ordered by an ALJ, (d) direct dealing with employees, bypassing their certified bargaining agent and (e) the Employer’s unilateral withdrawal of recognition. It was in the midst of all these facts and circumstances that the Employer, through its counsel, *sent a letter* to the union (as opposed to MikLin’s managers’ expressions of their personal opinions by means of Facebook postings on a page they thought was “private”) accusing the Union of “harming its own members” by insisting on compliance with an ALJ’s order to rescind the unlawfully granted increases.

In the *Davis Electric* case, the Employer (a) unlawfully had failed to bargain with the established representative of its employees over layoffs; (b) had unilaterally reassigned and transferred engineering work, and subcontracted work; (c) refused to furnish the Union with information it requested; (d) blamed the Union for forcing it to spend money to defend unfair labor practice charges and grievances; and (e) solicited employees to change their union representation.

In both cases, the employer had called into question the Union’s ability to carry out its *existing statutory obligation*, a factor not present here. Under Charging Party’s theory of

“coercive context,” the statement of a non-union employer to a group of employees among whom no organizing campaign was under way that “Jimmy Hoffa was a crook” would be a “threat” that constituted interference with the employees’ possible exercise of their Section 7 rights sometime in the unforeseeable future. Such a result is clearly not contemplated in the cases cited by the Charging Party.

In this case, the referenced Facebook posting of MikLin Vice President and Area Manager Rob Mulligan was a *reaction* to conduct MikLin maintains was unprotected, and expressed his personal opinion of the *intended* effect of that conduct. Moreover, as noted above, the postings were made with the expectation of privacy, and were intended to be read only by members of a group who had declared openly their opposition to the Union. In any event Mr. Mulligan’s remarks were far more benign than management’s memo to employees in *Children’s Center for Behavioral Development*, 347 NLRB 35 (2006),⁶ which the Board found contained no unlawful threats. That case also involved an ongoing, established collective bargaining relationship. The alleged unlawful comments arose in the context, not only of contract negotiations, but also several contemporaneous violations of Section 8(a)(5). The Board rejected the ALJ’s finding that the memo interfered with employees’ Section 7 rights. It held the message

⁶ That memo said: “I am sure that you know that Children's Center for Behavioral Development is suffering from severe financial hardship. What many of you may not know is that, I believe that for months now, the Union has been doing everything in its power to harm Children's Center for Behavioral Development. The Union has interfered with our relationship with the United Way, which affected our funding. Now the Union is trying to arbitrate grievances on behalf of Eileen Reducer, which has caused the Children's Center for Behavioral Development to incur costs and legal fees, which it cannot afford. In addition, the Union is now claiming that it has a contract with CCBD, even though the Union rejected the Center's last offer earlier this year and the parties have not been back to the negotiating table since.

“I wanted to make all of you aware of these issues and ask that you not permit Union issues to distract us from our mission. It is only by working together that we can move forward and succeed in these difficult times.”

to be “a lawful expression of the Respondent's opinion about the Union and does not violate the Act,” going on to say,

In this case, the Respondent's memo conveys nothing more than the Respondent's negative opinion of the Union's actions. The first paragraph of the memo states the Respondent's opinion that the Union was attempting to harm the Respondent. The memo then cites specific examples of the Union's conduct that supported the Respondent's opinion: (1) the Union's lobbying of United Way to get involved in the parties' ongoing collective bargaining; (2) the arbitration of grievances that result in legal fees for the Respondent; and (3) the Union's position that the parties had a collective-bargaining agreement. The second paragraph is a mere continuation of the Respondent's expressed opinion. It restates the Respondent's desire to continue its mission despite its disagreement with the Union over the issues stated above. The memo says that the Respondent wishes to make employees "aware of these issues."

Ibid.

Similarly, Rob Mulligan's Facebook comment that the distribution of the sick day posters “threaten[s] our business and your jobs” is a lawful expression of an opinion about the potential consequences should the Union succeed in frightening the public away from patronizing MikLin's stores. A sudden and drastic decline in sales in any business typically produces layoffs. As with the Employer's memo in *Children's Center*, making employees aware of these issues is not a “threat.”

The *Children's Center* memo also disputed the Union's position that the parties had a collective bargaining agreement. The Board found that the Union was right and the Employer was wrong. In the instant matter, there has been no final determination upholding Judge Amchan's finding that the employees' conduct did not lose the protection of the Act. However, even if such a determination were forthcoming, as the *Children's Services* Board held, “there is nothing unlawful in stating a legal position, even if it is later rejected.” *Id.*

MikLin submits that Store Manager Dylan Hiler's comments about self-identified Union leaders is no more disparaging than the litany of distasteful comments found lawful in the

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 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 (5th 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.)

In *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 708-709 (1992), *enfd. mem.* 991 F.2d 786 (1st Cir. 1993), speaking about an employer's campaign letter that commented on strikes, the Board said:

Section 8(c) does not require fairness or accuracy, and **does not seek to censor nastiness**. See e.g. *Sears, Roebuck and Co.*, 305 NLRB No. 23 (1991). In this regard, the letter is a low keyed exercise in pejorative, accusatory in tone, drawing on the time worn choice between good and evil. Thus, unions are portrayed, generally, as the provocateurs of hatred, discord and misunderstanding, all at the expense of reason. . . . [The management representative] simply opines that, instead of bringing

happiness to the workers, unions pursue their objectives, uncaringly, through the use of force, including violence, picketing and strikes. . . . In the final analysis, the reference to strikes and force in this letter was an attempt to draw upon emotionalism and overstatement, but merely produced an overall message easily recognizable as self-serving hyperbole. **Argumentation of this type is left routinely to the good sense of employees.**

[Emphasis added].

For the foregoing reasons, MikLin submits that the Board should uphold Judge Amchan's dismissal of the allegations regarding the Facebook postings and reject Charging Party's Exception 2.

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

[Cross-Exception 3: "**ALJ Decision p. 15:1-7:** The ALJ's dismissal of the Complaint allegation that Respondent unlawfully interrogated Micah Buckley-Farlee about Mike Wilklow's union sympathies in violation of Section 8(a)(1)."]

MikLin agrees with Charging Party 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 Charging Party's argument that the other factors⁷ discussed in *Rossmore house* compel the conclusion that the interrogation was unlawful. 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.)

⁷ 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*.

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 conversation took place "in the front of" the Dinkytown store, and that "there were people around working." 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 allegedly unlawful inquiry was not coincidental with specific situation in which employees were to exercise their Section 7 rights, 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.

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)*, *enfd. 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 Charging Party's Cross-Exceptions.

Dated June 18, 2012

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