

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

AMGLO KEMLITE)
LABORATORIES, INC.)
)
 Respondent,)
)
 and)
)
BEATTA OSSAK)
)
 Charging Party.)

Case No. 13-CA-65271

**AMGLO KEMLITE’S ANSWERING BRIEF TO COUNSEL FOR THE ACTING
GENERAL COUNSEL’S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION¹

In its exceptions brief, the General Counsel (“the GC”)² proffers conclusory and unsupported assertions, disregards or discounts numerous undisputed facts that are unhelpful to its position, misapplies well-established Board law, and in some respects fails to include *any* argument in support of its exceptions.

All of the GC’s exceptions should be rejected. The GC’s exceptions fall into four categories: (1) that the ALJ should not have used the *Quietflex* standard to determine whether the strikers were engaged in protected activity; (2) that the ALJ should have found that Amglo terminated all of the strikers within the first hour of the strike; (3) that the ALJ should have found a violation of Section 8(a)(1) with respect to the alleged transfer of work from Amglo’s Bensenville facility to its Juarez, Mexico facility, and (4) that the ALJ should have found that various alleged statements by Amglo employees constituted independent violations of Section 8(a)(1). For various reasons, these exceptions have the same thing in common: they completely lack legal and factual support.

First, the Board in *Quietflex* specifically articulated the factors that govern when an on-premises work stoppage should be regarded as unprotected, which is the precise question presented in the instant case. There is no basis for the GC’s efforts to circumvent the *Quietflex* standard which directly applies to the instant case. The GC alleges that *Quietflex* does not apply because Amglo “condoned the employees staying in the plant . . . by doing nothing to remove the employees from the plant.” But it was undisputed at the hearing that Ania Czajkowska, Amglo’s Plant Manager, told the gathered strikers to either go back to work or leave the facility.

Moreover, one of the *Quietflex* standards is “whether the employees were given any warning that

¹ This brief does not include a statement of facts. A full statement of facts is presented in Respondent’s Brief in Support of its Exceptions.

² For ease of reference, this brief uses the term “General Counsel” or “GC” (rather than “Acting General Counsel”) in reference to the positions asserted on behalf of the Board’s current Acting General Counsel Lafe Solomon.

they must leave the premises or face discharge.” The GC states turns Board law on its head by asserting that it violates Section 8(a)(1) to provide precisely the type of notice *required* under *Quietflex*.

Second, the ALJ correctly found that none of the strikers were terminated at any time. Nothing said or done by the Company would have reasonably led any striker to believe that their employment had been terminated. The Company repeatedly asked the strikers to return to work soon after the strike began, and continued to ask strikers to return to work throughout the strike. Moreover, and most importantly, numerous strikers returned to work during the strike without any conditions or consequences, and the strikers who remained on strike were aware of these returns to work. Additionally, the GC completely ignores case law stating that even if an employee reasonably believed they had been fired, an employer’s subsequent actions (such as continually offering employees the opportunity to return to work and in fact accepting returning strikers back to work) may disavow any statements that led an employee to believe he or she was terminated.

Third, although the ALJ’s reasoning regarding the alleged transfer of work makes little sense, the ALJ correctly found that any alleged transfer of work did not violate Section 8(a)(1) of the Act. The Company had a long history of transferring work to its Mexico facility, only a miniscule amount of work was transferred to Mexico after the strike, and it is well-established that work transfers cannot be deemed violative of Section 8(a)(1), as a matter of law, unless they violate Section 8(a)(3), which has not even been alleged in the instant case.

Finally, the ALJ correctly found that none of the statements alleged by the GC were independent violations of Section 8(a)(1). The GC provides no legal support for the proposition that any of these statements are violative of the Act, and has waived any contention that they are by not including allegations in the Complaint or argument in its post-hearing brief. In any event, for various reasons, none of the alleged statements violates the Act.

ARGUMENT³

A. The ALJ Correctly Applied the *Quietflex* Standard When Addressing Whether the Six-Hour Sit-Down Strike Was Protected, And Erroneously Held That the Strike Was Protected.

Since 2005, the Board has used the factors set forth in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005) to determine whether an in-plant sit-down strike is lawful. In *Quietflex*, the Board held that several factors governed whether an on-premises work stoppage was unprotected, including, among other things, “whether employees were given any warning that they must leave the premises or face discharge” and “whether employees remained on the premises beyond their shift.” *Id.* at 1056-57.

It is undisputed here that the Amglo employees engaged in an approximately six-hour in-plant sit-down strike, the ALJ properly analyzed whether the strike was protected using the *Quietflex* standards, and (as explained in detail in Amglo’s exceptions) the ALJ reached the incorrect conclusion that the strike was protected, .

Counsel for the General Counsel (“GC”) “excepts to the ALJ’s conclusion that *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005) is controlling in analyzing whether the employees [sic] work stoppage was protected.” (Exceptions Brief of Counsel for the General Counsel (“GC Mem.”) at 23). Without citing to any authority, the GC claims that *Quietflex* does not apply because Amglo “condoned the employees staying in the plant to protest Respondent’s action by simply doing nothing to remove the employees from the plant.” (*Id.*).

The GC’s contentions are meritless. First of all, of the GC misstates the law – one of the *Quietflex* standards is “whether the employees were given any warning that they must leave the premises or face discharge.” *Id.* at 1056-57. Second, the GC is wrong on the facts, as Amglo

³ References to the hearing transcript will appear as “Tr. __,” with the name of the witness following in parenthesis. References to exhibits introduced at the hearing will appear as “GCX ___” for General Counsel Exhibits, “CX __” for Company Exhibits.

hardly “condoned the employees staying in the plant.” To the contrary, it was **undisputed** at the hearing that between 9:00 a.m. and 10:00 a.m., Czajkowska told the gathered strikers to either go back to work or leave the facility. (Tr. 59, 62-63, Kopec; Tr. 105-06, Dzeikan, CX-3 (“Anna said to go back to work and if anyone does not like it, they should punch out and go home.”); Tr. 157-58, Ossak (“[Czajkowska said to] go back to work or punch out.”). Despite being unambiguously told to return to work or leave the premises, the strikers remained in the plant, not working, for more than five additional hours, with about half of the employees staying 90 minutes past the end of their scheduled shift.⁴

Counsel for the General Counsel also attempts to distinguish *Quietflex* on the grounds that “unlike *Quietflex*, the case at hand involves Respondent’s refusal to address the employee demands or to engage in any effort to resolve their grievance.” (GC Mem. at 26). The uncontroverted record evidence establishes that such a statement is absurd. Within the first thirty minutes of the strike, Christian – the president and COO of the Company and Czajkowska, the Plant Manager, met with employees for 60-90 minutes. There was substantial and undisputed testimony – from Czajkowska, Christian, Kopec, Dzeikan, Kulikowski, Ossak, Uchanska, and Skomoroska – that during that time, both Christian and Czajkowska repeatedly told the strikers in no uncertain terms that their demands for a wage increase would not be met. Strikers were told repeatedly that there was “no possibility” of raises, (Tr. 34-35, Kopec), that “we cannot do anything . . . [t]he pay raises are frozen.” (Tr. 127, Ossak), that there is “no chance this time for

⁴ Counsel for the Acting General Counsel correctly notes that “[n]o one called the police to remove the employees.” (GC Mem. at 24). It hardly needs mentioning that an employer should not need to call the police to remove employees from its plant after it asks them to return to work or leave the premises, and there is absolutely no support for the proposition that an employer must call the police to remove strikers from its premises before the strike can be found unprotected.

[a wage increase]” (Tr. 369, Skomoroska), and that “nothing can be done now.” (Tr. 88 Dzeikan). These were definitive responses to the issue raised by the employees.⁵

Strikers may not insist that an employer agree to their demands before they leave the property; the Board looks to whether the employees had an opportunity to make known their demands. *Quietflex*, 344 NLRB at 1059; *see also Waco, Inc.*, 273 NLRB 746 (1984) (in-plant strike unprotected where employees occupied the lunchroom at 7:00 a.m. and demanded a mass meeting with the department manager; after manager refused mass meeting at 7:45 a.m. employees remained in the lunch room for another three hours).

B. The ALJ Correctly Found That None of the Strikers Was Terminated.

The Complaint alleged that “[a]round September 20,” the Company “terminated” all of the striking employees in retaliation for their protected, concerted activity. (GCX-1(l)). The ALJ found that no employee was terminated, and that nobody from Amglo told any employee that they had been terminated. (ALJD at 3, n.5, 9).

The record clearly supports the ALJ’s finding that no employee was terminated in connection with the work stoppage. For example, the Company repeatedly asked the strikers to

⁵ The GC makes much of the fact that the employees did not receive a definitive response from the owner of the Company with respect to their wage increase demand. There is no support in Board law for the proposition that a union or striking employees can unilaterally insist that the owner of a business serve as the employer representative; indeed, such insistence regarding who the employer chooses as its own representatives would plainly violate NLRA Sections 8(b)(1)(B) and 8(b)(3). The sole requirement is that any employer representative have authority to address and resolve questions regarding wages, hours and working conditions. *General Elec. Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969) (“[the] right of employees and the corresponding right of employers . . . to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme”); *NLRB v. Indiana & Mich. Elec. Co.*, 599 F.2d 185, 191 (7th Cir. 1979), cert. denied, 444 U.S. 1014 (1980) (same); *Valley Imported Cars*, 203 NLRB 873, 878 (1973) (each party’s representatives in bargaining must have authority to address relevant issues) (ALJ opinion); *National Amusements, Inc.*, 155 NLRB 1200, 1206 n.6 (1965) (same) (ALJ opinion). This latter requirement is clearly satisfied by the role played by Christian – the President and Chief Operating Officer (based at the Company’s headquarters in Florida) who told the strikers multiple times within the first hour of the strike that their demands would not be met. In addition, she told the strikers that she had addressed the wage issue with the owner, and that “we couldn’t do anything about that and there are no changes right now.” (Tr. 307-08). In fact, the employees specifically chose September 20 as the day of the strike *because Christian was going to be at the facility*, obviously believing that Christian held a sufficient position in the Company to address their grievances. For all of these reasons, any suggestion by the GC (or the ALJ) that somehow the strikers’ demands had not been addressed is specious.

return to work soon after the strike began, and continued to ask strikers to return to work throughout the strike. More importantly, numerous strikers *did* in fact return to work without any conditions or consequence, and the strikers who remained away from work were clearly placed on notice during the work stoppage that they too could return without condition or consequence. Even more clearly, the record establishes that, at the time the remaining employees offered unconditionally to return to work, the Company clearly advised the employees that they were on a preferential hire list and their “employment [had] not been terminated. . . .” GCX-6; Tr. 188-89; GCX-6.

As explained more fully below, an employee cannot be deemed “terminated” when, as in the instant case, the record shows that (i) the Company advised the employee that he or she should return to work and the person’s employment was *not* “terminated,” and (ii) the Company regarded the employee as having “the right to be recalled if and when we have job opening[s] in the future.” *Id.*

1. Standard for Termination Cases.

The test for whether an employee was discharged is whether the statements and action of the employer would reasonably lead an employee to believe that he or she was discharged. *Pink Supply Corp.*, 249 NLRB 674 (1980). In *Pink Supply*, a group of employees engaged in a (protected) strike. The employer asked the employees’ spokesman to convince the employees to return to work, and that if they did not, the employer would have to act as if the employees had resigned. When the spokesman denied the employees had resigned, the employer asked “Well, what do you call it? What am I supposed to do?” The Board held that “the conversation as a whole did not, as we attempt to view it through the employees’ eyes, present anything like an

unequivocal refusal by Respondent to permit them to return to work.” 249 NLRB at 674 (emphasis added).

Even where an employer initially makes statements that would reasonably cause an employee to believe he or she had been terminated, there is no violation of the Act if the employer later disavows or clarifies the original statements. See *Phoenix Processor Ltd. Partnership*, 348 NLRB 28 (2006) (holding that employees told “you’re fired” but later told they could return to work with no penalty could not have reasonably believed they were discharged, and stating that “The General Counsel acknowledges, however, that an employer who initially leads employees to believe that their employment has been terminated may disavow such statements or clarify that the employees are, in fact, still employed”).

2. No Employee Reasonably Could Have Believed They Were Fired Within the First Hour of the Strike.

Counsel for the GC alleges that “Respondent terminated its employees on the morning of September 20, 2011 because they engaged in a work stoppage to protest a longstanding wage freeze.” (GC Mem. at 20). The GC claims that this *en masse* termination of the 80-odd strikers took place “within the first hour of the strike.” (*Id.* at 21, 22 “[Amglo’s] knee-jerk reaction [to the strike] was to fire the employees for stopping work to protest the lack of pay raises”).

The claim that all of the employees were fired *en masse* within the first hour rests on two alleged events: (1) that Czajkowska said to the gathered employees that they were “fired,” and (2) that Czajkowska “threw” resignation papers on a table and told employees to sign the papers and get out. (GC Mem. at 22).⁶ Neither of these alleged events supports a finding that the strikers were fired *en masse* within the first hour of the strike.

⁶ Counsel for the GC relies on various other subsequent alleged actions by Amglo as evidence that the employees had been fired *en masse* within the first hour of the strike. (GC Mem. at 23). But the determination of whether an employee was fired is based whether an employer’s statements or actions would lead a reasonable

Preliminarily, this case places at issue the treatment of roughly 80 striking employees (as of September 20) and 22 employees (after the strike's conclusion). The record contains no evidence that *any* person heard or was told that he or she was fired, with the sole exception of a single witness – Jesse Kopec – whose testimony as to this issue was discredited by the ALJ. (ALJD 3 at n.5; Tr. 36). The ALJ correctly found there was “no other testimony to this effect,” (ALJD 3 at n.5), and it is significant that nowhere in Kopec's affidavit, taken seven days after the events on September 20, did Kopec claim that Czajkowska said that employees were told on September 20 that they were being “fired.” (Tr. 62, Kopec). To the contrary, Kopec's affidavit states that Czajkowska said that employees *should go back to work or leave the facility.* (*Id.*). Five other witnesses (Czajkowska, Christian, Ossak, Dzeikan, and Kulikowski) all testified either that (i) Czajkowska did *not* tell the strikers they were fired, or (ii) they did not hear any statement by Czajkowska that strikers were fired. (Tr. 83, Dzeikan; Tr. 131, 159, Ossak; CX-15, Kulikowski; Tr. 200, Czajkowska, Tr. 311, Christian).⁷

employee to believe they had been terminated. Obviously, events that took place subsequent to the first hour of the strike would not have informed employees' views of whether they had been terminated during the first hour of the strike, as those events had not yet occurred. Regardless, as shown below, no reasonable employee could have believed they were terminated in any event, even taking those alleged events into account.

⁷ Kopec's testimony was not credible for numerous other reasons. His testimony was contradicted by other witness on multiple topics. For example, Kopec testified that Czajkowska and Christian stayed with the assembled group of strikers on September 20 for only “10 to 15 minutes.” (Tr. 37, Kopec). But every other witness testified that it was much longer – between 45 and 90 minutes. Kopec also testified that the workers on the 5:00 a.m. to 1:15 p.m. shift left the plant on September 20 at 1:15 p.m. (Tr. 39, Kopec). Yet every single other witness testified that the vast majority of employees – even those on the shift ending at 1:15 – stayed until 2:45 p.m. (See Tr. 213, Czajkowska; Tr. 310, Christian; CX-15, Kulikowski; Tr. 77, 89, 106-07 Dzeikan; Tr. 122, 140, 159, Ossak; Tr. 390, Wilusz; Tr. 371, Skomorowska). Kopec testified that on the morning of Wednesday September 21, when Czajkowska, Christian, Kerchenfaut, and Officer Melone addressed the group, Czajkowska said that employees “had no right to stand there because we were fired.” (Tr. 45, Kopec). Again, his testimony was contradicted by multiple other witnesses. Kopec also testified that although he was aware that strikers had returned to work, he did not believe that he could return to work because “nobody called me, nobody told me that I can return, that I could return.” (Tr. 69, Kopec). But in his affidavit, Kopec stated that “I later got a call from one of the employees who told me that we would meet at the company instead because they want us back to work, that we were not fired.” (*Id.*). At the hearing, he claimed that he did not remember getting such a call. (*Id.* at 69-70). Finally, Kopec told other strikers not to answer their phones because the Company “would probably persuade us to come back to work.” (Tr. 382, Uchanska).

In addition, every witness who testified – *even Kopec* - stated that Czajkowski asked the gathered strikers on September 20, during the first hour of the strike to go back to work. (Tr. 59, 62-63, Kopec; Tr. 105-06, Dzeikan, CX-3 (“Anna said to go back to work and if anyone does not like it, they should punch out and go home.”); Tr. 157-58, Ossak (“[Czajkowska said to] go back to work or punch out.”); Tr. 199, Czajkowska; Tr. 306, Christian; see also CX-15 at 1, 2, Kulikowski (“Ania asked us to return to work . . . Ania said that if we wanted to work, we could work . . . She left it up to us.”); Tr. 369, Skomorowska “[Ania] repeatedly asked [the strikers] to return to work”); GCX-9, Skomorowska ([Czajkowska and Christian] told employees “that they should return to work”); Tr. 381, Uchanska (“[Ania and Iza] asked the, the workers to return to work”); Tr. 84, Dzeikan (“What are you not working? Go back to work”). Obviously, telling employees that they should “go back to work” is inconsistent with terminating their employment.

Czajkowska’s presentation of a “resignation” paper to one employee does not support the GC’s claim that 22 employees would have reasonably considered that their employment was terminated. It was undisputed that at most one employee (Zofia Bialon) or a few others in the immediate vicinity could have seen the document. (Tr. 36, Kopec, Tr. 128, Ossak; Tr. 86, Dzeikan). And even if Ms. Bialon or others participated in an exchange where they heard the words “you can resign” (Tr. 207, Czajkowska), this is plainly insufficient to establish that a “reasonable” person would believe his or her employment was involuntarily terminated, when it is uncontroverted that Czajkowska and Christian repeatedly asked the strikers *to return to work*. Moreover, regarding the “resignation” form given to Ms. Bialon, the record establishes that she threw the form away, she told Czajkowska to “sign it yourself,” and no adverse action was taken

against Ms. Bialon, who remained in the area even after this exchange occurred (Tr. 36, Kopec, 128, Ossak).⁸

Finally, it is undisputed that all of the strikers remained engaged in a sit-down strike in the middle of the production floor *for four to five hours – without adverse action by the Company – after the GC claims they were “fired.”* This renders implausible any suggestion that the employees believed their employment had been terminated, since the record indicates *that the object of the employee’s ongoing dispute related exclusively to wages.* The record is devoid of evidence suggesting that any employee believed the work stoppage – on or after September 20 – regarded across-the-board employment terminations.

3. No Amglo Actions Subsequent to September 20 Suggest That Amglo Terminated Employees on September 20.

Similarly unavailing is the GC’s argument about other alleged incidents that supposedly “confirmed” that Amglo fired all 80-odd employees within the first hour of the strike: (1) that Czajkowska allegedly told Kopec, Wilusz, and Koszaniak that they were fired later on September 20; (2) that on the morning of September 21, Czajkowska told the employees they had “fired themselves,” and (3) that on September 23, several employees were told they had to fill out employment applications before returning to work. (GC Mem. at 23).

As noted above (and as noted by the GC in its brief), the correct test is whether the statements and action of the employer would reasonably lead an employee to believe that he or she was discharged. Here, Counsel for the GC claims that employees were fired within the first hour of the strike. Thus, the relevant inquiry is whether the statements and actions of Amglo

⁸ The GC’s theory here – that Czajkowska fired 80-some employees by showing a resignation paper to a single person where only a few people were in the immediate vicinity – makes little sense. If Czajkowska wanted to fire the employees, she could have simply said “you’re all fired,” and the record clearly indicates that such a statement was never made or communicated to the 22 employees who, as noted above, were expressly told in writing that their employment was *not* being “terminated.”

during the first hour of the strike would reasonably have led an employee to believe that he or she was discharged. Later actions, such as the ones now relied upon by the GC, are therefore irrelevant.

Moreover, for several reasons, none of these alleged incidents – even if considered – supports the proposition that all striking employees could reasonably have believed they had been fired.

First, while Kopec testified that Czajkowska told him and co-employee Wilusz that they were fired, the ALJ correctly did not credit Kopec’s testimony, which was contradicted by every single other witness (including Wilusz), all of whom testified that neither Czajkowska nor Christian said “you’re fired,” but rather said to go home and come back the following day. (Tr. 215-16, Czajkowska; Tr. 310, Christian; Tr. 390, Wilusz).

Second, the record reveals that some point on September 21, Czajkowska told the strikers that there would not be a wage increase, then striker Elizabeta Tarosa said “fire us” in Polish (Tr. 185, 218, Czajkowska), and Czajkowska responded to Tarosa, “no, you are trying to fire yourselves. You’re resigning because you don’t want to return to work.” (Tr. 185, 220, Czajkowska; see also CX-15, Kulikowski). Czajkowska’s statement on the morning of Wednesday September 21 that the employees were “trying to fire themselves,” in response to a striker saying “fire us,” *contradicts* the GC’s argument that Amglo had fired employees the previous day. Indeed, the record also shows that, on Wednesday morning, September 21, Czajkowska, Christian, Kerchenfaut, and Bensenville Police officer Joseph Melone addressed the strikers, and Czajkowska said “please come to work.” (Tr. 312, Christian; Tr. 216-17 Czajkowska). Christian, Kerchenfaut, and Officer Melone also told the strikers – in Polish and English – that if they wanted to work, they could come into the plant and do so. (Tr. 312,

Christian, Tr. 220-21, Czajkowska; CX-15, Kulikowski; CX-14; stipulated testimony of Officer Joseph Melone). Indeed, Office Melone's report stated that the Company wanted help "to ask employees *one more time* if they want to work or not." (CX-14).

In short, given the context – in which three management employees and a Bensenville police officer told the strikers that they could come back to work, it is inconceivable that the alleged "fire us" and "you are trying to fire yourselves" exchange constituted "an unequivocal refusal by Respondent to permit [the strikers] to return to work," especially given the abundant record evidence regarding Company statements and actions indicating that employees were *not* terminated. See *Pink Supply*, 249 NLRB at 674 (holding that reasonable employee could not have considered themselves terminated where employer told employee spokesman that if employees did not return to work he would have to act as if the employees had resigned).

Nor can the September 23 statement to several employees about completing an employment "application" be considered evidence that all striking employees reasonably believed their employment was terminated. First, the statement was made to only four individuals. Second, it was made at a time – Friday September 23 – at which about 30 strikers had *already* returned to work without any condition or consequence. Third, the Company's other actions undisputedly indicated that the striking employees had not been fired and the Company wanted them to return to work.⁹

⁹ The record provides no credible support for the GC's claim that Amglo's decision to change its locks after the first day of the strike constituted a "lockout" and was further evidence that employees were fired. The record shows there were legitimate business reasons for changing the locks especially given the fact that employee *had previously refused to work while continuing to occupy the premises*. Thus, Amglo management made a decision to change the locks because (a) they had been told that the striking employees planned to occupy the plant again the following day, and (b) some of the striking employees had keys to the facility. (Tr. 181-82, 216, 338). As noted in the text, the record also shows that, contrary to any alleged "lockout," the Company representatives repeatedly asked employees to resume working.

4. Even if Any of the Statements Could Have Led a Reasonable Employee to Believe He or She Was Terminated, the Company's Subsequent Actions and Statements Sufficiently Disavowed Any Indication That Employees Had Been Terminated.

Even if any of the statements discussed above supported a finding that one or more employees reasonably believed their employment had been terminated (which it does not), the Company's actions beginning the morning after the strike clearly rendered such a belief *unreasonable*.

All of the following facts are uncontroverted: On the morning of Wednesday September 21, as noted above, three Company managers and a Bensenville police officer told the group of strikers that they were welcome to come into the facility and work. (Tr. 312, Christian, Tr. 216-17, 220-21, Czajkowska; CX-15, Kulikowski; CX-14, Melone). Also on September 21, and continuing through the remainder of the week, Czajkowski and Christian repeatedly called employees and asked them to return to work, and to urge other employees to return to work, and told them there would be no consequences for going on strike. (Tr. 381-82, Uchanska). On the mornings of Thursday and Friday September 22 and 23, Czajkowska and Christian went to the end of the driveway at the facility and "were gesturing to people to come [into work]." (Tr. 314-15, Christian; Tr. 230-31, Czajkowska). Finally, and most importantly, numerous strikers were in fact going back to work and being accepted back by Amglo with no consequences or conditions – 10 on Wednesday September 21, 17 more on Thursday September 22, and 8 more prior to the end of the strike on Tuesday September 27. (CX-5).

Moreover, the strikers were clearly aware of these actions. Ossak testified in her affidavit – given September 27 – that she heard from Dzeikan on Monday September 26 that the Company was "waiting for us to come back." (Tr. 165-66, Ossak). Kopec's affidavit states that "I later got a call from one of the employees who told me that we would meet at the company

instead because they want us back to work, that we were not fired.” (Tr. 68-69, Kopec). And Dzeikan and Ossak testified that they were aware that strikers had returned to work, with Ossak testifying that she actually saw the strikers enter the plant. (Tr. 109-10, Dzeikan; Tr. 163, Ossak). Given this context, it is unreasonable that *any* employee – on and after September 21 – could have reasonably believed that their employment was terminated. See *Phoenix Processor Ltd. Partnership*, 348 NLRB 28 (2006) (“The General Counsel acknowledges, however, that an employer who initially leads employees to believe that their employment has been terminated may disavow such statements or clarify that the employees are, in fact, still employed”).¹⁰

C. The ALJ Correctly Found That Any Alleged Transfer of Work Did Not Violate Section 8(a)(1) of the Act.

The Complaint alleged that Amglo retaliated against strikers by transferring work previously done at the Company’s Bensenville facility to the Company’s Juarez facility. In his decision, the ALJ stated that because it was unclear how many employees worked at Amglo’s Juarez facility and because it was unclear how much overtime those employees worked, “I find that Respondent has not established that it did not transfer a significant amount of production work to Juarez and/or other facilities in retaliation for the strike at Bensenville.” (ALJD at 10).

As explained in the Company’s exceptions, this finding makes no sense. The Company presented substantial and undisputed evidence showing that only a miniscule amount of work product was transferred to Juarez from Bensenville after the strike.¹¹ For this reason, the ALJ

¹⁰ Counsel for the Acting General Counsel’s exceptions brief neither attempts to distinguish *Phoenix Processor* nor even cites it, nor does it discuss the facts that more than 30 strikers returned to work without consequence or condition prior to September 27, and that the remaining strikers were aware of the returns.

¹¹ The GC’s brief claims that “as of September 20, the day the employees initiated the work stoppage, no decision had been made to transfer machinery to Mexico” (GC Mem. at 28, citing RX-9 and Tr. 289-90). This is a gross mischaracterization of the record. Company Exhibit 9, cited to by the GC, is dated August 23, 2011, and clearly shows the two machines in question were scheduled to be moved to Mexico, and Czajkowska testified without contradiction by any other witness that the Company had plans before the strike to move the two machines to Mexico. (Tr. 286-90).

correctly did not find a violation of Section 8(a)(1) based on any alleged work transfer. And such an allegation lacks merit as a matter of law, based on the well-established principle that work relocations and similar business changes do not Section 8(a)(1) absent a finding that they violate Section 8(a)(3), which is not even alleged in the instant case.¹²

D. The ALJ Correctly Found No Independent 8(a)(1) Violations Based on Alleged Statements By Company Officials.

In its exceptions brief, the GC lists seven alleged statements that it believes the ALJ should have found to be independent violations of Section 8(a)(1). For several reasons, the ALJ correctly did not find that any of the alleged statements violated Section 8(a)(1).

First, the GC waived any contention that the alleged statements were independent violations of Section 8(a)(1) because this was not argued either at the hearing and in the GC's post-hearing brief. Only one of the alleged statements (that employees would "lose") was alleged in the Complaint, yet there was no testimony regarding that alleged statement at the hearing, nor did the GC argue that the statement was a violation in its post-hearing brief. And while the GC attempted to amend the Complaint to include one additional statement (that if the owner was present, he would fire half the employees), the GC did not present any argument in its post-hearing brief regarding that statement either. *See Wis. Bell, Inc.*, 346 N.L.R.B. 62, 64 n.8 (2005) (argument not raised at the hearing and in post-hearing brief waived); *Cornucopia Inst. v. U.S. Dep't of Agric.*, 560 F.3d 673, 677-78 (7th Cir. 2009) (failure to pursue argument in brief waives issue).

¹² The ALJ also correctly did not include a remedy relating to the work transfer. Nor could he have, given the absence of an 8(a)(3) allegation here and the Supreme Court's decision in *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) holding that "some employer decisions are so peculiarly matters of management prerogatives that they would never constitute violations of section 8(a)(1), whether or not they involved sound business judgment, unless they also violated section 8(a)(3)."

Second, with the exception of the alleged statement that employees would “lose,” none of the alleged statements were listed as allegations in the Complaint, and therefore Amglo did not have an adequate opportunity to defend against such allegations. *Lamar Advertising*, 343 NLRB at 265-66, quoting *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (“[A]n administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case”).

Third, the GC presents no actual argument and cites no cases for the proposition that any of the alleged statements, if true, warrant a violation of Section 8(a)(1). Simply asserting that a statement violates Section 8(a)(1), without more, is insufficient to warrant a finding of a violation.

Finally, even if considered on the merits, none of the specific allegations warrants a finding of an 8(a)(1) violation. For example, regarding the alleged Czajkowska statement that employees were going to “lose,” there is no basis in the record that Czajkowska even said this, and even if she had, it would not be a violation, because no evidence indicates this is more than a lawful statement of opinion that the strike would not turn out well for the employees. *See* NLRA Section 8(c), 29 U.S.C. § 8(c) (protecting the “expressing of any views, argument, or opinion, or the dissemination thereof” where the expression “contains no threat of reprisal or force or promise of benefit”).

The next allegation is based on the alleged statement by Czajkowska on the morning of September 20 that the strikers were “fired” and that they should sign the resignation papers. As noted in detail above, only Kopec – who the ALJ found not credible – alleges that Czajkowska told strikers they were fired, and five other witnesses said Czajkowska did not say the strikers

were fired. In addition, giving employees who were not working the option to resign is hardly evidence of an 8(a)(1) violation.

The GC also claims that the following alleged statement by Christian during the first morning of the strike warrants a violation of Section 8(a)(1). According to the testimony of Osaak:

[Christian] was saying something about the globalization, and do we know what it means? What it is? How other companies are shipping production to, moving production to China and Mexico. And then one of the employees said, well, that's what you do. And then Iza said that, you know that the owner has four other companies and on different continents, and it would be, and you're asking what would he do? It would be so easy for him to make a decision. It's so strange that you don't know what he would do at that point with you.

(Tr. 131).

No violation of Section 8(a)(1) can be found here. Osaak was unable to describe the actual statements made by Christian, as evidenced by the testimony that Christian stated “something” about the items described above. And in the context of Amglo – whose longstanding business model provides for the transfer of Bensenville products to Mexico for high-volume, lower-cost manufacturing – it is clearly permissible, when discussing possible wage-based cost increases in Bensenville, to discuss “globalization” and cost-competition involving non-U.S. facilities.¹³

¹³ The leading § 8(a)(5) relocation case *presumes* that many lawful work transfers occur *because of* labor costs or other things for which the union is responsible. *See Dubuque Packing Co.*, 303 N.L.R.B. 386, 391 (1991), *enforced in relevant part sub nom. UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 511 U.S. 1016 (1994), *cert. dismissed*, 511 U.S. 1138 (1994) (bargaining required over relocation decisions where, in part, “labor costs were a factor in the decision” and the union could have “offered labor cost concessions that could have changed the employer’s decision to relocate”). *See also Langston Cos., Inc.*, 304 NLRB 1022 n.2 (1991) (employer did not violate § 8(a)(3) and lawfully transferred work from a union to nonunion facility for economic reasons, even though work transfer occurred after successful union organizing drive). Thus, it is also clearly lawful for an employer to discuss such potential work transfers, for economic reasons, when discussing potential wage increases. *Id.* *See also* NLRA § 8(c) (protecting non-coercive expression of views and opinions regarding collective bargaining matters).

The GC also excepts to the ALJ not finding that the alleged statement by Czajkowska to Kopek on the afternoon of September 20 that he was fired was a separate violation of Section 8(a)(1). This exception should be rejected as well because the ALJ did not find Kopek credible, and his testimony was contradicted by all of the other witnesses to this event.

Next, the GC excepts to the alleged statements that Amglo's owner was not as "pro-Polish as he used to be," and that he would "tell the managers to get rid of half of the employees if they continued the strike." (GC Mem. at 19). Again, the GC does not make any attempt to explain why these alleged statements are violations of Section 8(a)(1). With respect to the "pro-Polish" allegation, while in theory that could form the basis of some type of non-NLRA discrimination charge (*e.g.*, pertaining to national origin), such a statement certainly is not a violation of Section 8(a)(1). Moreover, on its face, the alleged statement makes no sense because the primary Amglo management representatives in the instant case are Polish, including Christian (the President and Chief Operating Officer), Czajkowska (the Plant Manager) *and* the vast majority of the workforce. With respect to any allegation regarding "getting rid" of employees, Ossak is the only witness who testified regarding such a statement, and multiple other witnesses did not hear any such comment.

Finally, the GC excepts to the ALJ's finding that, in response to striker Elizabeta Tarosa saying "fire us," Czajkowska lawfully stated "no, you are trying to fire yourselves. You're resigning because you don't want to return to work." (Tr. 185, 220, Czajkowska; see also CX-15, Kulikowski). Once again, the GC provides no support that such a statement constitutes a *per se* violation of Section 8(a)(1), particularly given that

the instant case involves a nonunion work setting where, understandably, there was no prior experience with the terminology applicable to work stoppages and strikes. Even without such experience, however, the record establishes that Amglo repeatedly urged striking employees to return to work, returning employees were accepted throughout the work stoppage, and the Company expressed in writing to all non-returning employees that they were *not* fired and they retained preferential hiring rights. Such conduct is precisely what the Act permits. .

CONCLUSION

For the foregoing reasons, the Company respectfully urges the Board to reject all of the GC's Exceptions to the Administrative Law Judge's decision.

Respectfully submitted,

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Dated: August 9, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent Amglo Kemlite Laboratories, Inc.'s Response to Counsel for the General Counsel's Exceptions to the ALJ's Decision was served this 9th day of August 2012, upon the following:

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