

**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 REPLY BRIEF IN SUPPORT OF ITS CROSS EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

In its response to the Company's Cross-Exceptions, the General Counsel ("the GC")¹ 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 response to the Company's exceptions.

When the dust clears, the ALJ's decision remains wrong on the facts and wrong on the law, and clearly warrants reversal as to the issues identified in Amglo's Cross-Exceptions. Several points are especially noteworthy.

First, the strikers' conduct on Tuesday September 20 removed their actions from the protection of the Act. The strike severely interfered with production, because essentially no work was done at the Bensenville facility on September 20. The strikers very clearly had an opportunity – within the first hour of the six hour strike – to present their wage grievance to management; yet despite that grievance being clearly, unequivocally, and repeatedly rejected, and 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. The GC's clumsy attempts to dispute what are clearly undisputed facts should be rejected, and the Board should find that the strikers' conduct lost the protection of the Act.

Second, the ALJ violated Amglo's due process rights, first, by improperly creating an entirely new theory of the case premised around the concept that striking employees were "laid off" – when such a theory was not articulated by either party nor the subject of evidence; and second, by therefore applying the wrong legal standard instead of the long-established Board

¹ 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.

principles governing post-strike reinstatement questions. The GC's Answering Brief includes literally no argument with respect to these contentions, apparently conceding them.

For these reasons and those presented in Amglo's earlier brief supporting its Cross-Exceptions, the Board should reverse the ALJ's decision and dismiss the Complaint

ARGUMENT²

A. The ALJ By Finding the Six-Hour In-Plant Strike Protected.

Counsel for the General Counsel ("GC") claims that all of the *Quietflex* standards support a finding that the work stoppage was protected. The GC is wrong, and in multiple places misrepresents or simply ignores the record evidence.

1. The Length of the in-Plant Strike Alone Warranted a Finding that The Strike Was Unprotected.

The ALJ correctly found that the length of the strike – six hours – weighed in favor of a finding that the strike was unprotected. (ALJD at 7). There are numerous problems with the GC's claims that strike actually only lasted "one hour before management terminated the employees," and that the strike was protected because Amglo "instantly terminated the employees and thereafter neither attempted to resolve the dispute nor remove the employees from the facility." (GC Ans. at 13-14).

First, the Board has never found a six-hour in-plant strike to be protected, and therefore the ALJ erred by not finding the strike unprotected on this basis alone. The Board has uniformly held that work stoppages longer than two to three hours lose the Act's protection. See *Waco, Inc.*, 273 NLRB 746 (3.5 hour strike unprotected) and *Cambro Mfg. Co.*, 312 NLRB 634 (same).

² References to the hearing transcript 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.

Protected work stoppages generally are far shorter, including cases where the stoppages lasted less than 2 hours, and in some cases a matter of minutes. See *Quietflex*, 344 NLRB at 1058, n.15 (citing relevant cases). In finding the strikes in *Quietflex*, *Cambro*, and *Waco* unprotected, the Board relied heavily on the length of the strike, even where other factors weighed in favor of a finding that the strike was protected.

Second, the ALJ correctly found that Amglo did not terminate any employees, either within the first hour of the strike or at any time thereafter. (ALJD at 9).³ Finally, as explained below, despite the GC's protestations to the contrary, there was undisputed testimony from multiple witnesses that Amglo asked the strikers to either return to work or leave the facility, and that the strikers simply ignored this demand and remained on Amglo's production floor for six hours.

2. Multiple Other Factors in the *Quietflex* Analysis Warrant a Finding that the Strike Was Unprotected.

A number of other factors warranted a finding by the ALJ that the strike was unprotected, including three of the other most important standards – that the strikers had an adequate opportunity to present their single grievance, that the strikers were told to return to work or leave the premises, and that the strikers remained on Amglo property well after their shift had ended.

a. The Strikers Had an Adequate Opportunity to Discuss Their Grievance.

The GC claims that Amglo “did not give the employees an adequate opportunity to present their grievance” because they were not able to speak to the owner of the Company. (GC Ans. at 11-12). This contention is absurd. First of all, 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

³ In any event, whether or not the strikers were terminated is irrelevant to the question of whether the length of the strike warrants a finding that the strike was unprotected. There is simply no support for this claim in Board law, and it makes no sense that there would be – whether or not the strikers were terminated, they still remained on the Company's production floor for six hours.

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”). This requirement was clearly satisfied by the role played by Christian – the President and Chief Operating Officer (based at the Company’s headquarters in Florida). Indeed, the GC’s own witnesses testified that they waited until September 20 to strike because Christian was coming to the Bensenville plant from Florida.

Second, it was **undisputed** at the hearing (via testimony from at least **seven** different witnesses) that Christian and Czajkowska told the strikers multiple times within the first hour of the strike that their demands 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 [a wage increase]” (Tr. 369, Skomoroska), and that “nothing can be done now.” (Tr. 88 Dzeikan).

b. The Strikers Were Told to Return to Work or Leave the Premises.

The GC appears to argue that the strikers were not told to return to work or leave the premises. Specifically, Section III.5 of the GC’s Answering Brief is titled “The employees were not given warnings that they must leave the premises or face discharge.” (GC Ans. at 13). However, in the text that follows, the GC contradicts its assertion by stating that “Respondent’s employees were told that there would be no discussion of their grievance, to get to work or accept termination.” (*Id.*).

Indeed, it is clear from the testimony of multiple witnesses that the strikers were told to either return to work or to leave the premises, and that despite this command, they remained on the Company's production floor for five more hours. Specifically, 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

c. The Strikers Remained in the Plant Long After Their Shift Ended.

The GC concedes that the majority of strikers remained in the plant for approximately 90 minutes after the end of their shift. The GC claims this *Quietflex* standard does not support a finding that the strike was unprotected because there was no further “disruption to any other shift work or other negative consequence.” (GC Ans. at 15). First of all, this is simply wrong, as it was undisputed that because the strikers stayed beyond their shift, no work was able to be done by any employee. Second, the *Quietflex* test is not whether the employees remained past their shift *and* interfered with production. Rather, the *Quietflex* test looks only to whether the

⁴ Although GC claims that Amglo refused to address the employee demands (GC Ans. at 13), 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 [a wage increase]” (Tr. 369, Skomoroska), and that “nothing can be done now.” (Tr. 88 Dzeikan). These were definitive responses to the one issue raised by the employees. Obviously, there is a difference between refusing to address strikers’ demands and rejecting them. Clearly, the demands here were addressed – and rejected.

employees remained past their shift. 344 NLRB at 1057. Whether the employees interfered with production is a completely separate factor in the *Quietflex* test. The ALJ erred by conflating these two factors, and thus the fact that at least 40-50 employees stayed 90 minutes beyond their shift further weighs in favor of a finding that the in-plant strike was unprotected.

B. The ALJ Erred and Violated Amglo's Due Process Rights By Mischaracterizing Amglo's Legal Arguments, Applying the Wrong Legal Standards, and Creating an Entirely New Theory of the Case That Was Not Alleged in the Complaint.

In its Cross Exceptions, Amglo made detailed arguments regarding the ALJ's violation of the Company's due process rights by (a) claiming that Amglo had contended that it laid off employees, when Amglo never made any such contention at the hearing or in its briefs, (b) applying the wrong legal standards, and (c) creating an entirely new theory of the case that was not alleged in the Complaint. The GC's Answering Brief does not address any of these arguments at all. It simply ignores them, apparently conceding their accuracy and the serious problems with the ALJ's decision.

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

At the hearing, the Company presented substantial and undisputed evidence that only a miniscule amount of work was transferred from Bensenville to Juarez after the strike. Although the GC did not dispute any of these facts at the hearing, it now claims that this must not be the case because Amglo's "exhibits in which it relies were barely legible and the explanation given as to the content in these exhibits was often unclear and confusing." (GC Ans. at 16). But the GC did not complain about the legibility of Amglo's exhibits at the hearing, nor was there any question what those exhibits showed – namely, that Amglo had been moving work from Bensenville to Juarez for years, and that between the strike and the ALJ hearing, only a tiny amount of work was moved from Bensenville to Juarez. (CX-8-13). Indeed, if documentary

evidence is deficient on the basis of illegibility, it is incumbent on the opposing party to raise a timely objection and oppose its admissibility. Any such objections – not raised at the hearing – are waived and inappropriate to assert for the first time in post-hearing exceptions. And it is obviously common in NLRB cases – which often involve handwritten bargaining notes in Section 8(a)(5) cases or handwritten disciplinary documents in Section 8(a)(3) cases, for example – for documentary evidence to be accompanied by explanatory testimony at the hearing.

Contrary to the GC’s assertion that the exhibits and testimony were unclear, Amglo’s exhibits very clearly showed that the two products moved since the strike consisted of (a) product number AQM-7950, which was a temporary transfer made during the strike and has been transferred back to Bensenville, and (b) product number AQH-5755, of which only 200 units have been made since the strike, and of which large-scale production was always planned for Juarez (CX-13).⁵

The GC also complains that the ALJ did not include a remedy relating to the work transfer. But he could not 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).”

The GC attempts to distinguish *Darlington* on the grounds that it was a shutdown case, whereas there was no plant shut down here. This is a distinction without a difference, for several reasons. First, *Darlington* states that “[a] violation of section 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive.” 380 U.S. at 269. Here, the

⁵ Given this undisputed and clear evidence, the GC’s assertion that the Company unlawfully accelerated a work transfer is obviously wrong.

transfer of work from Bensenville to Juarez could not be unlawful “absent a discriminatory motive.” Second, there is no material difference in this context between a work transfer and a plant shutdown, particularly in the absence of a union or other bargaining obligation, and *Darlington* does not make that distinction. Finally, the Board has never found either before or in the 47 years since *Darlington* that a work transfer violates Section 8(a)(1) in the absence of a violation of Section 8(a)(3).

CONCLUSION

For the foregoing reasons, the Company respectfully urges the Board to find merit to its Cross-Exceptions and dismiss the Complaint.

Respectfully submitted,

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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 Reply Brief in Support of Respondent's Cross-Exceptions to the ALJ's Decision was served this 9th day of August 2012, upon the following:

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