UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY FIVE
SUBREGION THIRTY THREE

NICHOLS ALUMINUM, LLC

and

Case 25-CA-082690

TEAMSTERS LOCAL UNION NO. 371

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Comes now Counsel for the Acting General Counsel and respectfully submits this Brief in Support of Exceptions to the decision of the Administrative Law Judge issued in this matter on April 8, 2013.

I. STATEMENT OF THE CASE

Pursuant to charges filed by Teamsters Local Union No. 371 (the "Union"), a Complaint was issued on October 25, 2012. The Complaint alleged that Nichols Aluminum, LLC ("Respondent") engaged in conduct violative of Section 8(a)(1) and (3) of the Act by discharging its employee Bruce Bandy because he engaged in union and concerted activities and to discourage employees from engaging in these activities. A hearing was held on the issues raised by the Complaint on January 23, 2013 before Administrative Law Judge Michael A. Rosas.

On April 8, 2013 Judge Rosas issued his decision in which he recommended dismissal of the Complaint in its entirety. This recommendation was based, *inter alia*, on the Judge's findings that the record contained no evidence of hostile remarks or actions by Respondent since the conclusion of the strike; that returning striker Bandy made a gesture by simulating the cutting of his throat that Respondent reasonably construed as a threat of serious physical injury or death; that the record evidence indicated a tendency by Respondent to enforce its no-tolerance policy against employees who threaten or harass others with serious physical injury or worse, while overlooking threats of physical injury or harassment; and that where Respondent overlooked harassment and threats perpetrated by replacement workers, this does not establish Respondent engaged in disparate treatment for discharging Bandy. The Acting General Counsel excepts to these and other findings and to the Judge's conclusion that Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Bandy and to his corresponding recommendation to dismiss the Complaint in its entirety.

II. QUESTIONS PRESENTED

(1) Whether the Judge erred when he failed to find that questioning employees regarding their future intent to strike and conditioning their employment on a pledge they not strike again constituted animus. (Exceptions 2 through 4)

(2) Whether, on about April 27, 2012, Respondent discharged returning striker Bruce Bandy because of his union and concerted activities and to discourage employees from engaging in these activities in violation of Section 8(a)(1) and (3) of the Act. (Exceptions 1 through 12)

III. ARGUMENT

In his decision, the Judge found that there was no evidence of hostile remarks or actions by Respondent since the conclusion of the strike, that Respondent reasonably construed Bandy's gesture to be a threat of violence, that Respondent did not treat Bandy disparately than replacement workers and that Respondent's discharge of Bruce Bandy did not violate Section 8(a)(1) and (3). The record evidence, however, does not support these findings and conclusions of the Judge. Rather the evidence clearly supports a finding that Respondent's interrogation of returning strikers regarding their future intent to strike and Respondent's requirement that employees pledge not to strike again are unquestionable evidence of animus. The record also clearly supports a finding that Respondent demonstrated animus when it unreasonably and disparately construed Bandy's gesture to be a threat of violence in order to discharge him for his union and concerted activities, while failing to discharge replacement workers found to have engaged in similar, or worse, conduct.

A. Respondent's Requirement That Employees Pledge Not Strike Again Demonstrates Animus

The record reveals, and the Judge found, that following the expiration of the parties' collective bargaining agreement (CBA) and during the negotiation of a successor agreement, the Union initiated a strike at the Employer's two Davenport, Iowa facilities which lasted from about January 20 through April 6, 2012. Bandy was one of the employees who participated in the strike.[1] During the strike, Bandy and other employees brought pressure to bear by regularly patrolling picket lines at both of Respondent's Davenport facilities. The showing of solidarity

[1] The decision inadvertently erroneously refers to an "Organizing Campaign" in Section II, B, however it is undisputed that the Union has represented the bargaining unit employees since at least the time of Bandy's employment in February 1978. (TR at 35)

was undeniable. Out of over 165 bargaining unit employees who were called out on strike, a list maintained by Respondent identified only 21 employees who broke ranks and crossed the line. (G.C. Exh. 15)

Determined to weather the strike, Respondent hired at least 100 temporary replacement workers to keep operations going. The bargaining unit employees, however, remained steadfast and the strike persisted. Respondent's answer came on April 4, 2012 when it converted the status of approximately 100 replacement workers from temporary to permanent. Two days following this development, the Union strategically tendered an unconditional offer to return to work on April 6, 2012. (TR 22-26)

On about April 11, 2012, Respondent began the process of gradually calling the striking employees back to work. One of Respondent's first orders of business in the recall process was to hold orientation meetings for the returning strikers. The record reveals and the Judge found that during these orientation meetings, supervisors and agents of Respondent told employees they could not return to work unless they promise not to strike again (ALJD at p 3, lines 1-10). During these meetings, Respondent confronted employees with a document which can be likened to a "yellow dog" contract. The document—which was either signed by employees, or read to them, then signed by a manager—questioned employees regarding the basis of their return from strike and about their future intent to strike, requiring that employees pledge not go back on strike. Respondent told employees they had to make the pledge as a condition of returning to work. The document, in pertinent part, read:

> "Do you promise that you will not go out on strike again over the same dispute that caused the strike that just ended?____"
>
> "You are now on notice that if you break that promise and go on strike over the same dispute you will be subject to discipline up to and including the possibility of discharge." (TR 22-24; G.C. Exh. 3)

Bruce Bandy, a 34-year employee, was among the first employees to be recalled. On April 12, 2012, he was required to sign the no-strike pledge before he would be allowed to return to work. (TR 36-38, G.C. Exh. 3)

Contrary to the Judge's conclusion, the record evidence and case authority clearly demonstrate that Respondent's conduct was demonstrative of anti-union animus as Board law makes clear that questioning employees regarding the basis of their return from strike and their future intent to strike interferes with their Section 7 rights. For example, in *J.W. Rex Co.*, 308 NLRB 473 (1992), the Board upheld the administrative law judge's finding that the respondent's questioning of returning strikers regarding their reasons for returning constituted unlawful interrogation in violation of Section 8(a)(1) of the Act. See also *Graham Architectural Products, Corp. v. NLRB*, 697 F. 2d 534 (1983) where the Third Circuit stated:

> An employer's questioning becomes coercive and runs afoul of section 8(a)(1) when it "suggests to the employees that the employer may take action against them because of their pro-Union sympathies...." Although the Board need not show that the employer's interrogation actually had any coercive effect, the questioning must reasonably have tended to coerce under the circumstances.

Id. at 537 [quoting *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 65 (3d Cir. 1978)]

Additionally, in the present case, Respondent also required employees to pledge not to strike for the same reasons and threatened that they could be terminated if they were to do so. This conduct places restraints on and is coercive of employees' Section 7 rights. See e.g. *International Total Services*, 270 NLRB 645 (1984) where the Board upheld the administrative law judge's findings that respondent violated Section 8(a)(1) when it told employees that they would be fired if they went out on strike, but would be paid double time if they reported to work. *Id.* at 654.

Finally, the Board has long held that when economic strikers unconditionally offer to return to work, the employer must promptly reinstate them unless it has permanently replaced them or there is a legitimate and substantial business reason not to reinstate them. *Laidlaw Corporation,* 171 NLRB 1366, 1369-1370 (1968). Requiring former strikers to take steps beyond the union's unconditional offer to return, such as completing additional paperwork, violates the Act. *Peerless Pump Co.,* 345 NLRB 371, 375 (2005). An employer violates Section 8(a)(3) and (1) by interviewing and reinstating strikers based on their assurance that they would not strike again. *Lion Oil, Co.,* 109 NLRB 680 (1954). Failing to fully reinstate strikers who have made an unconditional offer to return to work is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed. *Harvey Manufacturing, Inc.,* 309 NLRB 465 (1992)

In his decision, the Judge incorrectly states that the Acting General Counsel contends that Bandy's strike participation alone provides sufficient circumstantial proof upon which to predicate animus. Acting General Counsel's Brief to the Administrative Law Judge (G.C. Brief to ALJ) cites both record evidence and authoritative case law demonstrating that Respondent's requirement that employees take a no-strike pledge was a clear demonstration of animus. (G.C. Brief to ALJ at pp. 16-17) [2] The Judge, however, for reasons which are not articulated in the decision, failed to conclude this conduct constituted animus. In his decision the Judge found there was no background of independent 8(a)(1) violations during the period after the strike. Even were this the case, however, it does not preclude a finding of animus as, under Board law, animus can be based on unalleged conduct, and even on conduct that is not necessarily violative of the Act. *Overnight Transportation Co.,* 335 NLRB 372, 375 fn. 15 (2001) *Stoody Co.,* 312

[2] Acting General Counsel also argued that Respondent's disparate treatment of Bandy showed its reason for discharging him to be a pretext. The disparate treatment argument will be addressed in Section 2(b), *infra*.

NLRB 1175, 1182 (1993), *Gencorp*, 294 NLRB 717 fn. 1 (1989). In the present case, Respondent's questioning of employees regarding the basis of their return to work and requirement that they take a no-strike pledge as a condition to return to work is not only demonstrative of animus, but shows the hostile, anti-union climate to which employees returned.

B. Respondent Violated Section 8(a)(1) and (3) of the Act When it Discharged Returning Striker Bruce Bandy because of his Union and Concerted Activities and to Discourage Employees From Engaging in These Activities.

After the strike ended and employees returned to resume their duties, they were assigned to work alongside the very individuals who had been hired to replace them. As discussed above, during Respondent's orientation meetings for returning strikers, employees were made to take a no-strike pledge. In this same meeting, Respondent emphasized there would be **zero tolerance** for any harassing and/or threatening behavior and anyone found to engage in such conduct would be subject to immediate discharge. The evidence shows, however, that Respondent was selective in its application of the policy. Determined to "set the tone" for returning strikers, Respondent unreasonably construed a gesture by returning striker Bruce Bandy's to be a threat of violence in order to make an example of him, while blatantly and repeatedly looking the other way when replacement workers engaged in conduct far more egregious.

1. Respondent Unreasonably Construed Bandy's Gesture to be a Threat of Violence in Order to Discharge Him Because of His Union Activities

The record evidence demonstrates that, in the circumstances present here, it was unreasonable for Respondent to construe Bandy's gesture as a threat of violence, but that it did so in order to set an example for how union supporters would be dealt with.

First, Respondent witness/replacement worker Sam Harroun was the only other known observer of the incident which transpired between Braffhart and Bandy. Harroun testified credibly that, and the Judge found that, Harroun saw Bandy make a hand gesture; however he did not interpret the gesture as a threat. He saw it, instead, to resemble a signal commonly used at the plant to request that a vehicle's engine be shut off. Given this, when Harroun observed Bandy's gesture, the circumstances told him it was a request for Braffhart to stop blowing the horn of the fork truck—not a threat. In fact, at the time of the incident Harroun told Braffhart that he thought the gesture was a signal to stop blowing the horn. When interviewed by Respondent's managers, Harroun reported the same: that the gesture was a signal to stop blowing the horn, and not a threat. (TR 140, 144-146) In view of Harroun's wholly plausible description and interpretation of what he witnessed, it was not reasonable for Respondent ignore this impartial witness's account and to construe Bandy's gesture as a threat of violence.

Second, even assuming *arguendo* Respondent had believed Bandy made a "cut throat" gesture to Braffhart, given the lack of proximity between the two men and the inability of Bandy to carry out any threat, Respondent could not have reasonably construed this as a serious threat of violence. (See *Franzia Bros. Winery*, 290 NLRB 927 (1988), where the Board affirmed the administrative law judge's ruling that respondent did not have a legitimate basis for discharging strikers for misconduct. In his decision, the judge cited *Associated Grocers of New England v. NLRB*, 562 F. 2d 1333, 1336 (1st Cir. 1977) for the proposition that a truly "serious threat" is one that "may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." *Franzia Bros. Winery*, 290 NLRB 927, 932 (1988))

In the instant case, Bandy and Braffhart were approximately 20 to 30 feet away from one another when the gesture was made. (TR 50, 71) Bandy was on the ground, while Braffhart was

in an enclosed fork lift truck. Bandy stands at 5 foot 9 inches and weighs about 155 pounds while Braffhart stands at an imposing 6 foot 3 or 4 inches and tips the scales at an estimated 270 pounds. (TR 58) Given these physical realities, the distance between the two men, the fact that Bandy's gesture was unaccompanied by words and the inability for Bandy to carry out any threat, it was not reasonable for Respondent to conclude that Bandy's gesture was a serious threat of violence.

Likewise, even if Respondent had believed Bandy had made the "cut throat" gesture, it is abundantly clear from Respondent's treatment of other employees that its termination of Bandy was an exaggerated and unjustifiable response. In *299 Lincoln Street, Inc.*, 292 NLRB 172, 202 (1988) the Board held that a respondent's exaggeration of the seriousness of an incident is one factor which has been relied upon by the Board to show that the incident is not the real reason for the discharge of an employee. In that case, the Board found that respondent not only exaggerated the seriousness of the incident between the two employees but also acted inconsistently with a belief that any immediate threat of harm existed.

In the present case, Respondent's post-incident conduct is also inconsistent with a belief that Bandy made a serious threat, or that any immediate threat of harm existed. For example, on the day in question, following Respondent's investigatory interview of the witnesses, Bandy was told to go home until further notice. He was then allowed to walk unescorted throughout the plant, access his computer and collect personal items without any apparent concern for whether he might act on his supposed threat against Braffhart. (TR 57) There is no evidence that any measures were taken to segregate the men from one another or to otherwise insure Braffhart's safety. By way of contrast, Respondent's reaction to a threat made by former employee Roosevelt Smith is illustrative of how it responds to serious threats. In that situation, a statement

was made by Smith threatening bodily harm against a supervisor. Upon learning of the statement, Respondent immediately suspended the employee, removed the supervisor from the plant for his own safety, and arranged for a security detail to be place at the supervisor's home. (TR 163-164, 185-186) When viewed in context, Respondent's purported belief that Bandy made a serious threat of bodily harm against Braffhart is simply not credible as it is clear that Respondent's conduct following Bandy's gesture was inconsistent with its conduct following actual and serious threats.

The Board has also found that a violation where an employer exaggerates the seriousness of an incident to discharge employees for violating a zero tolerance rule. For example, in *Sysco Food Services, LLC*, 343 NLRB 1183 (2004) the Board upheld the administrative law judge's findings that respondent violated Section 8(a)(1) and (3) when it discharged two union supporters for violating a zero tolerance policy. In her decision, upheld by the Board, the judge found that the respondent exaggerated the seriousness of an incident when it discharged two employees for violating the employer's "zero tolerance" workplace violence policy. In that case, two employees began to argue with one another about a near collision in the aisle. During the argument, one employee pointed his finger in the face of the other. The other employee reacted by moving the employee's finger aside with a brushing motion of his own open hand. The employees, both union supporters, were called into the manager's office, interviewed, then discharged for the incident two weeks later. During the hearing, evidence was introduced of other incidents known to the respondent in which employees engaged in screaming at other employees, cursing, pounding a fist into the other hand, and running after another employee in order to attack him. Notwithstanding respondent's supposed "zero tolerance" policy, none of the involved employees were discharged and only one was given a warning. *Id* at 1191.

In the instant case, even if Bandy had made a "cut throat" gesture, given the lack of proximity, the fact that the gesture was not accompanied by threatening remarks and the physical difference in size between the two men, there was no basis for the Employer to conclude that Bandy had either the means or the intention to carry out any threat, or that any immediate threat of harm existed. Likewise, Respondent's actions after Bandy's gesture was reported—i.e., its failure to escort Bandy out of the plant or take any protective measures towards Braffhart proves that Respondent's conscious decision to discharge Bandy for making a threatening gesture was a grossly exaggerated and illogical response to the circumstances, all done in an effort to bring his conduct under the zero tolerance policy.

2. Respondent Selectively Applied its Zero Tolerance Policy Against Bandy in Order to Discharge Him Because of His Union Activity

As discussed above, between January 20 and April 6, 2012, the Union engaged in a widely supported strike against the Employer in furtherance of its bargaining position during contract negotiations. In order to weather this strike, Respondent hired over 100 temporary replacement workers to man the positions of striking workers. On April 4, 2012, Respondent converted these replacements to permanent employees and within two days, the Union called off the strike forcing Respondent to reinstate the striking workers. Starting on about April 11, 2012, respondent began calling strikers back to work. As it did so, Respondent held orientation meeting for employees warning them there would be zero tolerance for threatening and harassing behavior. It is clear from the facts, however, that Respondent made a conscious decision not to enforce its zero tolerance policy against replacement workers found to have made threats of violence in the workplace. The record reveals that following Bandy's termination, there were at least two other instances of known threats in the workplace. In each instance Respondent

refused to apply its zero tolerance policy. In each instance the aggressor was a replacement worker.

a. Replacement Worker Saltzburger and Returning Striker Schalk

The record revealed and the Judge found that on May 4, 2012, returning striker Robert Schalk was talking to fellow employee Darren Schnowski by the time clock while the two men were waiting to punch out. At this time, replacement worker Craig Salzburger, without any provocation, began screaming at Schalk. He was cussing and grabbing himself in the crotch area while yelling, "What the fuck are you looking at? You got a fucking problem?" Schalk ignored Salzburger and walked out, but Schanowski followed Schalk out, stepping in front of him and asking if Schalk thought he was "pretty" and what his "fucking problem" was. Schalk told Saltzburger to get away from him and tried to walk around him, but he stepped in front of Schalk again and repeated, "You got a fucking problem? What the fuck are you looking at?" At this point, Schalk said they needed to go upstairs and report the confrontation. Saltzburger said, "That would be fucking fine. Let's fucking do it." (TR 84-86; ALJD p. 3, lines 23-28, p. 4, lines 1-5)

All three men walked back into the plant and, while on their way to report the incident to management, saw Supervisor Phil McBroom. Schalk called out to McBroom who came over to the employees. Schalk described what happened while Saltzburger continued to say, "You got a fucking problem? What the fuck are you looking at?" McBroom's response to this situation was to ask Schalk, "What the fuck do you want me to do about it?" Schalk stated that he thought employees were supposed to report any incidents that would violate Respondent's zero tolerance policy. McBroom told Schalk he "should fucking grow up" and if he wanted McBroom to do anything about it, he would fire them both. Schalk reported the incident to Human Resources

Manager Kris Riley and Bill Hebert that same day. A few days later, Schalk attended a meeting with Riley and Chief Union Steward Belk where Schalk again told Riley what had transpired with Saltzburger. Riley told Schalk that when there is more than one employee involved, you never get the full story. She promised Schalk she would look into the matter, but Schalk never heard back. (TR 87-88; ALJD p. 4, lines 7-23)

In August 2012 Schalk emailed Plant Manager Brian Wolfe reporting that, by McBroom's threat to discharge Schalk for reporting the incident with Saltzburger, McBroom was engaging in threatening, harassing and intimidating behavior in violation of Respondent's zero tolerance policy. Schalk had previously made Wolfe aware of this issue. Wolfe took no action. (TR 90, 95-98; G.C. Exh. 4; ALJD at p. 4, lines 19-28). It is clear from the context that Salzburger's assault on Schaltz was far more threatening and egregious than Bandy's gesture. Salzburger's highly provocative remarks, his profanity, his raised voice, his physical proximity to Schaltz and his repeated blocking of Schaltz's path leave no question as to Salzburger's intention to intimidate Schalk and his desire and ability to carry out threats of bodily harm. Respondent's so-called zero tolerance policy required that Salzburger be discharged for his conduct. Instead, when Schalk reported the incident, Respondent threatened him with discharge.

b. Replacement Workers Sam Harroun and John Dinkman

The record revealed and the Judge found other instances of threatening conduct perpetrated by replacement workers that went unpunished. Christopher James was a caster assistant since August 2007. On October 12, 2012—within a week of his return to work—a discussion took place regarding the temperature of Holder 2. Present were James, Supervisor Everett Orey, Melding Operator Sam Harroun and Caster Assistants John Dinkman and Aaron Ellenberg. Harroun, Dinkman and Ellenberg were all replacement workers. James testified and

the Judge found that during this discussion Harroun said to Dinkman that it was the casters assistants' fault that Holder 2 was too hot. Dinkman disagreed and said he never told the caster assistants to watch the temperature. Supervisor Orey told the employees to stop blaming each other. Harroun then turned to Dinkman and said, "I'm going to take you out back and beat your ass." Several other remarks were exchanged before Supervisor Orey finally said, "Hey, that's enough." No disciplinary action was taken in response to Harroun's comment. (TR 105, 109-111; ALJD at p. 4; lines 31-40). As with Salzburger's assault on Schalz, it is clear from the context that Harroun's remarks to Dinkman were far more threatening and egregious than Bandy's gesture. Harroun's threat to inflict bodily harm on Dinkman, his profanity, and his physical proximity to Dinkman leave no question as to the seriousness of threat of bodily harm and his ability to carry out the threat. Again, Respondent's so-called zero tolerance policy should have resulted in Harroun's discharge. Instead, no action was taken whatsoever.

c. The Pre-Strike Discharge and Post-Strike Rehire of Mike McGlothen

In addition to the disparate treatment displayed by Respondent relative to the threats made by replacement workers Salzburger and Harroun, the record revealed a very telling incident about how Respondent does not have zero tolerance for workplace violence. The evidence revealed and the Judge found that, on January 13, 2012, seven days prior to the commencement of the strike, Respondent terminated a maintenance mechanic for violating its zero tolerance against assault by cleaning and loading a gun at the finishing plant where he worked. Then, several weeks later, and only after the strike was called on January 7, 2012, Respondent rehired McGlothen to cross the picket line and resume his duties at the plant. (TR 26-30, 188, G.C. Exh. 4; ALJD p. 5; lines 3-8) As with Salzburger's assault on Schalz, and Harroun's threat to Dinkman, McGlothen's having a loaded weapon on Respondent's premises

was far more threatening than Bandy's gesture. At the time the incident occurred, Respondent acknowledged the undeniably threatening nature of this conduct and the potential for serious harm. Respondent's zero tolerance policy called for McGlothen to be terminated and he was terminated. However, one week later, after the commencement of the strike, Respondent had a change of heart and brought the discharged employee back to work during the strike. This demonstrates the tremendous impact the strike had on Respondent and suggests that Respondent, in its scramble to find replacements, was willing to reverse itself and rehire an employee properly discharged for violating its zero tolerance policy. This about-face on the zero tolerance policy was subsequently seen when Respondent repeatedly refused to enforce the policy against replacement workers engaging in threatening conduct. Notwithstanding its tolerance for this behavior on the part of replacement workers, Respondent refused the same leniency to Bandy and discharged him. From the facts in this case, it is apparent Respondent was only too eager to seek out an opportunity where it could apply its policy against a returning striker—even where such application was completely unwarranted.

3. Respondent's zero tolerance policy did not differentiate between threats of physical injury and threats of serious physical injury—it differentiated between replacement worker and returning striker.

In the final two paragraphs of his decision, the Judge writes that Salzburger's assault on Schalk in the parking lot did not suggest it would be followed by violence and Harroun's threat to kick Dinkman's rear end referred to physical injury at most. Neither employee was discharged. The Judge then concludes that, when considered together, the record evidence indicates Respondent had a tendency to enforce its zero tolerance policy against employees who threatened or harassed others with serious physical injury or worse, while threats of physical injury and harassment tended to be overlooked. (ALJD at p 8; lines 18-31) This construction of

the zero tolerance articulated by the Judge was neither argued by Respondent nor supported by documentary or testimonial evidence.

The record evidence revealed and the Judge found that Respondent has policies against violence and harassment in the workplace. The details of these policies can be found in the parties' collective bargaining agreement (CBA), as well as other materials publicized to employees. According to the CBA, commission of "Group 1" violations may lead to discharge without notice. One such violation is "Assault on any employee: Violation of the Company's policy on Workplace Violence and Threats." In addition to this language in the CBA, Respondent offered and the Judge found there were other elements to its zero tolerance policy. For example, during Respondent's post-strike orientation meetings in April 2012, Respondent showed a slide titled "Company Violence in the Workplace Statement" where it informed employees that "[h]arassing, disruptive, threatening, and/or violent situations or behavior by anyone, regardless of status, will not be tolerated and subject to discharge on the first offense." A notice stating the same was posted in Respondent's facility sometime after the strike. (TR 172-173, Resp. Exhs. 3,4; ALJD at p. 3, lines 15-19; and FN 5)

In every iteration of Respondent's zero tolerance policy, it is "threats" that are prohibited. There was no evidence adduced at the hearing, either documentary or testimonial, to advance the argument that Respondent differentiated between *threats of serious physical injury, or worse,* versus *threats of physical injury*. To be sure, glaring differences in application can certainly be seen in Respondent's zero tolerance policy, however the difference was not between serious physical injury versus non-serious physical injury—the difference was in the treatment of returning striker versus replacement worker.

Based on the foregoing, there can be little question that the Judge erred in failing to find that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Bandy because of his union and concerted activities and to discourage other employees from engaging in these activities. The animosity borne by Respondent against employees' union and concerted activity is readily visible when, following employees' unconditional offer to return to work, Respondent extracted an unlawful pledge from them that they would not strike again and threatened that they would be discharged if they did so. Not convinced that this conduct was sufficiently coercive, Respondent, just two weeks later, discharged a 34-year employee with an exemplary work record for making a gesture which it concluded was a serious threat. The unreasonableness of this conclusion was demonstrated both by the context of the gesture and by Respondent's reaction to other legitimate threats at the workplace. If there was any question as to Respondent's reason for discharging Bandy at the time of his discharge, the question is answered by Respondent's failure to discharge replacement workers for their even more egregious, but post-strike, threats. With tensions still high following the four-month strike and heated negotiations, Respondent was determined to make an example of a returning striker. Unfortunately for Bruce Bandy, the example was him.

IV. CONCLUSION

For all the above reasons, the Board should reverse the Administrative Law Judge in this regard, find that Respondent violated Section 8(a)(1) and (3) as alleged, order Respondent to post a Notice to Employees, such as that set forth in the attached Appendix A, and order such relief as may be just and proper under the circumstances. In addition, the Board's remedy should include reimbursement for excess income taxes and backpay should be reported to the Social Security Administration pursuant to the Board's Remedy in *Latino Express, Inc.* 359 NLRB No. 44 (2012).

DATED at Peoria, IL, this 6th day of May 2013.

Respectfully submitted,

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APPENDIX A

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- ▪Form, join, or assist a union;
- ▪Choose a representative to bargain with us on your behalf;
- ▪Act together with other employees for your benefit and protection;
- ▪Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT discharge employees because they engage in protected, concerted or union activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL return employee Bruce Bandy to work and **WE WILL** pay him for the wages and other benefits he lost because we discriminatorily discharged him.

WE WILL reimburse Bruce Bandy an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Bruce Bandy, it will be allocated to the appropriate periods.

WE WILL remove from our files any reference to the unlawful discharge of Bruce Bandy and **WE WILL**, within three days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NICHOLS ALUMINUM, LLC