

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 ANSWERING BRIEF  
TO RESPONDENT'S CROSS-EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION

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Comes now Counsel for the Acting General Counsel and respectfully submits this Answering Brief to Respondent Nichols Aluminum, LLC's Exceptions to the Administrative Law Judge's Decision. This Answering Brief addresses each of Respondent's Cross-Exceptions numbered 1 through 5. Counsel for the Acting General Counsel hereby requests that Exceptions 1 through 5 be denied and that the Administrative Law Judge's Decision with respect to these exceptions be affirmed. In support of this position, Counsel for the Acting General Counsel offers the following:

I. STATEMENT OF THE CASE

On October 25, 2012, based upon charges filed by Teamsters Local Union No. 371 (the "Union"), the Regional Director for Region 25, Subregion 33 issued a Complaint. 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. On January 23, 2011, a hearing was held on the issues raised by the Complaint before Administrative Law Judge Michael A. Rosas. On April 8, 2013 Judge Rosas issued his decision in which he recommended dismissal of the Complaint. On May 6, 2013, the Acting General Counsel filed exceptions to certain 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. On May 20, 2013, Respondent filed cross-exceptions to certain factual findings of the Judge. The Acting General Counsel now answers these cross-exceptions.

## II. RESPONDENT'S CROSS-EXCEPTIONS SHOULD BE DENIED

### A. Cross-Exception 1: Bruce Bandy's No-Strike Pledge

It is undisputed that Respondent held orientation meetings for returning strikers and that, during these meetings, Respondent confronted employees with a no-strike document. The document 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. Employee Robert Schalk testified that management asked employees to sign the pledge but the Union intervened and directed employees not to. Managers then signed the document on employees' behalf. In most cases, the document was read to employees, then signed by management. Counsel for the General Counsel notes that Respondent is correct: Bruce Bandy did not sign GC Exhibit 3. He was one of the employees to whom the document was read. GC Exhibit 3 was then signed by Vice President of Human Resources Mike Albee and Plant Manager Bill Hebert after they orally elicited a pledge not to strike from Bandy. (TR 23-24, 36-38, 84, 102, G.C. Exh. 3) However,

the fact that Bandy did not personally physically sign the document is immaterial. The point is that Respondent conditioned returning strikers' employment on their agreement not to strike. Thus, Bandy can be said to have "signed" the document by his agreement not to strike. Respondent's managers then affixed their signatures as a means of affirming Bandy's agreement. Based on the foregoing, then, the Judge's finding that Bandy signed the no-strike pledge should be affirmed.

**B. Cross-Exception 2: Respondent Took Little, if any, Action in Response to Schalk's Concerns He was Being Harassed, Threatened and Intimidated in Violation of Respondent's Zero Tolerance Policy**

The record evidence reveals that on May 4, 2012, returning striker Robert Schalk was repeatedly and aggressively confronted by replacement worker Saltzburger who grabbed at his crotch and yelled, "You got a fucking problem? What the fuck are you looking at?" while blocking Schalk's path to his vehicle. (TR 84-88) Schalk reported this incident to Supervisor Phil McBroom as violative of Respondent's purported zero tolerance policy. McBroom told Schalk he should "fucking grow up" and if he wanted McBroom to do anything about it, he would fire both Schalk and Saltzburger (TR 88).

In late July or early August 2012, Schalk reported to Plant Manager Brian Wolfe that he had heard McBroom had gotten mad during an orientation meeting about the zero tolerance policy and that Schalk's name was brought up. McBroom said, "Don't believe what Rob Schalk's saying, he's lying, just trying to start trouble." Schalk testified that he told Wolfe this was unacceptable for management to discuss this matter during the orientation meeting. Wolfe assured Schalk he would speak with McBroom and it would not happen again. (TR 94) But it did.

In around August 2012 Schalk sent an email to Wolfe advising him that McBroom's orientation remarks about Schalk had not ceased, despite Wolfe's promise they would. Schalk

also emphasized how, on May 4, when McBroom threatened to discharge Schalk for reporting the incident with Saltzburger, McBroom was himself engaging in threatening, harassing and intimidating behavior in violation of Respondent's zero tolerance policy. Schalk stated he had previously made Wolfe aware that McBroom has violated company policy by this conduct, and of Schalk's impression that McBroom was harassing and slandering Schalk in meetings, yet nothing was being done. (TR 95-97; GC Exh. 14)

Counsel for the Acting General Counsel disputes Respondent's representation that Schalk's email related solely to his concern over his name being brought up in orientation meetings. As discussed above, his purpose of his email was two-fold: (1) to request Respondent address McBroom's original violation of the zero tolerance policy in threatening Schalk with termination; and, (2) to request Respondent address McBroom's continuing violation of the zero tolerance policy by harassing and slandering Schalk in meetings. Counsel for the Acting General Counsel notes that Respondent is correct: there was testimony that Human Resources Manager Riley began sitting in on McBroom's orientation meetings, however, this could not have been the response Schalk was seeking or the one he was entitled to. Namely, that Respondent protect employees against threats, harassment and intimidation by enforcing its zero tolerance policy against McBroom, as it had against Bandy. Respondent asserts it must be noted that no further comments must have been made after Wolfe's second promise to "take care of it," because he made no reference to any further concerns regarding comments made by McBroom. Respondent's assertion is based on faulty logic. That Schalk made no subsequent reference to further comments does not mean that no such comments were made. They absolutely could have been made. Significantly, in the event they were made after October 12, 2012, Schalk would not have been around to hear them. Schalk testified he resigned his employment on this date

because he wanted to work at a company that didn't have a hostile work environment (TR 99). Based on the foregoing, then, the Judge's finding that Wolfe took no action should be affirmed.

**C. Cross-Exception 3: The Credible Record Evidence Establishes Harroun Told Braafhart that Bandy's Gesture was a Request to Stop Blowing the Horn.**

The Judge correctly found that immediately after the April 25 incident, Sam Harroun told Keith Braafhart that he saw Bruce Bandy's gesture as a request to Braafhart to stop blowing the horn." (Decision p. 6, lines 1-2) 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. For this reason, immediately following the incident, Harroun told Braffhart that he thought the gesture was a signal to stop blowing the horn. (TR 139-140)

In Respondent's brief in support of its cross-exceptions, it cites a section of the transcript wherein Harroun discusses his conversation with Braafhart after the incident with Bandy. Braafhart asks Harroun, "Did you see that?" Harroun's response follows. In the transcript, quotation marks appear around Harroun's remark: "Yeah, I seen him." But not around his subsequent remark: "I didn't think nothing about it. I figured he was telling him that because to stop blowing the horn, you know." Notwithstanding the misplacement of quotation marks by the court reporter, the Judge observed the testimony in person and clearly understood Harroun to be testifying about what all he said to Braffhart. Despite Respondent's argument that Harroun testified only about what he thought and not about what he told Braafhart, the record supports the Judge's conclusion that Harroun told Braafhart he thought the gesture was a signal to stop blowing the horn, therefore the Judge's finding should be affirmed.

To the extent Respondent is challenging the Judge's credibility findings, there is no basis for such a challenge as they are well-founded and based on the record. The Board has repeatedly held that it will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (P Cir. 195 1). In this case, the record clearly supports the Administrative Law Judge's findings, therefore there is no basis for overturning Judge's credibility findings, and his conclusions regarding Harroun's conversation with Braafhart should be affirmed.

**D. Cross-Exception 4: Harroun Told Albee and Hebert that Bandy's Hand Gesture Resembled a Commonly Used Cut Off or Shut Off Gesture.**

The Judge correctly found that Harroun told Vice President of Human Resources Albee and Plant Manager Hebert he thought Bandy's gesture resembled a gesture where one person tells another to shut off the vehicle's engine. (Decision p. 6, lines 7-8). Harroun testified that he told management on the day he was originally interviewed that he saw Bandy's hand motion, but he also explained he believed Bandy was trying to tell Braafhart to stop blowing the horn, as he recognized Bandy's hand motion to be a common gesture used when telling someone to shut something off. Specifically, in response to Counsel for the Acting General Counsel's question as to whether Harroun had ever explained to management his opinion about the gesture, Harroun testified as follows:

“Well, we do that all the time. I mean, that's a hand gesture like when you want something shut off or cut off, or whatever. I mean, that's just a gesture we've always used. In my opinion, I told them that day that that's what I felt—you know, that he blared the horn , that's like enough, it's done, it's over, you know. I told Kris Riley the same thing, that I didn't think that I didn't think it wasn't any threat at all. I still don't believe it was.” (TR 146)

In Respondent's brief in support of its cross-exception, it cites a separate section of the

transcript where Counsel for Respondent questions Harroun on this same point. The cited portion of the transcript reflects disjointed questions and responses, riddled with interruptions and confused answers. The Judge, who observed Harroun's demeanor, properly credited Harroun where he testified to telling Respondent he thought Bandy had made a shut off or cut off gesture.

Respondent also makes reference to Resp. Exh. 2 which purports to be Harroun's statement regarding the April 25 incident. Respondent argues that the document describes a "cut throat" gesture and makes no mention of any other meaning of the gesture. Notably, while Harroun testified regarding this written statement, it was revealed that Harroun was not its author, nor had he ever taken any notes about the incident. Moreover, Harroun testified he was first presented with the statement and asked to sign it only 10 days prior to trial. (TR 144-145; Resp. Exh. 2).

Therefore, notwithstanding Respondent's argument that Harroun did not tell management he saw the gesture as a shut off signal and not a threat, the record supports the Judge's conclusion that Harroun did inform Respondent of this fact, and the Board should affirm the Judge's finding in this regard. As with the prior cross-exception, to the extent Respondent is challenging the Judge's credibility findings, there is no basis for such a challenge or for overturning Judge's credibility findings as they are well-founded and based on the record.

#### E. Cross-Exception 5: Respondent Gave Saltzburger Only a Warning For His Assault Against Schalk

Respondent excepts to the Judge's finding that Respondent took no disciplinary action against Saltzburger. Counsel for the General Counsel notes that Respondent is correct: Saltzburger did receive minor discipline for assaulting a returning striker. Even still, the discipline Saltzburger received was almost non-existent when compared to the discharge that was

levied upon returning striker Bandy. In support of its cross-exception, Respondent argues, in the first place, that no one testified Salzburger's behavior was considered a threat of violence. Assuming this is the case, it is immaterial because regardless of whether witnesses uttered the exact words: *threat of violence*, there can be no doubt that Salzburger did, in fact, threaten Schalk with violence. To recap, the record evidence revealed that while returning strikers Schalk and Schanowski waited to punch out, Schalk was confronted, without provocation, by replacement worker Saltzburger. The assault began at the time clock and continued in the parking lot while Schalk attempted to walk to his vehicle. (TR 84-86). Schalk reported to Supervisor McBroom that Saltzburger's actions were violative of Respondent's zero tolerance policy (TR 84-88). McBroom did nothing except to tell Schalk to grow up and him threaten Schalk with termination.

In an August 2012 email to Wolfe, Schalk reaffirmed his original complaint of Saltzburger's threatening behavior when he made reference to Saltzburger's attempt to fight him. (G.C. Exh. 14) It is curious then how, in light of these facts, Respondent can argue that no one testified that Saltzburger threatened Schalk with violence. Irrespective of what exact words were uttered, Counsel for the General Counsel questions what else the act of physically blocking someone's path while yelling obscenities and attempting to bait them into a fight could be, if not a threat of violence. In this case, it is irrelevant whether witnesses used certain buzz words during their testimony. It is clear from witness testimony and from the record as a whole, that Schalk considered Saltzburger's behavior to be a threat of violence, and that it was. (TR 84-88, G.C. Exh. 3)

Following the assault, and McBroom's threat to discharge Schalk for reporting it, Schalk took his complaint to HR Manager Kris Riley and Bill Hebert and a meeting was scheduled. (TR

88) After the meeting, there is no evidence Schalk was ever contacted by management regarding the situation. He was never told that any investigation had been done, what if any conclusions had been made, or whether corrective actions had been taken. His safety in the plant was never assured (TR 91-92). Although not communicated to Schalk, Respondent witnesses testified that Saltzburger was ultimately given a write up for a Group 1 offense. This is the same category of offense for which Bandy was terminated. According to Respondent, the write up was a warning that his behavior was unacceptable and further instances would lead to termination (TR 157, 188). If Respondent's rationale for terminating Bandy is to be believed, however, once it concluded Saltzburger had committed a Group 1 offense, he should have subjected him to discharge as well. Instead, Respondent opted to let him off with a warning. (TR 157, 188) In response to Respondent's exception then, Counsel for the Acting General Counsel notes the evidence that Schalk received some minor discipline, but argues that the lack a of more severe response bolsters the Acting General Counsel's argument that Bandy was treated disparately because of this union activity.

### III. CONCLUSION

For all the above reasons, Counsel for the Acting General Counsel hereby requests that Exceptions 1 through 5 be denied and that the Administrative Law Judge's Decision with respect to these exceptions be affirmed.

DATED at Peoria, IL, this 3<sup>rd</sup> day of June 2013.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 3, 2013, a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was filed electronically with the NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES. A true and correct electronic copy was also sent to the following parties via E-MAIL:

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DATED at Peoria, Illinois this 3<sup>rd</sup> day of June 2013.

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