

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 REPLY TO ANSWERING BRIEF
TO ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Comes now Counsel for the Acting General Counsel and respectfully submits this Reply to Answering Brief to Acting General Counsel's Exceptions to the Administrative Law Judge's Decision. Counsel for the Acting General Counsel hereby requests its Exceptions 1 through 12 be affirmed and that the Administrative Law Judge's Decision with respect to these exceptions be reversed. 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, 2013, 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 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. On May 20, 2013, Respondent filed an answering brief to these exceptions (Respondent's Answering Brief). The Acting General Counsel now replies to Respondent's Answering Brief (G.C. Reply Brief).

II. ARGUMENT

In Respondent's Answering Brief it contends that Acting General Counsel's Exception 1, arguing it was unreasonable for Braafhart to construe Bandy's gesture as a threat, challenges the core credibility determination made by the Judge. This is a mischaracterization of the Acting General Counsel's argument and is not correct. Respondent argues Exception 2, addressing the Judge's erroneous statement that the strike took place the year following Bandy's termination, is purely technical and of no consequence. In fact, this finding materially confuses the record. Respondent argues Exceptions 3 and 4 reflect a departure from previous theories. In fact, they are consistent with Acting General Counsel's always-advanced argument that Respondent's no-strike pledges are evidence of animus. Respondent argues Exceptions 5 through 10, going to Respondent's disparate treatment of Bandy, should be denied because Respondent consistently enforced its zero tolerance policy. In fact, the record clearly demonstrated that Respondent failed again and again to enforce this policy against replacement workers engaging in even more severe

conduct in the workplace. For the reasons discussed below and previously filed briefs, the Acting General Counsel's Exceptions should be granted.

A. Acting General Counsel's Exceptions 1 and 8

In Exception 1, Acting General Counsel excepts to the Judge's finding on page 5, footnote 13, that Braafhart did not reasonably construe Bandy's gesture as a request to cut off the machine but, rather, as a cut throat gesture. In Exception 8, Acting General Counsel excepts to the Judge's finding on page 8, lines 23-24, that Bandy made a gesture by simulating the cutting of his throat that Respondent reasonably construed as a threat of serious physical injury or death. Contrary to Respondent's assertions, Acting General Counsel does not challenge the core credibility determination made by the Judge in either exception. Rather, Acting General Counsel argues it was not reasonable under the circumstances for Braafhart or Respondent to conclude that Bandy made a serious threat of violence.

The record evidence demonstrates that, in the circumstances present in this case, 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. In the first place, Bandy testified the fork truck was 20 to 30 feet away when he saw it and jumped back (TR 50, 71). In addition, the warped, opaque window of the fork truck and the environmental conditions in the plant made it impossible for Bandy to identify the driver at that distance. Employee Christopher James testified that a person would have to be approximately three feet from the truck, and looking in at an angle, before they would be able to identify the driver. (TR 114-116; G.C. Exhs. 10-13) Importantly, replacement worker Sam Harroun testified credibly, and the Judge found, that Harroun saw Bandy make a hand gesture. He did not, however, interpret the gesture as a threat, but as a signal commonly used at the plant to request that a

machine be cut off or shut off. Given this, when Harroun observed Bandy's gesture, the circumstances told him it was a request for Braafhart to stop blowing the horn of the fork truck—not a threat. Harroun told Braafhart as much at the time of the incident. 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 to ignore this impartial witness account by Harroun and to construe Bandy's gesture as a threat of violence.

Even assuming *arguendo*, Respondent had believed Bandy made a "cut throat" gesture to Braafhart, 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.¹ Bandy and Braafhart were approximately 20 to 30 feet away from one another when the gesture was made (TR 50, 71). Bandy was on the ground, while Braafhart was in an enclosed fork lift truck. Braafhart is a very large man, while Bandy is slight in stature. (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.²

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

¹ (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))

² Respondent states in its Answering Brief that Counsel for the Acting General Counsel is "somewhat ironically" [...] "jettisoning her prior theory" by arguing first that Bandy could not see Braafhart and then that the gesture could not have been a serious threat. Respondent is incorrect. As indicated by the phrase, "even assuming *arguendo*," Counsel for the Acting General Counsel is not jettisoning her prior theory. She is arguing in the alternative. Regardless of whether Respondent finds such argument ironic, it does not signify abandonment of a prior theory. (G.C. Exceptions Brief at p. 8)

was an exaggerated and unjustifiable response.³ 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 Braafhart. (TR 57)

There is no evidence that any measures were taken to segregate the men from one another or to otherwise insure Braafhart'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 placed 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 Braafhart 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.⁴ So, even if Bandy had

³ 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.

⁴ 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 when an argument about a near collision in the aisle led to one employee pointing his finger in the face of another employee who reacted by brushing the finger aside. The employees, both union supporters, were discharged. During the hearing, evidence was introduced of other incidents known to the respondent where employees screamed at other employees, cursed, pounded a fist into the other hand, and ran after

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 Braafhart 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. For the foregoing reasons, it was not reasonable for Braafhart or Respondent to construe Bandy’s gesture as a serious threat and Exceptions 1 and 8 should be granted.

B. Acting General Counsel’s Exception 2

In Exception 2, the Acting General Counsel excepts to the Judge’s finding on page 6, lines 15-17, that the Acting General Counsel contends Respondent violated Section 8(a)(3) by discharging Bandy on April 27 because he went out on strike the following year. In its answering brief, Respondent argues this exception is purely technical, classifying it as a timing error of a clerical nature and referring the Board to the calendar to demonstrate that April 27, 2012 comes after April 6, 2012.

Counsel for the Acting General Counsel also takes notice of the calendar and agrees that April 27, 2012 comes after April 6, 2012, however this neither sufficiently corrects the error nor clarifies the record. If, for instance, the Judge had erroneously used the words the *following year* when he meant the *previous year*, as Respondent seems to suggest, this statement would still be

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.

materially incorrect. The strike, which lasted from about January 20 through April 6, 2012, occurred in the *same year* and, in fact, ended just *two weeks* prior to Bandy's termination. This timing is critical both from an animus perspective and for providing overall context. If the Judge believed the strike occurred the year preceding Bandy's termination, he could have deemed both the strike and the no-strike pledges to be too remote, resulting in his failure to find animus. Because the Judge's decision does not explain why he failed to find animus, there is no way to know whether he had a mistaken belief about when the strike occurred or about the proximity of the strike in relation to Bandy's termination. For all of these reasons, Exception 2 should be granted.

C. Acting General Counsel's Exceptions 3 and 4

In Exception 3, Acting General Counsel excepts to the Judge's finding on page 6, lines 39-40, that the Acting General Counsel contends that Bandy's strike participation alone provides sufficient circumstantial proof upon which to predicate animus. In Exception 4, Acting General Counsel excepts to the Judge's finding on page 7, lines 26-27, that there is no evidence of hostile remarks or actions by Respondent since the strike concluded and employees returned to work.⁵ In its answering brief, Respondent argues these exceptions are seeking to resurrect assertions that Respondent's no-strike pledges are evidence of animus, contrary to a prior position taken by Acting General Counsel. This is incorrect. The Acting General Counsel's position is unchanged. It is now, and always has been, that Respondent's no-strike pledges are evidence of animus.

⁵ In his decision, the Judge incorrectly stated that the Acting General Counsel contended that Bandy's strike participation alone provides sufficient circumstantial proof upon which to predicate animus. This statement is erroneous. Acting General Counsel's Brief to the Administrative Law Judge (G.C. Brief to ALJ), Brief in Support of Exceptions (G.C. Exceptions Brief) and Reply Brief to Respondent's Answer (G.C. Reply Brief), all consistently argue Respondent's no strike pledges and disparate treatment are indicative of anti-union animus. The Judge, however, for reasons which are not articulated in the decision, failed to conclude this conduct constituted animus.

The record revealed and the Judge found that during Respondent’s return to work orientation meetings, supervisors and agents of Respondent told employees they could not return to work unless they promised 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, in pertinent part, reads:

“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)

In Acting General Counsel’s post-hearing brief to the administrative law judge (G.C. Brief to ALJ), Counsel cited appropriate case authority and wrote:

“Under Board law, animus can be based on unalleged conduct, and even on conduct that is not necessarily violative of the Act.⁶ [...] While not alleged in the Complaint, Respondent’s questioning of employees regarding the basis of their return from strike and about their future intent to strike could certainly be seen to interfere with their Section 7 rights.⁷ [...]

Additionally, [in the instant case] Respondent required employees to pledge not to strike for the same reasons and that they could be terminated if they were to do so. This conduct could also be viewed as **restraining or coercive of employees’ Section 7 rights** [Emphasis added].⁸ [...]

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

⁶ *Overnight Transportation Co.*, 335 NLRB 372, 375 fn. 15 (2001) *Stoody Co.*, 312 NLRB 1175, 1182 (1993), *Gencorp*, 294 NLRB 717 fn. 1 (1989).

⁷ See e.g., *J.W. Rex Co.*, 308 NLRB 473 (1992).

⁸ See e.g. *International Total Services*, 270 NLRB 645 (1984).

there is a legitimate and substantial business reason not to reinstate them.⁹ [...] Requiring former strikers to take steps beyond the Union's unconditional offer to return, such as completing additional paperwork, violates the Act.¹⁰ [...] An employer violates Section 8(a)(3) and (1) by interviewing and reinstating strikers based on their assurance that they would not strike again.¹¹ [...] 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.¹²” (G.C. Brief to ALJ at pp. 16-17)

While it is not clear where Respondent sees the departure in argument, Respondent seems to zero in on the statement in the G. C. Exceptions Brief that, “[Requiring returning strikers to make no-strike pledges] places restraints on and is coercive of employees’ Section 7 rights.” Respondent argues this position is unfounded and no such violations were alleged or argued by the General Counsel. As explained above, this position was argued at length in both in the post-hearing G.C. Brief to the ALJ as well as in G.C. Exceptions Brief. Counsel for the Acting General Counsel acknowledges that the allegation was not pled in the Complaint but notes that, even where conduct is not pled in the Complaint, and even where the General Counsel is not seeking a specific finding relative to unlawful conduct, the Board is not precluded from finding the conduct is indicative of animus. As the record evidence establishes Respondent’s no-strike pledges constitute animus, Exceptions 3 and 4 should be granted.

D. Acting General Counsel’s Exceptions 5 through 10

In Exceptions 5 through 10, the Acting General Counsel excepts to a number of the Judge’s findings which relate back to the evidence that Bandy was treated more harshly than

⁹ *Laidlaw Corporation*, 171 NLRB 1366, 1369-1370 (1968).

¹⁰ *Peerless Pump Co.*, 345 NLRB 371, 375 (2005).

¹¹ *Lion Oil, Co.*, 109 NLRB No. 106 (1954).

¹² *Harvey Manufacturing, Inc.*, 309 NLRB 465 (1992).

replacement workers. Respondent argues its zero tolerance policy was applied fairly when Bandy was terminated for making a supposed threatening gesture. Both in its Answer to G.C. Exceptions and in its Cross-Exceptions Brief, Respondent repeats its own witnesses' version of the events of April 25. Counsel for the Acting General Counsel has addressed these matters in its G.C. Brief to ALJ, Exceptions Brief and Answering Brief to Respondent's Cross-Exceptions. There is no need to re-address them here. The record clearly demonstrates Respondent failed again and again to enforce its zero policy against replacement workers found to have made threats of violence in the workplace, therefore Exceptions 5 through 10 should be granted.

III. CONCLUSION

For the reasons set forth above and in Acting General Counsel's Exceptions and Brief in Support of its Exceptions, the Board should reverse the Judge, find that Respondent violated Section 8(a)(1) and (3) as alleged, order Respondent to post a Notice to Employees, and order such relief as may be just and proper under the circumstances.

DATED at Peoria, IL, this 3rd day of June 2013.

Respectfully submitted,

/s/ Ahavaha Pyrtel

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CERTIFICATE OF SERVICE

I hereby certify that, June 3, 2013, a copy of ACTING GENERAL COUNSEL'S REPLY TO ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S 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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