

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUTLER MEDICAL TRANSPORT, LLC

and

MICHAEL RICE, AN INDIVIDUAL

Case 05-CA-097810

WILLIAM LEWIS NORVELL, AN INDIVIDUAL

Cases 05-CA-094981
05-CA-097854

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BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

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Pursuant to Section 102.46(e) of the National Labor Relations Board's Rules and Regulations, the Acting General Counsel files the following Brief in Support of Cross-Exceptions to the decision of Administrative Law Judge Arthur J. Amchan:

I. STATEMENT OF THE CASE

Upon charges filed by William Norvell on December 14, 2012 and February 6, 2013, and a charge filed by Michael Rice on February 6, 2013, the Regional Director of Region 5 issued a Consolidated Complaint on March 20, 2013. The case was tried before Administrative Law Judge Arthur J. Amchan (herein ALJ) on July 2, 2013, in Baltimore, Maryland. On September 4, 2013, the ALJ issued his decision, finding Respondent committed some, but not all, of the violations alleged in the Complaint and issued an order requiring Respondent to remedy the effects of its unlawful conduct.

Specifically, the ALJ found that Respondent violated Section 8(a)(1) of the Act by: (1) discharging William Norvell; (2) maintaining a provision in its employee handbook that prohibits "unauthorized posting or distribution of papers;" and (3) maintaining a policy that prohibits use of social networking sites which could discredit Butler Medical Transport or damage its image. The ALJ found that Respondent did not violate the Act in discharging Michael Rice.

On September 30, 2013, Respondent filed Exceptions and a Brief in Support of Exceptions to the ALJ's decision and recommended order.¹

¹ Exceptions were originally due on October 2, 2013. However, beginning on October 1 and extending for sixteen days, the Board's offices were closed due to a lapse in appropriated funds. Accordingly, the Board extended the due date for the filing of exceptions to October 18, 2013. Pursuant to Section 102.46(e) of the Board's Rules and Regulations, cross-exceptions are due within fourteen days from the last date on which exceptions may be filed. As such, the due date for cross-exceptions is November 1, 2013, and these cross-exceptions and supporting brief are timely filed.

II. ISSUES PRESENTED

The ALJ dismissed the complaint allegations alleging that Michael Rice was discharged in violation of Section 8(a)(1) of the Act. In doing so, the ALJ found that Rice made a post on www.Facebook.com that was maliciously untrue.² As this brief will set forth, the ALJ erred in making such a finding and the discharge of Rice was unlawful. Moreover, Rice's discharge was unlawful under Board law even if the Board adopts the finding that Rice's post was maliciously untrue.

The ALJ failed to address the Acting General Counsel's complaint allegations that Rice and William Norvell were discharged in violation of Section 8(a)(1) because they were both discharged pursuant to an unlawfully overbroad rule. In *The Continental Group, Inc.*, 357 NLRB No. 39 (2011), the Board set forth the appropriate analysis to be applied when an individual is discharged pursuant to an unlawfully overbroad rule. Even though the ALJ found Respondent's social media policy to be unlawfully overbroad, he failed to analyze the case under *The Continental Group* or address the complaint allegations that both discharges were pursuant to the unlawful policy.³ As such, the Board should find that both Rice and Norvell were discharged pursuant to Respondent's unlawfully overbroad social media policy in violation of Section 8(a)(1) of the Act.

III. FACTS

To the extent relevant, the Acting General Counsel incorporates by reference the statement of facts from the Answering Brief to Respondent's Exceptions.

² www.Facebook.com is a social media website and will be referred to as Facebook hereafter.

³ Respondent did not take exception to the ALJ's finding that its social media policy was unlawful.

A. Respondent's Business Operations

Respondent provides ambulance transport services to nursing homes, hospitals, and other organizations throughout Maryland, Pennsylvania, and Washington, D.C. (ALJD 1; Tr. 34-35).⁴ Respondent maintains locations in Beltsville, Hagerstown, and Owings Mills, Maryland, York, Pennsylvania, and Washington, D.C. (ALJD 1; Tr. 34-35).

Respondent's Chief Operating Officer is William Rosenberg.⁵ (Tr. 33). Rosenberg has held that title for approximately seven years. (Tr. 33). Reporting to Rosenberg, among others, is the Director of Human Resources, Ellen Smith. (Tr. 34).⁶ Respondent employs approximately 250 employees. (Tr. 36). A majority of those employees are EMTs, drivers, and paramedics. (Tr. 36). Respondent also employs billing staff, dispatch staff, and administrative staff. (Tr. 36).

B. Discharge of William Norvell

Respondent hired William Norvell on May 16, 2005. (ALJD 2; Tr. 12). Norvell worked for Respondent as an EMT and an EMT driver and was based out of Respondent's Owings Mills, Maryland location. (ALJD 2; Tr. 12, 13). Norvell's last day of work at Respondent was July 21, 2012, at which time he suffered an injury on the job and went out on workers' compensation. (ALJD 2; Tr. 13). Norvell remained an employee of Respondent's until October 22, 2012, when Respondent discharged him because of a comment he posted on Facebook. (ALJD 3; Tr. 17-18, 42).

Norvell maintains an account on Facebook and frequently posts status updates and comments on his and his friends' Facebook pages. (Tr. 14). Norvell's Facebook friends

⁴ Citations to the Administrative Law Judge's Decision will be noted as (ALJD page number). Citations to the hearing transcript will be noted as (Tr. Page number). Citations to the hearing exhibits will be noted as (GC Exh. number).

⁵ Respondent admitted in its Answer that William Rosenberg has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

⁶ Respondent admitted in its Answer that Ellen Smith has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

include, and have included, some of his co-workers at Respondent. (Tr. 16). On October 10, 2012, Norvell observed a post on the Facebook page of one of his Facebook friends and co-workers named Chelsea Zalewski. (Tr. 14–15). At the time of Zalewski’s October 10 Facebook post, she had recently been discharged by Respondent. (Tr. 68). Zalewski posted, “Well no longer a Butler employee. . . . Gotta love the fact a ‘professional’ company is going to go off what a dementia pt says and hangs up on you when you are in the middle of asking a question.” (ALJD 2; GC Exhs. 7 and 13). On the same day, Norvell posted a Facebook comment in response to Zalewski’s status that said, “Sorry to hear that, but if you want you may think about getting a lawyer and taking them to court.” (ALJD 2; Tr. 15; GC Exh. 13). Norvell also posted a comment on Zalewski’s post that said, “you could contact the labor board too.” (ALJD 2; Tr. 20; GC Exh. 13). When Norvell posted the October 10 comments, he believed his comments would be visible on Facebook to Zalewski and Zalewski’s Facebook friends. (Tr. 16).

Jake Hiepler, Matt Lyons and Andrea Shockney posted in response to Zalewski’s status; each was employed with Respondent at the time of their posts. (Tr. 16–17, 41, 69; GC Exhs. 7 and 13). Erica Auster, Eric Martinez and Larry Smart also posted in response to Zalewski’s Facebook post and were former employees of Respondent at the time of their posts. (GC Exh. 12, p. 5).

Sometime in October 2012, a copy of Norvell’s October 10 Facebook posting was left anonymously on Smith’s desk. (Tr. 68). Smith went to Rosenberg and discussed Norvell’s Facebook post and that Norvell was encouraging Zalewski to get an attorney. (Tr. 42, 69). Smith and Rosenberg made the decision to discharge Norvell. (ALJD 3; Tr. 82; GC Exh. 12, p. 5). On October 22, 2012, after making that decision, Smith and Rosenberg called Norvell at his home. (ALJD 2–3; Tr. 82; GC Exh. 12, p. 5). At the beginning of the call, Smith told Norvell

that Rosenberg was present with her on speakerphone. (Tr. 17; GC Exh. 12, p. 5). Smith asked Norvell if he had made any postings on a former employee's Facebook page. (ALJD 3; Tr. 17). Norvell responded that he probably had. (ALJD 3; Tr. 17). Smith referred to Zalewski's October 10 Facebook status. (Tr. 18).

At that point, while still on the telephone, Norvell accessed his Facebook account from his home computer and viewed the conversation on Zalewski's Facebook page. (Tr. 18). Norvell told Smith he had made the postings she was asking about. (Tr. 18). Smith told Norvell that his post was a violation of policy and he was terminated. (Tr. 18, 83; GC Exh. 12, p. 5). According to Norvell, he stated to Smith "so you're firing me for my First Amendment rights" and Rosenberg responded that words have repercussions. (Tr. 18). Norvell testified that he was very upset at that point and could not remember what else was said on the phone call, but that other words were exchanged. (Tr. 18).

C. Discharge of Michael Rice

Respondent employed Michael Rice from November 18, 2011, until January 14, 2013. (ALJD 6; Tr. 44; GC Exhs. 8 and 9). Respondent discharged Rice for posting a comment on Facebook related to his employment with Respondent in violation of Respondent's social media policy. (ALJD 6; Tr. 46, 81, 84; GC Exhs. 8, 9 and 11). In early January 2013, Rice posted the following comment on Facebook: "Hey everybody!!!! IM FUCKIN BROKE DOWN IN THE SAME SHIT I WAS BROKE IN LAST WEEK BECAUSE THEY DON'T WANTNA [sic] BUY NEW SHIT!!!! CHA-CHINNNGGGGGG CHINNNG – at Sheetz Convenience Store." (ALJD 6; Tr. 45; GC Exhs. 8 and 10).

A copy of Rice's Facebook comment was anonymously left in Ellen Smith's office, possibly by an employee of Respondent. (Tr. 69, 71). After receiving a copy of the Facebook post, Smith

consulted with Rosenberg and they made the decision to discharge Rice based on his Facebook post. (Tr. 57-58, 72; GC Exh. 11).

D. Respondent's Beliefs Concerning Michael Rice's Facebook Activity

The record contains abundant evidence regarding the beliefs Smith and Rosenberg held about Rice's Facebook post when they decided to discharge him. The record evidence indicates that Respondent held the following beliefs regarding Rice's Facebook activity: Rice's Facebook post concerned one of Respondent's ambulances; Rice previously posted concerns regarding vehicles; Rice was Facebook friends with co-workers; and Rice intended his co-workers to see his Facebook post about Respondent's vehicle.

At hearing, Rosenberg testified that he believed Rice's post gave the appearance of referencing one of Respondent's ambulances. (Tr. 58). Smith testified that she believed the post to be referring to one of Respondent's ambulances. (Tr. 85). This was also not the first time Smith had seen postings where Rice voiced his concerns regarding vehicles. (Tr. 92).

During cross-examination, Smith unequivocally denied having knowledge of any Facebook postings of Rice concerning Respondent, other than the post in GC Exhibit 10. (Tr. 86). However, Smith previously testified under oath at an unemployment proceeding, where she admitted that she did have knowledge of other Facebook postings Rice made concerning Respondent.⁷ (Tr. 92-93). When confronted with the unemployment recording, Smith endeavored to distance herself from her own sworn testimony with attempts to differentiate between Facebook postings, statuses, and labels. (Tr. 93). However, the fact remains that Smith admitted knowledge of Rice's Facebook activity under oath.

⁷ The parties orally stipulated on the record that Ellen Smith provided testimony under oath at a Maryland unemployment proceeding concerning Michael Rice's claim for unemployment compensation. (Tr. 89-90).

During the hearing, Smith was asked several questions concerning her belief about Rice's Facebook affiliations with co-workers and her belief about Rice's intent regarding the Facebook post in GC Exhibit 10. (Tr. 85-86). Smith's testimony in response to those questions was evasive and combative. (Tr. 85-86). At the unemployment hearing, Smith testified that she assumed Rice intended his Facebook post to be seen by other employees and other people in the community. (Tr. 92-93). She also testified at unemployment that she believed Rice was Facebook friends with a lot of people that work for Respondent. (Tr. 96-97). That Smith held such beliefs is bolstered by Rosenberg's testimony at hearing. During direct examination, in response to questions about Rice's Facebook post reflected in GC Exhibit 10 and the decision to discharge Rice, Rosenberg testified, "...you know, he lists that he works here, several other people probably knew he was working here at the time...." (Tr. 47). Thus, the record is clear that at the time Respondent discharged Rice, Smith believed Rice was Facebook friends with co-workers and intended his post be seen by those co-workers.

IV. ALJ FINDING REGARDING MICHAEL RICE'S FACEBOOK POST (Exc. 1)

A. Michael Rice's Fifth Amendment Assertion

Respondent subpoenaed Rice to testify at hearing, but Rice refused to answer Respondent's questions based on his Fifth Amendment right against self-incrimination. (Tr. 101). The invocation of the Fifth Amendment is explicitly contemplated by the Board in Section 102.31(c) of the Board's Rules and Regulations. Section 102.31(c) states that once a witness has refused to testify on the basis of the privilege against self-incrimination, the Board, with the approval of the Attorney General of the United States, may issue an order requiring an individual to give testimony. If the privilege is invoked during a hearing, the request for such an order is appropriately addressed to the administrative law judge. Respondent made such a request to the

ALJ, which he denied. (Tr. 106-107). Respondent thereafter failed to appeal the ALJ's denial to the Board pursuant to Rule 102.31(c).

Due to Rice's refusal to testify, the ALJ found that portions of Respondent's testimony stood uncontradicted. (ALJD 6). However, the ALJ did not draw any adverse inferences based on Rice's refusal. Concerning adverse inferences, the Board has held that "an adverse inference 'may be drawn,' not must be drawn, and 'the decision to draw an adverse inference lies within the sound discretion of the trier of fact.'" *Tom Rice Buick*, 334 NLRB 785, 786 (2001) (citing *International Automated Machines*, above, 285 NLRB at 1123 and *Underwriters Laboratories, Inc.*, 147 F.3d 1048, 1054 (9th Cir. 1998)). Accordingly, an administrative law judge may cite the undisputed nature of the record evidence on an issue when declining to draw adverse inferences due to a witness's failure to testify on that issue. See *Roosevelt Memorial Med. Ctr.*, 348 NLRB 1016, 1022 (2006). Thus, the ALJ's treatment of Rice's refusal to testify was appropriate and should be upheld.

B. Maliciously Untrue Finding Not Supported by Record Evidence

In dismissing the complaint allegation regarding Rice's termination, the ALJ cited *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006). In *TNT*, the Board stated that communications otherwise protected by the Act will lose protection if they are maliciously false or, in other words, made with knowledge of their falsity or reckless disregard for their truth. *Id.* However, the mere fact that statements are false, misleading, or inaccurate is insufficient to demonstrate that they are maliciously untrue. *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1252 (2007). Additionally, Respondent has the burden to show that the words were published with the knowledge of their falsity or with the reckless disregard of whether they were true or

false. *Springfield Library & Museum*, 238 NLRB 1673 (1979). Based on the record evidence, Respondent failed to meet this burden and the ALJ's finding was in error.

In *TNT*, employees sent a letter to the company's corporate management and its largest customer as a way to protest alleged mistreatment. *TNT Logistics North America, Inc.*, 347 at 568. In that letter, among other things, the employees accused managers of asking them to engage in illegal activity. *Id.* At the hearing, an employee witness admitted that managers had never actually asked employees to engage in said illegal activity. *Id.* Based on that testimony, and a finding that employees previously threatened to disseminate false accusations, the Board held that the letter lost the protection of the Act because the statements were maliciously false. *Id.* at 569. The case at hand is distinguishable from *TNT* because the record does not contain any evidence that Rice threatened to disseminate false accusations and does not contain evidence to support a finding that Rice's statement was actually false.

In order for Rice's post to be maliciously untrue, it is necessary to find that Rice was *in fact* posting false information about Respondent's vehicle. However, there is no record evidence to support such a finding. Rosenberg testified that during Rice's unemployment hearing, Rice repeatedly denied that his post referred to Respondent and claimed his post referred to a private vehicle. (ALJD 6; Tr. 48). Additionally, Rosenberg testified that Rice's post gave the *appearance* that it was about Respondent, but testified that it was *not* his understanding that the post referred to Respondent. (Tr. 58). Thus, the record evidence is that Rice denied his post concerned Respondent but Respondent believed the post gave the appearance of referencing Respondent.

Furthermore, the text of Rice's post does not name Respondent. (GC Exh. 10). Black's Law Dictionary defines "malicious act" as "an intentional, wrongful act performed against another

without legal justification or excuse.” Black’s Law Dictionary 444 (3rd Pocket ed. 2006). If Rice intended to perform a wrongful act against Respondent by posting a message on Facebook, it is unlikely he would have failed to make any mention of Respondent in the post. Furthermore, the record is void of any evidence concerning any reason why Rice may have intended to perform a wrongful act against Respondent.

Based on *Springfield Library*, Respondent has the burden to prove that Rice made his Facebook post with knowledge of its falsity. 238 NLRB at 1673. Respondent failed to produce evidence that Rice was *actually* posting about Respondent, or any reason why Rice would intend to harm his employer. Absent a finding that Rice’s post was *actually* about Respondent, it cannot be said that Rice’s post was maliciously untrue. Thus, Respondent failed to meet its burden and all that can be said is that Respondent *believed* Rice’s post to be referring to Respondent and *believed* his post to be maliciously untrue.

Accordingly, it is respectfully urged that the Board reverse the ALJ’s conclusion that Rice’s Facebook post was maliciously untrue and that Rice made the post with knowledge of its falsity.

V. THE ALJ’S FAILURE TO FIND RESPONDENT DISCHARGED MICHAEL RICE FOR ENGAGING IN PROTECTED CONCERTED ACTIVITIES
(Excs. 2-4, 8)

Complaint paragraph 12(a)⁸ alleges that Respondent discharged Rice because he engaged in concerted activities by posting on Facebook concerning terms and conditions of his employment. If the Board finds that Rice was posting about terms and conditions of employment, but finds that the ALJ erred in finding Rice’s Facebook post to be maliciously untrue, it follows that Respondent’s discharge of Rice violated Section 8(a)(1) of the Act for the reasons discussed below.

⁸ The Complaint was orally amended at hearing to include paragraphs 12(a) and 12(b) and Respondent did not object to the amendment. (GC Exh. 2; Tr. 6-7).

A. Legal Framework

In *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984),⁹ the Board held that the discipline or discharge of an employee violates Section 8(a)(1) of the Act if the following four elements are established: (1) the activity engaged in by the employee was “concerted” within the meaning of Section 7 of the Act; (2) the employer knew of the concerted nature of the employee’s activity; (3) the concerted activity was protected by the Act; and (4) the discipline or discharge was motivated by the employee’s protected, concerted activity. The Board defined concerted activity in *Meyers I* as that which is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” 268 NLRB at 497. In *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), the Board expanded this definition to include those “circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” The Board has held that the traditional *Meyers Industries* analysis for protected concerted activity applies in cases involving employee postings on Facebook. *Hispanics United of Buffalo*, 359 NLRB No. 37 (2012).

B. Application to Michael Rice

If the Board finds that Rice posted on Facebook concerning Respondent, then the Board should find that Rice’s post satisfied all elements of the *Meyers Industries* analysis.

As the Board stated in *Meyers II*, the definition of concerted activity encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action. 281 NLRB at 887. The concerted nature of Rice’s post is established by the text of the post, as Rice began by stating “Hey everybody.” Such an announcement is the type that induces

⁹ *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984) reversed. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied, 474 U.S. 948 (1985), on remand, *Meyers Indus.*, 281 N.L.R.B. 882 (1986) (*Meyers II*), affirmed sub nom., *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

others to respond and engage in a discussion about the conditions of employment. Whether or not other employees actually accept an invitation to engage in a discussion about working conditions is irrelevant to establish the concerted nature of Rice's post. *Whittaker Corp.*, 289 NLRB 933, 934 (1988); *El Gran Combo*, 284 NLRB 1115, 1117 (1987).

Respondent's knowledge of the concerted nature of Rice's activity is established by Smith's admission that she believed Rice was Facebook friends with a lot of co-workers and that he intended his co-workers to see his post. (Tr. 92, 97). Respondent's knowledge is also established by the fact that Rice's post was left in Smith's office, presumably by an employee.

If the Board finds Rice's post concerned the operational status of his company vehicle, then Rice's concerted activity was protected by the Act because he was discussing his working conditions. The Board has found that employee complaints about inadequate equipment on an ambulance directly relate to working conditions because such complaints concern the ability of employees to perform their work. See *Parr Lance Ambulance Service*, 262 NLRB 1284 (1982), enf. 723 F.2d 575 (7th Cir. 1983). The operating condition of Rice's ambulance directly relates to the ability of Rice, and other employees, to perform their work just as the adequacy of the equipment affected the performance of work in *Parr Lance Ambulance Service*. Therefore, the Board should find that Rice's post was a Section 7 protected discussion of working conditions.

Finally, the record is clear that Rice was discharged because of his protected Facebook post. Rice's Corrective Action Form and Exit Checklist both explicitly state that he was discharged for his Facebook post. (GC Exh. 8, 9). Additionally, both Rosenberg and Smith testified that Rice was discharged because of his Facebook post. As such, all four elements of *Meyers I* are established such that Respondent discharged Rice in violation of Section 8(a)(1) of the Act.

C. Post-hoc Argument and Profanity

The alleged falsity of Rice's post was merely a post-hoc argument raised by Respondent at trial. In Smith's affidavit, the only reason she cited for Rice's termination was his use of profanity and inappropriate language on Facebook. (GC Exh. 11). In her affidavit, Smith makes no mention that Rice discussed vehicle conditions or that Rice's post was false.

The fact that Rice's post contained profanity is not enough to remove Rice from the protections of the Act. The Board has held obscenities uttered by an employee as part of the *res gestae* of concerted protected activity were not so flagrant or egregious as to remove the protection of the Act and warrant the employee's discipline. See *United States Postal Service*, 250 NLRB 4, fn. 1 (1980). In *The Loft*, 277 NLRB 1444, 1467 (1986), the Board stated the employee's right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Rice's comments were an impulsive response to an unexpected, negative working condition. He did not name the Employer and he did not make any threats. Thus, Rice's use of profanity did not rise to the level to remove him from the protections of the Act

VI. THE ALJ'S FAILURE TO FIND RESPONDENT DISCHARGED MICHAEL RICE BASED ON THE BELIEF RICE ENGAGED IN PROTECTED CONCERTED ACTIVITIES (Excs. 2, 3, 5, 8)

Complaint paragraph 12(b) alleges that Respondent discharged Rice because Respondent *believed* that Rice engaged in concerted activities by posting on Facebook concerning terms and conditions of his employment.

A. Legal Framework

An employer violates Section 8(a)(1) of the Act if the employer takes action against an employee because the employer *believes* the employee engaged in, or intended to engage in,

protected concerted activity, even if the employee did not actually engage in, or intend to engage in, protected concerted activity. *Monarch Water Systems*, 271 NLRB 558, fn. 3 (1984); *See also Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992) (stating that the General Counsel made a showing that employees engaged in concerted activity, or at least that the respondent believed the employees' activity was concerted); *Daniel Construction Co.*, 277 NLRB 795, fn. 4 (1985) (citing *Monarch*, the Board held that an employer's belief that an employee engaged in concerted activity was enough to bring the employee under the protection of the Act).

B. Application to Michael Rice

As discussed in Section III(D) above, the record contains abundant evidence regarding the beliefs Smith and Rosenberg held about Rice's Facebook post when they decided to discharge him. The record is clear that Respondent held the following beliefs regarding Rice's Facebook activity: Rice's Facebook post concerned one of Respondent's ambulances; Rice previously posted concerns regarding vehicles; Rice was Facebook friends with co-workers; and Rice intended his co-workers to see his Facebook post about Respondent's vehicle.

Thus, the record evidence supports a finding Smith and Rosenberg made the decision to discharge Rice based on the belief that he was posting on Facebook about a company vehicle and that he intended for his coworkers to see that post. The protected, concerted nature of the activity Respondent believed Rice to be engaging in is established by the argument made in Section V above. Based on the foregoing, the Acting General Counsel respectfully urges the Board to find that Respondent unlawfully discharged Rice in violation of Section 8(a)(1) of the Act based on its belief that Rice engaged in protected concerted activity and in order to discourage employees from engaged in concerted activities.

VII. THE ALJ'S FAILURE TO FIND RESPONDENT DISCHARGED MICHAEL RICE PURSUANT TO AN UNLAWFUL RULE (Excs. 2, 3, 6, 8)

Complaint paragraph 13 alleges that Respondent discharged Rice because it believed he violated the social media policy. The ALJ found Respondent's social media policy to be unlawfully overbroad in violation of Section 8(a)(1) of the Act. Respondent did not except to that finding. Based on the reasons set forth below, the Acting General Counsel respectfully urges the Board to find that Respondent unlawfully discharged Rice pursuant to an unlawfully overbroad rule, in violation of Section 8(a)(1).

A. Legal Framework

“Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act.” *The Continental Group, Inc.*, 357 NLRB No. 39 (2011). Respondent admits that Rice was discharged pursuant to the social media policy. As that policy was found by the ALJ to be unlawfully overbroad, the discharge of Rice was also unlawful if he engaged in protected conduct or engaged in conduct that otherwise implicated the concerns underlying Section 7 of the Act.

B. Discharge of Michael Rice

Since Respondent's social media policy was found to be unlawfully overbroad, Rice's discharge was unlawful pursuant to the first prong of *The Continental Group* if he is found to have engaged in protected concerted activity. However, even if Rice's activity is found to fall short of protected concerted activity, his activity at least implicates the concerns underlying Section 7 of the Act, thus satisfying the second prong of *The Continental Group*.

The argument for the protected concerted nature of Rice's activity is made in Section V above. If the Board finds Rice's Facebook post constituted protected concerted activity or that Respondent believed it constituted protected concerted activity, then it follows that Rice's discharge was unlawful pursuant to the first prong of *The Continental Group*.

If the Board finds that Rice's Facebook activity falls short of protected concerted activity, Rice's activity should be considered the type that implicates the concerns underlying Section 7. Discussions about working conditions are one of the most fundamental types of activity protected by Section 7 of the Act. Rosenberg and Smith admitted that they believed Rice's post to concern the breakdown of Respondent's ambulance that Rice was driving at the time. As discussed above, the condition of Rice's work vehicle would affect his ability to perform his work duties, thus affecting conditions of his employment. Rice's perceived attempt to engage co-workers in a discussion about the operational status of Respondent's ambulance is clearly the type of discussion which could lead employees to engage in concerted action in an effort to affect their working conditions. The attempt to engage in such a discussion necessarily implicates the concerns underlying Section 7 of the Act, even if Rice's co-workers did not join in the activity, thus bringing Rice under the protection of the second prong of *The Continental Group*.

Rice was discharged pursuant to an unlawfully overbroad rule based on Respondent's belief that he either engaged in protected concerted activity or engaged in activity that implicated the concerns underlying Section 7 of the Act. Therefore, Rice's discharge violated Section 8(a)(1) of the Act pursuant to *The Continental Group*.

C. Affirmative Defense set out in *The Continental Group*

During the hearing, Respondent orally amended its Answer to assert an affirmative defense under *The Continental Group*, arguing Norvell and Rice were terminated for interfering with the business operations of Respondent. In *The Continental Group*, the Board made clear that in order to establish such a defense, an employer must establish that, “the employee’s conduct *actually* interfered with... the employer’s operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.” [Emphasis added]. *Id.* at slip op. 4. The Board went on to state that, “It is the employer’s burden, not only to assert this affirmative defense, but also to establish that the employee’s interference with production or operations was the actual reason for the discipline. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee’s interference with production and not simply the violation of the overbroad rule.” *Id.*

The record contains no evidence that Rice’s Facebook post *actually* interfered with Respondent’s operations. Rather, Respondent’s witnesses testified that Rice’s post, in their opinion, could possibly affect Respondent’s operations. For example, when asked about Rice’s Facebook post, Rosenberg testified about what he thought customers might think. (Tr. 47). Respondent did not present any testimony or evidence that any customers complained, canceled contracts, or even had knowledge of Rice’s post. Neither of Respondent’s witnesses provided evidence of any *actual* interference with operations.

Additionally, Rice’s discharge forms explicitly state that he was terminated for posting on Facebook. Neither form makes any reference to Rice’s actions having any impact on Respondent’s operations. (GC Exh. 8 and 9). Furthermore, the affidavit submitted by Smith

explicitly states that Rice was discharged for violating Respondent's social media rule. (GC Exh. 11). Again, Smith's affidavit makes no mention of any *actual* interference with Respondent's operations.

Based on the foregoing, Respondent failed to meet its burden in establishing an affirmative defense relating to Rice's discharge under *The Continental Group*.

D. Malicious Untruth and *The Continental Group*

In *The Continental Group*, the only defense the Board articulates is the defense discussed above, which concerns actual interference with operations. Based on that fact, and the reasons set forth below, the Acting General Counsel urges the Board to find Rice's discharge unlawful under *The Continental Group* even if the Board agrees with the ALJ's finding that Rice's Facebook post was maliciously untrue.

i. The Reason for the Continental Group Rule

In *The Continental Group*, the Board modified a rule set out in *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), which stated disciplines issued pursuant to unlawfully overbroad rules were per se unlawful. *The Continental Group, LLC.*, 357 NLRB No. 39, slip. op. 1. Therein, the Board described one of the rationales underlying the *Double Eagle* rule, that the existence of an unlawfully overbroad rule violates the Act based on the potential chilling effects such a rule may have on employees' exercise of their Section 7 rights. *Id.* at slip. op. 3. The Board went on to state that, "...because the mere maintenance of an overbroad rule creates a potential chilling effect on the exercise of protected rights, it is reasonable to infer that the enforcement of such a rule would have a similar, or perhaps even greater, chilling effect on the exercise of protected rights...." *Id.* Based on the Board's concern for such chilling effects, the

application of an unlawful rule will itself be unlawful even if an employee's actions are not themselves protected, but otherwise implicate the concerns of Section 7. *Id.*

Where an employer discharges an employee who has engaged in concerted protected activities, an array of defenses are available, such as showing the same action would have obtained even had the employee never engaged in protected activity (*Wright Line*), establishing that misconduct caused the concerted activity to lose the protections of the Act (*Atlantic Steel*), or that the concerted activity involved a malicious falsehood (*TNT*). Those lines of cases reflect the Board's determination that Section 7 activities provide employees a shield against retaliatory conduct by employers, rather than a sword employees can use to foist poor production, violent or uncivil misconduct, or maliciously false statements upon their employers. However, victims of unlawful rules fall into a different category – there is no concern for their improperly using Section 7 as a sword because the violation is not premised on their having engaged in concerted protected activity to begin with. Rather, the policy underlying *Double Eagle* as modified by *The Continental Group* is that the chill to *other* employees who have seen their co-worker discharged pursuant to an unlawful rule for conduct implicating Section 7 should be remedied by conferring reinstatement and backpay to the discharged employee even if he never engaged in protected activity. Because the violation is not premised on there being protected concerted activity, the panoply of *Wright Line*, *Atlantic Steel*, and *TNT* defenses are not availing. Thus, the Board was very specific in *The Continental Group* to articulate one and only one defense – actual interference with business operations.

Even if the Board finds Rice's Facebook post to be maliciously untrue such that Rice loses protection of the Act, Rice's discharge still creates the chilling effect that concerned the Board in *The Continental Group*. If Respondent believed Rice's post to pertain to a company vehicle,

then presumably so did Rice's coworkers. Thus, it is reasonable to conclude that Respondent's enforcement of the unlawful social media policy against Rice would chill other employees of Respondent in the future engagement of protected discussions on social media concerning terms and conditions of employment. The only way to remedy this chilling effect is for the Board to order Respondent to reinstate Rice with backpay, as vindication for the rights of other employees to engage in concerted protected activities.¹⁰

ii. Malicious Untruth as an Affirmative Defense Under The Continental Group

Should the Board choose to recognize malicious untruth as an affirmative defense under *The Continental Group*, then Respondent should bear the same burdens as already set forth in order to establish a defense based on actual interference with operations. The Board explicitly stated that the employer bears the burden of proving that the interference itself, rather than the violation of the rule, must have been the reason for the discipline. *Id.* Furthermore, assuming the employer provided the employee with a reason for the discipline, the employer must demonstrate that it cited the employee's interference and not simply the violation of the overbroad rule. *Id.* Concerning malicious untruth as a defense, Respondent should bear these same burdens.

Respondent failed to establish that the malicious untruth, rather than the violation of the rule, was the reason for Rice's discharge. In both documents Respondent created pursuant to Rice's discharge, Respondent failed to cite falsity as a reason for the action. (GC Exh. 8, 9). Rather, Respondent cited Rice's posting on Facebook and his violation of company policy as the only reasons. This is exactly the type of evidence that the Board contemplated would doom an employer's attempt to establish an affirmative defense under *The Continental Group*.

¹⁰ This practice parallels the Board's *Parker-Robb Chevrolet* doctrine, where the Board will order a respondent to reinstate and pay backpay to a supervisor – who has no Section 7 rights whatsoever – in order to vindicate the Section 7 rights of others. 262 NLRB 402 (1982) *review denied sub nom. Auto Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

Furthermore, Smith's affidavit fails to mention anything related to the truth or falsity of Rice's post and instead focuses on Rice's use of profanity. (GC Exh. 11). Even at hearing, Smith and Rosenberg did not explicitly state that the reason for Rice's discharge was the falsity of the post. Rather, both Smith and Rosenberg focused on the use of profanity in Rice's post and the *potential* effect such language could have on Respondent's customers.

Based on the foregoing, the Board should find that Rice's discharge was unlawful pursuant to Section 8(a)(1) of the Act because Rice was discharged pursuant to Respondent's unlawfully overbroad social media policy.

VIII. THE ALJ'S FAILURE TO FIND RESPONDENT DISCHARGED WILLIAM NORVELL PURSUANT TO AN UNLAWFUL RULE (Exc. 7)

Complaint paragraph 11 alleges Respondent discharged William Norvell because Respondent believed Norvell's Facebook activity violated Respondent's social media policy. While the ALJ found that Respondent discharged Norvell in violation of Section 8(a)(1) of the Act, the ALJ failed to address the allegation that Norvell's discharge was also unlawful because it was based on an unlawfully overbroad rule.

If the Board upholds the ALJ's finding that Norvell was engaged in protected concerted activity, then it follows that Norvell's discharge was also unlawful pursuant to the first prong of *The Continental Group*. However, even if Norvell's Facebook posts were not protected concerted activity, his discharge still violated the Act under the second prong of *The Continental Group* because Norvell's posts at least implicated the concerns underlying Section 7 of the Act.

For the reasons discussed below, the Board should find that Norvell's discharge was unlawful because the discharge was based on an unlawfully overbroad rule in addition to the reasons cited by the ALJ.

A. The First Prong of *The Continental Group*

The ALJ found that Norvell's Facebook posts constituted protected concerted activity. (ALJD 3: fn.1).¹¹ The ALJ also found that, during the conversation in which Respondent discharged Norvell, Respondent told him that he violated the social media policy. (ALJD 3). The ALJ found that Respondent did not give Norvell any reason for his discharge other than his Facebook posts. (ALJD 3). Based on the ALJ's findings, Norvell was discharged for engaging in protected concerted activity in violation of Respondent's unlawfully overbroad social media policy. Therefore, it necessarily follows that Respondent's discharge of Norvell was additionally unlawful under *The Continental Group*.

B. The Second Prong of *The Continental Group*

Should the Board disagree with the ALJ's findings discussed above, Norvell's termination should still be found unlawful under the second prong of *The Continental Group*. Here, the evidence is clear that Norvell's Facebook comments were communications with a recently terminated employee concerning that termination and suggestions to that employee about how she might seek redress regarding the terms and conditions of her employment. The record shows that this communication was seen by and further commented on by both current and former employees of Respondent who had access to the discussion.

In *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 17 (2012), the Board agreed with an administrative law judge's finding that employees engaged in protected concerted activity when they communicated with other employees about their concern that a co-worker had been discharged. Thus, Norvell's communication is at least an initial step that could grow into the kind of activity the Board has found protected in *Relco*. As such, Norvell's communication, at

¹¹ To the extent Respondent excepted to the ALJ findings discussed in this section, Counsel for the Acting General Counsel addressed those exceptions in the Answering Brief.

the very least, implicates the concerns underlying Section 7 of the Act. Therefore, Norvell's discharge was unlawful under *The Continental Group*.

C. Affirmative Defense under *The Continental Group*

As described in Section VII above, an affirmative defense may be established under *The Continental Group* if an employer is able to show that “the employee’s conduct *actually* interfered with... the employer’s operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.” [Emphasis added]. *Id.* at slip op. 4. The Board went on to state that, “It is the employer’s burden, not only to assert this affirmative defense, but also to establish that the employee’s interference with production or operations was the actual reason for the discipline. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee’s interference with production and not simply the violation of the overbroad rule.” *Id.*

The record contains no evidence that Norvell’s Facebook activity had any actual interference with Respondent’s operations. On direct examination, Respondent’s counsel asked Rosenberg to what extent a Facebook posting such as Norvell’s *would* interfere with Respondent’s business operations. (Tr. 44). Rosenberg testified about what he thought *could* happen, but provided no testimony or evidence that Norvell’s post had any *actual* interference with operations. (Tr. 44).

Respondent never provided Norvell with any documentation citing the reasons underlying the decision to discharge him. No evidence was produced demonstrating that Respondent cited actual interference with operations when it notified Norvell of his discharge. In order to establish the affirmative defense provided for in *The Continental Group*, Respondent would have needed not only to identify *actual* interference with operations, but to establish that such

interference had already taken place at the time of—and was contemporaneously cited as a reason for— Norvell’s discharge. Respondent must then establish that it discharged Norvell not for violating the overbroad rule, but for the interference with operations. The record evidence shows instead that Respondent’s witnesses repeatedly admitted that Norvell was fired pursuant to its social media policy.

Thus, Respondent failed to meet the burden required for establishing an affirmative defense under *The Continental Group* regarding its discharge of Norvell.

X. CONCLUSION

Counsel for the Acting General Counsel respectfully urges that the Board find in favor of the stated exceptions, find that Respondent has violated the Act as alleged in the Complaint, order Respondent to cease its unlawful conduct, and direct that Respondent remedy the harm that it has caused to its employees.¹²

Respectfully submitted,

Matthew J. Turner
Counsel for the Acting General Counsel
National Labor Relations Board, Region 5

Dated this 1st day of November, 2013

¹² Proposed Conclusions of Law, a Proposed Order, and a Proposed Notice to Employees are attached as Appendices.

APPENDIX I – PROPOSED CONCLUSIONS OF LAW

1. Respondent, Butler Medical Transport, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. At all material times, William Rosenberg and Ellen Smith have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.
3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by maintaining overly broad work rules.
4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by discharging William Norvell and Michael Rice.

The aforementioned unlawful conduct engaged in by the Respondent constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

APPENDIX II – PROPOSED ORDER

Respondent, Butler Medical Transport, LLC, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Maintaining a work rule prohibiting the unauthorized distribution of papers.

(b) Maintaining the following work rule: I will refrain from using social networking sights [sic] which could discredit Butler Medical Transport or damages [sic] its image.

(c) Discharging employees due to their engaging in protected concerted activities.

(d) Discharging employees pursuant to the rules described above in paragraphs 1(a) and 1(b).

(e) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of the Board's Order, offer William Norvell and Michael Rice full reinstatement to their former jobs or, if any of those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make William Norvell and Michael Rice whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of William Norvell and Michael Rice, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not

be used against them in any way.

(d) Compensate William Norvell and Michael Rice for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Maryland, Pennsylvania, and Washington, D.C. facilities, copies of the attached Notice to Employees.¹³ Copies of the notice, of forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered with any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the

¹³ A proposed Notice to Employees is attached as Appendix III.

Notice to Employees to all current and former employees employed by the Respondent at any time since October 10, 2012.

(g) Notify the Regional Director for Region 5, in writing, within 21 days from the date of the Administrative Law Judge's Order, what steps have been taken to comply with this Order.

APPENDIX III – (Proposed) NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

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 maintain a provision in our employee handbook entitled, “Employee Conduct” that contains the following prohibition: “Unauthorized posting or distribution of papers.”

WE WILL NOT maintain a provision in our new employee form that contains the following language: “I will refrain from using social networking sights [sic] which could discredit Butler Medical Transport or damages [sic] its image.”

WE WILL NOT discipline or discharge you under either provision described above.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL rescind the provision in our employee handbook entitled, “Employee Conduct” that contains the following prohibition: “Unauthorized posting or distribution of papers.”

WE WILL rescind the provision in our new employee form that contains the following language: “I will refrain from using social networking sights [sic] which could discredit Butler Medical Transport or damages [sic] its image.”

WE WILL furnish all of you with (1) inserts for the current edition of the employee handbook and new employee form that advise you that the unlawful provisions above have been rescinded; or (2) the language of lawful provisions on adhesive backing that will cover or correct the unlawful rules; or (3) **WE WILL** publish and distribute to all of you a revised employee handbook and new employee form that do not contain the unlawful provisions cited above.

WE WILL offer William Norvell and Michael Rice their jobs back along with their seniority and all other rights or privileges.

WE WILL pay William Norvell and Michael Rice for the wages and other benefits they lost because we fired them.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to William Norvell and Michael Rice, it will be allocated to the appropriate periods.

WE WILL remove from our files all references to the discharges of William Norvell and Michael Rice and **WE WILL** notify them in writing that this has been done and that the discharges will not be used against them in any way.

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

CERTIFICATE OF SERVICE

This is to certify that on November 1, 2013, copies of the Counsel for Acting General Counsel's Brief in Support of Cross-Exceptions were served by e-mail on:

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