

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

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION**

November 1, 2013

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Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision (hereinafter "ALJD").

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 ALJ Arthur J. Amchan on July 2, 2013, in Baltimore, Maryland. On September 4, 2013, Judge Amchan 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 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. Judge Amchan 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 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. UNCHALLENGED FINDINGS AND CONCLUSIONS

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board, herein “Board Rules,” any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. Respondent did not specifically take exception to the ALJ’s credibility determinations. Respondent’s failure to specifically urge an exception to these credibility determinations should result in the Board’s adoption of those determinations.²

Respondent did not specifically urge any exceptions to the ALJ’s determinations regarding Respondent’s business operations. Respondent also did not except to the ALJ’s finding that Respondent’s distribution and social media rules violated the Act.

III. FACTS

To the extent relevant, the Acting General Counsel incorporates by reference the statement of facts from the Brief Supporting the General Counsel’s Cross-Exceptions. (GC Cross-Exceptions and Brief, pp. 3–6).

A. Respondent’s Business Operations

Respondent provides ambulance transport services to nursing homes, hospitals, and other organizations throughout Maryland, Pennsylvania, and Washington, D.C. (Administrative Law Judge’s Decision (“ALJD”) 1; Transcript (“Tr.”) 34-35). Respondent maintains locations in Beltsville, Hagerstown, and Owings Mills, Maryland, York, Pennsylvania, and Washington, D.C. (ALJD 1; Tr. 34-35).

² To the extent that the Board finds that Respondent has indirectly excepted to some of the ALJ’s credibility findings, Counsel for the General counsel respectfully urges that those findings be affirmed. The Board’s established policy is not to overrule an ALJ’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (195), enfd. 188 F.2d 362 (3rd Cir. 1951). Here, there is no basis to reverse the ALJ’s credibility findings.

Respondent's Chief Operating Officer is William Rosenberg.³ (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).⁴ 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 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."

³ 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.

⁴ 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.

(ALJD 2; General Counsel’s Exhibits (“GC Exh.”) 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).

IV. ARGUMENT

Respondent's arguments in support of its exceptions lack merit. As the ALJ found, and as discussed below, the totality of the record evidence supports a conclusion that Respondent violated Section 8(a)(1) of the Act when it terminated William Norvell because of his October 10, 2012 posts on Facebook. Thus, the Acting General Counsel respectfully urges the Board to find no merit to Respondent's exceptions to the ALJ's findings and conclusions regarding the discharge of William Norvell.

Respondent exceptions to the ALJ's decision rest on four general contentions: (1) the Board, the ALJ, and the Regional Director lacked authority to process the proceedings; (2) the ALJ erred in finding that Respondent violated the Act when it discharged William Norvell for posting comments on the Facebook page of a recently discharged former coworker—conduct the ALJ found to be protected concerted activity, (3) the ALJ erred when, in support of his finding that Norvell was engaged in protected concerted activity when he posted his Facebook comments, he relied on documentary evidence of which Respondent was unaware at the time of Norvell's

discharge; and (4) the ALJ failed to follow Board precedent when he based his findings on a theory purportedly not advanced by the General Counsel.

A. Respondent’s Challenges to the Authority of the Acting General Counsel, Regional Director, and Administrative Law Judge Have No Merit.
(Respondent’s Exception 1).

Citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (Jun. 24, 2013) and *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), *appeal docketed*, No. 13-35912 (9th Cir. Oct. 1, 2013), Respondent challenges the authority of the Acting General Counsel and Regional Director to investigate and prosecute the complaint and the Administrative Law Judge to issue a decision in this case. (Exception (“Exc.”) 1). As discussed below, Respondent is wrong on all fronts.

As an initial matter, Respondent’s statement (Exceptions Brief (“Exc. Br.”) 4–5) that the Supreme Court issued a decision in *Noel Canning*, holding that the President’s recess appointments to the Board were invalid, is simply incorrect. Far from deciding the case—much less deciding against the Board—the Supreme Court merely granted the Board’s petition for certiorari; briefing is not yet completed, and no argument date has been set.

Moreover, regardless of the issue of the Board’s composition, Acting General Counsel Lafe Solomon has independent authority to issue and prosecute complaints. *Bloomingtondale’s, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013) (“[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel.”) (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and

prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* Accordingly, contrary to Respondent, both Acting General Counsel Solomon’s⁵ authority to issue and prosecute the complaint, and, in turn, Regional Director Wayne Gold’s authority⁶ to do so, are unaffected by any issue concerning the composition of the Board.

Similarly, any issue regarding the composition of the Board does not affect the Board’s longstanding delegation of authority to administrative law judges (“ALJs”). ALJs have possessed the authority to hold hearings on the Board’s behalf since 1936. *See* General Rules and Regulations, 1 Fed. Reg. 207, 209 (Apr. 18, 1936) (designating trial examiners (now called ALJs) as agents responsible for hearings); Secs. 102.34-35, Board’s Rules and Regulations (designating ALJs as agents responsible for hearings). Any assertion that delegees may not exercise delegated authority fails to account for the Supreme Court’s decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). In *New Process*, the Supreme Court, refusing to rely on language in the D.C. Circuit’s *Laurel Baye*⁷ decision, stated that its “conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel.” 130 S.Ct. at 2643 n.4. Indeed, since *New Process*, four Courts of Appeal have held that valid prior delegations of Board authority survive a loss of

⁵ Respondent’s undeveloped assertion (Exc. Br. 5 n.3) challenging the Acting General Counsel’s appointment is not “specifically urged,” and the Board should deem it waived. *See* Sec. 102.46(b)(1)-(2) of the Board’s Rules and Regulations (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived”). Additionally, this issue was not raised in Respondent’s Answer or at hearing. In any event, the Board has already found that the Acting General Counsel was properly appointed under the Federal Vacancies Reform Act. *See Belgrove Post Acute Care Ctr.*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013).

⁶ The General Counsel has delegated the authority to the Regional Directors for issuing complaints. *See United Elec. Contractors Ass’n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff’d*, 366 F.3d 776 (2d Cir. 1966).

⁷ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009).

Board quorum. *See Kreisberg v. Healthbridge Mgmt., LLC*, ___ F.3d ___, 2013 WL 5614101 at *6 (Oct. 15, 2013); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1821 (2012); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011). For these reasons, the Board should reject Respondent’s Exception 1.

B. The ALJ Correctly Found that William Norvell, in His Facebook Postings, was Advising Chelsea Zalewski, a Fellow Employee, to Obtain an Attorney and/ or Contact the Labor Board. (Respondent’s Exception 3).

Respondent does not expand upon this exception in its brief. This finding by the ALJ is presumably predicated upon a reading of the plain language found in General Counsel’s Exhibits 7 and 13 and should be affirmed.⁸

C. The ALJ Correctly Found Norvell’s Facebook Posts Were Protected Activity and that Respondent Violated the Act by Discharging Him for Those Posts. (Respondent’s Exceptions 3–10, 12, 13; Exceptions Brief Section V, A).

1. Legal Framework:

In *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*) 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), 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,

⁸ Not only has Respondent previously failed to object to the admission of—or to subsequently raise an issue challenging the accuracy of—the Exhibits containing representations of Norvell’s purported advice to Zalewski, its own arguments throughout these proceedings have seemed to rely heavily on the assumption that these are precisely the words—and the poster’s intent to post them—that led to Norvell’s discharge.

concerted activity. In *Meyers I*, the Board defined concerted activity 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 (Dec. 14, 2012).

2. Discharge of William Norvell

a. The Record Evidence Makes Clear the ALJ Correctly Concluded that the Facebook Posts for Which Respondent Discharged Norvell Constituted Protected Concerted Activity According to Established Board Doctrine.

The record evidence establishes that Norvell engaged in protected concerted activity when he posted on Zalewski’s Facebook page on October 10, 2012. There is no dispute that Norvell posted on Zalewski’s page or as to the content of those posts. The evidence demonstrates that each of the four *Meyers I* elements is satisfied here and that Respondent violated the Act when it discharged Norvell.

The first element of *Meyers I* is established by Norvell’s Facebook posts. Former employees who undertake legal or administrative action against their employer remain employees under the Act. See *Security U.S.A.*, 328 NLRB 374, 383 (1999) (“The law is clear that an employee’s testimony, and by implication representation, in aid of another’s claim for unemployment compensation is protected by Section 7 of the Act.”) (citations omitted); *Supreme Optical Co.*, 235 NLRB 1432 (1978) (“It is. . . well settled that the matter of unemployment compensation benefits arises out of the employment relationship.”) Norvell thus engaged in concerted activity

when he posted comments on Facebook encouraging his former coworker to pursue potential avenues of redress for her discharge.

Moreover, the Board has long held that the term “employee” as used in Section 2(3) of the Act means “members of the working class generally,” including “former employees of a particular employer.” *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977) (citing *Briggs Manufacturing Co.*, 75 NLRB 569, 570, 571 (1947)). Thus, whether Zalewski was no longer employed by Respondent at the time of Norvell’s posts is not relevant to the determination of the concerted nature of Norvell’s activity. Norvell and Zalewski were both statutory employees under Section 2(3) when Norvell made his October 10 Facebook posts.

In addition to Norvell, other current and former employees of Respondent engaged in the Facebook discussion concerning Zalewski’s discharge. There is no dispute that Smith and Rosenberg were aware of the Facebook comments of those individuals alongside Norvell’s.

The Board has held that the “object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate.” *Whittaker Corp.*, 289 NLRB 933, 933 (1988). It is of no consequence then, that Norvell did not announce on Facebook that he intended his posts to constitute protected concerted activity. In *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 17 (2012), the Board adopted 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. The administrative law judge reasoned that the discussion related to the employees’ collective concern about job security and such discussions were initial steps along the way to possible group action. *Id.* at 26. Similar concerns were implicated in the case at hand. Norvell and his co-workers engaged in a discussion with a recently discharged co-worker. Norvell specifically

discussed what he considered to be Zalewski's potential options. Just like the conversation in *Relco*, the Facebook discussion in this case was related to the employees' collective concerns about job security. That is the type of conversation that could lead to possible group action, thus rendering the conversation concerted.

The second element of *Meyers I* is established because Respondent clearly had knowledge of the concerted nature of Norvell's activity. Respondent admits it discharged Norvell after Smith and Rosenberg became aware of his October 10 posts. There is no dispute Smith and Rosenberg were aware Zalewski was a former employee and other of Respondent's employees and former employees posted on the Facebook conversation along with Norvell.

The third element of *Meyers I* is established because the content of Norvell's posts related to conditions of employment at Respondent. The Board has stated that "it is immaterial whether the subject of employee concerted activity is or is not directly related to their own conditions of employment vis-a-vis their own employer." *Supreme Optical Co.*, 235 NLRB 1432 (1978). In *Supreme Optical*, the Board held concerted activity in support of a co-worker's unemployment compensation claim is protected activity, noting that by attending an unemployment hearing in support of a co-worker, it was more likely that in the future the supporting employee would receive similar support should she find herself in similar circumstances. *Id.* at 1433.⁹ The Board also has held that the filing of a civil action by a group of employees is protected activity unless done with malice or in bad faith. See *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988).

Zalewski wrote a post on Facebook announcing she was discharged. Norvell responded to that post in support of Zalewski pursuing any recourse she may have had. Thus, Norvell's posts

⁹ The Board has also stated that "it is traditional for employees to help each other and make common cause so that 'each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping.'" *Washington Forge Inc.*, 188 NLRB 90, 97 (1971).

are akin to the activity found protected in *Supreme Optical*, in that he was supporting his discharged co-worker. Additionally, the Facebook posts are the type of discussion necessary for employees to have in order to assert their rights in a civil action, if necessary, which is a protected right based on the cases cited above. Thus, Norvell was seeking to initiate or to induce group action, as contemplated by *Meyers II*. Based on the foregoing, Norvell's Facebook activity was concerted and protected under the Act.

Finally, the fourth element of *Meyers I* is satisfied as Respondent admits Norvell was discharged based on his Facebook activity. Smith and Rosenberg admitted that Norvell was discharged for his Facebook posts, and Norvell testified that Rosenberg told him that his posting was the specific reason for his discharge. As such, Norvell was discharged for his protected and concerted Facebook posts.

In an effort to show that Norvell's October 10 Facebook posts were not protected concerted activity, Respondent cites *Holling Press, Inc.*, 343 NLRB No. 45 (2004). (Exc. Br. V, A, 4). There, the alleged discriminatee filed a state sexual harassment charge against the employer. *Id.* at 1. The employee asked a coworker to testify on her behalf. The employer terminated the charge-filing employee for "attempting to coerce coworkers into corroborating an unsubstantiated charge of sexual harassment against one of her supervisors." *Id.* The Board found that employee's conduct not protected because it was not undertaken for mutual aid and protection, having been "*uniquely designed to advance her own cause.*" *Id.* (emphasis added).

Holling Press is patently inapposite. In *Holling*, the alleged discriminatee's problem was that she wanted to bring other employees on board to support her individual harassment charge, but those other employees were uninterested in assisting her. Here, the facts are markedly different: Zalewski was not begging unwilling employees to participate in her individual issue;

rather, she posted on Facebook that she had lost her job which resulted in at least one sympathetic coworker—who reasonably shared the common concern of job security at Butler—responding that Zalewski should explore options for redress. Norvell—the employee whose conduct and discharge are at issue in the instant case—*offered advice* to a former coworker suddenly dealing with job loss: a concern in which Norvell and other Butler Medical employees have a mutual interest. Norvell’s conduct certainly cannot be described as “uniquely designed to advance his own cause.”

b. The ALJ did not Commit Prejudicial Error in Relying on General Counsel Exhibit 13 to Find that Norvell’s Conduct Constituted Protected Concerted Activity

Respondent specifically excepts to the ALJ’s reliance on General Counsel’s Exhibit 13 at ALJD page 2 regarding the trail of Facebook postings on Zalewski’s page. (Exc. 2; Exc. Br. V, A, 2). Respondent argues that the ALJ could not rely on a document of which Respondent was unaware in reaching the conclusion that Respondent discharged Norvell for his protected concerted activity. As discussed below, Respondent is correct that record evidence does not establish that Respondent knew of that document when it discharged Norvell. However, the ALJ’s reliance on General Counsel’s Exhibit 13 to conclude that Norvell was *engaged* in concerted activity was proper, and another document—General Counsel’s Exhibit 7—supports the ALJ’s conclusion as to Respondent’s knowledge.

General Counsel’s Exhibit 13 contains posts not represented in General Counsel’s Exhibit 7. Zalewski’s post in which she appears to explain the reason for her discharge is represented in General Counsel’s Exhibit 13, but not in General Counsel’s Exhibit 7.¹⁰ However, the record

¹⁰ That post said: “Yeah ur telling me! The pt said I told her that they never fix anything on the units. Yeah I no that pt I’m not dumb enough to tell her let alone any pt how shitty those units are they see it all on their own.” (GC Exh. 13). The existence of this post, in conjunction with her original status provides ample evidentiary justification

shows that all of the posts included in General Counsel's Exhibit 13 actually took place. It was proper for the ALJ to rely on that document to find that each of the posts represented in that document were indeed posted on Zalewski's Facebook page. To the extent that the ALJ's findings suggest knowledge of posts contained in General Counsel's Exhibit 13 but not General Counsel's Exhibit 7, such error would not be prejudicial because the record evidence supports the judge's conclusion that Norvell's posts constituted protected concerted activity. While the ALJ cites General Counsel's Exhibit 13 in his decision, both of the posts that Respondent referred to when discharging Norvell are included in General Counsel's Exhibit 7.¹¹

It is clear that the ALJ properly relied on General Counsel's Exhibit 13 to show the concerted nature of Norvell's conduct. While General Counsel's Exhibit 7 does not contain all of the posts found in General Counsel's Exhibit 13, it just as clearly establishes Respondent had knowledge that Norvell was engaged in discussion with a former coworker about the terms and conditions of her employment with Respondent. Thus, the Board should find no merit to Respondent's exceptions on this issue.

Respondent also specifically excepts to the ALJ's finding that Butler mistakenly believed Zalewski was engaged in protected concerted activity when she posted the details of her discharge, because that post is only found in GC Exhibit 13. (Exc. 10; Resp. Br. Sec V, A, 2). Again, to the extent the ALJ attributed knowledge to Respondent of the content of General Counsel's Exhibit 13, he did so in error. However, such error is not prejudicial to Respondent and should not form the basis for a reversal of the ALJ's conclusion that Norvell's posts

for the ALJ's finding that her posts "make clear what Zalewski was told was the reason for her discharge." (ALJD 2). Accordingly, Counsel for the General Counsel urges the Board to deny Respondent's Exception 8.

¹¹ In his decision, the ALJ never explicitly attributes knowledge to Respondent of the posts contained only in General Counsel's Exhibit 13. Counsel for the General Counsel intends its argument in this section to address the extent to which the Board finds that the ALJ implicitly does so.

constituted protected concerted activity. The Board should find no merit to Respondent's Exception 10.

Based on the discussion above, the precedent established by the cases cited, and on the ALJ's determinations, the Board should affirm the ALJ's finding that Norvell's Facebook posts were protected concerted activity and that his discharge for those posts violated the Act.

D. The ALJ Correctly Found that Norvell Was Making Common Cause with Zalewski When He Posted on Her Facebook Page. (Respondent's Exceptions 4, 5, 7, 8; Exceptions Brief V, A, 1).

1. The ALJ Did Not Go Beyond His Authority when He Concluded that the Record Evidence Established Norvell Was Making Common Cause with Zalewski on a Matter of Mutual Concern.

Respondent argues for several of its exceptions on the basis that the ALJ made erroneous determinations and rulings on the way to concluding that Norvell's termination violated Section 8(a)(1) because Norvell was "making common cause with Zalewski regarding a matter of concern to more than one employee," namely, the condition of Respondent's vehicles. (Resp. Exc. 5, 7) (citing ALJD 4: 11-13). Respondent argues that in reaching these conclusions, the ALJ failed to abide by established Board law by "find[ing] a violation of the Act that goes outside the complaint or the General Counsel's theory, where all material facts have not been litigated." (Exc. Br. P. 12). Respondent cites *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989) for this proposition.¹² (Exc. Br. p. 12). To the same end, Respondent also points to *Champion Int'l Corp.*, 339 NLRB 672, 673 (2003). (Exc. Br. p. 12). In *Champion Int'l*, the Board reversed in part the ALJ's decision: "We do not find a separate violation based on the theory that the Respondent engaged in unlawful direct dealing. This matter was neither alleged

¹² The relevant holding in *Pergament* appears in fact to be that "It is well settled that the Board *may* find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." 296 NLRB 333, 334 (1989) (emphasis added).

in the consolidated complaint, nor did the General Counsel subsequently amend the complaint to include this allegation. The complaint alleged a unilateral change.”¹³

Where Respondent attempts to draw parallels between the cited cases and the instant one, it succeeds in pointing up more differences than similarities. The portions of the ALJ’s decision excepted to by Respondent’s claims that the ALJ went beyond his authority—i.e., by finding that Norvell’s posts were protected concerted activity because he was making common cause with Zalewski—refer not to a *violation* unalleged in the complaint, but to *background facts*, the presence of which established the violation found by the ALJ.

That not every background fact adduced into the record was analyzed in the General Counsel’s posthearing brief does not undermine the ALJ’s reliance on them; they are on the record and were properly considered. Furthermore, the ALJ made clear in his decision that he found Norvell’s Facebook posts protected and concerted activity; this is precisely the theory advanced by the General Counsel.

Respondent addresses in depth the Board’s decision in *Sierra Bullets, LLC*, 340 NLRB 242 (2003). In *Sierra Bullets*, the Board found merit to the employer’s exception that the ALJ had found a violation based on a theory different than the one argued by the General Counsel. However, the circumstances of that case (some of which are alluded to in Respondent’s brief) are significantly different than those involved here. In *Sierra Bullets*, the parties had based a pre-hearing stipulation of facts on the assumption that the only issue at hearing regarding an alleged

¹³ Respondent cites *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987) as yet further authority for its argument that the ALJ overstepped his bounds. This case, however, was a decision by the Seventh Circuit denying enforcement in a case in which the ALJ had found no violation, only to be reversed by the Board on the basis of an alternative claim first raised in the General Counsel’s exceptions brief. The circuit court held that “the simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be “fully and fairly litigated” in order for the Board to decide the issue without transgressing [Respondent’s] due process rights.” *Id.* This case, like the others cited, is hardly supportive of Respondent’s efforts to urge reversal of the ALJ.

8(a)(5) violation was that there could be no lawful impasse at the time because the employer had not yet complied with an information request submitted by the union. This particular theory of a Section 8(a)(5) violation is described in *Sierra Bullets* as “the *Decker Coal* theory.” *Id.* at 243. The Board found that it was “clear that the General Counsel expressly chose to litigate only the narrow *Decker Coal* theory of violation.” *Id.* See also *Paul Mueller, Co.*, 332 NLRB 1350 (2000) (reversing ALJ’s finding of violation on alternative theory because General Counsel had explicitly stated narrow theory of case at hearing and made representations on record that led the Respondent to believe other theories were not being litigated).

Here, the General Counsel made clear only that it was pursuing a theory that Norvell was engaged in protected concerted activity and that he was discharged pursuant to an unlawful social media rule¹⁴ maintained by Respondent. Unlike in *Sierra Bullets*, General Counsel did not enter into a stipulation of facts or discuss with Respondent any particular theory of the case. General Counsel’s opening statement at hearing was brief and general, and made no reference to any particular case or Board doctrine on which it believed it would prevail. (Tr. 10–11). The record evidence is devoid of any representations on behalf of the General Counsel that could reasonably have led Respondent to believe that any particular theory or doctrine was the only one at issue and that the allegations pled in the Complaint were so limited at any time. Accordingly, nothing in the holding of *Sierra Bullets* requires the Board to reverse the ALJ’s finding that Norvell was engaged in common cause with Zalewski.

¹⁴ Again, Respondent did not take exception to the ALJ’s finding that its social media rule and distribution rules were unlawful.

2. Respondent's Arguments Rely in Part on Facts Not in Evidence and on Mischaracterization of Documentary and Testimonial Evidence.

Respondent argues that the ALJ made erroneous findings of fact and conclusions of law, and in doing so, makes several claims that are themselves erroneous and not supported by the record evidence. For instance, Respondent takes specific exception to the ALJ's finding that the condition of Butler's ambulances was a matter of mutual concern among Butler employees. (Exception 5). The record, however, makes abundantly clear that this case is about an ambulance company who employs a number of ambulance drivers (Tr. 34-35) and that at least one—Zalewski—was verbally disciplined and discharged for complaining about the condition of Respondent's ambulances. (ALJD 4; GC Exh. 6). Accordingly, the Board should deny Respondent's Exception 5.

Furthermore, Respondent specifically excepts to the ALJ's finding that Zalewski had previously been disciplined for posting on Facebook about the condition of Respondent's ambulances. (Exc. 6). This exception also lacks merit. Documentary evidence shows that Zalewski received a verbal warning for a Facebook post in response to another coworker's comment and accompanying picture about a seat belt in one of Butler's vehicles. (GC Exh. 6). In her Board affidavit, Smith testified that Zalewski was disciplined because her comment, while "not very explicit. . . could have suggested something was wrong." (GC Exh. 11, p. 3). There is clear record evidence to support this particular finding; the Board should deny this exception. Respondent also claims that "there is nothing in the record about whether a 'unit' refers to a Butler vehicle." This is an unreasonable conclusion. During Respondent counsel's direct examination of both William Rosenberg and Ellen Smith, the witnesses responded using the term "unit(s)." (Tr. 46, 72, 73). While the record does not include any testimony that "unit" means

“vehicle,” the judge reasonably inferred the witnesses were discussing Respondent’s ambulances.

Respondent also attempts to argue that when Norvell posted on Zalewski’s Facebook page, he knew nothing other than she had been fired. In doing so, Respondent mischaracterizes the evidence: “Norvell was pressed on cross-examination for any specific knowledge he had regarding Zalewski’s termination. Norvell confirmed that all he knew was that Zalewski had been terminated. . . . Not once did Norvell ever state on the record that he knew the reason Zalewski had been terminated.” (Exc. Br. 8–9). Norvell actually testified at hearing that all he knew was “what [Zalewski] posted on here,” while being cross-examined about the conversation on Zalewski’s Facebook page. (Tr. 24–25). Respondent thus ignores the fact that Norvell’s testimony refers to what Zalewski had written on her own Facebook page, and does not demonstrate that “all he knew was that Zalewski had been terminated.”

Similarly, Respondent takes liberties in its Exception 4 and the portion of the brief in support of that exception. In arguing that the ALJ erred when he found that Norvell “was responding to a post in which Zalewski stated she had been terminated for commenting to a patient about the condition of Respondent’s vehicles,” (Exc. 4, citing ALJD 4: 4–6), Respondent takes us through a very technical—and just as unsupported by the record—tutorial about the quirks inherent in Facebook’s layout when viewed on a personal computer. (Exc. Br. 15–16). The gist of Respondent’s argument here is that—“as anyone who uses Facebook can attest”—Facebook only allows users to see four comments at one time without expending the effort of clicking a link, and that Zalewski’s post about why she was fired was more than four posts away from Norvell’s. Respondent argues “[m]ost likely, all Norvell saw as he was posting to Zalewski’s Facebook page was her status update saying she had been fired and the four [preceding] comments.”

Respondent's representation on Brief as to what any Facebook user can attest to is not a substitute for record evidence. Although many people are Facebook users, Respondent did not address testimony from any of them about this phenomenon. The Board should thus reject Respondent's analysis of Facebook logistics and guesswork as to probabilities of what Norvell may have seen.

Finally, Respondent takes license when it refers to the document that would become General Counsel's Exhibit 13 as "a pasted-together Facebook posting" not seen by Butler until the hearing. (Exc. Br. 14).¹⁵ In fact, Norvell testified at hearing as to how he created that document, and a review of the relevant portion of his testimony reveals that no pasting of any kind was mentioned. (Tr. 19). Respondent did not cross-examine Norvell on the issue, and the untrue characterization in its exceptions brief of that document should also be rejected.

Counsel for the General Counsel highlights these particular mischaracterizations and inaccuracies because they deal with facts in evidence that the ALJ's reasonable conclusion that Norvell read Zalewski's posts, recognized that the condition of Respondent's ambulances (and of the relationship of that issue to Butler employees' job security) was a matter of concern to more than one employee, and engaged in the conversation by offering advice from the perspective of someone who shared an interest in the issues.

That Norvell's Facebook posts constituted protected concerted activity was clearly alleged in the Complaint, was dealt with at length during the hearing, and was exhaustively addressed in the parties's post-hearing briefs. The parties thoroughly litigated the issue and Respondent had

¹⁵ In its Exception 2, Respondent argues that the ALJ erroneously found that the copy of the Facebook conversation relied upon by Smith when she decided to discharge Norvell did not contain the post in which Zalewski made reference to Butler's belief that she had complained about the condition of a unit. It is true that the version that Smith claims to have relied on—and that she provided to the Region—does not contain that particular post. (GC Exh. 7). However, there is no evidence in the record that establishes that she had never seen that post prior to the hearing.

clear notice of the materiality of the facts contained in the record. Respondent's efforts to create new facts not on the record—and to ignore some that are—cannot sustain its exceptions and supporting arguments. The record evidence contains ample factual foundation for the ALJ's conclusion that Respondent violated Section 8(a)(1) when it discharged William Norvell; the ALJ's inferences to which Respondent excepts are reasonable in light of that evidence.¹⁶

Based on the foregoing, the Board should find that the record evidence supports a finding that Norvell was engaged in protected concerted activity.

E. The ALJ Correctly Found that the Fact that Chelsea Zalewski had Already been Discharged When Norvell Made His Posts is Irrelevant Under the Reasoning in *Little Rock Crate and Basket Co.* (Respondent's Exception 9).

As discussed in Section IV, D, 2, a, above, the Board has long held that the term "employee" as used in Section 2(3) of the Act means "members of the working class generally," including "former employees of a particular employer." *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977) (citing *Briggs Manufacturing Co.*, 75 NLRB 569, 570, 571 (1947)). The ALJ specifically cited to *Little Rock Crate* in his decision, finding irrelevant that Respondent had already discharged Zalewski.

Respondent cites no authority and makes no argument to support this exception. Accordingly, the Acting General Counsel respectfully urges the Board to affirm the ALJ's determination that Zalewski's employment status at Butler on October 10, 2012 is irrelevant with respect to whether Norvell's Facebook posts constituted protected concerted activity.

¹⁶ Respondent's assertion on page 14 of its supporting brief that the failure of Norvell to address the common cause theory in his Board affidavit is irrelevant to the matter at hand and refers to a document never offered into evidence and thus not available for consideration by the Board. Once again, the Counsel for the Acting General Counsel urges that the Board ignore or even strike the reference.

F. The ALJ Erred by Failing to Address the Complaint's *The Continental Group* Theory of Violation. (Respondent's Exceptions 13 and 14).

Respondent's exceptions 13 and 14 pertain to the ALJ's failure to address the Complaint's *The Continental Group* theory of violation as to Norvell's discharge. The ALJ did err by failing to address this theory of violation as to either Norvell or Rice; that error is the subject of cross-exceptions and a supporting brief being filed contemporaneously with this Answering Brief. However, the error was in failing to validate this additional theory of violation as to Norvell and to find a violation as to Rice, rather than a failure to dismiss the theory as Respondent contends. In order to limit repetition and confusion, this issue will be addressed only in the Acting General Counsel's cross exceptions and supporting brief, and not herein.

G. The ALJ's Summary Conclusions of Law Were Consistent with Board Law and Were Supported in the Record. (Respondent's Exception 15).

For the reasons discussed in this brief, and in light of the record and of established Board precedent, Counsel for the General Counsel respectfully urges the Board to deny Respondent's Exception 15.

H. The Remedies and Order Issued by the ALJ Are Appropriate and Necessary to Make Respondent's Employees Whole for the Harm Caused by Respondent's Violation of the Act. (Respondent's Exception 16).

The ALJ found that Respondent violated the Act when it discharged William Norvell for protected concerted activity. The ALJ's remedial order requires Respondent to make Norvell whole for the harm suffered by Respondent's unlawful discharge. As such, Counsel for the General Counsel urges the Board to deny Respondent's Exception 16.

V. CONCLUSION:

Respondent's exceptions and supporting arguments are unsustainable. Respondent has not established a basis for its contentions that: (1) the Board, the ALJ, and the Regional Director

lacked authority to process the proceedings; (2) the ALJ erred in finding that Respondent violated the Act when it discharged William Norvell for posting comments on the Facebook page of a recently discharged former coworker—conduct the ALJ found to be protected concerted activity; (3) the ALJ erred when, in support of his finding that Norvell was engaged in protected concerted activity when he posted his Facebook comments, he relied on documentary evidence of which Respondent was unaware at the time; and (4) the ALJ failed to follow Board precedent when he based his findings on a theory purportedly not advanced by the General Counsel.

The discussion above demonstrates that these findings and conclusions by the ALJ are free from prejudicial error, are supported by substantial evidence, and are supported by law. For the reasons set forth herein, the Board should adopt the recommended Decision of the ALJ with respect to the discharge of William Norvell.

For the reasons set forth in this brief and for the reasons set forth in the ALJ's Decision, Counsel for the Acting General Counsel respectfully urges that the Board deny Respondent's Exceptions in their entirety and that the Board affirm the findings of fact and conclusions of law in the ALJ's Decision in this matter with respect to the discharge of William Norvell.

Respectfully submitted,

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Dated this 1st day of November, 2013

CERTIFICATE OF SERVICE

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

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