UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

CONSOLIDATED COMMUNICATIONS d/b/a
ILLINIOS CONSOLIDATED TELEPHONE
COMPANY

and

Cases 14-CA-094626 and
14-CA-101495

LOCAL 702, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Dated: February 14, 2014

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TABLE OF AUTHORITIES

Counsel for the General Counsel, pursuant to Section 102.46(d)(1) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, files her answering brief to the Exceptions of Consolidated Communications, Inc. (Respondent) to the Decision of Administrative Law Judge Arthur Amchan, issued on November 19, 2013 (ALJD). Respondent has filed 176 exceptions to the factual findings, credibility resolutions and legal conclusions of the Administrative Law Judge Amchan (ALJ). Contrary to Respondent, Counsel for the General Counsel (General Counsel) submits the ALJ's factual findings, credibility resolutions, and legal conclusions are well supported by the record and Board law.

I. Background

Respondent is a communications company with offices and facilities in and around Mattoon, Illinois. (Tr. 27-28, 1211) Senior Director Gary Patrem and Ryan Whitlock, the Senior Director of Human Resources, were most prominently involved in the conduct alleged here.

Local 702, International Brotherhood of Electrical Workers, AFL-CIO (Union) represents an all-employee unit of Respondent's employees. (G.C. Exh. 7; Tr. 28) There was no collective-bargaining agreement in effect from November 14, 2012[1] to March 28, 2013, when the Section 8(a)(5) unilateral change occurred. (Tr. 30) The parties' negotiations broke down on December 6, when employees voted to strike. (G.C. Exh. 5; Tr. 35) Employees engaged in a strike from 10:00 p.m. December 6 through 5:00 p.m. December 11 (Thursday through Tuesday). (Tr. 37) Respondent operated during the strike, utilizing its 17th Street Rutledge building as its strike "command center" to manage operations. (Tr. 179, 1086) All of the discriminatees, except for Mike

[1] All dates are in 2012 unless otherwise specified.

Maxwell, were suspended and/or terminated for conduct that took place at, or originated from, Rutledge. (G.C. Exhs. 10C, 18; Stipulation p. 25)

All four discriminatees were suspended on December 13, and Pat Hudson and Brenda Weaver were terminated on December 17. Each of the discriminatees engaged in frequent picketing activity and were suspended and/or terminated for alleged picket line misconduct. (G.C. Exhs. 12-17) Significantly, and despite Respondent's attempt to characterize the strike as a violent one, no police reports were filed. (Tr. 328, 536) The police were not called regarding a single incident of alleged misconduct for which the discriminatees were allegedly suspended and/or discharged. (Tr. 183)

II. Credibility

Respondent excepts to many of the ALJ's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence shows they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). There is no evidence the ALJ's credibility resolutions are incorrect. The record amply supports the ALJ's resolution of fact and related credibility resolutions. The ALJ properly credited Mike Maxwell, Eric Williamson, Pat Hudson, and Brenda Weaver based on multiple factors, including consistency of their testimony, inherent probabilities, common sense, admitted facts, video evidence, and demeanor. The testimony of Respondent's witnesses is internally inconsistent, inconsistent with objective evidence, and inconsistent with the testimony of its other witnesses. As such, the ALJ properly discredited Respondent's witnesses based on these same well-

reasoned factors. Contrary to Respondent's claim, its witnesses were not held to any higher standard than General Counsel's witnesses.

The demonstrated lack of credibility among Respondent's witnesses about key facts underlying the alleged misconduct here is sufficient to meet the General Counsel's burden of showing, by a preponderance of the evidence, that the employees did not actually engage in such misconduct. *Alta Bates Summit Medical Center*, 357 NLRB No. 31, slip op. at 2 (2011).

A. Senior Director Gary Patrem

The testimony of Senior Director Patrem is unworthy of belief because he fabricated conversations underlying the discharges of Hudson and Weaver. Patrem fabricated conversations he claimed to have had with Director Rankin before Respondent's decision to discharge Hudson and Weaver. Patrem testified, "I believe I talked to [Rankin] a few times" before their discharges. (Tr. 244) Patrem claimed Rankin said, "he was threatened when [Hudson's] vehicle pulled out in front of him, and then a subsequent vehicle pulled behind him and would not let him through. He felt threatened, distracted, you know, harassed enough that he ultimately put it in four wheel drive and went across the shoulder into the ditch to finally get around them." (Tr. 244) Patrem claimed, "[Rankin] told me that there was a vehicle blocking him, and then there was a vehicle that was trapping him from behind." (Tr. 245) Patrem also testified with clarity to several subjects he recalled that were not discussed during these supposed conversations. (Tr. 249-50, 254, 260-61) Despite Patrem's extensive testimony about what Rankin did and did not say to him, when examined more closely **Patrem admitted he never actually spoke to Rankin** about any of the events underlying Hudson's and

Weaver's discharges. (Tr. 282-83) Rankin confirms he never spoke to Patrem about this incident. (Tr. 457) Patrem fabricated the conversations with Rankin.

Patrem also fabricated testimony about Hudson and Weaver's alleged Greider incident. Patrem claims employees Bernice Dasenbrock and Tara Walters told him they saw "Hudson's vehicle pull out in front of [Greider's] and then Brenda Weaver's vehicle pull in *immediately* behind Greider." (Tr. 289-90) At hearing, Walters and Dasenbrock denied witnessing the Greider incident; rather, they witnessed the Rankin incident. (Tr. 1206, 1028, 1184) Dasenbrock testified she never told Patrem a vehicle pulled behind Greider because "I didn't talk to [Patrem] about [Greider]." (ALJD, p. 15, ll. 44-45; Tr. 1202-03, 1206) Thus, Patrem's claim that Walters or Dasenbrock said anything about the Greider incident is also fabricated.

B. Senior Director Ryan Whitlock

Whitlock fabricated a conversation with Larry Digg. (Tr. 420-432) Whitlock testified that upon the return of Conley and Diggs the evening of the alleged incident, "I remember [Diggs] commenting to the effect that he couldn't believe that these people would do this," expressing "real concern about what had taken place and surprise." (Tr. 432) Diggs denies speaking to anyone, including Whitlock, about this incident or even being present during a conversation between Conley and Whitlock. (Tr. 960) Even Gary Patrem admits that Respondent never spoke to Diggs before discharging Hudson and Weaver. (Tr. 330-32)

C. Manager Kurt Rankin

Close examination of Rankin's testimony reveals this alleged incident did not occur as he claimed in his written report, which along with the video footage, was the

only evidence of the incident on which Respondent relied in terminating Hudson and Weaver. (ALJD, p. 14, ll. 8-10; p. 15, ll. 25-27)

Rankin's version of events is at odds with objective evidence and the testimony of employee witnesses Walters, Rich, and Dasenbrock who saw the incident:

- Rankin claims Hudson stopped multiple *times* in front of him. (Tr. 471, 479) Walters did not see Hudson stop at all, not even once. (Tr. 1032) Dasenbrock claims Hudson stopped at the corner of the Rutledge driveway before Rankin turned onto 17th Street, but not again until the first Pilson's driveway, but not multiple times. (G.C. Exh. 7d(E); Tr. 1199, 1208)

- Rankin claims a fast moving truck with picketers yelling, screaming, and whistling drove toward him while he was behind Hudson. (Tr. 466) Walters, Rich, and Dasenbrock saw no such truck. (Tr. 1036, 1146, 1162, 1171, 1200)

- Rankin claims he could not have avoided the entire situation by turning into the first Pilson's Auto driveway closest to Rutledge, the one into which Greider turned, because it was blocked by a vehicle waiting to turn. (Tr. 466-67) Walters, Rich, and Dasenbrock all testified that no vehicle blocked Pilson's first driveway. (ALJD, p. 13, ll. 42-45; Tr. 1035, 1137-39, 1189) Rankin also claimed he could not turn into Pilson's second driveway because it too was blocked. (Tr. 481) Rich, who saw nothing blocking the second and northern most driveway to Pilson's Auto, and Walters, do not corroborate Rankin's claim in this regard. Id.

- Rankin is the only witness that claims to have seen a car behind him blocking or trapping. (G.C. Exh. 16) When Rankin testified on direct for Respondent, he failed to recall any vehicle behind him during this incident. (Tr. 474) Walters, Rich, and Dasenbrock, who witnessed the alleged incident, saw no such vehicle behind Rankin. (Tr. 1139, 1051, 1171, 1199-1200)

- Rankin claims the entire incident, from approach to when he sped past Hudson, lasted five to eight minutes. (Tr. 475) Rich testified the incident took no more than 90 seconds, and certainly not five to eight minutes. (Tr. 1162)

- While Rankin contends Hudson purposefully pulled out in front of him, he admitted on cross-examination that the guard controlled his exit from the driveway and that had he wanted to pull out in front of Hudson's vehicle, he could not have done so. (Tr. 456-58)

The ALJ did not err in failing to credit those aspects of Rankin's testimony that were not corroborated by other credible evidence.

D. Employee Sarah Greider

An essential part of Greider's testimony, that Hudson stopped and started five or six times during the alleged incident, is not corroborated by other employee witnesses. (Tr. 1054, 1057, 1079) Employee witness Rich, who had no recollection that Hudson stopped more than once, was not certain Hudson stopped even once. (Tr. 1120)

E. Employees Jonell Rich and Bernice Dasenbrock

Employee Jonell Rich witnessed both alleged Greider and Rankin incidents. Employee Bernice Dasenbrock witnessed the alleged Rankin incident. (Tr. 1173, 1177) For the reasons discussed below, the ALJ properly found the testimony of Rich and Dasenbrok not to be particularly reliable. (ALJD, p. 15, ll. 5-6)

Rich's testimony is unworthy of belief because it is internally inconsistent, inconsistent with objective evidence, and inconsistent with other witnesses. Rich's testimony fails to corroborate two essential aspects of Respondent's case:

- Greider testified Hudson stopped five or six times in front of her, while Rich testified she was not even certain that Hudson came to a complete stop once. (Tr. 1120, 1079)

- That Weaver was driving behind Greider is an essential component to Respondent's allegation that Hudson and Weaver were blocking Greider, yet Rich has no recollection of any vehicle behind Greider. (Tr. 1139-40, 1148, 1160) That Weaver was behind Greider is a fact accepted by all parties here.

Rich's testimony is inconsistent with the video, which clearly depicts a guard escorting both Rankin and Greider into the street behind Hudson, yet Rich had no recollection of that in either instance. (Er. Exh. 1; Tr. 1127, 1158, 1160) Rich also failed to recall that Rankin drove extremely close behind Hudson's vehicle, which is clearly depicted on the video. (Er. Exh. 1, 11:35:45; Tr. 1133)

Rich's testimony is internally inconsistent. Initially Rich testified she was not even certain that Hudson came to a complete stop once during the Greider incident. (Tr. 1120) Upon further examination and without explanation, Rich changed her story, claiming that in fact Hudson had stopped twice in front of Greider. (Tr. 1136-37)

Rich's testimony about an important aspect of the Rankin incident is not corroborated. Rich claims that Hudson swerved to the left during this incident and that the vehicles of both Rankin and Hudson then came to a complete stop. Rich's testimony about the complete stop is not corroborated by any witness, creating suspicion about the accuracy of her other testimony about this incident. (Tr. 1141) Further, Rich's memory is simply unreliable. (Tr. 1139-40) Rich has absolutely no recollection of the guard prominently escorting Rankin out of the driveway and onto 17th Street behind Hudson's vehicle. (ALJD, p. 14, ll. 22-23; Er. Exh. 1; Tr. 1158-60)

Dasenbrock's testimony should not be credited because it is inconsistent with objective evidence and the testimony of other witnesses. Dasenbrock's testimony as to the location and number of times she claims to have seen Hudson stop in front of Rankin stands alone among Respondent's witnesses. Dasenbrock contends, contrary to all witnesses to this incident, that Hudson pulled in front of Rankin before he turned onto 17th Street, stopping in front of him at the northern corner of the driveway for a minute, preventing him from turning. (Tr. 1179-80, 1186-88, 1191) Dasenbrock also testified, contrary to all the evidence, that Hudson parked in a T-formation in front of Rankin's exiting vehicle for so long that a guard had to motion Hudson to move, a claim that is entirely uncorroborated. (Tr. 1189) The ALJ properly found this testimony to be "clearly inaccurate." (ALJD, p. 15, ll. 9-10) Another aspect of Dasenbrock's testimony

about the Rankin incident stands alone, that when Rankin pulled beside Hudson's vehicle that Hudson swerved toward Rankin as if she was "going to hit him," and that Rankin then stopped, which is not corroborated by any witnesses, including Rankin. (Tr. 467, 473-74, 1028, 1124, 1130-31, 1180-81, 1195)

III. Respondent's Exceptions

Respondent has filed 176 numbered exceptions and a brief in support. Respondent appears to have taken exception to every significant factual finding, credibility resolution and legal conclusion made by the ALJ. General Counsel responds:

A. Respondent's Procedurally Deficient Exceptions Should be Disregarded

Exceptions that do not comply with the Rules and Regulations of the National Labor Relations Board, Series 8, as amended (Board's Rules and Regulations) may be disregarded. *Board's Rules and Regulations*, §102.46(b)(2). Section 102.46(b)(1) of the Board's Rules and Regulations require that each exception to the administrative law judge's decision: "(i) shall set forth specifically the questions of procedure, fact, law or policy to which the exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception." None of Respondent's exceptions comply fully with these requirements. General Counsel submits that where Respondent's exceptions fail to comply with the Board's Rules and Regulations they should be disregarded.

A significant number of Respondent's exceptions fail to set forth with any degree of specificity the question of procedure, fact, law or policy to which exception is taken. Respondent repeatedly utilizes a single exception to except to larger mixed questions of

fact and law, rather than specify a particular question of procedure, fact, or law. (R. Exc. 1-4, 6, 8-14, 21, 31, 34, 37, 42, 70, 81-82, 84, 91 et al.) For instance, in exceptions 22 through 29, Respondent excepts to the ALJ's "misconstrual of and failure to fully and properly apply" the testimony of each of its witnesses as to misconduct, but does not reference with particularity the specific aspect of the testimony the ALJ misconstrued and/or improperly applied. (R. Exc. 22-29) Respondent's lack of specificity in this regard deprives the General Counsel the opportunity to respond fully here.

Most of Respondent's exceptions fail to identify the part of the ALJD to which exception is being made, and no exception cites the line of the ALJD to which exception is taken. Many of Respondent's exceptions cite to more than one page of the ALJD as the basis for a single exception, but not to any specific portion of the page or pages cited therein. (R. Exc. 2 - 16, 22 - 29, 49, 51, 65, 74, 84, 88, 90, 103, 155, 164, and 172) Numerous exceptions purport to be based upon unidentified portions of five or more pages of the ALJD. (R. Exc. 4, 9, 11, 14, 15, 21-25, 28, 29 and 172)

Most of Respondent's exceptions make no reference to the underlying transcript. Only 15 of Respondent's 176 exceptions reference the transcript. (R. Exc. 48, 57, 60, 64, 65, 110, 124, 133, 156, 162, 170, 173-176) In several of the exceptions in which Respondent does cite the transcript, there is no corresponding citation to the ALJD. (R. Exc. 162, 173 - 176)

Respondent excepts to a substantial number of the factual findings, credibility resolutions, and legal conclusions of the ALJ as being "contrary to the record." (R. Exc. 18, 20, 32-34, 41, 58, 79-82, 84, 86, 87, 92, 101, 103, 106, 120-122, 136, 139, 142, 145-148, 150-153, 157 and 163) In each of the 34 instances where Respondent makes

this assertion, there is no corresponding citation to the record. General Counsel is therefore unable to determine those portions of the record to which Respondent contends the findings of the ALJ are contrary. As such, General Counsel submits that Respondent's exceptions 18, 20, 32-34, 41, 58, 79-82, 84, 86, 87, 92, 101, 103, 106, 120-122, 136, 139, 142, 145-148, 150-153, 157 and 163 should be disregarded. *Board's Rules and Regulations*, §102.46(b)(2).

In exceptions 54, 59, 63, 65, 71, 73, 89, 96, 100, 102, 104, 112, 127, 132 and 166, Respondent asserts that the ALJ mischaracterizes or misconstrues aspects of the evidence. In each instance, however, Respondent fails to advance with specificity any record evidence to the contrary. As such, General Counsel submits that Respondent's exceptions 54, 59, 63, 65, 71, 73, 89, 96, 100, 102, 104, 112, 127, 132 and 166 should be disregard. *Board's Rules and Regulations*, §102.46(b)(2).

Respondent's brief in support of its exceptions also fails to comply with the Board Rules. Section 102.46(c) of the Board's Rules and Regulations provides that Respondent's brief shall specify the questions to be argued, together with a reference to the specific exception to which they relate, and that Respondent's argument shall specify the page reference to the record that is relied on. Respondent's brief fails to comply with any of these requirements.

General Counsel submits that Respondent's exceptions and its brief in support thereof fail to comply with the Board's requirements and should be disregarded. *Board's Rules and Regulations,* §102.46(b)(1)(ii)-(iv).

B. The ALJ Did Not Err in Presuming Respondent's 'Honest Belief'

General Counsel must show the suspensions and discharges at issue here were related to the Union's strike. The burden then shifts to Respondent to demonstrate an honest belief that Maxwell, Williamson, Hudson, and Weaver engaged in strike misconduct. *General Chemical Corp.*, 290 NLRB 76, 82 (1988). The ALJ assumed, for purposes of analysis, that Respondent met its burden in this regard. (ALJD, p. 20, ll. 11-12) In doing so, the ALJ acknowledged the low threshold of evidence required to meet the honest belief. (ALJD, p. 2, ll. 31; p. 19, ll. 21-30) The assumption that Respondent had an honest belief operated to shift the burden back to the General Counsel. (ALJD, p. 20, ll. 11-14) As such, Respondent was deprived of no due process in the ALJ's presumption of an honest belief.

Respondent further contends that after the AJL presumed Respondent met its burden of showing it had an honest belief, he then failed to shift the burden back onto the General Counsel to show that the employees either did not engage in the misconduct or the misconduct was insufficiently serious to lose the protection of the Act. (R. Br. p. 27) The ALJ did, in fact, engage in an analysis of determining whether the General Counsel established whether the employees actually engaged in the misconduct or whether the misconduct lost the protection of the Act. (ALJD, p. 19, ll. 27-30; p. 20, ll. 11-14). The ALJ dedicated two pages of his decision to the resolution of whether the General Counsel met her burden in this regard. (ALJD, p. 20-22) The ALJ did not misallocate any burdens of proof here as Respondent contends.

C. The ALJ Did Not Improperly Shift Legal Burdens

Respondent asserts, in exceptions 4, 40, 65, 70, 74-76, 82, 86, 99, 101, 108, and 167, that the ALJ's factual findings "impermissibly places the burden of proof on the Company," amounts to an "erroneous shifting of the burden of proof to the Company," or "imposes an erroneous legal standard." The resolution of facts against Respondent in no way operates to shift the established legal burdens.

The General Counsel carried her burden of showing that the discriminatees did not engage in the alleged misconduct or the misconduct was not sufficiently serious to warrant the loss of the Act's protection by presenting evidence as to what occurred, by showing that the testimony of her witnesses on disputed facts was credible and that the testimony of Respondent's witnesses was not. This is not a failure by General Counsel to carry her burden of proof.

The Board has specifically disavowed the suggestion that the party with the burden of persuasion on an issue necessarily fails to meet its burden where there is conflicting testimony that demeanor does not resolve. *RC Aluminum Industries, Inc.*, 343 NLRB 939, fn. 2 (2004), citing *Daikichi Sushi,* 335 NLRB 622, 623 (2001). One-on-one credibility contests may be resolved, and General Counsel may carry its burden by showing that its witnesses are more credible with reference to "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *Id.*

This is not a case where all of the credibility factors were equal. Rather, the ALJ properly found, and the record shows, that the credibility of Maxwell, Hudson, Weaver, and Williamson preponderates over that of Respondent's witnesses. The ALJ does not

shift applicable legal burdens simply by crediting General Counsel's witnesses over Respondent's witnesses. *Cloughtery Packing Co.*, 292 NLRB 1139, fn. 3 (1989); *Shamrock Food Co. v. NLRB*, 346 F.3d 1130, 1135 (D.C. Cir. 2005).

The ALJ properly considered the weight of all of the evidence, established facts, inherent probabilities, and reasonable inferences to resolve the credibility contests here. *Daikichi Sushi,* 335 NLRB at 623. As such, General Counsel submits that Respondent's exceptions 4, 40, 65, 70, 74-76, 82, 86, 99, 101, 108, and 167 be disregarded.

D. The Record Supports the ALJ's Findings and Conclusions Regarding Mike Maxwell

Respondent excepts to the ALJ's findings of fact and conclusions of law regarding the discipline of Mike Maxwell. (R. Exc. 1, 21, 37, 137 - 154) As discussed below, the record amply supports the ALJ's findings with regard to Maxwell. (ALJD, p. 3, ll. 29 - p. 4, ll. 36)

Respondent suspended Maxwell on December 13 for two days for picket line misconduct involving a van driven by Manager Leon Flood. (G.C. Exh. 12a) Senior Director Patrem has managerial and supervisory authority over Maxwell and conducted Respondent's investigation into the incident underlying the suspension, and, along with Senior HR Director Whitlock, recommended Maxwell's suspension to management. (Tr. 27, 185-86, 494, 1219)

Maxwell was suspended for violating the Employer's "handbook/workplace violence policy on December 8." (ALJD p. 4, ll. 27-28; G.C. Exh. 12A; Tr. 497) On Saturday, December 8, Maxwell picketed at Respondent's Taylorville garage with other employees, including Warren Evans. (Jt. Exh. 8; Tr. 495-96, 509) Picketers patrolled

single file as a van driven by Leon Flood, a Section 2(11) supervisor, exited the facility hitting Maxwell. (ALJD, p. 4, ll. 2; Tr. 503)

At the December 13 suspension, Maxwell was told that he impeded traffic, verbally harassed a driver, struck a vehicle, and leaned on a vehicle. (ALJD p. 4, ll. 19-22; Tr. 75) While Patrem admits that Union unit vice-chairman Evans told him that Maxwell had been hit by the van, he ignored this information and did not talk to Evans, Maxwell, or other picketers to determine the veracity of this assertion, and otherwise made no effort to determine whether Manager Flood hit Maxwell. (Tr. 194, 198-99)

At Maxwell's return-to-work meeting on December 17, Respondent provided Maxwell with a written suspension, its workplace violence policy, a Huffmaster incident report, and a CCI safety-property incident report completed by Flood. (G.C. Exh. 12A) Patrem told Maxwell he was disciplined because he "*struck* [Flood's] vehicle, proceeded to the front of the vehicle and leaned on the hood for an extended period of time impeding his progress, and then proceeded. . . to the driver's window and verbally harassed" Flood. (ALJD p. 4, ll. 28-30; G.C. Exh. 12b, 23; Tr. 1236)

Patrem testified that Flood told him that Maxwell struck the van, that Maxwell stopped in front of the van, and that Maxwell leaned on it for a considerable period of time. (Tr. 202, 215, 218, 225-28, 231, 236) Patrem *assumed* that a considerable period of time meant at least 30 seconds, though he never confirmed this with Flood or his passenger, Frank Fetchak. (Tr. 227-29) Patrem's claim that Maxwell *struck* the van or leaned on it for a *considerable* period of time is false. HR Manager Whitlock testified Flood and Fetchak never claimed Maxwell purposely struck the van or leaned on it for

an extended period of time. (Tr. 390-91) The record supports the ALJ's conclusion that "Maxwell did not intentionally strike Leon Flood's vehicle." (ALJD, p. 20, ll. 16)

According to Maxwell, Flood's van took off from the garage like a "bat out of hell," stopped and suddenly took off again and hit him, causing him to brace himself and lift his feet off the ground. (Tr. 498-500) When Maxwell tried to get out of the way, Flood hit him again. (Tr. 500) Maxwell gave Flood "the finger," and admits he may have said "fuck you." (Tr. 500) Flood's passenger, Frank Fetchak, testified that while Maxwell gave Flood the middle finger, Maxwell did not make any threatening gestures. (Tr. 220-21, 948) As such, the ALJ's finding that "Maxwell did not threaten anyone or commit any acts of violence" is well supported by the record. (ALJD, p. 4, ll. 32)

Flood, who failed to testify, claimed in incident reports that he stopped at the picket line with Maxwell in front of the van, waited 15 seconds, moved forward a few inches and stopped, repeated that procedure, when he claims Maxwell "put his elbow on the hood of the van and leaned his body against the van." (G.C. Exh. 12a) Flood wrote that he inched forward and Maxwell moved around to the driver's side of the van and said "fuck you scab," while flipping him the middle finger. Id. If the ALJ had given Flood's incident report full evidentiary weight, rather than finding it to be hearsay, it does not otherwise contradict the finding that "Maxwell did not threaten anyone or commit any acts of violence." (ALJD, p. 4, ll. 32; G.C. Exh. 12a) "Fuck you scab" and the display of the middle finger, standing alone, is not picket line misconduct under Board law.

Respondent claims the ALJ's finding that Flood struck Maxwell is contrary to the record. (R. Exc. 137, 152) The record amply supports the ALJ's finding that Flood hit Maxwell, and that Maxwell was moving when he was hit. (ALJD, p. 4, ll. 1-3) Maxwell's

testimony that he was struck by Flood's van was not contradicted at hearing. (Tr. 500) Passenger Fetchak, the only other person involved in this incident called to testify by Respondent, conceded the possibility that Maxwell briefly leaned on the van because he had been hit. (ALJD p. 4, fn. 5; Tr. 951)

The record supports the ALJ's finding that Maxwell did not engage in the conduct for which he was disciplined. (ALJD, p. 4, ll. 36) The testimony of both Maxwell and Fetchak contradict Patrem's claim that Maxwell struck the van, stopped in front of the van, and leaned on it for a considerable period of time. (Tr. 499-501, 504) Passenger Fetchak, contrary to Patrem, testified that Maxwell did not stop in front of the van, that Maxwell did not strike the van, and Maxwell did not lean on the van for a considerable period of time. (Tr. 941, 946-47, 950-52) Fetchak testified Maxwell was walking when his right forearm or elbow contacted the van, but that Maxwell did not strike the van. (Tr. 940, 950) At most, according to the ALJ, Maxwell briefly impeded Flood's progress leaving the facility, but no more than other picketers, and that Maxwell was not suspended for his failure to get out Flood's way. (ALJD, p. 4, ll. 32-34) As such, the record supports the ALJ's conclusion that "Respondent suspended Maxwell for offenses he did not commit," in violation of Section 8(a)(3). (ALJD, p. 4, ll. 36)

E. The Record Supports the ALJ's Findings and Conclusions Regarding Eric Williamson

Respondent excepts to the ALJ's findings of fact and conclusions of law regarding the discipline of Eric Williamson. (R. Exc.1, 157 - 165, 167-68) As discussed below, the record amply supports the ALJ's findings with regard to Williamson. (ALJD, p. 16, ll. 13 - p. 18, ll. 7; p. 21, ll. 22-23; p. 21, ll. 44 - p. 22, ll. 18)

Long term employee Eric Williamson had never been disciplined until his December 13 two day suspension for two alleged instances of picket line misconduct: (1) violating the company handbook/workplace violence policy on December 10 in an incident involving employee Dawn Redfern; and (2) violating the company handbook/ sexual harassment policy on December 11 in an incident involving employee Tara Walters. (ALJD, p. 18, ll. 3-5; Tr. 705-06; G.C. Exh. 13b) Respondent told Williamson he was suspended because he threatened and intimidated a female employee by "striking her vehicle" on the picket line (Redfern) and that he made "inappropriate gestures towards a female employee" (Walters). (G.C. Exh. 23, p. 6)

Director Sam Jurka investigated both events underlying Williamson's suspension, and was Respondent's only manager involved in the disciplinary process who spoke to Redfern and Walters before the suspension. (Tr. 395, 403, 406, 1219) Jurka, who has supervisory responsibility for Williamson's department, participated in discussions that led to the decision to suspend Williamson, which was made by Senior Manager (HR) Whitlock and Senior Vice-President Steve Shirar. (Tr. 393, 395) Jurka, an admitted Section 2(11) supervisor, was not called to testify at hearing and Respondent never explained its failure to call him. (G.C. Exhs. 1(i); 18) Respondent's failure to call Jurka to testify warrants the adverse inference that his testimony would have been contrary to Respondent. *International Automated Machines,* 285 NLRB 1122, 1123 (1987).

No one who was involved in Respondent's decision to suspend Williamson spoke to Redfern or Walters prior to his suspension. (Tr. 403, 406) Respondent's decision to suspend Williamson was based upon Senior Manager Whitlock's discussion with Jurka, and upon Whitlock's review of the written incident reports of Redfern and Walters. (Tr.

395, 400) While Whitlock claims that Jurka spoke to both women, Jurka failed to testify and Walters denies speaking to Jurka about it. (Tr. 398-99, 1037)

1. Redfern Incident (Alleged Mirror Incident)

Redfern reported that on December 10, Williamson "hit my mirror with his body and the mirror folded in," no damage was done, that "a striker hit the passenger side mirror." (G.C. Exh. 13b)

On December 10, at about 5 p.m., Redfern exited the parking lot at Rutledge in a caravan of employees being led out by guards. (Tr. 983) While the vehicles were exiting, picketers stood in the driveway and street yelling and waving picket signs. (Tr. 985) Redfern testified that when she turned right onto 17th Street, she "heard this loud smack," stopped her vehicle, turned the interior light on, and rolled down her window to see the passenger side mirror folded inward. (ALJD p. 16, ll. 24-26; Tr. 987) Redfern said to Williamson, who was standing outside her car, "you just hit my car," to which Williamson responded "no, you hit me." (ALJD, p. 16, ll. 28-29; Tr. 987-98, 1007)

Senior Manager Whitlock testified that he *assumed* Redfern actually saw Williamson hit her mirror, and that he thought that is what Redfern had told Director Jurka. (Tr. 412) Redfern did not see Williamson hit her car and never told Jurka that is what she saw. (Tr. 1004) Contrary to Whitlock's assumption in this regard, Redfern testified she was looking forward when she heard the noise and did not see what, if any, part of Williamson's body contacted the mirror. (Tr. 1003-04)

Williamson credibly denies intentionally hitting Redfern's mirror and there is no record evidence to the contrary. (ALJD, p. 16, ll. 30-31; Tr. 719) Redfern admits she never told Respondent that Williamson intentionally hit her mirror. (ALJD, p. 16, ll. 31-

32; Tr. 1004) Director Whitlock testified that he merely *assumed* Williamson intentionally hit the mirror, despite the fact that he spoke to no one involved in the incident before Williamson's discipline. (Tr. 417, 1009) Contrary to Whitlock's *assumption*, Redfern testified that she did not know whether Williamson intentionally struck her mirror. (ALJD, p. 16, ll. 32-33; Tr. 1004) Redfern testified that had Whitlock asked about the incident prior to disciplining Williamson, rather than a month afterward, she would have said that Williamson's contact with the mirror could have been entirely accidental. (ALJD p. 16; ll. 31-33; Tr. 1006, 1009, 1011) The ALJ's finding that there is no evidence that Williamson intentionally hit Redfern's mirror is, therefore, firmly grounded in the record. (ALJD, p. 16, ll. 31; Tr, 416-17, 719, 1004-06, 1009-11) The ALJ found that "Williamson engaged in no misconduct by coming into contact with Dawn Redfern's mirror" because there is no evidence that his contact with the mirror was intentional. (ALJD, p. 21, ll. 22-23)

2. Walters Incident (Alleged Gesture Incident)

The ALJ found that Williamson "grabbed his crotch as a hostile gesture directed" toward employee Walters. (ALJD, p. 18, ll. 3-4) The ALJ found this to be misconduct. (ALJD, p. 21, ll. 22) The ALJ further found Williamson's misconduct insufficiently serious to warrant his suspension. (ALJD, p. 21, ll. 45) The ALJ correctly found that vulgar or obscene gestures, standing alone, do not deny Williamson the protection of the Act. (ALJD, p. 21, ll. 45 - p. 22, ll. 3) The ALJ properly relied upon several cases that firmly hold vulgar and obscene gestures, without more, do not cause a striking

employee forfeiture of the Act's protection. Id. Respondent does not advance any cases where vulgar misconduct alone is sufficient to lose the protection of the Act.[2]

F. The Record Supports the ALJ's Findings and Conclusions Regarding Pat Hudson and Brenda Weaver

Respondent lumped together the conduct of Pat Hudson and Brenda Weaver for purposes of their suspension and discharge. (Tr. 238) Respondent told Hudson and Weaver they were terminated because they: (1) put people in peril with extremely dangerous vehicular activity on the strike line and on public roads; (2) "trapped vehicles on the picket line, impeding their progress;" and (3) followed and tormented our drivers for up to several miles away from the strike. (G.C. Exhs. 17, 23) At Hudson's discharge meeting, she was told that she followed employees away from the strike line out on Charleston Avenue. Id. At Weaver's discharge meeting, she was told that she and another vehicle were "blocking and trapping vehicles and then following employees offsite." Id. Respondent excepts to the ALJ's findings of fact and conclusions of law regarding the discipline and discharges of Pat Hudson and Brenda Weaver. (R. Exc.1, 6, 10, 12, 15, 22-134)

Hudson and Weaver were discharged for three alleged incidents of misconduct involving employee Sara Greider and manager Kurt Rankin as they left the Rutledge building and employee Troy Conley while driving several miles away. The ALJ found

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[2] Respondent asserts the ALJ improperly disregarded two cases standing for the proposition that gross vulgarisms alone restrain and coerce employees in their Section 7 rights. (R. Br. 69) *Bonanza Sirloin Pit*, 275 NLRB 310, (1985), is a Section 8(a)(3) organizing campaign discharge case where the owner used foul language toward an employee whom he later discharged because of her union activities, and does not involve striker misconduct or sexual harassment. The other case, *Roman Iron Works Corp.*, 285 NLRB 1178, 1182 (1987), is equally inapplicable. The Employer violated Section 8(a)(1) by using racial epithets while inviting picketers to fight, telling them he did not want them working for him and that they should be looking for work because they would never see the inside of his shop again. Id. *Roman Iron Works* is not a striker misconduct case and the Employer's vulgarities there did not stand alone, like Williamson's single vulgar gesture does, but were connected to threats of violence and termination.

that the alleged misconduct did not occur (Greider and Rankin) or was insufficiently egregious to forfeit the Act's protection (Conley). (ALJD, p. 20, ll. 11-13) The record and case law amply support the ALJ's findings. *Roto Rooter*, 283 NLRB 771, 771-772 (1987); *Consolidated Supply Co.*, 192 NLRB 982, 989 (1971); *Altorfer Machinery Co.*, 332 NLRB 130, 144 (2000); *Oak Harbor Freight Lines, Inc.*, 348 NLRB No. 41, slip op. at p. 16 (May 16, 2012); *Advance Pattern and Machine*, 241 NLRB 510 (1979).

1. Exceptions Related to the Greider Incident (R. Exh.1, Video 10:03:40)

Respondent's exceptions 120-136 relate to the ALJ's findings and conclusions respecting the alleged Sara Greider incident. Respondent asserts in its brief that Hudson's and Weaver's "blocking and trapping" of Greider as she crossed the picket line warranted the loss of the Act's protection. (R. Br. 15, 62-63)

There is no case law that stands for the proposition that merely driving in front of and behind an employee driving through a picket line is misconduct. Respondent chose the catch phrase "blocking and trapping" to describe its version of what took place with Greider and Rankin, but the ALJ weighed all of the evidence and properly decided the incident occurred entirely by happenstance and was far less serious than Respondent asserted. (ALJD, p. 6, ll.30-34; p. 8, ll. 10-13)

The video evidence does not support Greider's claim, first made at hearing, that Hudson was stopping and starting in front of her. (ALJD, p. 7, ll. 27-35; Er. Exh. 1; Tr. 1057) Misconduct is intentional conduct. The ALJ's consideration of the coincidental placement by the picket line guards of Greider's vehicle between the vehicles of Hudson and Weaver is proper where he must resolve whether the alleged "blocking and trapping" was intentional. (R. Exc. 120, 121, 136) The substantial weight of the

evidence demonstrated it was not, and therefore, that no misconduct related to this incident occurred. (ALJD, p. 20, ll. 21-22; p. 21, ll. 10, 17-18)

2. Exceptions Related to the Rankin Incident (R. Exh.1, Video 11:35:40)

Respondent's exceptions 12, 34, 86, 93-101, 103-117, and 129 relate to the AJL's findings and conclusions respecting the alleged Kurt Rankin incident. Respondent asserts in its brief that Hudson and Weaver's blocking of and swerving at Rankin warranted the loss of the Act's protection. (R. Br. p. 63) Respondent asserts Hudson "impeded Rankin's passage and swerved in front of him as he tried to leave the picket line." (R. Br. 63) At most, Hudson merely inhibited the travel of Rankin for a distance of a couple hundred feet during which Rankin had numerous opportunities to remove himself from the situation. (ALJD, p. 5-8; p. 13, ll. 41-45)

The ALJ properly found that "neither Hudson nor Weaver committed any act of workplace violence regarding Rankin, nor did they violate any CCI policy regarding employee conduct," that "Hudson engaged in no misconduct with regard to...Rankin." (ALJD, p. 14, ll. 31-32; 21, ll.10) Respondent cites numerous cases in support of its contention that Hudson's conduct respecting Rankin forfeited the protection of the Act. Each case cited involves conduct substantially more egregious than Hudson driving slowly in front of Rankin. The ALJ did not give weight to Respondent's claim that Hudson was intentionally "blocking and trapping" Rankin. There was no trapping because Weaver was actually in Hudson's car. (ALJD, p. 14, ll. 5-8) There was no blocking because Rankin was behind Hudson with several avenues to avoid the situation, including the mere application of his brakes. (ALJD, p. 13, ll.42-45)

3. Exceptions Related to the Conley Incident: (No Video)

Respondent objects to the ALJ's findings and conclusions regarding the alleged Conley incident. (R. Exc. 37-80)

After Hudson and Weaver unknowingly bookended Greider's vehicle leaving Rutledge, they drove past a local park toward Respondent's office. (Tr. 770-74) At the corner of 15th Avenue and Charleston Avenue, Hudson, who was leading, saw a company truck turning east on Charleston Avenue and decided to follow it. (Tr. 774) Hudson followed the truck to see if it was going to a commercial site where the Union might be able to picket. (Tr. 784-85) Weaver, who was behind Hudson, followed Hudson's vehicle as it turned away from the direction of the corporate office, heading out of town on Charleston Avenue/Route 16. (Tr. 774) The ALJ properly found this conduct, while away from the picket line, to be strike related and therefore protected. (ALJD, p. 19, ll. 1-19)

The cases advanced by Respondent respecting this alleged incident all detail substantially dangerous activity that far exceeds the conduct attributed to Hudson and Weaver. In *International Paper Co.*, 309 NLRB 31, 36 (1992), the discharged striker was following dangerously close, nearly forced another vehicle off the road, was weaving to within a foot of another vehicle and eventually pled guilty to the criminal charge of driving to endanger. (R. Br. 51) In *Teamsters Local 812 (Pepsi-Cola Newburgh)*, 304 NLRB 111, 117 (1991), the driver "kept on braking in a manner which almost caused an accident" and made a verbal threat of violence. (R. Br. 51) Conley admitted that neither Hudson or Weaver were trying to cause an accident. (Tr. 883)

Respondent submits that "otherwise protected activity surely loses its protection

when it compromises the safety of others." *NLRB v. Fed. Sec., Inc.*, 154 F.3d 751, 755 (7th Cir. 1998). Respondent failed to establish that the conduct of Hudson and Weaver compromised the safety of Conley or anybody else. (ALJD, p. 20, ll. 26; p. 21, ll. 10)

The record evidence does not support Respondent's allegation that Hudson engaged in any "dangerous vehicular activity." While Conley claims that Hudson pulled into his lane at a distance that he felt was less than a normal safe distance, Diggs testified that when Hudson changed lanes there was a least a car length distance between two vehicles. (Tr. 891-92Tr. 967) A car length distance while changing lanes did not compromise the safety of Diggs or Conley.

Initially Conley testified that Hudson "cut me off," "cut in front of me" and "cut back in front of me" (Tr. 866, 879) The details that emerged during Conley's cross-examination about this allegation does not paint the dangerous picture that comes to mind when one imagines being "cut off." Conley's claim that Hudson pulled in front of him at less than a safe distance is belied by Diggs' testimony, by the fact that Conley did not need to "slam the brakes," that he did not come anywhere close to hitting her vehicle, and that they did not believe they had come close to an accident. (Tr. 891-93, 967) Most significantly, Conley admitted that when he testified Hudson "cut him off," what he really meant was simply that she moved back into the fast lane in front of him. (Tr. 891) The ALJ resolved this issue by crediting Diggs' testimony that when Hudson pulled into the left lane, Conley had not begun to pass. (ALJD, p. 10, ll. 37-40)

The record evidence does not support Respondent's allegation that Weaver engaged in "dangerous vehicular activity." (ALJD, p. 20, ll. 26) Conley testified extensively about Weaver changing lanes but did not assert Weaver ever braked in

front of him. (Tr. 877, 879, 962-63) Conley admitted that when Weaver passed him, she pulled into his lane in front of him at a safe distance, did not slam on her brakes or attempt to swerve into him. (Tr. 877) Diggs testified Weaver did not "really cut the [truck] off," and that he does not even recall seeing her brake lights at the time. (Tr. 962-63) Thus, the record supports the ALJ's finding that Weaver engaged in no misconduct with regard to Conley. (ALJD, p. 13, ll. 16-17)

Respondent claims that Hudson and Weaver followed and tormented Conley. (G.C. Exh. 23, p. 3 and 5; Tr. 302) Patrem testified that the only evidence of this incident Respondent relied on in suspending and discharging Hudson and Weaver is Conley's incident report. (Tr. 317-321) Conley reports:

> Traveling eastbound on Hwy. 16 between Mattoon and Charleston. Car #1 (plate Weave 9) approached in passing lane honking horn (picket sign on passenger side seat) and cut in front of company truck and slowed speed. Another car approached (driver Pat Hudson) and paralleled the first car, both slowing. I proceed to pass with other traffic and (Pat Hudson) car #2 cut back in front of me slowing down creating a blockade to the front. After several miles I turned south on county road and proceeded to Charleston. (G.C. Exh. 16, p. 9)

Patrem told Hudson and Weaver at their suspension meeting that they "harassed and intimidated [Conley's company vehicle] while traveling at a rate of 50 to 60 mph . . . [and while] slowing down blocking, distracting, all while other vehicles were present." (G.C. Exh. 23, p. 3 and 5; Tr. 321)

In suspending and discharging Hudson and Weaver, Patrem lacked a complete understanding of this alleged incident, filling in the gaps with false assumptions. (Tr. 317-318, 328) Patrem testified, contrary to all other witnesses, that after Conley was initially blocked, he passed Hudson and Weaver and they passed him again. (Tr. 328) Patrem also made other incorrect factual assumptions about this alleged incident:

- Hudson and Weaver were travelling from 50 to 60 miles per hour. (Tr. 321). Conley never told Patrem the speed at which they were traveling; (Tr. 898-99)
- Conley was distracted; (Tr. 322-23)
- Weaver "cut in front" of Conley at both an unsafe distance and an unsafe speed. (Tr. 324). Conley testified that Weaver pulled in front of him at a safe distance and he did not believe Weaver was driving at an unsafe speed. (Tr. 877, 880-82) According to Conley, Weaver and Hudson only slowed down once, and then he may not have even had to apply his brakes. (Tr. 882-83) Conley opined they were travelling at a speed below the flow of traffic, but in any event slower than he wanted to drive. (Tr. 884, 909) Conley admitted that when they did slow in front of him that they may have even been driving at the speed limit. (Tr. 884) Diggs also admits that Hudson and Weaver may have been driving the speed limit. (Tr. 965)

Both Weaver and Hudson, during the alleged Conley incident, moved their vehicles in front of Conley's truck at speeds no less than the speed limit. (Tr. 884-85, 965) This alone is insufficient to support a finding that Hudson and Weaver engaged in striker misconduct. *Oak Harbor Freight Lines*, 348 NLRB No. 41, slip op. at p. 16 (May 16, 2012) (Employee Valesco's passing another employee not striker misconduct). In the Conley incident, there is no evidence that Hudson or Weaver repeatedly braked, and in the Greider and Rankin incidents, the witnesses can only agree that Hudson stopped at least once. Even repeated braking while driving in front of another vehicle, without more, is insufficient to constitute striker misconduct. Id. (employee Gibson's repeated braking insufficient to form good faith belief of serious misconduct).

Finally, Board law does not permit the bootstrapping of striker misconduct to employees who did not actively participate. Weaver was told at her discharge meeting that her discharge documents and Hudson's are the same, they acted together. (Tr. 238) Respondent failed to demonstrate it had an honest belief that Weaver had any involvement in the Rankin incident. Weaver was not driving during the incident, and any misconduct on the part of Hudson during the Greider incident may not be attributed to

Weaver, whom the undisputed evidence shows was merely a passenger. *General Telephone Company of Michigan*, 251 NLRB 737, 740 (1980). Respondent is required to show active participation by the employee who is alleged to have engaged in the striker misconduct. *GSM, Inc.*, 284 NLRB 174, 175 (1987). In the event it is found that any of Hudson's conduct is misconduct under Board law, Respondent has not shown Weaver's active participation in those incidents such that she may also be found to have engaged in misconduct. Id.

G. General Counsel's Failure to Call Certain Witnesses

It is settled Board law that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference *may* be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines,* 285 NLRB at 1123.

Respondent excepts to the ALJ's failure to apply adverse inferences to the alleged failure of the Union and General Counsel to call striker witnesses. (R. Exc. 21; R. Br. 35) The adverse inference rule does not apply when a party fails to call employee witnesses because they may not reasonably be presumed to be favorably disposed to any party. *Queen of the Valley Hospital*, 316 NLRB 721, fn. 1 (1995). Further, the drawing of such an inference is not required in all circumstances. See *Roosevelt Mem. Med. Ctr.*, 348 NLRB 1016, 1022 (2006) (drawing an adverse inference is within judge's discretion; a party is not required to call another witness where other record evidence supports existing testimony).

With regard to Maxwell, Respondent claims that the General Counsel should have called Warren Evans. (R. Br. p. 35) There was no need to call Evans as a witness

because Respondent's witness, Frank Fetchak, did not contradict any of Maxwell's essential testimony, i.e., that he did not strike the vehicle, that he was moving and was hit by the vehicle. Id. As such, Evans was not needed to corroborate any testimony.

With regard to the Rankin incident, Respondent claims that the General Counsel should have called employee Janice Neunaber. (R. Br. 35) While an adverse inference may be drawn from the failure to call an agent, current employees like Neunaber cannot be considered predisposed to testify in one manner or another, and are equally available to both parties. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 (1996); *Salisbury Hotel, Inc.*, 283 NLRB 685, 691 fn. 10 (1987).

H. Chaotic Strike-Line Conditions

In exceptions 15 and 173 Respondent excepts to the ALJ's failure to allow testimony regarding the Union's intent of creating an intimidating, harassing environment on the picket line, which it claims is relevant to the issues at hand. (R. Exc. 15, 173; Tr. 138-139) Respondent's counsel asked one question of the Union's business agent on cross-examination about whether employees were asking about getting out of the Union or crossing the picket line during the strike. (Tr. 138) Upon the Union counsel's relevance objection, Respondent's counsel advanced that the relevance relates to the intimidating and harassing picket line conditions and whether the purpose is "to make people hesitant to cross the picket line." Id. The objection was sustained, and despite the ALJ's invitation to make an offer of proof, Respondent's counsel moved on to other questions. (Tr. 139) No offer of proof was made. Id. Respondent failed to properly preserve its objection in this regard, and cannot now, without a sufficient basis in the record, contend the AJL's ruling was in error.

Notwithstanding Respondent's exceptions in this regard, there was sufficient record evidence of the chaotic strike-line conditions that Respondent was able to devote an entire page to the matter in its brief. (R. Br. 3-4)

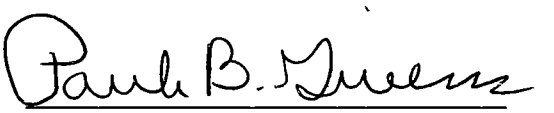
I. ALJ Applied Proper Objective Standard

In exception 176, Respondent excepts to the ALJ's failure consider the subjective testimony of the effect of the alleged "misconduct on the targets." (R. Exc. 176; Tr. 472; 993-94) The Board's standard for determining picket line misconduct is an objective one. *Clear Pine Mouldings*, 268 NLRB 1044 (1984). Subjective testimony respecting employee reactions does not bear upon the objective standard mandated by *Clear Pine Mouldings* and was properly excluded. See *Roto Rooter*, 283 NLRB 771, 772 (1987).

IV. Conclusion

General Counsel submits that Respondent's exceptions lack merit. Respondent's exceptions do not comply with the Board's Rules and Regulations and should be disregarded. Respondent's exceptions lack substantive merit and do not demonstrate by a clear preponderance of the evidence that the factual findings and credibility resolutions of Administrative Law Judge Amchan are incorrect. As such, the ALJ's Decision should be adopted in its entirety by the Board.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.114, a true and correct copy of the foregoing Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was e-filed with the Division of Judges and served via electronic mail on this 14th day of February 2014, on the following parties:

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