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

CONSOLIDATED COMMUNICATIONS D/B/A ILLINOIS CONSOLIDATED TELEPHONE COMPANY,	)	
and	)	Cases 14-CA-094626 and 14-CA-101495
LOCAL 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.	)	

RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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Respondent Consolidated Communications, Inc. ("Consolidated" or "the Company") responds to the General Counsel's answering brief to Consolidated's Exceptions to Decision of Administrative Law Judge and Proceedings and brief in support thereof as follows:

I. THE BOARD SHOULD REJECT THE GENERAL COUNSEL'S ERRONEOUS AND MISLEADING ARGUMENTS THAT CONSOLIDATED'S EXCEPTIONS WERE PROCEDURALLY DEFICIENT

The General Counsel asserts that the Company's exceptions are procedurally deficient because they purportedly do not comply with Section 102.46(b)(1)(i)-(iv). The General Counsel's argument fails to cite any Board or other case authority and ignores that the Rules provide that where "a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief." Sec. 102.46(b). Further, the Board rules provide that the *brief* shall set forth the argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on. Sec. 102.46(c). Here, Consolidated filed a brief in support of its exceptions (the exceptions document containing citations to the ALJ's decision where the exception was based upon an aspect of his decision), that clearly and unambiguously set forth its arguments and points of fact and law in support of its exceptions.[1] Consolidated's exceptions and brief in support thereof comply with both the Board's Rules and practice. *See How To Take A Case Before the NLRB*, 8th Ed. Ch. 17.II.B. (2008) ("If a supporting brief is filed, the Board's policy is not to allow any argument or citations in the exceptions document . . . (t)he best practice is . . . to

[1] While the General Counsel suggests that Consolidated's failure to set forth transcript citations in the exceptions document renders the exceptions improper, the majority of the transcript citations are associated with Consolidated's argument and therefore properly appear in the brief. Where the ALJ erred during the hearing but did not articulate such error in his decision (for instance, in excluding certain types of evidence), Consolidated appropriately cited the transcript portion, as there was no portion of the ALJ's decision to cite in the exceptions.

identify by . . . page . . . the portion of the administrative law judge's decision to which the exception is taken, and to use the brief to set forth the basis for the exceptions (*e.g.*, improper credibility resolutions, misapplication of case precedent, etc.), citations to the transcript that afford evidentiary support for the exceptions, and any relevant legal authorities.").

The General Counsel also asserts that the Company's purported lack of specificity adversely affected its ability to respond. Contrary to this argument, Consolidated clearly framed the issues and presented its case to the Board through its exceptions and detailed 75-page brief, which provides specific citations to the transcript, hearing exhibits, the ALJ's decision and legal authorities. The General Counsel's (unsupported) conclusion that Consolidated's brief does not comply with Section 102.46(c) is erroneous, as per Section 102.46(c), Consolidated's brief clearly sets forth the statement of the case, containing the information material to the questions presented (not disputed by the General Counsel), the questions to be argued, with a reference to the specific exceptions to which they relate (*see* p. 20 of Consolidated's brief), and legal argument with specific page references to the record and to other legal authorities.

Finally, although Consolidated asserts that it fully complied with the Board's Rules and practice, to the extent the Board finds that the exceptions are not in precise conformity with Section 102.46(b), at a minimum they are in substantial compliance therewith and should be considered pursuant to Board practice. *See Monarch Tool Co.*, 227 NLRB 1265, 1268 (1977).

II. THE GENERAL COUNSEL'S MISLEADING ARGUMENTS ON THE SUBSTANTIVE ISSUES DO NOT ASSIST HER IN DEMONSTRATING THAT SHE CARRIED HER BURDEN OF PROOF AND SHOULD BE REJECTED

A. The General Counsel Ignores That Many Of The Company's Exceptions Are Not Based Upon Credibility Resolutions

The General Counsel attempts to justify the ALJ's decision by arguing that the issues in controversy are primarily "credibility resolutions." Consolidated acknowledges the Board's

general practice is not to overrule credibility resolutions. However, as Consolidated's exceptions and brief in support thereof make clear, Consolidated objects to many of the ALJ's key findings and conclusions that are not based upon credibility resolutions, alleged consistency of testimony, inherent probabilities, common sense, admitted facts or demeanor. GC-Br. P. 2. Rather, CCI's exceptions to the ALJ's findings are largely based upon the ALJ's incorrect and inappropriate baseline assumptions. While not rehashing its initial brief, the ALJ, for instance, made a key determination—whether the Conley incident occurred—based primarily upon his assumption that all management witnesses are biased. Similarly, the ALJ found that Weaver and Hudson did not engage in conduct based primarily upon unsupported animus findings against non-management witnesses.

Where an ALJ makes credibility determinations based upon his incorrect analysis of the record, his findings are not to be afforded any weight. *Jewel Bakery, Inc*., 268 NLRB 1326, 1327 (1984). As set forth in Consolidated's brief, in addition to his erroneous assumptions, his application of inappropriate legal standards and his misapplication of the law, the ALJ substantially erred in his analysis of the record. Moreover, the ALJ does not discharge his duties (and ensure the Company receives its due process rights) by including a boilerplate statement that he considered the record and his observation of the demeanor of the witnesses in making his findings when his analysis is clearly flawed.

B. The General Counsel Mischaracterizes The Company's Argument Regarding The ALJ's Failure To Find That It Had An Honest Belief

In arguing that the Company was not deprived of due process through the ALJ's presumption of an honest belief (GC-Br. P. 11), the General Counsel misconstrues the Company's argument, which is that the ALJ did not err solely by presuming an honest belief, but rather that in the process of failing to apply the striker-misconduct burden-shifting framework by

finding that the Company had an honest belief, he never placed the burden of proof on the General Counsel to show that the misconduct did not occur or that it was not serious enough to forfeit protection of the Act. Here, the General Counsel continues to argue for the application of an improper burden of proof, as she argues that the ALJ's conclusions as to the Conley/Diggs incident should be upheld on the basis that "*Respondent* failed to establish that the conduct of Hudson and Weaver compromised the safety of Conley or anyone else." GC-Br. P. 24 (emphasis added). Obviously, requiring the Respondent to establish the misconduct and resolving ambiguities against the Respondent, as the ALJ admittedly did, is the opposite of placing the burden on the General Counsel. This alone is sufficient to reverse the ALJ's decision.

C. The General Counsel Cites Testimony Of Company Managers Not Relevant To Whether The General Counsel Carried Its Burden In Showing That The Disciplined Employees Did Not Engage In Misconduct

Despite not contesting the Company's honest belief, the General Counsel nevertheless goes to lengths to discredit the testimony of managers Gary Patrem and Ryan Whitlock and to argue that an adverse inference should be applied against the Company for not calling manager Sam Jurka. It is undisputed, however, that neither Patrem, Whitlock, nor Jurka witnessed any of the striker misconduct incidents. Their testimony is therefore not relevant to whether the General Counsel carried its burden of proof under the striker misconduct standard in showing that the Disciplined Employees did not commit the acts at issue or that they were not serious enough to forfeit protection of the Act. Hence, the General Counsel's attempts to confuse the issues by making assertions about Patrem's and Whitlock's testimony should be disregarded.

D. The Video Evidence Cited By The General Counsel Neither Supports The ALJ's Decision Nor Helps The General Counsel Carry Its Burden Of Proof As To The Greider Incident

A review of the General Counsel's brief and the ALJ's decision would lead an impartial observer to believe that the strike line video supports Hudson's and Weaver's self-serving

position on the basis that the video does not show that Hudson was stopping and starting in front of Greider. ALJ Decision P. 7; GC-Br. P. 21. This is not the case. The video is important because Hudson and Weaver purportedly had no memory of the event (Tr. 601-04, 768), and the video clearly shows Greider bookended by Hudson and Weaver. *See* R-Ex. 1 at 10:03:41-57. However, the video lasts only 16 seconds, while Greider's uncontested testimony indicates that it took her a minute to "escape." Tr. 1055, 1057; *see also* Tr. 1119-20 (Rich's testimony to same effect). Also, the video does indicate that even in the 16 second clip Hudson applied her brakes in front of Greider (R-Ex. 1 at 10:03:41), for which no reasonable explanation was offered. Tr. 1091-92, 1120-21. As no witness disputes that the strike line video only captures a small portion of the incident because the videographer did not film further down the road where Greider testified that the majority of the incident took place (R-Ex. 1 at 10:03:41; JT-Ex. 7; Tr. 1057, 1069-70), it is disingenuous for the General Counsel and plain error for the ALJ to rely upon such video for the proposition that the misconduct did not occur.

E. The General Counsel Failed to Rebut The Company's Exception To The ALJ's Error In Imposing A Violence Or Threat Of Violence Standard

General Counsel contends that Hudson and Weaver did not commit any workplace violence regarding Rankin and that Maxwell did not engage in violence regarding the Flood incident. GC-Br. P. 15, 22. The ALJ and the General Counsel rely on the improper analysis of whether the Disciplined Employees' misconduct involved violent acts or threats of violence, rather than whether their misconduct would reasonably coerce or intimidate employees in the exercise of their Section 7 right to work. *See Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984). The reliance upon this faulty analysis is plain error. Indeed, the General Counsel attempts to gloss over the ALJ's specific requirement of violence or a threat of violence:

- "Maxwell did not threaten anyone or commit any acts of violence on December 8, 2012." P. 4.

- "Neither Hudson nor Weaver committed an act of violence, nor has Respondent demonstrated that either violated any company policy regarding employee conduct." P. 13.

- "The record establishes that neither Hudson nor Weaver committed any act of workplace violence regarding Rankin." P. 14.

- While [Williamson's] gesture was totally uncalled for, and very unpleasant, it is difficult to see how it could have been perceived as an implied threat of violence." P. 22.

These findings which directly pertain to the ALJ's ultimate findings and conclusions are reversible error because the Board does not require violence or threat of violence, and has rejected the earlier "per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts." *Clear Pine Mouldings*, 268 NLRB at 1046. Nothing in the case law relied upon by the General Counsel, or the ALJ, requires that the misconduct be violent in order to forfeit protection of the Act. Because no such violence or threat of violence standard exists, the ALJ's findings relying on the erroneous standard should be overturned.

F. The General Counsel's Attempts To Support The ALJ's Discrediting Of The Only Third-Party Hearing Witnesses Is Contrary To Common Sense

The General Counsel attempts to discredit the testimony of neutral witnesses primarily on the basis that their testimony differs in some instances. Such discrepancies are not uncommon, and it is common sense that when nonparticipant witnesses view an incident from afar and testify to the incident eight to nine months later, it is unlikely that they are going to recount everything in the exact same manner.[2] This is especially true when the witnesses see something unexpected. Importantly, as to the Rankin incident, three neutral witnesses—Walters, Rich and Dasenbrock—testified that Hudson impeded Rankin's progress and that she attempted to block his path.

[2] Indeed, in its brief, the Union contradicts the General Counsel when it argues that Weaver and Hudson's inconsistent testimony should not be discounted because "some inconsistencies do not make all of a witness' testimony unreliable." U-Br. P. 33.

Tr. 1028, 1032, 1122-24, 1134, 1165, 1179-1181, 1183, 1195, 1198. Whether they remember seeing Hudson use precisely the same driving maneuver in blocking Rankin is irrelevant (and in fact shows that they each provided independent and forthright testimony), as each recalled seeing Hudson intentionally impede Rankin's progress as he attempted to pass. It is clear error for the ALJ to find and the General Counsel to support that any discrepancy in the testimony of these witnesses is based upon anti-union animus, where no evidence exists of such animus, as opposed to common sense rationale that not everyone always sees the same thing.[3]

G. The General Counsel Erroneously Mischaracterizes Neutral Witness Fetchak's Testimony As Confirming Maxwell's Denial Of Misconduct

In response to the Company's well-founded exception to the ALJ's failure to apply an adverse inference to the General Counsel's failure to call Union officer and direct witness Warren Evans, the General Counsel argues that there was no need to call him because neutral witness Fetchak's testimony did not contradict any of Maxwell's "essential testimony." GC-Br. P. 27-28. This argument is clearly erroneous, as Maxwell's and Flood's testimony differs significantly as set forth in Consolidated's brief. E-Br. P. 70-71. As neither the ALJ nor the General Counsel dispute Fetchak's veracity, his testimony should have been credited:

[3] As part of the "heads, I win; tails, you lose" bias displayed by the ALJ and supported by the General Counsel, the General Counsel attempts to discredit Rankin's testimony on the basis that his testimony differs from Rich's and Dasenbrock's testimony as to the incident. Yet, the General Counsel also argues that Rich's and Dasenbrock's testimony is not reliable. For instance, the General Counsel argues that Rankin's testimony should be disregarded because Walters, Rich and Dasenbrock did not see the truck that he testified having passed him on 17th Street. GC-Br. P. 5. Yet, the General Counsel's own witnesses (Weaver and Hudson) testified to this truck passing him. Tr. 622, 790, 842. The General Counsel also ignored the record when it argued that Rankin's testimony should be disregarded because his time estimate of the incident differed from Rich's testimony (GC-Br. P. 5), as Rankin testified that the incident took five to eight minutes from the time that he approached the strike line until he "got free" and "felt safe" after passing Hudson (Tr. 472-73, 478), while Rich only observed Rankin from the time he pulled out of the driveway until she lost view of him (as her view further down the road was obstructed by the building) Tr. 1131-32, 1162; JT-Ex. 7(c).

- As Flood approached, he was forced to stop the vehicle and slowly inch forward a couple of inches ("almost negligible") and stop again on multiple occasions until Maxwell left the front of the van;

- Maxwell intentionally made contact with the van with his arm;

- Maxwell impeded the van's progress from leaving for more than a "very brief period of time" by walking in front of the area between the van's headlights while strikers yelled at Flood and blocked his view as he inched forward in order to safely exit the facility onto a public road; and

- Maxwell yelled "Fuck You, Scab" at Flood while standing near the driver's side window and giving him the middle finger.

Tr. 929-34, 938-39, 952-53.

Given that the ALJ found no reason to discredit Fetchak's testimony, he should have applied Fetchak's testimony to conclude that Maxwell engaged in serious strike misconduct and found that an adverse inference was appropriate against the General Counsel for failing to call Evans to resolve differences between Fetchak and Maxwell.

H. The General Counsel's Argument That No Evidence Exists That Williamson Made Intentional Contact With Redfern's Mirror Is An Inappropriate Standard And Is Belied By The Evidence

The General Counsel's argument that the ALJ was correct in finding that there is no evidence that Williamson made intentional contact with the Dawn Redern's mirror as she drove out of the facility onto 17th Street is not the appropriate legal standard. Under the *Clear Pine Mouldings* standard, the inquiry is whether Williamson engaged in misconduct which would reasonably coerce or intimidate Redfern, not whether such conduct was intentional. Further, there *is* more than ample uncontroverted evidence that Williamson intentionally made contact with the mirror, including that:

- Williamson admitted he intentionally approached Redfern's vehicle as she pulled out of the parking lot, claiming he wanted to make sure she saw his sign. *See* Tr. 717, 748-50; R-Ex. 5. Williamson also admitted that he was close (i.e., within a foot) to cars many times that day. Tr. 743; *see also* Tr. 727-28.

- Redfern testified that she was driving about one to two miles per hour as she turned out of the Rutledge facility (Tr. 982-83, 986), which is more than enough time for a person to avoid making contact with a car. As Redfern left the facility, she heard a loud "smack," despite having the radio turned up "loud enough where [she] couldn't be distracted by the picketers." Tr. 987-88. Redfern testified her mirror never folded in before, and after conducting a pressure test on the mirror in preparation for the hearing, she was certain that the mirror would only fold in with application of considerable force, and not fold in if it came into contact with a whistle. Tr. 990-92, 1013.

- The video of the event shows and the ALJ's own remarks agree that the video does not show any evidence of Redfern's vehicle going outside of the driveway. *See* R-Ex. 1 at 5:08:07; Tr. 741. In addition, Williamson admitted that upon review of the strike video, Redfern's vehicle was squarely in the driveway as it exited and followed the same pattern and path as the cars before it. Tr. 737-40; *see also* R-Ex. 1 at 5:08:07-20; Tr. 741.

Applying the General Counsel's theory, a striker will only be judged to have engaged in striker misconduct if he admits that he did so (which is unlikely to happen) or another witness to the misconduct testifies that he acted intentionally. As to Redfern's testimony, as she cannot get inside of Williamson's mind, she truthfully answered that she did not know whether he intentionally struck the mirror. But, where the surrounding evidence indicates that it is more probable than not that Williamson hit her mirror intentionally, the General Counsel does not carry its burden.[4]

I. The General Counsel's Argument As To The Conley/Diggs Incident Is Premised Upon Consolidated Having The Burden Of Proof

The law is clear that "assuming" the Company had an honest belief, the burden falls on the General Counsel to show that the misconduct did not occur or was not serious enough to forfeit protection of the Act. Nevertheless, the General Counsel asserts that "*Respondent* failed to establish that the conduct of Hudson and Weaver compromised the safety of Conley or

[4] Contrary to the General Counsel's argument that Williamson's misconduct as to Walters, standing alone, is insufficient to warrant a two-day suspension, his misconduct does not "stand alone" in light of his conduct towards Redfern.

anybody else." GC-Br. P. 24 (emphasis added). The General Counsel's arguments in support of the ALJ's finding towards Conley based upon this assumption should be disregarded.

Further, the General Counsel continues to view Hudson and Weaver as merely having "followed" Conley's truck during the Conley/Diggs incident. But, it is undisputed that they were not following Conley and Diggs but rather drove in front of them miles away from a picket line (Tr. 153-54, 614-15, 657-58, 661, 778-780, 851), which is clearly not protected activity.

The General Counsel also creates a retroactive dispute on semantics regarding Conley's testimony.[5] The General Counsel argues that "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." GC-Br. P. 24. The General Counsel conveniently ignores that in the same line of questioning Conley testified that Hudson did not move in front of him at a safe distance and that he would be "surprised . . . if she thought that was the right, safe thing to do" and that he testified on numerous occasions that Hudson cut him off. Tr. 866, 892-93, 914-15. The General Counsel further concludes, without legal citation, that Hudson changing lanes in front of Conley at an abnormally short distance (a car length while driving 60 miles per hour) "did not compromise the safety of Diggs and Conley." GC-Br. P. 24. The General Counsel's conclusion that the public's safety was not threatened because a mere car length separated the two vehicles traveling 60 miles per hour is unsupported by law and common sense, and Hudson's conduct towards Conley is not and should not be protected under the Act.

In light of the numerous errors, the ALJ's decision should be reversed, and appropriate relief should be granted.

[5] The General Counsel inexplicably devotes several paragraphs to the testimony of Patrem, despite it being undisputed that Patrem was not a witness to the incident.

Respectfully submitted, this 28th day of February, 2014.

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CERTIFICATE OF SERVICE

I certify that on this 28th day of February, 2014, I caused the foregoing to be electronically filed the with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served via electronic mail to the following:

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