

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CORLISS RESOURCES, INC.

and

Cases 19-CA-093237
19-CA-093281
19-CA-102190
19-CA-104557
19-CA-105226
19-CA-106514

TEAMSTERS LOCAL 174, AFFILIATED WITH
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

**GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S LIMITED CROSS EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel submits this Answering Brief to the Limited Cross-Exceptions filed by Respondent Corliss Resources, Inc. (“Respondent”), to the Decision of Administrative Law Judge Jeffrey D. Wedekind (“ALJ”), issued on March 24, 2014, in the above-captioned cases. As discussed in more detail below, except for the recommended findings addressed in the General Counsel’s Brief in Support of Teamsters Local 174’s Limited Exceptions to the Decision of the Administrative Law Judge filed on May 5, 2014, the ALJ’s factual findings and legal conclusions are appropriate, proper, and fully supported by the credible record evidence in all respects. Accordingly, as each of Respondent’s Limited Exceptions lack merit, the Board should sustain the ALJ’s findings of fact, conclusions of law, proposed remedy, and recommended order with regard to Don Sturdivan’s discharge.

II. RESPONDENT’S EXCEPTIONS

A. Contrary to Respondent’s Assertions in its Limited Cross-Exceptions 1 and 2, the ALJ Correctly Found that Respondent Terminated Don Sturdivan in Retaliation for his Union and NLRB Activity and that Other Drivers were Treated Less Severely than Sturdivan

Respondent contends that, contrary to the ALJ’s finding, it satisfied its *Wright Line* burden of demonstrating that it would have reached the same termination decision regardless of Don Sturdivan’s (“Sturdivan”) Union support or his NLRB activity. As set forth in more detail below, Respondent failed to establish by a preponderance of the evidence, that it would have terminated Sturdivan regardless of his Union or NLRB activity. Therefore, the Board should affirm the ALJ’s findings with regard to Respondent having violated the Act by discharging Sturdivan.

1. Respondent was Aware of Sturdivan's Union and NLRB Activity

Don Sturdivan was a dump truck driver for Respondent for seven and half years before he was discharged. (ALJD 19:27-28; TR. 291:8-21). Sturdivan went to every Union meeting while he was employed by Respondent. (ALJD 19:28; TR. 295:9-11). Starting around March 2012, Sturdivan would talk to dump truck drivers about the Union and placed pro-Union fliers in drivers' trucks. (ALJD 19:29; TR. 113; 296:1-24; 548). Management was aware as early as March 2012 that Sturdivan was pro-Union and that he was known around the facility as a strong Union supporter. (TR. 548:3-14; 113:11-24).

In addition, Sturdivan was the only Corliss driver to testify on behalf of the Union at two separate NLRB hearings. (ALJD: 19:30-31; GC Ex. 19 and 20). On May 25, 2012, at the pre-election hearing regarding the petitioned-for unit, Sturdivan testified on behalf of the Union about the chain of command in the dump truck department as well as his duties as a dump truck driver. (TR. 306:1-23). Human Resources Director Shawna Williamson ("Williamson") and Respondent's co-owner Tim Corliss ("Tim") were both present during the hearing. (TR. 306:1-13). Sturdivan testified again, with Tim present, at the post-election hearing regarding challenged ballots held on October 25, 2012. (GC Ex. 20; TR. 316:2-12). Sturdivan was also named as a witness in support of the Union's July 26, 2012, objections to the first election. (ALJD 19:34; TR. 19:33-34; GC Ex. 6). In short, Respondent was well aware of Sturdivan's sympathies as well as his Union and NLRB activity when it terminated his employment on October 31, 2012. (ALJD 22:1-10).

2. Sturdivan's Minor Accident

On the morning of October 29, 2012, the Monday after Sturdivan testified on behalf of the Union at the post-election hearing, he had a minor truck accident at work. (ALJD 19:36-37; TR. 318:21-22). Sturdivan was following fellow dump truck driver Paul Dykes ("Dykes") to Respondent's Enumclaw plant in his dump truck and when Dykes stopped at a traffic light, Sturdivan stopped directly behind him. (ALJD 19:37-40; TR. 318:24-319:4; 319:3-4; 353:12-13). When Sturdivan saw Dykes' brake lights go off, he took his foot off the brake as well and started to move forward. (ALJD 19:40-20:4; TR. 319:5-8; 353:14-18). Dykes then put his brakes back on and, when Sturdivan went to place his foot back on his brake, his foot slipped off the brake and he rolled into Dykes. (ALJD 19:40-20:4; TR. 319:5-6; 342:16-22; 353:17-354:8, 354:12-15). After that, Dykes and Sturdivan got out of their trucks to look at the damage and check in with each other. (ALJD 20:6-7; TR. 319:17-19). Dykes called Dispatcher Randy Britt ("Britt") and told him what happened and Britt instructed both of them to load at plant four and then return to with their loads to the Sumner plant. (ALJD 20:6-7; TR. 319:10-15, 319:20-320:5). Sturdivan noted that his truck had some damage to the front fender and the step on the back of Dykes' truck had bent a little from the accident. (ALJD 20:6-8; TR. 320:6-12).

After that, Sturdivan and Dykes went up to the Human Resources office to fill out paperwork regarding the accident. (ALJD 20:7-8; TR. 321:5-11). Human Resources Director Williamson was there and Sturdivan told her that he was afraid that this was just what Corliss needed to get rid of him. (ALJD 20:12-14; TR. 321:15-16). Williamson testified that Sturdivan was upset and told her that the Union had told him that the one

thing he should avoid is getting into an accident, because it would give Respondent a reason to terminate him. (TR. 1374:7-10). According to Sturdivan, Williamson indicated that she did not think that Sturdivan would be fired. (TR. 321:20-21).

Sturdivan then commented on how sad it was that the two of them had been placed in a position where they had to testify against each other at the NLRB hearings and Williamson told Sturdivan that she thought he had done a really good job testifying. (ALJD 20:16-18; TR. 321:23-322:5; 1537:4-22). After that exchange, Sturdivan and Dykes went to take a drug test, which is required any time a driver is involved in an accident. (ALJD 20:n.42; TR. 322:8-11). Williamson admitted that she never asked Sturdivan any questions about the accident, but just had both Sturdivan and Dykes fill out the accident forms. (TR. 1534:10-14).

Williamson testified that after Sturdivan filled out his paperwork, she reviewed his personnel file, conferred with Truck Supervisor Darrin Rousseau (“Rousseau”) over the phone, and subsequently recommended to Respondent’s President Scott Corliss (“Scott”) that Sturdivan be discharged. (ALJD 20:22-24; TR. 1376:14-22; 1384:23-1385:11; 1387:8-13). Williamson testified that her review of Sturdivan’s previous write-ups led her to the conclusion that Sturdivan should be discharged.¹ (ALJD 20:23-24).

3. Sturdivan’s Previous Discipline

Williamson specifically mentioned her review of three incidents, which took place in 2010 and 2011, as factors leading her to recommend discharge. (ALJD 20:22-24).

¹ Rousseau testified that after he discussed Sturdivan’s record over the phone with Williamson, he concluded that Sturdivan was a distracted driver and, due the proximity in time of his driving accidents, he felt that Sturdivan should be terminated. (ALJD 21:26-27; TR. 832:4-8; 833:15-19). However, as found by the ALJ, Rousseau’s conclusions had no effect on Scott’s decision to terminate Sturdivan as he only spoke with Scott about the accident after Scott had made his decision to discharge Sturdivan. (ALJD 22:n.49).

First, dispatcher John Bobbitt (“Bobbitt”) wrote up Sturdivan on July 17, 2010, when he cut a corner too closely and his trailer hit a light pole, causing \$2,500 worth of damage. (ALJD 20:26-28; R. Exs. 13-15; TR. 1379-1380, 1387). Williamson testified that she recommended to Scott that Sturdivan be terminated for this incident at the time of the incident, but Scott rejected Williamson’s recommendation because he liked Sturdivan. (ALJD 20:28-30; TR. 1379-1380, 1387).

Second, on August 2, 2010, Sturdivan hit an ecology block with his trailer when the car stereo fell into his face as he was driving uphill. (ALJD 21:2-4; R Ex. 12). Respondent issued a written warning for this incident as well, but did not discharge Sturdivan even though this accident took place less than a month after his previous accident. (R. Ex. 12).

Finally, a year later, on August 20, 2011, Bobbitt issued Sturdivan a written warning after his dolly brakes failed causing damage to the reach on Sturdivan’s truck. (TR. 324:4-25; GC Ex. 21). Bobbitt testified that the damage to Sturdivan’s truck was due to a mechanical malfunction, which was not Sturdivan’s fault,² and that he wrote up Sturdivan for the accident because it was standard procedure to write up any incident resulting in more than \$1,000 worth of damage.³ (TR. 1590:7-15; 1591:24-1592:1; GC Ex. 21). As was Respondent’s practice, Scott ultimately decided what discipline Sturdivan would receive for the incident. (TR. 1594:23-25; 1635:17-25). Williamson was not involved in this write-up of Sturdivan. (TR. 1594:23-25; 1635:17-25).

² Bobbitt also explained that the comments he made under corrective action were listed as precaution for Sturdivan to take in the future as he acknowledged that Sturdivan’s truck was not equipped with all of the necessary equipment (such as chains and chocks) at the time of the accident. (TR. 1592:4-1594:22).

³ Bobbitt also testified that when he wrote “Due to the severity of the incident, a written warning was warranted,” he was referring to the total cost of the incident to Respondent. (TR. 1591:8-23).

4. Scott's Decision to Discharge Sturdivan

Significantly, Williamson did not mention any of these other incidents to Scott when she recommended that Sturdivan be discharged. As noted by the ALJ, Williamson testified that she had a brief phone call with Scott when she informed him of the accident and recommended Sturdivan's discharge. (ALJD 21:35-37; TR. 1387:7-13). She described the exchange as follows: "it wasn't a very in-depth conversation . . . I didn't get into any of the past documents with him, the history or anything. It was just, 'I think that he needs to be terminated,' and Scott said, 'Okay.'" (ALJD 21:35-37; TR. 1387:7-13).

On Wednesday morning, October 31, 2012, Sturdivan called Williamson to check in and she told him that Scott and his brother Tim had reviewed Sturdivan's file and that they were going to let him go. (TR. 322:17-323:6). Although Williamson informed Sturdivan that Scott and Tim had reviewed Sturdivan's file, there was no evidence whatsoever that either Scott or Tim had done so, or that Tim was involved in the process whatsoever.

Sturdivan never received any written notification of his termination, but Williamson did prepare an internal termination form for payroll purposes, which Scott signed on November 5, 2012. (ALJD 21:39-41; TR. 323:23-25). The form does not detail the reasons for Sturdivan's termination -- Williamson only wrote, "Please see file for accident history." (ALJD 21:41-42; R. Ex. 11).

5. Scott Had Final Word on Disciplinary Actions

Bobbitt testified that if a driver was in an accident, the dispatcher would go out to the site of the accident, evaluate it, and write up a report on it. (TR. 564:6-13; 1579:9-

16). Interviewing the driver about the accident was part of the standard investigation. (TR. 1589:1-18; 1589:11-18; 564:20-23). Once the paperwork was filled out, Bobbitt would call Scott, report to him exactly what had taken place, and ask him how he wanted it handled. (TR. 1635:15-22; 564:20-565:19; 1635:15-22). Scott would decide whether a driver should get a verbal warning, a written warning, or be discharged. (ALJD 24:10-12; TR. 1635:19-22). Scott had final decision making authority on all serious disciplinary actions and terminations and Respondent acknowledges that it does not follow a progressive disciplinary system. (ALJD 21:28-29; 21:n.45).

Scott was not consistent in giving out discipline, but rather would hand out harsher discipline if he did not like a driver and less stringent discipline if he liked the driver. (ALJD 21:27-31; 24:10-12; TR. 565:20-566:11). As Bobbitt testified, Scott would decide what level of discipline to issue based on his mood and whether or not he liked the driver. (TR. 565:20-566:11). According to Bobbitt, there were times when someone would have a minor accident and Scott would fire them because he was mad at them. (TR. 566:23-567:11). For example, Scott fired a driver named Simon Media, when he bumped an ecology block, because he was mad at him for an unrelated reason. (TR. 566:23-567:11).

6. Respondent Did Not Fire Other Dump Truck Drivers with Worse Records

As the ALJ correctly found, the evidence demonstrates that Respondent's other drivers with similar and worse records of accidents than Sturdivan were not discharged. For example, prior to the Union campaign, truck driver Jeff Cope ("Cope") had been written up for multiple serious driving accidents, but was never discharged or even threatened with termination. (ALJD 22:n.48; TR. 477:17-20; 505:22; GC Ex. 31(a)-(j)).

In 2011 alone, before management was aware of Cope's Union activity or leanings, Cope was given two written warnings for serious driving infractions, but no discharge. (GC Ex. 31(a) and (b)). On October 17, 2011, Cope was written up for getting into an accident with a front loader and causing about \$3,000 worth of damage. (ALJD 24:7-9; GC Ex. 31(a)). Cope admitted that the accident was his fault both on the stand as well as in the write-up itself. (GC Ex. 31(a); 505:23-507:13). On June 21, 2011, just four months prior to that, Cope was issued a Written Warning for having rear-ended a privately owned vehicle when his foot slipped off the clutch of his dump truck. (ALJD 24:3-5; GC Ex. 31(b); 507:14-508:1). Cope was not discharged for this accident either. (ALJD 24:3-5; GC Ex. 31(b)). In 2010, Cope was in another accident in which he rolled his trailer. (ALJD 24:2-3; GC Ex. 31(c)). Cope was also written up in October 2005, December, August, and February 2004, for four separate incidents during which he caused damage to his dump truck. (GC Exs. 31(d)-(h)). Cope also caused damage to his truck in August 2002. (GC Ex. 31(i)). Although Cope has an extensive history of causing damage to his truck prior to Respondent being aware of his Union activity, Cope was never fired or threatened with termination for any of these incidents. (ALJD 24:1-8; 22:n.48).

Similarly, Respondent issued dump truck driver Joe Futch ("Futch") six formal disciplinary actions and three Incident Reports in just two years between 2008 and 2010 without discharging him. (GC Ex. 33(b)-(h)). In October 2010, while entering a gated community, Futch caught his bumper on the community gate destroying the gate and causing severe damage to the 10 foot tall flagstone brick support column that the gate was attached to. (GC Ex. 33(b)). Even with the extensive damage done to the gate

after a series of significant accidents, Respondent did not fire Futch. (GC Ex. 33(b)-(h)). It was not until Futch was caught lying to Respondent about his involvement in a hit and run accident in November of 2010, that he was finally discharged. (ALJD 23:10-11; TR. 1534:17-1536:18; GC Ex. 33(a)).

In addition, Scott failed to terminate vocal anti-union driver Robert Cummings (“Cummings”) even though he hit a homeowner’s roof as he was raising his box, lifting the corner of the roof and causing significant damage to the roof line, truss, and gutter. (ALJD 23:14-20). Nor was Cummings discharged just seven months later, in February 2013, when his truck slid down a slope as he was making a turn and ran into a fence post. (ALJD 23:20-23). In fact, as noted by the ALJ, there was no evidence that Cummings was even disciplined for either of these incidents. (ALJD 23:20-24).

Further, even after a history of serious accidents each, drivers Marshall Graham and Brian Anderson (“Anderson”) were not discharged. (ALJD 23:25-31; 895:19-896:8; GC Ex. 35(a)-(f); 1399:12-1400:3; GC Ex. 30(b)-(g)). Specifically, Anderson was only given a written warning after he ignored prior safety instructions and followed a loader up a hill, resulting in a collision when the loader backed into him. (ALJD 23:25-28). In addition, Anderson was only given a written warning just a year later, in March 2011, when he failed to lower his truck box before leaving a job site and caught an overhead cross walk sign and ripped it off its fasteners, requiring the city to close one lane of traffic and call a boom truck out to remove the sign. (ALJD 23:28-31; GC EX. 30).

7. Sturdivan was Fired Unlawfully Under Both §§ 8(a)(3) and (4)

As found by the ALJ, it is clear that Respondent knew about Sturdivan’s Union activity starting around March 2012. (ALJD 22:5-10). In addition, the Union relied

heavily upon Sturdivan's testimony during the May 25, and October 25, 2012, NLRB hearings, during which Tim and Williamson were present. There is abundant record evidence, much of which is undisputed, that Scott harbored animus toward and intended to retaliate against Union supporters. (ALJD 22:3-5; 32:25-33:25; 1:1-14:29). As such, the timing of Sturdivan's discharge, less than a week after his final testimony, belies Respondent's true motivation for his termination. See *Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981) (timing of discharges supported Board's finding that discharges were motivated by antiunion bias); *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000) (timing is an important factor in assessing motivation in cases alleging discriminatory discipline based on union or protected activity), *enfd.*, 5 Fed. Appx. 236, 166 L.R.R.M. (BNA) 2896 (4th Cir. 2001) (unpublished); *Bethlehem Temple Learning Ctr.*, 330 NLRB 1177, 1178 (2000).

Respondent's defense is that it would have discharged Sturdivan anyway because of his driving record. Such defense fails for several reasons. First, Sturdivan's October 29, 2012, driving accident was a negligible fender bender causing minor damage to the front bumper of Sturdivan's truck and the step on Dykes' truck. In fact, the damage was so minor that Sturdivan and Dykes were told to go ahead and load at Enumclaw before reporting back to the Sumner plant. Moreover, the dispatcher was not even called out to assess the damage as was Respondent's standard practice in more serious driving infractions.⁴

Second, according to Williamson, who recommended Sturdivan's discharge, there was no investigation of the accident at all. Williamson herself testified that when

⁴ Notably, even though Sturdivan had two accidents in the same month in 2010, one of which caused approximately \$2,500 worth of damage to his truck, Sturdivan was not discharged for those accidents, but instead was discharged for this minor accident two years later.

Sturdivan and Dykes came into Human Resources to fill out the standard paperwork, neither she, nor anyone else, asked Sturdivan any questions about the accident at all, contrary to Respondent's standard disciplinary process. See *W.W. Grainger, Inc. v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978) (finding employer's failure to investigate employee's alleged misconduct to be evidence of unlawful motive).

Third, although Williamson asserts that Sturdivan was fired because of his driving record, Sturdivan's most recent driving accidents had occurred over two years prior, in August 2010. Sturdivan's 2011 write-up was not for a driving infraction, but rather due to a mechanical malfunction. This was acknowledged by Bobbitt, who was Sturdivan's direct supervisor at the time of that incident. Moreover, Sturdivan's driving record was not even raised or discussed when Scott made the final determination to discharge Sturdivan.

Finally, as found by the ALJ, the evidence demonstrates that Scott had final say on all disciplinary actions and he did not always follow his manager's recommendations. (ALJD 21:28-31). Scott's decisions were not based on a progressive disciplinary system or even review of the drivers' record, but rather on whether Scott liked the driver or not. (ALJD 21:28-31). This is evidenced by examples of drivers who remained employed even after multiple serious accidents, while others were terminated after a single incident. Here, after testifying against Respondent a second time, Scott was not happy with Sturdivan because he had firmly aligned himself with the Union. Therefore, Scott seized upon this minor accident as the perfect vehicle to unlawfully fire Sturdivan.

Given Sturdivan's Union and NLRB activity, ample evidence of Scott's animus, the suspicious timing of the termination as well as Scott's inconsistent and subjective

disciplinary process, the ALJ correctly found that Respondent did not meet its burden. (ALJD 24:16).

B. Contrary to Respondent's Assertions in Cross-Exception 3, the ALJ Correctly Found that an Adverse Inference was Warranted due to Scott Not Testifying at the Hearing

Respondent contends that the ALJ erred in finding that an adverse inference was warranted with respect to Scott's failure to testify. Although, the ALJ did not rely on an adverse inference in making his findings regarding Sturdivan (ALJD 24:n.51), he noted that an adverse inference *would* be warranted in these circumstances. As demonstrated by the record evidence and found by the ALJ, Scott was directly involved in all of Respondent's disciplinary decisions and had relevant first hand information with regard to many allegations. In addition, Scott is local and was the sole individual ultimately responsible for the final decision to terminate Sturdivan. Yet, rather than have Scott testify, Respondent did not call him as a witness and offered absolutely no explanation for its failure to do so.

Under Board law, Respondent's failure to present Scott as a witness clearly warrants an adverse inference. The Board has held 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." *In re DPI New England*, 354 NLRB 849, 858 (2009); citing *International Automated Machines*, 285 NLRB 1122, 1122-1123 (1987), *enfd.*, 861 F.2d 720 (6th Cir. 1988) (Table); *Electrical Workers Local 3 (Teknion, Inc.)*, 329 NLRB 337, 337 n. 1 (1999). *See also Roosevelt Memorial Med. Ctr.*, 348 NLRB 1016, 1022 (2006) ("Normally it is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed

to be favorably disposed to the party ..., particularly when that witness is the party's agent and thus within its authority or control").

Thus, the ALJ's conclusion that it would have been proper to infer that the reason that Scott did not testify was because if he did, he would have testified that he terminated Sturdivan because of his Union and/or NLRB activity. Respondent's exception to the ALJ's determination regarding this adverse inference should be rejected by the Board.

III. CONCLUSION

As discussed above, Respondent's Limited Cross-Exceptions must be rejected, as the ALJ correctly found that Don Sturdivan was discharged in retaliation for his Union and NLRB activity.

Dated at Seattle, Washington, this 19th day of May, 2014.



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Certificate of Service

I hereby certify that a copy of General Counsel's Answering Brief to Respondent's Limited Exceptions to the Decision of the Administrative Law Judge was served on the 19th day of May, 2014, on the following parties:

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