

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

<p>CORLISS RESOURCES, INC.,</p> <p style="text-align:right">Respondent,</p> <p>and</p> <p>TEAMSTERS LOCAL 174, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS,</p> <p style="text-align:right">Union.</p>	<p>Case Nos. 19-CA-093237 19-CA-093281 19-CA-102190 19-CA-104557 19-CA-105226 19-CA-106514</p>
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**CORLISS RESOURCES, INC.'S REPLY BRIEF IN SUPPORT OF ITS
LIMITED CROSS-EXCEPTIONS TO ALJ'S DECISION**

Dated: June 2, 2014

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I. Introduction

Corliss Resources, Inc., Respondent (“CRI”) respectfully submits this Reply Brief in Support of its Limited Cross-Exceptions to Administrative Law Judge Jeffrey Wedekind’s (“ALJ”) March 24, 2014 Decision. For all of the reasons set forth below and in CRI’s Brief in Support of its Limited Cross-Exceptions to the ALJ’s Decision, CRI respectfully requests that the National Labor Relations Board reverse the ALJ’s conclusion that CRI violated Sections 8(a)(3) and (4) of the National Labor Relations Act (“Act”) with respect to the termination of Donald Sturdivan (“Sturdivan”).

II. Sturdivan’s October 29, 2012 rear-end accident was not a minor accident, nor was Sturdivan’s accident and discipline record minor in relation to other drivers’ records.

Contrary to the General Counsel’s assertion, Sturdivan’s October 29, 2012 accident was not minor. Sturdivan’s October 29, 2012 rear-end accident was a serious act of carelessness. The fact that the resulting damage was not greater was fortuitous. Sturdivan rear-ended another dump truck and trailer at an intersection near CRI’s Enumclaw plant. Tr. 828:20-22; 1148:5-18; GC Exhs. 21-22; CRI Exhs. 23-24. Had it been a passenger car instead of the dump truck driven by Paul Dykes (“Dykes”), the accident could have caused significant damage, injury, or worse. Moreover, if Dykes had not had his foot on the brake pedal at the time, the force of Sturdivan’s truck striking Dykes’ truck would have caused Dykes’ truck to rear-end the passenger car in front of him. Tr. 1148:20-22. It is fortunate that more severe damage or injury did not result from Sturdivan’s carelessness.

As a result of the blow to Dykes’ truck, Dykes suffered neck, shoulder, and back injuries. Dykes had to undergo several weeks of physical therapy. Contrary to the General Counsel’s arguments, the fact that Dykes could continue to work (driving a dump truck) while undergoing

medical treatment and physical therapy does not undermine the severity of this incident.

Additionally, the fact that the two dump trucks went to Enumclaw before heading to Sumner does not undermine the severity of the accident. Randy Britt (“Britt”) instructed Dykes and Sturdivan to inspect the trucks to make sure they were safe to drive. Tr. 1150:3-15. If so, Britt instructed them to load up at the Enumclaw plant and then return to the Sumner plant, where the truck maintenance shop is. *Id.* The trucks were nearly at the Enumclaw plant at the time of the accident. As long as they were safe to drive and the drivers were feeling okay, it made sense to bring them back to Sumner loaded.

Moreover, there were no mitigating circumstances here to characterize this incident as “minor.” This was not a situation involving a driver attempting to maneuver in a tight, confined work area, who accidentally incurred some property damage despite his best efforts to avoid such.¹ Rather, Sturdivan simply failed to pay attention to the traffic in front of him at the intersection. As Dykes testified, his vehicle was completely stopped. Tr. 1148:17-20; CRI Exh. 24. He had not begun to move forward. *Id.* Sturdivan’s claim that his foot slipped off the brake does not warrant a different conclusion. Traffic was stopped. Sturdivan should not have been moving forward to begin with.² Once he realized his mistake, Sturdivan then attempted to stop his vehicle. *See* CRI Exh. 23. He failed to do so. There were no mitigating circumstances here. Sturdivan simply was not attentive behind the wheel, and he caused a preventable accident resulting in property damage and personal injury.

The severity of Sturdivan’s October 29, 2012 accident is also evident in the context of Sturdivan’s history of inattentive driving habits and carelessness. The October 29, 2012 accident

¹ *See* Truck Supervisor Darrin Rousseau’s (“Rousseau”) testimony regarding such mitigating circumstances being considered in discipline decisions. Tr. 861:3-13.

² In fact, Sturdivan acknowledged that Dykes’ truck was not moving at the intersection in his accident report. CRI Exh. 23.

was yet another example of Sturdivan’s failure to operate his dump truck and trailer in an attentive manner. There was no excuse or mitigating circumstance to justify Sturdivan’s rear-end accident. Sturdivan fully understood that another accident in his record would result in termination. In fact, he told Dykes immediately after the accident that inspecting the damage “doesn’t matter. I am fired anyway.” Tr. 1149:9-11. Sturdivan also acknowledged to Human Resources Manager Shawna Williamson (“Williamson”) that he understood the one thing he could not do if he wished to remain employed was to get into yet another accident.³ Tr. 1374:8-10. The Union understood this, as well. In fact, it was the Union that told Sturdivan he needed to avoid another accident prior to Sturdivan’s October 29, 2012 accident. *See id.*

The Union and Sturdivan knew that Sturdivan needed to avoid any additional accidents because of his history of accidents and inattentive driving habits at CRI. In the context of Sturdivan’s work record, the October 29, 2012 accident was sufficiently severe to warrant termination. Sturdivan had several incidents in his work history in which he engaged in inattentive and/or careless conduct. Sturdivan struck a scale, destroying a wheel on his truck in July 2005. CRI Exh. 22. He failed to check his fuel gauge and ran out of fuel in August 2007. CRI Exh. 21. Sturdivan blew out a tire on a jobsite in August 2007 by striking a piece of steel. CRI Exh. 20. He struck a manhole, denting the bumper of his truck while turning his truck around to dump material in August 2008. CRI Exh. 18. Sturdivan failed to set the parking brake on his truck at a jobsite in January 2009. CRI Exh. 17. The truck began to roll, and Sturdivan had to jump back into the truck to stop it. *Id.* Instead of recognizing the safety concerns, he

³ The General Counsel argued that Williamson informed Sturdivan that she did not think Sturdivan would be fired. See GC’s Brief, pp. 3-4. This is contrary to the evidence on the record. Rather, Williamson informed Sturdivan that she did not know yet whether his October 29, 2012 accident would result in his termination. Tr. 1374:14-15. At the time, Sturdivan and Dykes had not yet completed their accident reports. Tr. 1374-75. The investigation was just beginning. *See id.* It would have made no sense for Williamson to unequivocally state to Sturdivan that he would be fired before she had even reviewed the accident reports or before she had even completed her investigation into the matter.

joked about this incident on the CB radio to other drivers. *Id.* On July 17, 2010, Sturdivan turned a corner too sharply and struck a crosswalk pole, causing significant damage to his trailer. CRI Exhs. 13-15. On August 2, 2010, Sturdivan swerved into an ecology block instead of stopping his truck and trailer when his stereo fell out its holding case. CRI Exh. 12. On April 25, 2011, Sturdivan used a hammer to hit a rock out of the duals of his truck, causing the rock to fly out and break a window. CRI Exh. 16. On August 15, 2011, Sturdivan's trailer slid backwards while he was transferring the tub box into the truck box, causing the tub box to fall onto the reach between the truck and trailer.⁴ GC Exhs. 21-22; CRI Exhs. 30-31. Finally, on October 29, 2012, Sturdivan rear-ended Dykes' truck and trailer, causing personal injury and property damage. CRI Exhs. 23-24.

Sturdivan had a history of failing to operate his truck and trailer in a safe and attentive manner. He had a history of a lack of focus or care in the exercise of his job duties. As Williamson testified, she could not ignore the pattern of carelessness and lack of focus in Sturdivan's work history. Tr. 1381:11-1382:2. Given Sturdivan's entire work history, Williamson believed termination was warranted after Sturdivan's October 29, 2012 rear-end accident. Tr. 1382:5-8. Williamson considered the severity of Sturdivan's incidents and the likelihood that they could have harmed someone. Tr. 1381:8-10. She believed Sturdivan was a risk to himself and to others on the road. Tr. 1382:2-4. Sturdivan had multiple chances to improve his attentiveness and driving habits. He failed to do so.

⁴ Contrary to the General Counsel's arguments, there was no mechanical failure related to this transfer tub incident. Rather, that particular transfer truck and trailer did not have maxi-brakes on the front portion of the dolly. It only had maxi-brakes on the back portion of the trailer – not the front of the dolly. Tr. 884:16-885:10; GC Exh. 22. Sturdivan understood this. *See* GC Exh. 22. It was the way that particular truck and trailer was designed. Tr. 884:16-885:10.

III. CRI management reviewed the October 29, 2012 rear-end accident and Sturdivan's history of accidents and carelessness. CRI management agreed that termination was warranted.

Contrary to the General Counsel's arguments, Williamson and Rousseau conducted an investigation into the October 29, 2012 accident before reaching the conclusion that termination was warranted.⁵ Williamson reviewed the October 29, 2012 accident reports, Sturdivan's prior discipline, and incident reports. Tr. 1376:12-15; 1378-80; 1383-84; GC Exhs. 21-22; CRI Exhs. 12-22, 30-31. She spoke with Rousseau (who was on vacation at the time) on the phone regarding Sturdivan's October 29, 2012 accident and Sturdivan's discipline and incident history. Tr. 828:25-832:10; 1384:23-1386:5.

Williamson and Rousseau discussed the appropriate level of discipline for Sturdivan in light of his history. Tr. 831:5-9; 1385:16-1386:5. Both Williamson and Rousseau believed termination was warranted. Tr. 832:1-10; 1385:16-20. Concerning to Rousseau and Williamson were the number of inattentive and careless driving incidents in Sturdivan's record, the fact that Sturdivan repeatedly was unaware of his surroundings, Sturdivan's pattern of distracted driving and lack of attention or focus, and the proximity in time between his multiple incidents.⁶ Tr. 832:4-10; 1381:11-1382:2.

⁵ The General Counsel argued that Williamson did not ask Sturdivan any questions about the October 29, 2012 accident when they met shortly after the accident and that this was contrary to CRI's standard disciplinary process. There is no evidence to support the assertion that CRI deviated from any purported standard process. Moreover, there was no need for any questioning of Sturdivan. The accident reports completed by Sturdivan and Dykes provided fairly consistent accounts of the accident, including what happened, where it happened, and how it happened. See CRI Exhs. 23-24. There was no dispute that Sturdivan rear-ended Dykes' truck and trailer at the intersection of Highway 410 and Warner and that Dykes' truck was stopped at the time. *Id.*

⁶ Rousseau continued his inspection into the damage to the trucks and trailers upon his return to work after his vacation. Tr. 832:15-23. Contrary to the General Counsel's arguments, it was not Dispatcher Randy Britt's role to investigate the October 29, 2012 accident. See Tr. 1055:18-24; 1058:23-25. John Bobbitt had investigation and disciplinary authority as the Truck Supervisor, a role which Darrin Rousseau shared and later took over – not the dispatcher. See Tr. 1578:14-21; 781:25-782:8; 785:18-19; 893:19-894:2; 894:11-895:4; 900-901; 925:23-926:4; 1055:18-24; 1058:23-25; 1619:19-1620:2; CRI Exhs. 14-15, 30-31. Rousseau in fact conducted an investigation into the matter by discussing the facts of the October 29, 2012 accident with Williamson, reviewing all documents related to the accident (including the drivers' accident reports), and inspecting the damage to the equipment. Tr. 831:5-20; 832:21-833:4; 834-54. Rousseau was also very familiar with the intersection where the accident took place. Tr. 832:20-21.

Some time after this conversation between Rousseau and Williamson, Williamson informed Scott Corliss (“Corliss”) that they had decided termination was warranted for Sturdivan after his October 29, 2012 accident.⁷ Tr. 1386:20-1387:13. In response, Corliss said, “okay.” Tr. 1387:8.

When making discipline and termination decisions, CRI management does not follow a strict progressive discipline system in the traditional sense. Rather, CRI considers multiple factors in determining the appropriate level of discipline, including: the driver’s years of experience; history of accidents; the time between accidents or incidents; severity of and the extent of dangerous or careless driving; and the totality of the circumstances in the final accident or incident at issue. Tr. 860:14-17. Dangerous and/or careless driving is one of the most concerning issues for CRI. Tr. 860:15-24. Examples of dangerous and/or careless driving include: inattentive driving such as hitting another vehicle; losing sight or control of the trailer while driving; hitting something with a trailer; backing up into something; and not knowing your surroundings in your truck. Tr. 860:15-24. As Rousseau testified, the trucks “are so big, so heavy, that you can do so much damage so easy and someone could get hurt.” Tr. 861:1-2, 6-13. CRI typically reviews both non-disciplinary incident reports and disciplinary write-ups in a driver’s file when considering discipline and termination decisions. Tr. 897:9-17. CRI considers the driver’s entire history. Tr. 897:19-23.

CRI management makes discipline and termination decisions in a collaborative manner. Williamson and Rousseau are responsible for reviewing drivers’ discipline and work history. Tr. 785:8-786:3; 860:8-24; 897:9-23; 1354:17-20. They are involved in termination decisions affecting dump truck drivers. *Id.* Although Corliss is also involved in termination decisions,

⁷ The exact date of this conversation between Williamson and Corliss is not in the record. The termination notice was completed on November 5, 2012. CRI Exh. 11; Tr. 1389:24-25.

here, he simply responded, “okay,” to Williamson’s statement that she believed termination was warranted. Tr. 1386:20-1387:13. The evidence here is that Rousseau, Williamson, and Corliss agreed that termination was warranted after Sturdivan’s October 29, 2012 accident. Williamson and Rousseau testified as to the reason for the termination decision. They both explained that CRI’s termination decision was based on the October 29, 2012 accident plus Sturdivan’s history of accidents, inattentive driving habits and carelessness. Corliss agreed with the termination decision, and he signed off on the termination form – which stated the reason for Sturdivan’s termination was his accident history.⁸ Tr. 1386:20-1387:13; CRI Exh. 11.

IV. Sturdivan’s discipline record and history of accidents and carelessness were more severe than the records of the General Counsel’s purported comparators.

CRI reasonably concluded that termination was warranted given Sturdivan’s October 29, 2012 rear-end accident, for which there were no mitigating circumstances, and in light of Sturdivan’s accident history and pattern of carelessness. This is consistent with other terminations at CRI. *See* CRI’s Brief in Support of its Limited Exceptions, pp. 9-10. If anything, Sturdivan was given more chances than other drivers. *See id.*

The General Counsel’s purported comparators do not establish that Sturdivan was treated more harshly than other drivers. Joseph Futch was also terminated after a rear-end accident (with respect to which he also lied about). GC Exh. 33(a).

Robert Cummings’ work record consisted of merely two incident reports for property damage and a verbal warning. GC Exhs. 32(a)-(c). Sturdivan was also issued incident reports

⁸ Although the General Counsel argues that Corliss did not even review Sturdivan’s record before agreeing to terminate Sturdivan, the evidence on the record demonstrates that Corliss was well aware of the October 29, 2012 accident and Sturdivan’s previous accident and incident history. *See* Tr. 1387:3-6; 1635:10-1636:1 (John Bobbitt stating that he always discussed potential disciplinary incidents with Corliss, especially incidents involving damage to trucks); GC Exh. 21; CRI Exhs. 12-13 (discipline issued by John Bobbitt, which he discussed with Corliss).

for his first several incidents of property damage. CRI Exhs. 18, 20, 22. Robert Cummings' record was not nearly as extensive or severe as Sturdivan's record.

Marshall Graham had only a handful of incidents in his record prior to his termination. GC Exhs. 35(a)-(f). His incident history was not nearly as extensive as Sturdivan's record. *Id.*

Brian Anderson's total of five incidents over a six year period was also not nearly as extensive or severe as Sturdivan's incident history. GC Exhs. 30(a)-(g).

Finally, Jeff Cope's discipline and incident history spans over 14 years and includes a total of 9 incidents. GC Exhs. 31(a)-(j). In contrast, Sturdivan's incident and discipline history included 11 incidents spanning a little over 7 years. Although Jeff Cope's incident and discipline history is far from great, it is not as severe as Sturdivan's history.⁹

None of the comparators raised by the General Counsel indicates that Sturdivan's termination after a rear-end accident in light of his prior incidents and discipline record was discriminatory. No other CRI driver has remained employed with an incident or discipline history as extensive as Sturdivan's record.

V. **CRI has established that it would have made the same termination decision regardless of Sturdivan's protected activity or union sentiment.**

CRI has clearly demonstrated that Sturdivan was terminated for his October 29, 2012 rear-end accident in light of his prior history of accidents, incidents, and pattern of carelessness. For all of the above-stated reasons and as addressed in CRI's Brief in Support of its Limited Cross-Exceptions, CRI has satisfied its *Wright Line* burden.

The General Counsel relies heavily on the fact that Sturdivan had recently testified in a previous NLRB proceeding, of which CRI management was aware. However, the timing alone

⁹ The General Counsel's argument that Corliss based discipline decisions on whom he liked should also be rejected. The only alleged support for this theory was Bobbitt's speculation that Corliss based discipline decisions on whom he liked. *See* GC's Brief, p. 7. Regardless, this allegation does not support a finding of discriminatory motive here, where Sturdivan's termination was due to his own accident and incident history.

of protected activity in relation to the adverse employment decision is insufficient to prove a violation of Section 8(a)(3) or (4). *See Caribe Ford*, 348 NLRB No. 74, *4 (2006) (noting that timing alone is insufficient to satisfy the General Counsel’s *prima facie* case of discrimination); *Lasell Junior College*, 230 NLRB 1076 n.1 (1977) (noting that mere suspicion cannot be substituted as proof of an unfair labor practice). Moreover, Bobbitt testified at the prior NLRB hearing on behalf of the Union and General Counsel. Tr. 633:8-22; 691:22-692:1. Yet, Corliss rehired Bobbitt immediately after his participation in that previous NLRB hearing. *See id.* Other than Sturdivan’s own speculation, there was no evidence that Williamson, Rousseau, or Corliss even considered Sturdivan’s previous participation in an NLRB proceeding when reaching the termination decision. Rather, the evidence clearly demonstrated that CRI terminated Sturdivan for his October 29, 2012 rear-end accident and his history of accidents and carelessness. CRI has established it would have terminated Sturdivan regardless of his protected activity or union sentiment. It was Sturdivan’s accident history that caused his termination.

VI. No adverse inference was appropriate with respect to Scott Corliss not testifying.

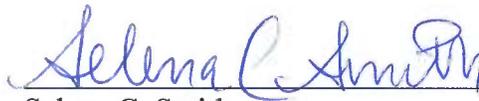
As discussed above, Corliss responded, “okay,” to Williamson’s and Rousseau’s conclusion that Sturdivan’s termination was warranted. Williamson and Rousseau investigated the October 29, 2012 rear-end accident and Sturdivan’s history of accidents and carelessness. Both Williamson and Rousseau reached the conclusion that termination was warranted. Corliss was well aware of Sturdivan’s accident history. He indicated his agreement with the termination decision (“okay”). Corliss signed off on the termination form, which stated the reason for Sturdivan’s discharge was his accident history. CRI Exh. 11. The evidence on the record clearly established the reason for Sturdivan’s discharge. There was no need for Corliss to also testify that Sturdivan was terminated for his October 29, 2012 accident and his history of accidents and

carelessness. To the extent that the ALJ granted any adverse inference with respect to Corliss not testifying, such inference is inappropriate where there is ample evidence on the record as to CRI management's termination reason and thought process. *See Aero Detroit*, 321 NLRB 1101, 1116 (1996) (adverse inference not warranted where oral testimony addressed issue which missing documentary evidence also could have addressed); *Riverdale Nursing Home*, 317 NLRB 881, 881-82 (1995) (inappropriate to use adverse inference to fill an evidentiary gap).

VII. Conclusion

For all of the reasons set forth above and in CRI's Brief in Support of its Limited Cross-Exceptions to the ALJ's Decision, CRI respectfully requests that the Board reverse the ALJ's conclusion that CRI violated Section 8(a)(3) and (4) of the Act by terminating Sturdivan after his October 29, 2012 rear-end accident.

Dated this 2nd day of June, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2014, I caused to be filed with the NLRB Executive Secretary via the NLRB E-Filing system the above and foregoing “*Corliss Resources, Inc.’s Reply Brief in Support of its Limited Cross-Exceptions to ALJ’s Decision.*” I further certify that on June 2, 2014, true and correct copies of the same were served via electronic mail upon the following individuals at the email address specified for them as shown below; and paper copies of the same were mailed to the undersigned via U.S. Mail, First Class Postage prepaid, at the following physical addresses:

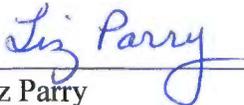
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