

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

KARL KNAUZ MOTORS, INC., d/b/a
KNAUZ BMW

Respondent

and

Case: 13-CA-46452

ROBERT BECKER, An Individual,

Charging Party.

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

Counsel for the Acting General Counsel's¹ Exceptions are almost entirely an attack on the Judge's credibility findings and his weighing of the evidence. There is scant legal argument in his 27-page Brief in Support of Exceptions, and what little there is lacks merit. The Exceptions Brief is at times overly selective about the evidence, wilfully ignorant of the evidence, and its few legal arguments are either based on distinguishable cases or unsupported altogether.

This was a relatively straightforward case about one individual's termination. The Judge heard the evidence and rendered a Decision. Applying Wright Line, the Judge correctly concluded that the General Counsel failed to carry his burden to demonstrate that Charging Party's alleged protected conduct was a motivating factor in his termination. There is no basis in the record or the law to upset this holding, which the Board should affirm and overrule General Counsel's exceptions in their entirety.

¹ Counsel for the Acting General Counsel is referred to, simply, as "General Counsel." The Administrative Law Judge's Decision is referred to as "Decision." The General Counsel's Brief in Support of His Exceptions is referred to as "G.C. Exceptions Brief." General Counsel hearing exhibits are referred to as "GCX ___." Citations to the transcript shall appear (Tr. __.)

DISCUSSION

A. The Overall Weight Of The Evidence Support The Judge's Conclusion That Respondent Terminated Charging Party Because Of His Accident-Related Facebook Posts

1. The Judge correctly considered and evaluated the evidence

General Counsel contends that the Judge “ignored” evidence showing that Respondent terminated Charging Party’s employment for both his Land Rover accident-related Facebook posts, as well as his Event-related complaints and Facebook posts. Thus, claims General Counsel, the Judge erred in finding that he failed to meet his initial burden under Wright Line. To prove a violation of the Act, the General Counsel must first make a prima facie showing sufficient to support the inference that Charging Party’s allegedly protected conduct was a motivating factor in Respondent’s decision to terminate his employment. If the General Counsel satisfies this burden, the burden of persuasion then shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct. Wright Line, 251 N.L.R.B. 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S. Ct. 1612, 71 L.Ed.2d 848 (1982)

Specifically, General Counsel argues that the Judge “ignored” Respondent Vice President and General Manager Barry Taylor’s memorandum of June 22 (GCX 12), which shows “conclusively” that Respondent terminated Becker for both sets of Facebook posts. (G.C. Exceptions Brief at 4-5.) This is incorrect. General Counsel relies on the June 22 memorandum because it shows that Respondent was aware of both the Event-related Facebook posts and the accident-related Facebook posts at the time it made its termination decision. Respondent does not dispute this knowledge, and the Judge considered it. The Judge directly addressed the fact that Respondent was aware of both sets of Facebook posts at the time it made the decision to terminate Charging Party:

“The evidence establishes, and reason dictates, that both incidents were discussed on June 16 and June 21, but doesn’t necessarily establish that both incidents caused his discharge. Rather, I find that Becker was fired on June 22 because of his Facebook posting of the Land Rover accident....”

(Decision at 9, lines 27-30) (Emphasis added.)

Obviously the Judge did not “ignore” Taylor’s June 22 memorandum; he specifically referenced it in his findings of fact. (Decision at 6, lines 1-8.) The General Counsel is putting too much probative value on his analysis of this one piece of evidence, and it should not be read separate and apart from other evidence, such as the live testimony of witnesses. Three Respondent witnesses testified – including Taylor – and the Judge credited their testimony that Respondent terminated Charging Party’s employment because of his Land Rover accident-related posts, and not his Event-related posts. (Decision at 9, lines 23-25, 29-32.)

Respondent’s General Sales Manager Ceraulo testified that “[t]he basis of the decision to terminate was the posting of the accident at the Rover store.” (Tr. 174.) Respondent’s Group Director of Sales Giannini testified that the termination discussion at the June 21 management meeting “was about an employee, Mr. Becker, posting a dangerous situation that occurred on our premises on his Facebook and, it being damaging to the company, as well as to the individuals involved, personally and, kind of making light of it.” (Tr. 138.) Respondent’s Vice President and General Manager Taylor testified that “because of what he’d done as far as posting on the Land or the Land Rover postings, that we were going to terminate his employment.” (Tr. 178.) Taylor also testified in response to the Judge’s question that the postings regarding the hotdog cart were “not why we made a decision to terminate Bobby Becker.” (Tr. 185.) And, as the Judge noted in the Decision, Taylor also testified that “[t]he BMW issue, to me, was somewhat comical, if you will ... if it had been that, that would have been it. But no, it was the Land Rover issue.” (Decision at 6, lines 20-21; Tr. 183.)

With or without an explicit discussion of the June 22 memorandum, the outcome is the same. Respondent undeniably knew of both sets of Facebook posts when it met with Charging Party on June 16, and when its management team met to discuss his employment situation on June 21. Ceraulo, Giannini, and Taylor testified consistently and without contradiction as to how they weighed both sets of Facebook posts in their decision. (Decision at 9, lines 20-25.) The June 22 memorandum neither adds nor subtracts from the Judge's conclusion – the Event-related Facebook posts were not the cause of Charging Party's termination. (Decision at 9, lines 27-32.)

2. The evidence demonstrates that Respondent would have met its burden under the second prong of *Wright Line*

Assuming for the sake of argument that General Counsel is correct and he met his initial burden under Wright Line, the outcome of the case would remain the same. Under Wright Line, if the General Counsel demonstrates that protected concerted activity was a motivating factor in an employee's termination, the burden shifts to the employer to demonstrate that it would have made the same decision in the absence of protected activity. 251 N.L.R.B. at 1089. Respondent's witnesses testified without contradiction that the Event-related complaints and Facebook postings were nonfactors in Charging Party's termination. One of these witnesses, Taylor, testified regarding whether the Event-related posts played a part in the termination decision. Taylor testified in response to examination by the Judge: "I mean, we laughed about it [the Event-related posts]. Unfortunately, that's not, that's not why we made a decision to terminate Bobby Becker." (Decision at 5, lines 48-49; Tr. 185.) The Judge found these witnesses "more credible" than Charging Party. Thus, even if General Counsel met his initial burden of demonstrating that the Event-related posts were a motivating factor in Charging Party's termination, the evidence already credited by the Judge demonstrates that Respondent would have taken the same action in the absence of the Event-related posts.

In sum, the Judge correctly weighed all the evidence and concluded that Respondent did not terminate Charging Party in violation of Section 8(a)(1) of the Act. The Board should overrule the General Counsel's exceptions on this issue and affirm the Judge's conclusion that the termination was lawful.

B. The Judge Correctly Ruled That Becker Was Not The Victim Of Disparate Treatment

General Counsel devotes eight pages of his Exceptions Brief to his stubborn contention – rejected by the Judge (Decision at 9 fn. 4, lines 48-51) – that Charging Party was the victim of disparate treatment. In support of his argument, General Counsel cites various individuals that did not engage in protected concerted activity, and were not discharged for conduct that he alleges is the same or worse compared to Charging Party. Put bluntly, General Counsel's disparate treatment argument is the height of intellectual dishonesty and demonstrates a wilfull ignorance of the record. Not once in his lengthy disparate treatment argument does General Counsel address his own witness, Greg Larsen – an employee in the same job classification as Charging Party, who made the same Event-related complaints as Charging Party, at the same time as Charging Party, to the same manager as Charging Party. (Decision at 2, lines 26-31, 47-49; Decision at 3, lines 6-7; Decision at 7, lines 49-52.) One can see how it might be inconvenient for General Counsel to consider Larsen. Larsen, after all, was not disciplined by Respondent for his Event-related complaints. (Tr. 119.)

Aside from Larsen, the employees identified by General Counsel are not similarly situated as a matter of Board law. General Counsel asserts that Land Rover sales employee, Jamie Johnson, was similarly situated to Charging Party because she “caused the accident at the Land Rover dealership.” (G.C. Exceptions Brief at 10.) The Judge addressed this argument and concluded that Johnson's “negligence” was not similar to Charging Party's conduct, and thus he

“[found] no similarity between the two and [found] it not unreasonable that they resulted in different penalties.” (Decision at 9 fn. 4, lines 50-51.)

General Counsel contends that Charging Party’s accident-related Facebook posts were “objectively less serious” than Johnson’s conduct. (G.C. Exceptions Brief at 10.) General Counsel attempts to support this argument with his *purely subjective* analysis of the evidence. (G.C. Exceptions Brief at 11-13.) General Counsel’s personal opinion regarding the seriousness of the accident is irrelevant. What matters is whether the conduct was similar. See Basic Industries, Inc., 348 N.L.R.B. 1267, 1273 (2006) (rejecting General Counsel’s disparate treatment contention where employees did not receive discipline for the same infractions and thus were not comparable).

A critical flaw in General Counsel’s disparate treatment analysis is his “straw man” argument that the Decision “imputes into Board law a requirement not currently present that employee conduct be *identical* in order to constitute evidence of disparate treatment.” (G.C. Exceptions Brief at 13) (Emphasis in original.) This is a curious assertion. Respondent has reviewed the Decision in detail, and such an “identical conduct” requirement is nowhere to be found. General Counsel has employed a straw man to portray the Judge’s analysis as far more restrictive than it actually is. The Judge simply found “no similarity” between Johnson’s and Charging Party’s conduct. Claiming that this finding has “imputed” a new standard requiring “identical” behavior lacks merit. Indeed, General Counsel cites a case for the proposition that the proper standard is whether the conduct was “similar.” Air Contact Transport, Inc., 340 N.L.R.B. 688, 696 (2003); see also Basic Industries, supra. Logic dictates that he should have no quarrel with the Judge’s finding of “no similarity.”

None of the three other cases cited by General Counsel help his argument. General Counsel’s reliance on Donelson Packing Co., 220 N.L.R.B. 1043 (1975), is particularly

troubling. General Counsel nowhere in his Exceptions Brief informs the Board that Donelson Packing was subsequently *overruled*. Parker-Robb Chevrolet, Inc., 262 N.L.R.B. 402, 404 n.20 (1982), petition denied, 711 F.2d 383 (D.C.Cir. 1983). In fact, as discussed below, it was overruled on the issue of whether a pro-union supervisor is protected by the Act from termination for his pro-union activities. Thus, under Parker-Robb, the Board may have upheld the termination of the pro-union supervisor in Donelson Packing, thus mooted General Counsel's argument based on the case. General Counsel's zeal to prevail in this litigation should not excuse him from his professional obligations.²

In Donelson Packing, the Board affirmed the judge's holding that the employer terminated a supervisor – not an “employee” as General Counsel claims (G.C. Exceptions Brief at 14) – for his pro-union activities. A large quantity of meat product was spoiled, and the employer terminated the supervisor, but not the employees who actually worked in the smokehouse where the meat was processed. 220 N.L.R.B. at 1051-52. In other words, the employer blamed the pro-union supervisor for the alleged poor performance of the anti-union employees. Thus Donelson Packing is entirely distinguishable from the instant case. Donelson Packing would only have application to the present case if Charging Party was a supervisor, Johnson was an employee, and Respondent terminated Charging Party for being responsible for Johnson's conduct. Obviously, this is not such a case. The Judge found, and the record demonstrates, that there was “no similarity” between Charging Party's and Johnson's respective conduct.

In SCA Tissue North America, LLC, 338 N.L.R.B. 1130, 1137 (2003), an open union supporter was terminated for leaving his job without permission. The judge, affirmed by the Board, concluded that the employee was the victim of disparate treatment. However, in that case

² See e.g. Ill. Sup. Ct. R. Prof. Conduct 3.3(a)(1) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”)

the judge compared the employee to a coworker who had failed a drug test, a coworker who committed insurance fraud, and a coworker who engaged in sexual harassment. Id. Here, Jamie Johnson was “negligent” or failed to use “good judgment.” While still a subjective analysis, the degree of conduct by the employees in SCA Tissue is so extreme that the case has no persuasive value here.

Chesapeake Plywood, 294 N.L.R.B. 201 (1989), is of no use to General Counsel because in that case, unlike here, the employees at issue were in fact similarly situated. The employees at issue all made varying degrees of violent or physical threats. 294 N.L.R.B. at 203-04. In such a case involving similar conduct, Respondent does not dispute that a disparate treatment analysis is appropriate. Here, however, Charging Party’s conduct was nothing like Johnson’s conduct. In fact, Chesapeake Plywood actually bolsters the Judge’s conclusion. The Board in that case affirmed the termination of employee Hemmian, who provoked a physical altercation with employee Dennis. The employer did not terminate Dennis, and the General Counsel alleged disparate treatment. The judge rejected this assertion: “Simply put, Dennis did not provoke the fight, and to this extent their conduct was dissimilar.” 294 N.L.R.B. at 222 n.44. If two employees involved in the same fight are not similarly situated, then certainly Charging Party and Johnson are not similarly situated.

General Counsel also tries to draw similarities with “other employees who engaged in the same conduct as Becker.” (G.C. Exceptions Brief at 16.) The problem he runs into is that the record is devoid of anyone who engaged in the same conduct as Charging Party. Irrespective of any person who commented on, liked, forwarded, tweeted, re-tweeted, or re-posted the Facebook photographs of the Land Rover accident, it was Charging Party alone who captured the accident in digital photograph form and posted those photographs on the Internet via his Facebook page. It was this irresponsible and unprotected (Decision at 9, lines 8-9) action that triggered

concerned phone calls from other Land Rover dealerships to the Knauz Land Rover dealership.³ (GCX 11; Tr. 132.)

General Counsel's suggestion regarding other employees who commented on the posts that Respondent at a minimum should have "discussed their Facebook postings with them" does not help his case. (G.C. Exceptions Brief at 17.) First, it is an admission by General Counsel that their conduct is not similar because it merits lesser discipline than termination. Second, it is settled that the Board may not substitute its own business judgment for that of Respondent or act as a "super-personnel" department. Pro-Tec Fire Servs., 351 NLRB 52, 58 (2007).

In sum, the Judge's conclusion that Charging Party was not the victim of disparate treatment is well-supported by the record evidence and the law. The Board should overrule the General Counsel's exceptions on this issue, and affirm this basis for Respondent's lawful termination of Charging Party.

C. There Is No Basis To Overrule The Judge's Credibility Determinations

This case did not generate a complex record. It was a one-day hearing. Five witnesses testified. There were a modest 20 hearing exhibits. The Judge's concise, yet thorough, Decision reflects the straightforward nature of this case. Thus it is mystifying how General Counsel can spend nearly the entirety of his 27-page Exceptions Brief attacking the Judge's credibility determinations and his weighing of the evidence. It is well established that the Board will overrule a judge's credibility findings only where "the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." Standard Drywall Products, 91 N.L.R.B. 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). This is a high standard, and there are consequences when the General Counsel's exceptions to credibility are not substantially

³ General Counsel argues that Charging Party's accident-related posts could not be viewed as negative by Respondent because they made no reference to the dealership or any of Respondent supervisors. (G.C. Exceptions Brief at 8.) General Counsel's *theory* totally ignores the *evidence* that Respondent first learned of the posts via concerned phone calls from other Land Rover dealerships who were not pleased to see such images on the Internet. (GCX 11; Tr. 132.)

justified. Fantasia Fresh Juice Co., 339 N.L.R.B. 928, 928-29 (2003) (affirming EAJA award of attorneys fees where General Counsel filed exceptions in what was “primarily a credibility case”).

The primary thrust of General Counsel’s unjustified credibility argument is that Respondent’s decision to terminate Charging Party was motivated, at least in part, by the Event-related Facebook posts. General Counsel leads with this curious sentence: “The ALJ provided three sentences of explanation as to why he credited the testimony of Respondent’s supervisors that they terminated Becker only for the Land Rover posts.” (G.C. Exceptions Brief at 18.) Apparently, Respondent and the Board are meant to guess which three sentences General Counsel refers to, because he offers no citations to the Decision. In any event, General Counsel’s analysis is overly selective. The Decision sets forth Becker’s testimony. It contrasts such testimony with the testimony and notes of Respondent’s witnesses. The Decision then concludes that Respondent’s witnesses were more credible. (Decision at 9, lines 17-25.) This is precisely the Judge’s role under Standard Dry Wall Products and progeny.

General Counsel’s credibility argument is built on little more than his unsupported conjecture. His contention that Charging Party must be believed regarding Giannini’s alleged statement is an example. General Counsel hammers away at the Judge’s failure to credit Charging Party’s testimony as to what supervisor Giannini told him about the two sets of photographs he posted on Facebook.⁴ Discussing the June 16 meeting that Respondent held with Charging Party, General Counsel theorizes: “No reason exists why Giannini could not discuss both sets of posts at this meeting, but be more upset about the BMW posts than he was the Land Rover posts and express that to Becker.” (G.C. Exceptions Brief at 19.) “*No reason exists*”? This statement, masquerading as argument, has no support in the record or the law.

⁴ The Judge discredited Charging Party’s testimony that on June 16 Giannini told him: “The photos at Land Rover are one thing, but the photos at BMW, that’s a whole different ball game.” (Decision at 9, lines 18-20.)

General Counsel goes on: “Moreover, if Giannini did not make this statement to Becker at the meeting, the clear expectation would be for him to deny that he said this to Becker when testifying at the hearing.” (G.C. Exceptions Brief at 19-20.) This assertion ignores the fact that Giannini was not asked to admit or deny that he made this statement by either Respondent’s counsel, General Counsel, or the Judge. (Tr. 130-162.) It was then, and is now, an insignificant part of the record. General Counsel thus concludes his meritless argument: “Yet Giannini did not do so and Becker’s testimony thus was uncontroverted.” (G.C. Exceptions Brief at 20.) *Uncontroverted?* General Counsel is essentially arguing to the Board that if a witness fails to deny words that someone else is putting in his mouth to show his motivation, at a hearing where the witness is not asked to deny the statement, and where the witness has otherwise testified and offered evidence as to his motivation, then the someone-else’s words are nonetheless “uncontroverted.” If this is the basis for General Counsel’s credibility arguments, his Exceptions are substantially unjustified.⁵ See Fantasia Fresh Juice Co., *supra*.

As opposed to General Counsel’s speculative assertions, the record reflects Giannini’s first-hand testimony and notes demonstrating that Respondent terminated Charging Party for the accident-related posts – not the Event-related posts. (Decision at 5, lines 31-35; Decision at 6, lines 35-38.) The Judge evaluated this evidence and held: “I do not credit Becker’s testimony that Giannini downgraded the serious nature of the Land Rover posting while stressing the seriousness of the posting of the Event.” (Decision at 9, lines 26-27.) There is no basis to upset this holding.

General Counsel points to a Facebook message that Charging Party sent to a friend on or about June 16. (GCX 9.) General Counsel argues that this message “obviously corroborates Becker’s testimony,” referring to the words Charging Party was putting in Giannini’s mouth

⁵ The Board should also reject General Counsel’s related characterization of the Judge’s sound reasoning as “work[ing] in reverse.” (G.C. Exceptions at 20.) General Counsel’s argument is nonsensical.

about the June 16 meeting. (G.C. Exceptions Brief at 21; GCX 9; Tr. 76-77.) The very text General Counsel relies on undercuts his argument. Charging Party's message notes that Taylor told him he embarrassed Respondent with the "Event photo's *and* my sarcastic comments." (GCX 9) (Emphasis added.) General Counsel appears to assume that "sarcastic comments" refers only to the Event photos. However, no one can dispute that his postings regarding the Land Rover accident were sarcastic (Decision at 4, lines 6-24), or in the Judge's words, "mocking." (Decision at 9, line 13.) If General Counsel is holding out the Facebook message as contemporaneous evidence demonstrating that Respondent was only concerned with the Event-related posts, the evidence does not support this argument. Moreover, the Board is wary of witnesses who seek to corroborate their own testimony about what others allegedly said. Unite HERE (Sam's Town Hotel and Gambling Hall Tunica), 357 N.L.R.B. No. 14 *16 (July 13, 2011) (affirming judge's rejection of testimony by witness who sought to get around hearsay objection by corroborating her own testimony).

General Counsel attacks the credibility of Respondent's witnesses regarding the June 21 meeting that determined Charging Party's termination. This is an awful big hill for General Counsel to climb because Respondent's witnesses were the only ones to testify with first-hand knowledge of what was discussed in that meeting. Neither Charging Party or Larsen – the only other two witnesses called at the hearing – were present for the June 21 meeting. Thus General Counsel resorts to characterizing the testimony of Respondent's witnesses as "conclusory," "textbook, non-responsive," "evasive," "non-specific," and "vague." (G.C. Exceptions Brief at 22-23.) The record, however, tells a different story. Each of Respondent's witnesses, in response to questions on direct examination, on cross-examination, and/or in response to the Judge's questions, testified unequivocally that the Land Rover accident postings were the sole reason Respondent terminated Charging Party. The Decision thoroughly recounts each

manager's respective testimony (Decision at 5, lines 26-49), and the Judge credited this testimony over Charging Party's self-serving characterization of what one of the managers allegedly said. (Decision at 9, lines 23-25.)

General Counsel attempts to support his unjustified attack on the Judge's credibility determinations with citations to cases where the Board overruled a judge's credibility determinations. These cases are distinguishable. In Camelot Terrace, Inc., 353 N.L.R.B. 151 (2008)⁶, the Board held that the judge "failed to articulate a basis for many of his credibility determinations and did not address evidence that arguably contradicted a number of his factual findings." Specifically, the Board noted that, in the face of conflicting testimony, he "failed to discredit or otherwise address the testimony of two witnesses." Id. Here, the Judge expressly discussed the testimony of Charging Party, as well as the "testimony and notes" of Respondent's witnesses. He then concluded that Respondent's witnesses were more credible (Decision at 9, lines 17-25), and ruled in favor of Respondent. Thus Camelot Terrace is not applicable.

In E.S. Sutton Realty Co., 336 N.L.R.B. 405 (2001), the Board reversed the judge's credibility determinations in a case that involved numerous witnesses and apparently a sizeable amount of contradictory evidence. By way of a few examples, the judge mistakenly failed to credit a witness whose first-hand testimony was not contradicted by more reliable evidence. 336 N.L.R.B. at 406. Also, the judge mistakenly credited testimony that was refuted by objective payroll records. Id. at 406. Finally, the judge mistakenly credited a witness whose recollection about dates "tended to be shifting." Id. at 407. None of this has any bearing on the instant case. The only witnesses with first-hand knowledge regarding Respondent's motivation for terminating Charging Party were Respondent's supervisors, and the Judge correctly credited

⁶ Camelot Terrace was decided by a two-member Board panel; thus it should not be cited as controlling authority. See generally New Process Steel, LP v NLRB, 130 S.Ct. 2635 (2010).

them. No witness's testimony was contradicted by objective documentary evidence. No witness's testimony was "shifting." E.S. Sutton is simply inapplicable to the instant case.

A third case cited by General Counsel, Casino Ready Mix, Inc., 335 N.L.R.B. 463 (2001), is also distinguishable. There, the judge erroneously found a violation of Section 8(a)(1) based on a witness that he subsequently discredited in full. Here, by contrast, the Judge did not make any findings based on discredited witnesses. Indeed, even though he ultimately (and correctly) believed Respondent's witnesses, he still characterized Charging Party as "a generally credible witness." (Decision at 9, line 23.)

In sum, General Counsel's attack on the Judge's credibility determinations are baseless, both in part I.C of his Exceptions Brief, as well as in the bulk of his arguments in parts I.A and I.B. As in Fantasia Fresh Fruit Juice Co., the General Counsel's Exceptions "can only be characterized, in their totality, primarily as an attempt to reverse credibility finding." 339 N.L.R.B. at 928. And as discussed above, General Counsel's credibility arguments lack merit and thus his Exceptions are not substantially justified. The board should overrule General Counsel's credibility-related exceptions in their entirety and affirm the Judge's dismissal as to Charging Party's termination.

D. The Judge's *Wright Line* Analysis Was Correct And Should Be Affirmed

General Counsel separately excepts to the Judge's conclusion that he failed to satisfy his initial burden under Wright Line. (G.C. Exceptions Brief at 25.) For all the reasons discussed in parts A, B and C, supra, the Board should overrule General Counsel's exceptions.

Furthermore, as discussed in part A.2, supra, the Board should uphold Charging Party's termination because Respondent would have met its second-step *Wright Line* burden even if the General Counsel had met his initial burden. Arguing to the contrary, General Counsel recycles his earlier arguments and adds the following: "Respondent offered nothing but its word that it

terminated Becker solely for his Land Rover postings, an insufficient showing pursuant to the Board's preponderance of the evidence standard." (G.C. Exceptions Brief at 25.) Apparently, General Counsel does not recognize credible, first-hand oral testimony under oath at a hearing before a Judge as sufficient under Board law. Not surprisingly, General Counsel has no legal support for this assertion. Also, General Counsel is ignoring the Judge's conclusion, based on the "testimony and notes" of Respondent's witnesses, that Respondent's witnesses were more credible. (Decision at 9, lines 20, 24.)

In sum, the Board should overrule General Counsel's Exceptions regarding the Judge's *Wright Line* analysis, and should affirm Respondent's termination of Charging Party's employment.

CONCLUSION

For all the reasons discussed above, Respondent respectfully requests that the Board overrule General Counsel's Exceptions in their entirety, and affirm the Judge's conclusion that Respondent's termination of Charging Party did not violate Section 8(a)(1) of the Act.

Respectfully submitted,

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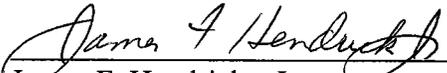
CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing **RESPONDENT'S BRIEF IN OPPOSITON TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was filed electronically with the National Labor Relations Board, Office of the Executive Secretary, before 5:00 p.m. on November 9, 2011.

Service of this **RESPONDENT'S BRIEF IN OPPOSITON TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was sent via Federal Express delivery on November 9, 2011, to the following:

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