

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

In the matter of:	)	
	)	
MICHAEL RICE	)	
	)	
and	)	
	)	
WILLIAM L. NORVELL,	)	
	)	
Charging Parties,	)	
	)	
and	)	Case Nos. 05-CA-097810
	)	05-CA-097854 and
	)	05-CA-094981
	)	
BUTLER MEDICAL TRANSPORT,	)	
LLC,	)	
	)	
Respondent.	)	

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

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## I. INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Butler Medical Transport, LLC ("Butler" or "the Company"), by its undersigned labor counsel, hereby files this Answering Brief to the Acting General Counsel's Cross-Exceptions to the Administrative Law Judge's ("ALJ") decision.<sup>1</sup> On September 30, 2013, Butler filed Exceptions, with a supporting brief, to portions of the ALJ's decision. On November 1, 2013, the Acting General Counsel filed an Answering brief, as well as his own Cross-Exceptions to the ALJ's decision. For the reasons that follow, the Acting General Counsel's arguments lack merit.<sup>2</sup>

Throughout his Brief, the Acting General Counsel tries to ignore that all record evidence establishes, conclusively, that Charging Party Michael Rice (1) was not engaged in protected, concerted activity – his Facebook post referred to his girlfriend's broken-down car, rather than Butler's ambulance, (2) Butler immediately ascertained that the ambulance Rice was driving on the day he made the post had not broken down, (3) Rice's post falsely suggested that it was about Butler's ambulance (or, Butler reasonably believed that the post did so), and (4) Butler terminated Rice not because he had (or because it believed he had) complained about his working conditions, but because it concluded that he had posted knowingly false information about the Company in a public forum.

Moreover, the Acting General Counsel completely ignores the elephant in the room: he should not have excepted from the ALJ's finding as to Rice's termination. Rice admitted under oath in an unemployment hearing that he was not referring to a Butler vehicle in his Facebook

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<sup>1</sup> References to the ALJ's Decision will be referred to as "ALJD at \_\_\_." References to the Acting General Counsel's Exhibits will be referred to as "GC Ex. \_\_\_."

<sup>2</sup> For the reasons stated in its Exceptions and Brief in support thereof, and in its Reply to the Acting General Counsel's Answering Brief to Butler's Exceptions, the Board lacks authority to find that Butler violated the Act in any of the three above-captioned cases. Rather than restate those arguments, Butler adopts them and incorporates them as fully set forth therein.

post – an admission that contradicts what he claimed in his Board Charge and contradicts what the Acting General Counsel alleged in the Complaint allegations pertaining to Rice. With the apparent knowledge that Rice was a liar subject to criminal penalty, the Acting General Counsel did not call him to testify at the trial of this matter. Butler subpoenaed Rice, and he refused to testify, asserting this Fifth Amendment right against self-incrimination. How can the Acting General Counsel ask the Board to reinstate and order back-pay for an employee who abused the government’s resources by lying under oath in an attempt to injure and profit from his employer? Even in the unlikely event that the Board agrees with the Acting General Counsel that Butler violated the Act in terminating Rice, he nevertheless cannot be rewarded for his misconduct.

**II. FACTS**

**A. Butler’s Business and Termination of William Norvell.**

With respect to any background facts relating to its business and to its termination of Charging Party William Norvell, Butler adopts and incorporates as if set forth fully herein the statement of facts set forth in the Brief filed in support of its Exceptions. Exc. Br. at 5-11.

**B. Butler’s Termination of Michael Rice.**

Michael Rice was employed by Butler as an EMT Driver. Approximately two months after Norvell was terminated, an unknown person slid another Facebook post under the office door of Ellen Smith, Butler’s Director of Human Resources. Tr. 71:15-22, GC Ex. 10. Rice made the post, which stated as follows:

Hey everybody!!!! IM FUCKIN BROKE DOWN IN THE SAME SHIT I WAS BROKE IN LAST WEEK BECAUSE THEY DON’T WANTA BUY NEW SHIT!!!! CHA-CHINNNGGGGGG CHINNNG.

GC Ex. 10. Upon receiving a copy of the post, Smith brought it to the attention of William Rosenberg, Butler’s Chief Operations Officer. Tr. 72:7-9. It appeared that Rice had made the post during a Butler shift; as Rosenberg testified, he saw that the post indicated that Rice was at a

Sheetz convenience store in Frederick, not far from the Company's facilities in Hagerstown, Maryland. Tr. 46:13-19. Rosenberg immediately checked the Company's vehicle repair/maintenance records to determine whether Rice's vehicle had, in fact, broken down. Tr. 46:3-9, 72:9-11. Rosenberg's investigation showed that the vehicle Rice was driving did not break down on the date he made the post, nor had it broken down the previous week. Tr. 46:6-9, 72:17-18. Rosenberg testified as follows:

Q. To what extent did you check records to see whether the vehicle that Mr. Rice was occupying broke down the previous week?

A. I did a full records search of our maintenance system and of our fit issue track system to find any record of a broken down vehicle that was the same number, or same unit number that he was in during this post, and I found none.

Tr. 46:3-9. Rosenberg, in short, found that Rice's post—which apparently suggested that his Butler ambulance had broken down—was “completely false.” Tr. 46:12.

Rice's Facebook post—which falsely suggested that Butler's ambulances are prone to breaking down—threatened to damage Butler's business. Rosenberg explained as follows:

Q. If this referred to one of Butler's vehicles, to what extent, if any, would that impact your business and operations?

A. Well, I can't imagine anyone in this courtroom would want their family member transported in an ambulance that breaks down multiple times in a week. I know I certainly wouldn't. So if that image was portrayed to our customers, I would think they would seek other vendors who had equipment that did not fail twice a week, if in fact this was equipment.

Tr. 47:11-20. Rosenberg then testified about a recent high-profile ambulance breakdown that made international news:

Q. And is an ambulance breakdown something the public would be interested in?

A. It certainly made international news last week.

Q. What happened?

A. For those of you who watch MSNBC, it was international news when Nelson Mandela's ambulance broke down on the way to the hospital transporting him. And I can't imagine that private company is going to fare well in the

country of South Africa after everybody knows their equipment can't even transport the president....

Tr. 47:21-25, 48:1-5. Rosenberg testified that Rice was terminated for falsely implying that Butler's equipment was substandard:

- Q. All right. Do you recall the reason [Rice's] employment was terminated?  
A. Yes. He was putting out for the world to see things about our equipment that weren't actually factual at all.

Tr. 45:3-6. Rosenberg, moreover, made clear that it was not Smith who alone made the decision to terminate Rice; the decision was not made until both Rosenberg and Smith had discussed the issue. Tr. 57:10-17. Because Rosenberg, as stated above, immediately had investigated whether Rice's vehicle had broken down, this discussion between him and Smith necessarily would have occurred after Rosenberg found out that Rice's Butler vehicle had not broken down.

**C. Rice Admitted That He Was Not Referring to a Butler Ambulance in his Facebook Post, Then He Refused to Testify Before the ALJ, Apparently Fearing Prosecution for Making False Statements in His Board Charge.**

Not long after Rice was terminated, he filed a claim for unemployment benefits, and a hearing was held before a DLLR hearing examiner. At that hearing, Rice testified under oath regarding his Facebook post. In that hearing, which was attended by Rosenberg and Smith (and in which Smith testified on Butler's behalf), Rice testified that his Facebook post was not in reference to a Butler vehicle, but his girlfriend's car. Tr. 48:6-11. As Rosenberg recalled, Rice was asked "multiple times" not only by Rosenberg but by the DLLR hearing examiner whose vehicle his Facebook post referred to, and he repeated each time that he was referring to his girlfriend's car, "he was mad about his girlfriend's car, and [the Facebook post] had nothing to do with Butler's equipment whatsoever." Tr. 48:12-25.

Rice's testimony at his unemployment appeal hearing made clear that, to the extent a vehicle he was driving broke down, it was not a Butler vehicle. This highlighted to Butler that

Rice had falsely suggested that his Butler ambulance had broken down twice in one week. As Rosenberg testified:

when questioned about [the post], including under oath, [Rice] said he wasn't talking about our equipment. So he was just posting facts that he knew to be untrue for our customers, clients, patients, and competitors to see.

Tr. 45:9-13.

Counsel for Butler subpoenaed Rice to testify at the trial of this matter. Counsel for the Acting General Counsel did not call Rice as a witness. Apart from stating his name and address for the record, and confirming that he was one of the two charging parties in the case, Rice refused to answer a single question, opting to assert his Fifth Amendment right not to testify. Tr. 101:6-15, 102:1-25, 103:1-15. Rice would not even confirm under oath that he had signed the Charge he filed with the Board:

- Q. When you filed your charge with the National Labor Relations Board, did you sign that charge?  
A. I plead the fifth, sir.

Tr. 103:13-15. Given the statements that Rice made under oath at his unemployment hearing, and given that he refused to testify at trial, it is obvious that Rice perjured himself in his Charge when he alleged that he was terminated after he criticized Butler on Facebook. As Rice saw in black-and-white when he signed his Charge, "willful false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)." GC. Ex. 1(C). The only logical conclusion to be drawn is that Rice refused to testify because he was concerned that he might be criminally charged if he were required to admit under oath that he had lied in his Charge. This is particularly true where he should have expected that he would be questioned about the admissions he made at his unemployment hearing, *i.e.*, that he was not talking about a Butler vehicle in his Facebook post.

**D. Rice Did Not Discuss His Facebook Post With Any Co-Workers, and the Acting General Counsel Did Not Adduce Any Evidence That Rice Was Addressing a Group Concern, or Intended Group Action, With His Post.**

The record makes clear that no concerted activity existed here. The post indicated that two individuals had “liked” the post (indicated by the “thumbs up” with a “2” next to it at the bottom right corner of the post) and that two individuals had posted comments in response to the post (indicated by the “word bubble” with a “2” next to it at the bottom right corner of the post), but the post did not identify who those individuals were. GC Ex. 10. Smith never learned the identity of the individuals who “liked” or commented on the post, nor did Rosenberg. Tr. 49:1-4, 71:23-25, 72:1-3. The Acting General Counsel presented no evidence that any of Rice’s coworkers, in fact, commented on or “liked” his post, or whether any of them ever saw it.<sup>3</sup>

Moreover, both Rosenberg and Smith confirmed that no other Butler employees have had conversations among themselves regarding Butler’s vehicles breaking down. Tr. 49:5-7, 73:14-16. Rice never had complained to management about his ambulance breaking down. Tr. 73:11-13. (He would have had nothing to complain about, because his ambulance never broke down. Tr. 73:11-13.) Rice did not testify, so no testimony exists in the record to support the Acting General Counsel’s position that Rice intended for coworkers to see his post. There is absolutely nothing about Rice’s post that suggests that his post grew out of conversations with coworkers or involved any of his coworkers, or that his post reflected a group concern among Butler employees.

**E. When it Terminated Rice, Butler Did Not Believe That He Had Engaged in Protected, Concerted Activity.**

The Acting General Counsel’s alternative theory is that Butler terminated Rice because it mistakenly believed that he had engaged in protected, concerted activity. Cr. Exc. Br. at 6-7, 13-

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<sup>3</sup> How could the Acting General Counsel have done so? He must have known that Rice lied about referring to a Butler ambulance and would refuse to testify at trial.

14. Not a shred of evidence exists to support the Acting General Counsel's contention. The Acting General Counsel first points out that Rosenberg testified that he believed that Rice's post gave the appearance of referencing one of Butler's ambulances. *Id.* at 6. Rosenberg testified as follows on cross-examination:

- Q. When you made the decision to terminate Mr. Rice, it was your understanding that this post in GC Exhibit 10 was referring to a Butler Medical Transport Ambulance. Correct?
- A. It was my understanding that was the appearance. It was not my understanding that that was what that was referring to. It was my understanding that would be the appearance to the public.
- Q. You thought based on this, that's what – it was obvious it appeared to be referring to Butler Medical Transport?
- A. Like I said, it's not what I thought. It's what I thought people would think.

Tr. 58:2-13. Rosenberg's testimony makes clear that he (1) interpreted Rice's Facebook post to be in reference to a Butler vehicle, (2) determined that a reference to Butler's vehicles as substandard and prone to breaking down would tend to injure Butler's business, (3) immediately checked the Company's vehicle records and determined that Rice's vehicle had not broken down, (4) concluded that Rice had made a knowingly false statement, publicly, which had a tendency to injure the Company, and (5) discussed the matter with Smith who agreed with his assessment that Rice should be terminated. That Rosenberg was concerned that Rice's Facebook post gave the (false) appearance to the world at large that he was referring to a Butler ambulance does not establish that he thought Rice was engaged in protected activity. It establishes that Rosenberg thought that Rice had knowingly posted false information which people might misconstrue as being about Butler's vehicles. None of the record evidence suggests in any way that the Company thought that Rice was engaged in protected, concerted activities when it decided to terminate him.

The Acting General Counsel then points to Smith's testimony, which he claims establishes that Smith thought Rice was engaged in protected activity. He argues, for instance, that Smith was aware of prior Facebook posts Rice made about Butler and that she and Rosenberg knew Rice was Facebook "friends" with other Butler employees. Cr. Ex. Br. at 6-7. Even if the Board credits the Acting General Counsel's characterization of the evidence here, there is no support for the conclusion that Smith believed that Rice was engaged in protected, concerted activity when the Company decided to terminate him. The record evidence is clear that Rosenberg determined that Rice's vehicle had not broken down. And as Rosenberg testified, the decision was not made to terminate Rice until after he and Smith had discussed the situation. Tr. 57:10-17. Smith confirmed in her testimony that Rosenberg related to her his finding that Rice's vehicle had not broken down. Tr. 72:9-18. Rice was not terminated until a week after the Company learned of the post. Tr. 72:19-21. Smith clearly knew that Rice was not referring in his post to a Butler ambulance; thus, she could not possibly have believed that his Facebook post constituted protected, concerted activity when she came to her own conclusion that he should be terminated.<sup>4</sup>

### III. ARGUMENT

#### A. **The Acting General Counsel Mischaracterizes the ALJ's Finding Regarding Rice's Refusal to Testify.**

##### 1. The ALJ effectively drew adverse inferences from Rice's refusal to testify.

Reading the Acting General Counsel's Brief in a vacuum, one might wrongly conclude that the ALJ did not view negatively Rice's refusal to testify. The Acting General Counsel states in his Brief that the ALJ merely "found that portions of [Butler's] testimony stood uncontradicted" but "did not draw any adverse inferences based on Rice's refusal" to testify. Cr.

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<sup>4</sup> Rice's posting on Facebook about his girlfriend's car breaking down is wholly unrelated to his employment and cannot have constituted protected, concerted activity. The Acting General Counsel does not argue to the contrary.

Ex. Br. at 8. For that reason, the Acting General Counsel argues, the ALJ's "treatment of Rice's refusal to testify was appropriate and should be upheld." *Id.* The Acting General Counsel's argument here is an attempt at hair-splitting that does not stand up when one reviews the ALJ's statements on the record, as well as the substance of his Decision.

The following exchange occurred between the ALJ and Counsel for the Acting General Counsel:

JUDGE AMCHAN: [The Fifth Amendment] is just generally not applicable in our proceedings. There's no criminal –

MR. TURNER: Your honor, if I may? It is applicable if Mr. Rice has a reasonable fear that his testimony here could potentially lead to criminal prosecution...

\* \* \* \*

JUDGE AMCHAN: [I]f he's not going to answer questions, I mean, then I will, **I will draw an adverse inference that his, his answers would be –**

MR. TURNER: The Bench Book – the Fifth Amendment claim is dealt with – it's Section 13-625. And it's – the Board's Rules and Regulations is addressed in Section 102.31...

JUDGE AMCHAN: I guess he can invoke his right and you can ask me to draw an adverse inference from that fact.

Tr. 101:12-17, 102:12-20 (emphasis added). The ALJ stated as follows in his Decision:

At an unemployment insurance hearing, Rice contended that his post referred to a private vehicle, not one of Respondent's vehicles. **At the instant hearing, Rice was not called as a witness by the General Counsel. He was subpoenaed by Respondent and then refused to testify citing his rights under the Fifth Amendment of the United States Constitution. As a result** I conclude on the basis of Respondent's uncontradicted testimony that the allegations made in his Facebook post were maliciously untrue and made with the knowledge that they were false. Thus I dismiss the complaint allegation regarding Rice's termination.

ALJD at 6:38-44 (emphasis added). Perhaps the ALJ was inartful in his delivery. However, it is clear, to use the ALJ's own words, that **as a result** of (1) the Acting General Counsel's failure to call Rice as a witness<sup>5</sup> and (2) Rice's refusal to testify when subpoenaed at trial, he was crediting

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<sup>5</sup> The Acting General Counsel faults Butler for not appealing to the Board the ALJ's denial of Butler's request to compel Rice to testify. Cr. Ex. Br. at 8. Why was it Butler's burden to do so? It speaks volumes that the Acting General Counsel – who had the burden of proof in showing that Rice's discharge was unlawful – not only failed to

the testimony of Butler's witnesses that Rice's post, to the extent it referred to a Butler vehicle, was false. It does not matter that the ALJ did not use the words "adverse inference."

The Acting General Counsel relies on *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006), for the proposition that an ALJ "may cite the undisputed nature of the record evidence on an issue when declining to draw adverse inferences" due to a witness's failure to testify. Cr. Ex. Br. at 8. That case stands for the proposition that an adverse inference should not be drawn where the only reason a party refrains from calling a witness is that the testimony would be cumulative, rather than out of a fear that the testimony would be adverse. *Roosevelt Mem. Med. Ctr.*, 348 NLRB at 1022. That most assuredly is not the case here. **The Acting General Counsel not only did not call Rice, but argued to the ALJ that Rice had a right, under the Board's Rules and Regulations and the Fifth Amendment, to refuse to testify. Moreover, Rice took the stand, was asked questions and refused to answer.** Rice's testimony certainly would not have been "cumulative," because there was no other testimony in the record to support the allegations as to Rice. The Acting General Counsel did not call Rice because he knew that Rice would have testified contrary to his case and to Rice's own interests (*i.e.*, if testifying truthfully, he would have admitted to lying in his Board Charge). The ALJ was aware of this, and that is why he made the finding he did. *Roosevelt Memorial* is more properly cited for the proposition that where the evidence is, at most, in equipoise, an ALJ should dismiss the complaint allegations. *Id.* (citing *Blue Flash Express*, 109 NLRB 591, 591-592 (1954) (where credibility factors are equal and the judge is not persuaded by the testimony of the

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call Rice to testify but apparently shielded him from having to testify by advising him to plead the Fifth Amendment (unless one assumes that Rice is familiar with Section 102.31 of the Board's Rules and Regulations). It is clear what Rice would have said if he were to have testified truthfully: he made false allegations in an NLRB charge, a criminal act. It was the Acting General Counsel's burden to prove the allegations as to Rice, not Butler's burden to disprove them. Why, then, did the Acting General Counsel not seek protection for Rice under Section 102.31 so that Rice could testify in support the allegations he himself made (albeit falsely) in his Board Charge?

General Counsel's witnesses that unlawful conduct took place, the General Counsel has failed to meet his burden of proof); *American, Inc.*, 342 NLRB 768, 768 (2004)). Here, credibility factors are not equal; rather, Rice has absolutely no credibility, and the allegations as to him are baseless.

2. Given Rice's misuse of the Fifth Amendment as a shield and a sword, the ALJ correctly penalized him by crediting Butler's witnesses to conclude that Rice lied in his Facebook post.

The ALJ, as the Acting General Counsel himself states, did treat correctly Rice's refusal to testify. Although an individual has a right under the Fifth Amendment to the Constitution not to testify against himself, a party to a civil case who asserts his Fifth Amendment rights does so at the risk of having his case dismissed as a result of his failure to testify. When a defendant in a civil case asserts his Fifth Amendment rights, his refusal to testify "may ultimately result in a conclusion at trial...that the plaintiff's evidence is unrebutted and that defendant is unable to establish any genuine issue of material fact." *GmbH v. Design Indus.*, Civil No. 1:06CV00644, 2008 U.S. Dist. LEXIS 31150 (M.D.N.C. Mar. 20, 2008) (Citing *Edmond v. Maryland*, 934 F.2d 1304, 1308-09 (4th Cir. 1991); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1476-77 (4th Cir. 1988)).

When a plaintiff refuses to testify in his own civil case, dismissal of his case is the proper remedy. In *Fremont Indemnity Co. v. Superior Court*, the plaintiff, an insured, brought a civil action to recover under a fire insurance policy for fire damage to his insured premises. 137 Cal. App. 3d 554 (Cal. App. 4th Dist. 1982). The insured was under investigation and later indicted for arson in connection with that fire. 137 Cal. App. 3d at 555-56. Consequently, the insurer refused to pay the insurance claim. *Id.* at 556. In connection with the litigation, the insurer

noticed the plaintiff's deposition, and the plaintiff refused to participate in the deposition, citing his indictment for arson and his Fifth Amendment right against self-incrimination. *Id.*

The court framed the issue as follows: "whether a person can initiate a lawsuit and then by reliance upon the privilege against self-incrimination effectively prevent the party sued from getting at the facts...and thus prejudice preparation of his defense." *Id.* at 557. The court held that the plaintiff's "plac[ing] in issue all factual matters relevant to any exclusion clause [in the insurance policy]" by initiating the civil litigation "operated to waive his constitutional privilege against self-incrimination with reference to any factual issues...tendered by the complaint." *Id.* at 559. As the court put it, the plaintiff was free to continue to assert the Fifth Amendment and refuse to be deposed, "but he will have to dismiss his lawsuit if he persists in doing so...he cannot have his cake and eat it too." *Id.* at 560. *See also Holmes v. Republic Nat'l Distr. Co., LLC*, Civil No. JKB-10-16092011 U.S. Dist. LEXIS 137972 (D. Md. Dec. 1, 2011) ("A plaintiff cannot thwart an opposing party's defense of its case by claiming the Fifth Amendment privilege against self-incrimination in order to keep discoverable evidence out of the opponent's hands"); *Guadagni v. New York City Transit Auth.*, Civil No. 08-CV-3163, 2009 U.S. Dist. LEXIS 6054 (E.D.N.Y. Jan. 27, 2009) (Where plaintiff refused to attend administrative hearing on Fifth Amendment grounds, court granted defendant's motion to dismiss his civil action; "[p]laintiff may not assert his Fifth Amendment privilege against self-incrimination to circumvent a jurisdiction prerequisite to the commencement of an action in tort...").

Rice, the individual who initiated the instant litigation by filing a Charge against Butler, stands squarely in the shoes of a plaintiff who brings a lawsuit only to throw up a roadblock to defense against his allegations by refusing to testify in support of his own case. The ALJ should have dismissed all of the allegations as to Rice on this ground alone. However, he was correct in

his lesser sanction of accepting as true all of the evidence presented by Butler as to Rice, as a penalty to Rice<sup>6</sup> for his use of the Board's processes both as a shield and a sword against Butler. *See GmbH v. Design Indus.*, Civil No. 1:06CV00644, 2008 U.S. Dist. LEXIS 31150 (M.D.N.C. Mar. 20, 2008). Indeed, Rice's refusal to testify when subpoenaed effectively denied Butler its own due process rights and made it completely impossible for it to make a complete record regarding Rice's allegations. This situation was completely of Rice's doing: he chose to file a baseless, false Charge, and he alone chose to refuse to testify because he feared criminal sanctions. The ALJ was completely appropriate in his treatment of Rice's refusal to testify. On this concept, at least, Butler and the Acting General Counsel agree.

**B. The ALJ Appropriately Found That Rice's Facebook Post was Maliciously Untrue; the Finding is Supported by Unrebutted Testimony.**  
(Exception 1)

At the outset, Butler notes that the only way that the Acting General Counsel could argue successfully that the ALJ erred in his finding here is to show that (1) the ALJ mistakenly relied on the unrebutted testimony of Butler's witnesses in concluding that Rice lied in his post or (2) the Butler vehicle Rice was driving actually did break down and that he was referring to that vehicle in his post (*i.e.*, that Rosenberg and Smith lied under oath when they said that his vehicle never broke down). The Acting General Counsel does not quarrel with the ALJ's decision to rely on Rosenberg's and Smith's unrebutted testimony.<sup>7</sup> He points to no evidence (nor could he) to establish that Rice's Butler vehicle did, in fact, break down and that Rice was referring to it in

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<sup>6</sup> Again, it matters not that the ALJ did not state that he drew any specific "adverse inferences." Rice's unusual conduct in pleading the Fifth Amendment to support his own allegations warranted the ALJ's to credit Butler's unrebutted evidence.

<sup>7</sup> He poses no serious challenge to the ALJ's doing so. Later in his brief, the Acting General Counsel states that the falsity of Rice's post was a post hoc argument raised at trial. Cr. Ex. Br. at 13. He claims that Smith's Board affidavit does not mention falsity as a reason for Rice's termination. *Id.* The Acting General Counsel did not prevail on the ALJ in his post-hearing brief to draw this conclusion from the evidence, so this contention should not be given merit. Moreover, Butler submits that the Board agent's questioning of Smith drove her affidavit; to the extent it fails to note the falsity of Rice's post, that was the fault of the individual drafting the affidavit.

his post. Rather, the Acting General Counsel makes a series of erroneous legal arguments, all of which should be rejected.

The Acting General Counsel initially correctly poses the applicable framework: a statement loses protection of the Act if it is “maliciously false, *i.e.*,...made with knowledge of [its] falsity or with reckless disregard for [the] truth.” *TNT Logistics N. Am., Inc.*, 347 NLRB 568, 569 (2006). However, he then apparently misconstrues Board precedent by arguing that because Rice lacked intent to harm Butler, he did not lose protection of the Act. For example, he cites the definition in Black’s Law Dictionary of “malicious act” to show that Rice lacked malicious intent. Cr. Ex. Br. at 9. He argues that there is no evidence that “Rice intended to perform a wrongful act against [Butler] by posting a message on Facebook” and suggests that there is “no evidence concerning any reason why Rice may have intended to perform a wrongful act against Respondent.” *Id.* at 10. Intent to harm one’s employer is not a relevant factor under Board precedent. The sole inquiry is whether a statement was false and the employee, when he made it, either knew it was false or acted with reckless disregard as to its falsity. Nothing more. *TNT Logistics*, 347 NLRB at 569; *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252 (2007) (“statements are unprotected if they are...made with knowledge of their falsity”); *see also Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100, 1105, fn.17 (2000) (quoting *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995)); *CKS Tool & Engineering, Inc. of Bad Axe*, 332 NLRB 1578, 1586 (2000); *Sprint/United Management Company*, 339 NLRB 1012, 1015 (2003) (no protection of the Act where company-wide e-mail sent to coworkers contained false statements both intentionally and with reckless disregard for truth).

The Acting General Counsel then argues that there is no evidence that Rice’s post was actually false. Amazingly, as support for this contention, he faults Butler for failing to prove that

Rice was, in fact, posting on Facebook about Butler. Cr. Ex. Br. at 8-9. The Acting General Counsel also points to Rosenberg’s testimony that Rice, at his unemployment hearing, stated under oath that he was referring to his girlfriend’s car, not a Butler ambulance. Cr. Ex. Br. at 9. Indeed, the Acting General Counsel argues, “the text of Rice’s post does not name [Butler].” If he never posted about Butler, then Rice could not have lost the protection of the Act, because he was never protected by the Act. This position apparently admits that the Complaint allegations that Rice was engaged in protected, concerted activity lack merit.<sup>8</sup>

As the Acting General Counsel seems to concede, the record evidence establishes conclusively that Rice was not actually posting about his Butler ambulance. This fact does not undermine, in any way, the fact that the Company believed that Rice’s post gave the false appearance that he was in a broken-down Butler ambulance at the time he made the post. Rice obviously knew when he made his post that he was not in a Butler ambulance – how could he have been unaware of this fact? To the extent that his post intended to convey that he was in a Butler vehicle, it was a knowingly false statement. This, and this alone, establishes that Rice’s post was maliciously false such that it lost the protection of the Act (to the extent it was protected in the first place, which the Acting General Counsel seems to admit that it was not).

**C. The ALJ Did Not Err in Refusing to Find that Rice Was Terminated for Engaging in Protected, Concerted Activity.**  
(Exceptions 2-4 & 8)

1. Rice’s post was not protected.

The Acting General Counsel states at the outset that “if the Board finds that Rice was posting about terms and conditions of employment” and disagrees with the ALJ that Rice’s post

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<sup>8</sup> It is incomprehensible that the Acting General Counsel can take the position on one hand that Rice was terminated for posting on Facebook about Butler’s vehicles, and on the other that Butler cannot show that Rice posted knowingly false information because Butler has failed to show that Rice was posting about its vehicles. This simply is inconsistent, and it is unseemly for a federal agency to engage in such tactics.

was maliciously untrue, then Rice's discharge was unlawful. Cr. Ex. Br. at 10. The Board should quickly dispose of this issue by finding that Rice did not post on Facebook about the terms and conditions of his employment. If Rice was posting about his girlfriend's car, it goes without saying that his post was wholly unrelated to his employment with Butler. First, the Acting General Counsel concedes in his Brief that the evidence does not show that Rice was actually posting about a Butler ambulance. The Acting General Counsel himself points out that Rice admitted at his unemployment hearing that "his post referred to a private vehicle." Cr. Ex. Br. at 9. According to the Acting General Counsel, Butler has failed to prove that "Rice's post was actually about [Butler]." *Id.* at 10 (emphasis in original). The Acting General Counsel sums it up best: "the record evidence is that Rice denied his post concerned [Butler] but [Butler] believed the post gave the appearance of referencing [Butler]." *Id.* at 9.

To the extent that the Acting General Counsel might argue that Rice falsely denied (under oath at an unemployment hearing) referencing Butler in his Facebook post, but that he actually was posting about Butler, there is not a shred of evidence in the record to support this contention. How could there be? Rice refused to testify. The Acting General Counsel did not call a single witness to substantiate his claim that Rice was referencing a Butler vehicle in his post. How could the ALJ possibly have concluded that Rice was posting about a Butler vehicle? Nor is there any evidence to support the Acting General Counsel's apparent contention that if Rice were referencing a Butler vehicle, he was making a truthful statement. No evidence exists in the record to contradict the testimony of Rosenberg and Smith that Rosenberg, after he learned of the post, immediately checked the Company's vehicle records and determined that Rice's Butler vehicle had not broken down when Rice appeared to be claiming it did. Rice obviously knew that he was not sitting in a broken-down Butler vehicle when he posted, so to the extent his post

referred to Butler, he knew that was false. To conclude otherwise would be to rely upon conjecture rather than evidence. For that simple reason alone, the Board should disregard the Acting General Counsel's Exceptions urging the Board to find that Rice engaged in protected, concerted activities.

2. Rice's post was not concerted.

Even if the Board were to conclude that Rice was talking about a Butler vehicle, there is no evidence that his post was concerted. There is no indication that the alleged mechanical problems in Butler's vehicles actually was a matter of concern among Butler employees.<sup>9</sup> The unrebutted testimony from Rosenberg and Smith was that (1) to the Company's knowledge, no employees ever had conversations about Butler vehicles having mechanical problems and (2) no employees, including Rice, ever complained to the Company about its vehicles' mechanical problems. While there were comments and "likes" to Rice's post, the Company did not, and still does not, know the identity of those people, including whether they were Butler employees. The Acting General Counsel did not introduce any evidence that a single coworker was aware of Rice's post. This is precisely the kind of evidence that Counsel for the Acting General Counsel had to have presented in order to meet his burden that Rice was engaged in concerted activity. *See, e.g., Meyers Indust.*, 281 NLRB 882, 885 (1986); *Knausz BMW*, 358 NLRB No. 164, Slip Op. at 25-26, 29-30 (Sep. 28, 2012) (posting concerted where evidence showed employee had prior conversations with coworkers on subject of protected activity, post grew out of those conversations, and employee was "friends" with coworkers); GC Mem. OM-74, at 13-15, 17 (postings not concerted where no evidence that employees discussed postings before or after

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<sup>9</sup> To the extent the Acting General Counsel argues that Butler's vehicles generally were of concern to employees based on employees' Facebook posts about a seatbelt in a Butler vehicle (GC Ex. 6 at 2), a discussion about seatbelts is wholly different from mechanical problems with a vehicle, which is what the Acting General Counsel claims Rice was referencing.

with coworkers, no evidence that coworkers responded to the posts, and no evidence that postings otherwise logically grew out of prior group activity or reflected group concern).

The Acting General Counsel argues in his Brief that Rice's statement "Hey everybody!" in his post is evidence of his attempt to "engage in a discussion about the conditions of employment." Cr. Ex. Br. at 11-12. There is no evidence in the record of whom Rice allegedly intended to engage in a conversation with his post. (How could there be, given that he refused to testify?) There is no record evidence that establishes that Rice actually was friends with any Butler employee on Facebook. It is not enough for the Acting General Counsel to rely on Smith's testimony at an unemployment hearing that she thought Rice intended employees to see his post. Tr:94:10-18. Smith clearly stated at the trial of this matter that she has no actual knowledge of whom Rice is friends with on Facebook. *Id.* at 94:13-14. To the extent Smith thought Rice's post was intended to be seen by employees, it is clear that such a belief was not based on personal knowledge that Rice is, in fact, friends with coworkers on Facebook. There is no other evidence in the record to which the Acting General Counsel can point that suggests that Rice was even friends with any coworkers on Facebook.

Even if Rice's post had referred to Butler (and was not maliciously false), one can only conclude from the record evidence that it was not intended to be seen by, and it was not to be seen by, any of Rice's coworkers. In other words, it was the equivalent of an employee going home and shouting into an empty closet about working conditions. No coworker is present to hear such statements, and such statements could not have been concerted activity under the Act.

**D. Butler Did Not Believe That Rice Was Engaged in Protected Activity.**  
(Exceptions 2, 3, 5, & 8)

Butler concedes that the record evidence is sufficient to show that Smith (but not Rosenberg, the ultimate decisionmaker) had an apparently mistaken belief that Rice was friends

with coworkers on Facebook and that he intended them to see his post. However, this is of no moment, because nobody at Butler believed that Rice's post constituted protected activity.<sup>10</sup> The Acting General Counsel is wrong that the record clearly shows that the Company believed that Rice was posting about a Butler ambulance at the time it decided to terminate him.

As argued at length above, the unrebutted testimony in the record is that Rosenberg immediately verified via Company records that Rice's vehicle had not broken down. He communicated this to Smith. Thus, the Company's belief at the time it decided to terminate Rice was that he had made a post, which did not refer to a Company vehicle but which the Company believed gave the false impression that he was posting about a broken-down Butler ambulance. This was information which the Company knew to be untrue. There is no basis for a conclusion that the Company mistakenly believed that Rice was attempting to discuss any terms and conditions of his employment with his coworkers. Thus, the ALJ's refusal to find that Rice was terminated because Butler mistakenly believed him to be engaged in protected, concerted activity should be upheld.

**E. Even if Butler Had Violated the Act in Terminating Rice, He Is Not Entitled to a Remedy.**

The circumstances surrounding Rice's refusal to testify at trial establish that he feared criminal sanctions for committing perjury.<sup>11</sup> If it is determined "that an employee engaged in

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<sup>10</sup> The Acting General Counsel appears to be arguing in his Brief that *Monarch Water Systems*, 271 NLRB 558 (1984) and *Daniel Construction Co.*, 306 NLRB 1037 (1992) stand for the proposition that discharge based on a mistaken belief that an employee is engaged in concerted activity is sufficient to establish a violation of the Act. To the extent that this is the Acting General Counsel's position, he is wrong. A reading of both cases (and all other Board precedent) shows that an employer must believe that an employee has engaged in protected and concerted activity. Any other conclusion would be contrary to the law: if two employees concertedly entered a radio station contest and the employer disapproved of this activity and fired them, the Act certainly would not be violated by the discharges, even though "concerted" activity had occurred.

<sup>11</sup> Rice clearly made false allegations in his Board Charge. While it could be argued that Rice lied at his unemployment hearing and not in his Board Charge, this is unlikely. Butler submits that it is incredible that Rice had a reasonable (let alone actual) fear that he would be prosecuted by the State of Maryland for admitting in a Board proceeding that he lied in a state unemployment hearing. Butler submits that Rice feared being prosecuted for

deliberate and malicious misconduct that abused and undermined the integrity of the Board's processes, the Board will withhold reinstatement and/or backpay for any unfair labor practice found." *Federal Security, Inc.*, 359 NLRB No. 1, Slip Op. at 12 (Sept. 28, 2012); *see also Precoat Metals*, 341 NLRB 1137 (2004) (denying employee both reinstatement and backpay where he lied about central issue in case in Board affidavit and during his testimony at trial, where his lies probably contributed to the General Counsel's decision to pursue the complaint).

In *Toll Manufacturing Co.*, the Board set out the test to be applied where an employee lies under oath in Board proceedings. 341 NLRB 842, 845 (2004). In such a situation, the Board "assesses the impact of the discriminatee's transgression on the integrity of the Board's processes." *Toll Mfg.*, 341 NLRB at 845. When an alleged discriminatee lies about a minor issue (*e.g.*, his age) that does not go to the heart of the Act or the Board's judicial processes, penalizing him may not be appropriate. *Id.* However, "when a discriminatee's conduct is more serious and has a greater impact on the Board's processes, the Board crafts a remedy that accords with the magnitude of the transgression." *Id.* at 17. In *Toll Manufacturing*, the charging party lied during his testimony about issues that went to "a central issue" in the proceedings. *Id.* at 19. The Board therefore concluded that he had "abused the Board's processes for his own benefit." *Id.* at 20. Although the employee's lies "were not dispositive as to the lawfulness of his discharge, they went to a central issue in the case (including remedy) and unnecessarily prolonged the litigation." *Id.* at 21. Accordingly, the Board ordered that the employee's backpay cut off as of the first day he abused the Board's processes. *Id.*

Rice unquestionably abused the Board's processes to such an extent that he should be completely denied any remedy. Rice did not simply get caught in a lie; his "testimony" was not

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admitting to the Board that he lied to it in his Charge, which he was told on the Charge form was a criminal act. In any event, it is unquestionable that Rice lied under oath about Butler and would not be entitled to any remedy.

merely untrustworthy or incredible, as was the case in *Toll Manufacturing* or *Precoat Metals*. Rather, his testimony was completely nonexistent, as he refused to testify at trial. He would not even confirm that he had signed the Charge he filed with the Board. This is because he was concerned that he would be prosecuted for lying to the Board when he filed his Charge. Rice's Charge was a bald attempt to abuse the Board's processes for personal gain, and it was filed in bad faith. His misconduct was even more serious than that of the employee in *Toll Manufacturing* and *Precoat Metals*; he openly flouted the Board's hearing procedure by sitting at the witness stand and refusing to even participate in the process. Rice must have given a Board affidavit in support of his Charge and, like the employee in *Precoat Metals*, that affidavit presumably contained lies that were consistent with the false allegations made in his Charge.<sup>12</sup> Rice abused the Board's processes from the beginning: when he filed his Charge, when he presumably gave a false affidavit to the Board, and when he refused to answer a single question after being subpoenaed, including whether he signed his own Charge. To grant Rice any remedy here would be a miscarriage of justice.<sup>13</sup>

**F. Neither Rice's Nor Norvell's Discharge Violated Continental Group.**  
(Exceptions 2, 3, 6 & 8)

1. Neither Norvell nor Rice was engaged in conduct implicating Section 7 concerns.

In the event the Board were to conclude that it should reach whether Norvell and Rice were terminated in violation of *Continental Group*, 357 NLRB No. 39 (Aug. 11, 2011), it should

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<sup>12</sup> Of course, Butler has no way of confirming this, because the Acting General Counsel shielded Rice's affidavit by deliberately not calling him during his case-in-chief.

<sup>13</sup> While Rice is not entitled to any remedy, reinstatement would be particularly inappropriate. Rice lied under oath when making serious allegations against Butler. How could Butler be expected to continue to employ a proven liar who attempted to abuse the Government's processes to injure the Company? Even if he lied at his unemployment hearing and not in his Charge, he still has lied under oath to gain profit at the Company's expense. No employer should ever, under such circumstances, be expected to re-employ a known liar who committed a criminal act.

conclude that they were not. Neither Norvell<sup>14</sup> nor Rice was engaged in conduct touching on Section 7 concerns. There is a complete dearth of case law following *Continental Group* that illustrates exactly what conduct “touches on” Section 7 concerns such that it falls under the rule of that case.<sup>15</sup> However, as stated above, *Continental Group* is properly read to mean that an employee is engaged in such conduct when he undertakes activities that would be protected, but for the fact that they are not (yet) concerted.

The Acting General Counsel’s social media Memorandum issued in January 2012 is instructive. That Memorandum discussed a case where an employee was terminated pursuant to an unlawful rule after she posted on Facebook that a coworker/bartender “was a cheater who was ‘screwing over’ the customers” and accused the coworker of using cheap mix in drinks rather than premium alcohol. GC Mem. OM 12-31, at 9 (Jan. 24, 2012). The employee later posted a status update that said, “dishonest employees along with management that looks the other way will be the death of a business.” *Id.* A coworker posted agreement with that sentiment; the employee was also “friends” on Facebook with numerous coworkers. *Id.* The employee also posted that she was concerned that if customers found out about the other bartender’s conduct, they might stop buying drinks or would not tip as well, which would affect her compensation. *Id.* The Division of Advice found that the employee’s posts had “only a very attenuated connection with terms and conditions of employment” and she “did not reasonably fear that her failure to publicize her coworker’s dishonesty could lead to her own termination.” *Id.* at 10-11.

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<sup>14</sup> With respect to Norvell, Butler argued at length in its Exceptions and supporting Brief that the ALJ erred by failing to find that Norvell’s discharge did not violate *Continental Group*. Ex. Br. at 21-23. Butler adopts those arguments as if fully set forth herein.

<sup>15</sup> The only Board case to pass on conduct that merely implicates Section 7 concerns, *Taylor Made Transp. Servs.*, 358 NLRB No. 53 (Jun. 7, 2012), dealt with an employee terminated for discussing wages with coworkers. The Board repeatedly has held that wage discussions are “inherently concerted” and are “at the core of Section 7 rights.” *Automatic Screw Prods. Co.*, 306 NLRB 1072 (1992); *Parexel Int’l, LLC*, 356 NLRB No. 82 (Jan. 28, 2011). *Taylor Made*, unfortunately, sheds almost no light on what the Board meant in *Continental Group* by conduct that “implicates Section 7 concerns.”

Thus, her posts did not touch on Section 7 concerns within the meaning of *Continental Group*, and a complaint was not issued. *Id.* at 11.

In another case discussed in the Memorandum, an employee, after being insulted and threatened by coworkers and after unsuccessfully pursuing relief under the employer's assistance program, posted on her Facebook wall that she hated people at work, that they blamed everything on her, and that she wanted to be left alone. *Id.* at 11. One coworker responded that he had "gone through the same thing." *Id.* The employer obtained a copy of the post and fired her. The Division of Advice reasoned that the posts did not touch on the concerns underlying Section 7. The employee was not engaged in concerted conduct within the meaning of *Meyers, supra*. *Id.* at 12. Moreover, the employee's posts were "personal and highly charged rants" about coworkers and the employer. *Id.* at 13. No complaint issued.

As the discussion in the Acting General Counsel's Memorandum illustrates, postings on social media outlets that do not bear a significant connection to terms and conditions of employment are insufficient to protect an employee who posts rants about his employer and is terminated pursuant to an unlawful social media rule. With respect to Rice's post, the unrebutted record evidence shows that he was not referring to a Butler vehicle in his post but about his girlfriend's car. That subject does not even bear an "attenuated" relationship to the terms and conditions of employment at Butler, it bears absolutely no relationship to his employment.<sup>16</sup> Even if Rice had been talking about a Butler vehicle, there is no evidence whatsoever that his

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<sup>16</sup> The Acting General Counsel argues at length in his Brief (Cr. Ex. Br. at 20-21) that even if the ALJ's "malicious untruth" finding is affirmed, the finding is not an affirmative defense under *Continental Group*. Butler has never advanced the argument that the falsity of Rice's post is an affirmative defense under that framework. Rather, inherent to a finding that Rice made a false statement in his Facebook post is the fact that Rice's Butler vehicle was not broken down. To the extent that Rice's vehicle was not broken down, he was not complaining on Facebook about working conditions, and his post had no relationship to his employment with Butler. This is not an affirmative defense, because Rice's termination does not satisfy the initial requirement of *Continental Group* that he be terminated for engaging in protected, concerted activity or conduct that implicates Section 7 concerns. Under these circumstances, there is no need for Butler to raise an affirmative defense.

post dealt with a concern among Butler employees as a group and conceivably could have been for mutual aid and protection, a factor that a reading of *Continental Group* makes clear is essential to a finding that conduct implicates Section 7 concerns. At most, Rice's comment was a personal rant unrelated to his employment at Butler (which gave the false impression that Butler's equipment was substandard). In the absence of any evidence that the reliability of Butler's vehicles was somehow a common concern among employees, there simply was no basis for the ALJ to have concluded that Rice's post touched on the concerns underlying Section 7. Thus, the ALJ's refusal to do so was appropriate.

Likewise, Norvell was not engaged in conduct touching on Section 7 concerns. In fact, as stated above, the appropriate reading of *Continental Group* is that conduct that is protected, but not yet concerted, falls under the rule of that case. Norvell's situation is the opposite: he was engaged in arguably concerted conduct which was not protected. As the Board held in *Holling Press*, 343 NLRB 301 (2004), a discussion between two employees regarding one employee's personal claim, unrelated to any collective employee concern, simply is not protected under Section 7. It would not have been protected under Section 7 had it been allowed to progress. Therefore, Norvell's "advice" to Zalewski to sue Butler did not, and could not possibly have, implicated Section 7 concerns.

2. Both Norvell's and Rice's Facebook posts disrupted and interfered with Butler's operations.

Finally, even assuming Norvell's and Rice's terminations otherwise would be unlawful under *Continental Group*, Rosenberg's and Smith's unrebutted testimony showed that the postings interfered with Butler's business because they placed the Company's business relationships with its customers in jeopardy. Rice's falsely suggesting in his post that Butler's ambulances are unreliable and continually break down unquestionably could have caused some

of its customers to end their relationship with Butler: after all, who in his right mind would want to rely on an ambulance company to transport a sick, possibly critically ill, patient to a hospital when its vehicles are not reliable?

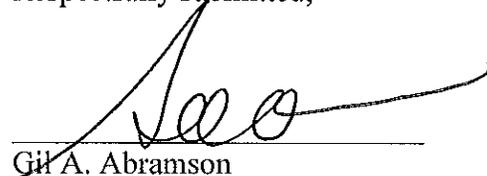
The same is true of Norvell's post. Butler, because it is in the business of transporting sick patients to hospitals, is in a position of trust with respect to those patients. Norvell's suggestion that Butler engages in unlawful conduct with respect to its employees, such that it should be sued, likewise would tend to cause Butler's customers to cease doing business with it. This is particularly true where, like other EMTs, Norvell and Rice (as well as Zalewski, on whose Facebook "wall" Norvell posted) commonly interacted with hospital employees and were likely Facebook "friends" with hospital employees. It is not unlikely that hospital officials would have learned of Norvell's and Rice's attacks on the Company. Moreover, as Rosenberg testified, Butler is in a competitive business, with over 40 competitors in Maryland. A hospital very easily could terminate its relationship with Butler and employ the services of a competitor instead. For all the foregoing reasons, to the extent it has to do so, Butler has raised an affirmative defense under *Continental Group*.

#### IV. CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Board disregard the Acting General Counsel's Cross-Exceptions in their entirety and uphold Butler's discharge of Michael Rice and find, further, that William Norvell's discharge was not unlawful under *Continental Group*.

Dated: November 15, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Gil A. Abramson', is written over a horizontal line.

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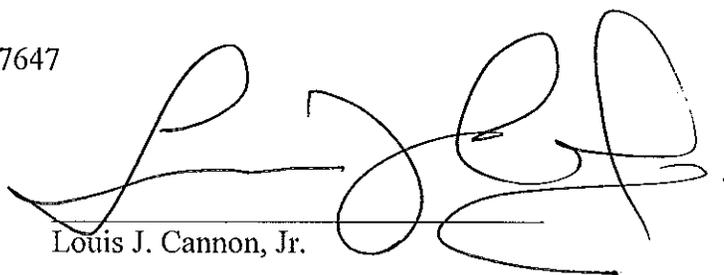
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of November, 2013, a copy of the foregoing Respondent's Answering Brief to the Acting General Counsel's Cross Exceptions was sent by e-mail and/or U.S. Mail, postage prepaid, to:

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