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

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

CONSOLIDATED COMMUNICATIONS, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO ALJ'S DECISION AND PROCEEDINGS

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I. OPENING STATEMENT

The primary issue in this case is whether the Respondent Consolidated Communications, Inc. ("Consolidated" or "the Company"), violated the Act by disciplining four employees, Pat Hudson, Brenda Weaver, Eric Williamson and Michael Maxwell ("the Disciplined Employees") for conduct committed during a strike organized by Charging Party IBEW Local 702 ("the Union"). At the beginning of the hearing, the ALJ opined that "strikes are supposed to be intimidating" towards non-striking employees attempting to work. This, however, is not the law, as the clear Board precedent provides that conduct that would reasonably tend to coerce or intimidate in the exercise of Section 7 rights loses the protection of the Act. *See Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984).

The ALJ applied his erroneous view of permissible strike conduct in finding that Consolidated's discipline of the Disciplined Employees violated the Act. Consistent with the ALJ's ignoring the *Clear Pine Mouldings* standard, and despite recent decisions to the contrary, the ALJ essentially added a violence requirement to the striker misconduct standard. He also focused on how long the misconduct lasted, if the misconduct was reported to the police, and whether the employee who was subject to the misconduct could have escaped earlier. In each instance, the ALJ focused on an obligation he personally created for the employee who was the subject of the harassment, as opposed to focusing on whether the conduct in which the Disciplined Employees engaged was coercive or intimidating.

The ALJ also ignored the well-established burden-shifting standard in striker misconduct cases. Although he "assumes" the Company had an honest belief of striker misconduct, he did not make such a finding and he did not, as required after such finding, put the burden of proof on the General Counsel to show that either the conduct did not occur, or was not sufficiently serious to lose the protection of the Act. Consistent with his failure to apply the proper burden-shifting

standard, the ALJ held that "any ambiguity as to whether" Hudson's conduct "was serious enough to forfeit the protection of the Act should be resolved against Respondent." P. 21.

Throughout his decision, the ALJ makes several findings of bias without any factual support whatsoever regarding Company management and employee witnesses, and one finding of bias regarding Company witness Conley which sets forth a bias witness standard which would essentially deem any management employee from any Company, a biased witness. Consistent with his tendency to disfavor Company witnesses, the ALJ failed to consider that despite the existence of numerous picketers who were potential witnesses, neither the General Counsel nor the Union called a single employee witness to support the Disciplined Employees' self-serving, *post-hoc* accounts.

Finally, the ALJ misconstrued and mischaracterized the record, including, but not limited to, finding that Hudson and Weaver were engaged in protected ambulatory picketing (i.e., following) when the conduct for which they were disciplined took place while they were driving <u>in front</u> of Company employees.

For the reasons set forth in its Exceptions and as set forth below, Consolidated respectfully requests that the Board dismiss the Complaint in its entirety. In the alternative, Consolidated requests that the Board remand the decision to a neutral ALJ in light of the current ALJ's clear bias against any management witnesses.[1]

II. STATEMENT OF CASE

A. <u>The Union's Strike</u>

Consolidated is engaged in the communications services industry (Tr. 1211) and maintains numerous facilities in Illinois. *See* GC-Ex. 18 ¶ 24. Consolidated and the Union did not reach agreement on a new collective bargaining agreement prior to the collective bargaining

[1] Consolidated hereby requests that oral argument be taken in this case.

agreement's expiration, and the parties continued bargaining without an extension of the collective bargaining agreement. GC-Ex. 18 ¶ 2. On December 6, 2012, the Union notified the Company it would commence a strike on the same evening. Tr. 1211; GC-Ex. 18 ¶ 3. The Union began picketing on December 7, and picketing took place at several locations, including the Company's Rutledge facility (Tr. 38-39, 41) at 2116 S. 17th Street, Mattoon, Illinois. GC-Ex. 18 ¶ 24.

During the strike, the Rutledge facility housed the Company's "Command Center," which served as the Company's central point of communication and was the location where the majority of replacement employees were stationed. Tr. 1214-15.

B. <u>The Chaotic Strike-Line Conditions</u>

As testified to by Mattoon Chief of Police Jeffery Branson (who the General Counsel called as a witness), at the time he arrived to the Rutledge strike line on Monday, December 10:

> "I was upset because the road was so congested. . . . And my first impression when I got out there -- and I told you that I was a little upset with the shift commander because it was very chaotic. I thought that it was out of control and that we needed to get a handle on it. And, again, I told the shift manager these people have to get out of the roadway. They just can't stand there. So that was my first observation. My second observation was when we were -- when the vehicles were leaving -- that brought me concern as the police chief and the safety issue, was the fact that -- and I know that they are allowed to do it, but it was so loud, deafening, and they were getting as close to the cars as they possibly can ... Within feet -- a foot, two foot at times, and sometimes they were almost touching it . . . I was afraid and I talked to shift manager about this, what we're going to have happen here is that [someone is] going to drive out, get upset . . . and they are going to hit the gas, and they are going to run somebody over. And I said we've got to get a handle on this because that was concern was public safety."

See Tr. 539, 549-51; *see also* Tr. 540 ("(T)here was what I consider chaos in the street" . . . (a)nd at that point in time I considered it ridiculous.")[2]

[2] Union representative Brad Beisner admitted upon reviewing the strike line video filmed by the security company hired by the Company, Huffmaster Security Crisis Response L.L.C.

In addition, Chief Branson testified that he was upset because some of the Rutledge strikers were engaging in "little Mickey Mouse games," by walking "real slow across the road" in lines of three. Tr. 541. Chief Branson believed that cars were restricted in leaving the facility (Tr. 553-54), as people were "getting too close to cars" and "clearly in the roadway." *See* Tr. 560-63 (Chief Branson testimony as to Huffmaster video [R-Ex. 1]). Indeed, the strike conditions were such that Chief Branson planned to use barricades the following day to keep the strikers out of the road (Tr. 548, 553), and the police department "could have made some arrests that morning." Tr. 575. Based upon Chief Branson's observations, it is not surprising that he noted that some employees that crossed the picket line were very upset and crying. Tr. 543-44.

From the beginning of the day, Disciplined Employee Hudson was clear in her intention that she was going to obstruct traffic coming into and out of the Rutledge facility. Early in the morning (likely between 7 and 8 a.m. per her recollection), she was accidentally hit by a security guard who was escorting a vehicle through the picket line as she was in the street. Tr. 821-22; *see* R-Ex. 1 at 9:09:25. Despite this experience, instructions from the police to picketers not to block the roadway, as well as specific instructions to Hudson from the Union to maintain a safe picket, Hudson continued to intentionally obstruct traffic and put herself in the way of oncoming vehicles. *See* R-Ex. 1 at 10:18:26 (where the Police Chief had to move her back), 11:30:32, GC-Ex. 6 (Union instructions); Tr. 541-42, 766-67, 802-03, 806, 810-11, 825.

C. <u>Huffmaster Meeting And Guidance</u>

On the morning of Sunday, December 9, the Company held a meeting with some of its replacement workers and Command Center employees and representatives from Huffmaster to discuss certain strike procedures. *See* Tr. 486. On the same day subsequent to that meeting,

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("Huffmaster"), that strikers were in and obstructing the driveway at the Rutledge facility. Tr. 144, 149; R-Ex. 1 at 9:25:05, 9:57:52.

Gary Patrem, Senior Director of Control Services, sent an email to Illinois non-bargaining unit employees (including Conley, Redfern, Greider and Rankin) attaching Huffmaster's strike-line guidelines. Tr. 180-81; GC-Ex. 21. In his email, Patrem indicated: "Report any incidents to the Command Center at [phone number]." GC-Ex. 20. This directive is consistent with the responses by the targets of the misconduct. R-Ex. 9; Tr. 473, 872-73, 895-96, 988-90, 1059-60.

D. Employees' Reports Of Striker Misconduct By The Disciplined Employees

During the strike, the Company received written and verbal reports of six specific incidents of strike misconduct relating to the Disciplined Employees. There were three incidents relating to Hudson and Weaver (the Conley/Diggs incident, the Rankin incident and the Greider incident), two incidents relating to Williamson (the Redfern incident and the Williamson incident) and one incident relating to Maxwell (the Flood/Fetchak incident).[3] *See, e.g.*, R-Ex. 9; Tr. 206-208, 283-85, 329, 358, 384-85, 395, 428-29, 431-33, 474-75, 872, 894-95, 902, 992-94, 1024-25, 1069, 1220-23, 1255.

As testified by Ryan Whitlock, Consolidated's Senior Director of Labor Relations who oversaw the Company's response to the strike (Tr. 179, 380), the first step in the Company's plan for investigating and addressing any strike-line misconduct was for anyone involved in an incident to call the Command Center. Tr. 1216. They were then to fill out a Huffmaster incident report and a CCI incident report. *Id.* After the Company, with Huffmaster's assistance, gathered documentation, Whitlock was to review the documentation after the strike and address any misconduct that took place with Steve Shirar, Senior Vice President. Tr. 1216-17. At the conclusion of the strike, the department directors were responsible for investigating and

[3] None of the Disciplined Employees are Union officers, stewards, held any Union position or were on the negotiating team (Tr. 154), and no evidence exists that the Company took any adverse action against a Union leader, negotiating team member, or any of the many striking employees for engaging in the strike.

providing the information to Whitlock. Tr. 1219. As set forth at the hearing, the Company followed this process in addressing the discipline. Tr. 1227-31.

E. **The Disciplined Employees Refused To Respond To The Company's Request For Their Side Of The Story As To Alleged Misconduct**

The strike was concluded on the first full shift of December 12, and the employees returned to work on December 13. Joint Stipulations (GC-Ex. 18) ¶ 4; Tr. 49. Upon reviewing the information in the Company's possession as to the Disciplined Employees' misconduct, including the Huffmaster incident reports, Whitlock and Shirar made the decision to suspend the employees prior to their return to work, and while the Company's investigation was pending. Tr. 1219-22. They also decided that the Company would hold a meeting with each employee and their Union representative to get the employees' "side of the story." *Id.* After consulting with legal counsel, the Company prepared a script for the appropriate Operational head to read during the meeting. Tr. 1223-24. Each of the scripts included instructions to ask each employee to explain their actions. GC-Ex. 12(c) (Maxwell), 13(c) (Williamson), 17 (Hudson), 24 (Weaver).

The Company operations heads opened each investigatory meeting by reading from the prepared script. Tr. 348-49, 351, 1225, 1284-87. Union representative Beisner was present during the meetings and admitted that Maxwell was asked to give his side of the story at this meeting. Tr. 156. Moreover, despite Beisner's claim that the Company did not ask Williamson for his side of the story (Tr. 99-100, 161-62), Williamson admitted being asked to give his side of the story, but that he was "advised not to" say anything. Tr. 725.[4] Also, Beisner's notes from these meetings and testimony indicate that as to Hudson and Weaver:

[4] Unlike Williamson and Maxwell, Weaver and Hudson did not testify that the Company asked them for their side at the investigatory meeting. Tr. 641-42, 796. However, if the meeting was just to suspend the employees, these suspensions could have been administered in writing the night before. In fact, the Company sent the Union a notice the night before notifying it of the meeting. Tr. 49; GC-Ex. 11. In the face of the evidence presented against them, the Union had

With regard to Hudson's investigatory meeting, the Company provided information about the three specific incidents. *See* R-Ex. 12. Specifically, the Company informed the Union and Hudson that she was accused of harassing, intimidating and following Company employees in their Company vehicles and personal vehicles. *Id.* For the Conley/Diggs incident, the Company provided Conley's and Diggs' name, a date and time of "12/10 9:30 am" and a location of "E.Bound on HWY 16 Between Mattoon & Charleston." *Id.* For the Rankin incident, the Company provided Rankin's name and a date and time of "12/10 11:35 am." *Id.* For the Greider incident, the Company provided Greider's name and a date and time of "12/10 10:05 am." *Id.*

With regard to Weaver's investigatory meeting, which immediately followed Hudson's investigatory meeting, the Company told the Union and Weaver that the Company had multiple reports of Weaver engaging in threatening behavior and acting in concert with Hudson on three occasions in a separate vehicle (Weaver's vehicle). R-Ex. 12. Beisner's notes indicate that the Union was once again told that Conley and Diggs were involved in an incident at 9:30 am, Greider was involved in an incident at 10:05, and Rankin was involved in an incident at 11:35. *Id.* Beisner's notes also refer to the notes from Hudson's investigatory meeting, which as previously noted provide more specific details, i.e. Conley/Diggs incident occurring on 12/10 9:30 am" and a location of "E.Bound on HWY 16 Between Mattoon & Charleston." *Id.* The Company further informed the Union and Weaver that Consolidated employee Jonell Rich and two others witnessed certain events. Tr. 92, 161.

Despite being given detailed information and being asked to provide their side of the story, Hudson, Weaver and Williamson refused to do so during their meetings. Weaver "smirked" during her meeting, Hudson said nothing and "shook her head" during her meeting,

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no defense for Weaver and merely asked for Hudson if the Company had ever heard of "ambulatory picketing." GC-Ex. 23; R-Ex. 12; Tr. 1284-85.

and Williamson said he "was advised not to respond" and "chose not to say anything" during his meeting. Tr. 725, 1284-87; GC-Ex. 23; *see also* Tr. 348-49. Regardless of the advice or why Hudson, Weaver and Williamson refused to give their side of the story, there is no question they and the Union did not provide a side of the story. Tr. 156, 158-59, 161-62, 348-51, 725, 1227-28, 1284-87; R-Ex. 12, GC-Ex. 23. At the conclusion of the meetings, the Company suspended the employees pending investigation of the allegations. *See* GC-Ex. 23; R-Ex. 12.

F. Despite The Disciplined Employees' Refusal To Provide A Response To The Incident Reports And Defenses To Their Conduct, The Company Took Additional Steps To Confirm Its Investigation Prior To Issuing Discipline To The Disciplined Employees

Significantly, Hudson, Weaver and Williamson did not respond to the allegations, give their version of the facts, or present a defense between the suspension meetings and the discipline meetings, and essentially for the next eight months until the time of the hearing before the ALJ. The first time that Whitlock (the Company's interface with the Union) learned the positions of Hudson and Weaver as to any of the incidents was at their unemployment insurance hearings, which took place on March 15, 2013, more than three months following the incidents' occurrence. Tr. 1242-44. The first time Whitlock learned of Williamson's explanation of his conduct was after the commencement of the hearing in August. Tr. 1243.

As noted by Whitlock, after he and Shirar (Tr. 394, 1231), were told that Hudson, Weaver and Williamson failed to provide a defense (Tr. 1226-29), "we really didn't have a lot to follow up on" to counter the incident reports and the discussions with witnesses. Tr. 1230. Nevertheless, before making a final decision regarding Hudson and Weaver, the Company took additional steps, including following up on the Union's comment referencing ambulatory picketing as to the Conley/Diggs incident by seeking "guidance from legal counsel." *Id.*

The Company continued to hear nothing from the Union, Hudson, Weaver or Williamson as to their explanations for the conduct. *See* Tr. 1242-44. On December 17, the Company met with Hudson, Weaver, Maxwell and their Union representatives and administered discipline, terminating Hudson and Weaver for engaging in conduct that created a public safety risk and confirming its suspension of Maxwell for two days for impeding the progress of replacement workers and threatening them. Tr. 80, 104, 1231, 1234-36; GC-Ex. 12(a), GC-Ex. 14, GC-Ex. 15. On December 18, the Company met with Williamson and his Union representatives and confirmed its suspension for two days for engaging in coercive and intimidating behavior for the purpose of intimidating employees from coming to work. Tr. 102, 1232; GC-Ex. 13(a).

G. The Testimony As To The Disciplined Employees' Conduct

At the hearing held from August 19-23 and September 17, 2013, the Company presented eight witnesses, including five non-management employees, that testified to the specific incidents at issue. Despite the existence of other potential witnesses who allegedly would support their stories, the General Counsel and Union presented no witnesses other than the Disciplined Employees in support of their claims that the incidents did not occur.

As to each incident, the following testimony was presented:

Hudson's And Weaver's Blockading Of Conley And Diggs On Public Highway 16

As admitted by Hudson, the Conley/Diggs incident occurred on a public highway, Route (Highway) 16, approximately three miles from the Rutledge facility and the corporate office they allegedly intended to picket. Tr. 769-76. The incident occurred while they were driving in the opposite direction from that office. *Id.* Union representative Beisner confirmed that the incident did not occur near a picket line. Tr. 153-54.

As set forth in Conley's testimony, as he was driving employee Larry Diggs and himself to a commercial site in a Company truck, he heard honking and observed that a car driven by

Weaver had proceeded into the left lane beside him. Tr. 861-64.[5] Weaver then passed Conley and moved into the right lane in front of him. Tr. 864. Next, Hudson came into the left lane, passed Conley, "proceeded parallel" to Weaver, and they both immediately slowed down. *Id.* Hudson and Weaver continued to drive parallel to each other for some time, and although Conley went into the left lane and attempted to pass them, Hudson did not move from the left lane, and he returned to the right lane behind Weaver. Tr. 865-66. Conley testified that at this time: "It became obvious to me when [Hudson] passed me, the hand motion started, both cars made a very obvious slow down in traffic. That's when I started feeling trapped. When I came into the left lane to pass and was not allowed to at that slower speed, I was feeling very harassed at that point. It was obvious what was happening." Tr. 909-10.

At that point, cars began coming up behind in the flow of traffic, and Hudson pulled over into the right-hand lane to allow cars to pass. Tr. 866. As other cars behind began to pass, Conley also proceeded into the left lane to pass, but as he got up to Weaver, Hudson "cut [him] off and slowed down again," forcing Conley to slow down and get back into the right lane behind Weaver, who also had slowed down. Tr. 866-67. When asked if he believed that Hudson intentionally cut him off, Conley responded that he "absolutely" believed it was intentional. Tr. 866; *see also* Conley cross-examination testimony, Tr. 914 ("I was in the left lane. [Hudson]

[5] Weaver claimed she pulled beside Conley prior to passing him to ascertain the identity of the driver to determine if he had the credentials, such as a CDL, to drive that truck. Tr. 628. However, the truck Conley drove was a simple standard pick-up, obviously not requiring a commercial driver's license, and Weaver admitted on cross-examination that she was not aware of any such requirement for driving the pick-up truck Conley drove. Tr. 656-57, 862. Moreover, when asked how long she drove alongside Conley, Weaver claimed that it lasted the time it takes to snap her fingers twice. Tr. 696-97. But, when questioned how she could have driven beside Conley for such a short period of time consistent with her testimony of having made eye contact with and pulling ahead of him all the while going the speed limit, Weaver admitted that it could not have been this short of a period of time. *Id.* Weaver's claim of driving beside Conley for such a short period of time is even more implausible given her testimony that three or four cars had come up behind her to pass during the time in which she was beside to Conley. Tr. 657

was in the right lane. [Hudson] swerved back in front of me in the left lane."), 915 ("I knew what [Hudson] was doing . . . [Hudson] was trying to block me in on the pass.").[6]

In an attempt to get away from Hudson and Weaver, Conley turned off to the right onto 1200 East, and proceeded by an indirect route to his destination, rather than remaining on Highway 16. Tr. 867-68; *see also* JT-Ex. 9; R-Ex. 6; Tr. 958. Conley used this indirect route because he felt "very harassed" and was "trying to avoid conflict." *See* Tr. 868-70.

Diggs, an employee from Texas, corroborated Conley's account by testifying that both Weaver and Hudson "slowed down at a fairly fast pace" and drove parallel to each other "to block us from going at the normal speed that we were trying to travel at." *See* Tr. 954-58. If Conley had not been paying attention, Diggs believes an accident would have occurred. Tr. 962. Weaver's and Hudson's testimony Diggs's testimony, as each admitted to being a mere car length ahead of Conley while driving approximately 55 miles per hour. Tr. 615, 657-59, 662, 851; *see also* Tr. 583-84.[7]

Hudson and Weaver attempted to deny that they engaged in dangerous conduct not related to striker activity by claiming that their encounter with Conley and Diggs was ambulatory picketing. Tr. 592-93, 610-11, 656, 767, 784, 828, 833-34. However, Hudson and Weaver admit they were both <u>in front</u> of Conley and Diggs on Highway 16 (Tr. 614-15, 657-58, 661, 778-780, 851), and the ALJ found that they were in front of Conley and Diggs. P. 19. Indeed,

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[6] While Hudson claimed on multiple occasions that she pulled in between Weaver and Conley prior to Conley turning off (Tr. 780, 782, 833, 838), Weaver did <u>not</u> testify that Hudson ever pulled between them, and in fact, her testimony indicates that Hudson was either beside Conley or just next to Weaver in the left lane at the time Conley pulled off. Tr. 616, 659-61.

[7] Although Diggs was not aware of the speed limit given that he had been to Mattoon twice in his life, he testified that Hudson and Weaver "were traveling much slower than everyone else was traveling prior to them pulling in front of us." Tr. 954, 965.

the ALJ discredited Hudson's and Weaver's claims that Conley never was in the left lane attempting to pass Hudson and that Hudson did not block him. Tr. 617, 850.

Despite their claim that they were engaged in ambulatory picketing, when Conley turned off Highway 16, neither Hudson, nor Weaver, followed Conley to the corporate jobsite. Tr. 663, 668, 78-81, 839. Purportedly, once Conley pulled off, both Hudson (in her car) and Weaver (in her car), without communication between them, simultaneously decided their "ambulatory" picketing was over, and returned back the way they came. Tr. 663, 765, 774, 834-35, 839.

Hudson's and Weaver's Blocking And Swerving Of Rankin While Leaving Picket Line

Rankin testified that as he was leaving the Rutledge premises in his car on the morning of December 10, he approached the strike line and waited for the Huffmaster security guard. Tr. 454-56. Rankin saw Hudson's car on the grass, which was stationary, but went into motion as Rankin signaled to the guard. Tr. 465-66; *see also* Tr. 456. As Rankin left the facility and was attempting to drive down the road, Hudson's car cut in front of him, and she "stop[ped] the brakes, move[d], stop[ped] the brakes" so that he was continually moving at a slow speed controlled by Hudson. Tr. 466. Shortly thereafter, a four-wheel drive truck going southbound (in the opposite direction of Hudson and Rankin) approached Rankin. Tr. 466-67; *see also Tr.* 622, 790, 842. After getting past the truck, Rankin, hoping to "get out of this situation," considered taking the first left into Pilson's auto dealership but could not do so because a car was coming out of its parking lot. Tr. 467. At that point, Rankin "tried to speed up and go around" Hudson, but she swerved over into the left lane. Tr. 468. Rankin returned to his lane and eventually passed her after putting his truck in four-wheel drive and "[taking] to the ditch to get around her," but not without Hudson again attempting to block him from passing by swerving

into the left-hand lane. Tr. 468, 470-71.[8] During this time, Rankin felt vulnerable and threatened. Tr. 474-75; GC-Ex. 13.

While Hudson admitted to driving in front of Rankin outside of the Rutledge facility (also confirmed by the Huffmaster video), Hudson testified that she did not swerve and did not try to prevent Rankin from passing, instead claiming that Rankin initiated the incident by pulling out behind her. Tr. 789, 849; R-Ex. 1 at 11:36:16.[9] Weaver testified that she was a passenger in Hudson's car, and her testimony indicated that she did nothing to prevent either the stop and go driving, or the swerving in front of Rankin to avoid him from passing Hudson. Tr. 620.

Three independent, non-management witnesses, including Rich (who Hudson is friends with and attended her wedding), corroborated Rankin's account that Hudson impeded his progress and swerved to keep him from passing while viewing the incident from the Rutledge building. Tr. 137, 1022, 1027-28 1114, 1116-18, 1122-23, 1125, 1171, 1173-74. Rich testified that Hudson was in front of Rankin as he pulled out of the Rutledge facility going north on 17th Street. Tr. 1122-23, 1125. Hudson and Rankin drove very slowly, "brakes on, stopping and going." Tr. 1122-24; *see also* Tr. 1165 ("My recollection is that Pat was driving slow to keep Kurt from going north on 17th Street. That's my opinion."). When Rankin attempted to get around Hudson, he "swerved to the left and kind of got his tires off down in the grass." Tr. 1123-24. At the same time, Hudson "pull[ed] to the left to keep – I assume to keep him from going around her." *Id.* Rich also testified that she saw Hudson come to a complete stop during the time that she was "stopping and going" in front of Rankin and that Hudson completely stopped at the point that Rankin was trying to get around her. Tr. 1134.

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[8] In response to the ALJ's inquiry, Rankin testified that both entrances to Pilson's car dealership were blocked and therefore were not viable exits. Tr. 481-82; JT-Ex. 7(a).
[9] Hudson admitted that she could have pulled over to let Rankin drive by. Tr. 846-47.

Bernice Dasenbrock, who saw the incident from her desk on the second floor, confirmed that Hudson swerved in front of Rankin. Tr. 1174-75; JT-Ex. 7(d).[10] Dasenbrock further testified that Hudson stopped in the roadway and that she swerved in front of him in an attempt to stop him from passing. Tr. 1179-81, 1183, 1195; *see* also JT-Ex. 7(d). Hudson's actions were egregious enough for Dasenbrock to exclaim, "what the hell is she doing" in the presence of co-workers while viewing the incident. Tr. 1183-84. Indeed, Dasenbrock characterized Hudson's actions as a "dare game" – "It's just like if somebody wants to just tease you a little bit and they're like, okay, I dare you, and I dare you to move." Tr. 1198.

Tara Walters, the third non-management employee who saw the incident from the building, confirms Rankin's account of the incident. According to her testimony, Hudson was driving "very, very slow" in front of Rankin. Tr. 1027-28; *see also* Tr. 1032. When Rankin tried to get around Hudson, she "pulled over in front of him so he couldn't pass." Tr. 1028.[11]

Other than her and Weaver's self-serving testimony, Hudson failed to produce any evidence contradicting the accounts of Rankin, Rich, Walters and Dasenbrock. The General Counsel did *not* call Janece Neunaber, a fellow striker who both Hudson and Weaver claimed at the hearing was a passenger in Hudson's vehicle along with Weaver during the incident. Tr. 620, 786-89.[12] Although the General Counsel raised the possibility that people were in front of Hudson and that could have been her reason for going slow and stopping, witnesses to the

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[10] In view of the fact that every time a vehicle attempted to exit the Rutledge facility, the picket line's volume would significantly increase (*see* R-Ex. 1), it is not surprising that some people from the second floor would look out "to see what was going on."

[11] Although the record is unclear as to how long the Rankin incident took, Rankin testified that the incident took five to eight minutes from the time that he approached the strike line until he "got free" and "felt safe" after passing Hudson. Tr. 472-73, 478. Hudson testified that the incident lasted a "few minutes." Tr. 793. In either case, it was long enough to catch the attention of three unbiased witnesses.

[12] Although Neunaber appears as "new neighbor" in this portion of the testimony, it is spelled correctly in Weaver's testimony as well as later in Hudson's testimony. Tr. 620, 670-71, 839.

incident testified that they saw no one in front of Hudson. Tr. 484, 1166, 1181-83. Even Hudson testified that there was no one in front of her. Tr. 842-43.

Hudson's And Weaver's Blocking And Trapping Of Greider As She Crossed The Picket Line

According to Greider's testimony, as she pulled out of the Rutledge driveway onto 17th Street on the morning of December 10 to go to a personal appointment, Hudson pulled in front of her and Weaver pulled in behind her; they then stopped, causing her to be blocked in. Tr. 1053-55.[13] During this time, Greider believes that Hudson "stopped and started and stopped and started" about five to six times. Tr. 1056-57, 1079. Eventually, Greider was able to pull into Pilson's parking lot (on the other side of the street and north of the Rutledge facility (*see* JT-Ex. 7)) to escape the harassing blockade. Tr. 1055; *see also* Tr. 1092 (ALJ's remark that "(i)t's pretty clear her feeling is that it was done to harass her).[14]

Hudson and Weaver claimed to not remember the incident (Tr. 601-02, 768), although they both testified at that time that they had a pre-approved plan to meet at a location with which they were both familiar. Tr. 608-09, 650, 769-70, 829. Moreover, the Company told Hudson and Weaver on December 13 that they blocked Greider on December 10 at 10:05 a.m. Tr. 88, 92, 155, 349-350, 818-19, 1284-86; R-Ex. 12; GC-Ex. 23. They were also shown a video several months before their testimony showing that Hudson drove very slowly and applied her breaks in front of Greider, while Weaver drove behind Greider, who was clearly identified by her license plate, "SDG." Tr. 601-03, 768, 1056-57; R-Ex. 1 at 10:03:41.[15]

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[13] As with Rankin's testimony, Greider testified that Hudson was "waiting" and then pulled out ahead of her as she exited the parking lot. Tr. 1055-57.

[14] The uncontroverted evidence is that Greider had never had any unpleasant interaction with Hudson prior to the incident. Tr. 1085-86.

[15] Again, as with the Rankin incident, the General Counsel raised the specter that someone may have been in front of Hudson. Greider and Rich testified, however, that they did not see

Additionally, Hudson's culpability is confirmed by Hudson's friend Rich, who viewed the incident from the second floor of the Rutledge building. Tr. 1116-18. Rich confirmed Greider's testimony that as she was pulling up to the exit, Hudson pulled in front of her and drove very slow (i.e. "barely moving" in front of Greider). Tr. 1118-20. Within minutes of viewing the incident, Rich discussed the issue with co-workers and sent a text to Greider saying, "I just saw what Pat Hudson did to you. I can't believe she did that." Tr. 1121-22, 1167; *see also* Tr. 1059 (Greider testimony).[16]

Williamson's Striking Of Redfern's Car Mirror As She Crossed The Picket Line

Redfern, a non-supervisory employee (Tr. 137, 980), testified that she was driving through the picket line about one to two miles per hour as she turned out of the Rutledge facility on the evening of December 10. Tr. 981-83, 986. Redfern heard a loud "smack," despite having the radio turned up "loud enough where [she] couldn't be distracted by the picketers." Tr. 987-88. Redfern stopped the car and engaged Williamson, who she believed had knocked in her mirror.[17] Tr. 987, 1007, 1015-16. Redfern was told to keep driving by a Huffmaster security guard, and she did so. Tr. 988. When she went to a gas station following the incident, she noticed that the mirror was still folded in. Tr. 990-91. Redfern testified her passenger-side mirror had never folded in before, and after conducting a pressure test on the mirror in preparation for the hearing, she was certain that the mirror would only fold in with application of

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anything in front of Hudson during the incident (Tr. 1091, 1120-21, 1166), and the General Counsel produced any evidence to support this unsupported *post-hoc* justification.

[16] Dasenbrock testified she saw Greider pull through Pilson's parking lot but did not see Greider leave the Rutledge facility or anything prior to her pulling through the parking lot. Tr. 1184.

[17] Redfern's reaction demonstrates her steadfast belief that Williamson intentionally hit her mirror, as it is highly unlikely that Redfern otherwise would engage Williamson, who by his own description is 6 foot 2 in shoes and weighs 245 pounds. Tr. 719, 987, 1007, 1015-16.

considerable force, and not fold in if it came into contact with a whistle. Tr. 990-92, 1013. The incident caused Redfern to be "very scared." Tr. 993-94.

Williamson admitted that as Redfern was pulling out, "I made sure she seen my sign and I tried to yell 'scab.'" Tr. 717. Williamson claimed that Redfern's passenger-side mirror "grazed" the whistle hanging on his chest (a standard coach's whistle used for basketball games), causing the mirror to pop in. Tr. 717, 740-31 740-42. Williamson initially claimed that Redfern's vehicle was not in the roadway/driveway when she "hit him." Tr. 732. However, on cross-examination, Williamson admitted that upon review of the Huffmaster video, Redfern's vehicle was squarely in the driveway as it exited and followed the same pattern and path as the cars before it. Tr. 737-40; *see also* R-Ex. 1 at 5:08:07; Tr. 741 (ALJ's remark that video does not show any evidence of Redfern's vehicle going outside of driveway). Moreover, while Williamson claimed on direct-examination that Redfern's mirror "flexed in and flexed out," on cross-examination Williamson stated that he is not sure if it popped back into place. Tr. 731.[18]

Williamson's own evidence indicates that he intentionally approached Redfern's vehicle as she pulled out of the parking lot. *See* Tr. 717, 748-50; R-Ex. 5. As he approached the car, either his hand, body or whistle hit the mirror and knocked it in. Tr. 717, 719, 730-31, 987.

Williamson getting too close to a vehicle was consistent with his actions all day. *See, e.g.*, R-Ex. 1 at 9:14:17, 10:01:17, 10:06:27, 1044:21, 11:15:30, 2:20:48, 2:56:25. Chief Branson testified that he observed Williamson "getting as close as he possibly could" to vehicles, and that Williamson only was begrudgingly compliant with the Chief's request to "back off." Tr. 565-66.

Williamson's Obscene Gesture At Walters After She Crossed The Picket Line

[18] As Redfern testified, the mirror did not pop back, and Jenny Belleau, an employee who drove behind Redfern during the incident, confirmed when she met Redfern at a gas station following the incident that the mirror was still folded in all the way. Tr. 989-991, 1020-21.

Walters testified that on the morning of December 11, as she was alone in the Rutledge parking lot having just crossed the picket line, Williamson yelled "scab" at her and grabbed and lifted up his crotch "as a mean, hateful gesture." Tr. 1023-24, 1047-48. Williamson looked towards her and grabbed his crotch. Tr. 1023-24. While Williamson admitted to seeing Walters in the Rutledge parking lot that morning, he initially claimed on direct-examination that all he did was yell "scab" at her and that he "did not do anything more than that." Tr. 712-13; *see also* Tr. 714. Later, Williamson back-tracked by not ruling out that he may have "adjusted himself" (Tr. 715-16), and he admitted that Walters was "in that direction." Tr. 714-15.

Maxwell's Obstruction Of Replacement Workers Flood and Fetchak

Frank Fetchak, a non-supervisory employee who lives and works in Pennsylvania (Tr. 926-27) testified that on December 8, the vehicle in which he was a passenger and driven by Leon Flood, another non-supervisory employee,[19] was impeded by Maxwell as they attempted to leave the Company's Taylorville Garage facility. As they were going to work and attempting to exit the Company's Taylorville Garage driveway by turning onto a public road, their vehicle was obstructed by Maxwell, who was part of a picket line. Tr. 929-33, 952. As the strikers yelled and obstructed Flood's view as he attempted to turn, Maxwell walked abnormally slowly "between the headlights" and intentionally placed a part of his arm on the vehicle's front hood. Tr. 932-33, 952-53.[20] Flood, the driver, was forced to stop the vehicle and slowly inch forward a couple of inches and stop again (on multiple occasions) until Maxwell left the front of the van.

[19] No competent evidence supports the General Counsel's assertion that Flood was a supervisor or agent of Consolidated under the Act. GC-Ex. 1(g) at ¶ 4. Moreover, Consolidated denied this allegation, and although it stipulated to the supervisory status and/or agency status of 14 managers, it did not stipulate to Flood being a supervisor. GC-Ex. 1(i) at ¶ 4, Joint Stipulations (GC-Ex. 18) at ¶ 23.

[20] During the hearing, Fetchak could not recall what part of his arm that Maxwell placed on the vehicle's hood. Tr. 942. Regardless, Fetchak testified that he believed Maxwell made intentional contact with the vehicle in an effort to impede its progress. Tr. 953.

See Tr. 931, 938-39, 953. After Maxwell left the front of the van, he went over to the vehicle's driver side, and while standing near the driver's side mirror, gave Flood the middle finger and yelled at Flood, "Fuck you, Scab." Tr. 934. After Flood exited the driveway (in an appropriate manner according to Fetchak) he drove down the road about half a mile and pulled the vehicle off the road in order to calm down and to collect their thoughts. Tr. 934. Fetchak's testimony materially corroborates Flood's written account via the Huffmaster Incident Report, which Fetchak signed and testified that he agreed to, as well as Flood's written email account to Company manager Gary Patrem, which Fetchak was copied on. Tr. 936; R-Ex. 8, 11.

Maxwell admitted that he walked in front of another Company vehicle that morning and that he was walking back and forth in the driveway when Flood and Fetchak approached in the van. Tr. 504, 511-12. Maxwell claimed that Flood's van "took off like a bat out of hell" out of the Company's garage and then hit him twice. Tr. 499-501. Maxwell admitted to not reporting the incident to the police or going to the doctor, and he did not testify to even telling Flood and Fetchak that he hit him; instead, he stayed on the strike line for another six to seven hours after allegedly being hit twice. Tr. 501, 505, 514, 519-21.

At least six people witnessed the incident: 1) Maxwell – a bargaining unit and suspended employee who testified and claimed he got hit by the truck crossing the Taylorville picket line; 2) Flood, the non-supervisor driver; 3) Fetchak, the non-supervisor passenger; 4) Warren Evans, a Union officer who was at the Taylorville picket line at the time of the incident[21]; 5) Anthony Adkins, a fellow picketer that Maxwell claimed also was hit by Flood at the same time; 6) Derrick Conley, another picketer picketing near Maxwell; and 7) other bargaining unit employees (Brandon Finney, Nick Evans and Brad Rickett) who were on the picket line that

[21] Indeed, Evans participated in Maxwell's disciplinary decisions on behalf of Maxwell and the Union. Tr. 74, 82; R-Ex. 8, 11, 12, GC-Ex. 23.

morning. Tr. 495-96, 499-500, 502-03, 511, 515-17. The General Counsel, however, failed to call a single witness other than Maxwell.

III. QUESTIONS INVOLVED

The primary legal questions implicated by these exceptions are, based upon the errors enunciated in Consolidated's exceptions and as set forth in the legal argument section below:

1) Did the ALJ err in finding that the Company violated the Act by discharging Pat Hudson? (Exceptions 1-17, 19-25, 28-29, 31, 33-36, 38-78, 81-86, 88-116, 118-134, 136, 169-176.)

2) Did the ALJ err in finding that the Company violated the Act by discharging Brenda Weaver? (Exceptions 1-17, 19-25, 28-29, 31-33, 35-36, 38-80, 82-85, 87-90, 92-136, 169-176.)

3) Did the ALJ err in finding that the Company violated the Act by suspending Eric Williamson for two days? (Exceptions 1-5, 7, 9, 11, 13-21, 27, 31, 35-36, 154-176.)

4) Did the ALJ err in finding that the Company violated the Act by suspending Michael Maxwell for two days? (Exceptions 1-5, 7, 9, 13-14, 21, 26, 31, 35-37, 137-153, 172, 175.)

IV. LEGAL ARGUMENT

A. <u>The ALJ Failed To Properly Apply The Established Striker Misconduct Standard</u>

In striker misconduct cases, although the burden of going forward with evidence shifts, the General Counsel has the overall burden of proving discrimination. *Avery Heights*, 343 NLRB 1301, 1302 (2004). Initially, the General Counsel must show that the employee in question was a striker and the employer took action against the employee for conduct related to the strike. *Id.* If the General Counsel makes this showing, the burden shifts to the employer to show that it honestly believed that the discharged employees engaged in strike misconduct of a serious nature. *Universal Truss*, 348 NLRB 733, 734 (2006); *Avery Heights* 343 NLRB at

1302.[22] If the employer proves an "honest belief," the burden shifts back to the General Counsel to establish that the employee did not in fact engage in the alleged misconduct or that the conduct was not serious enough for the employee to forfeit protection of the Act. *Universal Truss*, 348 NLRB at 734; *Avery Heights* 343 NLRB at 1302 (*citing Detroit Newspapers*, 340 NLRB at 1024; *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999)). As to the latter, "(t)he ultimate issue is whether the conduct in question would reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights, including the right to refrain from striking." *Universal Truss*, 348 NLRB at 735 (*citing Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), *enfd.*, 765 F.2d 148 (9th Cir. 1985), *cert. denied* 474 U.S. 1105 (1986)).

1. The ALJ Erred In Analyzing The Conduct of Weaver And Hudson In Blockading Conley And Diggs On Highway 16 As Striker-Related Conduct

Hudson and Weaver's conduct directed towards Conley and Diggs took place on Highway 16, miles from the nearest picket line. Tr. 153-14, 769-76. Conley and Diggs were going to a worksite. *See* Tr. 863-67, 954-58. Conley was driving when Weaver approached them in the passing lane. Tr. 863-64. She drove alongside Conley, honked her horn, and moved in front of Conley in the right lane. Tr. 864-65. Hudson then approached Conley in her vehicle and paralleled Weaver, with both vehicles slowing. Tr. 865. Conley moved to the left-hand lane, behind Hudson, in an attempt to pass. Tr. 865-66. Hudson would not move over to let Conley pass, and as Conley moved back into the right lane behind Weaver, traffic began to pile up behind them. Tr. 866. Hudson pulled to the right-lane to allow the backed up traffic to proceed. *Id.* As traffic proceeded around Conley in the left-hand lane, Conley attempted to pass with that group. *Id.* As Conley was attempting to pass Weaver, Hudson cut in front of Conley in order to keep from passing. *Id.* Feeling harassed, Conley turned off of the main road and

[22] As the Charging Party conceded it its post-hearing brief, "(a)n employer's honest belief does not require it to prove the employee engaged in misconduct." CP Brief at P. 27.

proceeded to the jobsite by an alternative route. Tr. 867-68. Hudson and Weaver were terminated for engaging in harassing conduct towards Conley and Diggs that created a safety risk for employees and the public. Tr. 1231.

If it is established that this conduct is not related to strike activity, the striker misconduct analysis is inapplicable, and the NLRB and the ALJ have no jurisdiction to review the action further absent a showing of unlawful motivation.[23] *See, e.g., Neptco, Inc.*, 346 NLRB 18, 21 (2005) ("Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws.") (*quoting Midwest Regional Joint Board v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977)); *Yuker Constr.*, 335 NLRB 1072, 1073 (2001) (upholding termination of employee even where employer acted hastily on mistaken belief where conduct not protected) (*citing Manimark Corp. v. NLRB*, 7 F.3d 547, 552 (6th Cir. 1993) (employer may discharge employee for any reason, whether or not it is just, as long as it is not for protected activity).

The ALJ erred in finding that the conduct of Hudson and Weaver as to the Conley/Diggs incident was strike-related, and in analyzing the Company's disciplinary action under the striker misconduct standard. P. 19. Here, it is uncontested the Conley/Diggs incident occurred approximately three miles from the Rutledge facility and the corporate office they allegedly intended to picket. Tr. 769-76. Union representative Beisner confirmed that the Conley/Diggs incident did not occur near a picket line. Tr. 153-54.

[23] While the Complaint asserts that Consolidated disciplined the employees because they engaged in the strike, *i.e.*, because of anti-union animus, the General Counsel did not adduce any evidence supporting the allegation. Indeed, the disciplined employees are not Union officers or stewards, held any position with the Union or were on the negotiating team (Tr. 154) and no evidence exists that the Company took any adverse action against a Union leader, negotiating team member, or any of the many striking employees for simply engaging in the strike.

The ALJ, however, found that Hudson and Weaver were engaged in ambulatory picketing, and therefore, engaged in strike activity. P. 18-19. The ALJ based this finding on Hudson's and Weaver's testimony that they followed Conley in order to determine whether he was going to perform bargaining unit work at a commercial site so that the Union could decide whether to picket that worksite (i.e., ambulatory picketing). P. 19.[24] The ALJ made this finding despite Hudson and Weaver both admitting, and the ALJ's own finding, that the conduct at issue occurred while they were in front of Conley and Diggs on Highway 16. P. 9, 10, 19; Tr. 614-15, 657-58, 661, 778-780, 851.

The ALJ's conclusion is illogical, ignores the record and is contrary to the law. Hudson's and Weaver's conduct only could constitute protected ambulatory picketing if they were following Conley as he was going to a corporate location. *See, e.g., Nations Rent, Inc.*, 342 NLRB 179, 188 (2004) ("Ambulatory picketing was also conducted by two full-time staff organizers who *followed* Respondent's trucks from the facility to jobsites.") (emphasis added). Indeed, when Conley turned off Highway 16, neither Hudson nor Weaver followed Conley to the corporate site. Tr. 663, 839. Purportedly, once Conley pulled off, both Hudson (in her car) and Weaver (in her car), without communication between them, simultaneously decided their "ambulatory picketing" was over, and returned back the way they came without ever determining to which jobsite he was going. Tr. 663, 765, 774, 834-35, 839. The only logical rational explanation for their conduct is that they did not intend to follow Conley to a job site and were not engaged in ambulatory picketing. Rather, Hudson and Weaver sought to harass and intimidate Conley and Diggs by blocking them in, and once Conley took an alternative route, the mission was successful, and they returned to the corporate picket line. *See* Tr. 663, 839.

[24] In so finding, the ALJ noted the obvious- it was "peculiar that Hudson and Weaver would get ahead of Conley if they were following him to a worksite." P. 19.

Consolidated excepts to the ALJ's conclusion that "(w)hile Conley may have been intimidated by the fact that strikers were following him to his worksite, they had a protected right to do so." P. 20. Whether they had a protected right to peacefully ambulatory picket Conley and Diggs by following them is completely irrelevant under the circumstances. It is agreed by all parties that Hudson and Weaver were in front of Conley and Diggs. Tr. 614-15, 657-58, 661, 778-780, 851, 863-68. This is unprotected activity, and the ALJ found that Hudson prevented Conley from passing her. P. 12. Further, the record is clear that Hudson and Weaver were terminated upon the Company's receipt of the report of their conduct while driving in front of Conley and Diggs. Tr. 329, 358, 431, 872, 1220-21, 1255; R-Ex. 7; R-Ex. 9(a)–(d). Accordingly, the conduct for which they were terminated is not protected strike-activity.[25]

The ALJ attempted to justify his conclusion that Hudson's and Weaver's conduct was strike-related by asserting that "they were keeping track of [Conley] in their rear view mirrors." P. 19. Obviously, the method of following someone by being in front of them is fraught with problems, including that they could not effectively carry out ambulatory picketing if in fact Conley turned off the road (as he did). Indeed, both Weaver and Hudson testified that they were unable to follow Conley once he turned off the road because they were in front of him. Tr. 668, 780-81. Moreover, the ALJ was factually incorrect in that Hudson and Weaver were not actually keeping track of where Conley was going, as demonstrated by their divergent testimony as to where Conley turned off, which as demonstrated by Google Maps (which the ALJ took judicial

[25] Indeed, the record lacks any reasonable explanation for how Hudson and Weaver passing and driving in front of Conley is "strike-related." As previously noted, Weaver claimed that motivation for pulling beside Conley and looking at him was to ascertain the identity of the driver in order to determine if he had the credentials, such as a CDL, to drive that truck. Tr. 628. But, Weaver admitted that the truck Conley drove was a simple standard pick-up, obviously not requiring a commercial driver's license (despite the parties' agreement that Conley drove a truck, the ALJ erred in referring to it on P. 8 of his decision as a "van". *See* Tr. 656-57, 862

notice of), is a full mile apart. *See* Tr. 668, 780-81; *see also* JT-Ex. 9(b); GC-Ex. 10(c); R-Ex. 6.[26] Most importantly, even if they were "keeping track," this does not excuse their conduct in blockading Conley or transform it into "strike-related" conduct.

Decisions cited by the ALJ purportedly supporting his finding that this conduct was strike-related (p. 20-21) are inapposite because the allegations in these cases relate to the *following* of non-strikers, which is not the conduct for which Hudson and Weaver were terminated. *See Otsego Ski-Club*, 217 NLRB 408, 413 (1975) ("Prusakiewicz and Slesinski followed in Slesinski's car, honking the horn."); *Consolidated Supply Co., Inc.*, 192 NLRB 982, 989 (1971) ("There were some incidents in which Kirk is claimed . . . to have threatened their safety by following the trucks in a dangerous manner.")[27]; *Gibraltar Sprocket Co.*, 241 NLRB 501, 509 (1979) ("LaVere went with VanDenBerghe in the car that followed Burns."); *Federal Prescription Serv., Inc.*, 203 NLRB 975, 976 n.4 (1973) ("The Administrative Law Judge found that the car-following incidents were not of such an outrageous nature that they render the three employees unfit for further employment by the Respondent.").

Because the conduct of Hudson and Weaver was not strike-related, and the General Counsel adduced no evidence to satisfy its burden of demonstrating that the Company terminated Hudson and Weaver on the basis of anti-union animus, the ALJ erred by not upholding the terminations of Hudson and Weaver solely on the basis of their unprotected actions against

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[26] The ALJ supported his conclusion that Weaver and Hudson engaged in strike-related activity as to Conley and Diggs by finding that the Company asked Conley to file a report with Huffmaster instead of calling the police. P. 19. Consolidated excepts, as nothing requires the Company to report an incident of misconduct by one employee directed at another to the police, and here the Company acted consistent with its general plan of having striker misconduct reported through the Company-provided channels. *See* GC-Ex. 20; Tr. 180-81, 1216.

[27] In *Consolidated Supply*, an allegation was made that the single striker at issue drove slowly in front of a company truck. That incident took place on a hotel's private road, and the ALJ found the alleged blocking to be "momentary," 192 NLRB at 988-89, which is obviously distinguishable from the incident here that took place on a public highway for multiple miles.

Conley and Diggs. *See, e.g., Neptco, Inc.*, 346 NLRB at 21; *Yuker Construction*, 335 NLRB at 1073.[28]

B. <u>The ALJ Erred By Failing To Apply The Established Striker Misconduct Burden-Shifting Standard, And Instead Improperly Placed The Burden Upon Respondent</u>

Consistent with his failure to adhere to established Board law, the ALJ failed to properly apply the established burden of proof in striker misconduct cases. In so doing, the ALJ deprived Consolidated of its due process rights and erred in finding that Consolidated violated the Act.

1. The ALJ Erred By Never Making A Finding Regarding The Company's Honest Belief As Applied To The Discipline Of All Four Employees

While the ALJ acknowledged the burden of proof framework in striker misconduct cases, he clearly failed to follow the framework. After finding that the General Counsel met its burden in showing that the actions taken against the Disciplined Employees were related to the strike, pursuant to clear Board precedent, the ALJ was obligated to determine whether Consolidated established that it had an honest belief in disciplining the employees. *Universal Truss*, 348 NLRB at 734; *Avery Heights* 343 NLRB at 1302.[29] If he found that Consolidated had an honest belief, the ALJ should have placed the burden on the General Counsel to demonstrate that the Disciplined Employees did not engage in the alleged misconduct or that the conduct was not serious enough for them to forfeit protection of the Act. *Id.*

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[28] Indeed, where a termination decision is made on the basis of unprotected activity, the ALJ has no discretion to determine the level of discipline, if any, that should have been given to the employees. *See, e.g., Midwest Reg. Joint Bd.*, 564 F.2d at 440 ("The decision of what type of disciplinary action to impose is fundamentally a management function."); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 531 (2007) ("(T)he Board will not second-guess an employer's efforts to provide its employees with a safe workplace, especially where threatening behavior is involved."); *Prudential Protective Servs., LLC*, 2013 NLRB LEXIS 656, at *43-44 (NLRB Div. of Judges Oct. 17, 2013) ("It is well settled that the Board does not substitute its own judgment for the employers as to what discipline would be appropriate.") (*citing George Mee Mem'l Hosp.*, 348 NLRB 327, 322 (2006)).

[29] As previously above, Consolidated excepts to this finding as to Hudson's and Weaver's conduct in the Conley incident.

Instead of applying the established framework, the ALJ merely "assumed" that the Company demonstrated its honest belief. P. 20.[30] The ALJ erred in failing to make the required finding that the Company had an honest belief, and then failed to shift the burden to the General Counsel to prove that the employees either did not engage in the misconduct or that the misconduct was not sufficiently serious to forfeit the protection of the Act.

2. "Assuming" The Company Had An Honest Belief, The ALJ Erred By Failing To Shift The Burden To The General Counsel

As the ALJ's decision demonstrates, he impermissibly placed the burden on the Company in determining whether the misconduct occurred or was not serious enough to forfeit protection of the Act:

In ruling on the discharge of Hudson, after finding that Hudson did prevent Conley from passing (P. 12), the ALJ explicitly stated "that any ambiguity" as to whether her misconduct "was serious enough to forfeit protection of the Act should be resolved against the Respondent." P. 21 (emphasis added).

Obviously, resolving ambiguities against the Respondent is the opposite of placing the burden on the General Counsel. This alone is sufficient to reverse the ALJ's decision.

C. The ALJ Erred By Not Utilizing The Proper Standard In Determining Whether The Four Disciplined Employees' Conduct Was Serious Enough To Forfeit Protection Of The Act

The ALJ opined at the beginning of the hearing that strike lines are "supposed" to be intimidating to employees attempting to cross them. Tr. 150-51; *see also* Tr. 472, 993-94 (ALJ refusing to allow questioning into effect of actions on targeted non-strikers). This is an incorrect

[30] The ALJ gratuitously questioned whether Consolidated had an honest belief by making several erroneous musings that are either directly contradicted or not borne out by the evidence. However, he certainly did not find that the Company did not have a honest belief, nor rule against the Company on this issue. P. 19-20. Because the ALJ did not rule against the Company on the honest belief issue, in an effort to conserve resources, the Company will not address this issue in this brief.

statement of the law, and is the basis for several errors made by the ALJ. As his decision demonstrates, the ALJ determined whether the conduct at issue lost the protection of the Act according to his misguided belief that strikes are "supposed" to be intimidating, not the appropriate legal standard.

It is established in striker misconduct cases that an employer may lawfully discharge a striker whose conduct, under all circumstances, would reasonably coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings, Inc.*, 268 NLRB at 1046. Thus, strike lines are not supposed to be intimidating to those individuals exercising their equally valid Section 7 right to work, and an employer is within its rights to discharge strikers who engage in conduct which would reasonably intimidate employees.[31]

Instead of addressing whether the behavior at issue would reasonably coerce or intimidate employees in their exercise of rights, the ALJ held that the occasions in which strikers have forfeited protection of the Act "in almost all cases involve violent acts or threats of violence acts." P. 21. He then improperly used an analysis as to whether there was "violence or a threat of violence" in determining whether the conduct at issue constituted misconduct and whether the conduct was "serious" enough to lose protection of the Act. He specifically found that:

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

[31] The Board in *Clear Pine Mouldings* held that an analogous standard governs misconduct directed against persons not protected under Section 7 of the Act. *Id.* at 1046 n. 14; *see also Avery Heights*, 343 NLRB 1301, 1302 (2004), *vacated on other grounds*, 448 F.3d 189 (2d Cir. 2006); *Detroit Newspapers*, 340 NLRB 1019, 1025 (2003) ("This standard also applies to misconduct directed at nonemployees such as supervisors, security guards, and independent contractors.") (*citing General Chemical Corp.*, 290 NLRB 76, 82 (1988); *PBA, Inc.*, 270 NLRB 998 (1984)).

- "Neither Hudson nor Weaver committed an act of violence, nor has Respondent demonstrated that either violated any company policy regarding employee conduct." P. 13.
- "The record establishes that neither Hudson nor Weaver committed any act of workplace violence regarding Rankin." P. 14.
- While [Williamson's] gesture was totally uncalled for, and very unpleasant, it is difficult to see how it could have been perceived as an implied threat of violence or even future mistreatment (whatever that means) or have discouraged Walters from continuing to report to work during the strike." P. 22.

The ALJ's imposition of an additional requirement of "violence or a threat of violence" in order for acts to be sufficiently serious to forfeit protection of the Act is plain error. The Board does not require "violence or threat of violence" for misconduct to lose protection of the Act. Instead, the Board in *Clear Pine Mouldings* defined the misconduct which strips an employee of the protection provided by the Act: misconduct "that, under the circumstances existing, [] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 268 NLRB at 1046. Importantly, the Board rejected the earlier "per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, [the Board] agree[d] with the United States Court of Appeals for the First Circuit that '[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker.'" *Id.* (*citing Assoc. Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977), *denying enf. in part to* 227 NLRB 1200). Indeed, behavior that may seem "relatively innocuous" may nevertheless justify discharge/discipline if it may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. *See GSM, Inc.*, 284 NLRB 174, 174-75 (1987).

In support of his erroneous conclusion that the acts in question must be violent or constitute a threat of violent in order to lose protection under the Act, the ALJ surprisingly cited *Clear Pine Mouldings*. P. 21. While the conduct in the *Clear Pine Mouldings* case involved threats of violence, nowhere in that decision did the Board require a threat of violence or actual violence for acts to lose the protection of the Act, and indeed, the Board stated that strikers have no right to block access to an employer's premises, 268 NLRB at 1047, which, while intimidating, is not necessarily a violent act or a threat of violence. The ALJ also cited *Detroit Newspapers*, 340 NLRB at 1030, in support of his "violence or threat of violence" requirement (P. 21); however, in *Detroit Newspapers*, the Board upheld the discharge of a striker that placed a plastic utensil to render a coin-fed newspaper rack outside of a grocery store inoperable, causing a mere $20 in damage. *Id.* at 1027-29. While this is not "violent" behavior, the Board found that this conduct forfeited protection of the Act.

While violent conduct certainly could reasonably tend to coerce or intimidate, and Consolidated asserts that some of the conduct here constituted a threat of violence, nothing in the law requires that the misconduct be violent in order to forfeit protection of the Act. Indeed, the Board has found on numerous occasions conduct that is not violent or does not constitute a threat of violence loses the protection of the Act. *See Avery Heights*, 343 NLRB at 1301, 1303-05 (upholding discharge where striker's statement as to non-striker's mother residing at picketed nursing home could reasonably be deemed as an implied threat of future mistreatment); *Detroit Newspapers*, 340 NLRB at 1027-30 (upholding striker discharge where striker placed a plastic utensil to render a coin-fed newspaper rack outside of a grocery store inoperable, causing $20 in damage); *Electrical Workers Local 3 (Cablevision)*, 312 NLRB 487 (1993) (driving vehicles slowly in the vicinity of an entrance to obstruct passage coerces employees); *Teledyne Indus.*,

Inc., 295 NLRB 161, 175 (1989) (discharge upheld in part on basis that employee intentionally blocked and vandalized vehicle); *Carpenters, Metro District of Philadelphia (Reeves, Inc.)*, 281 NLRB 493, 497 (1986) (blocking ingress and egress coerces employees whether the blocking actually prevents passage or merely delays it). Accordingly, the ALJ erred by using a "violence or threat of violence" standard or to even view it as a relevant factor in evaluating the Disciplined Employees' misconduct. The relevant standard is whether the Disciplined Employees' acts would reasonably intimidate or coerce employees in the exercise of their Section 7 rights, which the ALJ never ruled upon. Although this is an objective standard, Consolidated excepts to the ALJ ignoring the uncontested evidence that the targeted employees did feel threatened and/or harassed. Tr. 474-75, 868-70, 909-10, 993-94, 1065, 1092.[32]

D. The ALJ Erred In His Application And Analysis Of The Evidence And His Findings Are Not Supported By the Record

Consolidated excepts to the ALJ's misconstruing of the record and making factual and legal findings that have no record support, which dictates reversal of the ALJ's decision.[33]

1. On Several Occasions, The ALJ Concluded That Company Witnesses Were Biased Or Had Animus Against The Disciplined Employees Without Any Factual Support Whatsoever

In several instances, without record support, the ALJ concluded that Company witnesses- management and non-management alike- were biased or had animus against the Disciplined Employees. Consolidated excepts to these findings as follows:

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[32] The ALJ acknowledged that Greider was "afraid" Weaver was going to follow her (P. 7) and that Conley "may have been intimidated" that Hudson and Weaver followed him (P. 20); however, he obviously did not apply these findings, or explain how they were not determinative.

[33] To the extent the ALJ made credibility determinations based upon his incorrect analysis of the record, his findings should not be afforded any weight. *Jewel Bakery, Inc.*, 268 NLRB 1326, 1327 (1984) ("In cases in which the excepted-to credibility resolutions are in decisions which have omitted reference to relevant testimony on critical matters and have mistakenly characterized the state of the record, the Board" has not given the traditional level of deference to the ALJ's credibility resolution).

- Regarding Conley, the ALJ found: "Conley is a manager who understands that his employer terminated Hudson and Weaver and that his employer would very much like them to remain terminated. Moreover, it is quite clear that many of Respondent's managers were very angry about the strike and the conduct of the strikers at Rutledge. Conley is likely to have been angry about the fact that Hudson and Weaver were following him." P. 9. The ALJ subsequently rejected Conley's testimony that he tried to pass Hudson twice, Hudson cut him off and that Weaver engaged in the blockade. Tr. 864-70, 909-10, 914-15; P. 10-12, 14. There is absolutely no record support for the assertion that Conley was "angry" about the fact that Hudson and Weaver were following him. To the contrary, he testified that he was "harassed" when they were in front of him blockading him. Tr. 868-70; *see also* Tr. 909-10. Although the ALJ used the word "likely" before "angry," since that does not reduce the ALJ's obligation to have record support, just as no one testified he was angry, no one testified he was likely to be angry. Nor did Conley testify that he understood or even thought about "that his employer would very much like them to remain terminated." Indeed, the only question regarding anger was when the General Counsel asked Diggs whether Conley was angry at the time of Hudson's and Weaver's conduct, Diggs responded that "I don't remember [Conley] getting mad." Tr. 965.

Obviously, if the ALJ's conclusory assumption is correct, and can be upheld without any record support, any management employee in the United States testifying on behalf of any Company in the United States during a discharge case would be presumed to have a bias against the bargaining unit employee. This is both an improper method for evaluating testimony, and shocking that an ALJ would harbor such a bias, let alone make such a statement in his decision.

- As to Conley and Diggs, although the ALJ found that Hudson's and Weaver's testimony is "self-serving and thus should be approached with some degree of caution," he also found that

"the same is also true with regard to Troy Conley, and to some extent Larry Diggs." P. 8. As with the ALJ finding addressed above, there is absolutely no record support that Conley's or Diggs' testimony was self-serving. The mere fact that Conley is a manager does not mean that his testimony is self-serving, and no evidence indicates that Conley would have a reason to give self-serving evidence. Regarding Diggs, he is not even employed at the Illinois facility, had only been to Mattoon twice in in his life (Tr. 954), and likewise no evidence exists as to why he would proffer self-serving testimony.[34]

- As to Greider's and Rich's (non-supervisors) testimony on the critical point as to whether Hudson repeatedly stopped and started in front of Greider, the ALJ found that their testimony was "solely the result of their animus towards Hudson, arising at least in part from the strike." P. 7 (emphasis added). The ALJ failed to cite any evidence for this finding of non-supervisory animus; rather, the evidence (not refuted by Hudson) is that Greider never had any unpleasant interaction with Hudson prior to the incident and that Hudson is friends with Rich and attended her wedding. Tr. 1085-86, 1116. Hence, the ALJ's exclusion of Greider's and Rich's testimony on the basis that Greider and Rich had animus towards Hudson is completely unjustified.
- As to the Rankin incident, the ALJ found that "assuming Hudson's car moved laterally there is no basis for concluding she did so to harass Rankin." In doing so, the ALJ ignored Rich's testimony and found that Rich was "very upset" about the conduct of the strikers, "give [sic] her assumptions about 'Pat Hudson's motives while driving in front of Greider and Rankin." P. 14-16. The ALJ's discounting of Rich's testimony on the basis that she was "very upset" about the

[34] Even where the ALJ found (either explicitly or implicitly) that the Disciplined Employees' testimony as to a key issue- whether they actually engaged in misconduct- was false as to Hudson's and Weaver's claims that Conley never was in the left lane attempting to pass Hudson and that Hudson did not block him (Tr. 617, 850), he still credited the majority of Hudson's and Weaver's self-serving account. P. 12.

strikers' conduct is not supported by the record, and as Rich's testimony is materially consistent with the other witnesses to the Greider and Rankin incidents, there was no reason to question her credibility other than the ALJ's unsupported bias that Company witnesses to striker misconduct (even non-supervisory employees) should be viewed skeptically. Similarly, the ALJ found that "(b)y the time anyone talked to Walters about the Rankin incident, she certainly was upset about her encounter with Eric Williamson on December 11." P. 14-16. The ALJ cited no evidence that Williamson's misconduct towards Walters affected the reliability of her testimony as to the Rankin incident, because none exists. Moreover, in discounting Dasenbrock's account, he noted, without support, that "(m)any of the customer service representatives were very upset about the conduct of the strikers." P. 16. The record is likewise devoid of any reason to find that Dasenbrock was biased against Hudson and Weaver.[35]

The ALJ's "findings," which ignore or discount testimony based on completely unsupported assumptions of bias, must be overturned. Bias or animus cannot be assumed simply because witnesses are non-bargaining unit employees, and the ALJ's use of such bias assumptions is not only contrary to law but also violates Consolidated's due process rights, as well as the rights of other employees. In light of the ALJ's admitted bias against Company witnesses, the decision should be reversed. Although Consolidated submits that the complaint should be dismissed based upon the record, to the extent the Board finds remand necessary, the matter should not be remanded to the current administrative law judge.

[35] Consistent with his bias against Company witnesses and inclination to credit the self-serving accounts of the Disciplined Employees, although the ALJ found that Williamson grabbed his crotch at Walters despite Williamson's weak denial (Tr. 712-16) (P. 17), he still credited Williamson's self-serving defense to his conduct during the Redfern incident without meaningfully analyzing his testimony regarding that incident. P. 22.

2. The ALJ Failed To Consider That The General Counsel Failed To Call A Single Witness In Support Of the Disciplined Employees' Accounts

Consistent with his tendency to disfavor Company witnesses, the ALJ failed to consider that despite the existence of numerous picketers who were potential witnesses, neither the General Counsel nor the Union called a single employee witness to support the Disciplined Employees' self-serving, post-hoc accounts:

- As to the Rankin incident, the General Counsel did not call direct witness Neunaber, a fellow striker and passenger in Hudson's car during Rankin incident. Tr. 620, 786-87.
- As to the Flood incident, the General Counsel call did not call Union representative Evans, a direct witness to Maxwell incident, picketer Adkins, who Maxwell claimed also was hit, or any of the other multiple picketers present. Tr. 495-96, 499-500, 502-03, 511, 515-17.
- As to the Redfern incident, the General Counsel did not call any of the strikers present. Tr. 987; R-Ex. 1 at 5:08:07.
- As to the Greider incident, the General Counsel did not call any of the strikers present. R-Ex. 1 at 10:03:41.

Consolidated excepts to the ALJ failing to even consider that not a single witness came forward to support the Disciplined Employees' accounts of the incidents, which is highly probative of the reliability and accuracy of these self-serving accounts.

3. The ALJ Erred In Refusing To Consider Testimony Of Certain Witnesses Who Were Not Identified Or Interviewed Contemporaneously With The Incidents

The ALJ erred in disregarding witness testimony and evidence where the witnesses were not identified or were not interviewed contemporaneously. Consolidated excepts to such findings, as they were contrary to the record and have no legal support:

- As to whether Hudson and Weaver boxed in Greider, the ALJ "gave no weight to Rich's testimony" on the basis that "she was first interviewed 2 months after the incident." P. 7. The ALJ made such finding despite the fact that Rich identified herself at the time of the incident, and the record indicates that she did discuss the incident contemporaneously with it occurring, including by texting Greider herself. Tr. 92, 161, 1059, 1120-22, 1167; GC-Ex. 16.
- The ALJ discredited the three non-supervisory Company witnesses to the Rankin incident, Dasenbrock, Rich and Walters, holding that "there is no credible evidence as to when anyone discussed the Rankin incident with any one of the three women. This raises doubt in my mind as to what they actually remember or observed about the Rankin incident." P. 15. There was evidence that there were discussions with "the three women," the day of or after the incident.

The ALJ cites no legal authority for discrediting testimony on the basis that witnesses were not contemporaneously interviewed with the event, as nothing in the law dictates that the ALJ should discount testimony based upon the date that witness was interviewed. Under the ALJ's view, no witnesses to an incident can come forward and credibly substantiate misconduct unless they were identified and interviewed contemporaneously at the time the incidents occurred. This cannot be the standard and again deprives Consolidated of its due process rights. Moreover, the ALJ's reasoning on this issue is totally inconsistent with the fact that Hudson, Weaver and Williamson refused to provide their accounts for several months. *See* Tr. 1242-44. If not providing accounts contemporaneously is a reason to discount testimony, the same finding should be applied to Hudson, Weaver and Williamson, as there is no evidence they provided contemporaneous accounts, and accordingly, their accounts should be discarded on the same grounds. In fact, there is no evidence that Williamson ever provided his account prior to the time

of trial, and the earliest evidence of Hudson and Weaver providing their accounts is in the March unemployment hearing, four months after their termination. *Id.*[36]

The ALJ also discredited the neutral witnesses to the Rankin incident because Rankin did not identify any witnesses to his encounter with Hudson on his Huffmaster report or orally. P. 15. The ALJ's analysis is flawed and defies common sense, as Rankin was in a vehicle on the road, while the BCS witnesses were inside the building. Tr. 465-68, 1027-28, 1122-23, 1125, 1174-75. Hence, there was no reason for him know that they viewed the incident.

4. The ALJ Erred In Placing Any Probative Value On The Reporting Of The Incidents Through The Company-Provided Channels Rather Than By Filing Police Reports

The ALJ effectively placed a duty on the targets of the incidents to have reported the incidents to the police in order to find that they occurred. Specifically, in determining that several of the incidents did not occur, the ALJ applied the following reasoning to which Consolidated excepts:

- The Conley Incident: The ALJ stated that "(a) major reason I credit Hudson and Weaver over Conley is the fact that Conley did not bother to report this incident to the police as he had been instructed" and that "(i)n making credibility resolutions regarding this incident, it is very significant that Conley did not contact the police." P. 12 (emphasis added).
- The Grieder Incident: In finding "that the record establishes there was absolutely no misconduct by either Hudson or Weaver with regard to Greider" the ALJ "rel[ied] in part of the

[36] The ALJ found that Consolidated provided "little in the way of specifics" to Hudson and Weaver at their suspension/investigatory meetings and that their silence "has very little relevance in resolving credibility." P. 9. However, Union representative Beisner's notes indicate the Company provided specific names, times and dates of all three incidents, including Conley's and Diggs' names, a date and time of "12/10 9:30 am" and a location of "E. Bound on HWY 16 Between Mattoon & Charleston." *See* R-Ex. 12. Weaver's and Hudson's silence is significant in light of the specific information given to them.

fact that Greider did not file a police report as she had been instructed prior to this incident" and noted that the Company did not call the police about the incident despite manager Mike Croy calling the police that morning. P. 8.

- The Rankin Incident: In finding that the record establishes neither Hudson nor Weaver committed workplace violence regarding Rankin, the ALJ relied "in part of the fact that no police reports were filed for their conduct, such as stop/starting in front of vehicles, which is clearly illegal." P. 14.
- The Redfern Incident: The ALJ found that Redfern did not call the police after Manager Sam Jurka advised her to do so. P. 16.

Initially, the ALJ misapplied the evidence, which indicates that the specific instruction given by the Company was to contact the Company's Command Center in the event of an incident. *See* GC-Ex. 20. Secondly, nothing in the law requires the Company or the victims of misconduct to notify the police or to follow specific protocols in the event of misconduct in order to find that the alleged incidents actually occurred. In finding that the misconduct in the above-referenced incidents did not occur because the objects of the misconduct and the Company did not report the incidents to the police, the ALJ totally ignored the instruction given to employees, and relied upon a meeting held by Huffmaster and Huffmaster's generic written guidelines for strikes procedures (entitled "procedures" as opposed to "instructions" as characterized by the ALJ) provided to some Illinois non-bargaining unit employees. *See* P. 4-5; GC-Ex. 21.[37] While the record is ambiguous as to what was said at the Huffmaster meeting and who attended the

[37] Consolidated notes the irony in the ALJ's failure to discredit Maxwell's self-serving account where he admittedly failed to call the police despite having the right to call the police after purportedly being hit twice by Flood's vehicle. P. 4; Tr. 519-20.

meeting,[38] the Huffmaster written procedures provide in one place that if an employee "encounter[s] any problems during the course of [his or her] normal day, contact the local police department and Huffmaster security personnel for instructions. File a report" while also providing that if an employee is threatened at work, "immediately notify security personnel and complete an incident report." GC-Ex. 21. Contrary to the ALJ's finding, the Huffmaster generic written procedures do not require an employee to report an incident to the police (P. 5), and the procedures are at best ambiguous as to what an employee was expected to do in the event of an incident while coming to and from work or while working.

The ALJ's findings totally ignore that subsequent to the Huffmaster meeting, Patrem sent an email to Illinois non-bargaining unit employees (including Conley, Redfern, Greider and Rankin), which enclosed Huffmaster's guidelines, and included in his email the following instruction: "Report any incidents to the Command Center at [phone number]." Tr. 180-81, 486; GC-Ex. 20. Nowhere in Patrem's email did he indicate that the employees should report an incident to the police; that statement only can be found buried in Huffmaster's generic guidelines along with contradictory guidance that if an individual is threatened at work, he or she should notify security personnel and complete an incident report. GC-Ex. 20. Thus, the specific instruction to the non-striking employees was to report incidents to the Company's Command Center rather than the police. *Id.*; *see also* Tr. 1216 (Whitlock's testimony that first step in addressing strike line misconduct was for anyone involved in an incident to call the Command Center and then fill out an incident report). Thus, in finding that a "major reason" to discredit Company witnesses was their not reporting the incident to the police, the ALJ totally ignores the

[38] Consolidated excepts to the ALJ's finding that some of the 27 customer service representatives who work in Mattoon were present at the Huffmaster meeting in which the "written guidelines" were read (P. 5), as this (irrelevant) finding is not supported by the evidence.

specific instructions given by Senior Director of Central Services Patrem to employees to report the incident to the Command Center.

In fact, the evidence demonstrates that each of the targeted employees did exactly what the Company instructed them to do, i.e., to report incidents to the Command Center. Conley, Grieder, Rankin, and Redfern all filed an incident report with the Company's Command Center. *See* GC-Ex. 13; R-Ex. 7, 9; Tr. 473, 872-83, 895-96, 996, 1059-60. As to Conley, he does not recall what specific instructions were given during the Huffmaster meeting or even reviewing the Huffmaster guidelines. Tr. 916-17. Rather, his recollection as "far as reporting, was to report incidents internally, and then we would be directed whether a police report needed to be filed. I think all that was being done through Huffmaster."). Tr. 895-96. Indeed, Conley was aware of the number he used to report the incident to the Command Center as being a "number that was designated to call into." Tr. 924. Upon calling into the Command Center, Conley was directed to complete a Huffmaster report, which he did. Tr. 872-73, 895-96; R-Ex. 7.[39]

As to Greider, the uncontroverted evidence is that she called the Command Center immediately after she got off the phone with her husband (who was on the phone with her during the incident) and filled out a Huffmaster report at the Command Center. Tr. 1059-60. Regarding

[39] Consolidated also excepts to the ALJ placing any weight on Jurka's decision not to contact the police after Conley informed him of the incident. P. 12. The General Counsel did not call Jurka, and the ALJ could not presume that the incident did not occur because he apparently did not call the police when the Company's general plan was for employees involved in an incident to call the Command Center and then fill out an incident report. GC-Ex. 20; Tr. 1216. Regardless, there is no justification for discrediting Conley on the basis of any other manager's decision not to call the police. Consolidated further excepts to the ALJ finding it "notable" that Jurka did not call the police after learning of the Conley incident because he was working the morning of December 10 with Croy (P. 12), as his apparent assumptions that Jurka and Croy worked closely that morning and that he would have been aware of the level of Croy's contact with the police are unsupported. Further, the record is silent as to what extent Croy knew about the incidents. Regardless, the fact that Croy may (or may not) have called the police when others might not have done so due to his feelings about the strike cannot possibly affect Conley's credibility.

Rankin, the record is not clear as to whether he attended the Huffmaster December 9 meeting, but after the incident, Rankin returned to the Command Center, requested a Huffmaster incident report and filled it out. Tr. 473. Thus, there is nothing about either Greider's or Rankin's actions in reporting the incidents that support the ALJ's finding that Hudson and Weaver did not engage in misconduct as to them.

As to Redfern, there is no evidence that she attended the Huffmaster meeting on December 9, and Whitlock testified that he did not recall seeing her there. Tr. 487. After her encounter with Williamson, Redfern immediately met with a co-worker and a manager, who called the Command Center. Tr. 988-90. While Jurka called Redfern later and asked her to go to the police station, after talking to her husband, Redfern decided not to go to the police because: a) she works with the picketers; b) there was no damage to the mirror; and c) the security guard saw the incident. Tr. 992-93. Instead, like the other targets, she chose to handle the matter internally by filing incident reports. R-Ex. 9(r)-(v). This is a perfectly rational response consistent with employees' natural inclination to go through Company channels during a workplace dispute and certainly does not satisfy the General Counsel's burden in establishing that Williamson did not engage in misconduct.

The ALJ's stated reliance upon the lack of police reports in determining that four of the six incidents did not take place defies logic and ignores crucial pieces of contrary evidence. Indeed, the fact that the targets went through the channels set up by the Company versus the police demonstrates that they all understood this to be the Company's recommended process, (which the General Counsel never proved that the targets considered consulting in any event). Because the ALJ's decision to disregard/discredit the accounts of the targeted employees is based upon a clearly incorrect analysis of the record and ignores the specific direction given, it

should not be afforded any weight. And where it is the "major reason" for the determination, as in the case of the Conley incident, the determination should be overturned.

5. The ALJ Erred In Applying The Striker Misconduct Standard By Placing An Affirmative Duty On The Objects Of Hudson's And Weaver's Misconduct To Escape From The Misconduct

Rather than focusing on whether the misconduct occurred and whether that misconduct reasonably tended to coerce or intimidate in the exercise of their Section 7 rights, the ALJ erroneously focused on what efforts the targets took to avoid the incidents as follows:

- As to the Conley/Diggs incident on Highway 16, the ALJ found that Conley could have passed Weaver after she passed him prior to Hudson's approach and emphasized on multiple occasions that he could have avoided being boxed in or traveling behind Hudson and Weaver by turning onto other roads. *See* P. 9-11.
- In the Rankin incident, the ALJ improperly placed the burden on Rankin to quickly escape Hudson's blocking of him by finding that "(t)here is no evidence that Rankin could not have turned into the Pilson's lot and cut through to Landlake Boulevard as Greider had done about an hour previous to this incident." P. 13.

Consolidated excepts to this shifted focus, which perverts the striker misconduct analysis and effectively places a burden on the <u>objects</u> of the misconduct, who had no reason to know that they would be harassed, to have made decisions the ALJ (with the benefit of hindsight) apparently would have made in an effort to lessen the impact of the conduct. The ALJ erred in giving any weight to these findings, as the proper inquiry (to the extent such conduct is strike-related) is whether Hudson and Weaver engaged in misconduct that would reasonably tend to coerce or intimidate employees (*Universal Truss*, 348 NLRB at 734-35), <u>not</u> whether in

hindsight Conley or Rankin could have taken steps to reduce the amount of time they were blocked and harassed.

Obviously, because Hudson and Weaver were in front of him, Conley could have done a number of things- including stopping the vehicle in the middle of the road, driving on the median or, as the ALJ noted, turning onto an indirect route (which would have delayed his arrival at the work spot). But, the ALJ improperly placed the burden on Conley, who was merely attempting to proceed to his work assignment, to turn off the main road and take a significant detour to get to his job side (Tr. 867-70; *see also* JT-Ex. 9, R-Ex. 6; Tr. 958),[40] particularly where he had no reason to suspect that he would be the target of harassment in the first place.

Similarly, the ALJ's statements that there is no evidence that Rankin could not have turned in to Pilson's lot and that "he drove past two entrances to the [Pilson's] lot and then sped past Hudson on her left on 17th street" (P. 13) are false and misleading. Initially, Rankin testified that he considered taking the first left into Pilson's but could not do so because a car was coming out of its parking lot and that both entrances were blocked and therefore were not viable exits. Tr. 467, 481-82; JT-Ex. 7(a). The finding also places the burden on Rankin to escape Hudson's blockade, rather than focusing on the proper inquiry- whether Hudson engaged in misconduct that would reasonably tend to intimidate or coerce- which she did.

[40] Consolidated excepts to the ALJ's (irrelevant) finding that Diggs did not corroborate Conley's testimony that Conley had to drive an extra 4.97 miles to reach the jobsite. P. 11. Conley never testified that he drove an extra 4.97 miles to reach the jobsite; rather, he testified that he took an indirect route, which as shown by R-Ex. 6, took him 4.97 miles to reach the site rather than the 3.24 miles he would have driven had he stayed on the main road while facing Hudson's and Weaver's harassment. R-Ex. 6; Tr. 868-70. Moreover, Diggs was not asked about exact distances, but did testify that Conley took an indirect route. Tr. 958. Given that Diggs is from Texas and had been to the Mattoon area twice in his life (Tr. 954), it is not surprising that he would not know the exact distances driven that day.

It is error on the part of the ALJ to place a burden on the target to escape the harassment at the first available option (as viewed seven months later in a less emotional setting). However, if the ALJ, as he seems to have done, recognized attempted escape as a relevant variable regarding whether the conduct occurred and whether it was reasonably coercive and intimidating, all three of the targeted victims, Conley (Tr. 867-68, 958-59; R-Ex. 6), Rankin (Tr. 467, 470-71), and Greider (Tr. 1055), altered there route to escape from Hudson and Weaver's blockade. Accordingly, the evidence of escape should be used to find Hudson and Weaver's conduct was intimidating and coercive, not to support the General Counsel in her burden to prove the coercive conduct did not occur.

E. <u>The ALJ Erred In Finding That The General Counsel Met Its Burden In Demonstrating That The Misconduct Was Not Serious Enough To Forfeit Protection Of The Act</u>

1. The ALJ Erred In Requiring All Incidents Alleged To Have Occurred

At the conclusion of the hearing testimony, the ALJ asked the parties to brief the issue of how he should analyze the discipline if he found that the Disciplined Employees engaged in some but not all of the alleged misconduct. Tr. 1349-51. In response, the General Counsel opined that "the law is pretty clear on, you know, what's left. Is that misconduct or not." Tr. 1351. In their briefs, all parties addressed the issue and cited the Board's decision in *Roto Rooter*. In *Roto Rooter*, 283 NLRB 771, 772 (1987), after finding that of the five serious incidents of striker misconduct supporting the Company's refusal to reinstate the striker for misconduct, two of the incidents did not occur, the Board considered the remaining three incidents and found that "taken as a whole [these] encounters . . . reasonably tended to coerce or intimidate [the non-striking employees]." The Board therefore ruled that the Company's refusal to reinstate the employer did not violate the Act. *Id.*; *see also NLRB v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 844 (5th Cir. 1978) (in refusing to enforce Board order where reinstatement of

discharged striker ordered on basis that five separate incidents supporting termination were insufficiently serious to warrant discharge, holding that single incident was sufficiently serious).

Consolidated excepts to the ALJ's failure to heed Board precedent:

- In concluding that the Company violated the Act by discharging Hudson, the ALJ noted that the Company terminated Hudson for her involvement in three incidents- the Conley/Diggs incident, the Rankin incident and the Greider incident- and effectively required all three incidents to have occurred in finding that any "ambiguity" as to whether her misconduct was serious enough to forfeit protection of the Act should be resolved against Consolidated. P. 21.
- In reaching his conclusion that the Company violated the Act by suspending Williamson for his misconduct in the Walters incident, the ALJ noted that Respondent suspended Williamson for two incidents- the Walters incident and the Redfern incident. P. 22. Further, the ALJ held that assuming that Williamson's conduct during the Walters incident "forfeited the protection of the Act, I conclude that it is Respondent's burden under the *Wright Line* doctrine to establish that it would have suspended Williamson solely on the basis of the Tara Walters incident." *Id.*
- The ALJ relied upon his finding that because the Company did not suspend Maxwell for the conduct "for which he was suspended," it violated the Act. P. 4, 20.

In the event that he found that certain misconduct did not occur, the ALJ should have considered whether the remaining misconduct, taken as a whole, was serious enough to forfeit the protection of the Act (with the burden on the General Counsel). Instead, the ALJ erroneously required the Company to demonstrate that all of incidents for which the individuals were disciplined occurred. As to Hudson, although he found that she engaged in misconduct by blocking Conley on Highway 16, it is apparent from his decision that in resolving the "ambiguity" against the Company as to whether her conduct was sufficiently serious to forfeit

protection of the Act that he required all three alleged incidents to have occurred. P. 12, 21. Although Consolidated asserts that the ALJ erred in not finding that Hudson committed misconduct during the Rankin and Greider incidents, the ALJ should have considered whether her conduct in the Conley incident was sufficiently serious to forfeit protection of the Act regardless of whether the other two incidents occurred.

As to Williamson, Consolidated excepts to the ALJ's error in placing the *Wright Line* burden on the Company, as the *Wright Line* burden is clearly inapplicable to a striker misconduct case. The Board's clear position is that striker misconduct is not governed by the *Wright Line* analysis but rather is governed by the *Clear Pine Mouldings* standard. *See, e.g.*, *Siemens*, 328 NLRB at 1175 (1999). In erroneously applying the inapplicable *Wright Line* analysis, the ALJ shifted the burden to the Company and found that the "record was barren as to whether Respondent has ever applied its sexual harassment policy . . . to a single incident not involving physical contact." P. 22.[41] The ALJ applied the wrong analysis, as even under his factual analysis, he should have considered whether the General Counsel met its burden as to demonstrating that Williamson's misconduct as Walters was not sufficiently serious to justify a two-day suspension.[42]

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[41] Ironically, the General Counsel subpoenaed the Company's records, which the Company complied with, as to all employee discipline issued for a violation of the Company's workplace violence policy, and/or sexual harassment policy. The General Counsel did not bring forth any evidence whatsoever of the manner in which the Company applied its sexual harassment policy.

[42] While the Company compared Williamson's conduct with its sexual harassment policy (Tr. 1231-32), and Williamson testified to his belief that grabbing his crotch and gesturing towards an employee would be in violation of the policy (Tr. 745), the appropriate inquiry is whether Williamson's conduct towards Walters would reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights, *Universal Truss*, 348 NLRB at 735, rather than whether Williamson's conduct constituted sexual harassment under federal law or even the Company's policies.

Moreover, the ALJ's statement that Maxwell was not suspended for impeding Flood's progress is contrary to the evidence. Whitlock, who made the decision to suspend Maxwell and had discussed the incident with Flood prior to doing so, testified unambiguously that the Company suspended Maxwell in part because he purposely impeded the progress of the replacement workers. Tr. 1234-36.

The ALJ's analysis is contrary to Board law, and if taken to a logical extreme, an employer that terminated a striker for 100 different incidents of striker misconduct would violate the Act if it showed that "only" 99 of them actually occurred. It was plain error for the ALJ to analyze the misconduct in this manner.

2. The ALJ Erred In Finding That The General Counsel Met Its Burden In Establishing That The Misconduct Hudson Engaged In Was Not Serious Enough To Forfeit Protection Of The Act

For the reasons and exceptions noted above, the ALJ's finding that the misconduct Hudson engaged in was not serious enough to forfeit protection of the Act should be overturned. In addition, Consolidated excepts to the following:

a. Hudson's And Weaver's Blockading Of Conley And Diggs On Public Highway 16

(1) The Proper Legal Standard Was Not Applied

The ALJ should not have applied the striker misconduct to Hudson's behavior impeding Conley's progress on Highway 16. As stated in more detail in Section IV.A.1., the proper standard is whether the Company had an unlawful motivation for terminating Hudson. Since the General Counsel did not offer any proof of anti-union animus, Hudson's termination should not be overturned.

(2) Alternatively, The ALJ Erred In Applying The Record And Misapplied The Striker Misconduct Standard

The ALJ did find that Hudson impeded Conley's progress in attempting to pass her on the highway (P. 12), in traffic while going 55 miles per hour or more. *See* P. 10; Tr. 583-84, 659, 662. In finding that Hudson's conduct was not serious enough to forfeit protection of the Act, the ALJ misplaced the burden of proof (*see* Section IV.B.), applied a violence or threat of violence standard (*see* Section IV.C.), improperly considered whether the other incidents occurred, assumed bias without any record support (*see* Section IV.D.1.), placed a duty on Conley to escape the strikers' misconduct (*see* Section IV.D.5.) and imposed a police reporting requirement contrary to law and the record (*see* Section IV.D.4.). Consolidated excepts to these errors, which plainly dictate a reversal of the ALJ's findings.

In addition to what the ALJ found did occur and the argument that such conduct taken alone is sufficient to forfeit the protection of the Act if the ALJ would have credited Conley's testimony, Hudson's conduct was clearly reasonably intimidating and coercive and in violation of the Act. In discounting Conley's testimony the ALJ applied an unsupported assumption of bias towards Conley simply because he is a manager at a company. *See* Section IV.D.1. The ALJ also stated a major reason in crediting Hudson and Weaver over Conley "is the fact that Conley did not bother to report this incident to the police as he had been instructed." P. 12. As set forth in Section IV.D.4., the record does not support that Conley "was instructed" or had an obligation to call the police. To the contrary, as the record indicates, Conley followed specific Company instructions in calling the Command Center. *See* Section IV.D.4.

In addition to the above exceptions, the Company also excepts to the following aspects of the ALJ's decision as they apply to the Conley incident:

- The ALJ placed an undue emphasis on the amount of time an admitted improper action lasted in finding that "(w)here Conley first saw Weaver is significant in determining how far and for

how long he was "trapped" behind Hudson, or alternatively, merely prevented from passing Hudson and Weaver (assuming this was the case)." P. 9. *The pertinent issue is not the exact distance the incident lasted, as it is clear that the incident lasted for multiple miles, but whether the conduct Hudson and Weaver undertook would reasonably tend to coerce or intimidate.*

- In apparently crediting Conley's testimony that Hudson and Weaver did slow down while driving in front of him, the ALJ suggested that Weaver and Hudson may have slowed down due to a change in the speed limit on the road. P. 10. *The ALJ did not cite any testimony supporting this hypothesis, as none exists.*

- The ALJ found that Diggs' testimony corroborates the testimony of Hudson and Weaver that Hudson never "cut off" Conley. P. 10. *The ALJ misconstrued Diggs' testimony on Tr. 966-67, as Diggs' testimony on Tr. 966-67 indicates that as Conley proceeded in the left lane Hudson, ahead of Weaver, pulled into the left lane and slowed down such that Conley had to put his brakes on. See also Tr. 959 (Diggs' testimony that Conley had to apply brakes after Hudson pulled into left lane as Conley tried to pass). There is no explanation as to why Hudson, ahead of Weaver, would pull into the left lane only to slow down as Conley moved into the lane. The only logical explanation is that she attempted to impede his progress, which is coercive and intimidating regardless of one's personal view as to whether this act technically constitutes cutting someone off.*

- The ALJ found probative value to Diggs' testimony "his concession" that Weaver and Hudson may have been driving at the speed limit." P. 13. *Diggs testified that he does not know what the speed limit is (unsurprising given that he had been to the Mattoon area twice in his life), but that Hudson and Weaver "were traveling much slower than everyone else was traveling prior to them pulling in front of us." Tr. 954, 965.*

- Without explanation, the ALJ credited Hudson and Weaver on several occasions in which they contradicted themselves; a) Weaver testified she passed Conley close to Loxa Road, while Hudson testified that Weaver passed Conley near the airport (Tr. 613, 779), which are a half mile apart (P. 9); b) Weaver and Hudson contradicted themselves by a full mile as to where Conley turned off (*see* Tr. 668, 780-81; *see also* JT-Ex. 9(b); GC-Ex. 10(c); R-Ex. 6); c) Weaver claimed she drove alongside Conley for the amount of time it takes to snap her fingers twice, but when questioned how she could have driven beside Conley for such a short period of time consistent with her testimony of having made eye contact with and pulling ahead of him all the while going the speed limit had having three or four cars coming behind her to pass, Weaver admitted that it could not have been this short of time (Tr. 657, 696-97); Hudson, meanwhile, testified that there was no congestion or backup behind Weaver (Tr. 832-33); and d) while Hudson claimed on multiple occasions that she pulled in between Weaver and Conley prior to Conley turning off (Tr. 780, 782, 833, 838), Weaver did <u>not</u> testify that Hudson ever pulled between them, and in fact, her testimony indicates that Hudson was either beside Conley or just next to Weaver in the left lane at the time Conley pulled off. Tr. 616, 659-61.

(3) The ALJ Erred In Applying Existing Caselaw

As noted in Section IV.A.1., decisions cited by the ALJ purportedly supporting his conclusion that Hudson's and Weaver's conduct was not serious enough to forfeit protection of the Act are inapposite because they analyze striker misconduct related to the *following* of non-strikers. Obviously, merely following someone differs from impeding someone's progress, particularly where that includes cutting him off. Further, all of the cases cited by the ALJ were decided prior to *Clear Pine Mouldings*, which made it clear that violence or a threat of violence is not necessary for misconduct to forfeit protection of the Act.

Under the *Universal Truss* striker misconduct standard, the ALJ erred in ruling that Hudson's conduct in interfering with Conley on a public highway was not sufficiently serious to justify termination, particularly where it posed a safety risk to others. *See Moore Bus. Forms, Inc.*, 574 F.2d at 843 (in finding that striker discharge warranted where striker sped past non-striking employee on highway, ruling that striker "had no right to accost, pursue, block or otherwise interfere with any right of citizen in the use of public highway while attempting peaceably and lawfully to go to work"); *Intern'l Paper Co.*, 309 NLRB 31, 36 (1992) (discharge of striker upheld where he engaged in cat and mouse game on public highway with replacement employees); *Teamsters Local 812* (*Pepsi-Cola Newburgh)*, 304 NLRB 111, 117 (1991) (union violated Act through act of picketer interfering with driver of company vehicle on highway); *see also NLRB v. Fed. Sec., Inc.*, 154 F.3d 751, 755 (7th Cir. 1998) ("(O)therwise protected activity surely loses its protection when it compromises the safety of others.").

(4) Conclusion

The ALJ conducted a tortured analysis to ignore the facts – that Hudson took actions in front of Conley in slowing down and cutting him off, which harassed him. Hudson certainly was not engaged in ambulatory picketing where she drove in front of him, and she should not be rewarded for having engaged in threatening, unprotected conduct on a public highway.

b. Hudson's Blocking And Swerving Of Rankin Near Picket Line

(1) The ALJ Erred In Applying The Record And Misapplied The Striker Misconduct Standard

As to this incident, six people testified- Rankin, Hudson, Weaver and three neutral witnesses- Rich, Dasenbrock and Walters, the latter three who observed the incident from the second floor of the Rutledge building (the General Counsel did not call striker Neunaber, who Hudson and Weaver testified to being in Hudson's car during the incident). Tr. 620, 786-89,

1027-28, 1128, 1149-50, 1174-75, 1177-78; JT-Ex. 7(c), 7(d). Critically, the ALJ found that the three neutral witnesses were biased, with no support. *See* Section IV.D.1.[43]

As there is no valid reason to discredit their testimony, Consolidated excepts to the ALJ's failure to apply the testimony of the three neutral witnesses as follows:

- Rich- Hudson drove very slowly in front of Rankin, with the brakes on, stopping and going with an aim of driving slow to prevent Rankin from proceeding. Tr. 1122-24, 1134, 1165. When Rankin attempted to get around Hudson, he "swerved to the left and kind of got his tires off down in the grass." Tr. 1123-24. At the same time, Hudson "pull[ed] to the left to keep – I assume to keep him from going around her." *Id.*
- Dasenbrock- Hudson was stationary and waiting for Rankin in the grass. Tr. 1186. After they proceeded down the road, Hudson stopped in the roadway, just before Rankin decided to go around her and swerved in front of him in an attempt to stop him from passing. Tr. 1179-81, 1183, 1195; *see also* JT-Ex. 7(d). Hudson's actions were egregious enough for Dasenbrock to exclaim, "what the hell is she doing" while viewing the incident. Tr. 1183-84. Indeed, Dasenbrock characterized Hudson's actions as a "dare game" – "It's just like if somebody wants to just tease you a little bit and they're like, okay, I dare you, and I dare you to move." Tr. 1198.
- Walters- Hudson drove "very, very slow" in front of Rankin. Tr. 1028: *see also* Tr. 1032. As Rankin tried to get around her, she "pulled over in front of him so he couldn't pass." Tr. 1028.[44]

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[43] The ALJ also attempted to discredit the employees on the basis that the incident did not "affect them personally." P. 16. If true, it is actually a reason to credit their objective testimony versus the self-serving and otherwise unsupported accounts of Hudson and Weaver. Further, as previously noted, the ALJ erred in discounting their accounts because they were not interviewed or identified contemporaneously.

[44] Consolidated excepts to the ALJ's mischaracterization of Walters' testimony by claiming that she did not see Hudson swerve. P. 14. Walters did not say that she did not see Hudson swerve;

While the ALJ claimed that none of these three witnesses are "particularly reliable" and that inconsistencies exist in their testimony (P. 14), none of their testimony is materially inconsistent, as they all testified that Hudson impeded Rankin's progress and that she attempted to block his path. Tr. 1028, 1032, 1122-24, 1134, 1165, 1179-1181, 1183, 1195, 1198. To the extent that some inconsistencies exist as to minor details, this is not surprising given the passage of time, and indeed, as noted herein, the ALJ ignored inconsistencies in Hudson's and Weaver's testimony on numerous occasions. The ALJ also failed to credit their testimony on the basis that they were not identified or interviewed contemporaneously with the occurrence of the incident (P. 15), even though no evidence exists that Rankin would have known that they viewed the incident or that their truthfulness and memories were impacted. *See* Section IV.D.3.

In addition to applying unsupported findings against the three neutral witnesses in disregarding their testimony, the ALJ erred in placing a duty upon Rankin to avoid the situation by turning into a parking lot sooner (P. 13, 14, 16, 20) and ignored the record evidence. *See* Section IV.D.5. The ALJ also erred by "rel[ying] in part of the fact that no police reports were filed for their conduct, such as stop/starting in front of vehicles, which is clearly illegal" and applying a violence of threat of violence standard. *See* Section IV.D.4..

In addition to the above exceptions, the Company also excepts to the following aspects of the ALJ's decision as they apply to the Rankin incident:

- The ALJ found that people were on the roadway during the Rankin incident and that Rankin's testimony that he passed Hudson's vehicle only when there were no cars on the side of the street supports her purported testimony that she was driving very slowly because of the parked cars and people in the street rather than to harass Rankin. P. 14. *Hudson admitted,*

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she stated that she did not know if it was a swerve. Tr. 1049. Regardless, her testimony is materially consistent with the other Company witnesses.

however, there was nothing in front of her (Tr. 842-43), which is consistent with the testimony of the Company witnesses that they did not see anything in front of her car and that there was no reason for her to drive so slowly. Tr. 484, 1166, 1182-83.

- The ALJ found that "(a)ssuming Hudson's car moved laterally there is no basis for concluding she did so to harass Rankin" and stated that "(i)t is just as likely that she did so to avoid hitting cars, people or in reaction to the truck coming towards her from the north." P. 14-15. *As previously explained, four witnesses, including three non-supervisory witnesses, testified that Hudson blocked Rankin from passing on her left. The ALJ's statement that Hudson could have been attempting to avoid hitting cars or people is completely unsupported by the record, and clearly the General Counsel did not meet its burden through the ALJ's unsupported hypotheses. Moreover, the ALJ's conclusion that Hudson may have swerved to the left in reaction to a truck coming towards her from the north is completely illogical, as the parties agree (and the ALJ found at p. 13) that the truck from the north was approaching her on her left (Tr. 466, 622, 790, 842); thus, she obviously would not have moved to the left to avoid it. Further, Hudson admitted that she could have pulled over to let Rankin drive by (Tr. 846-47), which indicates there was no good reason for her to swerve in the first place.*

- The ALJ erroneously mischaracterized the Rankin incident as having lasted "for a very brief period." P. 16. The record does not support the ALJ's conclusion, as Rankin testified that the incident took five to eight minutes from the time that he approached the strike line until he "got free" and "felt safe" after passing Hudson. Tr. 472-73, 478. Indeed, Rich, who only observed Rankin from the time he pulled out of the driveway until she lost view of him, testified she saw about 90 seconds (Tr. 1162), hardly a "very brief period" for someone being harassed by another

vehicle outside of a strike line. Even under Hudson's version, the incident was not "very brief," as she testified that the incident lasted a "few minutes." Tr. 793.

- Without explanation, the ALJ failed to consider several issues highly probative to the accuracy of Hudson's and Weaver's self-serving accounts, including: a) the General Counsel's failure to call fellow striker Neunaber; b) their contradictory testimony in that Hudson claimed that there was not a ditch in the vicinity of the Rankin incident, while Weaver first stated that she did not know if there was a ditch in the vicinity but moments later testified that the ditches "were really muddy" (Tr. 623-25, 790); and c) Hudson's and Weaver's failure to provide defenses at their investigatory meetings. Tr. 157-59, 348-49, 1284-86; R-Ex. 12, GC-Ex. 23.

(2) The ALJ Erred In Failing To Apply Existing Caselaw

Clearly, if Hudson engaged in the conduct testified to by the neutral witnesses and Rankin, she engaged in serious strike misconduct which forfeited protection of the Act, as such actions would reasonably tend to coerce and intimidate the driver of the car, the three non-supervisory employees who viewed the incident, and anyone else apprised of the incident.[45] Indeed, the Board has consistently held that interfering with an employee's ability to cross the picket line reasonably tends to coerce or intimidate. *See Capital Bakers Div. of Stroehmann Bros.*, 271 NLRB 578 (1984) (blocking truck's exit from employer's facility sufficient to warrant discharge for strike line misconduct, as it tends to coerce or intimidate); *see also Auto Workers Local 695 (T.B. Wood's)*, 311 NLRB 1328, 1336 (1993) (union violated Act by preventing car from entering employer's plant); *Teamsters Local 812*, 304 NLRB at 115-17 (holding that "the blocking of vehicles by picketers violates the Act" and that union violated Act through picketer driving in front of company vehicle and braking in a manner which could have caused an

[45] In fact, the ALJ noted because starting and stopping in cars is clearly illegal (P. 14), and Rankin did feel totally vulnerable and threatened. Tr. 474-75.

accident); *Teledyne Indus., Inc.*, 295 NLRB 161, 174-75 (1989) (upholding denial of reinstatement to striker in part due to blocking of nonstriker vehicle); *Carpenters, Metro Dist. Council Of Philadelphia (Reeves, Inc.)*, 281 NLRB 493, 497-98 (1986) (union violated Act through acts of picketers blocking the ingress of employees); *United Steelworkers of Am. (Oregon Steel Mills, Inc.)*, 2000 NLRB LEXIS 495, at *77 (NLRB Div. of Judges Aug. 2, 2000) ("Blocking ingress and egress coerces employees whether the blocking actually prevents passage or merely delays it.").

c. Hudson's And Weaver's Blocking And Trapping Of Greider As She Crossed The Picket Line

In addition to the exceptions cited above, the ALJ failed to properly put the burden of proof on the General Counsel to prove that Hudson's stopping and starting in front of Greider, and Weaver's close following of Greider (blockading) either did not occur, or was not sufficiently serious to lose the protection of the Act. In fact, the General Counsel presented no proof that the blockade did not occur. Hudson and Weaver did not remember anything (Tr. 601-02, 768), and the General Counsel did not call a single, independent witness who was on the picket line and may have witnessed the event, despite the presence of strikers during the incident. R-Ex. 1 at 10:03:41. Since the General Counsel put in no evidence to counter Greider's and Rich's testimony that Hudson was stopping and starting in front of her, and that Weaver was following closely behind her, the General Counsel did not carry its burden to prove either that the conduct did not occur, or was not serious enough to lose protection of the Act.

Moreover, Consolidated excepts to the ALJ's failure to properly consider the inherent improbabilities of Hudson's and Weaver's claim that they do not recall the incident (Tr. 601-02, 768), as they were both told three days after the incident that they were involved with an incident with Greider on December 10 at 10:05 a.m. *See* Tr. 88, 92, 155, 349-50, 818-19, 1284-86; R-Ex.

12, GC-Ex. 23. They were also shown a video several months before their testimony showing that Hudson drove very slowly and applied the break in front of Greider, while Weaver drove behind Greider, who was clearly identified by her license plate, "SDG." Tr. 601-03, 768, 1056-57; R-Ex. 1 at 10:03:41.

In finding that the blocking did not occur, the ALJ made several tortured, unsupported (and even contradicted) findings. And, the Company makes the following exceptions:

- The ALJ found that "(t)here is absolutely no basis for questioning the testimony of Hudson and Weaver that they were on their way from Rutledge to the corporate building to picket at the latter site" and "(t)here is absolutely no basis for concluding that Greider's car ended up between Hudson and Weaver's vehicles other than by coincidence and the traffic control actions of the Huffmaster guard." P. 6. *As Hudson and Weaver testified that they went to a park to see if Company vehicles were present and then admittedly targeted Conley (see Tr. 609-14, 650-52, 770-79), the ALJ is wrong to presume that Hudson and Weaver necessarily planned to go to the corporate building to picket. Further, the ALJ is simply incorrect that there is <u>no</u> basis for assuming that Greider ended up between Hudson and Weaver coincidentally, as Greider testified to the blockade by Weaver and Hudson (Tr. 1053-57, 1079; see also R-Ex. 9(e)-(g)[46]) and Hudson's friend Rich testified that Hudson pulled in front of Greider and barely moved. Tr. 1118-20.[47] More importantly, the relevant issue is not what their initial plans were, but what actions they did or did not take towards Greider.*

[46] In acknowledging that Greider filled out a Huffmaster incident report, the ALJ cited to the incorrect exhibit, GC-Ex. 12. P. 7. The correct exhibit is R-Ex. 9(e)-(g); *see also* GC-Ex. 16.

[47] Consolidated excepts to the ALJ not giving any weight to Rich's testimony regarding the Greider incident on the basis that her testimony is inconsistent on material matters and that it is either inaccurate or incomplete, apparently relying upon an inconsistency in Rich's testimony as to whether she was sure if Hudson came to a complete stop in front of Greider. P. 7. The ALJ's

- The ALJ found that there is no evidence that Hudson drove slowly to harass or annoy Greider and that there is no credible evidence that Hudson was stopping/starting while in front of Greider. P. 6-7. *In asserting that no credible evidence exists that Hudson stopped and started while in front of Greider, the ALJ merely cited to the strike line video (R-Ex. 1), and the testimony of Patrem. Patrem was not a witness to the incident, and neither party disputes the strike line video only captures a small portion of the event, as the videographer did not film further down the road where Greider testified that the majority of the event took place. R-Ex. 1 at 10:03:41; JT-Ex. 7; Tr. 1057, 1069-70. Greider's uncontested testimony that Hudson was stopping and starting in front of her (people she indisputably had no unpleasant interactions with prior to the incident) were doing to her (Tr. 1079) is clear evidence of Hudson's stopping and starting in front of Greider. Likewise Rich's testimony that Hudson barely moved in front of Greider, and Rich's text message to Greider within minutes of viewing the incident, that "I just saw what Pat Hudson did to you. I can't believe she did that," is highly indicative of Hudson's misconduct. Tr. 1059, 1118--22, 1167; see also Tr. 1092 (ALJ's comment that "(i)t's pretty clear that [Greider's] feeling is that it was done to harass her").*
- In questioning the uncontested account of Greider, the ALJ made a number of unsupported statements including relying upon his finding that in her Huffmaster report, Greider stated that "[Hudson] refused to move or moved very slowly. She did not allege that Hudson was stopping and starting as she did at Tr. 1057." P. 6-7. *The ALJ's expectation and requirement that Greider's handwritten report of the incident mirror the more extended live testimony she provided is unreasonable, not required by law and shifts the burden to the Company. Moreover, there is no meaningful difference between "stopping and starting" or "refused to move or moved*

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analysis is flawed, because whether Rich saw Hudson "barely move" or actually stop is irrelevant, in that both constitute harassment and strike misconduct under the circumstances.

very slowly,"(appearing in her report) and it is error for the ALJ to create a semantic difference between the two and declare it an inconsistency.

- The ALJ relied upon Dasenbrock's testimony for support that there was "absolutely no misconduct by either Hudson or Weaver with regard to Greider." P. 8. *Dasenbrock clearly testified at Tr. 1184 that she did not see Greider leave or anything prior to Greider pulling through Pilson's driveway (the conclusion of the incident). The ALJ 's distortion of this is testimony to find that "nothing happened" and that she did not see "anything unusual" is completely and phenomenally inappropriate, or an unbelievable poor and inaccurate reading of the testimony.*

Without the support of the excepted to findings and unsupported comments of the ALJ, Greider's and Rich's testimony is uncontested that Hudson engaged in an improper blockade of Greider and the General Counsel did not prove that such blockade did not occur, or was not sufficiently serious to lose the protection of the Act. As with the Rankin incident, Hudson engaged in harassment of Greider as she attempted to leave the picket line. The fact that Greider was able to escape the incident sooner than Rankin is immaterial, as Hudson's conduct still would reasonably tend to coerce or intimidate. *See* caselaw cited in Section IV.E.[48]

3. The ALJ Erred In Finding That The General Counsel Met Its Burden In Establishing That The Misconduct Weaver Engaged In Was Not Serious Enough To Forfeit Protection Of The Act

a. Hudson's And Weaver's Blockading Of Conley And Diggs On Public Highway 16

[48] The ALJ erred in concluding on the basis of Consolidated's citation on page 47 of its post-hearing brief to Chief Branson's testimony that the misconduct by Hudson and Weaver during the Greider incident is "a police matter" that the conduct should have been reported to the police had it been serious. P. 7-8. Rather, Consolidated's citation to Chief Branson's testimony that Hudson's and Weaver's conduct towards Greider potentially constituted criminal harassment (Tr. 576) is probative in considering whether their acts constitute serious strike misconduct forfeiting protection of the Act. As previously noted, nothing required Greider report the incident to the police, and she reasonably reported it to the Command Center as instructed.

(1) The Proper Legal Standard Was Not Applied

As stated in more detail in Section IV.A.1., the proper standard for evaluating the Conley/Diggs incident is whether the Company had an unlawful motivation for terminating Weaver. Since the General Counsel did not offer any proof of anti-union animus, Weaver's termination should not be overturned.

(2) Alternatively, The ALJ Erred In Applying The Record And Misapplied The Striker Misconduct Standard

In finding that Weaver did not engage in misconduct during the Conley incident, the ALJ misplaced the burden of proof (*see* Section IV.B.), applied a violence or threat of violence standard (*see* Section IV.C.). improperly considered whether the other incidents occurred, assumed bias without any record support (*see* Section IV.D.1.), placed a duty on Conley to escape the strikers' misconduct (*see* Section IV.D.5.), imposed a police reporting requirement contrary to law and the record (*see* Section IV.D.4.), illogically found that Weaver was engaged in "ambulatory picketing" despite her admission of passing and staying in front of Conley (*see* Section IV.A.1.) and misapplied the record, including as to Hudson's and Weaver's discrepancies and failure to proffer any defense, as noted above (*see* Sections IV.D.2. and IV.E.2(a)).

If the ALJ had not erred as noted above, Conley's testimony established that Weaver harassed him on a public highway miles from the nearest picket site when she: a) proceeded into the left lane beside Conley and honking; b) passed Conley and moved into the right lane in front of him; c) engaged in hand motioning after Hudson passed Conley and proceeded parallel to her; d) immediately slowed down with Hudson after such motioning; e) continued to drive parallel with Hudson, resulting in Conley being blocked as he tried to pass Hudson; and f) continued to play the "cat and mouse" game as Hudson cut Conley off as he tried to pass her a second time,

which ultimately led Conley to turn off the main road to avoid further conflict. Tr. 864-70, 914-15. Such conduct clearly constituted misconduct sufficient to forfeit protection of the Act.

Instead, in addition to the errors enunciated above, in finding that Weaver did not engage in misconduct, the ALJ found probative value to Diggs' testimony that he did not recall seeing Weaver's brakes lights when she pulled in front of Conley and that Weaver and Hudson may have been driving at the speed limit. P. 13. Consolidated excepts to this finding in that both Weaver and Hudson testified that after passing Conley they moved a mere car's length of distance in front of him, hardly safe driving when driving approximately 55 miles per hour, which supports Diggs' statement that had Conley not been paying attention an accident would have occurred. Tr. 615, 657-59, 662, 851. As to Diggs' "concession" regarding the speed limit, Diggs testified that he does not know what the speed limit is (unsurprising given that he had been to the Mattoon twice in his life), but Hudson and Weaver "were traveling much slower than everyone else was traveling prior to them pulling in front of us." Tr. 954, 965.[49]

(3) The ALJ Erred In Applying Existing Caselaw

As noted in Section IV.A.1., decisions cited by the ALJ purportedly supporting his conclusion that Hudson's and Weaver's conduct was not serious enough to forfeit protection of the Act are inapposite because they analyze striker misconduct related to the *following* of non-strikers. Under the *Universal Truss* striker misconduct standard, the ALJ erred in ruling that Weaver's conduct in interfering with Conley on a public highway was not sufficiently serious to justify termination, particularly where it could have affected the safety of others. *See* caselaw cited in Section IV.E.2.(a). Moreover, the fact that Hudson, rather than Weaver, cut Conley off

[49] In apparently crediting Conley's testimony that Weaver did slow down while driving in front of him, the ALJ suggested that Weaver may have slowed down due to a change in the speed limit on the road. P. 10. The ALJ did not cite any testimony supporting this hypothesis, as none exists, and the General Counsel certainly did not meet its burden in establishing that Hudson and Weaver did not engage in misconduct through the ALJ's unsupported hypothesis.

as he tried to pass them is immaterial, as it is clear that Weaver was an active participant in the blockade and cat and mouse game. *Auburn Foundry, Inc.*, 274 NLRB 1317, 1318 (1985) (finding discharge of striker lawful where he acted "in association" with others in harassing nonstrikers on highway).

b. Hudson's And Weaver's Blocking And Trapping Of Greider As She Crossed The Picket Line

In addition to the exceptions cited above, as previously noted, the ALJ failed to properly place the burden of proof on the General Counsel to prove that Hudson's stopping and starting in front of Greider, and Weaver's close following of Greider during the stopping and starting (blockading) either did not occur, or was not sufficiently serious to lose the protection of the Act. *See* Section IV.B. and IV.E.2.(c). Moreover, Consolidated excepts to the ALJ's failure to properly consider the inherent improbabilities of Weaver's claim that she not recall the incident (Tr. 601-02), as she was told three days after the incident that Hudson and she were involved in an incident with Greider on December 10 at 10:05 a.m. *See* Tr. 92, 155, 161, 349-50, 1284-86; R-Ex. 12; GC-Ex. 23. Weaver also was shown a video several months before her testimony showing that Hudson drove very slowly and applied the break in front of Greider, while Weaver drove behind Greider who was clearly identified by her license plate of "SDG." Tr. 601-03; R-Ex. 1 at 10:03:41.

Consolidated further excepts to the ALJ's finding that Weaver ended up behind Greider due to the actions of the Huffmaster security guard in allowing Greider to exit the parking lot. P. 6. While the ALJ's finding as to why Weaver ended up behind Greider is irrelevant to the actual issue of whether Weaver engaged in strike misconduct once Greider exited the parking lot by participating in a blockade, the video, which covers only 16 seconds of the entire incident, does indicate that Hudson applied her breaks in front of Greider and that Weaver was initially a

substantial distance behind Greider. *See* R-Ex. 1 at 10:03:41. Thus, there was no legitimate reason for Weaver to have followed Greider so closely, particularly where both Hudson and Weaver testified that that they had a pre-approved plan to meet at a location with which they were both familiar. Tr. 608-09, 650, 769-70, 829.

Since the General Counsel put in no evidence to counter Greider's testimony that Hudson pulled in front and Weaver pulled in behind her and blocked her, with Weaver getting within two feet, Tr. 1053-57, the General Counsel did not carry its burden to prove either that the conduct did not occur, or was not serious enough to lose protection of the Act. The fact that Greider was able to escape the incident sooner than Rankin is immaterial, as Weaver's conduct still would reasonably tend to coerce or intimidate, particularly where a lone employee was driving through a loud and aggressive picket line. Tr. 1053-57. *See* case law cited in Sections IV.C and IV.D.5.

c. Hudson's and Weaver's Blocking And Swerving Of Rankin While Leaving Picket Line

As set forth in Sections IV.C., IV.D., and IV.E.2.b. above, the ALJ made numerous errors in analyzing the Rankin incident, and it is clear that Hudson forfeited protection of the Act when she impeded Rankin's passage and swerved in front of him as he tried to leave the picket line. Although Weaver was a passenger while Hudson drove, it is still clear that Weaver participated in the harassment of Rankin, as Weaver was a passenger in the car and did nothing to prevent either the intentional slow driving or swerving in front of Rankin to impede his progress. Tr. 452, 620.

As a passenger and active participant with Hudson on the morning of December 10 in all three incidents, Weaver is subject to discipline for her misconduct and should not be able to disclaim responsibility when it is clear that she supported Hudson all day in her efforts to threaten and intimidate employees merely trying to do their jobs. *See Alaska Pulp Corp.*, 296

NLRB 1260, 1275 (1989) (employer justified in refusing to reinstate striker where she was an accessory to misconduct); *GSM*, 284 NLRB at 175 (upholding discharge of strike because of his "active cooperation with pickets"); *Auburn Foundry*, 274 NLRB at 1318 (1985) (finding discharge of striker lawful where he acted "in association" with others in harassing nonstrikers on highway).

4. The ALJ Erred In Applying The Record and The Case Law To Williamson's Misconduct

In addition to the errors noted above, the ALJ erred, and the Company takes exception to, the following aspects of the ALJ's decision regarding Williamson:

a. Williamson's Striking Of Redfern's Car Mirror As She Crossed The Picket Line

The ALJ did not properly apply the striker misconduct standard in analyzing Williamson's conduct towards Redfern (an employee in the midst of crossing a picket line). The ALJ found that "there is no evidence that Williamson intentionally "struck" Redfern's mirror. P. 16. However, under *Clear Pine Mouldings*, that is not the proper question; the question is did Williamson engage in misconduct which would reasonably coerce or intimidate an employee. Here, the inquiry is whether Williamson intentionally engaged in conduct which resulted in him (or his whistle) striking Redfern's mirror with enough force to fold the mirror in.

Two witnesses testified to the event: Williamson and Redfern. Despite the ALJ's comment that no evidence exists that Williamson intentionally struck the mirror, it is essentially undisputed that Williamson intentionally engaged in the conduct which resulted in Redfern's car mirror being knocked in. Williamson admitted he intentionally approached Redfern's vehicle as she pulled out of the parking lot, claiming he wanted to make sure she saw his sign. *See* Tr. 717,

748-50; R-Ex. 5. Williamson also admitted that he was close to cars all day. Tr. 743.[50] Williamson claimed that Redfern's mirror "grazed" the standard basketball coach's whistle he was wearing on his chest, causing the mirror to knock in. Tr. 717-18, 730-31, 740-42.

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

The Company excepts to the ALJ's statement that "(i)t is not clear whether Williamson moved closer to [Redfern's] car, or whether Redfern turned more sharply than other cars." P. 16. That finding is contrary to the video of the event and the ALJ's own remarks that the video does not show any evidence of Redfern's vehicle going outside of the driveway. *See* R-Ex. 1 at 5:08:07; Tr. 741. In addition, Williamson admitted that upon review of the strike video, Redfern's vehicle was squarely in the driveway as it exited and followed the same pattern and path as the cars before it. Tr. 737-40; *see also* R-Ex. 1 at 5:08:07; Tr. 741.

[50] Further impugning his credibility, while Williamson claimed on direct-examination that Redfern's mirror "flexed in and flexed out," on cross-examination he stated that he is not sure if it popped back into place. Tr. 731.

The Company also excepts to the ALJ's failure to consider that Williamson's approaching of Redfern's vehicle was consistent with his actions throughout the day. As Chief Branson testified, Williamson (*see* R-Ex. 10(a), R-Ex. 10(b); Tr. 1111-13) "was kind of a hot head," and "kind of over the top" in his striker activities. Tr. 557. Chief Branson observed Williamson "getting as close as he possibly could" to vehicles, and that Williamson only was begrudgingly compliant with the Chief's request to "back off." Tr. 565-66.[51] Indeed, when Williamson himself was asked, "someone could easily say, he, Mr. Williamson was close to cars all day? He was within one foot many times today." Williamson responded that "I was at many times, yes" (Tr. 743; *see also* Tr. 727-28), which is clear from the strike line video. *See, e.g.*, R-Ex. 1 at 9:14:17, 10:01:17, 10.06-27, 1044:21, 11:15:30, 2:20:48, 2:56:25.

In supporting his finding that no evidence exists that Williamson intentionally struck the mirror, the ALJ stated that Redfern testified that Williamson could have come into contact with her mirror accidentally and that Redfern never told anyone that she thought Williamson struck her mirror intentionally. P. 16. Redfern merely testified, however, that she does not know whether Williamson intentionally struck the mirror. Tr. 1004. This is forthright and truthful

[51] The ALJ noted in his decision that he had "skepticism" as to Chief Branson's identification of Williamson. P. 5. Initially, Chief Branson's credibility cannot be seriously questioned, as he talked to both parties during the strike, both parties' counsel following the strike and was called by both parties as a witness. Tr. 531, 534-35, 537, 1111. Further, Williamson testified that he wore jeans, an orange shirt and a hoodie on December 10 and that he was close that day to cars on several occasions. Tr. 743; *see also* Tr. 727-28. A man in jeans, an orange shirt and a hoodie with a small logo on the front of it (i.e. a San Francisco 49ers logo) matching Williamson's description of himself as 6-2 and 245 pounds (Tr. 719) is clearly seen on the strike line video of December 10 crowding cars on numerous occasions. R-Ex. 1 at 9:14:17, 10:01:17, 10:06:27, 1044:21, 11:15:30, 2:20:48, 2:56:25. The picture of this person in R-Ex. 10(a) and R-Ex. 10(b) depicts the same person in the orange hoodie, jeans and hoodie with the San Francisco 49ers logo and even shows a whistle that Williamson testified to wearing during the day. Tr. 740-41. This person is clearly Williamson, and the ALJ is simply wrong in his statement that this person is not Williamson. P. 6. The General Counsel could have called Williamson or Union representative Beisner to dispute that this person is Williamson, but choose not to for the obvious reason that they could not truthfully dispute that R-Ex. 10(a) and (b) shows Williamson.

testimony, since Redfern cannot get inside of Williamson's mind, but this fact does not mean that the General Counsel established that Williamson did not intentionally hit the mirror. Further, both Redfern and Williamson agree that Redfern accused Williamson of hitting her car, which demonstrates her steadfast belief that he intentionally hit her mirror, as it is highly unlikely that Redfern otherwise would engage Williamson, who by his own description is 6 foot 2 in shoes and weighs 245 pounds. Tr. 717, 719, 987, 1007, 1015-16.[52] Redfern's incident reports also state that Williamson "hit" her mirror (R-Ex. 9(r)-(v); *see also* Tr. 1017), a fair reading of which indicates she believed Williamson intentionally made contact with her mirror.

In addition to the above, the Company excepts to the following ALJ findings:

- The ALJ erred in apparently crediting Williamson's completely unsupported testimony that a police officer told him after the incident that he had done nothing wrong. Tr. 717-18. The Department Shift Commander stationed at the site, Captain Eric Finley, testified that none of the police officers saw the actual incident, he is not aware of any other police officer having a conversation with Williamson about the incident and that he did not tell him he did nothing wrong. Tr. 539-40, 1103, 1105-06.[53] The General Counsel presented no contrary evidence (including police officer) to support Williamson's claim. Indeed, the ALJ failed to consider that the General Counsel did not call any supporting witnesses despite numerous picketers being in the area (and a purported police officer that supported his story). Tr. 987; R-Ex. 1 at 5:08:07.

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[52] Indeed, the ALJ did not permit Redfern to testify to her phone conversation with Jenny Belleau, who was in the vehicle behind her, immediately after the incident. Tr. 989. Consolidated asserts this testimony would have supported its contention that Williamson intentionally hit the mirror.

[53] Consolidated excepts to ALJ finding no probative value to Caption Finley's testimony. P. 5-6. As explained above, the individual Captain Finley identified as the person to whom he spoke in R-Ex. 10(a) and 10(b) is Williamson. The General Counsel chose not to call Captain Finley despite having visited the police. Tr. 539, 1105.

- The ALJ erred in crediting Williamson's account, particularly in light of his conclusion that Williamson fabricated his testimony in denying his involvement in the Walters incident. P. 17-18. Williamson's version- which he never told the Company until the hearing (unsurprisingly, given its absurdity) (Tr. 1243)- that Redfern's passenger-side mirror hit a basic whistle hanging on his chest, causing the mirror to pop in (Tr. 717-18, 740-42) is too incredible to be believed. Simply put, the resolution of the testimony is not based upon credibility; rather, it is based on what must be true (Williamson used enough force to knock the mirror back) and what cannot be true (a standard coach's whistle was grazed by a car mirror causing the mirror to fold in).

b. The ALJ Erred In Finding That The General Counsel Met Its Burden In Establishing That The Conduct Williamson Engaged In Was Not Serious Enough To Forfeit Protection Of The Act

Williamson's Striking Of Redfern's Car Mirror As She Crossed The Picket Line

The ALJ erred in applying existing caselaw. If Williamson intentionally engaged in conduct which resulted in him making contact with Redfern's vehicle, his conduct justifies a two-day suspension (particularly when considered in conjunction with the misconduct the ALJ found Williamson committed towards Walters). *See Siemens,* 328 NLRB at 1176 (upholding discharge of striker that kicked a vehicle as it passed through the picket line); *GSM*, 284 NLRB at 174-75 (in upholding discharge of strikers making intentional conduct with non-strikers' vehicles, finding that "(c)onduct such as kicking, slapping, and throwing beer cans at moving vehicles is intimidating enough in and of itself" to forfeit protection of the Act); *see also Auto Workers Local 695*, 311 NLRB at 1336 (1993) (union violated Act where picketers broke vehicle mirrors and prevented car from entering employer's plant); *Teamsters Local 812*, 304 NLRB at 115-117 (finding that union violated Act through act of picketer in bending mirror (*citing Boilermakers Local 696 (Kargard Co.)*, 196 NLRB 645, 649 (1972)). But, even if Williamson only crowded Redfern's car as she exited the facility, such conduct was reckless and would

reasonably tend to coerce or intimidate because it reasonably could lead to the type of incident that occurred here. *See Calmat Co.*, 326 NLRB 130, 135 (1998) (upholding discharge of striker hit by exciting vehicle where he intentionally placed himself in front of exiting car).

Williamson's Obscene Gesture At Walters After She Crossed The Picket Line

The ALJ found that after Walters crossed the picket line Williamson engaged in misconduct by grabbing his crotch as a hostile gesture and yelling the word "scab" at her. P. 18. The ALJ cited Board decisions as leading "to the conclusion that for a striking employee to forfeit the protection of the Act, an implied threat of bodily harm must accompany a vulgar or obscene gesture." P. 21-22. The ALJ then found that "Williamson's gesture certainly does not meet this standard." P. 22. This is another example of the ALJ inferring a legal standard that does not exist in lieu of applying the proper standard, which is whether the misconduct reasonably would tend to coerce or intimidate an employee from exercising Section 7 rights. *See Universal Truss*, 348 NLRB at 780-81 (upholding termination of striker that made sexually suggestive dance towards female employee). Indeed, behavior that may seem "relatively innocuous" may nevertheless justify discharge if it may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. *See GSM*, 284 NLRB at 174-75.

The ALJ also improperly disregarded *Romal Iron Works Corp.*, 285 NLRB 1178, 1182 (1987) and *Bonanza Sirloin Pit*, 275 NLRB 310 (1985), cases cited by Consolidated when the ALJ concluded that the cases involved "threats of retaliation to employees, couched in obscene language" and are not relevant to the inquiry. P. 22. While *Romal* and *Bonanza Sirloin Pit* concern vulgar words by an employer, the principle is still the same – subjecting employees to gross vulgarisms, such as racial slurs or sexually suggestive and inappropriate behavior, because they are they are engaged in activities protected by Section 7 of the Act-- directly inhibits them

in the exercise of those rights and therefore interferes with, restrains and coerces employees in the exercise of their Section 7 rights. *See Romal,* 285 NLRB at 1182); *Bonanza Sirloin Pit,* 275 NLRB at 311. Indeed, the Board has held that such conduct is not protected by the Act. *Id.*

Here, the General Counsel failed to carry its burden in demonstrating that the Walters misconduct would not reasonably tend to coerce or intimate employees in the exercise of their Section 7 rights, and Consolidated excepts to the ALJ relying upon a "threat of bodily harm" legal standard that does not exist to find that Williamson's two-day suspension violated the Act.

F. <u>The ALJ Erred By Failing To Apply The Established Striker Misconduct Burden-Shifting Standard, And Instead Improperly Placed The Burden of Proof Upon Respondent In His Analysis Of Maxwell's Misconduct. The ALJ Also Erred by Making Findings Not Supported By the Record.</u>

As to the Flood incident, the Company takes exceptions to the following:

- The ALJ found that Maxwell did not intentionally strike Flood's vehicle and did not threaten and intimidate Flood. P. 4, 20. The ALJ credited Maxwell's testimony based upon his finding that passenger Fetchak's account did "not contradict Maxwell's testimony in any material way." P. 4. The Company excepts to the ALJ's finding on the basis that Fetchak's testimony <u>does</u> materially contradict Maxwell's testimony. While Maxwell and Fetchak agree that Maxwell was walking back and forth in the driveway when Flood approached the exit and that Maxwell intentionally refused to move out of the way (Tr. 504, 511-12, 515), Maxwell claimed that Flood's van "took off like a bat out of hell" out of the Company's garage going about 15 miles per hour (Tr. 499-501), while Fetchak testified that Flood, the driver, was forced to stop the vehicle and slowly inch forward a couple of inches ("almost negligible") and stop again on multiple occasions until Maxwell left the front of the van. Tr. 931, 938-39, 953. Fetchak's testimony also materially contradicts Maxwell's claim that Flood was the aggressor and that the

van hit him twice. Tr. 500-01.[54] To the contrary, Fetchak testified that Maxwell intentionally placed a part of his arm on the vehicle's front in an effort to impede their progress from turning out of the driveway while they inched forward (contrary to the ALJ's conclusion that Maxwell placed his arm on the hood to regain his balance). Tr. 932-34, 952-53.

- The ALJ did not find any reason to dispute the veracity of Fetchak, a non-interested, non-management, subpoenaed witness employed in another state. P. 3-4; Tr. 926-27. His testimony must be credited: "As we slowly tried to inch forward a couple of inches at a time, [Maxwell] would not leave the front of the van. He would walk from one side of the van to the other, pretty much staying between the headlights." Tr. 932. The ALJ should have found that as Fetchak testified: a) Flood did not hit Maxwell with the van but rather Maxwell intentionally made contact with his arm; b) Maxwell impeded the van's progress from leaving for more than a "very brief period of time" by walking in front of the area between the van's headlights while strikers yelled at Flood and blocked his view as he inched forward in order to safely exit the facility onto a public road; and c) Maxwell then yelled "Fuck You, Scab" at Flood while standing near the driver's side window. Tr. 929-34, 938, 952-53. Indeed, Flood and Fetchak were so upset that after escaping the picketers, Flood pulled off the road about half a mile down so that they could calm down and collect their thoughts. Tr. 934.

- The Company also excepts to the ALJ's finding that "Maxwell did not impede Flood's progress more so than the other five picketers." P. 4. The ALJ cited no evidence supporting this

[54] The Company also excepts to the ALJ crediting Maxwell's testimony, not only because it contradicts credited witness Fetchak, but also because it defies logic (P. 4) in that: Maxwell testified that despite being hit twice, he (other than a bruise) sustained no injuries, did not go to a doctor, did not file a police report or even bring up to Flood or Fetchak that he was hit at the time. Tr. 499-501, 504-05, 511-12, 514, 519-521. Indeed, Maxwell testified that he continued to picket until 5:30 to 6:00 p.m. that day (Tr. 514), hardly the behavior of a person who had been hit not once, but twice, by a vehicle.

finding, and as Fetchak testified, while there were a number of people to Flood's left yelling at him, only one particular striker, i.e. Maxwell, impeded his progress, and once he left the front of the van, Flood was able to make his turn. Tr. 929-34. Moreover, Flood's written accounts indicate that one striker- Maxwell- impeded his progress. R-Ex. 9(n)-(p), R-Ex. 11.

Under the burden-shifting framework, if any doubt exists between two witnesses the ALJ finds credible (Maxwell and Fetchak), the doubt must be resolved against the General Counsel, who has the burden of proof. Additionally, the ALJ erred in not applying an adverse influence against the General Counsel for failing to present as a witness Union officer Evans, which is particularly egregious given his involvement in the incident both as a witness and a participant (Tr. 74, 82; R-Ex. 8, 11, 12, GC-Ex. 23) (*see Douglas Aircraft Co.*, 308 NLRB 1217, 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference…regarding any factual question on which the witness is likely to have knowledge"))[55] and in failing to consider the General Counsel's failure to call one of the approximately six strikers picketing with Maxwell at the time, including one striker, Adkins, who Maxwell claimed also was hit. Tr. 495-96, 499-500, 502-03, 511, 515-17.

1. The ALJ Erred In Finding That The General Counsel Met Its Burden In Establishing That The Conduct Maxwell Engaged Is Not Serious Enough To Forfeit Protection Of The Act

While the ALJ erred by applying a violence or threat of violence standard to all of the misconduct at issue in this case, Maxwell's actions against Flood and Fetchak did threaten violence by intentionally making contact with Flood's van (which happened based upon Fetchak's reliable account confirmed by Flood's written accounts), impeding the van's progress (found to have happened by the ALJ) and yelling "Fuck You, Scab" to Flood while standing near

[55] As previously noted, no competent evidence supports the General Counsel's assertion that Flood was a supervisor or agent of Consolidated within the meaning the Act.

his door (the ALJ found that Maxwell yelled "Fuck You" at Flood). Maxwell clearly engaged in unprotected misconduct which is more than sufficient to justify a two-day suspension. *See Siemens*, 328 NLRB at 1176 (upholding discharge of striker that kicked a vehicle as it passed through the picket line); C*almat*, 326 NLRB at 135 (upholding discharge of striker hit by exciting vehicle that "placed himself in front of the exiting vehicle by, after all the other pickets had stopped, continuing to walk purposefully in front of it, slowly, in order to cause it to slow down or stop" and subsequently approaching and threateningly driver); *GSM*, 284 NLRB at 174-75 (in upholding discharge of strikers making intentional conduct with non-strikers' vehicles, finding that "(c)onduct such as kicking, slapping, and throwing beer cans at moving vehicles is intimidating enough in and of itself" to forfeit protection of the Act); *see also Auto Workers Local 695*, 311 NLRB at 1336 (1993) (union violated Act by preventing car from entering employer's plant); *Teamsters Local 812*, 304 NLRB at 115-17 (1991) (in finding that union violated Act through actions of picketers in blocking vehicles, stating that "the blocking of vehicles by picketers violates the Act"); *Carpenters, Metro Dist. Council Of Philadelphia (Reeves, Inc.)*, 281 NLRB 493, 497-98 (1986) (union violated Act through acts of picketers blocking the ingress of employees); *Capital Bakers Div. of Stroehmann Bros.*, 271 NLRB at 578 (discharge of employees lawful where aggressive contact made with Company vehicle).[56]

G. <u>The ALJ Failed To Consider The Surrounding Circumstances In Considering Whether The Disciplined Employees' Misconduct Was Sufficiently Serious To Forfeit Protection Of The Act</u>

In determining whether specific misconduct is serious enough to warrant discharge, "it is appropriate to consider all of the circumstances in which the alleged misconduct occurs."

[56] In *Stroehmann Bros.*, as with Maxwell's conduct, the Board upheld the discharge of a striker that, among other things, stood in front of a company truck, forcing it to stop, remained against the hood as the vehicle moved forward and then proceeded to the driver's side to harass the driver. 271 NLRB at 578; *see also Calmat*, 326 NLRB at 135

Universal Truss, 348 NLRB at 735. Here, the ALJ erred in failing to consider all of the circumstances in which the alleged misconduct occurred, as the chaotic strike lines heightened the coercive and threatening impact of Hudson's, Weaver's and Williamson's misconduct.[57]

As testified to by Chief Branson (called as a witness by the General Counsel), at the time he arrived to the Rutledge strike line on Monday, December 10, there was what he "would consider chaos in the street" due to the road's congestion. Tr. 540. Moreover, strikers "were getting as close to the cars as they possibly can . . . sometimes they were almost touching it" and the noise was "deafening." Tr. 550. The conditions were such that the Chief Branson was (justifiably) concerned about the public safety and planned to use barricades the following day to keep the strikers out of the road . Tr. 548, 550, 553 [58] Indeed, the police department "could have made some arrests that morning." Tr. 575.

From the beginning of the day, Hudson was clear in her intention that she was going to obstruct traffic coming into and out of the Rutledge facility, and despite being hit accidentally by a security guard and the general instructions she received from the police and the specific instructions she received from the Union, she continued to intentionally obstruct traffic and put herself in the way of oncoming vehicles. *See* R-Ex. 1 at 9:09:25 (hit by security guard), 10:18:26 (where the Police Chief had to move her back), 11:30:32; GC-Ex. 6 (Union instructions); Tr. 541-42, 766-67, 802-03, 806, 810-11, 821-22, 825. Similarly, as testified by Chief Branson,

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[57] Consolidated excepts to the ALJ's failure to consider and allow testimony as to effect of the strikers' misconduct, as it is clear that the misconduct did have a negative impact on some employees. Tr. 472, 543-44, 993-94.

[58] Union representative Beisner admitted upon that strikers were in and obstructed the driveway at the Rutledge facility. Tr. 144, 149; R-Ex. 1 at 9:25:05, 9:57:52. The strike line video (R-Ex. 1) indicates that the ALJ erred in finding that the picketers complied with Chief Branson's instructions not to congregate in the roadway. P. 5. Moreover, the ALJ misconstrued Chief Branson's testimony, as he indicated that after he spoke to the picketers, they continued to restrict traffic after he spoke with Company management inside. Tr. 541; *see also* Tr. 548.

Williamson acted like a "hot head" and "over the top" in his striker activities and that he was "getting as close as he possibly could to vehicles." *See* Tr. 565-66, 577, R-Ex. 10(a) R-Ex. 10(b); Tr. 1111-13). Indeed, Williamson admitted that he was very close to vehicles "at many time" and that he had no voice by the time Redfern left the facility at about 5 pm. *See* Tr. 717, 727-28, 743; R-Ex. 1 at 9:14:17, 10:01:17, 10:06:27, 1044:21, 11:15:30, 2:20:48, 2:56:25. It is clear that a 6 foot 2 inch man weighing 245 pounds acting in this manner would be threatening and intimidating to those trying to exercise their Section 7 rights to work.

The deafening, chaotic strike line conditions and the conduct taken by the Disciplined Employees, particularly Hudson and Williamson, who indisputably crowded cars attempting to leave and enter during the strike, heightened the coercive and threatening acts of the conduct, and the ALJ erred in failing to consider in making his determination. While Weaver may not have been the "ringleader" that Hudson and Williamson were, her overall conduct, including her collaboration and cooperation with Hudson all day, when considered in light of the surrounding circumstances, would reasonably tend to coerce other employees in the exercise of their rights, and the General Counsel therefore cannot show that Weaver retained protection of the Act.

V. CONCLUSION

In light of the numerous legal and factual errors, the ALJ's decision should be reversed, and the evidence indicates that complaint should be dismissed in its entirety. To the extent the Board finds remand necessary, the matter should not be remanded to the current administrative law judge due to his admitted bias against Company witnesses.[59]

[59] *See, e.g., CMC Electrical Construction and Maintenance, Inc.*, 347 NLRB 273 (2006).

Respectfully submitted, this 10th day of January, 2014.

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CERTIFICATE OF SERVICE

I certify that on this 10th day of January 2014, I caused the foregoing to be electronically filed the with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served via electronic mail to the following:

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