Nos. 14-1135, 14-1140

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSOLIDATED COMMUNICATIONS d/b/a
ILLINOIS CONSOLIDATED TELEPHONE COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 702
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JILL A. GRIFFIN
Supervisory Attorney

JOEL A. HELLER
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2949
(202) 273-1042

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

Consolidated Communications is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. International Brotherhood of

Electrical Workers, Local 702 is an intervenor before the Court, and was the charging party before the Board. There are no amici.

B. Rulings Under Review

This case is before the Court on Consolidated's petition to review a Board Order issued on July 3, 2014, and reported at 360 NLRB No. 140. The Board seeks enforcement of that Order against Consolidated.

C. Related Cases

The case on review was not previously before this Court and or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 17th day of June, 2015

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GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board
Consolidated	Consolidated Communications d/b/a Illinois Consolidated Telephone Company
Local 702	International Brotherhood of Electrical Workers, Local 702

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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Consolidated Communications d/b/a Illinois Consolidated Telephone Company ("Consolidated") for review, and the cross-application of the National Labor Relations Board ("the

Board") for enforcement, of a Board Order issued July 3, 2014, and reported at 360 NLRB No. 140. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"). 29 U.S.C. §§ 151, 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, *id.* § 160(e) and (f), which provides that petitions for review of final Board orders may be filed in this Court and allows the Board, in that circumstance, to cross-apply for enforcement. Consolidated filed its petition on July 14, 2014, and the Board filed its cross-application on July 24, 2014. Both filings were timely. International Brotherhood of Electrical Workers, Local 702 ("Local 702") intervened in the case in support of the Board.

RELEVANT STATUTORY PROVISIONS

Section 8(a) of the Act, 29 U.S.C. § 158(a):

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 13 of the Act, 29 U.S.C. § 163:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT OF ISSUES

I. An employer violates Section 8(a)(3) and (1) of the Act by disciplining an employee for alleged misconduct during a strike if the misconduct did not, in fact, occur or was insufficiently egregious to cause the employee to lose the protection of the Act. Does substantial evidence support the Board's finding, based on the credited evidence, that Consolidated unlawfully discharged or suspended three employees for alleged misconduct during a five-day strike?

II. An employer violates Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment without notifying or bargaining with the union representing its employees. Does substantial evidence support the Board's finding that Consolidated's unilateral elimination of the position of office specialist-facilities was an unfair labor practice?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on unfair-labor-practice charges filed by Local 702, the Board's Acting General Counsel issued a complaint alleging that Consolidated violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging

Patricia Hudson and Brenda Weaver and suspending Michael Maxwell and Eric Williamson for alleged misconduct that either did not occur or was insufficiently egregious for them to lose the protection of the Act. The complaint also alleged that Consolidated violated Section 8(a)(5) and (1), 29 U.S.C. § 158(a)(5) and (1), by eliminating a bargaining-unit position without notifying or bargaining with Local 702. The case was heard before an administrative law judge, who issued a decision and recommended order finding the Section 8(a)(3) and (1) violations as alleged; the judge did not rule on the Section 8(a)(5) allegation. On review, the Board affirmed the judge's rulings and conclusions, as modified, and adopted the judge's recommended order, as modified. In addition to the judge's findings, the Board found the Section 8(a)(5) violation as alleged.

II. THE BOARD'S FINDINGS OF FACT

A. Consolidated's Employees Go On Strike

Consolidated is a telecommunications company that operates in several states, providing commercial and residential telephone, television, and broadband services. (JA 4; JA 733.)[1] A unit of employees at Consolidated's facilities in Taylorsville and Mattoon, Illinois are represented by Local 702, and were covered by a collective-bargaining agreement that expired on November 15, 2012.

[1] References in this brief are to the Joint Appendix ("JA"). References preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence. "Br." cites are to Consolidated's opening brief to the Court.

Negotiations for a new agreement continued, but, following demands from Consolidated to make concessions on pension issues, employees went on strike on December 6. (JA 4; JA 53, 177-78.) Employees picketed at ten locations, including Consolidated's garage in Taylorsville and its Rutledge Building service center ("Rutledge") and corporate headquarters in Mattoon. Local 702 instructed the strikers that they also could picket at commercial worksites, a practice known as ambulatory picketing. (JA 4; JA 179-80, 182-83.) Management and non-unit employees continued to work during the strike, and Consolidated brought in replacement workers from other locations to perform the jobs of striking employees. (JA 4-5; JA 231-33, 246.)

Consolidated hired the Huffmaster Security Company to guard the facilities, direct traffic across the picket line, and advise managers, non-unit employees, and replacement workers how to conduct themselves during the strike. Non-striking employees were told to follow a Huffmaster guard's instructions when crossing the picket line. Huffmaster also provided written guidelines on how to respond to incidents of misconduct by strikers. The guidelines advised employees to report any damage to the police, and, if they were followed when leaving company property, to drive directly to a police station or return to company property. Employees also were told to fill out an incident report. (JA 4-5; JA 59-62.)

B. Maxwell Is Hit by a Company Van While Picketing

Michael Maxwell had worked as a janitor for Consolidated for ten years at the time of the strike. (JA 3; JA 205, 336.) On December 8, Maxwell was picketing at the Taylorsville garage, walking back and forth across the entrance and exit to the parking lot along with five other employees. Replacement workers Leon Flood and Frank Fetchak left the garage in a company van and approached the exit, where Flood stopped briefly and inched forward towards the picketers, who were still moving. The van hit Maxwell, who fell forward and braced himself on the hood with his arm. Maxwell tried to regain his balance, but was pushed towards the driver's side of the van, where he cursed at Flood and gave him the finger. (JA 4; JA 337, 341-42, 578-80.) Flood drove off, and later submitted incident reports to Consolidated and Huffmaster. (JA 4; JA 24-27, 346.)

C. Weaver and Hudson Travel Between Picket Sites, Investigate Opportunities for Ambulatory Picketing, and Support Their Fellow Strikers

Patricia Hudson worked as an office specialist in the fleet department. At the time of the strike, she had been at Consolidated for 39 years and had never been disciplined. (JA 3; JA 465-66.) Brenda Weaver was an office specialist in facilities, and had worked at Consolidated for 13 years. (JA 3; JA 388.) During the strike, Hudson both walked the picket line and drove by Rutledge waving and cheering on the other picketers. (JA 5, 9; JA 467, 471.)

On the morning of December 10, Hudson and Weaver were picketing at Rutledge and decided to drive over to join the picket line at corporate headquarters. (JA 5; JA 471.) Non-striker Sarah Greider was leaving Rutledge at the same time. As Greider approached the parking-lot exit and prepared to turn onto 17th Street, a Huffmaster guard stopped her car to allow Hudson's car to pass by on 17th. The guard then stopped Weaver, who was travelling behind Hudson, and directed Greider to exit. Once Greider turned onto 17th behind Hudson, the guard let Weaver continue. (JA 5; JA 658-59, 664-65.) Seventeenth Street had been reduced to one lane, with parked cars and picketers on both sides of the roadway, and Hudson was driving slowly. (JA 6; JA 188-89, 391, 668-70.) After approximately 135-165 feet, Greider turned left off of 17th into the parking lot of Pilson's Auto Center and continued on a parallel street. Neither Weaver nor Hudson followed her. (JA 6; JA 168, 186-87, 652, 657.) Greider told Consolidated that Hudson and Weaver had blocked her in, and filled out a Huffmaster report. Neither she nor Consolidated contacted the police. (JA 6; JA 47-49.)

En route to headquarters, Hudson noticed a company truck headed east on Route 16. Manager Troy Conley was driving, with replacement worker Larry Diggs as a passenger. (JA 6-7; JA 476-77, 588-90.) Hudson and Weaver followed the truck to see if it was travelling to a commercial worksite, where striking

employees could picket. (JA 6; JA 485.) They caught up to Conley at Miller Road and, about a mile and a half later near the county airport, Weaver passed the truck and returned to the right lane. Near Sarah Bush Hospital, Hudson passed Conley in the left lane. (JA 7 & n.12; JA 20, 481-82.) About a half mile later, the speed limit temporarily dropped from fifty-five to fifty miles per hour; at one point, Conley had been driving sixty-nine miles per hour. (JA 7 & n.12; JA 386-87, 562.) Hudson went into the right lane to let a car pass, then returned to the left lane. Conley had pulled into the left lane, but was unable to pass once Hudson returned. (JA 7-8; JA 519, 552.) He went back into the right lane, exited Route 16 at County Road 1200, and proceeded to his worksite. Conley called Consolidated after he reached the site, but no one contacted the police. He later submitted a Huffmaster incident report. (JA 8; JA 50-51, 559.) The distance from where Hudson and Weaver caught up to Conley to where he exited is approximately three miles. Conley was behind Hudson and Weaver for a mile or less and not more than one minute. (JA 7-8; JA 20, 546.)

After Conley exited, Hudson and Weaver drove to the picket site at headquarters. (JA 9; JA 520.) After a short while there, Weaver got into Hudson's car, and they drove south past Rutledge on 17th Street, waving to the picketers. They turned around and drove north past Rutledge again. (JA 9; JA 428-29, 487-90.) Non-striker Kurt Rankin was stopped at the parking-lot exit, and a Huffmaster

guard held him up while Hudson passed. (JA 9; JA 505-06.) Rankin then turned onto 17th Street behind Hudson, who was driving slowly due to the picketers and parked cars crowding the roadway. (JA 9-10; JA 307, 529.) A southbound vehicle passed Hudson and Rankin as they drove north. Rankin drove past two entrances to the Pilson's parking lot where Greider had turned that morning, then passed Hudson on the left and drove off. (JA 9; JA 431-35, 491.) He filed a Huffmaster report, but did not speak to anyone at Consolidated or to the police. (JA 9-10; JA 45-46, 314-15.)

D. Williamson Is Hit by a Car Mirror and Uses a Crude Gesture Towards a Non-Striker Crossing the Picket Line

Eric Williamson had worked as a switchman at Consolidated for 12 years at the time of the strike and had never been disciplined. (JA 10; JA 437.) He picketed at Rutledge every day of the strike. On the evening of December 10, Williamson and other picketers were standing along the driveway waving signs at a row of exiting cars. (JA 10; JA 438-39, 443.) Non-striker Dawn Redfern turned right out of the parking lot and heard a smack on the side of her car. She did not see what happened, but rolled down the window and noticed that her side-view mirror had folded in. (JA 10; JA 611-12, 619-20.) Williamson told Redfern that she had hit him. (JA 10; JA 443.) The car was not damaged, and Redfern was able to fold the mirror back into place when she arrived home. (JA 11; JA 614-15.)

Williamson picketed at Rutledge again the next morning. After non-striker Tara Walters crossed the picket line and parked her car, Williamson faced her from across the parking lot, yelled "scab," and grabbed his crotch. Walters proceeded inside to work. The following day, she submitted an incident report. (JA 11; JA 37-39, 168, 440, 629-31, 641-43.)

E. Consolidated Discharges Hudson and Weaver, and Suspends Maxwell and Williamson

On December 11, Local 702 made an unconditional offer to return to work. (JA 3; JA 54.) The following day, Consolidated informed Local 702 that it would discipline Maxwell, Hudson, and Weaver. Local 702 requested the information that Consolidated had used in investigating them, but received nothing. (JA 4; JA 21, 194-95.) In back-to-back meetings on December 13, Consolidated suspended Maxwell, Hudson, Weaver, and Williamson indefinitely pending investigation into alleged misconduct during the strike. At the meetings, Consolidated's Director of Central Services Gary Patrem read from prepared talking points. (JA 3; JA 30, 40, 52, 86, 236-37.) Patrem told Maxwell that he had been accused of striking a company vehicle, leaning on the hood for an extended period of time, and verbally harassing the driver. (JA 4; JA 30.) Hudson and Weaver were accused of harassing and intimidating non-strikers by the "extremely dangerous vehicular activity" of trapping vehicles on the picket line and following drivers away from the strike for several miles. (JA 3; JA 52, 86.) Williamson was

told that he was suspended for striking a vehicle and making an inappropriate gesture. (JA 3; JA 40.)

On December 17, Consolidated suspended Maxwell for two days and discharged Hudson and Weaver. Maxwell's suspension was for violating Consolidated's workplace-violence policy, which prohibits "any acts or threats of violence." (JA 4; JA 22-23.) The reason given for Hudson and Weaver's discharges was violation of Consolidated's workplace-violence and employee-conduct policies. (JA 3; JA 41-42, 271.) On December 18, Williamson was suspended for two days for workplace violence and sexual harassment. (JA 11; JA 31.)

F. Consolidated Eliminates the Position of Office Specialist-Facilities

In January or February 2013, Consolidated decided not to fill Weaver's former position of office specialist-facilities. Instead, it assigned part of the position's duties to the office specialist in the fleet department. Consolidated did not notify or bargain with Local 702 about the decision before it was made. (JA 1 n.3, 11; JA 55, 285-86.) Upon later learning of the change, Local 702 demanded a return to the status quo and bargaining over the issue. (JA 11; JA 149-50.) On April 18, Consolidated informed Local 702 that it was transferring some of the eliminated position's duties outside of the bargaining unit. (JA 11; JA 56.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On July 3, 2014, the Board (Chairman Pearce and Members Johnson and Schiffer) issued a Decision and Order finding that Consolidated violated Section 8(a)(3) and (1) of the Act by discharging Hudson and Weaver and suspending Maxwell and Williamson. The Board concluded that Maxwell and Weaver did not commit the alleged misconduct and that any misconduct by Hudson and Williamson was insufficiently egregious for them to forfeit the protection of the Act. In addition, the Board found that Consolidated violated Section 8(a)(5) and (1) by unilaterally eliminating Weaver's former position and reassigning her job duties.

The Board's Order requires Consolidated to cease and desist from disciplining or otherwise discriminating against employees for engaging in protected concerted activities such as a strike and from refusing to bargain with Local 702 by eliminating and reassigning the job duties of office specialist-facilities without notice and an opportunity to bargain about the change. Affirmatively, the Order directs Consolidated to reinstate Hudson and Weaver, rescind Maxwell and Williamson's suspensions, make the four employees whole for loss of earnings and benefits, return the position of office specialist-facilities, and notify and, upon request, bargain with Local 702 before implementing any

changes to the job duties. The Order also requires Consolidated to post a remedial notice. (JA 1-2, 14.)[2]

STANDARD OF REVIEW

The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Court also "applies the familiar substantial evidence test to the Board's . . . application of law to the facts." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Similarly, the Court "'do[es] not reverse the Board's adoption of an ALJ's credibility determinations unless . . . those determinations are hopelessly incredible, self-contradictory, or patently unsupportable.'" *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1134 (D.C. Cir. 2003) (quoting *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998)); *see also Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996) ("The mere fact that conflicting evidence exists is insufficient to render a credibility determination 'patently insupportable,' since such a conflict is present in every instance in which a credibility determination is required."). The Court will enforce a Board order regarding

[2] Consolidated, Local 702, and Weaver settled the portion of the case finding that Consolidated violated Section 8(a)(3) and (1) by discharging Weaver. The Board does not seek enforcement of the portion of its Order providing remedial relief to Weaver.

discipline for alleged strike misconduct when it is "reasonable and conforms with [Board] precedent." *Gen. Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1314 (D.C. Cir. 1991).

SUMMARY OF ARGUMENT

Employees have a statutorily protected right to strike. An employer thus violates Section 8(a)(3) of the Act by disciplining employees for alleged misconduct during a strike if the misconduct did not, in fact, occur or if it was insufficiently egregious to cause them to lose the protection of the Act. Given a strike's adversarial context and its status as protected activity, alleged strike misconduct is analyzed under a different standard than conduct in the workplace.

Substantial evidence supports the Board's finding that Consolidated violated Section 8(a)(3) by disciplining long-time employees Maxwell, Hudson, and Williamson based on untrue or exaggerated allegations of misconduct during the five-day strike. Based on credited testimony and the application of settled legal principles, the Board found that the alleged misconduct for which Consolidated discharged Hudson and suspended Maxwell and Williamson either did not occur or was insufficiently egregious for them to lose the Act's protection. Consolidated's arguments to the contrary are premised largely on discredited accounts of what happened during the strike, as well as inadequate challenges to the Board's factual findings and credibility determinations.

Substantial evidence also supports the Board's finding that Consolidated continued its pattern of unfair labor practices by unilaterally eliminating the bargaining-unit position of office specialist-facilities without notice or an opportunity to bargain. It is uncontested that Consolidated eliminated the position without notifying or bargaining with Local 702, and the law is settled that such conduct breaches an employer's duty to bargain and thus violates Section 8(a)(5). Consolidated has provided the Court with no basis to disturb the Board's finding.

ARGUMENT

Following an unconditional offer to return to work after a five-day strike, Consolidated leveled multiple untrue or exaggerated allegations of misconduct against employees who had participated in the strike. Consolidated violated the Act when it disciplined employees based on those allegations and eliminated a discharged striker's former position without notice or an opportunity to bargain.

I. SUBTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CONSOLIDATED DISCIPLINED MAXWELL, HUDSON, AND WILLIAMSON FOR CONDUCT DURING THE STRIKE THAT EITHER DID NOT OCCUR OR WAS INSUFFICIENTLY EGREGIOUS FOR THEM TO LOSE THE PROTECTION OF THE ACT

A. Disciplining Strikers Is an Unfair Labor Practice If the Alleged Misconduct Did Not Occur or Did Not Cause the Strikers to Forfeit the Act's Protection

An employer commits an unfair labor practice in violation of Section 8(a)(3) of the Act by discharging or otherwise disciplining employees for engaging in protected activity such as a strike. *Gen. Telephone Co.*, 251 NLRB 737, 738 (1980), *enforced mem.*, 672 F.2d 985 (D.C. Cir. 1981).[3] Likewise, an employer violates Section 8(a)(3) by disciplining an employee for alleged misconduct during a strike if the employee did not, in fact, engage in that misconduct or if the

[3] Section 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). An employer that violates Section 8(a)(3) also derivatively violates Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

misconduct was insufficiently egregious to cause him to lose the protection of the Act. *Augusta Bakery Corp.*, 298 NLRB 58, 58, 62 (1990), *enforced*, 957 F.2d 1467 (7th Cir. 1992); *Seeburg Corp.*, 192 NLRB 290, 290, 302-03 (1971), *enforced sub nom. Allied Indus. Workers Local 289 v. NLRB*, 476 F.2d 868 (D.C. Cir. 1973). Because strikers' protected activity occurs in a context of adversarial struggle, "[p]icket-line misconduct is accordingly evaluated by a different standard than similar conduct in a working environment." *Airo Die Casting, Inc.*, 347 NLRB 810, 812 (2006).

"[T]he starting point in analyzing these matters is that employees have a statutory right to strike." *Hotel Roanoke*, 293 NLRB 182, 207 (1989); *see also* 29 U.S.C. § 163 (describing the "right to strike"). From that fundamental premise, the analysis proceeds along a burden-shifting framework. The first consideration is whether the disciplined employee "was a striker and . . . the employer took action against him for conduct associated with the strike." *Detroit Newspapers*, 342 NLRB 223, 228 (2004), *enforced*, 171 F. App'x 352 (D.C. Cir. 2006). The conduct need not occur on a picket line to be "associated with the strike"; the Board analyzes conduct by strikers away from the picket line under the same standard. *Id.* at 265; *Consolidated Supply Co.*, 192 NLRB 982, 988-89 (1971). Next, the employer must prove that it had an honest belief that the employee "engaged in the conduct for which he was discharged." *Detroit Newspapers*, 342

NLRB at 228. Finally, the burden shifts to the Board's General Counsel to show that the employee "did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge." *Id.* If the alleged misconduct did not in fact occur, or was insufficiently egregious, the discipline was unlawful—"the employer's good faith is simply not relevant." *Shamrock Foods*, 346 F.3d at 1134; *cf. NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964) (finding an unfair labor practice "if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred").

As the Board has long recognized, "not every impropriety committed during a strike deprives an employee of the Act's protection." *Avery Heights*, 343 NLRB 1301, 1322 (2004), *enforcement denied on other grounds*, 448 F.3d 189 (2d Cir. 2006); *Shalom Nursing Home*, 276 NLRB 1123, 1137 (1985) (same); *see also Allied Indus. Workers Local 289*, 476 F.2d at 879 ("Clearly some types of impulsive behavior must have been within the contemplation of Congress when it provided for the right to strike."). Rather, misconduct is sufficiently egregious to justify discipline if, "under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984) (internal quotations omitted), *enforced mem.*, 765 F.2d 148 (9th Cir. 1985). Misconduct found to reach

that standard includes physical violence against non-strikers, "[v]andalizing the property of an employer or nonstriking employees," *Detroit Newspapers*, 340 NLRB 1019, 1028 (2003), "[d]amaging a vehicle crossing a picket line," *id.* at 1027, and "statements which could be construed as threats of bodily injury or property damage," *Briar Crest Nursing Home*, 333 NLRB 935, 947 (2001). The standard for egregiousness is objective; it is not relevant whether employees actually were intimidated or whether the striker intended to intimidate. *Universal Truss, Inc.*, 348 NLRB 733, 734 (2006).

B. Consolidated Unlawfully Disciplined Maxwell, Hudson, and Williamson

The alleged misconduct for which Consolidated disciplined Maxwell, Hudson, and Williamson was "associated with the strike." *Detroit Newspapers*, 342 NLRB at 228. Although the administrative law judge raised some questions regarding the reasonableness of Consolidated's belief that the three employees had engaged in misconduct (JA 12), the Board assumed (JA 1 n.2, 12) that Consolidated had an honest belief that the alleged misconduct occurred.[4] The discipline was nonetheless unlawful, however, because substantial evidence based

[4] With the exception of Hudson's conduct related to Conley, which is discussed below, the alleged conduct's association with the strike is undisputed. In addition, it was proper for the Board simply to assume that Consolidated had an honest belief that the three employees had engaged in misconduct rather than expressly find whether Consolidated had such a belief. *Augusta Bakery Corp.*, 298 NLRB at 58; *Cloughtery Packing Co.*, 292 NLRB 1139, 1139 (1989).

on credited testimony supports the Board's findings that the conduct either did not occur or was insufficiently egregious for them to lose the protection of the Act. *Shamrock Foods*, 346 F.3d at 1134.

Many of the Board's conclusions in this case are founded on credibility determinations. The Board identified multiple reasons for discrediting certain testimony from Consolidated witnesses as to what occurred during the strike, including inconsistency, uncertainty, and departure from contemporaneous accounts. *See* pp. 25, 27-28, 33. Indeed, the Board explained that it resolved issues of credibility "largely on the basis of the testimony of [Consolidated's] witnesses, their consistency with the contemporaneous reports they filed and the consistency of [Consolidated's] witnesses with each other." (JA 7.) On appeal, Consolidated's arguments that the discipline was lawful are premised on those discredited accounts. And given the numerous grounds identified by the Board for its credibility determinations, Consolidated's attack on those determinations as "based on nothing more than speculation and unfounded assumptions that [Consolidated witnesses] were 'angry' about the strike" (Br. 18) is simply incorrect. Because Consolidated has not shown that the credibility determinations were "hopelessly incredible, self-contradictory, or patently unsupportable." *Shamrock Foods*, 346 F.3d at 1134 (internal quotations omitted), the Board's findings based on them should be affirmed.

1. Maxwell did not commit the conduct for which he was suspended

Substantial evidence supports the Board's finding (JA 12) that Maxwell "did not engage in the conduct for which he was suspended." The stated basis for Maxwell's suspension was violation of Consolidated's workplace-violence policy, but briefly bracing himself with his forearm on the hood of a company van after being hit by the vehicle did not constitute "acts or threats of violence" (JA 22-23). Moreover, the accusation that Maxwell "struck" the van and "leaned on the hood for an extended period of time" (JA 30) was directly contradicted by Fetchak, the passenger in the vehicle, who testified that Maxwell did not strike, slam, or hit it and that any contact was "not for an extended period of time." (JA 586.) Similarly, Flood's contemporaneous incident reports did not state that Maxwell "struck" the van, and Flood did not tell Consolidated that Maxwell had done so. (JA 24-27, 249.) As the Board held (JA 4), Consolidated thus "suspended Maxwell for offenses he did not commit" in violation of Section 8(a)(3). *Cf. Desert Inn Country Club & Spa*, 275 NLRB 790, 792, 797 (1985) (discharge of a striker who allegedly "struck a . . . car without provocation" unlawful when, in fact, the striker was hit by the car and fell on the hood).

Consolidated challenges the Board's credibility findings, but its assertion (Br. 54) that Fetchak "materially contradict[ed] Maxwell's testimony" is incorrect. On the central issue of whether Maxwell struck the van or otherwise engaged in

violent conduct, Fetchak's testimony confirms Maxwell's account. Nor, as Consolidated contends (Br. 55), did Fetchak testify that Maxwell "intentionally placed a part of his arm on the vehicle's front in an effort to impede their progress" or that "Maxwell was the aggressor." Instead, he agreed that Maxwell may have touched the hood because he had been hit by the van. (JA 587.) Further, although Consolidated now asserts (Br. 54) that Maxwell "refused to move out of the way" when Flood approached, such conduct was not the basis for his discipline; as the Board recognized, Maxwell "was not suspended for failing to move out of the way" (JA 4), but for alleged "acts or threats of violence" (JA 22-23) that did not occur.

Consolidated's argument (Br. 56) that the alleged misconduct for which Maxwell was disciplined was sufficiently egregious to lose the protection of the Act is misplaced, as it is based on the erroneous premise that the misconduct actually occurred. Because the Board found that Maxwell did not engage in the alleged misconduct, the question of whether it was egregious is not implicated. *See Detroit Newspapers*, 342 NLRB at 228 (discipline is unlawful if the striker "did not engage in such misconduct *or* . . . the misconduct was not sufficiently egregious to warrant discharge") (emphasis added). In any event, the cases that Consolidated cites (Br. 56) finding unprotected misconduct are distinguishable on their facts, as they involve actions more severe than the allegations against

Maxwell. *See Siemens Energy & Automation, Inc.*, 328 NLRB 1175, 1175 (1999) (striker kicked a car and strew tacks on the roadway near the entrance to the plant); *CalMat Co.*, 326 NLRB 130, 131, 134-35 (1998) (striker forced a truck to stop, climbed onto the running board, hit the driver-side window, opened the door, and tore off the door handle); *GSM, Inc.*, 284 NLRB 174, 174 (1987) (strikers kicked, slapped, and threw beer cans and rocks at cars leaving the plant). Consolidated's argument is thus not only beside the point, but unsupported.

2. Hudson committed no misconduct related to Greider or Rankin and no egregious misconduct related to Conley

Substantial evidence, supported by credibility determinations, supports the Board's findings (JA 13) that Hudson committed no misconduct related to Greider or Rankin and that any misconduct related to Conley was insufficiently egregious for her to lose the protection of the Act.

a. Hudson did not "trap" or harass Greider and Rankin

As the Board found, Hudson did not, in fact, engage in the alleged misconduct related to Greider or Rankin for which she was discharged. Evidence in the record reveals that Hudson did not commit "acts or threats of violence" in violation of Consolidated's workplace-violence policy or perform "[u]nlawful or improper conduct" or any other action in violation of its employee-conduct policy, which were the stated bases for her discharge. (JA 41, 43-44.) Nor did she intentionally "trap[]" Greider or Rankin or otherwise engage in "harassing,

intimidating, threatening and reckless behavior" or "extremely dangerous vehicular activity," as Consolidated alleged at the December 13 meeting. (JA 52.)

i. Greider

Substantial evidence supports the Board's finding (JA 6) that "[t]here is no basis for concluding that Hudson . . . intentionally blocked Greider's car in" or otherwise "harass[ed]" her. Hudson was driving in front of Greider on 17th Street only because the Huffmaster guard who was directing traffic stopped Greider at the parking-lot exit and allowed Hudson to proceed first. (JA 658-59.) Similarly, Weaver was behind Greider only as a result of the Huffmaster guard's directions. (JA 664-65.) Because Greider was between Hudson and Weaver only "by coincidence and the traffic control actions of the Huffmaster guard" (JA 5-6), they did not "trap[]" her. (JA 52.) Moreover, Greider was behind Hudson for, at most, 165 feet, and was able to turn off of 17th Street and away from Hudson at the first opportunity. The Board's finding that, although Hudson drove slowly, "[t]here is no evidence that she did so to harass or annoy Greider" (JA 6) is similarly supported. The roadway was crowded with picketers and parked cars, and had been reduced to one lane, such that Mattoon Police Chief Branson observed that someone passing by "definitely needed to drive very slow" and that 5 miles an hour would be a safe speed in the area. (JA 381-82.)

The Board reasonably discredited Greider's testimony at the hearing that Hudson stopped and started in front of her. (JA 6.) Greider did not include that detail in her contemporaneous written report of the incident and did not tell anyone at Consolidated that Hudson had engaged in such conduct. (JA 47-49, 277.) Jonell Rich, a witness for Consolidated who had watched the three cars from the second floor of Rutledge, testified inconsistently as to whether Hudson stopped in front of Greider; she first testified that she did not know whether Hudson came to a complete stop and later stated that Hudson had stopped. (JA 689, 700.) Like Greider, Rich did not tell anyone at Consolidated at the time that she saw Hudson stopping and starting. (JA 277.) Consolidated once again challenges the Board's credibility findings, and denies (Br. 49-50) that Greider and Rich harbored animus towards Hudson. Even if they did not, their testimony was not credible because, as the Board found (JA 6 & n.10), it was internally inconsistent and deviated from their contemporaneous accounts.

Greider's testimony was further undermined by her failure to contact the police—as Huffmaster had instructed employees to do (JA 60-62)—to report starting and stopping, which would have been illegal activity.[5] Similarly, even

[5] Consolidated attempts to repurpose a credibility challenge as a legal argument by accusing the Board of "impos[ing] a duty to report to the police" (Br. 38-40), but the point fails as either incarnation. The Board did not treat contacting the police as a stand-alone legal requirement, but as a factor relevant to credibility in this case given the alleged illegal activity of starting and stopping and Huffmaster's

though Mattoon police were present at Rutledge on December 10 and Chief Branson testified that he would have taken action if he saw a car stopping and starting on the road, no such action was taken against Hudson. (JA 361, 384.) Thus, the only credited account of what happened was that Hudson followed a Huffmaster guard's instructions, drove slowly along a crowded road, and was in front of Greider for 135-165 feet. That was not the alleged "extremely dangerous vehicular conduct" (JA 52) for which Hudson was discharged.

ii. Rankin

The Board's finding that Hudson did not engage in the alleged misconduct related to Rankin is likewise supported by substantial evidence. Hudson ended up driving in front of Rankin under similar circumstances as with Greider—a Huffmaster guard directed Rankin to stop at the Rutledge parking-lot exit while Hudson passed by on 17th Street. (JA 253, 311-12.) In addition, the evidence of parked cars and strikers lining both sides of the street supports the Board's finding (JA 10) that Hudson was driving slowly due to the crowded roadway, not to harass Rankin. Indeed, Rankin testified that there were parked cars on the side of the street for the entire time that he was behind Hudson. (JA 46, 323.)

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guidelines for dealing with strike misconduct (JA 6, 8, 10). Moreover, Consolidated's supplemental instruction to report incidents to the Consolidated Command Center (JA 59) was not inconsistent with the Huffmaster procedures, as Consolidated claims (Br. 39-40); employees could contact both Consolidated and the police.

Further undermining the allegation that Hudson "trapp[ed]" Rankin, no one associated with Hudson was behind him when Hudson was driving in front of him. Consolidated mistakenly believed when it discharged Hudson that Weaver was behind Rankin (JA 250-51), but even Rankin testified that she was not (JA 309), and his incident report did not state that she was. Moreover, Rankin was not "trapp[ed]" because he could have pulled into the Pilson's parking lot and continued on the parallel road, as Greider had done. Rankin testified that a car was in the Pilson's driveway—a statement contradicted by other Consolidated witnesses (JA 637-38, 702-03, 727)—but admitted that he simply could have waited for that car to turn onto 17th and then pulled into the lot. (JA 327-28.)[6]

As with Greider, the Board reasonably discredited Rankin's embellished account of the incident at the hearing. Although he testified that Hudson was waiting by the Rutledge driveway when he approached and that she later swerved in front of him when he attempted to pass her on 17th Street, Rankin did not include either of those details in his contemporaneous report or otherwise inform Consolidated of them at the time. (JA 45-46, 254-55, 314-15, 327.) The only evidence related to Rankin on which Consolidated relied in discharging Hudson was his report and a video that shows neither incident. (JA 292, 305, 316.)

[6] Whether Rankin could "escape" thus was relevant to whether Hudson actually engaged in the "trapping" for which she was discharged. The Board did not, as Consolidated insists (Br. 37-38), treat that factor as an absolute "duty."

Because Consolidated thus was not told that Hudson had waited by the driveway or swerved in front of Rankin, that alleged misconduct was not the basis for her discharge.

Likewise, Consolidated witnesses Rich, Walters, and Bernice Dasenbrock, testified inconsistently with each other and with Rankin as to what happened, and were otherwise not credible. Dasenbrock testified that Hudson swerved towards Rankin when the two cars were parallel and almost hit his passenger-side door (JA 729-30), but, in direct contradiction, Rich testified that Hudson was in front of Rankin at the time and denied that Hudson tried to hit him (JA 696-97). Dasenbrock testified that she was as sure that Hudson swerved as she was that Hudson stopped directly in front of the Rutledge exit (JA 725-27), a detail that no other witness (including Rankin) testified to and that is disproven by the video. Further, Rich and Walters testified that no one at Consolidated spoke to them about Rankin prior to Hudson's discharge. (JA 633, 706.) Because Hudson was not discharged for swerving to block Rankin, nothing that those witnesses later claimed to have seen regarding such an action bears on the question of whether the conduct for which Hudson *was* discharged actually occurred.

As with Maxwell, Consolidated's argument that the alleged misconduct was egregious enough to lose the Act's protection relies upon the discredited premise that the conduct occurred. Because the Board found that it did not, Consolidated's

argument is beside the point. And the cases that Consolidated cites are again distinguishable. Unlike here, many of those cases involved picketers purposefully blocking ingress and egress and then attacking or damaging the blocked cars. *See, e.g.*, *Stroehmann Bros. Co.*, 271 NLRB 578, 578 (1984) (striker blocked a truck from exiting, jumped on it, and pounded on the windows as other strikers beat the truck with two-by-fours and broke the windshield). And contrary to Consolidated's suggestion, temporarily blocking egress is not per se egregious misconduct. *See Detroit Newspaper Agency v. NLRB*, 171 F. App'x 352, 353 (D.C. Cir. 2006) ("[E]mployees' participation in picket disrupting traffic [is] not 'of itself particularly serious misconduct.'" (quoting *Va. Holding Corp.*, 293 NLRB 182 (1989))); *Ornamental Iron Work Co.*, 295 NLRB 473, 479 (1989) ("[A] momentary, otherwise noncoercive blockage will fall within that form of mischief classified as minor acts of misconduct . . . .") (internal quotations omitted), *enforced*, 935 F.2d 270 (6th Cir. 1991) (Table).

b. Hudson's conduct related to Conley was strike related and did not cause her to lose the Act's protection

The Board's finding that Hudson's conduct related to Conley did not cause her to lose the protection of the Act is similarly supported by substantial evidence and is consistent with precedent. As an initial matter, and contrary to Consolidated's claim (Br. 23-28), her conduct was "associated with the strike," *Detroit Newspapers*, 342 NLRB at 228, even though it occurred away from a

picket line. The Board analyzes conduct by strikers away from the line in the same manner as conduct at the line. *See id.* at 265 ("[I]t is the alleged discriminatee's status as a striking employee at the time of his discharge, not the location or nature of the incident for which he was discharged, that determines whether or not [the strike-misconduct standard] applies."); *Consolidated Supply*, 192 NLRB at 988-89 (striker conduct on the road); *Gibraltar Sprocket Co.*, 241 NLRB 501, 501-02 (1979) (same). In *Detroit Newspapers*, for example, the Board analyzed as strike misconduct an incident that occurred away from the picket line after the strike had ended. 342 NLRB at 235.

Hudson was actively involved in the strike. She had just left a picket site when she saw the company truck that Conley was driving, and she followed the truck to determine if it was going to a commercial worksite where employees could picket. Such ambulatory picketing at remote jobsites is protected strike activity. *Int'l Bhd. of Teamsters Local 807*, 87 NLRB 502, 506-07 (1949). In addition, she proceeded to another picket site immediately after Conley exited Route 16. Consolidated makes much (Br. 24-27) of Hudson's position in front of Conley for part of the time, but the relative location of the drivers is not dispositive as to whether the conduct was strike related. In *Consolidated Supply*, the Board applied a strike-misconduct analysis to strikers who drove in front of a non-striker. 192 NLRB at 989; *see also Int'l Paper Co.*, 309 NLRB 31, 36 (1992), *enforced*, 4 F.3d

982 (1st Cir. 1993) (Table); *PRC Recording Co.*, 280 NLRB 615, 615, 663-64 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987). Consolidated cites cases that involved strikers following non-strikers (Br. 25-27), but none of those cases *require* that particular line-up of cars for the driving strikers' conduct to be associated with the strike. Further, even when Hudson temporarily was in front of Conley, she still could see where he was going and could gauge the likelihood that it would be appropriate for ambulatory picketing. (JA 482.)

Further, as the Board recognized (JA 12), Consolidated "dealt with this incident . . . through the procedures that it had established to deal with strike misconduct." *See Detroit Newspapers*, 342 NLRB at 235 (applying the strike-misconduct standard when the employer "handled the incident according to the procedures that it had set up for reporting, investigating, and taking action on incidents of alleged strike misconduct"). Conley filed a Huffmaster report, channeling the incident through one of the mechanisms that Consolidated put in place for handling alleged strike misconduct. (JA 59-62, 736.) In addition, at the December 13 meeting, Consolidated referred to Hudson's behavior "during the strike" as the basis for her suspension pending investigation. (JA 52); *see Detroit Newspapers*, 342 NLRB at 255 (noting that "the Personnel Action Report generated in connection with [the striker's] discharge states that the reason for his termination was 'strike related activities'"). Consolidated's treatment of the

Conley incident as strike misconduct thus supports the Board's finding that it was associated with the strike.

Next, the Board reasonably concluded that, even if Hudson engaged in misconduct related to Conley, that misconduct was not sufficiently egregious to cause her to lose the protection of the Act. (JA 9, 13.) Conley was behind Hudson and Weaver for, at most, one mile and one minute. There is no evidence that they were driving slower than the speed limit during that period. Hudson testified that she was going the speed limit, and both Conley and Diggs acknowledged that she could have been. (JA 530, 550, 597.) Thus, Hudson's actions simply prevented Conley from driving faster than the speed limit for approximately one mile.

Further, substantial evidence supports the Board's finding (JA 8-9) that Hudson's actions were not violent or dangerous. Conley did not remember even having to brake when Weaver and Hudson were first in front of him. (JA 549.) The Board's determination (JA 8) that Hudson did not "cut off" Conley when she returned to the left lane is likewise supported. Both Conley and Diggs testified that Conley did not have to slam on his brakes when he was behind Hudson and that there was no danger of hitting her or any other type of accident. (JA 555-57, 599-600.) According to Diggs, Hudson was at least one car-length ahead of them when she entered the left lane, because they had not yet begun to pass Weaver, who was between them and Hudson. (JA 598-99.) Moreover, Conley did not call the police

to report that he had witnessed dangerous driving, undermining the credibility of any subsequent claim of egregious or illegal conduct.[7]

The Board's finding is also consistent with precedent. *Gen. Indus. Employees Union, Local 42*, 951 F.2d at 1314. In *Consolidated Supply*, 192 NLRB at 989, the Board found that a striker who followed a non-striker's truck and then "got ahead of the truck and slowed down, forcing [the non-striker] also to drive slowly" and, another time, "followed [a different non-striker] . . . , cutting in once or twice" over the course of half a mile did not lose the Act's protection. Such "incidents[] of following the truck or blocking it momentarily, are the sort of trivial, rough incidents which are to be expected during a long, contested strike where an employer attempts to continue operating with nonstrikers." *Id.* Similarly, the strikers in *Gibraltar Sprocket*, 241 NLRB at 501, did not forfeit the protection of the Act by following and driving alongside a non-striker, who drove "at a high rate of speed" to escape them. *See also Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408, 413 (1975) (conduct of driving strikers not egregious when "it did not place [non-strikers] in any danger"), *enforcement denied on other grounds*, 542 F.2d 18 (6th Cir. 1976).

[7] The Board explicitly declined to adopt the administrative law judge's statements that Conley was not credible because he was a manager or because he was angry, finding it "unnecessary to rely on the judge's speculation as to what might have motivated Troy Conley's testimony." (JA 1 n.2.) Consolidated's attack (Br. 35-36) on those statements is thus misplaced.

By contrast, the lawfully disciplined strikers in the cases cited by Consolidated (Br. 43) all engaged in significantly more extreme conduct than Hudson. Hudson did not, as in *International Paper*, 309 NLRB at 36, and *NLRB v. Teamsters Local 115*, 1995 WL 853551, at *4 (3d Cir. Jan. 13, 1995), drive the wrong way on a highway directly at a non-striker's car. Nor did she stop her car in the middle of the road and block Conley or force him to travel in reverse, as did the strikers in *International Paper*, 309 NLRB at 36, and *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978). And unlike the strikers in *International Paper*, who weaved back and forth on both sides of the non-striker's car and attempted to force it off the road or into oncoming traffic, 309 NLRB at 36, and *Teamsters Local 812*, 304 NLRB 111, 117 (1991), who "almost caused an accident," Hudson did not place Conley at risk of a collision. (JA 556-57, 599-600.) Unlike those cases, what happened on Route 16 did not reach the high bar of serious strike misconduct that would "reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 NLRB at 1046.

Finally, Consolidated's contention that the Board "apparently required all three alleged incidents committed by Hudson to have occurred in order to uphold the termination" (Br. 44) mischaracterizes the Board's decision, which found that *none* of the alleged incidents justified Hudson's discharge. The Board thoroughly

analyzed Hudson's conduct related to Conley (JA 6-9) and found that it was insufficiently egregious for her to lose the protection of the Act. The Board independently considered her alleged misconduct related to Greider and Rankin and found that those incidents did not occur. Because none of the three allegations provided a lawful basis for discharging Hudson, a 39-year employee with no disciplinary record, the discharge was an unfair labor practice.[8]

3. Williamson did not intentionally strike Redfern's mirror, and did not lose the Act's protection based on a single crude gesture

Substantial evidence supports the Board's finding that the conduct related to Redfern for which Williamson was disciplined did not occur and that his misconduct related to Walters did not cause him to lose the protection of the Act. Like Maxwell and Hudson, Williamson was disciplined for "actions in violation of the Company handbook/workplace violence policy," and, like Maxwell and Hudson, he did not engage in "acts or threats of violence." (JA 31-32.)

[8] Contrary to Consolidated's assertion (Br. 29-30), the Board articulated and applied the correct burden of proof as to whether Hudson's conduct was egregious. It explained that "the burden shifts to the General Counsel to show that the striker did not engage in the misconduct or that it was not serious enough" (JA 3, 13) and concluded that "the General Counsel met its burden" (JA 12). *Cf. Shamrock Foods*, 346 F.3d at 1135 (finding that "the ALJ properly assigned the burden" when "his opinion states both that the General Counsel has the burden . . . [and] has sustained his burden" (internal quotations omitted)). The Board's conclusion was based on factual findings, credibility determinations, and precedent, not, as Consolidated claims (Br. 29), on "resolving ambiguities against [Consolidated]."

Consolidated accused Williamson at the December 13 meeting of "striking [Redfern's] vehicle while . . . standing on the picket line," (JA 40), but, as the Board found (JA 11), "there is no evidence that Williamson intentionally struck the mirror." Indeed, Redfern never told Consolidated that he had done so; she did not see what happened, and acknowledged that any contact between Williamson and the mirror could have been an accident. (JA 619-22.) Consolidated's Director of Labor Relations Ryan Whitlock, who made the decision to suspend Williamson, agreed that his decision could have been different if he had known that Redfern did not see Williamson strike her mirror. (JA 298-99.)[9] Further, Consolidated's contention in its brief that Williamson "intentionally engag[ed] in the acts that resulted in Redfern's car mirror being knocked in" (Br. 52) constitutes a post hoc reimagining of the allegation against him, and was not the basis for his discipline. Because Williamson did not, in fact, strike Redfern's car, the alleged misconduct for which he actually was suspended did not occur, and his suspension on those grounds was unlawful.

The Board also reasonably found (JA 13) that Williamson's crude gesture towards Walters, while misconduct, did not cause him to lose the protection of the

[9] Consolidated refers (Br. 13, 57) to Police Chief Branson's testimony that he saw a striker getting close to cars, but the Board expressed skepticism (JA 5 n.7) that the striker he discussed was Williamson. In any event, Branson's testimony did not refer to the alleged Redfern incident, as he was not at Rutledge when it occurred. (JA 370.) Moreover, Branson never saw the striker hit a car. (JA 380.)

Act. The Board has held consistently that, in the context of a strike, "the use of obscene . . . gestures . . . , standing alone without any threats or violence, d[oes] not rise to the level where [a striker] forfeit[s] the protection of the Act" under the *Clear Pine Mouldings* standard. *Airo Die Casting*, 347 NLRB at 812; *see also Briar Crest Nursing Home*, 333 NLRB at 947; *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989); *APA Warehouses, Inc.*, 291 NLRB 627, 630 (1988), *enforced mem.*, 907 F.2d 145 (2d Cir. 1990). A striker's single incident of crude behavior not accompanied by threats or physical contact thus does not justify discipline. *See Gloversville Embossing Corp.*, 297 NLRB 182, 193-94 (1989) (finding "a one time noninjurious occurrence which did not deter the nonstrikers from entering and leaving the plant on the day it occurred or thereafter" insufficiently egregious). Such "impulsive behavior" is expected in an adversarial context when passions are high, "especially when directed against nonstriking employees or strike breakers"; striking employees engaged in otherwise protected activity do not so easily forfeit that protection. *Allied Indus. Workers Local 289*, 476 F.2d at 879 (internal quotations omitted).

Williamson did not engage in violence or threaten bodily harm, and thus did not lose the protection of the Act for a single obscene gesture from across the parking lot. Indeed, strikers who engaged in conduct more outrageous than Williamson's have been found not to forfeit the Act's protection. *See Wayne Stead*

Cadillac, Inc., 303 NLRB 432, 436-37 (1991) (striker stood next to a car and "grabbed his testicles with his right hand, while holding his picket sign with his left hand, and gyrated his hips back and forth . . . while mouthing the words, 'Fuck You!'"); *Gloversville Embossing*, 297 NLRB at 193-94 (striker pulled down his pants and exposed himself to non-strikers). By contrast, the striker who was lawfully discharged in *Universal Truss*, 348 NLRB at 734, 780, which Consolidated cites (Br. 51), threatened a non-striker with rape.[10] Without comparable conduct, the Board reasonably concluded that "it is difficult to see how [Williamson's gesture] could have . . . discouraged Walters from continuing to report to work during the strike," and thus that it did not "tend to coerce or intimidate employees in the exercise of their . . . right to refrain from striking." (JA 11, 13). Accordingly, Williamson's suspension violated Section 8(a)(3).[11]

[10] Consolidated also cites *Romal Iron Works Corp.*, 285 NLRB 1178, 1182 (1987), but that case involved threats of job loss and violence that were couched in racial slurs and were made to striking employees by an *employer*, a situation that involves a different and inherently more coercive dynamic.

[11] The Board did not, as Consolidated asserts (Br. 52), apply *Wright Line*, 251 NLRB 1083 (1980), in concluding that Williamson's suspension violated Section 8(a)(3). Because the Board found that Williamson did not forfeit the Act's protection under the strike-misconduct standard (JA 13), the reference to *Wright Line*'s applicability "assuming that Williamson's conduct forfeited the protection of the Act" (JA 13) was unnecessary to the Board's decision.

4. Consolidated's Remaining Arguments Mischaracterize the Board's Decision

Consolidated's argument that the discipline was lawful consists largely of challenges to the Board's credibility determinations and the factual findings based on them, but, as detailed above, Consolidated has not shown that they are "hopelessly incredible, self-contradictory, or patently unsupportable." *Shamrock Foods*, 346 F.3d at 1134 (internal quotations omitted). Consolidated's remaining arguments are similarly unavailing, as they are based on mischaracterizations of the Board's decision and caselaw.

Contrary to Consolidated's assertion (Br. 30-34), the Board did not apply a blanket "violence requirement." The Board considered the lack of violence or threats in this case to be relevant because Maxwell, Hudson, and Williamson were disciplined for violating Consolidated's workplace-violence policy. (JA 22, 31, 41.) If they did not threaten or commit violence, they did not engage in the conduct for which they were disciplined, and their discipline was unlawful. In addition, the Board did not, as Consolidated contends (Br. 30-31), hold that violence was always required for strikers who engaged in misconduct to lose the Act's protection. It simply observed that violence or threats were relevant and frequently present factors in the *Clear Pine Mouldings* analysis. As the Board explained, "violent acts or threats of violent acts . . . may reasonably tend to coerce

or intimidate employees." (JA 13).[12] The absence of violence thus went to whether Hudson and Williamson's conduct related to Conley and Walters was sufficiently egregious for them to lose the protection of the Act.

Finally, in accusing the Board of ignoring context in its evaluation of Hudson and Williamson's conduct (Br. 56-57), Consolidated miscomprehends the Board's practice of "consider[ing] all of the circumstances in which the alleged misconduct occurs." *Universal Truss*, 348 NLRB at 735. Unlike in *Universal Truss*, in which the Board found a threat of violence to be coercive because similar violence had already occurred, there were no previous instances of strike misconduct in this case—no "pattern of violence, threats, and intimidation" that colored the entire atmosphere of the Consolidated strike. *Id.* The picket line may have been loud and boisterous at times, as strikers have a right to be. *Allied Indus. Workers Local 289*, 476 F.2d at 879. Yet the presence of other employees exercising their statutorily protected right to strike did not transform Hudson and

[12] Consolidated cites (Br. 32) *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 215-15 (D.C. Cir. 1996), but that case did not involve a strike. It is a well-settled principle that conduct in the strike context is evaluated under a different standard than conduct in the workplace. *Airo Die Casting*, 347 NLRB at 812. Indeed, *Earle Industries, Inc. v. NLRB*, 75 F.3d 400, 406 (8th Cir. 1996)—the other case that Consolidated cites—recognizes that distinction. *See Earle Indus.*, 75 F.3d at 406 ("[I]n the context of strikes . . . [w]e have acknowledged the need to excuse impulsive, exuberant behavior (so long as not flagrant or rendering the employee unfit for employment) as an inevitable concomitant of struggle.").

Williamson's conduct into grounds for discipline. Consolidated references Hudson's other picket-line activity during the strike (Br. 57), but does not contend that it was unprotected; nor did Consolidated allege at the time that any of that conduct was grounds for her discharge. Unlike past acts of violence that imbue a threat of similar harm with added weight, *Universal Truss*, 348 NLRB at 735, prior protected conduct does not render subsequent conduct coercive.

In discharging Hudson and suspending Maxwell and Williamson, Consolidated displayed a pattern of disciplining former strikers based on mistaken or exaggerated allegations. Such discipline violated Section 8(a)(3), and the Board's unfair-labor-practice findings are supported by substantial evidence, based on the application of settled legal principles, and consistent with precedent.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CONSOLIDATED ELIMINATED A BARGAINING-UNIT POSITION WITHOUT NOTIFYING OR BARGAINING WITH LOCAL 702

After unlawfully disciplining Maxwell, Hudson, and Williamson, Consolidated continued its unfair labor practices by violating its duty to bargain. An employer violates Section 8(a)(5) of the Act by "refus[ing] to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).[13] Accordingly, an employer may not unilaterally change terms and conditions of

[13] An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

employment without bargaining to impasse. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). The elimination of a bargaining-unit position is a mandatory subject of bargaining, because the existence of such a position is a "term[] and condition[] of employment." *Finch, Pruyn & Co.*, 349 NLRB 270, 277 (2007) (internal quotations omitted), *enforced on other grounds*, 296 F. App'x 83 (D.C. Cir. 2008). Thus, an employer violates Section 8(a)(5) by "tak[ing] away a unit position without giving [the union] prior notice and an opportunity to bargain." *Id.*; *see also FiveCAP, Inc.*, 332 NLRB 943, 943 n.2, 955 (2000), *enforced*, 294 F.3d 768 (6th Cir. 2002) (same). In *Finch, Pruyn & Co.*, the Board found an unfair labor practice when, after a strike, the employer did not recall one of the strikers, did not fill his position, and unilaterally reassigned his duties, effectively eliminating the position. 349 NLRB at 277.

Substantial evidence supports the Board's finding of a Section 8(a)(5) violation. After discharging Weaver following the strike, Consolidated eliminated her former position of office specialist-facilities without notifying or bargaining with Local 702. The duties were transferred to other employees, including non-unit employees. Consolidated does not contest that it unilaterally eliminated the bargaining-unit position. And its contention that the Board "provided no legal analysis or findings of fact" (Br. 58) regarding the Section 8(a)(5) violation is

simply incorrect. The Board found that Consolidated failed to bargain over a mandatory subject, explained that Consolidated "had a duty to notify and bargain with [Local 702] before implementing its decision to reassign job duties and eliminate Weaver's position," and cited on-point precedent finding a violation under similar circumstances. (JA 1 n.3, 11.) Consolidated's straightforward violation of well-settled law required no further fact finding or legal analysis. As in *Finch, Pruyn & Co.*, "[i]t is undisputed that the [employer] never bargained with [the union] over the elimination of the . . . position," and Consolidated's unfair labor practice "is thus plainly established on the record." 349 NLRB at 277.

CONCLUSION

The Board respectfully asks that the Court deny Consolidated's petition for review and enforce the Board's Order as it relates to Maxwell, Hudson, Williamson, and the position of office specialist-facilities.

/s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

/s/ Joel A. Heller
JOEL A. HELLER
Attorney
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2949
(202) 273-1042

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD
June 2015

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSOLIDATED COMMUNICATIONS d/b/a ILLINOIS CONSOLIDATED TELELPHONE COMPANY	)	
Petitioner/Cross-Respondent	)	Nos. 14-1135 14-1140
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 702	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,162 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2007.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 17th day of June, 2015

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Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 17th day of June, 2015