UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:	)	
	)	
COMPONENT BAR PRODUCTS, INC.,	)	
	)	
Respondent	)	
	)	Case: 14-CA-145064
And	)	
	)	
JAMES R. STOUT, an Individual,	)	
	)	
Charging Party.	)	

RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent, Component Bar Products Inc., files this Reply Brief to address specific issues raised in Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision and Order, dated August 7, 2015, of Administrative Law Judge Charles J. Muhl. The focus of this Reply Brief is simply on key points—it is not an effort to restate Respondent's prior brief. Accordingly, not every point addressed in Counsel for the General Counsel's Answering Brief will be addressed here, as Respondent has addressed these points already in its original Brief in Support of Respondent's Exceptions to the Administrative Law Judge's Decision.

ARGUMENT

A. The Charging Party Did Not Engage In Protected, Concerted Activity.

Most importantly, the Charging Party did not engage in protected, concerted activity because he in no way attempted to initiate or induce group action or to act with or on the authority of other employees. *See Prill v. N.L.R.B.*, 835 F.2d 1481, 1484 (D.C. Cir. 1987) (holding "concerted activity . . . encompass[es] only those circumstances where individual

employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management" (quoting *Meyers Industries, Inc.*, 281 NLRB 882, 887 (1986) (*Meyers II*))).

The General Counsel's reliance on *Jhirmack Enterprises*, 283 NLRB 609 (1987), for the proposition that the Charging Party's actions were concerted is misplaced. As explained in Respondent's brief in support of its exceptions to the Administrative Law Judge's Decision, the co-worker in *Jhirmack* was merely "upset" about the subject matter of the conversation that the charging party had initiated. The *Jhirmack* co-worker, however, never disavowed any interest in the interaction itself.

In stark contrast to *Jhirmack*, Shawn Burgess in this case was much more than just "upset" by the Charging Party's actions. Mr. Burgess felt that it was inappropriate for the Charging Party to have called him for the purpose for which he called. (Tr. 53-4, 67-8, 81). Mr. Burgess stressed that the call he received from the Charging Party "was <u>not</u> a call that should come from . . . another employee; I think that's management's job." (Tr. 54). Mr. Burgess stated to Respondent that "[h]e didn't appreciate anybody from [the Charging Party's department] calling him and interfering in something that wasn't any of his business, and hearing it from somebody in [the Charging Party's department] that was not his supervisor." (Tr. 67-8). Mr. Burgess expressly disavowed the Charging Party's actions, clearly demonstrating that the Charging Party acted without the authority of Mr. Burgess. Merriam-Webster defines "disavow" as "say[ing] that you are not responsible for (something)" or "deny[ing] that you know about or are involved in (something)." The Board has made clear that employee disavowal of another employee's actions negates any concerted nature of such actions. *See, e.g.*, *Meyers II*, 281

NLRB at 884. Therefore, in calling Mr. Burgess, the Charging Party acted solely by himself, and so his actions were not and could not have been concerted.

The Courts also have refused to find protected, concerted activity on the basis of mere contact with other employees absent effort to initiate group action. In *Mushroom Transportation Co. v. N.L.R.B.*, 330 F.2d 683 (3d Cir. 1964), the court rejected the argument that an employee engaged in protected, concerted activity when the employee was "in the habit of talking to other employees and advising them as to their rights" relating to such topics as "holiday pay, vacations, and the company's practice of assigning trips to drivers of other companies rather than to its own regular drivers." 330 F.2d at 684. The court explained:

> We look in vain for evidence that would support a finding that [the charging party's] talks with his fellow employees involved any effort on his or their part to initiate or promote any concerted action to do anything about the various matters as to which [the charging party] advised the men or to do anything about any complaints and grievances which they may have discussed with him. It follows that, if we were to hold that [the charging party's] conversations constituted concerted activity, it could only be upon the basis that any conversation between employees comes within the ambit of activities protected by the Act provided it relates to the interests of the employees. We are unable to adopt this view.
>
> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.
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> . . .
>
> Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "griping."

> There being no evidence that any question of group action entered into the conversations, we hold that [the charging party] was not engaged in concerted activities within the protection of Section 7 of the Act.

Id. at 684-85. Under this standard, it is clear that the Charging Party did not engage in protected, concerted activity when he called Mr. Burgess because that conversation did not intend, contemplate, or even refer to group action of any kind.

B. Respondent Lawfully Discharged The Charging Party For Causing Disruption To The Workplace.

Respondent lawfully discharged the Charging Party for conduct that actually and significantly interfered with Respondent's operations.[1] Under *Continental Group Inc.*, 357 NLRB No. 39 (2011), an employer may avoid liability for discipline imposed pursuant to an unlawfully overbroad rule if the conduct at issue "actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations." *Id.* at 6. As explained in Respondent's brief in support of its exceptions, two days before hearing, Counsel for the General Counsel changed its theory and argued that the Charging Party's activity was "inherently concerted," under the theory adopted by the Board in *Sabo, Inc.*, 362 NLRB No. 81 (2015). Despite the fact that the Charging Party's Complaint never invoked (and was never amended to invoke) this inherently concerted allegation, and despite the fact that

[1] The General Counsel may not agree with Respondent's reasoning for discharging the Charging Party, but it is not the role of the General Counsel or the Board to second-guess Respondent's business judgment. *See NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956) ("[A]s we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.").

the concept of "inherently concerted activity" is irreconcilable with *Meyers Industries*, even under this new theory of the case, the Charging Party's activity was not protected.[2]

Perhaps realizing the weaknesses of its case, the General Counsel again attempted to shift the theory of its case in its Answering Brief to Respondent's Exceptions by drawing upon *Atlantic Steel Co.*, 245 NLRB 814 (1979), and arguing that because the Charging Party's actions were not "opprobrious," they are protected. Neither *Sabo* nor *Continental Group*—the cases the General Counsel has relied upon to this point—uses the *Atlantic Steel* standard or even cites to the case. Nevertheless, even under *Atlantic Steel*, the Charging Party's actions were not protected in light of *Atlantic Steel's* four-factor test: The incident occurred on the production floor during working time; the Charging Party admitted there were reasonable alternatives to his actions; the Charging Party's actions caused significant production interference; and the incident was not at all provoked by any unfair labor practice of Respondent. *See Atlantic Steel*, 245 NLRB at 816-17.

C. The Administrative Law Judge's Characterization Of Witness Testimony Must Be Rejected.

The Board need not follow credibility findings of an Administrative Law Judge when they "conflict[] with well supported inferences drawn from other parts of the record." *Russell-*

[2] As Respondent explained in its prior briefing, the Charging Party's actions were not protected because: (1) the Charging Party's purpose in placing the telephone call was to "see what was up" with Mr. Burgess, rather than to discuss job security; (2) the Charging Party's actions were disruptive to production and operations; (3) the Charging Party himself admitted that there were reasonable alternatives to his actions, such as contacting management about the issue of Mr. Burgess' employment, rather than taking on the task himself and thereby breaching his job duties; and (4) employers have a right to control the workplace, and employees do not have the right to dictate their own terms of employment. *See, e.g.*, *Yellow Freight Sys. Inc.*, 247 NLRB 177, 180 (1980) (holding employer's decision to discharge employee for insubordination was lawful where decision was based on employer's legitimate business interests); *see also Report of the General Counsel Concerning Employer Rules*, GC 15-04 (March 18, 2015) (explaining employers may restrict distribution of literature in paper form in work areas because such solicitations can interfere with production).

Newman Mfg. Co. v. N.L.R.B., 407 F.2d 247, 249 (5th Cir. 1969); *see also Sutter E. Bay Hosps. v. N.L.R.B.*, 687 F.3d 424, 438 (D.C. Cir. 2012) ("Although an ALJ's credibility determinations are entitled to significant deference . . . they are not immune to judicial scrutiny."). Further, "[i]t is the special function of the administrative law judge to prepare for the Board an independent and careful analysis of the factual issues and legal arguments in the case over which the judge presides." *Waterbury Hotel Mgmt. LLC*, 333 NLRB 482, 482 (2001). In this regard, an Administrative Law Judge should not simply adopt the brief of the General Counsel, as he appears to have done in this case.

The Administrative Law Judge has attempted to pluck isolated, post-discharge comments out of context as a basis to establish unlawful motivation on the part of Respondent. The Administrative Law Judge found Plant Manager Grant Yeakey to be "openly hostile" towards the Charging Party on the witness stand, but the Administrative Law Judge did not set forth in any fashion why he characterized Mr. Yeakey's testimony as "hostile." Being firm and assertive is not the same as being "hostile." The Administrative Law Judge's characterization thus fails to meet the required standards for determining credibility. The Administrative Law Judge also went on to state that Mr. Yeakey testified evasively and inconsistently concerning his conversations with the Charging Party and the reasons for discharge but, again, failed to explain the basis for those findings. Such conclusory statements, which are not based on facts, are insufficient. The Board is required to examine the record as a whole, not to pull isolated comments out of context in an attempt to establish motive. Accordingly, the Administrative Law Judge's findings in this area must be rejected.

D. The General Counsel's Shifting Pleadings Have Prejudiced Respondent.

Contrary to the General Counsel's assertions that it has sufficiently "put Respondent on notice of the allegations against it," the General Counsel's shifting pleadings have impaired Respondent's ability to present its case in a timely fashion. The affirmative defenses Respondent is required to plead depend on the theory of the case put forth by the General Counsel, but the General Counsel continues to put forth differing theories of the case. Even in its most recent pleading—the General Counsel's Answering Brief to Respondent's Exceptions—the General Counsel once again changed its theory regarding the standard of review in drawing upon *Atlantic Steel*, as explained above. The General Counsel's accusation that Respondent has employed "shifting defenses" is thus ironic in light of the General Counsel's shifting theories of its own case.[3]

CONCLUSION

The General Counsel has failed to meet its burden of proof in this case. In addition to the analyses set forth above, Respondent rests on its analyses set forth in its Brief in Support of Respondent's Exceptions to the Decision and Order of the Administrative Law Judge.[4] Based on the foregoing, Respondent's Exceptions should be granted and the Complaint should be dismissed.

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[3] Furthermore, attempting to use Respondent's position statement as the basis for a "shifting defenses" charge is improper. The position statement—an unverified legal document submitted by counsel early in these proceedings—does not "admit" to "shifting defenses." Such pleadings should be admitted into or relied upon as evidence only when they contain an employer's admission to the violations alleged by the charging party or General Counsel. *See United Scrap Metal, Inc.*, 344 NLRB 467, 468 (2005).

[4] For example, Respondent, in its prior briefing, appropriately distinguished its handbook policies from the unlawful handbook policies in the case law relied upon by the General Counsel. Respondent rests on its prior analyses of these issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2015, a copy of the Respondent's Reply Brief to the General Counsel's Answering Brief to Respondent's Exceptions Administrative Law Judge's Decision was filed electronically through the Board's E-Filing system and was served via email upon:

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