UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTH WEST RURAL ELECTRIC COOPERATIVE,	)	
	)	
Respondent,	)	Case 18-CA-150605
	)	
and	)	
	)	
DAVID JAMES SVOBODA, an Individual	)	

RESPONDENT'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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RESPONDENT'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

Comes now the Respondent, North West Rural Electric Cooperative ("Respondent"), and files the following exceptions to the Decision issued by Administrative Law Judge Thomas M. Randazzo (the "ALJ") on September 30, 2016:

I. Respondent excepts to the ALJ's finding that Svoboda's two performance reviews during his probationary period contained overall positive comments, or "overwhelming positive reviews" about his work. (ALJD, p. 5, 28-30; p. 6, line 2).[1]

II. Respondent excepts to the ALJ's finding that Svoboda worked for approximately two months as the GPS & Staking Technician without incident until December 8, 2014, when he was discharged. (ALJD, p. 7, lines 18-19).

III. Respondent excepts to the ALJ's finding that the Linejunk Facebook page serves as an on-line forum for linemen and electrical workers. (ALJD, p. 7, lines 21-22).

IV. Respondent excepts to the ALJ's finding that the Linejunk Facebook page

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[1] Herein, references to the ALJ's Decision will be listed as "ALJD, p. _, line(s) ____".

pertains to “safety concerns.” (ALJD, p. 7, lines 39-40).

V. Respondent excepts to the ALJ’s finding that Svoboda viewed the Linejunk Facebook page on a daily basis because it showed on his Facebook newsfeeds. (ALJD, p. 7, lines 44-45).

VI. Respondent excepts to the ALJ’s finding that Svoboda’s Facebook page alerted him that Luke Lathrop, Mike Berkenpas, and Gabe Roetman “liked” and followed the Linejunk Facebook page. (ALJD, p. 8, lines 4-6).

VII. Respondent excepts to the ALJ’s finding that Svoboda discussed the Linejunk page with his coworkers, including “different safety concerns.” (ALJD, p. 8, lines 10-12).

VIII. Respondent excepts to the ALJ’s finding that the Linejunk Facebook page focused on safety concerns in the lineman and electrical field. (ALJD, p. 8, lines 41-42; ALJD, p. 9, lines 1-4).

IX. Respondent excepts to the ALJ’s finding that Svoboda read at least some of the comments to the Linejunk page administrator’s question before he posted his own comment. (ALJD, p. 9, lines 12-13).

X. Respondent excepts to the ALJ’s finding that Svoboda’s Facebook comments referenced “safety issues or concerns.” (ALJD, p. 10, line 21).

XI. Respondent excepts to the ALJ’s finding that Svoboda credibly testified regarding the meaning of his Facebook post. (ALJD, p. 10, line 8 through p. 11, line 22).

XII. Respondent excepts to the ALJ’s finding that Svoboda’s posted comments were “regarding safety” or similar in nature to the other posted comments in the Facebook thread. (ALJD, p. 11, lines 24-26).

XIII. Respondent excepts to the ALJ’s finding that many of the comments in the

Linejunk "conversation" were similar to Svoboda's. (ALJD, p. 11, lines 28-34).

XIV. Respondent excepts to the ALJ's finding that the Facebook "conversation" was "trending" in the same direction as Svoboda's post. (ALJD, p. 11, lines 33-36).

XV. Respondent excepts to the ALJ's finding that Svoboda's posts were similar in nature to comments posted on other websites and mentioned in other media articles relating to lineman safety and the electrical industry. (ALJD, p. 11, lines 39-45).

XVI. Respondent excepts to the ALJ's finding that Svoboda's post pertained to safety, and that his remarks in the post "were nothing new to management or his co-workers." (ALJD, p. 12, lines 6-16).

XVII. Respondent excepts to the ALJ's finding that some of Elgersma's testimony contradicted Alons' testimony. (ALJD, p. 12, line 45 through p. 13, line 14).

XVIII. Respondent excepts to the ALJ's finding that since taking the staking position, Svoboda worked "much less with the crew than he had before." (ALJD, p. 13, lines 9-10).

XIX. Respondent excepts to the ALJ's finding that Dustin Koele understood that the subject matter of Svoboda's Facebook post "was about safety." (ALJD, p. 13, lines 15-27).

XX. Respondent excepts to the ALJ's finding that Koele testified that Svoboda was not part of the line crew. (ALJD, p. 13, lines 29-32).

XXI. Respondent excepts to the ALJ's finding that Alons' testimony was contradicted by evidence of the December 11, 2014 memorandum. (ALJD, p. 14, lines 27-29).

XXII. Respondent excepts to the ALJ's finding that Svoboda's testimony was credible. (ALJD, p. 15, line 15).

XXIII. Respondent excepts to the ALJ's finding that Alons was "somewhat evasive" when being questioned regarding his statements to Svoboda when Svoboda's employment was

terminated. (ALJD, p. 15, lines 19-22).

XXIV. Respondent excepts to the ALJ's finding that Alons informed Svoboda that he was discharged "on the basis of his Linejunk Facebook post." (ALJD, p. 15, lines 15-16).

XXV. Respondent excepts to the ALJ's finding that Haak's testimony revealed that Svoboda was informed that he was discharged because of his Facebook post. (ALJD, p. 15, lines 24-25).

XXVI. Respondent excepts to the ALJ's finding that Korver's memorandum pertaining to his conversation with Alons on December 5 and the termination meeting Alons and Haak had with Svoboda on December 8, reflects that Svoboda was informed that his discharge was based on his Facebook post. (ALJD, p. 15, lines 35-38).

XXVII. Respondent excepts to the ALJ's finding that Korver's testimony regarding the reasons for discharging Svoboda differs from the reasons set forth in his memorandum or the reasons conveyed to Svoboda at the time of his discharge. (ALJD, p. 16, lines 12-14).

XXVIII. Respondent excepts to the ALJ's finding that Svoboda appeared sincere and honest in his demeanor, and he testified in a clear, convincing and straightforward manner. (ALJD, p. 16, lines 37-38).

XXIX. Respondent excepts to the ALJ's finding that Korver testified in a less convincing manner than Svoboda, and that Korver presented testimony that was at times guarded and defensive. (ALJD, p. 16, lines 42-43).

XXX. Respondent excepts to the ALJ's finding that Korver's testimony was not supported by the record, and that it was contradicted by the testimonies of Alons and Haak, and his own memorandum documenting Svoboda's discharge. (ALJD, p. 16, lines 45-47).

XXXI. Respondent excepts to the ALJ's finding that Korver did not present his asserted reasons of changing schedules and safety concerns in his affidavit to the Region. (ALJD, page 16, line 50 through page 17, line 2).

XXXII. Respondent excepts to the ALJ's finding that Svoboda engaged in concerted activity for the purpose of mutual aid or protection, and that Respondent discharged him because of that activity, in violation of Section 8(a)(1) of the Act. (ALJD, p. 17, lines 30-32; ALJD, p. 32, lines 11-12).

XXXIII. Respondent excepts to the ALJ's finding that it is undisputed that Svoboda was involved in a Facebook "discussion" seeking input on how accidents in the lineman industry could be stopped or prevented, and the content of his post in reply to that inquiry clearly concerned the protected topic of lineman safety and accident prevention. (ALJD, p. 18, lines 29-32).

XXXIV. Respondent excepts to the ALJ's finding that when Svoboda posted his comments on the Linejunk Facebook page, he was addressing workplace health and safety concerns. (ALJD, p. 18, lines 32-34).

XXXV. Respondent excepts to the ALJ's finding that Svoboda's post was directly concerned with improving his and his co-workers' terms and conditions of employment. (ALJD, p. 18, lines 26-37).

XXXVI. Respondent excepts to the ALJ's finding that the record does not support Respondent's contention that Svoboda's Facebook post was merely unprotected "griping," and did not involve workplace safety or health concerns. (ALJD, p. 18, lines 39-41).

XXXVII. Respondent excepts to the ALJ's finding that Koele acknowledged that Svoboda's Facebook post concerned workplace safety. (ALJD, p. 18, lines 41-42).

XXXVIII. Respondent excepts to the ALJ's finding that Svoboda's Facebook post was a continuation of safety concerns he had previously shared with some of his supervisors and coworkers. (ALJD, p. 18, lines 45-47; ALJD, p. 20, lines 37-38).

XXXIX. Respondent excepts to the ALJ's finding that Alons acknowledged that Svoboda's Facebook post did not include any information that he had not already raised with Respondent. (ALJD, p. 19, lines 10-11).

XL. Respondent excepts to the ALJ's finding that record establishes that Svoboda's Facebook post concerned a discussion regarding the safety of employees of other employers in the industry, and that the post was aimed at improving industry-wide safety for all linemen who viewed the post. (ALJD, p. 19, lines 14-17).

XLI. Respondent excepts to the ALJ's finding that Svoboda's post "clearly concerned matters of 'mutual aid or protection' of the Respondent's employees and of employees generally." (ALJD, p. 18, line 27; p. 19, lines 41-42).

XLII. Respondent excepts to the ALJ's finding that Svoboda's single and individual action in his Facebook post sought to bring his own concerns regarding health and safety to the attention of all those who viewed the administrator's initial Facebook post. (ALJD, p. 20, lines 31-34).

XLIII. Respondent excepts to the ALJ's finding that Svoboda posted in a "group forum that included some of his coworkers," and that his post was intended to initiate or to induce or to prepare for group action. (ALJD, p. 20, lines 38-42).

XLIV. Respondent excepts to the ALJ's finding that Svoboda's coworkers' testimony regarding their disagreement with Svoboda's Facebook post had "little bearing on whether his activity was concerted." (ALJD, p. 21, lines 17-21).

XLV. Respondent excepts to the ALJ's finding that the testimony regarding Svoboda's unsafe work practices is irrelevant and immaterial. (ALJD, p. 21, lines 35-37).

XLVI. Respondent excepts to the ALJ's finding that Svoboda's Facebook post established concerted activity, regardless of whether his coworkers agreed with his post, or whether his comments actually had merit. (ALJD, p. 20, line 5; p. 22, lines 15-17; p. 21, lines 44-46).

XLVII. Respondent excepts to the ALJ's finding that Svoboda's comments were part of, and in response to, a group discussion of employees on Facebook regarding what could be done to prevent accidents in the lineman profession. (ALJD, p. 22, lines 2-4).

XLVIII. Respondent excepts to the ALJ's finding that it is plausible to infer that some of the 77 Facebook users who "liked" the administrator's initial Linejunk post, or the individuals who posted in response to the administrator's post were employed as non-supervisory linemen and statutory employees within the meaning of the Act. (ALJD, p. 22, n. 12).

XLIX. Respondent excepts to the ALJ's finding that it is undisputed that lineman work is inherently dangerous work, and that therefore workplace health and safety is likely one of the most important concerns to employees in that profession. (ALJD, p. 23, lines 22-24).

L. Respondent excepts to the ALJ's finding that workplace health and safety is likely one of the most important concerns in every profession. (ALJD, p. 23, lines 24-28).

LI. Respondent excepts to the ALJ's finding that workplace health and safety "unquestionably has a vital effect on terms and conditions of employment," and that therefore the Board's rationale for finding discussions of wages and job security inherently concerted would be equally applicable to conversations about workplace health and safety. (ALJD, p. 23, lines 30-33).

LII. Respondent excepts to the ALJ's finding that health and safety concerns are the "grist on which concerted activity feeds," and that such discussions are often "preliminary to organizing or other action for mutual aid and protection." (ALJD, p. 23, lines 33-35).

LIII. Respondent excepts to the ALJ's finding that Svoboda's Facebook post was "inherently concerted" and thus protected regardless of whether Svoboda made the post with the express object of inducing group action. (ALJD, p. 22, line 2; p. 23, lines 36-38).

LIV. Respondent excepts to the ALJ's finding that the evidence establishes that Respondent's managers informed Svoboda that he was, in fact, discharged for his Facebook post. (ALJD, p. 24, lines 1-3).

LV. Respondent excepts to the ALJ's finding that there is no evidence to establish that Svoboda's comments were sufficient to remove his protected concerted activity from the protection of the Act under any of the applicable legal standards. (ALJD, p. 23, lines 41-42; p. 24, lines 7-9; p. 26, lines 1-2).

LVI. Respondent excepts to the ALJ's finding that Respondent offered no credible evidence that Svoboda's comments were so offensive, abusive or indefensible that they exceeded the bounds of protected concerted activity. (ALJD, p.25, lines 6-7).

LVII. Respondent excepts to the ALJ's finding that Svoboda's comments were not abusive or threatening. (ALJD, p. 25, lines 9-11).

LVIII. Respondent excepts to the ALJ's finding that the nine *Pier Sixty* factors favor retaining the protection of the Act. (ALJD, p. 25, line 47).

LIX. Respondent excepts to the ALJ's finding that the record and case law do not support Respondent's argument that Svoboda's discharge was based on disloyal or disparaging comments. (ALJD, p. 26, lines 5-7).

LX. Respondent excepts to the ALJ's finding that, similar to an ongoing labor dispute, the comments in this case involved an ongoing Facebook discussion involving terms and conditions of employment such as workplace health and safety and ways in which lineman accidents could be prevented. (ALJD, p. 26, lines 30-32).

LXI. Respondent excepts to the ALJ's finding that Svoboda's comments were not "so disloyal . . . as to lose the Act's protection" under *Jefferson Standard*, because they did not mention Respondent's name or disparage the Respondent or its services. (ALJD, p. 26, lines 35-37).

LXII. Respondent excepts to the ALJ's finding that the purpose of Svoboda's comments were to seek and provide mutual support toward group action, and to encourage Respondent and other employers to address problems in terms and conditions of employment such as safety and safety training, not to disparage Respondent or undermine its reputation. (ALJD, p. 26, lines 37-40).

LXIII. Respondent excepts to the ALJ's finding that Svoboda's comments were not defamatory under the standard set forth in *Linn*, and that Svoboda was voicing a critical personal opinion of Respondent's safety practices and safety training in his workplace and in the lineman's workplace in general. (ALJD, p. 26, line 43 through p. 27, line 2).

LXIV. Respondent excepts to the ALJ's finding that Svoboda was discharged on the basis of his protected concerted activity, in violation of Section 8(a)(1) of the Act. (ALJD, p. 27, lines 8-9; p. 32, lines 11-12).

LXV. Respondent excepts to the ALJ's finding that protected conduct was a "motivating factor" in Svoboda's discharge. (ALJD, p. 27, lines 21-22).

LXVI. Respondent excepts to the ALJ's finding that an analysis under *Wright Line*

demonstrates that Svoboda's discharge was discriminatorily motivated. (ALJD, p. 28, lines 22-23).

LXVII. Respondent excepts to the ALJ's finding that the General Counsel made a *prima facie* case of discrimination. (ALJD, p. 28, line 25).

LXVIII. Respondent excepts to the ALJ's finding that Respondent "essentially informed" Svoboda of its animus toward Svoboda's "protected concerted Facebook comments critical of its safety practices and training" when it discharged him. (ALJD, p. 28, lines 33-35).

LXIX. Respondent excepts to the ALJ's finding that Respondent did not demonstrate that it would have discharged Svoboda even in the absence of the protected conduct. (ALJD, p. 28, lines 42-44; ALJD, p. 32, lines 8-9).

LXX. Respondent excepts to the ALJ's finding that the Respondent's asserted reasons for Svoboda's discharge are without merit and are pretext for its unlawful motivation. (ALJD, p. 29, lines 1-2).

LXXI. Respondent excepts to the ALJ's finding that Korver failed to mention the reasons for discharging Svoboda based on changing work schedules and safety concerns in his sworn affidavit, and that Respondent failed to allege such reasons as an affirmative defense in its answer to the complaint. (ALJD, p. 30, lines 1-5; p. 30, lines 36-39).

LXXII. Respondent excepts to the ALJ's finding that it is implausible and unbelievable that Korver would neglect to inform Svoboda, either verbally or in writing, that changing work schedules and safety concerns were the basis for his discharge. (ALJD, p. 30, lines 17-18, 23-25).

LXXIII. Respondent excepts to the ALJ's finding that Svoboda no longer worked with the line crew on a daily basis. (ALJD, p. 30, lines 30-31).

LXXIV. Respondent excepts to the ALJ's finding that Respondent's assertions that Svoboda was discharged for an inability to get along with his coworkers and because his coworkers did not want to work with him are implausible, unsupported by the record, unpersuasive, and nonsensical. (ALJD, p. 30, line 41 through p. 31, line 1).

LXXV. Respondent excepts to the ALJ's finding that Respondent suggested that it has provided its bargaining unit employees with the ability and authority to determine which employees they worked with, and what work those employees were to perform. (ALJD, p. 31, lines 1-4).

LXXVI. Respondent excepts to the ALJ's finding that Respondent's position is contradicted by the fact that some of Svoboda's coworkers had voiced their desire to not work with him well in advance of his Facebook post. (ALJD, p. 31, lines 12-13).

LXXVII. Respondent excepts to the ALJ's finding that Respondent's failure to discharge Svoboda until December 2014, at a time when he no longer worked with the line crew "on a regular basis," constitutes further evidence that Respondent's asserted reasons for Svoboda's discharge lack merit and are pretextual. (ALJD, p. 31, lines 17-21).

LXXVIII. Respondent excepts to the ALJ's finding that Svoboda's coworkers' refusal to work with him is immaterial to the determination of whether Respondent's decision to discharge him was lawful. (ALJD, p. 31, lines 27-29).

LXXIX. Respondent excepts to the ALJ's finding that Respondent's reasons for discharging Svoboda were "shifting," and that those reasons lack merit and must be dismissed. (ALJD, p. 31, lines 35-36; ALJD, p. 32, lines 3-4).

LXXX. Respondent excepts to the ALJ's finding that Respondent failed to show that it would have taken the same action against Svoboda in the absence of his protected

concerted activities. (ALJD, p. 32, lines 8-9).

LXXXI. Respondent excepts to the ALJ's finding that Respondent, by Alons' statements, coercively informed Svoboda that his protected concerted Facebook activity was the basis for his discharge, which constituted a separate and distinct violation of Section 8(a)(1) of the Act. (ALJD, p. 32, lines 14-15; ALJD, p. 32, lines 27-29).

LXXXII. Respondent excepts to the ALJ's finding that he may, under the circumstances of this case, find and recommend a remedy for violations that were not alleged or amended to be included in the Complaint. (ALJD, p. 32, line 14 through p. 33, line 7).

LXXXIII. Respondent excepts to the ALJ's finding that Alons' statement to Svoboda at the time of his discharge is closely connected to the subject matter of the complaint, and that it is undisputed evidence supporting a finding that his discharge was unlawful. (ALJD, p. 32, lines 44 -46).

LXXXIV. Respondent excepts to the ALJ's finding that Alons admitted to informing Svoboda that he was discharged for his Facebook comments. (ALJD, p. 33, lines 2-3).

LXXXV. Respondent excepts to the ALJ's finding that the it maintained and enforced unlawful Conduct Policies or rules in violation of Section 8(a)(1) of the Act, and that Respondent discharged Svoboda pursuant to those unlawful rules, in violation of Section 8(a)(1) of the Act. (ALJD, p. 33, lines 9-12).

LXXXVI. Respondent excepts to the ALJ's finding that employees would reasonably believe that in order to comply with Policy C-6, they would be prohibited from utilizing other methods to resolve workplace issues, including discussing such issues with one another, third parties, or governmental agencies. (ALJD, p. 34, lines 28-32).

LXXXVII. Respondent excepts to the ALJ's finding that the applicability of Policy C-

6 to employees' terms and conditions of employment is unmistakable. (ALJD, p. 34, lines 24-34).

LXXXVIII. Respondent excepts to the ALJ's finding that Policy C-6 conveys a duty or obligation to use Respondent's procedure as a directive, rather than a non-exclusive suggestion. (ALJD, p. 35, lines 4-6).

LXXXIX. Respondent excepts to the ALJ's finding that, based on established Board law, Policy C-6 is unlawful. (ALJD, p. 35, line 16).

XC. Respondent excepts to the ALJ's finding that Policy C-9 is likewise unlawful. (ALJD, p. 35, line 18).

XCI. Respondent excepts to the ALJ's finding that employees would reasonably believe or interpret Policy C-9 as proscribing any discussions about their terms and conditions of employment, such as wages, hours, and working conditions (and such as Respondent's safety practices or safety training), which Respondent may deem to be "confidential information." (ALJD, p. 35, lines 24-27).

XCII. Respondent excepts to the ALJ's finding that employees would reasonably understand "confidential information" to encompass wages, hours, and other terms and conditions of employment, and "discussions and interactions protected by Section 7." (ALJD, p. 35, lines 29-31).

XCIII. Respondent excepts to the ALJ's finding that the Respondent's maintenance and enforcement of Policies C-6 and C-9, constitute violations of Section 8(a)(1) of the Act. (ALJD, p. 35, lines 42-43).

XCIV. Respondent excepts to the ALJ's finding that Svoboda's discharge pursuant to Policies C-6 and C-9 constituted a violation of Section 8(a)(1) of the Act. (ALJD, p. 36, lines 1-

2).

XCV. Respondent excepts to the ALJ's finding that Svoboda was engaged in conduct clearly within the protection of Section 7 of the Act when he made his Linejunk Facebook post, and that those Facebook comments constituted protected concerted conduct, and engagement in conduct that implicates the concerns underlying Section 7. (ALJD, p. 36, lines 39-41).

XCVI. Respondent excepts to the ALJ's finding that the evidence also establishes that Respondent discharged him on the basis of that protected concerted activity, and pursuant to its overbroad conduct policies or rules. (ALJD, p. 36, lines 41-42).

XCVII. Respondent excepts to the ALJ's finding that that there is insufficient evidence that Svoboda's Facebook post interfered with his work, the work of Respondent's employees, or with Respondent's operations. (ALJD, p. 36, lines 43-44).

XCVIII. Respondent excepts to the ALJ's finding that Svoboda's Facebook had no impact at all on his work, the work of his co-workers, or the Respondent's ability to provide services to its customers. (ALJD, p. 36, lines 45-46).

XCIX. Respondent excepts to the ALJ's finding that there is insufficient evidence to establish that any interpersonal friction between Svoboda and his coworkers would have actually affected the Respondent's operations. (ALJD, p. 37, lines 2-3).

C. Respondent excepts to the ALJ's finding that there is no evidence Svoboda's actions caused an interference with Respondent's operation or its employees' work. (ALJD, p. 37, lines 8-9).

CI. Respondent excepts to the ALJ's finding that it is immaterial whether the line crew wanted to work with Svoboda. (ALJD, p. 37, lines 8-11).

CII. Respondent excepts to the ALJ's finding that there is no evidence that

interference with Respondent's operation was the reason for Svoboda's discharge, and that such explanation was never conveyed to Svoboda as the reason for his discharge. (ALJD, p. 37, lines 26-28).

CIII. Respondent excepts to the ALJ's finding that Respondent failed to assert as an affirmative defense in its answer to the Complaint that Svoboda's conduct interfered with its business operations. (ALJD, p. 37, lines 28-29).

CIV. Respondent excepts to the ALJ's finding that Respondent did not inform Svoboda that he was being discharged because his conduct interfered with Respondent's operation. (ALJD, p. 37, lines 30-31).

CV. Respondent excepts to the ALJ's finding that Respondent's managers informed Svoboda that he was being discharged on the basis of his Facebook post. (ALJD, p. 37, lines 31-33).

CVI. Respondent excepts to the ALJ's finding that Respondent has not met its burden of establishing that Svoboda's protected conduct interfered with its operations, and that Respondent failed to show that interference with its operations was the actual reason for the discharge. (ALJD, p. 37, lines 35-37).

CVII. Respondent excepts to the ALJ's Conclusions of Law. (ALJD, p. 37, line 43 through p. 38 line 19).

CVIII. Respondent excepts to the ALJ's proposed remedy. (ALJD, p. 38, line 21 through p. 39, line 25).

CIX. Respondent excepts to the ALJ's proposed Order. (ALJD, p. 39, line 27 through p. 41, line 30).

A Brief in Support of Exceptions is included in this mailing.

Dated this 8th day of November, 2016.

Respectfully submitted,

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

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TABLE OF CONTENTS

I. **STATEMENT OF THE CASE** 1

A. **Preliminary Statement** 1

B. **Procedural Overview** 1

C. **Factual Overview** 2

II. **STANDARD OF REVIEW** 11

III. **ARGUMENT** 11

A. **The ALJ ignored undisputed evidence showing that Respondent did not terminate Svoboda because of his Facebook post**. 12

B. **The ALJ twisted logic and Board precedent to find that Svoboda's Facebook rant was protected concerted activity**. 13

1. ***The ALJ erred in finding that Svoboda's Facebook rant was for the purpose of mutual aid or protection***. 13

2. ***The ALJ erred in finding that Svoboda's Facebook rant was concerted activity***. 16

3. ***The ALJ erred in finding that Svoboda's Facebook rant was "inherently concerted," expanding that already-problematic doctrine to the point of eviscerating the plain language of Section 8(a)(1) of the Act***. 20

4. ***The ALJ erred in finding that Svoboda's Facebook rant did not exceed the bounds of protection provided by Section 7 of the Act***. 22

C. **The ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by discharging Svoboda on the basis of protected concerted activity.** 24

1. ***The ALJ erred in finding that General Counsel made a prima facie case of discrimination under the Wright Line test*** 24

2. ***The ALJ erred in finding that Respondent's credible and unrebutted reasons for Svoboda's discharge were pretextual***. 26

D. ***The ALJ erred in finding that Respondent coercively informed Svoboda that he was discharged because he engaged in protected concerted activity in violation of Section 8(a)(1) of the Act***. 28

E. **The ALJ erred in finding that Respondent's Conduct Policies were unlawful, and that Respondent discharged Svoboda pursuant to those rules in violation of Section 8(a)(1) of the Act.** 29

1. ***The ALJ erred in finding that Policy C-6 is unlawful***. 29

2. ***The ALJ erred in finding that Policy C-9 is unlawful***. 31

3. ***The ALJ erred in finding that Respondent discharged Svoboda pursuant to unlawful policies in violation of Section 8(a)(1) of the Act*** 32

IV. **CONCLUSION** 33

TABLE OF CASES

Cases

Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB, 81 F.3d 209, 214 (D.C. Cir. 1996)..... 21
Aroostook Cnty. Reg'l Ophthalmology Ctr., 317 NLRB 218, 220 (1995) 20
Circle K Corp., 305 NLRB 932 (1991) 17
Cont'l Grp., Inc., 357 NLRB 409 (2011) 32
Daly Park Nursing Home, 287 NLRB 710 (1987) 18
Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) 15
Flex Frac Logistics, LLC, 360 NLRB No. 120 (May 30, 2014)..... 32
Fresh & Easy Neighborhood Mkt., Inc., 361 NLRB No. 12 (2014)..... passim
Hoodview Vending Co., 359 NLRB No. 36 (Dec. 14, 2012) (*Hoodview I*) 20, 21
Hoodview Vending Co., 362 NLRB No. 81 (Apr. 30, 2015) (*Hoodview II*) 20, 21
L.B.&B. Assocs., Inc., 346 NLRB 1025 (2006) 25
Lafayette Park Hotel, 326 NLRB 824 (1998)..... 31
Meyers Indus., 268 NLRB 493, 497 (1984) *(Meyers I)*..... 16, 19
Meyers Indus., 281 NLRB 882, 887 (1986) (*Meyers II*) 19
NLRB v. Noel Canning, 134 S.Ct. 2550 (2014) 20
Pier Sixty, LLC, 362 NLRB No. 59 (2015)..... 23
Standard Dry Wall Prods., 91 NLRB 544 (1950) 11
Sun Cab, Inc., 362 NLRB No. 185 (Aug. 27, 2015)..... 16
Super K-Mart, 330 NLRB 263 (1999) 31
Triple Play Sports Bar & Grille, 361 NLRB No. 31 (2014) 17
Triple Play Sports Bar and Grill v. NLRB, 2015 WL 6161477 (2d Cir. Oct. 21, 2015) 20
Unique Pers. Consultants, Inc., 364 NLRB No. 112 (Aug. 26, 2016) 14, 17

Statutes

29 U.S.C. § 157..... 14

Other Authorities

NLRB Gen. Counsel Memo. GC 15-04 (March 18, 2015)..... 31, 32

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTH WEST RURAL ELECTRIC COOPERATIVE,	)	
Respondent,	)	Case 18-CA-150605
and	)	
DAVID JAMES SVOBODA, an Individual	)	

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

Comes now the Respondent, North West Rural Electric Cooperative ("Respondent"), and files the following Brief in Support of the Exceptions to the Decision issued by Administrative Law Judge Thomas M. Randazzo (the "ALJ") on September 30, 2016, and states as follows:

I. STATEMENT OF THE CASE

A. Preliminary Statement

The ALJ's goal-oriented decision turns a simple case of unprotected individual griping into a massive expansion of the meaning of "protected concerted activity" and "inherently concerted activity." To make his findings that Respondent violated Section 8(a)(1) by interfering with Dave Svoboda's ("Svoboda") Section 7 rights, the ALJ ignored overwhelming evidence, twisted logic, and disregarded Board precedent. For the reasons discussed below, the Board should reject the ALJ's findings and hold that Respondent did not violate Section 8(a)(1).

B. Procedural Overview

The charge in Case No. 18-CA-150605 was filed and served on Respondent on April 21, 2015, nearly five months after Svoboda's termination by Respondent. The Complaint, alleging

violations of § 8(a)(1) of the Act issued on October 5, 2015. Respondent's Answer, denying the § 8(a)(1) allegations and raising multiple affirmative defenses, was timely filed on October 16, 2015.

The trial was conducted in Sioux City, Iowa before the ALJ, on January 26 and 27, 2016. The Parties submitted post-hearing briefs on March 2, 2016. The ALJ issued his Decision and Order Transferring Proceeding to the Board on September 28, 2016. The Parties stipulated to an extension of time to file exceptions to the Decision, due to the untimely death of Respondent's Lead Counsel, Jim Walters. The Executive Secretary granted the extension to November 9, 2016.

C. Factual Overview

1. Respondent's business. Respondent is a rural electrical distribution cooperative with its main office located in Orange City, Iowa. (Tr. 325, ll. 12–13). Its purpose is to provide its members affordable, efficient, reliable, and safe electricity in the rural areas where they live. (Tr. 167, ll. 15–19; 191, ll. 3–9).

Respondent employs linemen[2] to do the day-to-day maintenance of the distribution system, construct new power lines, and respond to service calls. (Tr. 167, ll. 21–23). Respondent's linemen have been continuously represented by the International Brotherhood of Electrical Workers ("IBEW") for nearly 50 years. (Tr. 13, ll. 7–11; 20, ll. 3–8). The charge at issue is the first unfair labor practice charge filed against Respondent in at least thirty-seven years. (Tr. 226, ll. 14–19). Respondent also has a stellar safety record. Over the last 32 years,

[2] The term "lineman" as used at the hearing and in this brief refers to a position at Respondent or other electrical distributors. Among other duties, a lineman builds and maintains electrical lines—from setting poles with a digger or stringing wire by climbing a pole or on an aerial device. (Tr. 20, ll. 14–17). The

Respondent has not been issued a single OSHA citation or complaint, (Tr. 263, l. 18 – Tr. 264, l. 3) and it has not had a lost-time accident since February, 2011, a period of now more than five years. (Tr. 164, ll. 1–9; Tr. 267, ll. 13–18; R. Ex. 7, p. 2). Respondent has never experienced a death case involving a lineman or any other individual for at least the last 32 years. (Tr. 265, ll. 12-13; 267, ll. 2-4).

2. Witnesses at the hearing included David J. Svoboda ("Svoboda"), Doug Alons, Lyle Korver, Phil Elgersma, Derrick Haak, and Dustin Koele. Alons is a 30-year supervisory employee of Respondent. (Tr. 166, ll. 3–7). As Respondent's Operations Director, Alons is in charge of organizing work flow and involved in Respondent's hiring and discipline processes. (Tr. 166, l. 8 – Tr. 167, l. 7). Korver is Respondent's CEO and General Manager. (Tr. 173, ll. 7–8; Tr. 190, ll. 24–25). He has been employed by Respondent for thirty seven years, and has been its CEO for thirty two years. (Tr. 190, ll. 22–23). Elgersma, an eleven year employee of Respondent, holds the position of Lead Lineman in the IBEW bargaining unit. (Tr. 308, ll. 17–21). Haak works under Alons, and is Respondent's Assistant Operations Director. (Tr. 202, l. 25; Tr. 203, ll. 12–15). He has been employed by Respondent for nearly thirteen years. (Tr. 202, ll. 22–23). Koele is a journeyman lineman, and has worked for Respondent for more than five years. (Tr. 343, ll. 15–16). Each of these witnesses works out of Respondent's Orange City, Iowa facility.

Svoboda was employed by Respondent from February 2007 through December 2014. (Tr. 17, ll. 17–18). He started with Respondent as an apprentice lineman, and eventually became a journeyman lineman. (Tr. 17, ll. 19–21; Tr. 18, ll. 12–16). In October 2014, he was given

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positions of Lineman and Lead Lineman are specifically covered by the IBEW Certification and its CBA with Respondent. (R. Ex. 2, p. 1).

part-time GPS staking responsibilities, but he testified that he continued to work with the regular line crew "50 to 60 percent of the time" until his termination two months later. (Tr. 18, ll. 20–24; Tr. 152, ll. 11–21). Svoboda was represented by IBEW Local 231 as a lineman, but his staking job was not necessarily in IBEW's bargaining unit. (Tr. 20, ll. 7–11).

3. Svoboda's prior discipline. In his Jencks statement, Svoboda claimed he was never formally disciplined by Respondent, but at the hearing he testified that he did, in fact, receive multiple disciplinary actions while employed by Respondent. (Tr. 23, ll. 17–24). Svoboda's self-serving explanation for the discrepancy was that he was never formally disciplined because he was never "garnished" or "deducted" pay or suspended. (Tr. 23, l. 25 – Tr. 24, l. 1).

On June 10, 2011, Svoboda received an "Employee Warning Notice" for unsafe operation of a forklift. (G.C. Ex. 2). Svoboda did not contest this warning notice, and he testified that he "knew [he] was in the wrong." (Tr. 86, ll. 20–23).

In September 2012, Svoboda received another written warning because he failed to stay in the local service area while he was on call. (G.C. Ex. 3). This warning stated "[t]here have also been further instances of not working and cooperating well with fellow employees. This issue has been discussed with [Svoboda] previously, and he has received previous verbal warnings." (G.C. Ex. 3). The warning further stated "[Svoboda] will have to demonstrate the ability to get along well and work in a cooperative effort with his fellow employees." (G.C. Ex. 3). Svoboda signed the warning, which cautioned that "further infractions will result in immediate dismissal from employment." (G.C. Ex. 3).

On December 18, 2013, Svoboda received a final warning. (G.C. Ex. 4). Svoboda had requested to meet with Doug Alons and Lyle Korver to "clear the air" after Phil Elgersma, a

younger but more senior lineman, was promoted to an open lead lineman position. (Tr. 30, ll. 1–21; Tr. 97, ll. 11–19). The meeting lasted an hour and a half to two hours. (Tr. 108, ll. 16–20). During the meeting, Alons and Korver told Svoboda that they considered attitude, communication skill, and how well the employee works with his coworkers in making their promotion decision. (Tr. 102, ll. 2–8). Korver told Svoboda that his conduct and the language he was using in that meeting was disrespectful. (Tr. 109, ll. 7–18). Korver told Svoboda that they did not want to terminate his employment, but that they were close to doing so because of his disrespectful conduct and refusal to cooperate with his coworkers. (Tr. 109, l. 7 – Tr. 110, l. 11).

At the end of the meeting, Korver gave Alons the authority to terminate Svoboda for any additional offenses relating to Svoboda's conduct or refusal to cooperate with other employees. (Tr. 110, 7–19). They issued Svoboda another verbal warning, and Korver told Svoboda "that this would be the last straw" and the "last chance" to change his conduct. (Tr. 31, 7–18). Although Svoboda did not immediately receive the written confirmation of this meeting/warning, he confirmed in his testimony virtually all of its components. (Tr. 97–103). Svoboda did not testify that he raised any safety concerns in this or previous meetings with Alons and Korver. It is clear that Respondent's decision to put Svoboda on a final written warning was based solely on Svoboda's disrespectful conduct toward his supervisors (rooted in a perceived slight, not any alleged safety issues) and his consistent inability to cooperate with his coworkers.

As evidenced by Svoboda's disciplinary actions and his coworkers' testimony, Svoboda's relationship with his coworkers was strained. (Tr. 322, ll. 14–17). Elgersma testified that "there's bucking heads most times" he had to work with Svoboda. (Tr. 322, ll. 17–20). The situation got so strained that for several months leading up to Svoboda's termination, members

of Svoboda's crew would ask Elgersma to change the crews in order to avoid being on the same crew as Svoboda. (Tr. 323, l. 14 – Tr. 324, l. 3). In fact, it got so bad that Svoboda's coworkers had to resort to flipping a coin to decide who had to work with him, and one coworker testified that he asked approximately fifteen times to not work with Svoboda. (Tr. 324, ll. 4–15; Tr. 353, ll. 12–24).

4. The Linejunk Facebook page. Linejunk is a Facebook page devoted to selling products such as t-shirts and other apparel to linemen and people interested in the lineman profession. (G.C. Ex. 7). General Counsel's Exhibit 7 is a screenshot of the Linejunk page "timeline," the page that one would see immediately after navigating to the Linejunk page. (Tr. 37, l. 20–25). As of January 19, 2016, 64,767 people "liked" the Linejunk page. (Tr. 41, ll. 24–25). Svoboda and a handful of his coworkers "liked" the Linejunk page, which was "public," meaning that anyone could view the page regardless of whether they had a Facebook account or "liked" the page. (Tr. 42, l. 22 – Tr. 44, l. 21).

5. Svoboda's Linejunk Post. On December 1, 2014, a Linejunk administrator posted a question to the Linejunk page. (G.C. Ex. 5, p. 1; Tr. 45, l. 10–18; Tr. 46, 1–2). The administrator stated that he has been asked to be part of a safety team, and that he has been following another Facebook page called Time for a Change, which discusses how to address the number of deaths in the lineman industry. (G.C. Ex. 5, p. 1; G.C. Ex. 9, p. 1). Based on those statements, the administrator proceeded to ask, verbatim:

> "How do we fix this, what do we need to do to prevent accidents? i know a few will say that the company pushs us, well that may be, but if you think its unsafe, then why did you do it, so i dont want to get in any pissing match with anyone, i would just like to know your ideas on how we can stop all the accidents, is it lack of training, is it inexperience ect. your thoughts will be appreciated."

(G.C. Ex. 5, p. 1).

On December 2, 2014, Svoboda posted two "comments" in the thread below the administrator's conversation starter. The essence of these two posts is somewhat difficult to comprehend but they are transcribed verbatim from those postings dated December 2, 2014:

> **David Svoboda**
>
> I agree with most comments been in the trade 11 years started with iou and got my ticket was trained by the "old" guys then moved back home to a coop and what a goat bang it has been I will never forget the guys that brought me up they were the real deal the brotherhood that was compared to me at 31 being the oldest of our 6 man crew and I use 6 man crew loosely most it's 3 out doing all work a jl or two and apprentice sometimes lead man one man In the air all the time I have brought everyone through there apprenticeship except my lead lineman who's 3 years younger I was in The Air all the time look down not a one would be looking up not even apprentice then I would get lip back when I would talk about it told management all the time these new guys need time in the air I can count on my damn hand how many times I have seen them do hot work. Again brought it up they agree nothing gets done biggest part now days lack of experience one man in the air it all drove me out I got sick of fighting the guys took a staking job. Just last month Lack of discipline, and having to care about others feelings.
>
> **David Svoboda**
>
> Is why people get hurt I used probably the least amount of cover and like others have said it teaches you to keep your shit In a row and pay attention. Not to just go slopping around. That's my 2 cents. every accident I have heard of is o e man in the air and maybe one on the ground on maybe they are a few spans down stupid."

(G.C. Ex. 14).

Asked specifically what he sought to accomplish with his post, Svoboda testified that his purpose was to "give my 11 years' worth of insight to the question that [the administrator] asked." (Tr. 53, ll. 10–12). Svoboda never testified that he wanted his coworkers or

Respondent's management to see the post. To the contrary, ***he testified twice that he did not expect that his coworkers would ever see the post***. (Tr. 120, ll. 16–23).

To help decipher his post's meaning, Svoboda testified that the "coop" he was referring to was Respondent, and that by "goat bang" he meant that "[i]t didn't seem like things jibed together well all the time. They're just kind of a mess." (Tr. 54, ll. 1–17). Svoboda admitted that "goat bang" is not a complimentary term. (Tr. 120, 9–15). Indeed, his offended coworkers understood the phrase to be a marginally less vulgar manner of saying "goat fuck." (Tr. 327, ll. 11–14). Svoboda did not explicitly name Respondent or any of his coworkers in these posts. (Tr. 55, ll. 7–10). Nobody—including any of Svoboda's coworkers—ever "commented" on or "liked" either of Svoboda's posts on the Linejunk page. (Tr. 73, ll. 3–8; G.C. Ex. 5, p. 3).

After his December 2, 2014 postings on the Linejunk page, Svoboda testified that his coworkers' demeanor toward him changed. (Tr. 74, ll. 2–7). His coworkers were "real short, or they didn't really care to have conversation" with Svoboda. (Tr. 74, ll. 8–10). Svoboda felt that his coworkers were "angry" towards him; so much so that he had a confrontation with Dusty Koele and Luke Lathrop the next day. (Tr. 143, l. 25 – Tr. 144, l. 12).

Led by Phil Elgersma, the linemen in Svoboda's Orange City crew approached Doug Alons on the morning of December 3, 2014 to discuss their frustrations with Svoboda. (Tr. 170, ll. 7 – Tr. 171, l. 1; Tr. 177, l. 9 – Tr. 178, l. 7; Tr. 350, ll. 14–21). In that meeting, Svoboda's coworkers told Alons that they "really want no part of working with" Svoboda. (Tr. 171, ll. 7–16; Tr. 351, l. 21 – Tr. 352, l. 4). Specifically, Elgersma told Alons that Svoboda had "thr[own] them under the bus" with his Linejunk post, and that Svoboda "put the Orange City crew and the whole organization in a bad light." (Tr. 171, ll. 17–21; Tr. 178, ll. 13–24). "If this is how [Svoboda] feels about us," Elgersma recalled saying, "being how our job entails safety and

respect . . . and we watch out for each other . . . we don't want to work with him anymore." (Tr. 326, ll. 8–11). Because of the Linejunk post "and different things" from their past experiences with Svoboda, the crew told Alons that they would prefer that Svoboda "never worked on a crew with them again." (Tr. 179, ll. 16–24). This sentiment was unanimous among Svoboda's coworkers. (Tr. 179, l. 25 – Tr. 180, l. 2).

In response to Svoboda's coworkers' complaints, Alons called Lyle Korver, Respondent's CEO, on December 5th. (Tr. 174, ll. 3–5). In that conversation, Alons told Korver about Svoboda's Linejunk posting and his coworkers' complaints. (Tr. 173, ll. 11–20). Alons and Korver also discussed Svoboda's past written and verbal warnings, including the fact that Svoboda was on a final warning for related issues, and they decided to terminate Svoboda's employment. (Tr. 173, l. 22 – Tr. 174, l. 2). Specifically, Alons and Korver both testified that their decision to terminate Svoboda was based in particular on how Svoboda's work crew reacted to his Linejunk post and their requests to no longer work with Svoboda. (Tr. 181, l. 4–8; Tr. 199, ll. 15–24; Tr. 286, ll. 3–10).

Svoboda was terminated on the next work day, Monday December 8, 2014. (Tr. 75, ll. 12–13; Tr. 174, ll. 19–25). In the termination meeting, Doug Alons (Svoboda's direct supervisor) and Derrick Haak (Respondent's Assistant Operations Director) informed him of his termination and asked for his keys. (Tr. 77, ll. 17–20). Before they could continue the meeting, Svoboda threw his keys on the table in front of Alons and Haak, collected his tools and left the premises. (Tr. 183, l. 12 – Tr. 184, l. 5). After the termination meeting, Korver prepared a memorandum to Svoboda's file regarding his termination and subsequent requests for assistance obtaining health insurance and unemployment benefits. (R. Ex. 1; Tr. 182, ll. 3–24). Alons,

Korver, and Derrick Haak all reviewed and signed the memorandum. (R. Ex. 1; Tr. 182, ll. 10–13).

The memorandum repeatedly states that Respondent decided to terminate Svoboda based on his long history of disrespectful conduct and "lack of cooperation." For instance, it states:

- there was "another issue" with Svoboda;
- Respondent would need to terminate Svoboda "based on our previous warnings," including "several previous verbal warnings about his bad attitude an lack of cooperation with other employees and two written 'final warnings'";
- Alons told Svoboda during his termination meeting that his disrespectful Facebook post was "another demonstration" of his bad attitude, which creates conflict and mistrust with his coworkers.

The statements given by Haak, Alons, and Korver also confirm that Respondent terminated Svoboda based on his long history of disrespectful conduct and teamwork issues. The derogatory comments in his Facebook post, and his coworkers' response to those comments, were merely the last in a long string of problems that Svoboda had created. For example:

- Haak swore in his statement that Alons told Svoboda in the termination meeting that he was being terminated "based on his previous warnings";
- Alons swore in his statement that when they decided to terminate Svoboda, he and Korver "discussed the ongoing warnings that Svoboda had and that he had been on his last warning for his attitude and getting along with crew members.";
- Korver swore in his statement that Svoboda "had received previous warnings about his actions and how it was impacting [Respondent's] work environment."

6. Respondent's challenged policies. Policy No. C-6 is titled "Attitude, Spirit, and Cooperation." This policy suggests that employees "should use the grievance procedure (Policy No. 36) when they have complaints about their working conditions." ALJD pages 34–35; G.C. Ex. 3, p. 3. Policy No. C-9 is titled "Personal Conduct." This policy provides examples of conduct that may result in corrective action, including "disclosure of confidential information."

(G.C. Ex. 11(c)). Examples of confidential information include information regarding competitive economic development projects, potential mergers and acquisitions of Respondent, and customer information. (Tr. 281, l. 1 – Tr. 283, l. 17). Respondent has not terminated or disciplined an employee for divulging "confidential information" in at least the last thirty two years. (Tr. 283, l. 18–22).

II. STANDARD OF REVIEW

Where exceptions to an ALJ's decision and recommended order have been filed, the Board is not bound by the findings of the ALJ and must engage in an independent review of the record. *See Standard Dry Wall Prods.*, 91 NLRB 544, 544–45 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). "[T]he Act commits to the Board itself the power and responsibility of determining the facts" and the Board must base its findings "on a de novo review of the entire record." *RC Aluminum Indus., Inc.*, 343 NLRB 939, 942 fn. 1 (2004) (citing *Standard Dry Wall Prods.*, 91 NLRB at 544–45).

III. ARGUMENT

The ALJ erroneously found that Respondent violated Section 8(a)(1) in three ways. First, the ALJ erred in finding that Respondent violated Section 8(a)(1) by terminating Svoboda because of his Facebook post, which was either protected concerted activity or "inherently concerted" protected activity. Second, the ALJ erroneously found that Respondent violated Section 8(a)(1) by coercively informing Svoboda that he was discharged for engaging in protected concerted activity, a violation that General Counsel never alleged or argued. Finally, the ALJ erred in finding that Respondent maintained and enforced unlawful conduct policies in violation of Section 8(a)(1) and, even assuming that Respondent did not terminate Svoboda for engaging in protected concerted activity, that Respondent discharged him pursuant to unlawful

rules in violation of Section 8(a)(1). These findings—based on the false premise that Respondent terminated Svoboda because of protected statements in his Linejunk post—distort beyond recognition the evidence presented at the hearing and the legal authority on which the ALJ's findings supposedly rely.

A. The ALJ ignored undisputed evidence showing that Respondent did not terminate Svoboda because of his Facebook post.

It is undisputed that when he was terminated, Svoboda was on a final written warning due to his inability to get along with his coworkers and his long history of disrespectful conduct. Respondent's decision to terminate Svoboda was based on this long disciplinary history, and had nothing to do with any supposed safety-related comments in the Linejunk post. Svoboda's post, and specifically his offensive characterization of his team as a "goat bang" and his rants about "fighting the guys" and "having to care about others (sic) feelings" were merely the last straw in a bale-full of instances in which Svoboda continued to demonstrate disrespectful and uncooperative conduct toward his coworkers and supervisors.

The ALJ's complete distortion of the record on this matter is difficult to overstate. For instance, the ALJ claims that there is "no question that Respondent harbored animus toward Svoboda's protected concerted Facebook comments critical of its safety practices and training because they essentially informed him of such when they discharged him." Even if Svoboda's post was protected concerted activity—which, as discussed further below, it was not—there was absolutely no evidence that Respondent harbored any animus toward Svoboda's alleged safety criticisms. Indeed, it is an undisputed fact that Svoboda had made similar comments about safety practices to Respondent prior to his post, and Respondent had never disciplined or otherwise shown animus toward Svoboda's safety-related comments.

On the other hand, Respondent had shown animus toward Svoboda's uncooperative and disrespectful behavior in the past. He was on a final written warning for that exact reason, which neither he nor his Union ever grieved. It should not be surprising, then, that when Svoboda called his team a "goat bang" and complained about "having to care about others (sic) feelings," Respondent would take the next step in the progressive discipline process and terminate him. In short, it defies logic—and the record—for the ALJ to find that Svoboda's termination was based on any allegedly safety-related comments in his post rather than his prolific record of disrespectful and uncooperative behavior.

B. The ALJ twisted logic and Board precedent to find that Svoboda's Facebook rant was protected concerted activity.

To be covered by Section 7 protections, Svoboda's conduct must have been both "concerted" and engaged in for the purpose of "mutual aid and protection." *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at *3 (2014). The analyses of each of these elements are closely related, but analytically distinct. *Id.* Svoboda's Facebook comment did not solicit support from coworkers, was not directed at coworkers or Respondent's management, and never elicited a single "like" or comment from his coworkers or anyone else. Under these facts, the ALJ's finding that Svoboda's comment was either protected or concerted activity strains logic.

1. The ALJ erred in finding that Svoboda's Facebook rant was for the purpose of mutual aid or protection.

Section 7 protects employee conduct only when it is "concerted," and only where it is motivated by the "purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. As Board Member Miscimarra recognized in *Fresh & Easy*, this is clear from both the statute's plain language, and its legislative history. *Fresh & Easy*, 361 NLRB No. 12 at *13 n.

15, 16. To be protected, therefore, Svoboda's conduct must have been some sort of appeal for help or solicitation of support from his coworkers or other employees to bring his safety concerns to the attention of Respondent's management. *See, e.g., id.* at *3 (noting that the concept of "mutual aid or protection" is grounded in the solidarity principle, wherein employees band together "to address their terms and conditions of employment with their employer.") Svoboda admitted at the hearing, however, that he had no such purpose or intent.

To work his way around this fact, which should be fatal to Svoboda's case, the ALJ found that Svoboda's post was "a continuation of safety concerns he had previously shared with some of his supervisors and coworkers." ALJD, p. 18, lines 46–47. However, the ALJ failed to cite any evidence showing that Respondent was hostile to Svoboda's alleged safety concerns. Instead, the record is replete with examples of Svoboda's profane, hostile, and combative conduct, which laid the groundwork for, and eventually resulted in, his termination.

Without making any meaningful comparisons to Board authority, the ALJ found that Svoboda's post was an "effort[] to address workplace health and safety concerns and to improve the terms and conditions of his employment, as well as that of all employees in the industry." ALJD, p. 19, lines 41–42. The ALJ concluded that Svoboda's post was therefore protected activity, engaged in for the mutual aid or protection of Respondent's employees, and of "employees generally." *Id.*

This finding is clearly erroneous. "Mutual aid or protection focuses on the *goal* of the concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees." *Unique Pers. Consultants, Inc.*, 364 NLRB No. 112, slip op. at *5 (Aug. 26, 2016) (emphasis in original) (quotations omitted). It is uncontroverted that Svoboda did not, through his Facebook comment,

approach his coworkers or seek their help in any sense. Indeed, Svoboda admitted at the hearing that he did not expect that his coworkers would ever see the post, and the post was not "liked" or commented on by any of his fellow employees. While the posts were surely insulting (*i.e.*, calling his team a "goat bang"), Svoboda's goal was not to improve the terms or conditions of anyone's employment. In his own testimony, Svoboda said nothing of the sort regarding his purpose for making the posts.

In *Fresh & Easy*, the Board held that an employee's activity was protected because "she approached her coworkers with a concern implicating the terms and conditions of their employment, and sought their help in pursuing it." *Fresh & Easy*, 361 NLRB No. 12 at *7. The Board's analysis of other cases in which it found "mutual aid or protection" demonstrates that it only exists where the employee has raised concerns about the terms and conditions of their employment to coworkers, management, or government agencies. *Id.* at *5. This, Svoboda admittedly did not do.

The ALJ obliquely suggests that Svoboda's Facebook post is independently protected under the Supreme Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). But *Eastex* is entirely distinguishable from this case. In *Eastex*, the Court held that employees could not be disciplined for or prohibited from distributing newsletters with political articles opposing right to work laws and the President's veto of an increased federal minimum wage. The Court noted that "at some point the relationship [between employee conduct and employees' interest as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Id.* at 567–68. The Board has recently recognized that, for instance, "economic pressure in support of a political dispute may not be protected when it is exerted on an employer with no control over the outcome of the dispute." *Sun Cab, Inc.*, 362

NLRB No. 185, slip op. at *3 (Aug. 27, 2015). Under this framework, Svoboda's comments supposedly related to workplace safety, found deep in a Facebook thread and not directed towards any employer or employee in particular, cannot satisfy the "mutual aid or protection" requirement of Section 7 because the post was not exerting any sort of pressure on anyone at all. Instead, Svoboda's post was just the sort of griping or ranting to which the Board refuses to extend Section 7 protection. *Meyers Indus.*, 268 NLRB 493, 497 (1984) *(Meyers I)*.

Svoboda did not make his Facebook post for the purpose of mutual aid or protection, and his comment should not be protected under Section 7 for the sole reason that he included a couple of oblique and incomprehensible references to "safety."

2. The ALJ erred in finding that Svoboda's Facebook rant was concerted activity.

The ALJ's finding that "since Svoboda raised his workplace safety concerns in a group forum that included some of his coworkers, his comments were intended, at least in part, 'to initiate or induce or to prepare for group action' in support of his position" on safety issues was legally, factually, and logically challenged. ALJD, p. 20, lines 38–42.

a. The Board should reject the ALJ's findings because they rely on distinguishable and irrelevant Board precedent. Though the ALJ strained to fit this case into existing Board precedent, the Board has never expanded the meaning of "concerted activity" to cover facts like those present here. Every single case that the ALJ cited in his finding that Svoboda's comment was concerted is distinguishable from the facts at issue here. For instance, in *Fresh & Easy*, the employee engaged in concerted activity where she asked her coworkers to help her bring her own complaint of sexual harassment to the attention of management. *Fresh & Easy*, 361 NLRB No. 12 at *6. Svoboda's post was not directed to his coworkers, and he was not asking anyone

else for assistance in bringing his purported safety concerns to the attention of his, or any other individual's, employer.

In *Circle K Corp.*, 305 NLRB 932 (1991), the Board held that an employee's letter to coworkers was concerted activity where it contained a call to action to improve their terms and conditions of employment. Again, Svoboda did not want or expect his coworkers to see his post. He had a plethora of options on Facebook to engage his coworkers—or, indeed, many other more visible or direct channels—but he chose instead to post a comment buried in a long string of other comments that he never expected his coworkers to see. Furthermore, Svoboda's post did not contain any sort of call to action.

The facts in *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014) are perhaps most closely related to the facts here. In *Triple Play*, the Board held that two coworkers engaged in concerted activity where—after in-person conversations—they participated in a Facebook discussion amongst themselves, two other coworkers, and one non-employee regarding their employer's tax withholding practices. The Board interpreted one employee's "like" of a coworker's status update to be concerted activity, and held that the other coworker also engaged in concerted activity when she commented on the original coworker's post regarding the employer's tax withholding practices. Svoboda's post—which was not directed to his coworkers or anyone else, and did not include any call to action—contrasts starkly with the actual discussion and interaction between the employees in *Triple Play*.

More recently, the Board analyzed a situation in which a discussion among coworkers would not be concerted. In *Unique Pers. Consultants, Inc.*, the Board recognized that an employee's activity would not be concerted where—in a verbal conversation with coworkers—an employee did not solicit or offer assistance or advice to any of her coworkers, or contemplate

doing anything about the terms or conditions of their employment. 364 NLRB No. 112 (Aug. 26, 2016) (discussing the facts in *Daly Park Nursing Home* 287 NLRB 710 (1987)).

Svoboda's Facebook rant was entirely different from conduct that the Board has previously considered concerted activity. Instead, it is even less concerted than the activity described in *Unique Pers. Consultants*. Svoboda did not attempt, or even expect, to join with any of his coworkers to improve the terms or conditions of their employment. He could have sent the text of his post to his coworkers directly on Facebook, or tagged them in the post to ensure that they would see the post. But he did not. Not a single person commented on or "liked" his comment, which was buried in a string of over 100 other replies to the original post. And nothing in his post indicates that he was attempting to prepare for, induce, or initiate any sort of group action. His post is therefore distinguishable from the cases that the ALJ cited to support his finding that Svoboda's post was concerted activity.

b. The ALJ's findings of fact fly in the face of the weight of the evidence. Factually, the ALJ erred in making inferences regarding Svoboda's intent. Though the ALJ inferred that Svoboda's comments were intended "to initiate or induce or to prepare for group action," Svoboda himself testified regarding his intent in making his Facebook post. He never indicated that his purpose was to initiate, induce, or prepare for group action. Indeed, he did not expect that his coworkers would ever see his post. The post itself does not contain any reference to group action or solicitation for anyone, much less his "goat bang" coworkers or Respondent, to engage in any sort of group action. Svoboda's post used the first person pronouns "I," "me" or "my" no less than 18 times—while not using "we," "our" or "us" even once. To be sure, "the activity of a single employee in **enlisting the support of his fellow employees** for their mutual aid and protection is as much 'concerted activity' as is ordinary group action." *Fresh & Easy*,

361 NLRB No. 12 at *3 (emphasis supplied); ALJD, p. 21, lines 11–13. But Svoboda's post was not concerted activity because it undeniably did not seek to enlist the support of his fellow employees or any other employees.

c. The ALJ's logical gymnastics also fall flat. The fact that Svoboda made a comment on Linejunk's enormous public page (the Linejunk page was "liked" by over 64,000 users), which some of his coworkers also "liked" has no logical relation to Svoboda's intent. Perhaps the ALJ's logic would follow if, instead of posting his comment deep in the comments section of a public Facebook post, Svoboda had sent his post directly to his coworkers. Or if Svoboda had tagged his coworkers in his post, or done anything to contradict his undisputed testimony that he never expected his coworkers to see the post. But he did not do anything to bring his coworkers' attention to his post, and he fully expected that they would never see it!

Furthermore, the ALJ's conception of "concerted activity" destroys the very meaning of that phrase. Conduct is concerted where it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself," or "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." *Meyers I*; *Meyers Indus.*, 281 NLRB 882, 887 (1986) (*Meyers II*). If any comment, with no solicitation of support or exhortation to action, on any website where an employee's coworkers *might* visit, can be "concerted," then nearly every public Facebook post or news article comment would be "concerted." This expansive interpretation of "concerted activity" is far removed from the Board's past interpretation, not to mention the plain meaning, of the phrase.

3. The ALJ erred in finding that Svoboda's Facebook rant was "inherently concerted," expanding that already-problematic doctrine to the point of eviscerating the plain language of Section 8(a)(1) of the Act.

In *Hoodview Vending Co.*, 362 NLRB No. 81 (Apr. 30, 2015),[3] the Board confirmed that conversations regarding wages and job security are "inherently concerted" and thus "protected, regardless of whether they are engaged in with the express object of inducing group action." *Id.* at *1, n. 1. The ALJ, however, expanded this list of inherently concerted activity to every statement related to workplace health or safety—not only in the electrical industry or other inherently dangerous professions. This expansive reading of the Board's questionable theory of inherently concerted activity goes too far. Svoboda's Facebook post was not "inherently concerted" because he was not involved in a discussion, and his post had nothing to do with wages or job security.

An internet posting that nobody—coworkers or otherwise—responded to is not a conversation for the purposes of inherently concerted activity. Every case cited by the Board in *Hoodview Vending Co. II* regarding inherently concerted activity involved employees actually communicating with one another. *See Aroostook Cnty. Reg'l Ophthalmology Ctr.*, 317 NLRB 218, 220 (1995), enf. denied in part on other grounds, 81 F.3d 209, 214 (D.C. Cir 1996); *Triana Indus.*, 245 NLRB 1258, 1258 (1979). Of course, a Facebook post that was directed to or commented on (or even "liked") by Svoboda's coworkers or Respondent's management may be considered a "conversation" under *Hoodview Vending Co. See, e.g.*, *Triple Play Sports Bar & Grill v. NLRB*, 2015 WL 6161477 (2d Cir. Oct. 21, 2015) (upholding the Board's decision that

[3] The Board's decision in *Hoodview Vending Co.*, 362 NLRB No. 81 (Apr. 30, 2015) (*Hoodview II*) incorporated by reference the Board's prior decision, *Hoodview Vending Co.*, 359 NLRB No. 36 (Dec. 14, 2012) (*Hoodview I*), which was invalidated, due to the composition of the Board, in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

Facebook activity was concerted "because it involved four current employees"). In contrast to the Facebook discussions among the employees in *Triple Play*, Svoboda's Linejunk posts were not joined by or directed to any of his coworkers or any other employees.

The Board has held that an employee forfeits protection under an "inherently concerted" theory where the employee negates "the object of group action, as reflected by [his] testimony that [he] was not attempting to enlist the aid of [other employees]." *Hoodview Vending Co. I* at *3 n. 10. Svoboda did just that when he testified that his purpose in making the post was to "give my 11 years' worth of insight to the question that [the administrator] asked." (Tr. 53, ll. 10–12). He also explicitly testified that he did not expect any of his coworkers would see his posts. (Tr. 120, ll. 16–23). At no point in his testimony did Svoboda state that his purpose involved enlisting the aid of his coworkers or any other participants in the comments thread.

The Board's questionable "inherently concerted" theory only applies to discussions of "wages" or "job security." *Hoodview II* at 1 n.1. The subject of safety—even in an inherently dangerous profession—is not a subject that can or should relieve General Counsel from its obligation to show that the activity was concerted. It is notable that every Circuit Court of Appeals to address the issue has rejected the theory of inherently concerted activity. *Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 214 (D.C. Cir. 1996); *Trayco of South Carolina, Inc. v. NLRB*, 927 F.2d 597 (4th Cir. 1991); *Meyers II* at 887 ("fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases," which held that a <u>conversation</u> qualifies as concerted activity only if it "appear[s] at the very least 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"). If the Board expands the theory of inherently concerted activity to all comments regarding workplace health or safety, it

would confirm the D.C. Circuit's declaration that the theory is "limitless and nonsensical." *Aroostook Cnty. Reg'l Ophthalmology Ctr.*, 81 F.3d at 214 (holding that the "adoption of a *per se* rule that any discussion of work conditions is automatically protected as concerted activity finds no good support in the law"). Where does the list of topics that are "vital term[s] and condition[s] of employment" end? The ALJ's boundless expansion of the "inherently concerted" theory obliterates the distinction between concerted and protected activity, and the Board should not follow his lead down this slick slope.

Because Svoboda's post was not a "discussion" and it did not discuss "wages" or "job security" (or even, arguably, "safety"), it was not inherently concerted under the Board's precedent. Furthermore, the Board should not expand the already-problematic theory beyond its confines to any statements loosely related to workplace health or safety.

4. The ALJ erred in finding that Svoboda's Facebook rant did not exceed the bounds of protection provided by Section 7 of the Act.

Even if Svoboda's post was protected and concerted activity, his profane and derogatory language was so egregious as to exceed the Act's protection. The ALJ's analysis of the nine factors the Board uses to determine whether social media posts lose the Act's protection is a shining example of his biased and goal-oriented approach to the case. In his perfunctory analysis, the ALJ found that every one of the nine factors favors a finding that Svoboda's post retained the Act's protection. But his analysis is riddled with factual errors and misapplication of Board authority.

First, the ALJ found that Respondent displayed hostility towards Svoboda because its managers informed him that he was discharged for engaging in protected activity. ALJD, p. 25, lines 16–18. As described above, Respondent did not discharge Svoboda because of any

ostensibly safety-related passages in his post. And contrary to the ALJ's finding, Respondent informed Svoboda that his post, in which he referred to his team as a "goat bang," was the final straw in a long history of uncooperative and disrespectful conduct.

Second, the ALJ found—without any shred of supporting evidence—that Svoboda was provoked by Respondent because he had "brought those same safety concerns to the Respondent prior to this post, but to no avail." ALJD, p. 25, lines 19-23. Nothing in Svoboda's testimony supports this finding. Even if it did, this is not the sort of "provocation" that the Board contemplated in *Pier Sixty, LLC*, 362 NLRB No. 59 (2015) (finding that an employee may have been provoked to post an intemperate status on Facebook minutes after his supervisor approached him forcefully and spoke to him in a harsh voice).

Third, the ALJ found that Svoboda's comment was a deliberate response to the Linejunk administrator's question. ALJD, p. 25, lines 23–25. But he did not address the fact that the post was peppered with typos and was so incoherent that it had to be translated line by line by Svoboda at the hearing. Regardless, the Board generally finds that intemperate impulsive (not deliberate) acts should keep the Act's protection. Therefore, under the ALJ's finding that Svoboda's intemperate comments were deliberate, this factor should weigh against retaining protection of the Act.

With respect to the fourth and fifth factors, the ALJ found that there was no evidence that the post impacted Respondent's relationship with its customers or affected its ability to provide services to its customers. ALJD, p. 25, lines 25–31. Of course, Respondent did present evidence that Svoboda's post severely impacted his coworkers' desire to work with him. The fact that his coworkers did not trust Svoboda, and declared that they would no longer work on a crew with him, could obviously affect Respondent's ability to provide services to its customers.

Perhaps most surprisingly, the ALJ found that the sixth and seventh factors—the nature of the post, and whether Respondent considered language similar to that used by Svoboda to be offensive—weighed in favor of protection. In support of this conclusion, the ALJ made the absurd and facially wrong finding that the post "did not contain profanity." ALJD, p. 25, line 35. The post refers to his team as a "goat bang" and refers to keeping his "shit in a row." Amazingly, the ALJ's entire 20-page analysis does not contain a single reference to Svoboda's use of the phrase "goat bang." These phrases are clearly profane and offensive, and the ALJ therefore erred in finding that these factors favor retaining protection.

Wrapping up his slanted analysis, the ALJ found that Respondent did not maintain a rule prohibiting the language used by Svoboda. ALJD, p. 25, line 38–41. Laughably, the "language" to which the ALJ refers are "comments on working conditions." Of course Respondent did not prohibit employee comments on working conditions in its Conduct Rules. Policy No. C-6 does, however, prohibit consistent rudeness and surliness. Furthermore, Respondent had previously warned Svoboda that his profane and disrespectful language would not be tolerated.

The ALJ ignored the record, demonstrated his bias against Respondent by finding that every factor favored retaining protection, and clearly erred in his analysis.

C. The ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by discharging Svoboda on the basis of protected concerted activity.

1. The ALJ erred in finding that General Counsel made a prima facie case of discrimination under the Wright Line *test.*

Even if Svoboda's post was protected concerted activity, the evidence demonstrates that Respondent did not discharge him based on that activity. Instead, he was terminated based on a long history of disrespectful and uncooperative behavior completely unrelated to any protected conduct. His post, which referred to his team as a "goat bang," prompted his coworkers to

declare that they would no longer work with him. Any ostensibly protected statements in the post had absolutely nothing to do with his termination.

Contrary to the ALJ's finding, General Counsel did not make a prima facie case of discrimination under the Board's *Wright Line* framework. Under that framework, General Counsel must carry the initial burden of showing that the employee engaged in protected activity, the employer knew about the activity, and animus against that activity on the part of the employer. *L.B.&B. Assocs., Inc.*, 346 NLRB 1025, 1026 (2006). As described above, General Counsel did not prove a prima facie case because Svoboda's post was not protected activity. Even if it was, there is no evidence that Respondent harbored any animus toward Svoboda's supposed safety concerns.

The ALJ erroneously found that there is "no question that Respondent harbored animus toward Svoboda's protected concerted Facebook comments critical of its safety practices and training because they essentially informed him of such when they discharged him." ALJD, p. 28, lines 33–35. This statement is blatantly wrong: every Respondent witness confirmed in his testimony and affidavits that Svoboda's termination was based on his consistent inability to cooperate with his teammates and his disrespectful conduct, which caused his coworkers to request not to work with him. There is no evidence that Svoboda's termination was motivated by his ostensibly safety-related comments.

The ALJ's repeated assertion that Svoboda had raised the same or similar safety issues to Respondent's management in the past helps prove that those comments were not the basis for his termination. If Respondent harbored animus toward Svoboda's safety concerns, it had the opportunity to terminate him many times before his Facebook post. Of course, Respondent

never took adverse action against Svoboda for his previous safety-related comments, and it did not do so when it terminated him.

The evidence clearly shows that Svoboda was terminated because he could not get along with his coworkers, had been warned numerous times before about his conduct, and the last straw was when he called his team a "goat bang." Respondent worked repeatedly with Svoboda to help him keep his job (multiple verbal and written warnings, a transfer to new job, and a final warning). It should not be punished now for following progressive discipline rather than summarily terminating Svoboda before he called his team a "goat bang" on Facebook.

2. The ALJ erred in finding that Respondent's credible and unrebutted reasons for Svoboda's discharge were pretextual.

The ALJ's decision repeatedly misstates testimony and twists evidence to discredit Respondent's witnesses, and thus find that its asserted reasons for discharging Svoboda are pretext for unlawful motivation. For instance, the ALJ found that "[m]ost importantly, Korver's memorandum pertaining to Svoboda's termination meeting reflects that Svoboda was informed his discharge was based on his Facebook post." ALJD, p. 29, lines 26–27. But the quotations that the ALJ cites from that memorandum do not support his conclusion. ALJD, p. 29, lines 28–33. Specifically, the memorandum stated that the post "was ***another*** demonstration of [Svoboda's] bad attitude toward the Cooperative and his fellow employees and it causes conflict and mistrust." R. Ex. 1 (emphasis supplied). The ALJ did not acknowledge that the memorandum states no fewer than four more times that Svoboda was terminated based on his long history of uncooperative and disrespectful behavior:

- "[W]e had experienced ***another issue*** with Dave Svoboda."
- "Based on our ***previous warnings*** to Dave, . . . he really gave us no choice."

- "He had received ***several previous warnings*** about his bad attitude and lack of cooperation with other employees and two written 'final warnings' – one in 2012 and one last December."

- "We agreed that Doug and Derrick would meet with Dave on Monday morning and terminate his employment immediately for his ***continued*** bad attitude, negative comments toward our organization and his fellow employees, and the concerns that have been raised of our lineman [sic] not wanting to work with him."

R. Ex. 1.

The ALJ also confoundingly twists Korver's testimony to make it appear that Respondent shifted its reasons for Svoboda's termination. The ALJ makes much of Korver's explanation of his statement that continuing to employ Svoboda would negatively impact Respondent's work environment. ALJD, p. 29, lines 35–47. Korver's entire testimony regarding the "negative work environment" was that:

> Crew members not wanting to work with him, so we would have to be changing work schedules that was going to affect our efficiencies, but the big thing was what that could do safety-wise when you got guys that don't want to work with somebody, there's not a trust there. There's conflict. I can't accept that responsibility as a manager to have – to not do something about that and then have something occur and I didn't do something about it.

(Tr. 280, ll. 3–9). Based only on that testimony, the ALJ found that Korver's testimony regarding the reasons for terminating Svoboda were different from the reasons set forth in the memorandum. ALJD, page 29, lines 35–47. But the reasons are not different. Both Korver's testimony and the memorandum are clear that Respondent terminated Svoboda because of Svoboda's inability to work in a cooperative and respectful manner with his coworkers. Korver's testimony regarding why cooperation and respect is important among employees—including operational efficiency and safety—does not in any sense shift the reasons for Svoboda's discharge.

The ALJ also found that Respondent's assertions that Svoboda was terminated for his inability to get along with his coworkers and because his coworkers did not want to work with him are "implausible" and "nonsensical" because Svoboda "only worked with crew members 'occasionally' or at the most, half his time at work." ALJD, p. 30, lines 29–47. Again, the ALJ is unequivocally wrong that Svoboda was working with his coworkers "at most" half of the time. Svoboda himself testified that he worked with the regular line crew up to sixty percent of the time. (Tr. 152, ll. 11–21).

The ALJ's decision is replete with misstatements and obfuscations like the ones described above. The simple fact is that Respondent's reasons for terminating Svoboda never changed, and those reasons never had anything to do with Svoboda's supposed safety concerns. For these reasons, the ALJ erred in finding that Respondent's unwavering reasons for terminating Svoboda were pretext for its desire to terminate Svoboda because he complained about Respondent's safety procedures.

D. The ALJ erred in finding that Respondent coercively informed Svoboda that he was discharged because he engaged in protected concerted activity in violation of Section 8(a)(1) of the Act.

General Counsel admittedly did not allege in the Complaint that Alons committed a distinct violation of Section 8(a)(1) by coercively informing Svoboda that his protected concerted Facebook activity was the basis for his discharge. Even so, the ALJ erroneously found a violation. ALJD, pages 32–33. As described above, it is not "undisputed that Svoboda was informed by the Respondent that he was discharged because of his comments in his Facebook post," as the ALJ asserts. ALJD, page 32, lines 17–18. Indeed, the testimony and evidence showed that Svoboda was terminated because of his longstanding inability to work in a cooperative and respectful manner with his coworkers, encapsulated in his statement on

Facebook that his team was a "goat bang." If Svoboda never heard the details regarding the reasons for his termination, it is because he stormed out of the meeting before Alons could explain, and he did not ask any questions regarding Respondent's reasons for terminating him. For these reasons, Alons did not violate 8(a)(1) when he informed Svoboda of his termination.

E. The ALJ erred in finding that Respondent's Conduct Policies were unlawful, and that Respondent discharged Svoboda pursuant to those rules in violation of Section 8(a)(1) of the Act.

The ALJ erroneously found that Respondent's policies regarding Attitude, Spirit and Cooperation (Policy No. C-6) and Personal Conduct (Policy No. C-9) are unlawful because employees would reasonably interpret the language in the policies to prohibit Section 7 activities. ALJD, pp. 34–35. These policies are not unlawfully overbroad. Even if they were, Respondent's termination of Svoboda was not unlawful because his conduct was neither concerted nor engaged in for mutual aid or protection.

The only policies that General Counsel refers to in the Complaint, and the only policy allegations before the ALJ, are:

- "Policy No. C-6, which instructs employees to use Respondent's internal grievance procedure to resolve complaints or grievances, thereby prohibiting employees from utilizing other methods to resolve complaints or grievances, including by discussing them with one another." (Complaint, ¶ 4(a)).

- "Policy No. C-9, which prohibits or interferes with employees' rights to discuss or disclose wages and other terms and conditions of employment." (Complaint, ¶ 4(b)).

Neither of Respondent's challenged policies is unlawful, and the ALJ therefore erred in finding that Respondent violated Section 8(a)(1) for terminating Svoboda pursuant to those rules.

1. The ALJ erred in finding that Policy C-6 is unlawful.

The ALJ erroneously found unlawful the suggestion in Policy C-6 that employees "should use the grievance procedure (Policy No. 36) when they have complaints about their

working conditions." ALJD pages 34–35; G.C. Ex. 3, p. 3. In so finding, the ALJ ignored the clear weight of the evidence when he found that "[e]mployees would reasonably believe that in order to comply with the rule they are to use the internal grievance procedure to resolve complaints or grievances regarding their working conditions, thereby prohibiting them from utilizing other methods to resolve such workplace issues, including discussing such issues with one another, third parties, or governmental agencies." ALJD, p. 34, lines 18–22.

The ALJ entirely disregarded the following facts, which show that Respondent's employees would not—and in fact did not—believe that the Policy prohibited them from engaging in methods outside Respondent's grievance process to resolve work disputes. Respondent's linemen had been represented by IBEW for decades and the collective bargaining agreement in place at the time contains a grievance/arbitration provision. (R. Ex. 2, p. 3). Svoboda could not have been under the impression that he was unable to settle disputes solely through Respondent's internal process because he was a signatory to the CBA on behalf of the Union, which provides for alternate methods of dispute resolution. (R. Ex. 2, p. 17).

Svoboda himself offered further evidence that employees would not, and in fact <u>did not</u>, believe that the "internal grievance procedure" referenced in the Policy prohibited them from "utilizing other methods" to resolve complaints. After he received his first written warning for failure to follow safety protocols on a forklift (G.C. Ex. 2), Svoboda "had the Union talk with Mr. Korver," Respondent's CEO. (Tr. 105, l. 23 – Tr. 106, l. 5). So, in fact, Svoboda and the Union demonstrated that they did not believe the Policy prevented them from exercising their Section 7 rights. (G.C. Ex. 2). Further, the evidence at the hearing showed that all of Svoboda's coworkers exercised their Section 7 rights without fear of repercussion based on the Policy when they discussed among themselves Svoboda's inability to get along with the crew. They similarly

did not fear repercussion due to the Policy when they brought their concerns to management outside of the formal procedure mentioned in the Policy. In short, there is no evidence that Svoboda or any other employee actually believed or reasonably could believe that the Policy prevented them from engaging in Section 7 activities.

2. The ALJ erred in finding that Policy C-9 is unlawful.

The ALJ erroneously found unlawful Respondent's inclusion of "disclosure of confidential information" among a non-exclusive listing of conduct which "may result in corrective action." In doing so, the ALJ ignored the General Counsel's own guidance that:

> [B]road prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment because employers have a substantial and legitimate interest in maintaining the privacy of certain business information.

NLRB Gen. Counsel Memo. GC 15-04 (March 18, 2015). The General Counsel's Memorandum cites two cases for this proposition. In *Lafayette Park Hotel*, the Board dismissed an allegation that a broad confidentiality rule implicated employees' Section 7 rights. In doing so, the Board recognized that "businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including . . . trade secrets, contracts with suppliers, and a range of other proprietary information." 326 NLRB 824, 826 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999). In *Super K-Mart*, the Board held that another broad confidentiality provision was not unlawful where it did "not by its terms prohibit employees from discussing wages or working conditions." 330 NLRB 263, 263 (1999). Respondent's broad Policy similarly does not prohibit any discussions of wages or employees' working conditions.

Furthermore, every one of the cases that the ALJ cites for the proposition that Policy C-9 is unlawful is distinguishable based on the General Counsel's guidance. Each of those cases

included references to "information regarding employees or [other things] that would reasonably be considered a term or condition of employment." ALJD, p. 35, lines 28–40; NLRB Gen. Counsel Memo. GC 15-04 (March 18, 2015). Those unlawful rules explicitly prohibited disclosure of information concerning "the company, its business plans, its partners, new business efforts, customers, accounting and financial matters," or "information concerning patients, associates, or hospital operations." ALJD, p. 35, lines 32–40. Because Respondent Policy C-9 does not contain any similar language that would be reasonably construed by employees to inhibit Section 7 activity, the Policy is lawful, and the ALJ erred in holding that it is not.

3. The ALJ erred in finding that Respondent discharged Svoboda pursuant to unlawful policies in violation of Section 8(a)(1) of the Act.

Svoboda's habitual inability to get along with his coworkers was not activity that he engaged in for mutual aid and protection, and it was not concerted. As described in detail above, Svoboda was not terminated because of his Linejunk post. Even if he were, the post was not concerted activity and it was not for mutual aid or protection. *See Cont'l Grp., Inc.*, 357 NLRB 409, 412 (2011) (holding that "it is not unlawful for an employer to discipline an employee pursuant to an overbroad rule, in situations in which the employee's conduct is not similar to conduct protected by the Act" in that the activity was neither concerted nor for mutual aid or protection); *Flex Frac Logistics, LLC*, 360 NLRB No. 120 (May 30, 2014) (holding that although an employee's conduct "arguably implicated concerns underlying" Section 7 rights, she was in fact discharged for reasons completely separated from those rights and employees "would understand that the [employer] had" not discharged her "because of the [employer's] application of its overbroad rule"). Furthermore, it is undisputed that Soboba was not discharged based on the challenged confidentiality provision in Policy C-9, or the challenged dispute resolution

provision in Policy C-6. Therefore, even if Policies C-6 and C-9 are overbroad, the ALJ erred in finding that Svoboda's discharge was unlawful because none of his conduct was protected by the Act, and he was not discharged pursuant to any unlawful Policies. ALJD, pages 36–37.

Finally, the ALJ erred in finding that Respondent cannot not avoid liability for discipline imposed pursuant to the supposedly overbroad rules because Respondent did not demonstrate that Svoboda's conduct interfered with Respondent's operations, and that interference was the reason for the discipline. ALJD, pages 36–37. As described in detail above, Respondent's witnesses and the record evidence show that Svoboda was discharged for his inability to get along with his coworkers. The undisputed fact that Svoboda's entire team requested not to work with him is evidence that his continued employment would have affected Respondent's business. The ALJ once again distorted the record by stating that "there is no evidence that such interference was the reason for his discharge." ALJD, p. 37, lines 27–28. Of course, there is plenty of evidence that Svoboda was discharged because of the interference his uncooperative and disrespectful conduct was having on Respondent's operations. *See, e.g.*, Tr. 280, ll. 3–9.

For these reasons, the ALJ erred in finding that Respondent violated Section 8(a)(1) by terminating Svoboda pursuant to unlawful policies.

IV. CONCLUSION

As set forth herein and within Respondent's attached Exceptions, the findings and conclusions of the ALJ are erroneous and must be set aside to the extent that record evidence proves that (1) Respondent did not violate Section 8(a)(1) by discharging Svoboda based on his long history of uncooperative and disrespectful conduct, which was not protected by Section 7 of the Act; (2) Respondent did not violate Section 8(a)(1) by coercively informing Svoboda that he

was discharged for engaging in protected concerted activity; and (3) Respondent did not maintain or enforce unlawful conduct policies in violation of Section 8(a)(1), and Respondent therefore did not violate Section 8(a)(1) by discharging Svoboda pursuant to those rules.

Respectfully Submitted,

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Filed this 8th day of November, 2016.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTH WEST RURAL ELECTRIC COOPERATIVE	)	
and	)	Case 18-CA-150605
DAVID JAMES SVOBODA, an Individual	)	

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2016, I e-filed the foregoing **RESPONDENT NORTH WEST RURAL ELECTRIC COOPERATIVE'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ'S DECISION** with the office of the NLRB's Executive Secretary using the Board's e-filing system and that it was served on the following individuals via email and/or Federal Express:

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