

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTH WEST RURAL ELECTRIC  
COOPERATIVE

and

DAVID JAMES SVOBODA, An Individual

Case 18-CA-150605

**GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **INTRODUCTORY REMARKS**

Administrative Law Judge Thomas Randazzo (“ALJ Randazzo”) heard this case in January, 2016. The hearing occurred over the course of two days and resulted in a carefully-established, concise yet comprehensive record (“the Record”), consisting of a 365-page transcript and 22 exhibits. Following the hearing, Respondent filed a 23-page Post-Hearing Brief. On September 3, 2015, ALJ Randazzo issued his Decision (“the Decision”) that both accurately and thoroughly considered the Record. Now Respondent has lodged 109 exceptions, supported by a 34-page brief – an iteration longer than its Post-Hearing Brief consisting of arguments already raised. It is clear from Respondent’s exceptions that Respondent does not like ALJ Randazzo’s Decision; in fact, the exceptions aim to refute every component of the Decision. However, nothing in Respondent’s exceptions warrants overturning ALJ Randazzo.

### **I. Respondent’s Exceptions are Unsupported by Record Evidence**

Many of Respondent’s exceptions are repetitive and objectively false, and can swiftly be invalidated based on review of the documentary evidence in the record and transcript. For each exception it lodges, Respondent cites the lines of the Decision it contests. Critically helpful is that throughout his Decision, ALJ Randazzo cited the exhibits and transcript pages he relied on in reaching each conclusion. Thus, for each of Respondent’s exceptions it is easy to determine which portions of the record ALJ Randazzo relied upon. Indeed, ALJ Randazzo repeatedly cited Respondent’s Post-Hearing Brief in his Decision, demonstrating that he already considered Respondent’s arguments. Even a cursory review of Randazzo’s cited sources demonstrates the falsity of Respondent’s exceptions.

***A. Respondent's exceptions to ALJ Randazzo's findings that the Linejunk Facebook page served as a forum on which linemen discussed industry safety and that Svoboda's Facebook post regarded safety are unsupported by record evidence***

Respondent has raised a multitude of exceptions regarding ALJ Randazzo's findings that the Linejunk Facebook page at issue served as a forum on which linemen discussed industry safety and that Svoboda's post regarded safety. (See e.g.<sup>1</sup> Exception III (the Linejunk Facebook page serves as an on-line forum for linemen and electrical workers); Exception IV (the Linejunk Facebook page pertains to "safety concerns"); Exception X (Svoboda's Facebook comments referenced "safety issues or concerns"); Exception XII (Svoboda's posted comments were "regarding safety" or similar in nature to the other posted comments in the Facebook thread); Exception XV (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); Exception XIX (witness Dustin Koele understood that the subject matter of Svoboda's Facebook post "was about safety"); Exception XXXIII (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); Exception XXXIV (when Svoboda posted his comments on the Linejunk Facebook page, he was addressing workplace health and safety concerns); and Exception XLVII (Svoboda's comments were part of, and in response to, a group discussion of employees on

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<sup>1</sup> The examples listed herein are not exhaustive. Numerous other exceptions regard ALJ Randazzo's findings that the Linejunk Facebook page provides a forum for linemen and Svoboda's post regarded safety.

Facebook regarding what could be done to prevent accidents in the lineman profession).)

When he concluded that the Linejunk Facebook page serves as an on-line forum for linemen and electrical workers (Respondent's Exception III, above), ALJ Randazzo cited Transcript page 33, where Svoboda stated that the Linejunk Facebook page "is a forum on Facebook that has to do with all things pertaining to linemen" and General Counsel Exhibit 8, which is a printout of the Linejunk Facebook page, stating that "it is the premiere place to go if you are a lineman." (ALJD p. 7, 21-22; Tr. 33; GCX 8.) When ALJ Randazzo concluded that the Linejunk Facebook page pertains to "safety concerns" (Respondent's Exception IV, above), he cited Transcript page 39, where Svoboda testified that the newsfeeds on the Linejunk Facebook include "safety concerns" and General Counsel Exhibit 7, which is another printout of the Linejunk Facebook page depicting its newsfeed with photos and comments including "Stay safe brothers! Remember short cuts don't get the job done faster but will get you to the grave sooner!!!!" and "Dear Lord. Protect our linemen all year but especially the ones who have to work in outrageous conditions. Linemen lives matter." (ALJD p. 7, lines 39-41; Tr. 39; GCX 7.) When he concluded that Svoboda's Facebook comments referenced safety issues or concerns (Respondent's Exception X, above), ALJ Randazzo cited Transcript pages 54-55, 121-124, and 127-128, wherein Svoboda explained the content of his post. Specifically, ALJ Randazzo found that within these transcript pages, "Svoboda credibly testified that by these comments he was advocating for better safety..." (ALJD p. 10, lines 35-36.) This is just the beginning. The list goes on, including citations to the record for ALJ Randazzo's determinations underlying every

single one of the above-listed exceptions. ALJ Randazzo accurately relied on the record in making his determinations, and thus, Respondent's exceptions are baseless and entirely unsupported by record evidence.

***B. Respondent's exceptions to ALJ Randazzo's finding that Svoboda was terminated because of his Facebook post are unsupported by record evidence***

The same is true for the multitude of Respondent's exceptions regarding ALJ Randazzo's finding that Svoboda was terminated because of his Facebook post. (See e.g.<sup>2</sup> Exception XXIV (Alons informed Svoboda that he was discharged "on the basis of his Linejunk Facebook post"); Exception XXV (Haak's testimony revealed that Svoboda was informed that he was discharged because of his Facebook post); Exception XXVI (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); Exception XXVII (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); Exception XXXI (Korver did not present his asserted reasons of changing schedules and safety concerns in his affidavit to the Region); Exception LIV (the evidence establishes that Respondent's managers informed Svoboda that he was, in fact, discharged for his Facebook post); and Exception LXXXIV (Alons admitted to informing Svoboda that he was discharged for his Facebook comments).)

Again, for these exceptions and all others, Respondent cites the lines of the Decision it contests, and because ALJ Randazzo cited the exhibits and transcript pages

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<sup>2</sup> The examples listed herein are not exhaustive. Numerous other exceptions regard ALJ Randazzo's finding that Svoboda was terminated because of his Facebook post.

he relied on in reaching his conclusions it is easy to measure how carefully and accurately he relied upon the record. Respondent's exceptions are unfounded and unsupported by the record.

For example, when he determined that "Alons informed [Svoboda] that he had been discharged on the basis of his Linejunk Facebook post," (Respondent's Exception XXIV, above), ALJ Randazzo cited Transcript page 175, where Alons testified that at Svoboda's termination, he told Svoboda that the Facebook post had been brought to his attention, it was all negative, and it had been made in a forum Svoboda knew his coworkers were on. (ALJD p. 15, lines 15-23; Tr. 175.) When ALJ Randazzo determined that Haak's testimony also revealed that Svoboda was discharged because of his Facebook post (Respondent's Exception XXV, above), he cited Transcript pages 205-207, where Haak testified that his affidavit was true and accurate and stated in relevant part

"Alons told Svoboda about the Facebook Post that had been brought to [their] attention and that [they] had read it... it was obvious to the crew that Svoboda was referring to the employer in his Facebook post, which was all negative. He also made a post in a forum that he knew his coworkers were on. This was relayed to Svoboda during the termination by Alons."

(ALJD p. 15, lines 24-34; Tr. 205-207.)

As stated above, Respondent excepts to ALJ Randazzo'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. However, when ALJ Randazzo made this determination, he cited Respondent's Exhibit 1, which is the memo itself. The memo states that Respondent had been made "aware of a social

media post by [Svoboda]” that was “negative to the Cooperative and to some of the line crew,” and that he and Alons “agreed that [Alons] and [Haak] would meet with [Svoboda] on Monday morning and terminate his employment immediately...” Further, the memo summarized that when Alons and Haak met with Svoboda to terminate him, “they mentioned that it had come to their attention that [he] had made a negative post on social media and this was another demonstration of [his] bad attitude toward the Cooperative and his fellow employees and it causes conflict and mistrust.” (ALJD p. 15, lines 35-44; RX 1.) It is unfathomable for Respondent to except to ALJ Randazzo’s finding that this memorandum reflects that Svoboda was informed that his discharge was based on his Facebook post. The memorandum – offered into the record by Respondent – clearly states exactly that. This exception is not only unsupported by the record, but is also objectively false.

Finally, as a last demonstration of the utter baselessness of Respondent’s exceptions, ALJ Randazzo’s Decision cites multiple pieces of record evidence on which he relied to determine that Korver’s testimony that continuing to employ Svoboda caused a safety risk and would necessitate changing all of the linemen’s work schedules could not be credited. ALJ Randazzo found that Korver’s testimony differed from the reasons set forth in the above-described memorandum, the reasons conveyed to Svoboda at the time of his discharge, and the reasons he provided in his affidavit to the Region (Respondent’s Exceptions XXVII and XXXI, above). (ALD p. 15, line 45 – p. 16, line 10, p. 16, lines 12-18; Tr. 285-286, 294-297; RX 1.) Further, ALJ Randazzo

concluded that Korver's testimony was contradicted by the testimonies of Alons and Haak<sup>3</sup>. (ALJD p. 16, line 45 through p. 17, line 2; Tr. 172-175, 205-207.)

These representative examples sufficiently demonstrate that Respondent's exceptions are wholly inconsistent with the record evidence and baselessly seek to overturn ALJ Randazzo's Decision. These (and other) exceptions raised by Respondent are nothing more than a lengthy regurgitation of its version of the Record evidence and a repetition of the arguments made in its Post-Hearing Brief that ALJ Randazzo already considered and rejected.

## **II. Respondent's Exceptions to ALJ Randazzo's Credibility Determinations are Unsupported by Board Law**

To the extent that Respondent excepts to ALJ Randazzo's credibility findings, these credibility assessments rested, at least in part<sup>4</sup>, on witness demeanor and other subjective impressions—indicators that are not present in a cold record. As such, and in accordance with the Board's well-established precedent, ALJ Randazzo's credibility determinations should not be disturbed. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950).

## **III. Svoboda's Facebook Post Constitutes Concerted Activity Under Two Distinct Theories**

### ***A. Svoboda's Facebook post constitutes traditional concerted activity***

To be protected under Section 7 of the National Labor Relations Act, an employee's conduct must be both "concerted" and engaged in for the purpose of

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<sup>3</sup> ALJ Randazzo also found Korver's testimony to be inconsistent with Svoboda's testimony, but herein, General Counsel limits its examples to demonstrate only the inconsistencies of Respondent's agents' testimony and evidence.

<sup>4</sup> As explained above, another component of ALJ Randazzo's credibility determinations were the blatant inconsistencies between Korver's testimony and the documentary evidence Respondent introduced on the record, as well as the discrepancies between Korver's testimony and that of Alons, Haak, and Svoboda.

“mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). In his Decision, ALJ Randazzo properly concluded that Svoboda’s Facebook post was both concerted and for the purpose of mutual aid or protection. First, ALJ Randazzo properly found “Svoboda’s Facebook post constituted protected activity under the Act,” because “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 30-33; p.19, lines 44-45.) Next, ALJ Randazzo properly found that Svoboda’s Facebook post constituted concerted activity. (ALJD p. 20-22.) In reaching this conclusion, ALJ Randazzo dismissed Respondent’s arguments that Svoboda did not seek to “initiate, induce or prepare for any group action” by way of his Facebook post, the Facebook post was “unrelated to group activity,” and that his coworkers “disagreed with the content of the post.” (ALJD p. 20, lines 6-17.) In dismissing these arguments, ALJ Randazzo found “that the Respondent’s arguments lack merit, and that Svoboda was engaged in protected concerted activity.” (ALJD p. 20, lines 16-17.)

In support of his conclusion that Svoboda’s Facebook post constituted traditional concerted activity, ALJ Randazzo found that “Svoboda’s albeit single and individual action in his Facebook post sought to bring to the attention of all those who viewed the Facebook question of what can be done to prevent accidents his concerns with regard to health and safety in his workplace and in the industry in general,” “even if Svoboda lacked a concrete plan for subsequent group action, his Facebook post nevertheless constituted concerted activity,” and “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. 20, lines 31-34 and 44-45, p. 22, lines 1-4.)

These findings are supported by the following facts and legal analysis, presented by the General Counsel at the hearing and in its Post-Hearing Brief. Svoboda’s Facebook post was made in response to a question posted on the Linejunk Facebook page on behalf of someone who self-identified as a lineman with 36 years of experience and had been asked to join a safety committee and wanted to know why so many accidents were happening. He asked what could be done to prevent the accidents. (Tr. 45, 53; GCX 5.<sup>5</sup>) At least 77 people “liked” this safety “conversation starter,” and 100 comments were posted in response. Svoboda’s post was among them. In his post, Svoboda responded to the safety inquiry and gave his “11 years’ worth of insight to the question that [Linejunk] asked.” (Tr. 53.) He was neither the first nor last to post. (Tr. 67-70; GCX 5, 14.) At the time of the hearing, nearly 65,000 people “liked” the Linejunk Facebook page. (Tr. 41-43; GCX 7.) Svoboda and at least several other of Respondent’s linemen “liked” and followed the page, and in fact, Svoboda and Elgersma each testified that Facebook had notified them that other of their coworkers followed the Linejunk page and Respondent’s agents acknowledged during Svoboda’s termination that he knew his coworkers were members of the Linejunk community when

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<sup>5</sup> General Counsel Exhibit 5 is an image of the Linejunk Facebook page administrator’s original safety inquiry post and Svoboda’s response. General Counsel Exhibit 14 is a printout of the original post (on page (e) of the exhibit) and *all* of the posts in response. The parties reached a four-prong stipulation on the record about GCX 14: 1) the original post was made by the administrator of the Linejunk Facebook page; 2) Svoboda made a response to that original post and his post (on page (a) of in the exhibit) is displayed in backward order: the longer paragraph should precede the shorter paragraph; 3) there were posts made in response to the administrator’s original question both prior to and after Svoboda made his post; and 4) the posts that appear in GCX 14 (a)-(q) are representative of the posts that appeared in response to the original post by the Linejunk administrator. (Tr. 158-160.)

he posted the comments in question. (Tr. 42-45, 175, 192, 206-207, 314-315, 340.) Furthermore, Svoboda confirmed in his Facebook post that he had previously raised his safety concerns with management and had been rebuffed. Given that Svoboda was raising his safety concerns to an audience that included his coworkers, it is reasonable to infer that his post was at least in part intended “to initiate or to induce or to prepare for group action” by bolstering support for his position among his coworkers in preparation for again speaking with management.

Respondent’s incessant arguments that Svoboda’s Facebook post was mere griping rather than protected concerted activity and that he did not seek to induce group action misdirect the reader and reflect a misunderstanding of protected concerted activity. As explained herein and on the record, Svoboda and approximately 100 other statutory employees engaged in a conversation about workplace safety in response to a question posted on the Linejunk page about how to reduce work accidents in the lineman industry. They were engaged in traditional group action no different than if Svoboda and his coworkers held a meeting to discuss their concerns about Respondent’s safety practices and Respondent argued that Svoboda’s participation in that conversation was not concerted because he was responding to others’ comments and questions rather than seeking to initiate. *See Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1-2, 5-6 (Aug. 22, 2014) (“no dispute” that employees engaged in protected concerted activity by taking part in Facebook discussion about employer’s tax withholding practices). Not only was Svoboda’s conduct thus “engaged in *with* . . . other employees,” but the Linejunk discussion was intended to “prepare for group action” both abstractly (improving industry-wide safety standards), and concretely (the

original poster's suggestion that he was on a safety team and was looking for "ideas on how we can stop all the accidents").<sup>6</sup>

Even if Svoboda's own coworkers were not his target audience, his Facebook post would still constitute traditional concerted activity because employees are protected when they seek to improve their terms and conditions of employment "through channels outside the immediate employer-employee relationship" and it is the "settled construction" of the Act that the statutory "employees" who may engage in concerted activities "include 'any employee, and shall not be limited to the employees of a particular employer.'" *Eastex, Inc. v NLRB*, 437 U.S. 556, 564 (1978) (quoting 29 U.S.C. § 152(3)). Accordingly, the Board has held that statutory employees employed by different employers may join together to engage in concerted activity. *See Reliant Energy, LLC*, 357 NLRB 2098 (2011); *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974); *Washington State Service Employees*, 188 NLRB 957, 958-59 (1971) (employee engaged in concerted activity by attending and participating in rally with employees of other employers).

Also in support of his determination that Svoboda's Facebook post constituted traditional concerted activity, ALJ Randazzo found that based on legal precedent, "Svoboda's coworkers did not have to agree with him or join his cause in order for his activity to be concerted, nor did his coworkers have to share an interest in the matter raised by Svoboda in the post for the activity to be concerted." (ALJD p. 21,

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<sup>6</sup> Although the identities of the original poster and the other Facebook users who engaged in the discussion—and whether they were statutory employees—remain unclear from the record, based on the context and the nature of the Linejunk Facebook page it is reasonable to infer that at least some of the 77 or more users who "liked" the post, the 100 or more who participated in the discussion, or the tens of thousands who followed the Linejunk Facebook page were also employed as non-supervisory linemen, and were thus fellow "employees" within the meaning of the Act. Additionally, what is known for certain is that the audience included at least some of Respondent's employees, who are indisputably statutory employees. (Tr. 42-45, 314-315, 340.)

lines 30-34.) This determination is supported by Board law providing that such conduct remains concerted under the Act even if Svoboda had no concrete plans for subsequent group action, and even if his coworkers uniformly rejected his concerns and reported him to management, because concerted activity “has to start with some kind of communication between individuals, [and] it would come very close to nullifying” Section 7 rights if those communications were not protected because of a lack of fruition. See *Fresh & Easy Neighborhood Market, Inc.*, supra, at 3-4 (“Even without more, under *Meyers II* and its progeny, [the charging party’s] conduct in approaching her coworkers to seek their support of her efforts regarding this workplace concern would constitute concerted activity. . . . [U]nder Board precedent, concertedness is not dependent on a shared objective or on the agreement of one’s coworkers with what is proposed” (citing cases)); *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (“An employee does not have to engage in *further* concerted activity to ensure that his initial call for group action retains its concertedness. In addition, employees do not have to accept the individual’s invitation to group action before the invitation itself is considered concerted.”); cf. *Timekeeping Systems, Inc.*, 323 NLRB 244, 244, 248 (1997) (finding an employee’s unilateral company-wide email to coworkers in response to employer’s email about vacation plan changes constituted concerted activity).

***B. Svoboda’s Facebook post constitutes inherently concerted activity***

In his Decision, ALJ Randazzo properly found that Svoboda’s Facebook post about safety in the lineman industry was “inherently concerted,” and therefore protected under the National Labor Relations Act. (ALJD p. 22, lines 21-22.) ALJ Randazzo explained that “the Board has historically applied the doctrine of ‘inherently concerted’ activity to wage discussions, and as such has found them to be protected, regardless of

whether they are engaged in with the express object of inducing group action.” (ALJD p. 22, lines 32-34.) This is because “wages are a ‘vital term and condition of employment,’ the ‘grist on which concerted activity feeds,’ and such discussions are often preliminary to organizing or other action for mutual aid or protection.” (ALJD p. 22, line 37 – p. 23, lines 1-2.) Further, he explained, in *Hoodview Vending Co.*, 359 NLRB No. 36 (Dec. 14, 2012), *incorporating by reference* 362 NLRB No. 81 (April 30, 2014), the Board applied the doctrine of “inherently concerted” activity to discussions about job security because “its rationale for finding discussions of wages inherently concerted ‘applies with equal force to conversations about job security.’” *Hoodview Vending Co.*, *supra*. (ALJD p. 23, lines 10-14.) In preparing to extend the “inherently concerted” classification to Svoboda’s Facebook post about safety in the lineman industry, ALJ Randazzo accurately stated that while the *Hoodview Vending* Board “declined to address ‘other possible topics of conversation’ that might also be found ‘inherently concerted,’ it also did not rule out the possibility that other topics of conversation might be included in the ‘inherently concerted’ category.” (ALJD p. 23, lines 17-20.)

Extending the “inherently concerted” classification to safety and Svoboda’s Facebook post, ALJ Randazzo explained “it is undisputed that lineman work is inherently dangerous work which could result in serious injury, or even death, and therefore workplace health and safety is likely one of the most important concerns to employees in that profession.” (ALJD p. 23, lines 21-24.) Further, he reasoned that “‘few matters can be of greater legitimate concern to individuals in the workplace... than exposure to conditions potentially threatening their health, well-being, or their very lives.’” (ALJD p. 23, lines 26-28.) (citing *Detroit Newspaper Agency*, 317 NLRB 1071

(1995).) Just as the Board has deemed discussions of wages and job security to have a “vital effect on terms and conditions of employment,” so too do health concerns, and “such discussions are often ‘preliminary to organizing or other action for mutual aid or protection.’” (ALJD p. 23, lines 30-35.) Thus, ALJ Randazzo ruled that “Svoboda’s Facebook comments about safety in the lineman industry were ‘inherently concerted,’ consistent with the Board’s legal theories discussed above, and as such, were protected regardless of whether they were made with the express object of inducing group action. *Alternative Energy Applications, Inc.*, [361 NLRB No. 139, slip op. at 4 fn. 10 (2014)]; *Hoodview Vending, supra.*” (ALJD p. 23, lines 35-39.)

ALJ Randazzo’s above-described decision that Svoboda’s Facebook post was inherently concerted is supported by the following facts and legal analysis, presented by the General Counsel at the hearing and in its Post-Hearing Brief.

General Counsel and Respondent stipulated on the record that “the profession of power lineman (sic), electrical lineman (sic) in the United States is an inherently dangerous job.” (Tr. 223, 230.) General Counsel Exhibits 12(a)-(b) and 13(a)-(d) illustrate the inherent dangers of the industry. General Counsel Exhibit 13(a)-(d) consists of four articles – three of which focus on the lineman profession being among the top 10 most dangerous industries – illustrating various safety concerns and safety conversations within the industry. Whereas that exhibit serves illustrative purposes only, General Counsel Exhibit 12(a)-(b) provides substantive evidence concerning fatal work injuries for various occupations, including the electrical lineman industry. (Tr. 210.) The government keeps track of fatal occupational injuries, and GCX 12(a)-(b) includes government documents generated by the Bureau of Labor Statistics, regarding

the 2014<sup>7</sup> National Census of Fatal occupational Injuries. (Tr. 209; GCX 12(a)-(b).)

The written explanation of the findings, with some comparison between the 2014 and 2013 statistics, is included in GCX 12(a), and GCX 12(b) is a table of statistics portraying the relative dangerousness of various occupations.<sup>8</sup> (Tr. 209; GCX 12(a).)

ALJ Randazzo correctly determined that discussions concerning workplace health and safety issues implicate the same considerations identified by the Board with respect to wages and job security, and are thus also inherently concerted. Workplace safety is undoubtedly one of the most “vital terms and conditions of employment” from the perspective of employees, and concerns about workplace health and safety issues often serve as a precursor to organizing or other actions for mutual aid and protection. *Hoodview Vending Co.*, supra, *Crossing Rehabilitation Services*, 347 NLRB 228, 231 (2006) (employees wanted union in order to negotiate over “concerns about safety at work, employment benefits, and job security”); *Snowshoe Co.*, 217 NLRB 1056, 1058 (1975) (employee unionization efforts began for the purpose of “improving working conditions, particularly safety measures, and wages”), *enforced mem.*, 530 F.2d 969 (4th Cir. 1975). As the Board has observed and ALJ Randazzo considered, “health and safety matters regarding unit employees’ workplaces are of vital interest to employees,” and indeed, “[f]ew matters can be of greater legitimate concern to individuals in the workplace . . . than exposure to conditions potentially threatening their health, well-being, or their very lives.” *Detroit Newspaper Agency*, supra (confirming relevancy of

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<sup>7</sup> Svoboda’s Facebook post about lineman safety and his subsequent termination occurred in December 2014.

<sup>8</sup> Statistics regarding linemen, or “electrical power-line installers and repairers” are found on page two of GCX 12(b), a bit more than halfway down the page, two lines above the bold title, “Production, transportation, and material moving occupations.” Of the 4,769 fatal work injuries recorded in 2014, 25 involved linemen.

union's request for information addressing health and safety issues); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982) (finding that employer was required to comply with union request for certain health and safety information), *enforced sub nom.*, *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 248 (D.C. Cir. 1983). The Board has recognized that unions often play a "central role in efforts to improve workplace safety," and that unions engaged in organizing campaigns may use their expertise to "address employees' safety concerns and advise them on methods to improve workplace safety." *Novotel New York*, 321 NLRB 624, 629-30 (1996) (discussing the "historical role of unions in vindicating the rights of workers," particularly regarding safety issues), *overruled on other grounds*, *Stericycle, Inc.*, 357 NLRB No. 61 (Aug. 23, 2011). Even in a non-union context, workplace health and safety issues often play a critical role in catalyzing employees' actions for mutual aid or protection. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (employees' spontaneous walkout to protest intolerably cold working conditions was protected attempt to "correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours"); *Systems with Reliability, Inc.*, 322 NLRB 757, 757-60 (1996) (employees talked among themselves about safety concerns before confronting employer and threatening to contact OSHA if employer did not correct safety issues); *Burle Industries, Inc.*, 300 NLRB 498, 498 n.1, 503 (1990) (employee engaged in concerted activity for mutual aid and protection by attempting to evacuate coworkers due to the presence of hazardous chemical fumes), *enforced mem.*, 932 F.2d 958 (3d Cir. 1991).

Here, Svoboda was not merely griping; he was engaged in a discussion about safety in the lineman industry. His contribution to the discussion concerned the safety of linemen working with high voltage overhead power lines in a particularly dangerous industry. Indeed, the issues of safety and accident prevention that Svoboda was discussing were so important to the Linejunk community that a second Facebook page had been established with the specific aim of advocating for an industry-wide “change” in safety standards, drawing thousands of supporters on Facebook. (Tr. 46-52; GCX 9.) Furthermore, the specific post that Svoboda was responding to drew at least 77 Facebook “likes” and sparked an active discussion involving an unknown number of different users and more than 100 responses. (GCX 14.) The facts of the present case thus confirm that, like concerns about job security, workplace safety issues have the propensity to “quickly ripple through, and resonate with, the work force.” *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3, *incorporated by reference*, 362 NLRB No. 81, slip op. at 1. As such, the informal conversation Svoboda contributed to was the type of preliminary discussion that has the inherent propensity to lead to more concrete group action in the future. *See Parexel Int’l, LLC*, 356 NLRB 516 (2011) (employer’s preemptive-strike discharge of employee before she could discuss wage concerns with coworkers violated Section 8(a)(1) because it “sought to erect ‘a dam at the source of supply’ of potential, protected activity”).

In addition, by posting his comments on the Linejunk Facebook page in response to an inquiry about how to improve safety in the industry, Svoboda was in part addressing his own coworkers, who were known to also be members of the Linejunk community. Regardless of whether his coworkers agreed with his views on accident

prevention, Svoboda’s comments carried at least the possibility of bolstering support among his coworkers – as well as countless other statutory employees – for further actions directed at improving workplace safety. Thus, Svoboda’s discussion of vital health and safety issues was a quintessential example of the prerequisite “grist on which concerted activity feeds.” To find Svoboda’s comments unprotected here would “allow employers to chill employees in the exercise of their right to act concertedly,” and would render the right to act concertedly “meaningless” by permitting employers to retaliate against preliminary discussions regarding health and safety, and thereby “shut down future discussions and any other concerted actions that might follow.” *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 4, *incorporated by reference*, 362 NLRB No. 81, slip op. at 1; *see also Parexel Int’l, LLC*, *supra*, at 519.

Given the vital importance of health and safety issues from the point of view of employees, the General Counsel argues that discussions of such issues are “as likely to spawn collective action as the discussion of wages,” or work schedules or job security, and that the discussion of health and safety issues should thus also be found to be inherently concerted, particularly where, as here, the work is inherently dangerous. *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995). As a result, Svoboda’s comments were inherently concerted and therefore protected.<sup>9</sup>

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<sup>9</sup> ALJ Randazzo also properly concluded that Svoboda’s Facebook post did not exceed the bounds of protection provided by the Act. *MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011) (citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953)). Svoboda did not even name Respondent or any of Respondent’s employees, his criticisms were relatively tame, and his post was certainly not “reasonably calculated to harm the company’s reputation and reduce its income.” *Jefferson Standard*, 346 U.S. at 471; *Triple Play Sports Bar & Grille*, *supra*, at 4 (finding the framework established in *Atlantic Steel*, 245 NLRB 814, 816 (1979), concerning employee “outbursts” and the use of profanity, to be inapposite in the context of social media discussions occurring on nonworking time).

#### **IV. Respondent Maintained and Enforced Unlawful Conduct Policies, and Terminated Svoboda Pursuant to the Unlawful Policies**

##### ***A. ALJ Randazzo properly determined that Respondent's Policies C-6 and C-9 are unlawful***

ALJ Randazzo properly held that Respondent “maintained and enforced unlawful Conduct Policies or rules.... [and] discharged [Svoboda] pursuant to those unlawful rules.” (ALJD p. 33, lines 9-12.) “Policy C-6 addresses ‘Attitude, Spirit, and Cooperation.’ It states that employees are ‘expected to use the [Respondent’s] problem-solving procedure to resolve misunderstanding (sic) or disagreements that could otherwise affect the employees’ ability to do their jobs in an efficient and positive manner...’ and ‘employees should use the grievance procedure... when they have complaints about working conditions...’” (ALJD p. 33, lines 17-21.) (citing GCX 11(a).) Policy C-9 “addresses employees’ rights to discuss or disclose certain terms and conditions of employment and “provides examples of personal conduct that may result in corrective action, including termination. One of those listed examples is ‘disclosure of confidential information.’” (ALJD p. 33, lines 22-25.) (citing GCX 11(c).)

ALJ Randazzo properly considered *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), under which a rule will be found unlawful if: 1) employees would reasonably construe the rule’s language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was applied to restrict the exercise of Section 7 rights. He determined “employees would reasonably believe that in order to comply with [Policy C-6], they are to use the internal grievance procedure... 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.) Further, ALJ Randazzo considered that

“employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Section 7 activity for fear of running afoul of a rule whose coverage is unclear.” (ALJD p. 35, lines 1-4.) (citing *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4 fn. 11 (2015).) Based on the above, he concluded that Policy C-6 is unlawful. (ALJD 35, line 16.) ALJ Randazzo found Policy C-9 to be unlawful because it lists “disclosure of confidential information” as an example of conduct that might result in corrective action or termination. (ALJD p. 35, lines 20-22.) Finding that “employees would reasonably believe or interpret this policy rule as proscribing any discussions about their terms and conditions of employment...” he deemed it unlawfully overbroad under *Triple Play Sports Bar & Grille*, supra. (ALJD p. 35, lines 24-27.)

The General Counsel argues that ALJ Randazzo’s careful consideration and rulings regarding Respondent’s policies should be upheld.

***B. ALJ Randazzo properly determined that Svoboda was terminated pursuant to Respondent’s unlawful policies, in violation of Section 8(a)(1) of the Act***

In finding that Svoboda’s discharge pursuant to Policies C-6 and C-9 was unlawful, ALJ Randazzo reasoned that “the Board has long held that discipline imposed pursuant to an unlawfully overbroad rule is unlawful”... “when an employee violates the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act.” (ALJD p. 36, lines 4-10.) (citing *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), *enfd.* 414 F.3d 1249 (10th Cir. 2005), *cert. denied* 546 U.S. 1170 (2006); *Continental Group, Inc.*, 357 NLRB 409 (2011).)

An employer avoids “liability for discipline imposed pursuant to an overbroad rule if it... can establish that the employee’s conduct actually interfered with the employee’s own work or that of other employees or otherwise actually interfered with the employer’s operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.” (ALJD p. 36, lines 18-22.) (citing *Continental Group*, supra.) Respondent has failed to meet this standard, and thus is liable for terminating Svoboda pursuant to its unlawful policies.

As is clear from the record evidence described in detail in Sections I(A) and I(B), Svoboda was engaged in protected, concerted activity when he posted about safety on the Linejunk Facebook page, and Respondent terminated Svoboda because of it. At the hearing, Respondent attempted to argue that Svoboda’s conduct interfered with employees’ work and its own operations, but its effort fell short. ALJ Randazzo found that Korver’s testimony that continuing to employ Svoboda caused a safety risk and would necessitate changing all of the linemen’s work schedules differed from the reasons set forth Respondent’s Exhibit 1, the reasons conveyed to Svoboda at the time of his discharge, and the reasons Korver provided in his affidavit to the Region. (ALD p. 15, line 45 – p. 16, line 10, p. 16, lines 12-18; Tr. 285-286, 294-297; RX 1.) Further, ALJ Randazzo correctly concluded that not only was Korver’s testimony at the hearing inconsistent with the documentary evidence and the affidavit he provided to the Region, but was contradicted by the testimonies of Alons and Haak. (ALJD p. 16, line 45 through p. 17, line 2; Tr. 172-175, 205-207.) ALJ Randazzo “specifically [did] not credit Korver’s testimony that having to change work schedules and safety concerns were bases for the discharge.” (ALJD p. 16, lines 43-45.) Further, ALJ Randazzo reasoned

that at the time of his termination, Svoboda “held a non-bargaining unit position [and] was not interacting with the line crew on a regular basis<sup>10</sup>... which diminishes any argument that some of the crew members’ desires not to work with him would have affected the Respondent’s ability to provide services to its customers. Furthermore, and most importantly, some of Svoboda’s coworkers had previously expressed a desire not to work with him well in advance of his protected Facebook post<sup>11</sup>, and there is absolutely no evidence that such feels (sic) in any way affected the line crew’s work or the Respondent’s operation of its business.” (ALJD p. 37, lines 12-19.) For all of these reasons, Respondent fails to prove that Svoboda’s termination was based on his interference with its operations rather than its unlawful policies.

### **CONCLUSION**

Even a cursory reading of ALJ Randazzo’s Decision discloses that he carefully considered the record evidence concerning the allegations of the Complaint. Respondent’s lengthy and unfounded exceptions simply reflect its disagreement with ALJ Randazzo’s resolutions, including those involving the credibility of witnesses.

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<sup>10</sup> (ALJD p. 6, lines 39-42; p. 7, lines 12-14, 15-18; p. 13, lines 29-32; Tr. 152, 325)

<sup>11</sup> (ALJD p. 13, lines 6-10; Tr. 324, 354)

For the reasons articulated by ALJ Randazzo in his Decision and the arguments General Counsel raised at the hearing and in its Post-Hearing Brief, General Counsel respectfully submits that Respondent's exceptions be rejected and the ALJ Decision affirmed.

Dated: November 22, 2016

Respectfully submitted,

**/s/ Abby E. Schneider**

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## **CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the Brief to the Administrative Law Judge on Behalf of Counsel for the General Counsel were served by electronic mail on the 22nd day of November, 2016, on the following parties:

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