

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KAPSTONE PAPER AND PACKAGING  
CORPORATION

and

ASSOCIATION OF WESTERN PULP AND  
PAPER WORKERS LOCAL 153, AFFILIATED  
WITH THE UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA

Cases 19-CA-160107  
19-CA-160108  
19-CA-160161  
19-CA-160175

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE

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The 21-page decision in this matter issued by the Judge is a cacophony of misapplied and unapplied Board precedent; erroneous evidentiary rulings; selective reading of key evidence; factual fabrications; and a misunderstanding of picket line activity protected by § 7 of the Act. Combined with crediting all of Respondent's witnesses, who often testified solely through one-word affirmative responses to leading questions over the General Counsel's repeated and standing objection; discrediting all of the General Counsel's witnesses, despite objective evidence in support of their testimony; and including several irrelevant, manufactured, and prejudicial findings, the Judge's decision reflects an unwarranted departure from established Board law to the detriment of the four employees discharged for their peaceful picket line conduct following their combined decades of service to Respondent. Accordingly, the General Counsel ("GC") is compelled to file the instant brief in support of its Exceptions seeking a Board order directing Respondent to reinstate the four employees with backpay.

## **I. STATEMENT OF FACTS**

Respondent is a State of Delaware corporation with its headquarters in Northbrook, Illinois, and a facility in Longview, Washington, where it operates a paper and pulp mill ("Longview Mill" or "Mill"). (JD 2:22-24; GCX 1(bbb), 1(ddd)).<sup>1</sup> The Union represents a wall-to-wall Unit of employees who work at the Mill. (JD 3:27; GCX 1(bbb), 1(ddd)). The collective bargaining agreement between the parties expired on May 31, 2014. (JD 3:37-38; GCX 1(bbb), 1(ddd)).

For about a year and a half leading up to August of 2015, the Union and Respondent had been embroiled in unsuccessful contract negotiations. (JD 3:38; Tr. 468:12 - 469:5). By August 2015, the Union had filed many meritorious unfair labor practices against Respondent, which primarily involved unilateral changes and failure to provide information. (JD 4:10-11; Tr. 468:12-17).

### **A. The August 27-September 4, 2015 Strike**

As a result of these concerns, the Union called a strike on August 27. (JD 4:16; Tr. 466:20-25). The four alleged discriminatees in this case were Unit employees at the Mill who went out on strike. Steve Blanchard

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<sup>1</sup> References to the Administrative Law Judge's Decision appear as (JD \_\_:\_\_), which shows the page and line, respectively. References to pages of the Transcript of the proceedings before the Administrative Law Judge (Judge) are noted as: (Tr. \_\_:\_\_), which shows the transcript page and line. References to Joint exhibits appear as: (JX \_\_). References to the GC's exhibits appear as: (GCX \_\_). References to Respondent's exhibits appear as: (RX \_\_).

("Blanchard") began his employment with Respondent in December 2012 and worked as a helper on the Kamyrd digester in its pulp mill, which creates pulp by cooking the raw wood chips, before he was terminated. (JD 3:27-30; Tr. 750:20-25; 751:1-3). John Bouchard ("Bouchard") had worked for Respondent for 18 years as a millwright prior to his termination. (JD 3:32; Tr. 578:21-22, 580:1-3). Melvin Elben ("Elben") had worked for Respondent for a year and a half and was employed as a Journeyman "A" electrician when he was terminated. (JD 3:33-34; Tr. 659:19-20, 660:17-20). James Froberg ("Froberg") was an employee with 27 years of distinguished service to Respondent and was, like Elben, employed as a Journeyman "A" electrician at the time of his termination.<sup>2</sup> (JD 3:34-35; Tr. 833:20-23, 836:3 - 838:21, 839:12-14; GCX 27). Neither Blanchard nor Froberg had any prior discipline. (Tr. 578:21-22, 659:19-20, 750:20-21, 833:20-23, 836:3 - 838:21, 839:12-14; GCX 11, 27).

Before the strike began, Local 153 President Kurt Gallow ("Gallow") assisted with running a series of required training sessions for all members who intended to participate in the strike, including the alleged discriminatees. (JD 4:16-18; Tr. 469:6 - 471:21, 661:19-23, 839:19 - 840:3). Members were generally instructed at these trainings to exhibit normal, respectful behavior on the picket line. (JD 4:18-19; Tr. 471:11-21, 662:7-8). Specifically, members were led point by point through the Union's "Picket Line Dos and Don'ts" document and were provided with copies to take home to review. (JD 4:19-20; Tr. 580:18 - 581:15, 663:20 - 664:13, 840:17 - 841:24; last 3 pp. of RX 12). The Union also instructed members where they could locate themselves on the picket line: right near the main and contractor gate entrances and exits was fine, but not in the road or on Respondent's property (except when patrolling in a timely fashion across the entrances or exits). (Tr. 478:12 - 479:17, 662:10-21, 840:4-16).

In addition to this training, there were specific strike team captains selected by the Union based on their leadership and ability to maintain control and order on the picket line. (JD 4:36-37; Tr. 480:18-14, 481:22 - 482:4, 663:14-19). Strike team captains were in charge of teams of picketers and were trained to be the liaisons to speak on behalf of the Union, for example, to the police. (JD 4:37-38; Tr. 662:22 - 663:13, 664:16 - 665:2). Elben was a strike team captain. (JD 4:38; Tr. 481:15-21, 594:1-3, 663:4-10).

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<sup>2</sup> While the Judge neglects to acknowledge Bouchard and Froberg's combined *45 years* of service to Respondent, she does find it necessary to mention in her decision that Elben was, relatively speaking, a "fairly new employee" (JD 3:33).

On September 1, 2015, a state superior court issued a Temporary Restraining Order (“TRO”) directing Respondent and the Union to take certain actions. (JD 8:18-20; GCX 2). Three days later, on September 4, the same court issued a temporary injunction setting forth the rules for picketing and directing both parties to take certain actions. (JD 8:35-39; GCX 3). On the morning of the same day, prior to the incident at issue involving Bouchard, Elben, and Froberg, the Union had announced its members’ unconditional offer to return to work. (Tr. 311:9-25). The Union received Respondent’s answer to its offer on the evening of September 4, and the strike then ended. (JD 5:2; Tr. 467:1-15).

With the exception of the four alleged discriminatees and one other employee whose termination was not at issue in this matter, Respondent did not discipline or discharge any other employee for alleged improper conduct on the picket line. (Tr. 50:21 - 59:15, 55:14 - 56:5, 378:20-24). Although Respondent’s counsel attempted to elicit testimony regarding alleged improper conduct by other picketers, and the GC attempted to elicit testimony regarding improper conduct by Respondent’s agents, on March 3, 2016, the Judge issued an order striking the testimony and precluding further testimony regarding the conduct of anyone other than the four discriminatees. (Tr. 504:20 – 506:25). The Judge specifically stated that she was ordering the “testimony of [Respondent official John] Mendenhall and [Union President Kurt] Gallow be stricken, and I will not consider that testimony at all in rendering a decision. That’s my order.” (Tr. 505:24 – 506:2). When Respondent’s counsel asked for clarification whether Mendenhall’s specific testimony regarding his observations of Blanchard’s conduct involving the Tahoe vehicle was permitted, the Judge answered that such testimony and any specifics regarding Blanchard and the other alleged discriminatees was permitted. (Tr. 506:9-25).

**B. While Lawfully Picketing and Publicizing the Employees' Grievances Against Respondent on August 30, Blanchard Kicks One Truck Out of Frustration and Is Struck and Injured by the Reckless and Unlicensed Driver of A Contractor's Truck**

Blanchard picketed every day of the August 27 through September 4 strike except for three days after sustaining injuries from being struck by a vehicle while picketing, as discussed below. (Tr. 752:19 - 753:2).

**1. A Delta Fire Driver Audibly Assaults Blanchard**

Late in the afternoon of August 30 Blanchard picketed at various locations on public property near the Mill, including the contractor’s gate and the main entrance to the Mill. (JD 5:16-17; Tr. 753:13-23). He carried a picket

sign that identified the Union and communicated the message that the employees were engaged in a strike due to being treated unfairly by Respondent. (Tr. 753:24 - 754:4). Blanchard and approximately 10 to 15 other picketers patrolled by, walking slowly across the entrances and exits to give the drivers of approaching vehicles the opportunity to read their picket sign message and listen to the picketers' verbal messages, and then clearing the vehicles' path so that the vehicles could proceed. As they were engaged in patrolling near the contractor's entrance, Blanchard noticed a line of vehicles approaching them, including a white GMC truck. (Tr. 754:14 - 755:21).

The white truck belonged to Delta Fire, a third-party contractor invited by Respondent to perform maintenance and service work on the fire suppression system at the Mill. (Tr. 148:18 - 149:5). The Delta Fire truck approached Blanchard and the other picketers while they were patrolling, then stopped for approximately 10 seconds. The truck's driver blared his horn and yelled at Blanchard and the other picketers while he was stopped. (Tr. 755:22 - 757:3, 796:13-16, 825:24-826:1). When Blanchard and the other picketers then walked off the road by the passenger side of the white truck, the driver stopped blaring his horn and began driving into the Mill. (Tr. 756:13-18, 757:4-11).

A video clip, which captures the movement of the truck **after** the picketers had cleared the road and the truck driver had stopped blaring his horn, reveals that Blanchard gave one brief kick to the rear quarter panel of the Delta Fire truck as it drove past him. (JD 5:17-19; RX 19; Tr. 757:12-13, 758:5-25; 759:4-21, 762:20-25, 796:8-12). Blanchard was wearing tennis shoes when he kicked the truck. Blanchard observed that he, in fact, had not damaged the truck with his brief, solitary sneaker-clad kick. (Tr. 759:22 - 760:2, 797:5-14).

Two photographs attached to a security officer's report showed part of a sneakered footprint on the side of the truck next to a tire and flap. (JD 5:21-22; GCX 5, 6). Security Manager Smith never visually inspected or washed the truck to remove the footprint during an investigation to see whether there was any damage to the truck after Blanchard kicked it. Delta Fire truck officials never submitted any repair bills or other paperwork claiming or showing any damage to the truck. (Tr. 66:21 - 67:11, 379:3-6, 442:2-5, 1112:3-11). At no point did any of Respondent's officials who made the decision to discharge Blanchard visually inspect the truck for damage. (Tr. 74:25 - 75:2, 75:13-16, 397:1-4, 442:10-13, 1112:16-18).

2. **A Contractor's Truck Recklessly Strikes and Injures Blanchard While He Is Lawfully Patrolling on Public Property**

Later that day Blanchard and approximately 10 to 15 other individuals picketed near the contractor's exit on the public property side of the double red line. (JD 6:6-7; Tr. 763:12 - 764:6; RX 5). Respondent had painted the double red line in the pavement to separate Respondent's private property from the county property, where picketers could lawfully picket. (Tr. 131:20 - 132:1, 180:17-25; 755:15-17, 763:14-18, 770:9-14). As a Chevy Tahoe began to approach the contractor's exit, someone yelled "there's another one." Blanchard and the other picketers began to patrol by walking slowing across the county side of the road with their picket signs to communicate their message to the Tahoe's driver. (JD 6:9-13; Tr. 176:13-16; RX 5:01-08).

The Tahoe did not stop at either the stop sign that had been placed behind the exit on Respondent's property or behind the double red line. (Tr. 764:13-20; RX 5:01-08). Every other vehicle had stopped behind the double red line while the picketers were patrolling at that location. (Tr. 764:21-24). No picketer struck or even touched the Tahoe with either their hands or picket signs before it crossed the double red line on to public property. (Tr. 765:20-766:1; RX 5:01-08). As the Tahoe crossed the double red line, Blanchard was the picketer directly in front of the vehicle, backed up by approximately four other picketers, with the other picketers behind them. (Tr. 765:3-11).

As the Tahoe continued to move forward, it struck Blanchard in the legs. (Tr. 765:12-16; RX 5:9-10). The impact forced Blanchard off the ground and onto the hood of the vehicle in a spread-eagle fashion. As Blanchard fell forward, the picket sign he was carrying made inadvertent contact with the Tahoe's hood. At that point, the Tahoe driver momentarily stopped, but did not get out of the vehicle to see if Blanchard was injured. (Tr. 765:17-19, 766:2-7, 828:3-7; RX 5:9-10).

Within two seconds, the Tahoe again began to accelerate with Blanchard directly in its path. (Tr. 766:8-13, 775:23 - 776:3; RX 5:10-12). Fearing that the accelerating Tahoe was going to kill or seriously injure him, Blanchard unsuccessfully attempted to jump on the hood so that he would not be forced under the moving vehicle. The picket sign he was carrying again inadvertently made contact with the hood. (Tr. 767:4-21, 828:8-12; RX 5:11-12). Although Blanchard's actions caused the Tahoe to stop moving forward for a fraction of a second, it then sped up

dramatically. As it did so, Blanchard brought his picket sign down on top of the hood in a futile effort to get the Tahoe driver to stop. (Tr. 767:25 - 766:18; RX 5:12-14).

The Tahoe also struck a picketer in an orange shirt who was standing next to Blanchard, off to the side. (RX 5:13-15). The picketer in the orange shirt was Aaron Hanson ("Hanson"), who worked with Blanchard in the same department at the Mill prior to Blanchard's discharge. (Tr. 778:4-13). Respondent continues to employ Hanson and did not discipline him or any other employee for their picket line activities involving the Tahoe on August 30. (Tr. 84:4-10; 778:14-18).

While Hanson was pushed to the side by the accelerating Tahoe, Blanchard was not so fortunate. He was thrown several feet to the side of the road by the quickly accelerating Tahoe. (JD 6:29-30; RX 5:14-17). Blanchard sustained injuries to his head, shoulder, and elbow. (Tr. 781:4-8). Although Blanchard was then transported to the emergency room at a nearby hospital, he declined medical treatment because he was concerned that he could not pay the medical bills due to Respondent having cancelled health benefits for the strikers. (JD 7:7-10; Tr. 781:13-24).

Blanchard then returned to the picket line to provide a statement to a Cowlitz County Sheriff's deputy about the incident and to gather his belongings. (JD 7:10-11; Tr. 781:25 - 782: 23; GCX 26). Blanchard did not return to the picket line for three days due to the injuries he had sustained from being struck by the Tahoe. (Tr. 752:21 - 753:2). He continued to seek medical treatment for his injuries after the strike ended. (Tr. 783:19-21).

John Mendenhall ("Mendenhall"), Respondent's Procurement Manager, was approximately 100 to 150 feet away from the contractor's exit when the Tahoe's confrontation with the picketers occurred. (Tr. 182:15 - 182:5). He later spoke to someone who was in the Tahoe regarding a crack that appeared on the Tahoe's windshield. The vehicle's occupant told him that he believed that it was a bottle, not a picket sign, that had cracked the windshield. (Tr. 193:20 - 194:5). Respondent was ultimately unable to determine who or what caused that damage. (JD 13:26-27; Tr. 81:2-19).

Law enforcement authorities did not charge or cite Blanchard with any violations for his picketing conduct on August 30. (Tr. 783:10-18). Cowlitz County, however, did charge the driver of the Tahoe for driving without a valid license, which is a criminal infraction in the State of Washington. (Tr. 43:19 - 45:8; GCX 4). The Tahoe driver was also driving the vehicle without any valid insurance. (Tr. 786:15-21).

The Tahoe belonged to RMR, a third-party contractor invited by Respondent to the Mill to perform boiler repair and pressure vessel work. (Tr. 149:6-10). Respondent provides contractors like RMR with its Mill rules that it requires contractors to follow. (Tr. 1098:24 – 1099:1). Although Mill rules prohibit unsafe driving on its grounds and subject the offender to discipline, Respondent never disciplined the Tahoe driver for his reckless driving even though he had committed a hit-and-run that sent Blanchard to the emergency room. Moreover, Respondent thereafter permitted that reckless driver to return to work at the Mill. (Tr. 65:14-18; 1129:1 – 1132:9).

**C. Respondent Purportedly Conducts an Investigation and then Fires Blanchard for His Picket Line Activities, Even Though the Delta Fire Truck Sustained No Damage from His Sneakered Foot and Blanchard Acted in Self Defense to the Tahoe Driver's Reckless Driving**

Respondent notified Blanchard by letter dated September 1 that it was in the process of investigating misconduct on his part with respect to the August 30 Delta Fire truck and the Tahoe incidents. (JD 13:30-32; RX 22). In response to the invitation set forth in that letter, Blanchard submitted a statement to Respondent explaining his conduct. (JD 13:32-34; Tr. 298:5-10, 790:13-17; GCX 11, RX 23). Blanchard's statement acknowledged that he had kicked one vehicle as it was entering the Mill, but pointed out that the driver had antagonized the picketers by blowing his horn at them. With respect to the Tahoe incident, Blanchard stated that the vehicle had not stopped and had struck him; rather, he had jumped onto the hood of the Tahoe as it began to move forward because he feared for his life that the Tahoe was going to run him over; he then struck the hood of the Tahoe with his picket sign in order to get the driver to stop; the Tahoe nonetheless accelerated, which trapped him on the hood from which he was thrown when the Tahoe turned; and he was transported to the emergency room for evaluation. (JD 14:4-8; GCX 11, RX 23).

On September 11, Respondent conducted what it labeled as a "fact finding" meeting regarding Blanchard's conduct. The meeting was attended by Blanchard, Security Manager Smith, Union President Gallow, and Stacy Davis, who works in Respondent's human resources office. At the meeting, Davis took notes on behalf of Respondent and Gallow took notes on behalf of the Union. (JD 14:10-12; Tr. 86:6-21, 297:8-11, 513:25 – 514:4, 514:7-9, 516:1-9, 1128:18-21; GCX 20, RX 24). Davis' notes reveal that, with respect to the Delta Fire truck incident, Smith asked Blanchard to verify how many vehicles he had kicked; whether he had made contact with the vehicle; and whether there was horn honking by contractors and picketers. (RX 24). Blanchard was never shown at the

meeting, or at any other time, any physical evidence demonstrating that he had dented or caused any damage to the Delta Fire truck with his solitary, sneaker-clad kick. (Tr. 826:10-14).

With respect to the Tahoe incident, the only question that Smith asked was whether the first paragraph of Blanchard's statement that he had submitted was Blanchard's recollection of what had occurred during that incident. (RX 24). There was no indication that Smith ever interviewed or took a statement from the driver or passengers in the Tahoe. (Tr. 787:17). Both Smith and Respondent's Mill Manager, Paul Duncan ("Duncan"), considered the actions of the Tahoe driver to be irrelevant with respect to justifying Blanchard's conduct towards the Tahoe. (Tr. 293:8-12, 409:11 - 410:7, 1091:5-12).

Smith thereafter submitted his investigative report and video footage to Labor Relations Manager Matt Gaston ("Gaston") for his review and determination with respect to whether to discharge Blanchard. (JD 16:25-26; Tr. 96:11-23, 388:4-23). As part of the decision-making process, Gaston consulted and discussed Blanchard's case with Duncan and Randy Nebel ("Nebel"), Respondent's Mill Division President. (JD 16:28-30; Tr. 433:12-15, 435:18 - 436:7). Gaston then recommended that Respondent discharge Blanchard, though he conceded that Respondent would not have discharged Blanchard solely for kicking the Delta Fire truck. (Tr. 436:10-12, 443:18-22). Duncan agreed with Gaston's recommendation and decided to discharge Blanchard. (JD 16:29-31; Tr. 436:13-19, 1084:1-4, 1084:23-25, 1108:1-4). Duncan acknowledged, however, that he felt fortunate that Blanchard was not killed by the Tahoe and that Respondent was not facing a lawsuit from Blanchard's widow. (Tr. 1117:14-18). Respondent issued Blanchard's discharge letter on September 15. (JD 17:13-15; RX 25).

**D. While Bouchard, Elben, and Froberg Are Lawfully Picketing and Publicizing the Employees' Grievances Against Respondent on September 4, a Contractor's Truck Makes a Sharp Turn out of Respondent's Main Exit Gate, Cuts the Corner into the Pedestrian Right-Of-Way Where Bouchard, Elben, and Froberg Are Standing, and Stops There for 20 Minutes**

On the last day of the strike, September 4, 2015, Bouchard, Elben, and Froberg picketed just outside Respondent's main exit gate, in the county right-of-way. They stood a few feet outside of the fog line defining where the road began, and a few feet away from the exit lane. (Tr. 105:2-5, 586:9-12, 591:5-16, 666:16-25, 842:22 - 843:4). At no point did the employees cross onto Respondent's property. (Tr. 591:5-11, 668:12-14, 844:7-9). At no point did these employees cross over the fog line into Fibre Way or cross into the main exit traffic lane, nor did they stick limbs

or picket signs in the way of exiting traffic. (Tr. 591:12-25, 668:15 - 670:16, 844:10-19, 845:8-13). Various picketers – including strike team captain Elben, as well as Bouchard and Froberg – had positioned themselves *in this exact* location throughout the eight days of the strike. (Tr. 584:10 - 585:1, 586:16 - 587:4, 666:12-15, 667:4-6, 842:18-21, 843:7-9; RX 34, 35, 36).

It is uncontested that, prior to the September 4 incident involving Bouchard, Elben, and Froberg, no one, including law enforcement and Respondent's security personnel and management, had ever requested that picketers refrain from picketing at or leave this particular location. (Tr. 103:18-25, 592:15-17, 593:13-15, 670:25 - 671:2, 671:17-23, 683:12-14, 845:14-16, 847:7-13). In fact, the Cowlitz County Sheriff's Department had specifically informed Union President Gallow prior to the strike that that the picketers *could* stand in this location and that it was a public right-of-way for *pedestrians, not* vehicle traffic. (Tr. 541:9 - 543:3). Strike captain Elben and Froberg also had a prior conversation with an officer while picketing in that exact location, and the officer told them there was no problem and that it looked like a perfectly fine place to be standing, since it was not on Respondent's property or out in the roadway. (Tr. 671:3-16, 845:17 - 847:1). Even Respondent conceded at the hearing that the law permitted these striking employees to stand in this exact location in the right-of-way to communicate their message to people entering and exiting the Mill. (Tr. 1102:22-1103:1).

According to Respondent's Security Manager Smith, there are hundreds of trucks that pass into and out of the Mill on a daily basis, including during the strike. (JD 11:1-2; Tr. 414:9-12). Throughout the 8-day strike, at least hundreds of vehicles, large and small, many of them commercial trucks with long trailers, had exited through the main exit gate and around strikers, including Bouchard, Elben, and Froberg, without issue while they stood in this same position. (JD 11:1-2; Tr. 587:5 - 588:7, 594:8 - 595:23, 667:7-25, 672:13-16, 679:3 - 680:25, 843:10 - 844:6, 848:12-20, 936:1-6, 1107:6-8; RX 34, 35, 36, 48).

- 1. A Gardner Trucking Driver Cuts the Corner Into the Pedestrian Right-of-Way and Stops Next to Bouchard and Froberg**

In the afternoon on September 4, a Gardner Trucking truck began exiting the Mill through the main gate, made it partway around the left turn onto the main county road (Fibre Way), and then stopped abruptly next to

Bouchard and Froberg, who were picketing in the same location in the pedestrian right-of-way where they and others had picketed many times before throughout the strike. (JD 9:27-40; RX 13).

Within about a minute of the truck stopping next to the picketers, Respondent's Main Gate Operator Darren Harger ("Harger") approached and asked Froberg to move.<sup>3</sup> (JD 10:8-11; Tr. 564:10 - 565:8, 597:9-13, 599:7-18, 850:16-18, 1065:16-19; GCX 19). Froberg told Harger that he was standing in the public right-of-way. (Tr. 850:21-22). As Froberg began to respond to Harger, strike team captain Elben tapped him on the shoulder and reminded him not to interact with the guards, per the Picket Line Dos and Don'ts with which picketers were required to comply. (JD 10:11-13; Tr. 674:7-20, 722:2-6, 722:21-23, 723:15-20; last 3 pp. of RX 12, 13). None of the employees had any further conversation with Harger during the entirety of the incident. (Tr. 852:6-8, 1060:20-22, 1067:15 - 1068:6).

The Gardner Trucking truck was stopped in this location at the main exit gate for about 20 minutes. (JD 10:36; Tr. 100:6-18, 868:22-25; RX 13). The entire time the truck was stopped, the three employees maintained a minimum of three to four feet of distance from the truck itself. (Tr. 105:17-22, 597:5-8, 677:15-18, 858:14-23; RX 13). The employees did not yell at, curse at, or direct any kind of verbal or nonverbal communication toward the truck driver whatsoever, at any point. (Tr. 105:23-106:3, 601:2-5, 601:10-19, 676:11-677:9, 857:21-858:7, 1003:1-20, 1060:23-25).

Nothing was obstructing the truck from the front or the back, such that it could not continue forward or, at a minimum, back up and try the turn again. (Tr. 600:14 - 601:1, 678:6-9, 863:8-17). As such, Respondent's own contracted Security Officer, Dimitri Shilov ("Shilov"), who was on the scene, asked the Gardner Trucking driver to attempt to back up the truck – but she refused. Shilov detailed this request in his incident report, which he provided to Respondent's management. (Tr. 107:17-24; GCX 14). Froberg saw Shilov attempt to direct the driver to back up (Tr. 864:8-21), and Shilov can be seen subtly motioning his hand to direct the driver to back up in Respondent's security video of this incident. (RX 13 at 3:10). The truck driver, Ms. Cutler, admitted that Shilov asked her if she could back up, but she felt she shouldn't try. (Tr. 1006:19 - 1007:7).

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<sup>3</sup> Harger directed his communications only toward Froberg; Harger and Froberg knew each other by name and had a history, while Harger did not know Bouchard or Elben. (Tr. 606:22 - 607:12, 674:21 - 676-10, 719:18-23, 721:2-4, 722:2-8, 734:11 - 736:20, 850:19 - 851:9, 851:24 - 852:5, 1059:10-12, 1066:15 - 1067:2).

## 2. Respondent Summons the Police

Soon after the truck stopped in this location, both Respondent and then-Gardner Trucking supervisor Heidi Mast ("Mast")<sup>4</sup> called the Cowlitz County Sheriff's Department, and officers arrived shortly thereafter. (JD 10:16-18, Tr. 940:13-23, 1024:2-3). For the first few minutes after the officers arrived, the parties casually discussed the situation. When prompted by the employees and union agents on the scene, the officers ambiguously described their understanding of the applicable law without expressing whether or not the employees were violating it.<sup>5</sup> (JD 10:18-25; JX 1, RX 27; Tr. 568:19 - 574:24).

For example, an officer asked if the three employees were blocking vehicles, and then stated, "If you are blocking a vehicle, you can't block vehicles." (JD 10:22-23). Similarly, an officer commented that the employees could not stick their arms out across the fog line to block a vehicle from passing. Strike Team Captain Dave Eckersley ("Eckersley") responded that the picketers were in the pedestrian right-of-way behind the fog lines, and were not reaching out past them. The officers never disagreed or suggested that the three employees had engaged in such conduct, since, as the record evidence establishes, they certainly hadn't. Rather, this was, again, a hypothetical statement of what conduct the deputies might have deemed to be unlawful. (JX 1, RX 27). An officer then asked whether the truck was "traveling on the road," and shrugged, "If the vehicle can get by you, then great." The responding officers never concluded aloud either that the vehicle was traveling on the road or that it could not get by the picketers. (JX 1, RX 27). The three picketers pointed out to the officers that all other vehicle traffic had been able to get by with no problem, and that they were standing in a pedestrian right-of-way. (JX 1, RX 27).

In short, at no point during their entire interaction did the officers conclude or relay to Bouchard, Elben, or Froberg that they were, in fact, unlawfully blocking the truck or engaged in any unlawful conduct.<sup>6</sup> (JX 1, RX 27, 48; Tr. 112:8-17).

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<sup>4</sup> Soon after the September 4, 2015 incident, but prior to her testimony at the hearing, Mast was hired on by Respondent as a Transportation Specialist. (Tr. 932:3-15).

<sup>5</sup> There is no evidence that the responding Cowlitz County Sheriff's deputies were well versed in federal labor law or were conversant in the rights afforded to employees under § 7 of the Act.

<sup>6</sup> The officers' statements were: "[I]f there's a car coming through, a vehicle, and you are in the way of that vehicle, then you are in the way of the vehicle"; "[I]f you are blocking the vehicle from ingress or egress, you know, whether you are sticking your arm out like this or whatever you are doing, if you are blocking the vehicle you are blocking the vehicle, you can't do that"; "[I]f a vehicle can get by you, then great"; and "You can't block a vehicle." (JD 10:22-23; RX 27, audio transcript of RX 27 at JX 1).

**3. After Minutes on the Scene, a Responding Officer Asks Bouchard, Elben, and Froberg If They'd Do Him a Favor and Move Three Feet, the Picketers Comply Immediately, and the Gardner Trucking Driver Pulls Away**

The three employees never refused a request by the officers to move. In fact, the officers never even required that the men move. (Tr. 115:5-7). Rather, after four minutes on the scene without requesting that the three employees alter their conduct, one of the officers asked the men if they would just do him a favor and move three feet away from the truck, since the truck driver needed to get to Portland. (JD 10:31-35; Tr. 112:22 - 113:9, 651:9-22, 681:16-22, 682:2-6, 869:1-3; JX 1, RX 27, 48). The three employees immediately complied with the officer's favor request. (JD 10:33-35; JX 1, RX 13, 27, 48; Tr. 115:8-10, 607:23 - 608:2, 683:7-11). As he moved, Elben confirmed, "Do you want me to move? No problem. You ask me to move, I'll move." (JD 10:33-34; JX 1, RX 27, 48; Tr. 604:6-15, 682:20 - 683:1). When the officer thanked the employees for moving, Elben followed up, "That's all you had to say. No problem. You are the law; I'm not going to say anything to you." (JX 1, RX 27; Tr. 604:16-21). The officer thanked him again for the favor. (JX 1). As the employees moved, the truck pulled away. (JD 10:34-35; Tr. 869:4-7; RX 13).

**4. An Equally Large Hapag-Lloyd Truck Exits without Incident Moments after Bouchard and Elben Return to Their Usual Posts**

After the Gardner Trucking truck pulled away, Froberg had a conversation with one of the officers during which Froberg noted that all the other vehicles had been able to get by, and the officer responded that if the truck driver had gotten over farther, she could have made it through the exit. (Tr. 869:8 - 870:11). Shortly thereafter, Froberg left the picket line. (Tr. 871:1-2). Around that time, with the police still present, Bouchard and Elben resumed their previous position. (Tr. 115:11-18, 608:3-8, 609:8-10, 611:16-23, 687:1-3; RX 13). In fact, shortly after the incident, back in his initial position, Elben had a lighthearted conversation with one of the responding officers as the officer was driving away about Elben placing a bet for the officer during his upcoming trip to Las Vegas. (Tr. 609:24 - 610:20, 685:8 - 686:25).

Then, moments after the Gardner Trucking truck drove off and Bouchard and Elben had returned to their previous location in the pedestrian right-of-way, a large Hapag-Lloyd tractor-trailer navigated the turn out of the main exit around Bouchard and Elben without incident, to the joyous, telling applause of the surrounding picketers: they

were sending a message that no other vehicles had trouble navigating this turn without cutting through the picketers in the pedestrian right-of-way. (Tr. 611:24 - 612:9, 687:4-12; RX 13). Elben remained in this position for 45 more minutes on September 4; Bouchard remained for two more hours. (Tr. 612:15-17, 687:13-23). During those two hours, just as had been the case throughout the rest of the strike, no other vehicle had any trouble exiting around Bouchard through the main exit gate. (Tr. 612:22-24).

After resuming their positions, the picketers were not told to move by law enforcement or by any contractor, manager, or employee of Respondent. (Tr. 115:23 - 116:5, 609:11-21, 612:18-21, 687:24 - 688:5). They were never threatened with arrest, let alone in fact arrested or cited over this incident; quite to the contrary, no police report was even filed by the responding deputies. (JD 10:37; JX 1, RX 27, 48; Tr. 112:18-21, 114:17 - 115:4, 606:17-21, 683:15-24, 870:12-14, 1071:7-12). Elben spoke with one of the officers days later when he went to the Cowlitz County Sheriff's Office to ask for the police report from the incident and found that there was none. (Tr. 683:15 - 684:17). When Elben relayed to the officer that Respondent was likely to terminate him, the responding officer answered incredulously, "There's no way they're going to fire you for that." (Tr. 684:18-24, 732:19-23).

##### **5. Respondent's "Choke Points" and Traffic Candles**

Respondent's witnesses testified, in part, that the presence of Bouchard, Elben, and Froberg in the location in question, in addition to the presence of two picketers shown across the street at the beginning of the main security video showing the incident, created a "choke point." (JD 9:30; RX 13; Tr. 226:3-13, 226:23 - 227:4). Respondent's witnesses never defined "choke point," but presumably they meant that Bouchard, Elben, and Froberg's presence alone may not have served to "obstruct" the exit of the Gardner Trucking truck; it was the combination of their presence in that location and the presence of the two picketers across the street (who were also completely out of the road, outside the fog line) that may have rendered the turn more difficult or impossible. (JD 9:26-35; Tr. 226:3-13, 226:23 - 227:4, 913:3 - 914:6, 915:25 - 916:9; RX 13). Despite that Respondent felt they were partly responsible for the alleged blocking, though, the picketers across the street were not disciplined. (Tr. 55:14-56:5, 378:20-24).

Respondent itself may have contributed to the Gardner Trucking driver's alleged inability to navigate this turn properly, as it had placed traffic candles or cones in the main exit lane during the strike that appeared to direct traffic to the left, making it more difficult for a large truck to make an appropriately wide turn to the left out of the main

exit gate. (Tr. 372:21-373:20; GCX 10). It is unclear why these cones were placed in such a way during the strike, but the record is clear that they were not there before the strike, and they were removed permanently just before the strike ended just hours later on September 4, the same date of the incident (Tr. 373:9-13, 373:21-24).

Following the incident involving Bouchard, Elben, and Froberg, Respondent decided to direct traffic through its chip gate – an alternate exit from the Mill. (JD 10:39 – 11:7; Tr. 367:9-10, 970:23 - 971:2, 1005:10-17, 1104:7-9). Respondent's Vice President for Mill Operations Duncan admitted that allowing large trucks to use the chip gate from the outset of the strike would have been a possibility. (Tr. 1105:7-10). Even though Respondent acknowledged that strikes are often inconvenient for employers, and specifically, that they sometimes require employers to entertain additional costs and make certain preparations, including, for example, altering their own physical property and re-routing traffic to ensure picketers are not injured and to allow for contractors to enter and exit safely, Respondent failed to re-route traffic this way until the last few hours of the strike. (Tr. 1102:4-16).

#### **6. The Gardner Trucking Driver's History of Striker Antagonism**

During the incident, Froberg saw the Gardner Trucking driver's face and identified her (Cutler) as the same driver from two notable instances he had experienced on the picket line earlier in the strike. (JD 15:6-8; Tr. 852:19 - 857:6). Specifically, just about half an hour before the incident discussed here, on September 4, Cutler<sup>7</sup> had been driving down Fibre Road, passing by, as a truck was exiting around the picketers, through the main exit gate. Cutler seemed impatient with the speed at which the truck was exiting and Froberg saw her flailing her arms inside the cab of her truck and appear to be yelling, "Get the fuck out of the way." (Tr. 853:4-12, 857:1-6). The driver's window was rolled up for this incident, so Froberg could not hear her; he only could read her lips. (Tr. 855:5-12).

In addition, a few nights before the September 4 incident, Cutler was driving fast enough through the strike zone that some of the picketers yelled at her to slow down, to which Cutler yelled back, with her window down this time, "Eat me!" (Tr. 854:20 - 855:4, 855:13-15). Gallow also testified to this earlier incident and, on rebuttal, having been present throughout the hearing as a representative of the Charging Party, identified Cutler, the driver who had earlier taken the witness stand, as the driver who had made that crude exclamation a few nights earlier. (Tr. 680:3-6,

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<sup>7</sup> Froberg did not know Cutler's name, but Gallow identified her after she took the stand as the same driver involved in the earlier incidents. (Tr. 1132:10 - 1134:14).

1132:10 - 1134:14). Froberg referred to these earlier events during the September 4 incident at issue, telling a police officer, "She [the driver] came in and she cussed me out!" (Tr. 680:3-6, 857:8-20; JX 1, RX 27, 48).

At the hearing, Cutler insisted that her truck – which she uses to deliver loads from the Mill daily – simply "will not fit" onto Fibre Way, a major two-lane county road, without crossing through the pedestrian right-of-way area where the picketers were standing. (Tr. 1008:11-17). However, Gardner Trucking has an entire fleet of trucks that operate regularly on the Mill site, at least many of which are the identical length and axle set-up. (Tr. 936:1-6). Other contractors delivering loads from Respondent's Mill also have equally large trucks in their fleets. (Tr. 1104:25 - 1105:6). Despite this, there is no evidence in the record that any of those identical Gardner Trucking vehicles, or any other vehicle at all, ever had trouble navigating around the picketers who stood in the pedestrian right-of-way outside the main exit throughout the 8-day strike.

Duncan, who manages and oversees all operational functions at Respondent's Mill, denied that there was any truck from Gardner Trucking that could not fit between the two fog lines of that two-lane county road. (Tr. 1084:17-20, 1104:11-19). Each of the two lanes of Fibre Way is 12.5 feet wide; the full road, from fog line to fog line, is 25 feet wide. (Tr. 916:13). Other equally large trucks traveled regularly into and out of the Mill throughout the strike and not a single other truck or driver had similar trouble exiting around the picketers standing in this location in the public right-of-way. (Tr. 587:5 - 588:7, 594:8 - 595:23, 667:7-25, 672:13-16, 679:3 - 680:25, 843:10 - 844:6, 848:12-20, 936:1-6, 1107:6-8). For example, the record includes video evidence of a Hapag-Lloyd truck unhesitatingly making its way around Bouchard and Elben after they had resumed their exact position just moments after the Gardner Trucking truck had pulled away. The objective video evidence makes clear that this Hapag-Lloyd truck was nearly identical in length to the Gardner truck. (Compare RX 13 at 19:17 mark to RX 13 at 29:53 mark).

**E. Respondent Purportedly Conducts Investigations and then Fires Bouchard, Elben, and Froberg for Their Picket Line Activities, Even Though They Engaged in No Violent or Intimidating Behavior and Remained in a Pedestrian Right-of-Way on September 4**

Soon after the September 4 incident, before the rest of the strikers returned to work, Bouchard, Elben, and Froberg received letters dated September 4 from Respondent advising them that Respondent was in the process of investigating their "misconduct" at the main gate exit and asking them each to provide a written statement" which each of them did. (JD 15:1-5; RX 31, 32, 33, 34, 35, 36). Unfortunately, very few of the details included in these

written statements were addressed or inquired about by Respondent at the brief alleged "fact-finding" meetings that were held on September 10. (JD 16:4-7; RX 34, 35, 36, 37, 38, 39, GCX 17, 18, 19). In fact, although Froberg detailed the two incidents of Cutler's earlier crudeness to picketers on the strike line to Respondent in the written statement he provided in advance of this "fact-finding" meeting, Respondent did not follow up with him about this information at the meeting in any way. (JD 15:6-8, 16:4-7; RX 34, 37, GCX 19). Instead, Smith allegedly contacted the Gardner Trucking driver, who "said that it did not occur," and that was that; Smith concluded that he "could find no evidence" that Froberg was telling the truth, despite never asking him about the situations. (JD 15:8-9; Tr. 346:25 - 347:18).

Similarly, all three employees had relayed in their written statements to Respondent that they felt, based on the hundreds of previous drivers' lack of trouble navigating the turn around them, that this particular driver had cut the corner too short. (JD 15:6, 15:32-35, RX 34, 35, 36). Despite his access to 24/7 security footage of the traffic passing through the main exit gate, Security Manager Smith did not investigate this further – at the fact-finding meetings or otherwise. (JD 16:4-7; Tr. 416:25 - 417:15; RX 37, 38, 39, GCX 17, 18, 19). Neither did Labor Relations Manager Gaston. (Tr. 455:15-18). The three employees were ultimately called in for termination meetings on September 14. (JD 17:10-13; RX 41, 42, 43, GCX 21, 22, 23).

Despite that no citation ever issued to Elben, Bouchard, or Froberg over the September 4 incident, and that there is no evidence in the record that any of the responding deputies had concluded that the three employees had engaged in any wrongdoing, Smith testified that Respondent made the decision to terminate these three employees because they had "obviously caused a breach of the peace" within the meaning of Washington state law and violated the Temporary Restraining Order through their conduct on September 4. (JD 14:24-25, 14:29-30, 16:19-21; Tr. 112:18-21, 114:17 - 115:4, 313:17-24, 606:17-21, 870:12-14). Similarly, Duncan testified that the three employees were terminated for gross and willful disorderly conduct under Washington law. (Tr. 1086:15-19).

The discharge letters that issued to Bouchard, Froberg, and Elben on September 4 allege that these employees were terminated for alleged "gross and willful misconduct during the work stoppage, engaging in Disorderly Conduct under Washington law, RCW 9A.84.030(1)(c) and violation of the Temporary Restraining Order." (RX 41, 42, 43). Interestingly, notwithstanding Respondent's conclusion that the three employees had engaged in

quite serious criminal activity, neither Smith nor any other agent of Respondent pursued criminal charges against any of the three employees. (Tr. 368:7-10). Instead, Respondent quickly terminated Bouchard, Elben, and Froberg, who, combined, had to that point given nearly 50 years of distinguished service to Respondent. (Tr. 578:21-22, 659:19-20, 833:20-23, 836:3 - 838:21, 839:12-14; GCX 27).

**II. THE JUDGE ERRONEOUSLY CONCLUDED THAT RESPONDENT LAWFULLY DISCHARGED THE STRIKERS BECAUSE SHE IGNORED THE PROTECTIONS GRANTED TO EMPLOYEES UNDER § 7; MISAPPLIED AND FAILED TO APPLY RELEVANT BOARD PRECEDENT; DISREGARDED CRITICAL UNDISPUTED EVIDENCE AND FABRICATED OTHER EVIDENCE; AND MADE SEVERAL IRRELEVANT AND ERRONEOUS EVIDENTIARY RULINGS**

**A. The Judge's Decision Fails to Recognize that Strikers Have the Right Under § 7 to Engage in Peaceful Picketing and Patrolling**

Section 7 of the Act "gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Desert Inn Country Club*, 275 NLRB 790, 795 (1985), quoting *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984). Picketing "generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite." *NLRB v. Retail Store Union Local 1001*, 447 U.S. 607, 618-619 (1980). The protections afforded by § 7 also include the right of strikers to engage in peaceful patrolling. *See Clear Pine Mouldings*, 268 NLRB at 1047. An employer commits an unfair labor practice in violation of §§ 8(a)(1) and (3) of the Act by discharging or disciplining employees engaged in protected activities such as a strike or picketing. *See, e.g., Gen. Tel. Co. of Michigan*, 251 NLRB 737, 738 (1980).

Not all conduct engaged in by strikers during the course of a labor dispute is protected by the Act. When an employer discharges or disciplines an employee for engaging in alleged acts of picket-line misconduct, the Board follows a well-established burden shifting framework for determining whether the discharge violates the Act. The GC must initially establish that the employee was a striker and that the employer discharged the employee for conduct associated with the strike. The burden then shifts to the employer to prove that it had an honest belief that the employee engaged in the misconduct for which he was discharged. Once the employer has proven an honest belief, the burden shifts back to the GC. If the GC establishes by a preponderance of the evidence either that the employee did not, in fact, engage in misconduct, or that the conduct was not sufficiently egregious to deny the employee the

protection of the Act, the discharge or discipline will be found unlawful. *Illinois Consol. Tel. Co.*, 360 NLRB No. 140, slip op. at 12-13 (2014); *Universal Truss*, 348 NLRB 733, 734 (2006); *Avery Heights*, 343 NLRB 1301, 1302 (2004).

"There is no question that Emily Post rules do not apply to a strike." *Consolidated Comms, Inc. v. NLRB*, 837 F.3d 1, 22 (D.C. Cir. 2016) (Concurring opinion of Circuit Judge Millett). "Clearly some types of impulsive behavior must have been within the contemplation of Congress when it provided for the right to strike." *Allied Indus. Workers, AFL-CIO Local Union No. 289 v. NLRB*, 476 F.2d 868, 879 (D.C. Cir. 1973). Consequently, as the Board has long recognized, "not every impropriety committed during a strike deprives an employee of the Act's protection." *Avery Heights*, 343 NLRB at 1322 (2004); *Shalom Nursing Home*, 276 NLRB 1123, 1137 (1985). As strikers' protected picketing activities occur in a context of adversarial struggle, "picket-line misconduct is accordingly evaluated by a different standard than similar conduct in a working environment." *Airo Die Casting, Inc.*, 347 NLRB 810, 812 (2006). Indeed, "[t]he striker-misconduct standard thus offers misbehaving employees greater protection from disciplinary action than they would enjoy in the normal course of employment." *Consolidated Comms, Inc. v. NLRB*, 837 F.3d at 8.

Accordingly, not all strike misconduct is sufficient to disqualify a striker from further employment. *Detroit Newspapers*, 340 NLRB 1019, 1024 (2003). Rather, the Board will find that the alleged misconduct warrants discharge only if it is sufficiently serious so that "under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984). The *Clear Pine Mouldings* standard is an objective one and does not involve an inquiry into whether any employee was actually coerced or intimidated by the conduct, nor an inquiry into the intent of the discharged striker engaged in the conduct. *Universal Truss*, 348 NLRB at 734; *Detroit Newspapers*, 340 NLRB at 1024-25.

- 1. The Judge's Erroneous Conclusions Regarding Blanchard's Conduct Toward the Tahoe Ignores His Protected Right to Engage in Peaceful Picketing and Patrolling**

Although the law is clear that strikers have a protected right to picket and patrol with their picket signs to communicate their message, the Judge's decision reveals a marked absence of discussion regarding the purposes of picketing and an outright antagonism to strikers' rights. This is particularly evident with regard to her findings

regarding the conduct of striker Blanchard and the other individuals who picketed and patrolled near the Tahoe at the contractor's exit gate.

The Judge's antagonism towards the strikers' picketing and patrolling is well illustrated by her preoccupation with, and subsequent extrapolation from, an alleged picketer's statement, "there's another one," as the Tahoe approaches the exit where Blanchard and other picketers were assembled. Even assuming that the statement was made by a picketer,<sup>8</sup> she uses her set of "Emily Post rules" of picketing to convert this innocuous statement into something sinister. Thus, she mysteriously concludes (JD 19:42 – 20:1) that this statement, which merely indicated the approach of another vehicle to the other picketers, "proved" that Blanchard and his "cohorts" intended to intimidate the contractor.

Putting aside the questionable logic that such a statement contributed, much less proved, anything relevant, the Judge's conclusion reveals both her lack of familiarity as to what actually happens on a picket line and an obvious hostility to protected picketing and patrolling. As the above discussion of the law demonstrates, strikers have a lawful right to picket and patrol by carrying their picket signs across an entrance or exit to a struck employer's property to communicate their message that they have a labor dispute with that employer. *NLRB v. Retail Store Union Local 1001*, 447 U.S. 607, 618-619 (1980); *Clear Pine Mouldings*, 268 NLRB 1044, 1047 (1984). Thus, the picketers here had every right to confront those who were assisting Respondent during the strike – including the Tahoe contractor – with their message about the labor dispute in an effort to persuade them to cease their cooperation with Respondent during the dispute.<sup>9</sup> The statement "there's another one" merely alerts picketers to be alert on a safety front and get ready to engage in protected activities involving confronting drivers crossing the line with that message in an attempt to persuade them to cease their cooperation.

Although the Judge apparently believes that picketers must remain at all times at the side of the road and hope that contractors will glance over to read the picket signs' message, that is not the law. *See, e.g., Ornamental*

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<sup>8</sup> Although there is no record evidence identifying who made the statement, the Judge assumes and finds (JD 19:43) that the statement is uttered by a "picketer."

<sup>9</sup> The Judge feels constrained to find (JD 5:26-29) that the driver of the Delta Fire truck that Blanchard and others picketed was not performing any bargaining unit work at Respondent's Mill. Like many of the Judge's other findings, that fact is simply irrelevant to the lawfulness of the picketing. Picketers during a strike have every right to make people understand that they have a labor dispute with their employer and have given up their means of a living in an effort to beseech those who cross the picket line to aid Respondent – regardless of whether they are performing bargaining unit work – not to do so.

*Iron Work Co.*, 295 NLRB 473, 479 (1989) (picketers have a traditional right to take steps necessary to perfect a verbal appeal to drivers seeking access to a strike-bound facility even if it results in momentary blocking of vehicle); *Hotel Roanoke*, 293 NLRB 182, 217 (1989) (although strikers picketed so as to disrupt traffic flow at the entrance to employer's hotel, such disruption of ingress and egress is often associated with picketing and is not particularly serious misconduct). Section 7 of the Act protects such conduct regardless of how distasteful and "intimidating" Judge Thompson apparently finds it.

The Judge's hostility toward the right of Blanchard and the other picketers to picket and patrol is also revealed by the Judge's repeated characterizations of them "swarming" the vehicle. Although the Judge cites no case finding an incidence of unlawful swarming, she apparently finds it "unprotected" and unlawful. (JD 19:39-41). The law protects the right of picketers to confront those who are assisting a struck employer operate with their picket signs and message. The video footage (RX 5) reveals that is exactly what Blanchard and the others were doing. Even Respondent's official Mendenhall, whose testimony the Judge credits, concedes (Tr. 176:6-16) that Blanchard and the picketers were walking across the public road from one end of the contractor's gate to the other with their picket signs in hand when the Tahoe approached them. That is the essence of lawful patrolling. *NLRB v. Retail Store Union Local 1001*, 447 U.S. at 618-19.

Instead, the Judge repeatedly chooses to label the picketers' conduct "swarming" or "blocking." Either the Judge intentionally distorts what the video evidence depicts, or she does not comprehend the concept of patrolling and equates it with intimidation. Under such a misinformed view, however, every form of confrontation with a picket sign would constitute intimidating misconduct that warrants discharge. Although Judge Thompson may prefer that picketers not confront those who aid and abet the struck employer with their message, her personal preferences are irrelevant in light of the above protections afforded to strikers under § 7 of the Act.

The Judge's hostility to the striker's protected picketing and patrolling is also evidenced by her repeated finding that Blanchard and the picketers "blocked" the Tahoe. Her preoccupation with picketers' "swarming" and her failure to understand what constitutes lawful patrolling grossly affected her conclusion that Blanchard and the other picketers engaged in unprotected "blocking." Although the Board has found that strikers who egregiously or

repeatedly "block" vehicles' ingress and egress engage in disqualifying strike conduct, such is not the case here, and examination of the video evidence and proper application of Board precedent reveal the Judge's error.

The video evidence (RX 5) that fully and completely captures Blanchard's confrontation with the Tahoe reveals only that Blanchard and the other picketers impeded the Tahoe's egress for a matter of seconds before the Tahoe's driver drove through them and out of the exit. The video shows the Tahoe approaching the picketers at the double line separating Respondent's property from the public right of way where Blanchard and the others were picketing at the 8-second mark of the video. It then shows the driver driving through them and out of the exit at the 13 to 16-second mark. Thus, the Tahoe's progress out of the mill was impeded for a grand total of 8 seconds at most. Under well-established Board law, such minimal disruption of progress does not constitute blocking that merits discharge. *See, e.g., Consolidated Comms, Inc. v. NLRB*, 837 F.3d at 9-10 (although a striker, while patrolling, briefly impeded progress of company van from 15 seconds up to a minute as it sought to exit from employer's garage, such conduct is not the type of seriously coercive or intimidating behavior that forfeits a worker's protection under the Act); *Cal Spas*, 322 NLRB 41, 62 (1996) (isolated incident of strikers' impeding non-strikers' access to employee parking lot does not constitute misconduct warranting denial of reinstatement); *Hotel Roanoke*, 293 NLRB at 217 (although strikers picketed so as to disrupt traffic flow at the entrance to employer's hotel, such disruption of ingress and egress is often associated with picketing and is not particularly serious misconduct); *Consolidated Supply Co., Inc.*, 192 NLRB 982, 989 (1971) (momentary blocking of truck is the sort of trivial incident that is to be expected during a contested strike where employer attempts to continue operating with non-strikers).

**2. The Judge's Erroneous Conclusions Regarding Bouchard, Elben, and Froberg's Conduct on September 4 Totally Ignore Their Protected Right to Engage in Peaceful Picketing and Patrolling**

Similarly, the Judge's hostility to the strikers' protected picketing and patrolling is further evidenced by her characterizations of the peaceful strike activities as coercive, intimidating acts through which they stood their ground and engaged in a "stand-off." Despite the fact that Board law has long acknowledged that some disruption of ingress and egress is commonly associated with picketing, the Judge dramatically concludes that the strike conduct of employees Bouchard, Elben, and Froberg – who silently and peacefully remained in a pedestrian right-of-way outside

the fog lines of the road holding their picket signs when a single truck exiting the Mill failed to successfully navigate around them – was “*inherently* coercive and intimidating.” (JD 21:25).

In particular, the Judge’s decision displays her extreme distaste with the picketers’ admission that they felt they were entitled, under Board law, to “stand their ground” in this location in order to communicate their message. In fact, the Judge references this “stand your ground” principle five times throughout her short decision – as if employees wanting to stand their ground peacefully during a strike was a new or dangerous concept, much less one denoting an unlawful motivation. (JD 11:38, 12:1, 12:6, 12:27, 20:37-38). It is not. *See, e.g., Ornamental Iron Work Co.*, 295 NLRB 473, 479 (1989); *Hotel Roanoke*, 293 NLRB at 217.

Similarly, despite the utter lack of any record evidence of coercive or otherwise unlawful conduct on the part of these three picketers, the Judge inexplicably refers to the peaceful 20-minute event *three* times as a “stand-off.” (JD 10:39, 11:3-4, 21:9). This term was not used by any witness. The Judge goes so far as to discredit Bouchard, Elben, and Froberg, in part, because they failed to provide – on the witness stand, in response her own pointed questioning in assistance to Respondent’s counsel (Tr. 899:23 - 901:19) – a “cogent explanation for their “stand their ground’ *belief*.” (JD 11:40-12:1 [emphasis added]). However, they needn’t have provided any explanation for their belief, as § 7 protects peaceful strike activity like that at issue here. *Ornamental Iron Work Co.*, 295 NLRB at 479; *Hotel Roanoke*, 293 NLRB at 217; *Cal Spas*, 322 NLRB at 62; *Consolidated Supply Co., Inc.*, 192 NLRB at 989.

In fact, although the Judge does not seem willing to recognize it, employees have a § 7 right to engage in peaceful strike activity, which is often adversarial and designed to draw passing traffic’s attention to employees’ grievances with their employer. *See, e.g., Hotel Roanoke*, 293 NLRB at 217; *Airo Die Casting, Inc.*, 347 NLRB at 812. Due to their very nature, strikes are often inconvenient for employers and those they contract with; the fact that picketing activity inconveniences an employer or its contractor or impedes traffic, on its own, does not lose it the broad protection of the Act. *Cal Spas*, 322 NLRB at 62; *Hotel Roanoke*, 293 NLRB at 217. As Respondent well knows (Tr. 1102:4-16), sometimes an employer has to entertain additional costs and make other preparations for a strike, such as hiring additional security personnel, altering its physical property, and altering the normal flow of traffic to ensure the safety of both picketers and those crossing the picket line.

**B. The Judge Misapplied and Failed to Apply Relevant Board Precedent Regarding Alleged Serious Picket Line Misconduct**

As noted above, the Board applies the standard set forth in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), to determine whether an employee has engaged in such serious picket line misconduct as to forfeit the protection of the Act. In order for the striker to lose the Act's protection, the Board must find that "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

The Board's "*Clear Pine* standard is an objective one" and "does not call for an inquiry into whether any particular employee was actually coerced or intimidated," *Mohawk Liqueur Co.*, 300 NLRB 1075, 1075 (1990), "nor does it involve inquiry into the intent of the discharged striker." *Universal Truss, Inc.*, 348 NLRB 733, 734 (2006).

**1. The Judge Consistently Misapplied the *Clear Pine Mouldings* Standard**

Although the Judge properly cited *Clear Pine Mouldings* as being the operative standard in her decision (JD 18:31 – 19:1), she consistently misapplied it with regard to all four of the discharged strikers' conduct, as well as those around them, despite the Board's clear instructions. Specifically, the Judge repeatedly engaged in improper inquiries cautioned against by the Board in order to reach her erroneous conclusions, both by thoroughly analyzing the subjective impact of the picketers' conduct and by guessing at the picketers' own intent.

With respect to her analysis of Blanchard's conduct alone, the Judge repeatedly focused on the "intent" underlying his actions. Specifically, she found that Blanchard "*intended* to swarm the vehicle and block its egress" (JD 7:27-28); "*intentionally* swarmed the white Tahoe" (JD 19:18-19); "*intended* to instill fear on the contractor's part" (JD 19:31-32); "*intended* to intimidate and coerce Respondent's contractor to refrain from entering the Mill" (JD 19:36-37); "*intentionally* swarmed and blocked the Tahoe's egress" (JD 19:41); "*intended* to intimidate the contractor (and others)" (JD 19:41-42); "*inten[ded]*... to intimidate the contractor" (JD 19:44 – 20:1); "*intended* to . . . threaten and instill fear of harm in Respondent's contractor" (JD 20:4-5); and "jumped onto the hood of the truck *in order to* gain a tactical advantage and further intimidate the contractor" (JD 20:17-18) [Emphasis added as to all].

Besides improperly focusing on Blanchard's alleged intent underlying his conduct, the Judge also improperly engaged in an inquiry regarding other employees' subjective reactions to Blanchard's conduct. Thus, she improperly

relied on reports allegedly received by Respondent regarding the Tahoe incident that employees "were afraid to take their vehicles across the picket line" (JD 7:16-17); that employees "were afraid to drive their vehicles across the picket line" (JD 20:7-8); and that the driver of the White Tahoe "feared for his safety and would not again return to the Mill as a result of the incident" (JD 20:25-28). She further improperly relied on the alleged subjective reaction of the owner of the GMC truck that Blanchard's solitary sneaker-clad kick to the truck had made him "reluctant to return to the Mill" (JD 13:21-22).

The Judge also improperly applied the *Clear Pine Mouldings* standard by focusing on intent in determining that Bouchard, Elben, and Froberg lost the Act's protection. Specifically, the Judge improperly found that they "*intended* to retaliate against Cutler [the Gardner Trucking driver] and intimidate her from returning to the Mill." (JD 20:38-39). She seems to concoct this intent theory based on the fact that all three employees had relayed their concerns about the earlier incidents with Cutler on the picket line to Respondent, which led them to believe Cutler had created the traffic incident by purposefully cutting through the pedestrian right-of-way where they were standing. (RX 35, 36; Tr. 853:4-12, 854:20 - 855:4, 855:13-15, 857:1-6). The Judge further improperly relied on the alleged subjective reactions to the three strikers' conduct, finding that "several of the Gardner truck drivers told [Gardner Trucking Supervisor-turned-Respondent-agent Heidi Mast] they were afraid to exit the Mill during the strike because they were fearful of their safety and/or that they would encounter a similar blocking situation by the Union" (JD 11:4-6) and, based only on that hearsay testimony by Mast, that, in fact, "several employees and contractors were afraid to cross the picket line" following this incident. (JD 21:4-7).

Not only does the Judge improperly analyze these picketers' intent, as forbidden by *Clear Pine Mouldings*, but, as discussed, there is no indication whatsoever that Bouchard, Elben, and Froberg had such an intent when they simply stood in a pedestrian right-of-way outside Respondent's main exit, communicating their message. Their conduct and location was the same during the days of the strike before any of the incidents with the Gardner Trucking driver as it was during and after. Rather, the relevance of the two incidents where this driver directed profanity toward the picketers immediately before the September 4 "blocking" incident is that this was really not a "blocking" incident at all, as every single other truck had been able to negotiate passage, but she chose instead to cut through a pedestrian right-of-way where picketers were peacefully communicating their message.

The Judge's analytical preoccupation with the strikers' intent and the subjective reaction of other employees was clear and reversible error under *Clear Pine Mouldings* and its progeny precisely for the reasons illustrated by the Judge's decision here – it prevented her from engaging in a proper analysis of whether the strikers' conduct was so egregious that it would objectively tend to coerce other employees in the exercise of their rights under the Act.

## 2. The Judge Misapplied Various Other Board Directives for Assessing Picket Line Misconduct

The Judge's misapplication of the law was not limited to the *Clear Pine Mouldings* test. She also misapplied the above-described burden-shifting test (pp. 17-18, *supra*) that the Board applies to decide whether alleged picket line misconduct warrants discipline or discharge. This is particularly evident where the Judge criticizes the GC for "ma[king] much to do about the fact that the [Tahoe] contractor's driver's license was suspended and . . . [about] the contractor's reckless driving," and then blithely concludes that "none of these considerations are relevant to Respondent's decision to discharge Blanchard." (JD 20:18-20). Although those considerations may have been irrelevant to Respondent when it made the decision to discharge Blanchard, they are certainly relevant to the analysis that the Judge should have engaged in regarding whether Blanchard's conduct under the existing circumstances objectively warranted his disqualification from the Act's protection. Indeed, the Board clearly considers such factors relevant in analyzing a picketer's conduct. *See, e.g., Illinois Consol. Tel. Co.*, 360 NLRB No. 140, slip op. at 4, 12 (2014), *enfd. in part*, 837 F.3d 1 (D.C. Cir. 2016) (striker who fell forward and struck hood of company van only because van hit him did not engage in any misconduct and was unlawfully suspended); *Desert Inn Country Club*, 275 NLRB 790, 796-797 (1985) (as striker was the innocent victim of reckless driving at the picket line, he did not engage in misconduct and was unlawfully discharged).<sup>10</sup>

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<sup>10</sup> The Judge's reliance (JD 20 n.75) on *Giddings & Lewis*, 240 NLRB 441, 448 (1979), and *Associated Grocers of New England, Inc.*, 227 NLRB 1200, 1207 (1977), to support her conclusion that the Tahoe's driver's suspended license and reckless driving were irrelevant is misplaced. As the Judge herself acknowledges (JD 18:24-26), those cases stand for the proposition that an employer need not obtain the strikers' side of the story to establish its honest belief that the striker engaged in misconduct. But, the GC has not argued that Respondent was required to obtain Blanchard's version of the event (which Respondent sought, in any event) before it could establish an honest belief. Rather, the GC introduced evidence of the Tahoe's driver's criminal citation for driving with a suspended license and reckless driving during his confrontation with Blanchard to establish that Blanchard did not engage in any misconduct but was merely acting in self-defense to the driver's reckless conduct. As the above cases establish, the driver's recklessness is very relevant to an evaluation of Blanchard's conduct.

Further, the Board has also held that employers may not “apply a double standard,” “knowingly tolerat[ing] behavior by nonstrikers or replacements that is at least as serious as, or more serious than, conduct of strikers that the employer is relying on to deny strikers reinstatement to jobs.” *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988). That Respondent tolerated the reckless driving of the Tahoe driver (who drove with a suspended license) and allowed him to continue delivering to and from Respondent’s Mill, undisciplined, after sending Blanchard to the emergency room, while it terminated Blanchard for his own conduct, reveals Respondent’s disparate treatment of union supporters like Blanchard. Thus, the Judge’s finding that the Tahoe driver’s reckless conduct is irrelevant is simply wrong.

The Judge also found that Blanchard, Bouchard, Elben, and Froberg’s actions were unlawful because they allegedly knew that the TRO and the Union’s picketing rules prohibited their conduct. (JD 19:33-37; 20:1-3, 21:9-11). First, it is simply impossible that Blanchard could have known that the TRO prohibited his alleged misconduct, because it did not exist at the time of his conduct: it is undisputed that Blanchard’s conduct occurred on August 30, 2015, whereas the TRO (GCX 2) did not issue until September 1, 2015. In any event, whether any of the four employees’ conduct was in violation of the court’s TRO is irrelevant to a proper analysis of the alleged picket line misconduct. In *W.C. McQuaide, Inc.*, the Board found that the fact that strikers’ conduct may have violated the terms of a state court’s injunction was not determinative regarding whether the strikers’ conduct removed them from the protection of the Act:

[T]he Board will not abdicate its statutory responsibility. . . to another tribunal whose decision may be predicated on different considerations from those pertinent to our inquiry. For this reason, we place no reliance on the finding by the [state court] that the [strikers] were in contempt of its injunction against unlawful picket line activity. That finding, broad as it was, is for our purposes a[t] best an indication that another tribunal has found that the conduct in question occurred.

220 NLRB 593, 594 (1975), *enfd. in part*, 552 F.2d 519 (3d Cir. 1977).

Second, regardless of whether the Union’s picketing rules in fact prohibited the conduct in question, or whether the four alleged discriminatees knew they did, such inquiries are simply irrelevant. The Board does not measure whether picket line misconduct is unlawful because it violates a union’s picketing rules or the picketer knows that the conduct violates the rules. Rather, as discussed above, the Board applies the objective *Clear Pine*

*Mouldings* standard. As such, what the picketers believed about the applicable Union picket line rules is not relevant and the Judge's analysis and conclusions were in error.

Finally, as with her analysis of Respondent's termination of Blanchard, the Judge's burden-shifting analysis in the cases of Bouchard, Elben, and Froberg was also faulty. The Judge begins her brief analysis of the whether the three terminations were justified with the following sentence: "[D]espite that the General Counsel satisfied their initial burden of proof, I conclude that the actions of Bouchard, Elben, and Froberg were unprotected." Thus, the Judge skips the second prong of the burden shifting framework: considering whether Respondent sufficiently proved it had an honest belief that these three long-time employees had engaged in the *serious* strike misconduct over which they were terminated.<sup>11</sup> See *Illinois Consol. Tel. Co.*, 360 NLRB No. 140, slip op. at 12-13; *Universal Truss*, 348 NLRB at 734; *Avery Heights*, 343 NLRB 1301, 1302 (2004).

The record cannot support a finding that Respondent had an honest belief that Bouchard, Elben, and Froberg engaged in serious strike misconduct on September 4. First, Respondent could not have had a legitimate honest belief of serious strike misconduct because of the Cowlitz County Sheriff's handling of the purported incident. Although Respondent asserts that Bouchard, Elben, and Froberg "obviously caused a breach of the peace" and engaged in both "gross and willful misconduct" and "Disorderly Conduct under Washington law, RCW 9A.84.030(1)(c)," it is established fact that the responding deputies neither warned nor threatened these three employees with arrest, nor did they issue citations to any of the three men. Even more poignant to the fallacy of Respondent's argument is the fact that the deputies did not even draft a basic police report about the incident. Second, notwithstanding Respondent's quite serious allegations that the three employees had engaged in criminal activity at the edge of its property, none of its agents, including Smith, pursued criminal charges against any of the three employees.

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<sup>11</sup> While she skips over the second prong of the applicable burden-shifting framework, the Judge does offer a pithy and legally erroneous four-paragraph analysis of the third prong of the test, regarding whether Bouchard, Elben, and Froberg had *in fact* engaged in serious misconduct. The failings of the Judge's analysis on this point are discussed below.

**C. The Judge Failed to Apply or Even Discuss Relevant Board Precedent to Decide Whether the Picketers Engaged in Misconduct and Whether It Was Serious Enough to Forfeit the Act's Protection**

As to all four terminated strikers, the Judge erroneously concludes that their conduct was “intimidating” and therefore sufficient to disqualify them from the Act’s protection. However, the decision’s virtual absence of case citations and discussion of relevant Board precedent, coupled with the Judge’s inappropriate application of that precedent she does cite, is striking. Had the Judge properly considered and applied relevant Board case law, she could not have reached the conclusions that she did.

**1. Board Precedent Does Not Support Denial of Reinstatement to Blanchard**

Without providing any supporting authority, the Judge found (JD 29:27-30) that Blanchard’s solitary kick to the Delta Fire truck was alone sufficient to warrant denial of reinstatement. As noted above, however, “not every impropriety committed during a strike deprives an employee of the Act’s protection.” *Avery Heights*, 343 NLRB at 1322; *Shalom Nursing Home*, 276 NLRB at 1137. “Clearly some types of impulsive behavior must have been within the contemplation of Congress when it provided for the right to strike.” *Allied Indus. Workers, AFL-CIO Local Union No. 289 v. NLRB*, 476 F.2d 868, 879 (D.C. Cir. 1973).

In reaching her conclusion, the Judge ignored those well-settled observations, as well as the several Board decisions cited by the GC that demonstrate that such momentary incidents on a picket line do not constitute egregious conduct warranting termination. For example, in *Medite of New Mexico*, the Board determined that strikers on the picket line who intentionally struck a foreman’s vehicle with their picket signs did not engage in serious misconduct warranting disqualification from the Act’s protection, because that “brief incident” does not “intimidate nonstriking employees from crossing the picket line and exercising their § 7 rights.” 314 NLRB 1145, 1146-47 (1994), *enfd.* 72 F.3d 780 (10th Cir. 1995). *See also Brown & Root USA*, 319 NLRB 1009, 1107 (1995) (striker who struck employee’s vehicle with his cane as employee attempted to drive through picket line did not engage in disqualifying misconduct); *Massachusetts Coastal Seafoods*, 293 NLRB 496 n.1, 536 (1989) (striker who kicked a nonstriker’s car as a reflex reaction to almost getting struck by the car did not engage in a serious act of misconduct);

*Preterm, Inc.*, 273 NLRB 683, 698, 704 (1984) (strikers' pounding on vehicles carrying non-strikers does not constitute serious misconduct).

The Judge also ignored relevant Board precedent cited by the GC establishing that Blanchard's reflexive conduct in self-defense to the recklessly driven Tahoe did not constitute misconduct justifying his discharge. As discussed above, the Tahoe struck Blanchard while he lawfully patrolled on the public right-of-way, drove straight through him as he attempted to climb on its hood to avoid being dragged under its wheels, and then threw him off the hood and onto the pavement where he sustained injuries. The Board has previously determined that strikers' reflexive actions in self-defense – even where they involve impeding a non-striker's vehicle's progress and kicking and striking the vehicle with a picket sign – do not constitute misconduct that justifies a striker's discipline or discharge. See, e.g., *Illinois Consol. Tel. Co.*, 360 NLRB No. 140, slip op. at 1 n.2, 4, 12; *Massachusetts Coastal Seafoods*, 293 NLRB 496 n.1, 536; *Desert Inn Country Club*, 275 NLRB at 796-97.

Besides failing to address the above precedent mandating that Blanchard's conduct could not disqualify him from the Act's protections, the Judge cited three totally inapposite cases (JD 20 n.74) to support her conclusions regarding Blanchard's conduct towards the Tahoe. Two of the cases – *Sheet Metal Workers Local 19 (Delcard Assoc.)*, 316 NLRB 426 (1995) and *Longshoremen ILA Local 1291 (Trailer Marine)*, 266 NLRB 1204 (1983) – are not even striker misconduct cases. Rather, they are § 8(b)(1)(A) cases where the Board was considering whether union agents' (not employees') alleged blocking constituted restraint and coercion under that specific Section. Moreover, even if they had been on point legally, both cases were factually distinct, involving several incidents where pickets blocked vehicles' routes over a period of days, in contrast to the singular 8-second delay at issue here.

Finally, the misconduct at issue in the third case cited by the Judge, *Clear Pine Mouldings*, 268 NLRB 1044 (1984), differed significantly in character and gravity. In *Medite of New Mexico*, 314 NLRB at 1146, the Board described the *Clear Pine Mouldings* picket line misconduct as follows: "the strikers carried clubs, tire irons, baseball bats, and axe handles and were accompanied by dogs. In addition, one striker swung a 2-foot long club at a nonstriking employee and struck a nonstriking employee's car." There is nothing in Blanchard's picket line conduct that is remotely comparable to that which would have justified his discharge.

2. **Board Precedent Does Not Support Denial of Reinstatement to Bouchard, Elben, and Froberg**

In baldly concluding that Bouchard, Elben, and Froberg's peaceful picketing activity from a pedestrian right-of-way on September 4 was "inherently coercive and intimidating," the Judge utterly neglected to apply the legal standards the Board has developed for analyzing strike situations involving blocking traffic. Even assuming, *arguendo*, that these picketers' failure to move from an area designated for pedestrian traffic could be called "blocking" at all, the Board, quite contrary to the Judge's conclusion, has found that "one isolated incident [of blocking] during a strike... is hardly sufficient to constitute grounds for denying reinstatement." *Cal Spas*, 322 NLRB 41 (1996). See also *Tube Craft*, 287 NLRB 491 (1987); *M. P. C. Plating*, 295 NLRB 583 (1989).

As discussed earlier, the Board readily acknowledges that some disruption of ingress and egress from an employer's facility is almost *always* associated with picketing activity. For that reason, the Board has made clear that only a "very serious" disruption of ingress and egress during a strike is sufficient to justify disciplinary action, let alone termination, as occurred here. In other words, not every incident of blocking constitutes per se serious misconduct justifying discipline. *Cal Spas*, 322 NLRB 41, 62 (1996). Rather, in order to lose the protection of the Act, the disruption of traffic must be "so serious as to deny one continued employment"; in other words, it must be "very serious indeed." *Hotel Roanoke*, 293 NLRB at 217.

In evaluating whether blocking constitutes serious misconduct, the Board weighs a number of factors, including, but not limited to: whether access was actually and effectively prevented, whether the blocking was momentary and isolated or extended and repeated, whether it was done peacefully or in a confrontational and intimidating manner, and how many strikers were involved in the blocking. See, e.g., *Cal Spas*, 322 NLRB at 62; *Hotel Roanoke*, 293 NLRB at 217. See also *Domsey Trading Corp.*, 310 NLRB 777 (1993); *Clear Pine Mouldings*, 268 NLRB No. 173 (1984).

It cannot be said that any of these three picketers were "actually and effectively blocking access" when they were standing in a public right-of-way designed for pedestrian traffic, where police had told them on more than one occasion that they could stand, with hundreds of other vehicles having made it around them without issue over the previous seven days of the strike. No more could it be said that, had the picketers been standing on a public

sidewalk when a truck came barreling toward them, they would be engaged in “blocking” if they failed to jump off the sidewalk to make room for the rogue vehicle.

Regardless, if the picketers’ presence in this location was truly a concern and certain trucks could not navigate this turn without crossing through the right-of-way (although there is no evidence of any other truck having such an issue), Respondent had at least two other options for routing traffic out of the Mill during the strike, including through the chip gate and/or the contractor/employee exit. Respondent chose not to employ these other strategies until September 4: the eighth and final day of the strike. Instead, Respondent had placed “traffic candles” in the main exit lane earlier in the strike that appeared to direct traffic to the left of the lane, such that larger trucks were forced to take a narrower turn. If anything, Respondent played a role in creating a situation where a truck nearly hit its striking employees standing in this location.

Moreover, the “blocking” was temporary, lasting for 20 minutes, and occurred only once during eight days of picketing. No one disputes that these employees acted 100% peacefully during the ordeal and were not confrontational or intimidating toward the Gardner Trucking driver or anyone else. The picketers stood in place, – in the right-of-way – silently communicating their message through the use of picket signs while not otherwise interacting with the truck driver in any way, whether verbally or non-verbally.

The Cowlitz County Sheriff’s deputies called to the scene did not warn or cite any of the involved employees. They never demanded that the three employees move or threatened them with arrest if they refused to do so – nor were the employees, in fact, arrested. In fact, Elben, Froberg, *and* Union President Gallow had each been explicitly told by the Cowlitz County Sheriff’s Office on previous occasions that this was an appropriate location for the picketers to communicate their message. Even though the picketers had every right to stand their ground in the lawful exercise of their § 7 rights, the moment they were only asked to move as a favor to one of the deputies, they immediately and graciously did so. This was not required of them, and there is zero record evidence to indicate that they would have been arrested had they refused. In fact, immediately after the Gardner truck pulled away, two of the three picketers returned to their exact previous position, in the presence of the responding deputies, without consequence.

Further, as discussed above, the Board is clear that blocking traffic during a strike is *not* inherently coercive, absent more; in fact, some disruption of traffic is necessarily associated with strike activity. The appropriate question is whether, upon a detailed review of the specific facts, the blocking is “serious [enough] indeed” to lose the assumed protection of the Act and justify the termination of the striking employee’s employment. Despite this, the Judge concludes her very brief legal discussion about this incident with a finding that the actions of the three picketers were “*inherently* coercive and intimidating.” Instead of properly analyzing the relevant facts, which show absolutely no confrontational conduct that would reasonably coerce other employees in the exercise of their § 7 rights, the Judge ignored them, opting instead to employ a very brisk and improper analysis of the strikers’ “intent” and rely on several outrageous factual conclusions unsupported by the record evidence (see *infra*).

**a. The Judge Failed to Address or Distinguish the Board Cases Cited by the General Counsel**

The Judge neglected to address or consider the Board cases cited by the GC that demonstrate that a single instance of blocking during a strike does not constitute per se serious strike misconduct. For example, in *Hotel Roanoke*, the Board upheld the Administrative Law Judge’s ruling that an employee’s termination for patrolling slowly across the entrance to the employer’s facility, occasionally outright stopping in the middle of the entrance to slow or obstruct traffic – resulting in the police being called to the scene – had violated the Act. Finding that this “blocking” did not constitute serious strike misconduct, the Judge reasoned:

It may very well be that [the terminated employee] in fact picketed in such a way that the flow of traffic was disrupted. *Such, however, is not of itself particularly serious misconduct.* Disruption of ingress and egress of vehicles is often associated with picketing and is the type of thing to be expected. When a strike occurs, there necessarily and commonly will be some disruptions. The question is whether the acts of disruption are so serious as to deny one continued employment, which is *very serious indeed*.

293 NLRB at 217 (emphasis added). Therefore, as the Judge in *Hotel Roanoke* concluded, “[a]lthough it is possible for a picketer to disrupt traffic in a manner exceeding the permissible bounds of strike activity, I do not believe that the Respondent presented sufficient evidence that [the picketer involved] did.” *Id.*

The GC also cited *Cal Spas* in support of its position that this one-time alleged blocking incident did not constitute serious strike misconduct. The Administrative Law Judge’s decision in *Cal Spas*, as fully adopted by the Board, perhaps most clearly summarized the recent progression of Board law on this point:

While in *Clear Pine Mouldings*... the Board did state that blocking access to the employer's premises constitutes misconduct sufficient to justify a denial of reinstatement at the conclusion of a strike, the subsequent Board decisions... establish that one isolated incident during a strike, involving identifiable individuals, is hardly sufficient to constitute grounds for denying reinstatement.

322 NLRB at 62.

In *Cal Spas*, two terminated employees stood directly in front of cars driven by non-striking employees, head-on, in the middle of the roadway in the entrance to the plant, as the non-striking employees attempted to drive into the employee parking lot, overtly blocking their entrance. In finding that this "isolated incident of blocking access" did *not* constitute serious strike misconduct justifying the two employees' terminations, the Judge in that matter compared those facts to the facts involved in cases where the Board has upheld serious strike misconduct terminations for blocking. For example, the Judge in *Cal Spas* considered *Tube Craft*, 287 NLRB 491 (1987), where the record evidence established that the blocking of access that the Board found to justify picketers' terminations occurred over a span of four days, each of the five total incidents lasted up to over an hour, and each incident involved four or five identifiable individuals. Likewise, the Board discussed *M.P.C. Plating*, 295 NLRB 583 (1989), where the blocking of access to the employer's facility occurred on a daily basis over the first few weeks of the strike and involved identifiable pickets, in sizable numbers, purposely impeding the access of numerous non-strikers and supervisors alike and engaging in such egregious misconduct as linking arms to form an impenetrable phalanx. In both cases, the blocking of access constituted "a pattern of conduct evidencing a strategy of refusing to limit the picketing to peaceful appeals for support of the strike." *Tube Craft*, 287 NLRB at 493.

No such pattern is found in our case, as Bouchard, Elben, and Froberg picketed peacefully throughout the strike, including during the incident at issue, in the pedestrian right-of-way area outside of Respondent's main exit, well outside of the street. The "blocking," if it can be called that, took place on a single 20-minute occasion, it was "committed" by three identifiable individuals, and there is absolutely no evidence in the record that it was strategic or planned. Rather, the three picketers simply stood with picket signs in the same exact location in the pedestrian right-of-way where picketers had stood throughout the strike – conduct identical to that which had never impeded any other vehicle's entrance to or exit from the Mill over the previous seven days of the strike.

Finally, the GC pointed to *Domsey Trading Corp.*, 310 NLRB 777, a case in which eight strikers formed a human chain around a bus hired by their employer to transport replacement workers to the plant, in order to prevent replacement employees from gaining access. In the process, the strikers pushed and shoved replacement workers and others. Although the Judge and Board concluded that such violent and intentional blocking conduct would normally entitle an employer to deny reinstatement, in that particular case, the employer had repeatedly condoned and even contributed to the “battlefield”-like conditions of the strike and had failed to discipline non-strikers and its own agents who engaged in similar or even more serious misconduct. As such, the Board upheld the judge’s finding that the employer’s termination of two of the striking employees who participated in the “human chain”, while it neglected to issue any discipline to non-strikers who engaged in misconduct, constituted disparate treatment in violation of the Act. 310 NLRB at 809.

**b. The Judge Cited Board Cases That Do Not Support Her Conclusion**

Although the Judge neglects to mention, discuss, or distinguish any of the blocking cases cited by the GC, she does cite three cases of her own in footnotes 76 and 77. The Judge does not explain in those footnotes or anywhere else in her decision how her cited cases are analogous to the instant case. This is quite puzzling, as none of the cases cited by the Judge remotely support her conclusion.

For example, in footnote 76, the Judge first cites *Clear Pine Mouldings*, for the Board’s statement therein that during a strike, picketers have no right “... to block access to the employer’s premises ....” 268 NLRB at 1047. Unfortunately, the specific facts of that case demonstrate that the Judge’s framing of this dicta is both misleading and taken out of context. In fact, the Board in *Clear Pine Mouldings* was not analyzing peaceful blocking activity, but rather, quite serious violent and destructive non-blocking conduct.

In *Clear Pine Mouldings*, Rodney Sittser (“Sittser”) and Robert Anderson (“Anderson”) were terminated for their alleged serious strike line misconduct. Sittser had “cornered” an employee against a wall at work and told him that he would have to go on strike, since the union membership had voted for it, then began shoving him; told the employee to watch out, because the strikers might burn his house or garage or something (and then repeated this threat to him over the telephone on several other occasions); made an angry phone call to the Union Business Agent within earshot of another employee during which he suggested that a group of union members might visit a different

employee to "straighten him out," then told that employee directly that the hands of certain personnel should be broken; and flagged down the car of an employee who had resigned from the Union at the start of the strike and told her that she was taking her life in her hands by crossing the picket line and would live to regret it. .

At the end of the night shift on one day of the strike, there were 40 to 50 pickets outside the plant who were carrying baseball bats, tire irons, and ax handles, and were accompanied by dogs. Anderson was among these picketers, and participated in: stopping a truck driven by a nonstriker, jerking open the doors, breaking the windows, using a 2-foot-long club to beat on the truck, hanging on the open doors of the truck and trying to pull the driver out, and yelling at him, "I am going to kill you, you son-of-a-bitch"; on another occasion, swinging at another non-striking employee with a club as he was trying to leave the plant on a motorcycle in the chaos; and hitting a third car with a club as the non-striking driver attempted to drive through the picket line, causing a significant dent.

On these facts, the Board held that the incidents had been severe enough to support the two employees' terminations. *Clear Pine Mouldings*, 268 NLRB at 1048. Although *Clear Pine Mouldings* involved violence, egregious threats, and destruction of property, – not nonviolent blocking – in its discussion of the general legal principles applied in strike misconduct cases, the Board did note in dicta that striking employees "have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, to block access to the employer's premises, and certainly no right to carry or use weapons or other objects of intimidation."<sup>12</sup> *Id.* at 1047. As such, Judge Thompson quotes the portion of this dicta referring to blocking in isolation in her footnote 76, despite the fact that there is absolutely no evidence that such violent and destructive conduct exists in our case.

Moreover, the Judge's reliance is additionally misplaced because, despite this passing dicta, the Board in *Clear Pine Mouldings* did not so much as touch on the unlawfulness of any alleged blocking of traffic that was separate from the violence, threats, and property destruction described above. Rather, the Board found that the conduct lost the protection of the Act *not* because of its interference with traffic, but precisely because of the accompanying seriously coercive and intimidating actions of the strikers. As such, the Judge's reliance on the cited dicta from *Clear Pine Mouldings* to support her erroneous legal conclusion that picketers during a strike have no right

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<sup>12</sup> The progression of Board law regarding blocking from the 1984 *Clear Pine Mouldings* decision to the 1996 *Cal Spas* decision, made clear that "one isolated incident during a strike, involving identifiable individuals, is hardly sufficient to constitute grounds for denying reinstatement." 322 NLRB at 62.

to temporarily and on a single occasion inadvertently block access to the employer's premises, absent any evidence of contributing coercive conduct, again demonstrates her lack of understanding of the law.

In footnote 77, the Judge cites two more cases in support of her erroneous conclusion that this solitary, peaceful "blocking" event was "inherently coercive and intimidating." First, in *General Chemical Corp.*, 290 NLRB No. 13 (1988), a striking employee slashed the tires of a non-striker's vehicle, intentionally drove his own vehicle in such a manner as to throw gravel at that vehicle, threw a "cherry bomb" at the vehicle, followed the vehicle while driving in a reckless manner, and on more than one occasion, attempted to cut off the driver of the vehicle. On those facts, the ALJ and the Board determined that the striking employee's violent and dangerous conduct was "inherently coercive and intimidating regarding the exercise of employees' § 7 rights to refrain from striking or other protected activities," losing it the protection of the Act and justifying his termination. *Id.* at 82. That decision also analyzed the strike misconduct of several other employees, including: making obscene threats, aggressively bumping into a supervisor in an attempt to start a fight, brandishing a knife during a verbal altercation, and using a vehicle to push a non-striker's vehicle into oncoming traffic. The Board in *General Chemical* adopted the Judge's rulings that the employees who had engaged in the above-listed acts had committed serious strike misconduct privileging their employer to decline to reinstate them.

Second, in *PBA, Inc.*, 270 NLRB 998 (1984), the Board adopted the Judge's findings upholding the serious strike misconduct terminations of striking employees who had engaged in: rock throwing at vehicles of non-striking employees and company officials (resulting in the destruction of a stationary vehicle's rear light and a state court harassment conviction); a hazardous car-truck chase resulting in a customer's moving truck getting hit with a board; random threats of assault on the picket line; throwing tacks under a non-striking nearby bar owner's vehicle; and carrying, waving, and swinging a baseball bat on different occasions at customers, management, and non-strikers. 270 NLRB at 998-99.

As to these two cases relied on by the Judge in footnote 77, it is unclear why she would rely on them at all in support of her incorrect conclusion. None of the multiple striking employees discussed in *General Chemical Corp.* had engaged in conduct remotely analogous to that of Bouchard, Elben, and Froberg, and the decision did not once mention blocking, let alone did it conclude, as the Judge does, that a one-time incident of blocking, absent more,

would be "inherently coercive." Similarly, neither the Board nor the Administrative Law Judge in *PBA, Inc.*, provide any support for the Judge's erroneous suggestion about the "inherent[] coercive[ness]" of a one-time peaceful blocking incident.

In sum, the Judge's reliance on these cases to support her novel conclusion is seriously misplaced. As the cases cited by the Judge make absolutely clear, in order for the Board to deny striking employees the broad protections of the Act and stand behind the loss of their jobs, those employees' strike misconduct must surmount a very high threshold – a threshold not even closely approximated here. The Judge cites no precedent to support any finding that three employees peacefully remaining in a pedestrian right-of-way for a 20-minute period, while a single truck out of hundreds ostensibly struggled to navigate by, meets this stringent standard. The clear precedent to the contrary, as cited by the GC, was improperly ignored by the Judge.

**D. The Judge Disregarded Critical, Undisputed Evidence and then Fabricated Other Evidence to Support Her Erroneous Conclusions**

The Judge concluded that Blanchard's conduct regarding the Tahoe was "unprotected" and that Blanchard's solitary kick of the Delta Fire truck was itself sufficient to warrant denial of his reinstatement. (JD 19-20). In reaching these conclusions, however, the Judge completely disregarded critical undisputed evidence underlying Blanchard's conduct. Compounding that error, she further relied on nonexistent and inadmissible evidence to support her erroneous legal conclusions.

**1. The Evidence Establishes that Blanchard Did Not Engage in Conduct Sufficient to Justify His Termination**

**a. Blanchard Acted in Self-Defense toward a Reckless Driver**

Videotape evidence (RX 5) clearly and completely depicts the Tahoe incident that allegedly warranted Blanchard's discharge. As the GC argued to the Judge and the evidence fully establishes, Blanchard did not in fact engage in any misconduct with regard to the Tahoe despite Respondent's alleged honest belief that he did. Rather, Blanchard's actions were those of a reasonable person acting in self-defense to a moving several-ton vehicle that was driven into him recklessly by the Tahoe's driver. Although the Judge concluded (JD 20:13-17) that the video evidence does not support that argument, she is wrong because she completely ignored the video evidence that clearly shows that *the moving Tahoe first strikes Blanchard while he is lawfully picketing.*

The Judge claims that she "carefully review[ed] the video evidence (frame by frame)" of this incident. (JD 6:14; 20:11). After this alleged careful review, the Judge somehow found that the Tahoe first came to a full stop, picketers then hit the Tahoe with their picket signs, and Blanchard then attempted to jump on the hood of the stopped vehicle, and that the video does not support Blanchard's claim that he jumped onto the hood to avoid being run over. (JD 6:14-25). With all due respect, the Judge's review and findings are neither careful nor correct.

A careful frame-by-frame review of the video evidence clearly illuminates the Judge's errors. At the 7 and 8-second mark of the video, the Tahoe first approaches the picketers. The picketers are clearly on the public right-of-way side of the double line that separates the public right-of-way from Respondent's property and are yelling "scab." As the Tahoe's right front tire crosses over the double line onto the public right-of-way near the end of the 9-second mark, there is no evidence that Blanchard or any other picketer has hit the Tahoe with their picket signs or anything else. At the final frame of the 9-second mark Blanchard's white tennis shoes are first visible in front of the picketer in the orange shirt. At the first two frames of the 10-second mark reveal, Blanchard is then struck and thrust spread-eagle onto the hood of the moving Tahoe<sup>13</sup> and his picket sign makes inadvertent contact with the Tahoe as a result of being flung into the air.

Despite this, the Judge completely fails to discuss Blanchard being spread eagle on the hood or why Blanchard is in such a position. Also ignored by the Judge are the angry yells of "hey, hey!!" from the picketers that are audible beginning at the 11-second mark of the video – immediately after Blanchard is struck at the 10-second mark. Those angry yells are explained by the fact that the surrounding employees have just watched the Tahoe plow into Blanchard as he is picketing.

Although the Judge refers to Blanchard jumping on the hood of the Tahoe for "tactical advantage," Blanchard does not voluntarily seek to get on the hood until the 11-second mark of the video, *after* he has been struck and thrust on to the Tahoe's hood and has returned to the ground. At the beginning of the 11-second mark, Blanchard attempts to jump on the hood of the still-moving Tahoe and his picket sign appears to make inadvertent contact with the Tahoe. Blanchard immediately returns to the ground at the end of the 11-second mark, and the Tahoe momentarily stops. At the beginning of the 12-second mark, however, the Tahoe begins to move again and

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<sup>13</sup> The continued movement of the Tahoe is revealed by the changing position of the hubcap on the left front wheel of the Tahoe.

speeds up at the beginning of the 13-second mark pushing Blanchard backwards and two other picketers off to the side. At the last frame of the 12-second mark, Blanchard raises his picket sign. At the 13-second mark, Blanchard brings the picket sign down on the Tahoe in a futile effort to get the Tahoe's driver to stop. At the 15-second mark of the video, Blanchard is thrown off the hood of the Tahoe, and he falls to the pavement at the 16-second mark.

The Judge's failure to acknowledge the Tahoe striking Blanchard totally undermines her absurd conclusion (JD 20:11-17) that Blanchard jumped on the hood of the moving Tahoe merely for "tactical advantage." It also allowed her to discount the GC's argument that Blanchard was engaged in a desperate act of self-defense to protect himself from the reckless driving of the Tahoe's driver. The Judge's conclusion ignores *the key* piece of evidence.

Besides ignoring the key visual and audio evidence of the video, the Judge's evaluation of Blanchard's conduct was further undermined by her failure to distinguish between Blanchard's picket sign inadvertently hitting and intentionally striking the Tahoe. The Judge was apparently content to find that Blanchard's conduct was unprotected because his picket sign hit the Tahoe's hood and windshield several times. (JD 7:35-39, 19:20-21, 20:3-4, 20:24-25). Review of the video evidence (RX 5) clearly reveals, however, that Blanchard's picket sign inadvertently hits the Tahoe at the 10-second mark when he is struck by the Tahoe and again inadvertently hits the hood of the Tahoe at the 11-second mark when Blanchard attempts to get on to the hood of the Tahoe to brace himself. As shown at the 12 and 13 second mark of the video, it is only when the Tahoe is accelerating that Blanchard raises his picket sign and intentionally brings it down on the Tahoe in a futile effort to stop the driver from driving through him and the other picketers.

The Judge's failure to distinguish between inadvertent and intentional acts was erroneous as the distinction is significant regarding the lawfulness of picketers' conduct under Board law. *See, e.g., Illinois Consol. Tel. Co.*, 360 NLRB No. 140, slip op. at 4, 12 (2014), *enfd. in pertinent part*, 837 F.3d 1 (D.C. Cir. 2016) (striker Maxwell, who fell forward and struck hood of company with his forearm after being struck by the van, did not intentionally strike van and engage in strike misconduct); *Desert Inn Country Club*, 275 NLRB 790, 797 (1985) (although striker inadvertently hit hood of car with picket sign because car hit him, employer unlawfully discharged striker because he did not intentionally strike car)

Finally, the Judge not only ignored critical, undisputed evidence, she also created other evidence to support her conclusions. That can be the only explanation for the Judge's astounding conclusion (JD 19:10-13, 19:20-21, 20:12-13, 20:24-25) that Blanchard damaged the Tahoe's windshield with his picket sign. Although it is undisputed that at some point in time the Tahoe's windshield was badly cracked, there is not one scintilla of record evidence that Blanchard was responsible for damaging the Tahoe's windshield, either with his picket sign or through some other means.

Review of the video evidence does not show Blanchard damaging the windshield at any point, and the Judge does not point to any evidence revealing that Blanchard damaged the windshield. Significantly, Respondent's own officials even conceded that they did not know who or what caused the windshield damage.<sup>14</sup> Even more significantly, Respondent official Mendenhall, whose testimony the Judge credited, testified (Tr. 193:20 – 194:5) that the occupants of the Tahoe told him that a bottle – not a picket sign – damaged the windshield, though they did not know who threw it. Despite this complete absence of evidence showing that Blanchard damaged the windshield, the Judge somehow concludes that Blanchard is the one responsible for cracking the windshield!

In sum, the Judge's conclusion regarding Blanchard's conduct towards the Tahoe is based on her total misreading of undisputed evidence. It must be reversed.

**b. Blanchard's Solitary Kick of the Delta Fire Truck, Which Was Provoked and Did Not Cause Damage, Was Not Serious Misconduct Warranting Discharge**

Although she never concluded that it had caused any damage, the Judge further found (JD 19:28-30) that Blanchard's solitary kick of the Delta Fire truck "for no legitimate reason" was sufficient to warrant denial of Blanchard's reinstatement. In finding that Blanchard did not have any reason to kick the truck, the Judge specifically found (JD 5:24-27; 14:12-15) that the video evidence (RX 19) did not support Blanchard's contention that the driver had provoked him by blaring his horn and taunting him and the other picketers. Once again, however, the Judge totally ignored un rebutted evidence in reaching her erroneous conclusion.

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<sup>14</sup> The Judge acknowledges (JD 13:25-27) in her factual findings that Respondent's security manager had concluded after an investigation that he could not determine how or by whom the windshield had been damaged.

Blanchard consistently testified that, seconds before his solitary kick, the Delta Truck driver blared his horn and yelled at Blanchard and the other picketers while he was stopped. Blanchard further explained that the horn blaring and taunting occurred in the immediate seconds before the scene captured on the short video clip that Respondent offered into evidence. Blanchard's testimony was not contradicted by any witness or other evidence offered. Thus, Blanchard fully explained that his minor kick was provoked and the reason why the provocation was not captured on that particular video clip. The Judge's failure to consider, let alone even discuss, that *unrebutted* testimony borders on dereliction of duty.

The Judge also failed to consider Respondent's admission that one of its decision makers did not consider the solitary kick serious misconduct warranting discharge. Matt Gaston, Respondent's Labor Relations Manager who was a member of the decision-making process that led to Blanchard's discharge, acknowledged that Respondent would not have discharged Blanchard solely for kicking the Delta Fire Truck. Respondent's assessment defeats the second prong of the burden-shifting analysis, since it admits that it did not have an honest belief that Blanchard, by this act, had committed serious strike misconduct warranting his discharge. Further, even assuming that Respondent had an honest belief, Gaston's admission is clearly relevant to the GC's burden to show that the striker's conduct was not sufficiently egregious to warrant discipline or discharge. Indeed, the GC submits that Respondent's concession strongly supports its argument that Blanchard's solitary kick with a rubbery tennis shoe was not serious misconduct that disqualified him from the Act's concessions, particularly in light of the fact, as discussed above, that Blanchard did not engage in any misconduct with respect to the Tahoe. *See Cornell Iron Works*, 296 NLRB 614, 614-615 (1989) (where evidence was insufficient to establish that picketer was engaged in misconduct for one of two incidents for which he was discharged, and employer official who participated in the decision to discharge conceded that he did not know if the employer would have discharged the striker for the second incident alone, discharge violates the Act and striker is entitled to reinstatement with backpay). Yet, once again, the Judge neither considers Respondent's admission nor even mentions it in her decision. She simply concludes (JD 19:27-30) that, in her view, kicking a truck alone is sufficient to warrant denial of reinstatement.

2. **The Evidence Establishes that Bouchard, Elben, and Froberg Did Not Engage in Conduct Sufficient to Justify Their Termination**

As a threshold matter, the record evidence is clear that hundreds of vehicles, large and small – in fact, every single passing vehicle on September 4 and on every other day of the 8-day strike, with the sole exception of the Gardner Trucking truck involved in this incident – had no issue exiting the Mill past picketers located in Bouchard, Elben, and Froberg's exact position. Further, the picketers' location throughout the 8-day strike, including during this incident, which was not in dispute, is easily discerned through viewing the extensive video evidence in the record, and was testified to thoroughly and un-controversially by every relevant witness: the picketers remained, at all times throughout the incident, outside the fog lines of the road, in the demarcated right-of-way where pedestrians and bikes are meant to traverse. Contrary to these facts, however, the Judge adopts Respondent's witnesses' dramatic language as her own, concluding that by standing in a pedestrian right-of-way outside of the fog lines of the road, these three picketers somehow created a traffic "choke hold" (JD 9:30) warranting their discharge.

Although there is absolutely no record evidence that these picketers ever crossed into the road during the 20-minute incident with the Gardner truck, even with a fingertip, even for a split second, the Judge goes so far in her decision as to conjure and repeat *five times* a non-existent factual finding that the pedestrian right-of-way area where picketers located themselves outside the main Mill exit gate throughout the 8-day strike – the location in question where Bouchard and Froberg stood as the Gardner truck began its left turn onto the county road, Fibre Way – was "*in the middle of Fibre Way.*" (JD 4:24, 9:29, 9 n.31, 11:12, 12:39, 21:18). This is not only factually inaccurate, but also irresponsible, as she has obfuscated one of the most threshold, undisputed, and important facts about the incident: that Bouchard, Elben, and Froberg remained, throughout the 20-minute event, nearly unmoving in their position well within the area established for pedestrian traffic, never having crossed into the lane of traffic for even a moment.

In her decision, the Judge also completely ignores the un-rebutted testimony of not just picketers Elben and Froberg, but also of Union President Gallow, that Cowlitz County police had confirmed with each of the three men directly prior to the September 4 incident that the location at issue *was* an appropriate location for picketing, and even specifically that it was a right-of-way for *pedestrians*, *not* vehicle traffic. She compounds this error with a further unsupported finding to the direct *contrary* of that un-rebutted fact, concluding "Because it was a public right-of-way,

trucks also had a right to use the public right-of-way.” (JD 12 n.42). The Judge then seeks to insulate her findings by cloaking these “findings” in credibility language, essentially discrediting the picketers as “evasive and/or non-responsive when asked whether the Gardner truck also had a right to use the public right-of-way to turn.” (JD 12:25-26). Such “evasion” on the part of the witnesses was unsurprising, given that the county police and the preceding seven days of strike activity had dictated the direct opposite.

The Judge similarly glosses over the palpable hesitation by the Sheriff’s deputies responding to the 911 call(s) placed on September 4 to suggest one way or another whether they felt the picketers were in fact blocking traffic by standing, where they were, in the pedestrian right-of-way. The video of the incident with audio reveals that the deputies engaged in a prolonged conversation with picket captain Eckersley and the picketers at the scene, during which, as discussed earlier, they made multiple hesitating, circular, hypothetical statements about their understanding of the applicable criminal law, being careful to *never* render a conclusion about the situation at hand or direct the picketers to take any action. (See, e.g., RX 27; audio transcript of RX 27 at JX 1).

Even more problematic, however, are the Judge’s manufactured findings regarding this incident despite having reached the opposite (and correct) conclusion just pages earlier in the decision: that the picketers moved aside immediately once they were actually asked by a Sheriff’s deputy, as a favor to him, to do so after being pressed by the impatient Gardner Trucking supervisor Mast.<sup>15</sup> (JD 13:1-4). First, she finds that “even after the Sheriff’s deputy told the[ picketers] and the Union they could not stand in the public right-of-way and block a vehicle, they *refused to move* to allow the Gardner truck to pass” (JD 21:11-13). Just lines later, she suggests that the deputy then “*admonished* the men” over this refusal. (JD 21:19-20). Neither of these factual conclusions find support *anywhere* in the record.<sup>16</sup>

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<sup>15</sup> Despite the fact that Mast had been hired on by Respondent as a Transportation Specialist by the time of the hearing, the Judge astonishingly concludes that, because Mast was not yet an employee of Respondent at the time of the September 4 incident about which she testified, her testimony at the hearing regarding the incident “lacked bias or prejudice.” (JD 11:24-25).

<sup>16</sup> Of her four total short paragraphs of substantive analysis regarding this “blocking” incident, the Judge uses an entire one to rebut an imaginary GC argument that the responding Sheriff’s deputies had in fact been speaking to the picketers about blocking a *different* vehicle, not the Gardner Trucking vehicle stopped immediately next to them. (JD 21:15-20). The Judge points to the GC’s emphasis on the fact that the responding deputies had made hypothetical statements about “not blocking vehicles” rather than conclusionary statements that the men were blocking “that” (Gardner Trucking) vehicle as evidence that the GC made such a “patently ridiculous” argument. (JD 21:15-20). Respectfully, the Judge is very confused.

There is no dispute that the only vehicle that had any trouble navigating around Bouchard, Elben, and Froberg in their location outside the main exit gate was the Gardner Trucking vehicle. There is no evidence, and the GC has never suggested, that the

In addition to deeming the September 4 incident a "stand-off," the Judge also fails to mention Respondent's role in creating it, including that it had a readily available chip gate through which it could (and afterwards, did) direct traffic during the strike, if necessary. She also fails to discuss how Respondent had placed "traffic candles" in the main exit lane that appeared to direct traffic to the left of the lane, such that larger trucks were forced to take a narrower turn around the picketers located at this corner. Similarly, she fails to address how a contractor's truck that regularly services Respondent's Mill could not make a turn out of the Mill's main exit gate and onto Fibre Way, a major county road, without crossing into the pedestrian right-of-way where the picketers were standing on September 4 (and throughout the 8-day strike) when every single other truck servicing the Mill throughout those eight days had been able to handle this turn without nearly hitting the picketers constantly posted at that corner, and the objective video evidence shows that an equally large Hapag-Lloyd truck exited around the picketers in that location with no issue just moments after the Gardner truck incident.

**E. The Judge Made Several Improper Evidentiary Rulings, Considered Irrelevant Factors that Prejudiced the General Counsel's Case, and Did Not Engage in the Proper Analysis**

**1. As the Video Evidence Fully and Accurately Depicted Blanchard's Conduct During the Tahoe Incident, the Judge Improperly Made Unnecessary Credibility Resolutions**

Although the Judge declares (JD 6:3-4) that what occurred regarding the Tahoe incident involving Blanchard "turns on an evaluation of credibility," she is patently wrong. It is undisputed that video evidence (RX 5) fully and completely depicts the incident both visually and aurally a few feet from Blanchard and the other picketers that the Tahoe encountered at the contractors' exit. It fully captures the event from the moment that the Tahoe approaches the picketers until it speeds away. While witness testimony was certainly necessary to identify who the individuals are or what an object is that is depicted in the video, the conduct itself is fully depicted. As such, that video evidence is *the best evidence* of Blanchard's conduct that the Judge is supposed to be evaluating. *See Culinary Workers*

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officers ever responded to any other alleged "blocking" incident involving these three men during the 8-day strike, nor ever told the men they were blocking any vehicle, let alone one other than the Gardner Trucking vehicle. The simple point is that, throughout their response to this sole incident, the deputies were very careful never to suggest that they felt the men were in fact blocking the Gardner Trucking truck's exit from the Mill or to require that they change their conduct, choosing instead to speak in hypotheticals.

*Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 159-160 (1997) (videotape with sound recording of confrontation between Lemley and Curtis is best record evidence of Curtis incident despite testimony regarding that incident).

Although the Judge attempts to create a credibility dispute between Blanchard, who was in the middle of the confrontation, and Respondent witness John Mendenhall, who was 100 to 150 feet away from the exit (Tr. 182:3-5), none exists regarding the conduct captured by the video. The Judge can view and hear what Blanchard and the other picketers did, what the Tahoe did,<sup>17</sup> and the other events as they unfolded on the video, as can the reader of the record. Moreover, contrary to the Judge's additional alleged credibility findings (JD 7:25-40), there was no need to resolve an alleged dispute concerning Blanchard's intentions or the number of times that his picket sign inadvertently hit the hood of the Tahoe, because those matters are irrelevant, as discussed above. The Board should focus on the video evidence (RX 5) as the best evidence to evaluate Blanchard's conduct regarding the Tahoe.

**2. The Judge's Reliance on Other Picketers' Actions to Find Blanchard's Conduct Unlawful Was Irrelevant and in Violation of the Judge's Own Evidentiary Ruling Precluding the Admissibility of Such Evidence**

The Judge rejected Blanchard's explanation that he attempted to jump on the hood of the moving Tahoe to avoid being dragged under its wheels. Rather, in the Judge's view, she concluded that Blanchard's intention<sup>18</sup> was to "swarm" the Tahoe and block its egress. To support that conclusion, the Judge relied (JD 7:28-30) on Mendenhall's testimony that other picketers blocked and "swarmed" other vehicles during the strike. The Judge's reliance on such testimony was improper.

First, whether other picketers allegedly "swarmed" or blocked vehicles at other times during the strike is simply irrelevant to evaluating whether Blanchard's specific conduct towards the Tahoe was unlawful. Second, the Judge's reliance on other picketers' actions during the strike completely undermines her March 3 Order (Tr. 502:19 – 506:25; 526:5 – 528:21) that she would prohibit such testimony and would not consider any testimony about the conduct of any picketers other than the four discriminatees at issue. The Judge issued her Order in response to the GC's questions that sought to demonstrate that other strike conduct testified to by Mendenhall and Smith did not

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<sup>17</sup> As noted above, however, the Judge failed to note the most critical moment of the video evidence depicting the moving Tahoe striking Blanchard as he lawfully patrolled on the public side of the red line.

<sup>18</sup> Again, Blanchard's intention underlying his conduct is totally irrelevant under the *Clear Pine Mouldings* standard.

occur, was based on hearsay, or was not unlawful. When the Judge cut off the questioning and issued her Order, the GC had every right to expect that the Judge would follow her own Order with respect to both sides. By issuing findings based on testimony that the GC was not allowed to respond to and that directly undermines her Order, however, the Judge significantly prejudices the GC in the presentation of its case.

**3. As the Video Evidence Fully and Accurately Depicted Bouchard, Elben, and Froberg's Conduct During the Gardner Truck Incident, the Judge Improperly Made Unnecessary Credibility Resolutions**

Similar to the video evidence involving the Tahoe incident, the extensive video evidence of the September 4 incident involving the Gardner Trucking truck (RX 27; audio transcript of RX 27 at JX 1; RX 30) fully and completely depicts the situation both visually and aurally, from the moment that the truck began its left turn onto Fibre Way to minutes after it pulled away and Bouchard and Elben resumed their positions in the pedestrian right-of-way. The several videos in the record were the *best evidence* of Bouchard, Elben, and Froberg's conduct that the Judge was supposed to be evaluating. *See Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 159-160 (1997) (videotape with sound recording of confrontation between Lemley and Curtis is best record evidence of Curtis incident despite testimony regarding that incident).

Despite that one of the videos with audio (RX 27, audio transcript at JX 1) makes quite clear that the responding deputies went to great pains to avoid directing the picketers that they were blocking traffic while standing in a pedestrian right-of-way, the Judge repeatedly makes conflicting factual conclusions – and even discredits the testimony of the picketers based on their refusal on the witness stand to agree with her erroneous conclusions. Similarly, despite that the video evidence shows an equally-long Hapag-Lloyd truck<sup>19</sup> exiting around Bouchard and Elben after they'd resumed their positions in the pedestrian right-of-way, just moments after the Gardner Trucking truck pulled away (RX 13, 30), the Judge finds it important to note that Bouchard, Elben, and Froberg were “evasive and non-responsive in their answers” on cross-examination when asked about the undisputed fact that all other vehicles, big and small, had been able to successfully navigate around them. (JD 12:10-16). Again, the Judge's

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<sup>19</sup> Specifically, compare RX 13 at 19:17 second mark (length of Gardner Trucking truck) to RX 13 at 29:53 second mark (length of Hapag-Lloyd truck).

creation of a credibility cloak in order to avoid objective, reliable evidence discernible from video evidence must be reversed.

**4. The Judge's Determination that Bouchard, Elben, and/or Froberg Refused a Direction to Move by the Responding Sheriff's Deputies, In Addition to Being Refuted by the Objective Video Evidence, Was Also Completely Irrelevant**

Further, the Judge's heavy reliance on her (erroneous) factual conclusions regarding the Sheriff's deputies' interactions with these picketers was misplaced. Even had the deputies explicitly concluded that the picketers *were* blocking traffic or gone so far as to arrest them, the conclusions of the responding Cowlitz County Sheriff's deputies regarding applicable local or state criminal codes are not relevant to the determination whether the picketers' discharges were unlawful. Law enforcement personnel have no authority to determine whether Bouchard, Elben, and Froberg were engaged in conduct protected by § 7 of the Act. The Board does. In fact, the Board has determined on several occasions that an employer violates § 8(a)(1) when it summons police and the police arrest individuals who refuse police directives to cease their activities that are, in fact, protected by the Act. *See, e.g., Fred Meyer Stores*, 362 NLRB No. 82 (2015); *Wild Oats Comm. Markets*, 338 NLRB 179 (2001); *Giant Food Stores*, 295 NLRB 330, 332-33 (1989). The Judge's unwarranted focus on the deputies' interactions with the picketers was misplaced and contributed to her erroneous conclusion that the picketers' conduct was not protected.

**5. The Judge's References to Smith's Conclusions Regarding the Strikers' Alleged Criminal Conduct, and Her Taking Judicial Notice of State Criminal Statutes, Were Completely Irrelevant and Bordered on the Frivolous**

The Judge referred on several occasions (JD 14:24-25, 14:29-30, 16:19-21) to the legal opinions of Respondent's Security Manager Smith: that Blanchard's conduct constituted criminal mischief and disorderly conduct and that the conduct of Bouchard, Elben, and Froberg constituted criminal disorderly conduct. The Judge also took judicial notice (JD 14 n.51, n.53) of two Washington State statutes defining the purportedly relevant criminal conduct. The Judge's discussion of these alleged crimes was improper on multiple levels.

First, whether the discriminatees' conduct constituted criminal conduct in violation of Washington State law is totally irrelevant. The question presented to the judge was whether Respondent's discharge of and failure to reinstate the four discriminatees violated the Act. It has *nothing whatsoever* to do with whether any Washington State statute was violated. Second, the Judge has no authority or expertise to decide whether state-level criminal

violations occurred. In the absence of such expertise and authority, the Judge's discussion detracts from the proper evaluation of the conduct she should have engaged in and prejudices the discriminatees. In fact, in a telling omission, the Judge failed to note in her decision that, while *none* of the four discriminatees were cited for any criminal conduct, the driver of the Tahoe who ran over Blanchard was! Third, the Judge's reliance on the criminal law opinions of Smith, an agent of Respondent, was pointless and improper because he was not called as an expert witness and could not be reasonably expected to be an impartial arbiter of the application of Washington State criminal law in this situation. Smith (like the Sheriff's deputies and Respondent's other decision makers) is not an expert in Board law and there is no record evidence that the picketers' § 7 rights even crossed his mind when he baldly asserted that the four discriminatees had engaged in criminal conduct. Considering the undisputed fact that none of the employees were warned, let alone cited, by the responding deputies for any crime, the fact that the Judge would rely in any way on the wholly irrelevant and self-serving criminal law analysis of a lay witness who is an agent of Respondent is simply irresponsible.

**6. The Judge's Determination that Bouchard, Elben, and/or Froberg Had Refused an Initial Direction to Move by an Agent of Respondent Was Completely Irrelevant**

The Judge erred in reaching, let alone giving any weight to, any factual conclusion that an agent of Respondent had previously asked Bouchard, Elben, and/or Froberg to move. Even assuming that Bouchard, Elben, and/or Froberg had refused a direction from Respondent's Main Gate Operator Darren Harger ("Harger") to move before the officers arrived, as the Judge found (JD 10:8-14), the mere fact that an agent of Respondent might have asked the picketers to move from their lawful picketing position would be no more relevant than had an agent of Respondent asked them to refrain from picketing or participating in the strike at all. Just as neither a Sheriff's deputy nor a Paper Mill Security Manager is an authority on Board law, neither is a Gate Operator, especially one whose role is to protect Respondent's interests, not the § 7 rights of the striking employees.

**7. The Judge's Reliance on Hearsay Evidence to Find Bouchard, Elben, and Froberg's Conduct Unlawful Was Improper**

In her four-paragraph analysis of the September 4 "blocking" incident involving Bouchard, Elben, and Froberg, the Judge improperly suggests that these picketers' conduct "had the effect of intimidating/discouraging other employees and contractors from coming to the Mill during the strike," suggesting that "[t]he record shows that

several employees and contractors were afraid to cross the picket line.” (JD 21:4-7). In support of this conclusion, the Judge cites only the clear hearsay testimony of Respondent’s agent Mast, that “several of the Gardner truck drivers told her they were afraid to exit the Mill during the strike because they were fearful of their safety and/or that they would encounter a similar blocking situation by the Union.” (JD 11:4-6). The Judge cites no other record evidence in support of this point, since there is none. In fact, the strike ended *on* the date of this incident, September 4. It is unbelievable that within the few short hours before the strike ended, “several” drivers relayed to Mast their “fear” that they would encounter a similar situation. The Judge’s determination to explicitly cite and credit this facially ridiculous hearsay testimony by an agent of Respondent was improper and erroneous.

**8. The Judge’s Reliance on Affirmative Responses by Respondent’s Witnesses to Blatant and Repeated Leading Questioning by Respondent’s Counsel, Over the Repeated and Standing Objections of the General Counsel, Was Improper**

Despite the GC’s repeated objections to Respondent’s counsel’s use of explicitly leading questions in eliciting non-background information from his witnesses, Respondent’s counsel continued to lead his friendly witnesses consistently throughout the hearing. For significant chunks of key factual “testimony,” Respondent’s counsel asked his own witnesses detailed leading question after question, breaking only to allow the witness to indicate a brief “Yes” or “Correct” in response to counsel’s assertions. (*See, e.g.*, Tr. 228-230, 234-236, 314-316, 325-326, 346-352, 942-943, 950-951, 956-959, 987-997, 1014-1018, 1046, 1062, 1083-1091, 1117-1123). This type of leading questioning by Respondent’s counsel was utterly pervasive throughout the hearing, despite the repeated and standing (Tr. 167:12-20) objections of the GC. (Tr. 151:7 - 152:4, 166:16-25, 167:7 – 168:20, 169:16-25, 213:19 – 214:7, 956:7-16, 995:10-14, 1046:12-22, 1084:5-17, 1089:11-19, 1118:13-17, 1123:6-13). Thus, for much of Respondent’s case, it was the attorney “testifying,” not the witness.

It is acknowledged that prompting a friendly witness through leading questions impairs the probative value of the witness’s testimony. *National Labor Relations Board Division of Judges Bench Book*, § 16-611.4 (2010). However, despite the inherently incredible nature of this testimony, the Judge often relied on Respondent’s witnesses’ simple “yes” answers as substantive evidence, even crediting this “testimony” over the detailed and unprompted testimony of the picketers themselves, and sometimes even over the objective video evidence – the best evidence of the events at issue. For example, although the Judge on several occasions cites the conclusions of

Respondent's witness Smith that the picketers had engaged in criminal activities, much of Smith's testimony on this point, in fact, consisted of him responding with one word – "Correct" – to three blatant leading questions in a row. (Tr. 326 1-11). Similarly, much of the hearsay testimony of Respondent's agent Mast credited by the Judge – that other Gardner drivers were fearful they might run into a similar blocking situation after the incident with Bouchard, Elben, and Froberg – was simply a series of "Yes"es and "Absolutely"s from Mast in response to counsel's leading questions. (Tr. 958:6-22).

In addition to crediting the specific fruits of Respondent's counsel's leading questioning, the Judge also generally credits Respondent's witnesses, whose testimony was aided in large part by counsel's consistent use of blatant leading questions. The Judge's decision to credit the testimony of these witnesses over *any* other record evidence, let alone the testimony of unprompted witnesses, was entirely improper.

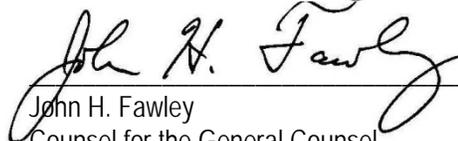
### III. CONCLUSION

Based on the record as a whole and for the foregoing reasons, particularly the Judge's many erroneous factual findings and misapplications of established Board precedent, the GC respectfully requests that the Board grant the GC's exceptions, reverse the Judge's decision in its entirety, find that Respondent violated the Act as alleged, and issue an order directing Respondent to reinstate the four terminated employees with backpay.

**DATED** at Seattle, Washington, this 5th day of January, 2017.

Respectfully submitted,

  
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