

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KAPSTONE PAPER AND PACKAGING
CORPORATION

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

And

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

**CHARGING PARTY'S ANSWERING BRIEF TO GENERAL COUNSEL'S
EXCEPTIONS**

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I. INTRODUCTION

The instant charges arose from employer Kapstone Paper and Packaging, Inc.’s (hereafter, “Respondent’s”) discharge of four employees, Melvin Elben, James Froberg, Jon Bouchard, and Steve Blanchard, for their picket line activities during a strike called by their union, the Association of Western Pulp and Paper Workers, Local 153 (hereafter, “Charging Party”). Following a five-day hearing by the parties’, Administrative Law Judge (“ALJ”) Lisa D. Thompson was called upon to determine whether the Respondent’s termination of the four strikers violated Sections 8(a)(3) and 8(a)(1) of the Act. The ALJ’s November 17, 2016 decision, dismissing the complaint, demonstrates a shocking disregard for the Board’s well-established burden-shifting framework for assessing alleged picket line misconduct and shows a marked disdain for employees’ Section 7 rights. In place of an objective, evidence-based decision that gives due consideration to the Board’s case law under *Clear Pine Mouldings*, the decision distorts the facts at bar¹, substitutes analysis based on the Act for a skewed consideration of state criminal law², and ignores established Board doctrines in favor of other factors the Board has expressly deemed insignificant.³ *See, Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), *enf’d*, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986). For these reasons, the Charging Party joins Counsel for the General Counsel in their request that the Board grant the General Counsel’s January 5, 2017 exceptions in full and reverse the ALJ’s decision.

¹ *See generally*, General Counsel Exceptions Brief at 18-22 (outlining distortions in ALJ’s factual findings not supported by the record).

² *See*, Section III.C below.

³ *See*, Sections III.B and III.D below.

II. STATEMENT OF FACTS

The Charging Party incorporates and generally refers the Board to Counsel for the General Counsel's Statement of Facts, which aptly summarizes the relevant evidence. *See*, General Counsel Exceptions Brief at 1-17.

III. ARGUMENT AND AUTHORITY

A. The Board Applies A Three-Part Burden Shifting Test To Determine Whether Strikers' Discharge Constitutes Unlawful Discrimination In Violation Of Section 8(a)(3).

The Board uses a tried and true framework for assessing whether an employer's discharge of employees stemming from their Section 7 picket line conduct violates Section 8(a)(3) of the Act. First, the General Counsel must prove that the discharged employees were strikers and that the employer discharged them for conduct associated with the strike. *See e.g.*, *Laredo Coca-Cola Bottling Co.*, 258 NLRB 491, 496 (1981). If satisfied, the burden shifts and the employer must then prove that it had an honest belief that the employees were engaged in the conduct for which they were terminated. *Universal Truss*, 348 NLRB 733, 734 (2006) (citing *Gem Urethane Corp.*, 284 NLRB 1349, 1352 (1987)). Finally, to prove unlawful discrimination, the burden shifts back to the General Counsel, who must either prove that the employees did not engage in the acts for which they were terminated or that the conduct was not sufficiently serious misconduct to lose the protection of the Act and to warrant discharge. *Universal Truss*, 348 NLRB at 734.

If the striking employees' conduct is not disputed, the key determination of this third phase of analysis is whether such conduct was egregious – i.e., whether it would “reasonably tend to coerce or intimidate [other] employees in the exercise of rights protected under the Act.” *Clear Pine Mouldings*, 268 NLRB at 1046. The inquiry is an objective one which does not

depend on either the strikers' intent when engaging in the alleged misconduct or the subjective reactions of individual nonstrikers.⁴ *See, Universal Truss*, 348 at 734 (citing cases).

B. The Four Discharged Kapstone Employees' Picket Line Actions Were Well Within The Bounds Of The Act's Protection.

Employees are empowered by Section 7 of the Act to “peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Clear Pine*, 268 NLRB at 1046. This includes patrolling with picket signs at an appropriate picket site during a labor dispute. *Id.* at 1047; *Hotel Roanoke*, 293 NLRB 182, 217 (1989).

The Board's precedent provides wide latitude to employees on the picket line. For instance, it is well understood that during a strike, “[t]empers are high, and there are few things that excite pickets more than to see strikebreakers going through their picket line.” *International Ass'n of Machinists Lodge No. 1233*, 284 NLRB 1101, 1106 (1987); *cf. NMC Finishing v. NLRB*, 101 F.3d 528, 532 (8th Cir. 1996) (the Act permits “rough and tumble” economic activity). Thus, not every passionate act on the picket line that is subsequently dubbed misconduct by an employer presents a lawful basis for discharge. *Clear Pine*, 268 NLRB at 1045; *Avery Heights*, 343 NLRB 1301, 1322 (2004) (“not every impropriety committed during a strike deprives an employee of the Act's protection”). Only that conduct which reasonably tends to coerce or intimidate other employees in their exercise of their own rights under the Act is sufficiently serious to exceed the bounds of the Act's protection and merit termination. *Clear Pine*, 268 NLRB at 1046. The hallmarks of unprotected conduct under the *Clear Pine* standard

⁴ The ALJ blatantly and repeatedly erred by disregarding this Board mandate. *See*, ALJ Decision at 18-19 (stating no less than three times in her analysis of Blanchard's actions' legality under the Act that she found that Blanchard intended to instill fear; relying on finding that nonstrikers subjectively feared returning to mill), 20-21 (basing ruling that Froberg, Elben, and Bouchard's stationary picketing was unprotected on findings that “[t]heir conduct was clearly intended to... intimidate” nonstriker and that this peaceful act “had the effect of intimidating/discouraging” non-strikers).

have included unprovoked violence, clear threats of violence, and substantial property damage. *Illinois Tel. Co.*, 360 NLRB 1284, 1295-96 (2014) (ALJ, upheld by Board, observing that, “The instances in which the Board has found that strikers have forfeited the protection of the Act in almost all cases involve violent acts or threats of violent acts”), *enfd. in rel. part*, 837 F.3d 1 (D.C. Cir. 2016); *Briar Crest Nursing Home*, 333 NLRB 935, 947 (2001) (decrying “threats of bodily injury or property damage”); *Siemens Energy & Automation*, 328 NLRB 1175 (1999) (company’s payment of \$1200 to repair damage to its customers, suppliers’, and employees’ vehicles due to strikers’ acts warranted serious misconduct finding).

It is undisputed that strikers James Froberg, Melvin Elben, and Jon Bouchard were discharged by the Respondent for picket line activity which was strictly peaceful. In short, the three picketed within a public right of way (Tr. 105:2-5; Tr. 586:9-12; Tr. 591:5-25; Tr. 666:12-25; Tr. 668:15-670:16; Tr. 842:22- 843:4), and when a contractor’s single truck cut a corner too sharply, leaving the driving lane of the road (Tr. 1008:11-17; Tr. 1084:17-20, 1104:11-19), and could not navigate around the men, they hesitated to move from their positions until asked to by a sheriff’s deputy (at which point they voluntarily complied) (Tr. 115:8-10; Tr. 607:23-608:2; Tr. 683:7-11; Joint Ex. 1; Respondent Ex. 13, 27, 48). This single truck was stopped for about 20 minutes.⁵ Tr. 100:6-18; Tr. 868:22-25. This does not constitute “serious misconduct.”

The Board has frequently held that strikers’ imposition of a temporary inconvenience to drivers in a roadway is insufficiently serious to lose the Act’s protection. *See, Illinois Consolidated Tel. Co.*, 360 NLRB 1295 (2014); *Hotel Roanoke*, 293 NLRB 182, 217 (1989) (even if strikers had obstructed traffic this would not be serious misconduct as “disruption of ingress and egress of vehicles... is the type of thing to be expected [in a strike]”); *Consolidated*

⁵ The record also demonstrated that the trucker driving the allegedly obstructed tractor-trailer refused to back up and attempt to make the turn correctly, even though nothing physically obstructed her from doing so. Tr. 600:14-601:1; Tr. 678:6-9; 863:8-17; Tr. 1006:19-1007:7.

Supply Co., Inc., 192 NLRB 982, 989 (1971) (calling temporary obstruction “trivial”). The Board has particularly found this conduct insufficient where, as here, it is the sole act of alleged picket line misconduct in which employees engaged. *California Acrylic Industries Inc., d/b/a Cal Spas*, 322 NLRB 41, 62 (1996) (one isolated incident of peacefully impeding replacement workers’ access to facility insufficient grounds for denying reinstatement). Thus, the ALJ’s summary decision that Froberg, Elben, and Bouchard’s peaceful picketing in the right of way constituted “inherently coercive and intimidating, and therefore, unprotected” misconduct is entirely at odds with established Board precedent. ALJ Decision at 21:25-26.

Further, the ALJ’s decision that striking employee Steve Blanchard engaged in “sufficiently egregious (and coercive)” conduct to lawfully merit termination under *Clear Pine* was also in error. ALJ Decision at 20:28-29. The record demonstrates that Mr. Blanchard was discharged for his sole act of kicking at a non-striker’s SUV with a sneaker as it passed and for an incident in which **a reckless replacement worker drove his SUV into him while he was picketing -- prompting Blanchard to** hit the SUV with his sign defensively. Respondent Ex. 25. No damage was caused by Blanchard in either incident; indeed, Blanchard *himself* was the only person to suffer injury from these incidents, as his head, shoulder, and elbow injuries from being thrown from the hood of the striking SUV required a hospital visit.⁶ Tr. 826:10-14; Tr. 781:4-24.

In her decision, the ALJ repeatedly took issue with the manner in which Mr. Blanchard and his fellow union brothers and sisters were patrolling at the time the Chevy Tahoe approached the picket line, dubbing it “swarming.” ALJ Decision at 6:14-16, 6:28, 7:27, 8:4. Without

⁶ The ALJ’s incredible finding that Mr. Blanchard broke the Chevy Tahoe SUV’s windshield is not supported by any piece of evidence in the case. To the contrary, the Respondent’s own witness, Procurement Manager John Mendenhall, attested that he was informed it had been a bottle, not a picket sign, that damaged the windshield. Tr. 193:20 – 194:5. The Respondent was ultimately unable to conclude through investigation how the windshield had become cracked. Tr. 81:2-19.

citation to authority, she found such conduct “unprotected” by the Act. ALJ Decision at 19:39-41. It is not; nothing in the record distinguishes the actions in which Mr. Blanchard and the other strikers were engaged from the lawful patrolling which is at the heart of the Act’s Section 7 protection. *See Clear Pine Mouldings*, 268 NLRB at 1047.

Further, the ALJ’s holding that Mr. Blanchard’s hitting of the Tahoe with his picket sign constituted serious misconduct is not supported by Board precedent. *See. e.g., Medite of New Mexico, Inc.*, 314 NLRB 1145, 1146 (1994), *enfd.* 72 F.3d 780 (10th Cir. 1995) (striking foreman’s vehicle with picket signs, which did not cause damage, was insufficient misconduct to warrant termination). The ALJ’s myopic ruling as to Mr. Blanchard’s conduct also entirely overlooked the fact that Mr. Blanchard **was being struck by an SUV** when he hit it with his picket sign, as video evidence plainly demonstrated. Respondent Ex. 5 at 00:12-15. The Board recognizes that employees may engage in self-defense activities, particularly if reflexive, and that this does not constitute unprotected misconduct. *See e.g., 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). This is exactly what the video evidence, along with Mr. Blanchard’s testimony, prove was occurring. Respondent Ex. 5 at 00:12-15; Tr. 767:25-766:18.

Finally, Blanchard’s lone kick at a passing contractor truck’s rear quarter panel, which caused a sneakered footprint but was not proven to cause any denting or damage (nor even investigated for damage by the Respondent), is insufficiently serious to lose the Act’s protection.⁷ Tr. 66:21-67:11, 442:2-13, 1112:3-18. *Compare with, Siemens Energy &*

⁷ The admission of the Respondent’s co-decisionmaker, Matthew Gaston, that the Respondent would not have discharged Mr. Blanchard for this kick alone defeats any argument by the Employer that it had an honest belief Mr. Blanchard’s act was serious strike misconduct warranting discharge. Tr. 436:10-12, 443:18-22; *Universal Truss*, 348 NLRB at 734.

Automation, 328 NLRB 1175 (1999) (where employee kicked car and threw roofing tacks into the roadway by picket line, causing \$1,200 in damage to vehicles, his conduct lost Act's protection).

C. The ALJ's Reliance On Washington Criminal Law And The Strikers' Purported Violation Of A State Court Order Are Misplaced.

In her decision, the ALJ gave weight to the Respondent's evidence and argument that the four discharged strikers violated Washington law and a state court Temporary Restraining Order. In her factual findings as to Blanchard, the ALJ found that the Respondent's discharge of Blanchard was due to his "criminal mischief" and "disorderly conduct." ALJ Decision at 14:24-30, 16:13-15. With respect to Elben, Froberg, and Bouchard, the ALJ found that the Respondent discharged them for violating the TRO and for criminal disorderly conduct. ALJ Decision at 16:10-13, 16:19-21. These findings were based almost entirely upon the testimony of Respondent witness David Smith, Security Manager for the Respondent, and upon two Washington state criminal statutes, of which the ALJ took judicial notice. ALJ Decision at 13:8-13, 14: fn. 51, 53.

Based on these factual findings, the ALJ concluded that the strikers' conduct lost the protection of the Act. For example, when assessing whether Blanchard's actions were unprotected, the ALJ emphasized that Blanchard took his actions, "despite admitting that he was aware that [they] were prohibited by... the Cowlitz County Court's TRO." ALJ Decision at 20:1-3. When analyzing the legality of the other three strikers' conduct, the ALJ found their conduct "particularly egregious in that they were fully aware that... the Court's TRO prohibited" the actions. *Id.* at 21:9-13. At the conclusion of her analysis, the ALJ again tied the putative unlawfulness of the strikers' conduct under state law and her finding that "[t]he men knew that their conduct was prohibited" to her legal conclusion that the strikers' actions were "inherently

coercive and intimidating” under the Act. ALJ Decision at 21:22-26. There are numerous legal problems with this analysis.

First, the Board has held that consideration of state criminal law is not relevant to its determination of whether an employee’s conduct is protected by Section 7. *See e.g., Keco Indus.*, 301 NLRB 303, 304 (1991); *Catalytic, Inc.*, 275 NLRB 97, 98 fn. 13 (1985). For example, in *Kecos*, the Board rejected an argument that a state gun control law should inform its analysis of whether a striker’s alleged picketing misconduct – displaying a firearm near nonstrikers – warranted a denial of reinstatement. The Board held that the legality of the alleged discriminatee’s conduct under state law “is not dispositive of what are separate and distinct issues raised under the Act.” *Id.* at 304; *see also, Olympic Limousine Svc.*, 278 NLRB 932, 943 fn. 27 (1986) (describing the same as a “well settled” issue).

Next, even if relevant, the evidence does not support the ALJ’s finding that the strikers violated either the Cowlitz County Court’s TRO or Washington criminal law. Blanchard could not have violated the Court’s TRO, as it was not put in place until the day after the picket line conduct for which he was terminated. Tr. 40:23-25; Tr. 49:1-4; Tr. 80:2-12; Tr. 204:1-6; Tr. 751:19-23; General Counsel Ex. 2. Further, Washington courts maintain procedures for civil enforcement of their injunctive orders. Notably absent from the record is any evidence that the Respondent ever sought or received an order finding the Union or its members in contempt of the TRO. *See*, Tr. 378:1-3 (Smith admitting that he was unaware of any such contempt proceeding). Further, it is undisputed that none of the four strikers discharged here was ever arrested (or even threatened with arrest), charged, or convicted for any violation of Washington state law. Tr. 117:8-21; Tr. 193:10-12; 683:15-24; 870:12-14; Tr. 1071:7-9. These facts contradict the self-serving opinion testimony of Respondent’s security manager Smith, upon which the ALJ ought

not have relied. *Sam's Club v. NLRB*, 141 F.3d 653, 658 (6th Cir. 1998) (self-serving testimony from interested party insufficient to prove legal issues unless testimony is “reasonably deemed to be credible and trustworthy... **and is not undermined by evidence to the contrary**”) (emphasis added).

D. The ALJ Wholly Ignored Evidence That The Respondent Applied A Double Standard To Strikers' Conduct By Comparison To Replacement Workers'.

The Board has long held that employers may not apply a double standard in their treatment of strikers' conduct versus non-strikers' when making reinstatement decisions. *See, Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988) (employer may not “knowingly tolerate 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 reinstatement to jobs”). Evidence that demonstrates that an employer discharged strikers for misconduct but took less serious disciplinary action following equally or more serious misconduct from nonstrikers “establishes that [an employer] lacked good faith and acted discriminatorily,” in violation of Sections 8(a)(3) and 8(a)(1). *Champ Corp.*, 291 NLRB 803, 807 (1988); *Gibson Greetings, Inc.*, 310 NLRB 1286, 1291, 1312 (1993) (upholding ALJ finding that condoning nonstriker misconduct can transform a striker discharge “otherwise... privileged” into unlawful discrimination), *enfd.in relevant part*, 53 F.3d 395 (D.C. Cir. 1995).

For example, in *Champ Corp.*, the Board found an employer's discharge of strikers for nonviolently blocking a thoroughfare discriminatory, in light of the employer's condonation of nonstrikers' violent assaults on – and axe-swinging threats towards – strikers. *Champ Corp.*, 291 NLRB at 807. Likewise, in *Domsey Trading Corp.*, the Board deemed nonstrikers' attacks on strikers that resulted in the employees' hospitalization more serious misconduct than strikers' “noninjurious pushing and shoving” during their protected concerted action, and consequently,

found the employer's discharge of only the strikers discriminatory. *Domsey Trading Corp.*, 310 NLRB 777, 778 (1993), *enfd* 16 F.3d 517 (2nd Cir. 1994).

Here, the ALJ wholly failed to analyze evidence showing that the Respondent disregarded the misconduct of its non-striking contractor who – while driving with a suspended license and exiting the employer's property – failed to stop at a stop sign, accelerated **directly** into a crowd of patrolling picketers with a large SUV, struck striker Blanchard, throwing Blanchard's body to the side of the road, and drove away from the scene.⁸ Tr. 764:13-20; Tr. 765:12-766:18; Respondent Ex. 5. As to the contractor's misconduct, which resulted in injuries to, and a hospital visit for, Blanchard and a criminal citation for driving with a suspended license to the contractor, the ALJ stated merely that “none of [these facts or the Respondent's condonation thereof] are relevant to the Respondent's decision to discharge” striker Blanchard.⁹ Tr. 43:19-45:8; Tr. 781:4-24; General Counsel Ex. 4; ALJ Decision at 20:18-22. This finding is clearly in error. *Aztec Bus Lines*, 289 NLRB at 1027 (evidence of double standard shows discrimination); *see also*, Counsel for the General Counsel's Exceptions at ¶ 133.

Had the ALJ properly analyzed this aspect of the *Clear Pine Mouldings*, she would have found the Respondent's conduct unlawfully discriminatory. First, the evidence on record supports a finding that the Tahoe driver's actions, recklessly maneuvering his vehicle through a crowd of patrollers, striking and throwing one patroller to the ground, then speeding off, despite

⁸ In light of this doctrine, the ALJ's failure to accept evidence from the General Counsel regarding misconduct directed at picketers by other non-strikers during the strike, which was condoned by the Respondent, also constitutes error. *See*, Tr. 486:3-490:21 (Union President Kurt Gallow testifying that management merely shrugged shoulders at Union's reports of non-strikers endangering picketers on picket line by driving through at high rates of speed; testimony included incident wherein mill employee “came in[to picket line area] at a high rate of speed, glanced over [*sic*] the side of [a picketer], hit him, then flipped [picketers] off as he went by”); Tr. 505:24-506:2 (ALJ striking testimony and ruling that she would only allow evidence of the misconduct of “the four individuals at issue in the case”); *compare with*, *International Paper Co.*, 309 NLRB 31, 39 fn. 21 (1992) (“A one-to-one comparison between the conduct of strikers and non-strikers and [employer's] reaction thereto is appropriate”) (citation omitted).

⁹ Additionally, the ALJ failed to consider the seriousness of the Tahoe driver's misconduct by comparison to that of strikers Elben, Bouchard, and Froberg, who were discharged by the Respondent for peaceful picketing conduct. This equally constitutes error under *Aztec*, et al.

a mill rule prohibiting unsafe driving, constituted clear misconduct.¹⁰ See Respondent Ex. 5; Tr. 1098:24 – 1099:1; *compare with, Gibson Greetings*, 310 NLRB at 1291 (nonstriker merely driving “too fast” through a picket line was misconduct serious enough to warrant discrimination finding). Further, the contractor’s misconduct was easily more serious than the alleged misconduct of any of the discharged strikers, in that it was violent and caused actual injury to Mr. Blanchard that warranted a hospital visit. *Champ Corp.*, 291 NLRB at 807 (violence vs. nonviolence); *Domsey Trading Corp.*, 310 NLRB at 778 (noting infliction of injury with significance). Finally, it is undisputed that the Respondent knew of the Tahoe driver’s misconduct and permitted the contractor to continue working at the mill without imposing any discipline upon him. Tr. 65:14-18; Tr. 1129:1-1132:9. Thus, even if the ALJ’s determination that the discharged strikers engaged in some unprotected misconduct was correct, the ALJ erred by failing to subsequently find that the Respondent lost its privilege to discharge the strikers when it failed to also discharge the Tahoe driver for his reckless violence. *Gibson Greetings, Inc.*, 310 NLRB at 1312; *Aztec*, 289 NLRB at 1027.

IV. CONCLUSION

For the foregoing reasons, the Charging Party respectfully requests that the Board grant the exceptions of the General Counsel, reverse the ALJ’s decision in whole, and issue a decision finding that the Respondent violated the Act, and an order directing the Respondent to reinstate Mr. Bouchard, Mr. Elben, Mr. Froberg, and Mr. Blanchard with back pay.

¹⁰ Many of the factual findings underlying this aspect of the ALJ’s decision are equally erroneous. *Compare*, ALJ Decision at 8:4-5, 9-10 (picketers blocking of vehicle “caused the Tahoe” to accelerate vehicle into picketers, Blanchard jumped on hood while vehicle stopped); *with*, Respondent Ex. 5 at 0:08-0:10 (Tahoe driver maneuvers SUV into picketers, striking Blanchard); *compare* ALJ Decision at 8:11-12 (implying that Tahoe driver sped away because “there was an opening in the crowd”); *with* Respondent Ex. 5 at 0:13-15) (showing that Tahoe driver *created* such opening by barreling through picketers before speeding away from the scene).



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DECLARATION OF SERVICE

I, Genipher A. Owens, hereby declare under penalty of perjury under the laws of the state of Washington that on January 27, 2017, I filed the foregoing Answering Brief to General Counsel's Exceptions with the National Labor Relations Board, and sent a true and correct copy via email to:

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Signed in Seattle, Washington, this 27th day of January, 2017.


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