

**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

Case Nos.	19-CA-160107
	19-CA-160108
	19-CA-160161
	19-CA-160175

**KAPSTONE PAPER AND PACKAGING CORPORATION'S ANSWERING BRIEF TO COUNSEL FOR
THE GENERAL COUNSEL'S EXCEPTIONS**

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I. STATEMENT OF THE CASE

A. Case Overview

This case involves the egregious picket line misconduct of Steve Blanchard, Jon Bouchard, Melvin Elben, and James Froberg, resulting in the termination of their employment by Respondent KapStone Paper and Packaging Corporation ("KapStone"). While striking on behalf of the Association of Western Pulp and Paper Workers Local 153 ("the Union"), Blanchard kicked and damaged a third-party contractor's truck as it entered the Mill's contractor entrance, and, a mere 50 minutes later, jumped on the hood of a second contractor's truck and struck it with his picket sign as it exited the Mill's contractor exit. Blanchard's violent outbursts against contractors contributed to KapStone seeking and obtaining a temporary restraining order ("TRO") and subsequent injunction against the Union. Several days after KapStone obtained the TRO, in violation of the TRO, Elben, Froberg, and Bouchard unsafely blocked another third-party contractor's truck for a period of 20 minutes, preventing its egress from KapStone's facility and causing disruption of traffic.

Counsel for the General Counsel ("General Counsel") of the National Labor Relations Board ("the Board") issued a Complaint against KapStone, alleging that KapStone terminated the four individuals in purported retaliation for having engaged in concerted activities. Following a hearing held on March 1-8, 2016, Administrative Law Judge ("ALJ") Lisa D. Thompson issued her thorough, well-reasoned, 21-page Decision ("Decision") on November 17, 2016, correctly finding that KapStone did not violate Sections 8(a)(1) or (3) of the National Labor Relations Act ("the Act") when it terminated the employment of Blanchard, Elben, Froberg, and Bouchard due to their serious picket line misconduct. General Counsel submitted its Exceptions ("Exceptions") and supporting Brief ("GC Br.") on January 5, 2017. The ALJ's decision relied, *inter alia*, on credibility determinations and videotapes of the misconduct.

B. Statement of Facts

1. **KapStone's Longview Mill**

KapStone operates a pulp and paper mill in Longview, Washington ("the Mill"), where it employs approximately 1,000 employees. *Transcript of Hearing ("Tr.")* 125:5-7. In addition, hundreds more third-party contractors, truck drivers, and visitors enter and exit the Mill's gates on a daily basis. *Tr.* 125:8-18. On average, well over 1,000 vehicles enter and exit the Mill on any given day. *Tr.* 126:12-16.

The Mill is situated in a remote location, accessible only via a single Cowlitz County road named Fibre Way. *Tr. 123:14-21*. There are no residential or commercial developments in the one-mile stretch of Fibre Way that leads to the Mill, and there is no public transportation available along that route. *Tr. 124:20-125:1*. Virtually everyone, including all KapStone employees, drive private vehicles to the Mill on a daily basis. *Tr. 125:2-20*.

The Mill has separate entrance and exit gates for, respectively, employees/commercial trucks and contractors. *Respondent's Exhibit ("RX") 3, 4; Tr. 127:10-15*. All of these Mill entrances and exits flow into and out of Fibre Way. *RX 3, 4*. The Mill's contractor entrance and contractor exit merge onto Fibre Way first when approaching the Mill. *Id.* The first offshoot from Fibre Way to the Mill is the contractor entrance, where Blanchard kicked and damaged a contractor's vehicle. *RX 3; Tr. 131:9-14*. Shortly after that is the contractor exit, where Blanchard jumped on the hood of another contractor's vehicle less than an hour later, striking it with his picket sign. *RX 3; Tr. 131:15-18*. Proceeding down the employee/truck entrance, one eventually comes to the location where the employee/truck entrance and exit intersect as they both connect to the Mill. *RX 4; Tr. 130:23-131:6*. The misconduct engaged in by Bouchard, Elben, and Froberg occurred just outside the Mill's employee/truck exit. Any vehicle exiting the Mill from there must negotiate a 90-degree left-hand turn onto Fibre Way. *Tr. 131:4-8, 138:14-16*. Taking a right-hand turn onto Fibre Way would take the exiting vehicle to a dead end with no outlet. *Tr. 138:17-19*. Thus, the sharp left-hand turn onto Fibre Way is the only available egress from the Mill. *Tr. 138:20-22*.

2. The Strike

In May 2014, KapStone and the Union began negotiations for a successor agreement to their 2010-2014 collective bargaining agreement ("CBA"). *Tr. 237:2-5*. Representatives of KapStone and the Union met approximately 35 to 40 times over the course of the contract negotiations, which continued through August 2015. *Tr. 237:7-9*. Three separate contracts were voted down by the Union membership, including one that was unanimously recommended by the Union's bargaining team. *Tr. 237:15-238:2*.

In the spring and early summer of 2015, the Union repeatedly threatened to go out on strike if KapStone did not meet its demands in bargaining. *Tr. 238:3-6*. Thus, KapStone Labor Relations Manager Matt Gaston sent a letter to the Union on June 11, 2015, outlining KapStone's expectations in the event of a strike. *RX 15; Tr. 242:19-243:3*. This included the following warning:

Please also be aware that any employee who engages in serious strike misconduct (e.g. violence, damage to property, threats of bodily harm) or violations of other applicable laws will not be protected by the National Labor Relations Act and will be subject to serious discipline, up to and including discharge.

RX 15.

The Union terminated the CBA on June 22, 2015. *Tr. 239:9-11; RX 16.* On August 3, 2015, KapStone properly declared impasse.¹ *Tr. 237:9-10, 243:14-17.*

Three weeks later, on August 27, 2015, the Union went out on strike.² *Tr. 466:20-24.* At one point, the Union President estimated the picketing crowd to reach 400. *Tr. 135:13-14; see RX 9, 10 (depicting strike scene on August 30, 2015).* Almost immediately, serious incidents occurred on the picket line, including violent and intimidating acts against KapStone employees and third-party contractors.³ *Tr. 268:17-269:4.* At least one third-party contractor, Safway Contracting, and at least one contracted security guard quit because of the picket line incidents. *Tr. 268:23-269:4.*

These incidents occurred despite the fact that the Union provided "extensive" training to all picketers, including the four terminated employees, on its "Picket Line Dos and Don'ts," which included the following instructions:

Do not, in any way, obstruct entrances or exits of the premises. Do not interfere with, or swarm, persons or vehicles entering or leaving the job.

. . . Keep the size [of picketers] reasonable. Gathering/swarming in large intimidating groups can lead to limits on the number of pickets and/or monetary damages.

. . . As a general rule, there should be no picketing on private property or in the streets.

. . . Avoid confrontations. Do not make physical contact with anyone under any circumstances. Do not throw anything at the picket site.

Do not behave in an intimidating manner. . . .

¹ At the hearing, counsel for the General Counsel stipulated to the fact that impasse was reached. *Tr. 247:10-12; see also RX 17.*

² The employees later returned to work on September 8, 2015. *Tr. 467:16-18.*

³ At the hearing, the ALJ ruled that evidence of specific incidents unrelated to the strike misconduct at issue in this hearing be excluded. *Tr. 504:19-506:7.*

RX 12, Attch. to TRO.; see also Tr. 469:8-10, 470:9-23, 534:4-7. The Union specifically trained its members not to obstruct entrances or exits and that “[y]ou can’t stand in front of a vehicle and just stop.” *Tr. 478:9, 539:9-14.* All of the terminated employees received that training, including receiving handouts of the “Picket Line Dos and Don’ts.” *Tr. 534:4-11, 661:16-662:21, 663:22-664:10, 713:13-20, 753:10-12, 794:12-16, 795:11-15, 839:19-840:8, 841:13-842:1, 878:15-23.* As Elben testified, they were trained “to stand, you know, out of the way, you know, don’t block traffic.” *Tr. 662:15-16.* Froberg confirmed that they were instructed not to attempt to block or impede traffic entering or leaving the Mill. *Tr. 902:4-13.*

3. Blanchard’s Misconduct

a. The Delta Fire Incident

Three days into the strike, on August 30, 2015, swarms of picketers were gathered around the Mill’s exit and entrance gates on Fibre Way. *RX 9; Tr. 198:13-200:18.* One of those picketers was Blanchard, who testified that he “was picketing from the entrance of the contractor’s gate past the exit of the contractor’s gate to the main entrance of the mill and back.” *Tr. 753:21-23.*

At approximately 5:50 PM, a truck being driven by an employee of a third-party contractor, Delta Fire (“the Delta Fire Truck”) had to drive past dozens of picketers, including Blanchard, to enter the Mill’s contractor entrance. *RX 20.* Blanchard fully acknowledges that as the Delta Fire Truck drove by him, he kicked its rear quarter panel. *Tr. 754:5-7, 757:12-13; see RX 19 at 0:04-0:05.* He claims that he did so because: “I had a brief moment that I was frustrated.” *Tr. 797:10-11.* Blanchard characterized the Delta Fire employee as a “scab,” despite the fact that Delta Fire’s employees did not perform any bargaining unit work during the strike and that Blanchard had no information that they did so. *RX 23; Tr. 148:17-149:14, 791:3-9, 801:18-802:3.*

KapStone Security Manager David Smith called the owner of Delta Fire to offer to pay for repairs to the dented vehicle, but the owner declined that offer and declined to press criminal charges against Blanchard, expressing fear of retaliation from the striking employees. *Tr. 282:22-283:1, 285:4-286:11.* The owner confirmed that the vehicle had, in fact, been dented by Blanchard. *Tr. 70:21-23, 207:25-208:2.*

Union President Kurt Gallow admits that Blanchard was not following the Union’s rules when he kicked the Delta Fire Truck. *Tr. 559:2-4.* Gallow noted that, had he become aware of the incident: “We would’ve definitely had a talk with him and potentially if it didn’t stop he would’ve been removed from the picket line.” *Tr. 559:18-20.*

Significantly, Blanchard himself acknowledges that he understood that kicking a truck was not allowed under either the Union's rules or KapStone's rules. *Tr. 795:16-23.*

b. The RMR Incident

Around the same time Blanchard kicked the Delta Fire Truck, KapStone Procurement Manager John Mendenhall, who serves as the Mill's liaison with third-party contractors, received a telephone call from several contractors, informing him that they feared for their safety while trying to exit and enter the Mill. *Tr. 147:15-22, 154:2-*

5. Mendenhall subsequently observed the contractor exit for approximately an hour and saw that:

[v]ehicles were being stopped. People were surrounding them, walking in front of them, forcing them to stop. There would be, again, profanities and things yelled at people as they were attempting to exit or enter.

Tr. 154:5-155:1.

Mendenhall observed Blanchard's second act of misconduct during that timeframe. *Tr. 155:2-156:4.* Less than an hour after having kicked the Delta Fire Truck as it entered the Mill, Blanchard was involved in an incident against a truck driven by an employee of third-party contractor RMR ("the RMR Truck"). *RX 20; Tr. 278:3-6, 292:11-14, 800:10-13, 812:4-6.* As with Delta Fire, RMR's employees did not perform any bargaining unit work during the strike, but were simply providing their usual services at the Mill. *Tr. 149:5-14.*

As the RMR Truck approached the Mill's contractor exit, one of the picketers called out: "Here's another one!" and approximately a dozen picketers, including Blanchard, swarmed the Truck. *Tr. 155:12-14, 412:7-8, 764:4-6, 804:8-18; RX 5 at 0:00-0:08; RX 6; General Counsel Exhibit ("GCX") 9.* Blanchard, who testified that he believed the RMR employee was a "scab," despite lack of any proof that RMR performed bargaining unit work, walked in front of the truck and towards it at an angle, blocking its egress. *Tr. 440:14-22, 803:1-6, 807:25-808:19; RX 5 at 0:02-0:08.*

The RMR Truck, suddenly surrounded by picketers as it attempted to exit, bumped Blanchard. *RX 5 at 0:09.* It then came to a brief but complete stop at the point where vehicles typically stop before turning onto Fibre Way. *Tr. 156:22-24, 287:10-288:18, 444:22-445:2, 766:6-7, 809:5-7; RX 5 at 00:09-00:12.* At that time, after the truck had come to a complete stop, Blanchard jumped onto the hood of the RMR Truck and began striking the vehicle with his picket sign. *Tr. 157:10-15, 767:7-768:10, 779:3-7; RX 5 at 0:10-0:14.* Blanchard initially testified that he only struck the RMR Truck once. *Tr. 813:1.* Such testimony is inconsistent with the video footage showing that he

hit the vehicle more than once, and with Blanchard's own affidavit to the Board, in which he stated that he hit the hood or windshield of the RMR Truck two or three times. *Tr. 814:17-815:7, 818:10-17, RX 5, 21.* At some point during this altercation, the windshield of the RMR Truck shattered. *Tr. 162:20-163:4, 190:5-11.*

The RMR Truck's driver apparently panicked when confronted with the swarming picketers, including Blanchard, who had jumped on the hood of the vehicle and was striking it with his sign. The driver commenced driving again, attempting to exit the dangerous situation, and Blanchard was thrown off of the hood. *RX 5.* The driver's reaction was understandable under the circumstances. Mendenhall testified that he was concerned for the driver's physical safety, because "[i]t looked as though things were very tense . . . And it looked like it was a violent situation." *Tr. 155:23-156:4; see also Tr. 161:9-15.* Smith similarly testified that if the RMR Truck driver had not driven away, Smith believes that "[h]e would have been subjected to further violence." *Tr. 292:22-293:3.* Indeed, the RMR Truck driver was so fearful for his personal safety that he never returned to the Mill after the August 30th incident. *Tr. 165:13-17, 1147:18-1148:1.* Blanchard visited the hospital but denied medical treatment, returning to the picket line later that same day. *Tr. 818:21-820:2.*

Mendenhall was concerned for the safety of other contractors in the wake of this incident and directed them not to attempt to exit the Mill until police had secured the scene. *Tr. 161:5-8, 190:8-11.* Several contractors, including an elevator company, expressed their unwillingness to come to the Mill in light of the violence that occurred on August 30th, refusing to provide services at the Mill out of fear for their employees' safety. *Tr. 175:2-13, 295:9-11.* And multiple KapStone employees expressed their fear of driving into and out of the Mill's gates following this incident and began trying to make alternative arrangements to get to and from work. *Tr. 166:9-167:6, 295:13-17; see also Tr. 195:11-12* (Mendenhall testifying that he would not cross the KapStone property line "for fear of personal harm and injury to myself" after the incident with Blanchard and the RMR Truck.)

KapStone was obligated to secure large buses to transport employees and contractors safely in and out of the facility. *Tr. 174:14-20, 295:18-24.* In addition, KapStone was obligated to increase its security presence at contractor locations. *Tr. 295:21-296:5.*

4. The TRO and Injunction

As a result of all the picket line violence and misconduct that had occurred thus far, KapStone moved for and obtained a TRO against the Union and its members, entered by the Cowlitz County Superior Court on

September 1, 2015. *RX 12; Tr. 204:7-9.* The testimony that supported the Court's issuance of the TRO and subsequent injunction included testimony regarding Blanchard's misconduct of two days earlier. *Tr. 169:5-12.* In moving for the TRO, KapStone did not seek to suppress the message being communicated by the picketers or to completely prohibit picketing near the Mill gates; rather, KapStone sought to put an end to the strike line misconduct that was harassing and intimidating its non-striking employees, third-party contractors, and visitors. *Tr. 268:21-270:15.*

The TRO mandated the following, in relevant part:

- 1) All parties, their officers, members and representatives, are to conduct themselves in a manner which does not cause a breach of the peace, and will not violate any section of the criminal laws of the State of Washington within 500 yards of the entrance and exit gates to the Longview, Washington Kap[Stone mill site.
- 2) No one will attempt to block or impede traffic entering or leaving the Kap[Stone mill site. . . .

GCX 2, ¶¶ 1-2 (emphases added).

KapStone served the TRO on the Union that same day: September 1, 2015. *Tr. 204:10-12, 535:16-24.* Union President Kurt Gallow confirms, with respect to the TRO, that the Union "communicated on the line to all our strike captains," including Elben, who, in turn, communicated it to all other Union members, including Froberg and Bouchard, as they came on site to picket. *Tr. 536:2-5.* Almost immediately after KapStone obtained and served the TRO, the level of violence and intimidating conduct on the picket line decreased dramatically. *Tr. 271:10-16.*

On September 4, 2015, after an all-day evidentiary hearing, KapStone obtained a preliminary injunction ("the Injunction"), which expressly incorporated the Union's "Picket Line Dos and Don'ts," including its instructions not to obstruct entrances or exits, interfere with vehicles, or picket in the streets. *RX 12, ¶ 6 and Attch.; Tr. 310:12-311:25, 312:20-313:3.* The Injunction also mandated: "Drivers entering or leaving will not proceed until they can do so safely." *RX 12, ¶ 2.*

5. Froberg, Bouchard, and Elben's Misconduct: The Gardner Incident

On September 4, 2015, three days after the TRO had gone into effect and earlier on the same day that KapStone obtained the Injunction, KapStone employees Froberg, Bouchard, and Elben deliberately prevented the truck of a neutral party, Gardner Trucking ("the Gardner Truck"), driven by Gardner employee Diane Cutler, from

exiting the Mill, blocking it for a period of nearly 20 minutes. *Tr.* 204:7-21, 214:22-25; *RX* 12, 13, 27, 28, 30, 48; *GCX* 2. Froberg, Bouchard, and Elben all acknowledged that they were aware of the TRO as of September 4th. *Tr.* 634:16-23, 878:25-879:2.

Between KapStone's property line and the white "fog line" marking the edge of the lane of Fibre Way is an area that the parties to this proceeding have referenced as a public right-of-way. The "right-of-way" area immediately outside and to the left of the Mill's employee/truck exit gate as one turns left onto Fibre Way will hereinafter be referred to in this Brief as "the Right-of-Way." Cutler confirmed that it is necessary for her to drive over the Right-of-Way every time she turns out of the Mill in her Gardner Truck in order to safely make the turn. *Tr.* 987:15-988:5. The only other safe option for negotiating that turn in her truck is to cross over the fog line on the far (passenger) side of Fibre Way, another maneuver that trucks exiting left onto Fibre Way also frequently utilize. *Tr.* 143:16-20, 948:9-11, 988:6-8. Smith explained:

In order to make that turn, the longer the truck, trucks with six axles, four-axle trailers, four-axle trucks, they have to -- they have a bigger turning -- turning radius. Therefore, they have to turn out onto that fog line. . . . [T]he longer the truck-trailer combination, the bigger the radius that's needed to make that turn.

Tr. 143:22-25, 144:3-5. A stop sign is set back from the employee/truck exit to, as articulated by KapStone Security Manager David Smith, "allow for large vehicles turning out of that exit onto Fibre Way, to have enough turning radius to be able to make that turn." *Tr.* 133:24-134:3; *see also Tr.* 143:12-15, 949:10-12.

On the afternoon of September 4th, Froberg, Bouchard, and Elben began picketing in the Right-of-Way. Not only were Froberg, Bouchard, and Elben standing in the Right-of-Way, but there were also picketers' vehicles parked on the far side of Fibre Way and other picketers standing on the fog line across the road. *Tr.* 209:21-210:2, 226:7-17, 621:17-622:1, 650:14-22, 883:10-19. This created a "choke point" between which vehicles were expected to negotiate a tight left-hand turn onto Fibre Way. *Tr.* 226:7-17, 883:17-884:4. As Froberg testified: "If they had to leave, they would have to go between us." *Tr.* 883:20-21. Mast testified that she does not know of any truck driver who could have safely navigated that left-hand turn with Froberg, Bouchard, and Elben standing in the Right-of-Way and creating a "choke point." *Tr.* 952:17-20. KapStone was unable to identify the other picketers on the far side of Fibre Way. *Tr.* 362:17-19.

Prior to the incident on September 4th, picketers had often stood on the shoulder of Fibre Way in positions that did not impact vehicles' ability to turn onto Fibre Way when exiting the Mill at the employee/truck exit, at least thirty feet from where Froberg, Bouchard, and Elben stood in the Right-of-Way. See, e.g., *RX 11; RX 13 at 0:00; Tr. 202:18-203:2, 222:14-223:18, 945:22-946:16*. Those picketers were still within view of exiting vehicles and able to effectively communicate their message to passing drivers with their picket signs. *Tr. 202:21-24, 210:3-10, 946:3-5*. The Gardner Incident was the first time that this type of tight "choke point" had existed simultaneously with a large, locked-axle truck attempting to negotiate the turn. *Tr. 418:5-12, 945:3-9, 947:6-8, 989:1-7, 1021:5-8*.

The Gardner Truck, at approximately 70-75 feet in length, was larger than most of the trucks exiting the Mill. *Tr. 210:24-211:2, 315:10-14, 425:15-17, 934:23-25, 984:1-4*. In addition, unlike many of the trucks exiting the Mill, the Gardner Truck's cab and trailer each had four locked axles, which made it much more difficult to negotiate a tight turn than was the case for many trucks. *Tr. 211:3-9, 416:11-15, 418:13-16, 935:1-25, 984:5-14*. The Gardner Truck's turning radius was such that it could not navigate the 90-degree left-hand exit from the Mill without crossing over the Right-of-Way, particularly when vehicles and picketers were also lined up on the far side of Fibre Way. *Tr. 362:11-16, 1008:11-17*. As Mast testified, with respect to the Gardner Truck: "It -- you cannot turn very sharp. You have to have a lot of room. They don't move. And the trailer does not track close to the tractor at all." *Tr. 935:21-25*. Cutler similarly testified: "The trailer does not follow the same route that the truck does. It cuts the corners," meaning that the truck cannot negotiate tight turns. *Tr. 984:9-14*. Mast describes the impact of the length and locked drop axles on the turning radius of the Gardner Truck as "very significant." *Tr. 936:17-24*.

Notably, only ten minutes before the Gardner Truck attempted to exit the Mill, Froberg and Elben affirmatively moved from the Right-of-Way to allow a Waste Control truck to safely exit left onto Fibre Way. *Tr. 224:24-226:2, 329:10-330:9, 1020:5-1021:11; RX 14, 28, 29*. Froberg even waved to or saluted the Waste Control truck as it passed by. *Tr. 226:18-22; RX 14 at 0:25*. KapStone's Main Gate Operator, LeAnn O'Brien, videotaped that incident after having received information earlier that day that picketers had been moving out of the way for Waste Control trucks, then returning to create a "choke point" to make it difficult for other trucks to exit the Mill. *Tr. 226:24-227:4*. O'Brien had friends in the Union who had alerted her to a post indicating "that Waste Control was friendly with the Union, wished that they could be out on the picket line with the Union." *Tr. 1019:5-11*.

Froberg and Elben both claim to have completely forgotten about this incident. Elben testified:

Q: Do you recall this incident in your memory?

A: No.

. . . Q: . . . Why did you move for the waste control truck? . . .

A: I have no idea.

* * *

Q: As of today, even after reviewing this video, do you have a recollection of this happening?

A: No.

Q: Why don't you remember?

A: I have no idea. . . .

Tr. 696:3-697:22. Froberg similarly testified:

Q: Why did you -- do you remember this incident today in your present recollection?

A: I -- I really honestly cannot.

Q: . . . Why did you move?

A: I -- I actually do not have any idea. I do not recall this.

Tr. 874:21-875:3. Notably, Bouchard testified that he had heard, earlier on September 4th, about Froberg and Elben moving out of the way to allow a Waste Control truck to go by, indicating the event held some significance at the time. *Tr. 633:23-634:1.* And Froberg admits that he stated at his later fact finding meeting that he had stepped out of the way for another truck, but he now claims "I -- I still couldn't remember it, but -- but I -- for some reason, I thought I had done that." *Tr. 873:6-18; see also GCX 19.*

Unlike their response to the Waste Control truck, Froberg, Bouchard, and Elben did not make room for the Gardner Truck to safely negotiate the turn from the Mill's employee/truck exit onto Fibre Way. Ten minutes after the picketers allowed the Waste Control truck to drive by, Cutler attempted to exit out of the Mill in the Gardner Truck, but was unable to complete her left-hand turn onto Fibre Way because Froberg and Bouchard were standing in the Right-of-Way, creating a "choke point" with other vehicles and picketers across the road. *Tr. 988:21-23; RX 13, 28.* As Cutler testified: "I couldn't finish my corner without hitting them. So I stopped." *Tr. 988:21-23.* Bouchard testified that the Gardner Truck "got about two-thirds of the way through the corner, I want to say approximately four feet from where I was standing, and they just stopped and then shut itself down." *Tr. 596:3-6.* Because of its turning radius, the Gardner Truck simply could not safely negotiate the turn with Froberg, Bouchard, and (later) Elben standing in

the Right-of-Way. *Tr.* 362:11-16, 1008:11-17. In fact, as explained above, a truck the size of the Gardner Truck needs to utilize the Right-of-Way to negotiate that left-hand turn every time it turns. *Tr.* 948:25-949:1, 987:24-988:12.

Cutler immediately contacted her supervisor, Gardner Trucking Site Supervisor Heidi Mast. *Tr.* 939:8-13, 990:2-3. Mast "could tell she was shook up. [Cutler's voice] was shaky, kind of quiet. I could tell she was scared or nervous, I think worried that she was going to hurt somebody if she moved." *Tr.* 940:10-12. Mast instructed Cutler to stop the truck and turn it off "[t]o keep the picketers out of harm's way because I knew what would happen if she moved." *Tr.* 939:8-24, 950:19-21, 990:7-8. Cutler complied with Mast's directive. Mast subsequently contacted the Cowlitz County Sheriff's office, requesting that law enforcement come to the scene. *Tr.* 315:19-23, 940:16-23.

Less than a minute after the Gardner Truck came to a stop, Elben walked over and joined Froberg and Bouchard in their position blocking the truck. *RX 13 at 0:45-0:58*. Elben served as a picket line captain, although he was not serving in that role on that particular day.⁴ *Tr.* 481:17-21, 534:11-14, 594:1-3, 663:9-10. When he joined Froberg and Bouchard, he was not carrying any picket sign. *Tr.* 557:10-13, 677:19-20. As Gallow testified, Union members do not communicate the strikers' message without a picket sign. *Tr.* 541:3-4. In fact, the Union's "Picket Line Dos and Don'ts" even provide: "You are not a picket without a picket sign. Carry a picket sign at all times that you are picketing."⁵ *RX 12, Attch. to TRO (emphasis added)*. In other words, Elben was not even communicating any strike-related message during the entire time period he participated in blocking the Gardner Truck.

Had the Gardner Truck continued on its course of travel, it would have struck Froberg, Bouchard, and Elben. *Tr.* 212:20-24, 222:22-25, 230:2-11, 326:16-21, 1062:9-10; *RX 13, 28*. As Mast testified, Cutler "knew it wasn't safe. She told me she thought she would probably hit them if she did go forward," an assessment with which Mast agreed. *Tr.* 951:18-21. Mast testified that she did not believe Cutler could have safely driven forward or backward at any point in time during the ensuing 20 minutes. *Tr.* 952:21-25, 960:8-12.

⁴ Union President Kurt Gallow confirmed that "regardless of whether he was acting as a picket line captain at that time, he would be responsible for following the picket line dos and don'ts" *Tr.* 535:3-6.

⁵ When questioned why he did not have a picket sign, Elben claimed: "Because sometimes I was strike team leader, and I was there to check on my people to make sure they had picket signs, and they were doing what they were supposed to do." *Tr.* 670:7-9. But Elben was not working as a strike team leader/picket line captain on that day. *Tr.* 481:17-21, 534:11-14, 594:1-3, 663:9-10. Nor was Bouchard part of Elben's strike team. *Tr.* 670:22-24, 712:5-6.

Approximately one minute after the Gardner Truck stopped, KapStone Main Gate Operator Darren Harger approached the trio, all of whom were facing him, and stopped on the KapStone property line, approximately twelve feet from the three. *RX 13 at 1:01-1:17; RX 28; Tr. 894:11-18, 895:19-21, 897:1-2.* Harger loudly asked them to move out of the way so that the truck could proceed. *Tr. 217:20-22, 1022:18-19, 1023:17-23; RX 13 at 1:01-1:35.* Specifically, Harger stated to the three: "Gentlemen, guys, can you please move this way a little bit, so she can leave." *Tr. 1075:17-25.* Harger, whom the ALJ recognized at the hearing as having a "robust" and "pretty loud voice," was speaking even louder than normal, projecting his voice so that the three could hear him. *Tr. 1053:7-8, 1060:4-12.* Froberg acknowledges that Harger expressly "called out for me to step out of the way[.]" *Tr. 850:17-18 (emphasis added).* Harger has no doubt that the gentlemen heard what he said to them. *Tr. 1060:13-16.* Froberg responded to Harger: "I'm standing in the public right of way." *Tr. 850:22, 893:6-10, 89:15-17.* Bouchard and Elben saw Harger speak to them, but claim they did not hear what Harger said.⁶ *Tr. 597:11-13.*

Although Elben claims he did not hear anything, he slapped Froberg on the shoulder and told him: "We do not have to talk to them." *Tr. 220:18-19, 674:17-675:4, 851:10-16, 1059:24-1060:1.* After Elben admonished him not to speak with Harger, Froberg immediately turned his back to Harger and refused to continue the conversation. *Tr. 220:20-22, 852:6-8, 1060:1-3; RX 13 at 1:27-1:31.* Despite Harger's explicit request, the three men refused to move to the side to allow the Gardner Truck to pass. *Tr. 326:22-24; RX 13.*

In fact, Froberg, Bouchard, and Elben remained in that location, blocking the Gardner Truck from proceeding, for approximately twenty minutes. *Tr. 212:24-25, 599:19-21, 868:22-25, 952:21-25, 990:16-18, 1024:18-19; RX 13.* The trapped Gardner Truck blocked Fibre Way, and no traffic could use the sole Mill employee/truck exit during that twenty-minute period. *Tr. 214:8-10, 1024:20-1025:25.* This caused "[a] significant amount" of disruption, as well as an unsafe traffic situation. *Tr. 227:19-24, 1024:20-23.* KapStone was obligated to divert traffic out of the Mill's entrance, converting it into a two-way road, a fact regarding which the three picketers were well aware. *Tr. 213:19-214:15, 636:14-21, 1024:20-1026:21.* While smaller vehicles were able to exit out the entrance during the traffic diversion, several "big trucks were stuck." *Tr. 1026:20-21.* This occurred during what Froberg admitted "to be one of the more busy [days] because they were trying to get things going and there was a lot of vehicles going out."

⁶ Both Bouchard and Elben alleged that they have imperfect hearing. *Tr. 606:23-25, 675:14-21.*

Tr. 875:6-9. The blocking of the Gardner Truck also delayed Gardner Trucking's delivery of a load bound for Portland, which was problematic because, as Mast explained, "the dock times are specific and the loads have to get there." *Tr. 950:25-951:14*

After Froberg, Bouchard, and Elben refused Harger's request to move, Main Gate Operator LeAnn O'Brien contacted the Cowlitz County Sheriff's office -- a separate call from that made by Mast. *Tr. 315:19-23, 1023:23-1024:3.* The scene quickly attracted a crowd. *Tr. 1024:5-11; RX 28.* A number of Security Officers responded to the scene, including one who approached the Gardner Truck and told Cutler, with respect to the picketers: "[T]hey've been trying to start fights with people all day." *Tr. 991:8-16, 1024:5-11; RX 13 at 3:12-3:28; RX 28.* The Security Officer asked Cutler if she could safely back up the truck, and she accurately responded that she could not safely do so. *Tr. 107:24-108:1, 992:1-7.* Cutler knew that if she moved her truck either forwards or backwards, she would run over the picketers. *Tr. 992:10-22, 995:1-3.* Indeed, there was no safe way for the Gardner Truck to back up, as confirmed by Mast, who testified: "There is nothing safe about that situation." *Tr. 943:21-25.* Mast elaborated:

We didn't discuss going backwards. It wasn't an option. . . . It's not safe. . . . If you look at that picture where she was parked, there's three lanes of traffic that have to come in behind her. . . . There's three lanes that filter into that for an exit. That is the only exit out of the mill.

Tr. 951:25-952:9; see also Tr. 1043:21-1044:5.

When the Gardner Truck had been blocked for approximately ten minutes, Mast arrived at the scene and spoke with Cutler. *Tr. 941:4-5; RX 13 at 10:10-10:38.* Mast observed, as to Cutler:

She was visibly shaken up. I could tell she was upset. I mean, she's kind of, like I said, just quiet, timid, and she was really -- I could tell she was nervous, didn't know what to do, didn't know what the picketers were going to do. I don't think she was crying, but I believe she was a little teary-eyed.

Tr. 941:21-942:1. Mast directed Cutler to remain in her truck, noting:

I did not know what was going to happen, and I know she was a little afraid, I was afraid. It's just kind of a scary situation when you've got a bunch of adult men standing around you yelling and in your way of your truck.

Tr. 954:13-23.

At some point, a Union member at the scene named Dave Eckersley, who was serving as a picket captain that day, taunted Cutler, asserting that she did not know how to drive and should be sent back to driving school. *Tr. 317:3-12, 953:1-6; see also Joint Exhibit ("JX") 1.* In fact, Cutler is an incredibly experienced and safe driver. Cutler

has held her commercial driver's license for 14 years, all of which time she has driven daily routes requiring her to exit from the KapStone Mill. *Tr. 981:6-982:17*. In total, Cutler has 24 years of experience in making this same left-hand turn, including 14 with large trucks with locking axles. While employed by Gardner Trucking, Cutler has turned out of that same Mill exit up to 20 times a week. *Tr. 936:25-937:4*. Prior to becoming a commercial truck driver in 2002, Cutler was an employee at the same Mill for ten years, driving her personal vehicle out of that same Mill exit. *Tr. 982:21-983:11*. Mast describes Cutler, who has a clean driving record and has never struck anything with her truck, as "very cautious. She's good. She was one of my best drivers." *Tr. 938:4-5, 983:12-21*. Mast gives Cutler a driving safety rating of "A plus." *Tr. 938:6-7*. Indeed, Mast testified that she does not know of any truck driver who could have safely navigated that left-hand turn under the conditions created by Froberg, Bouchard, and Elben. *Tr. 952:17-20*.

At no point did Froberg, Bouchard, or Elben attempt to speak with Cutler. *Tr. 601:16-17, 676:19-677:6, 716:2-3*. Nor did Cutler say anything to the three during that twenty-minute period or even stick her head out of her window during that time. *Tr. 602:9-22, 676:19-677:9, 716:2-3; RX 13*.

Eventually, three Cowlitz County Sheriff's deputies arrived at the scene in response to Mast's and O'Brien's calls. *Tr. 1024:12-19*. Approximately 16 minutes after he had begun blocking the Gardner Truck, Froberg briefly walked over to talk to the police officers. *RX 13 at 16:18; Tr. 318:6-11*. His stated purpose for doing so was "[t]o go ask that particular sheriff officer, 'I thought I had the right to stand in the public right-of-way,'" as he had overheard the officers discussing the blocked vehicle with Eckersley. *Tr. 886:24-25, 887:10-16*. Indeed, the officers had already informed Eckersley, who was the strike team captain that day:

They can't block the road. . . . It's very simple, if 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 you are blocking the vehicle, you can't do that.

JX 1 at 1 (emphases added); RX 27. Froberg asked the officer: "So I can't stand there on the public right-of-way where I was?" *RX 48 at 0:28-0:56; JX 1 at 2*. The officer clearly responded, "**No**. You can't block a vehicle." *RX 48 at 0:28-0:56; JX 1 at 2 (emphasis added); see also Tr. 112:4, 318:23-319:4, 554:5-6, 555:4-14, 558:2-6, 955:14-23, 1062:1-4*. But instead of standing to the side, Froberg returned to stand with Elben and Bouchard in the Right-of-

Way. *RX 13 at 17:12*. Despite being told by a law enforcement officer that he could not stand there, Froberg claims: "I thought that we had the right to be there." *Tr. 888:23*.

Eckersley and the officers subsequently came to speak with Froberg, Bouchard, and Elben at their location, with the officer again informing the three that they needed to step aside. *RX 13, 27, 48; JX 1 at 3; Tr. 606:10-12*.

Eckersley also told the three: "Yeah -- let's let her by.....Let her go. Let her go....No....let her go." *RX 27; JX 1 at 3; Tr. 956:2-5*. By that point, the police had already been on scene for at least four minutes. *Tr. 651:20-22*.

Directing Froberg, Bouchard, and Elben to move to the side, the officer indicated to Cutler: "You are free to go." *JX 1 at 4; RX 27*.

Approximately 19 minutes after the Gardner Truck was first trapped halfway onto Fibre Way, Froberg, Bouchard, and Elben finally moved several feet to the side. *Tr. 326:12-15; RX 13 at 18:35-18:47*. Elben estimates that he and Froberg moved approximately five feet, while Bouchard moved approximately three feet. *Tr. 707:12-25; see also RX 13 at 18:35-18:47*.

After Froberg, Bouchard, and Elben moved, the Gardner Truck slowly pulled away, its path clearly passing over the very spot on which the three picketers had stood just moments before; had they not moved, they would have been struck by the truck. *Tr. 105:13-16, 326:16-21, 957:15-24, 1062:5-10; RX 13 at 19:02-19:12*. In fact, as the truck began to move forward, Bouchard had to step even further out of the way than he had already moved in order to avoid being struck. *Tr. 105:13-16, 230:9-11, 605:1-4; RX 13 at 19:10-19:12; RX 27*. Bouchard admitted:

We were standing there, and then as the truck was leaving, I had to move a little bit further out of the way to make sure I wasn't in the line of fire as it was leaving.

Tr. 608:4-6 (emphasis added). Likewise, Froberg admitted on cross-examination that, had the truck continued on, it would have run over him, Bouchard, and Elben. *TR. 882:9-20*.

Towards the end of the ordeal, the vehicles and picketers that had previously been lined up along the far side of the fog line moved, as is demonstrated by the fact that small vehicles were able to pass by on the passenger side of the Gardner Truck. *Tr. 322:1-7, 344:3-8, 622:9-17, 624:22-625:10, 627:7-16; RX 13 at 16:35; RX 30*. This eliminated the previous "choke point" configuration. *Tr. 625:12-16, 627:25-628:4*. Thus, subsequent vehicles did not experience the same conditions that the Gardner Truck had faced.

Following this incident, Cutler no longer felt comfortable using the Mill exit. *Tr. 995:4-9.* The blocking of the Gardner Truck caused both Cutler and other Gardner Trucking truck drivers great reluctance to enter and exit the Mill, aggravating their fear of threats and intimidation. *Tr. 367:1-7, 957:25-958:22.* As Cutler testified: "[A]ll of us drivers at Gardner were afraid that they were going to create the same situation," and were concerned about the associated safety issues. *Tr. 995:8-17.* KapStone was obligated to redirect contractor traffic to the Chip Gate following the incident, in response to the contractors' fears for their safety. *Tr. 367:9-10, 958:6-11.* With respect to KapStone employees' response to the incident:

Everybody expressed some further angst. They thought that things had calmed down after the TRO and then this was another incident that was viewed by lots of KapStone employees.

Tr. 367:14-16.

6. KapStone's Investigations Into the Misconduct and Terminations of the Four Employees

KapStone Security Manager David Smith thoroughly investigated the four employees' misconduct. *Tr. 361:20-25; RX 20, 40.* Smith, who served as KapStone's Security Manager for eight years prior to his recent retirement, had extensive experience in conducting investigations. *Tr. 118:13-119:25.* During his eight years with KapStone, he conducted investigations on a daily basis, with human resources investigations occurring weekly. *Tr. 118:21-119:1.* Smith previously worked as a Cowlitz County Sheriff's Deputy for 35 years, attaining the rank of Chief Criminal Deputy. *Tr. 43:12-15, 119:12-17.* As a law enforcement officer, Smith conducted thousands of investigations into misconduct. *Tr. 119:18-25.* Smith became very familiar with RCW 9A.84.030, the Washington criminal statute prohibiting "disorderly conduct," an offense he commonly investigated and dealt with during his law enforcement career. *Tr. 120:1-8, 121:3-9; RX 1.* Similarly, Smith became very familiar with RCW 9A.48.090, the Washington criminal statute prohibiting "malicious mischief in the third degree," another common offense with which he dealt during his law enforcement career. *Tr. 122:6-18; RX 2.* Smith also conducted "innumerable accident investigations where [h]e had to estimate the amount of damage on the vehicle as part of the accident report." *Tr. 378:10-13.* In addition, Smith has experience having served as an administrative law judge for Cowlitz County, Longview Police Department, and Kelso Police Department. *Tr. 377:3-11.*

In every circumstance where KapStone could identify KapStone employees involved in strike misconduct, KapStone investigated the circumstances and, finding that misconduct had occurred, disciplined the employees.⁷ *Tr.* 51:14-18. There were many instances where KapStone could not identify the individuals involved and therefore could not take action against them. *Tr.* 51:14-18, 52:3-8, 60:17-22, 61:14-17, 271:4-7, 446:6-13, 456:14-20.

a. Investigation Into Blanchard's Misconduct

Regarding the incident involving Blanchard kicking the Delta Fire Truck ("the Delta Fire Incident"), Smith reviewed video footage of Blanchard kicking and denting the truck, as well as witness statements. *Tr.* 272:4-273:2, 274:16-19, 275:16-25; *RX* 19, 20. Smith also received and reviewed photographs that showed damage to the rear panel of the Delta Fire Truck and a report from a security officer who had inspected and confirmed that damage. *Tr.* 69:14-17, 70:17-20, 72:15-17, 275:16-277:18; *G.C. Exs.* 5, 6; *RX* 20. Smith himself confirmed with the owner of Delta Fire that the vehicle had, in fact, been dented. *Tr.* 70:21-23, 207:25-208:2.

With respect to the incident involving Blanchard and the RMR Truck ("the RMR Incident"), Smith reviewed multiple videos of the incident and spoke to witness John Mendenhall. *Tr.* 196:1-6, 206:19-207:6. From his review of the video footage, Smith observed that multiple picketers swarmed the RMR Truck when it came to a complete stop and that Blanchard climbed onto the hood of the vehicle and swung his picket sign at the windshield area several times. *Tr.* 289:8-14, 290:21-291:22. As Smith testified, in reviewing the video evidence of this incident:

It's very evident to me that [the RMR Truck] came to a complete stop. And it was further reinforced by looking at some of the other videos where you can actually see the wheels not moving, which is an indication that it stopped.

. . . In viewing this and other videos you can see that Mr. Blanchard comes from the driver side of the vehicle, towards the front of the vehicle. Takes a front and center position. Then Mr. Blanchard and the vehicle come into contact. It appears that Mr. Blanchard is walking towards the vehicle at that time. The vehicle may still be moving a little bit forward at that time. Mr. Blanchard starts swinging a picket sign, climbs up on the hood of the vehicle, and at that time the vehicle is completely surrounded, or at least the front of the vehicle is completely surrounded. The vehicle is in effect being assaulted. The driver then moves away from that area.

Tr. 290:21-291:14.

⁷ Notably, the driver of the RMR Truck was the employee of a third-party contractor, not an employee of KapStone. Thus, General Counsel's assertion that "Respondent never disciplined the Tahoe driver for his reckless driving," is illogical and irrelevant. *GC Br.* at 7.

On September 1, 2015, KapStone Mill Manager Paul Duncan notified Blanchard that KapStone was investigating the Delta Fire Incident and RMR Incident, warning: "In light of the alleged violence involved, we consider this to be a very significant matter and it may result in serious discipline up to and including discharge." *RX 22*. Duncan requested that Blanchard: "provide a written statement concerning the incidents to me so that we can obtain your side of the story for our investigation . . ." *Id.* The purpose for doing so was "[t]o give him an opportunity to respond to what was being said in the investigation." *Tr. 297:22-24*. Blanchard acknowledges that he was given a full ten days to provide a written statement and that KapStone did not limit him in any manner as to the information he could provide for Duncan's consideration. *Tr. 820:8-821:3*.

Blanchard provided a written statement to Duncan in which Blanchard attempted to justify his conduct as to the RMR Incident by claiming that he was merely "picketing, walking" when "the vehicle struck me as I was walking," and claiming that because he was afraid of being hit again: "I jumped onto the hood of the vehicle. I believe that I hit his hood with my picket sign to try and get the vehicle to stop (everything happened extremely fast)." *RX 23*. With respect to the Delta Fire Incident, Blanchard admitted to engaging in the conduct and expressed no remorse or reasonable justification for having done so, stating only:

The other incident that you reference in your letter happened while a scab⁸ was coming into the mill, not exiting as you state in your letter. He was honking his horn antagonizing picketers. I believe I kicked at the vehicle while it was entering the contractor gate.

RX 23.

After reviewing Blanchard's response letter, Smith held a fact finding meeting with Blanchard on September 11, 2015 that was also attended by Union President Kurt Gallow and KapStone representative Stacy Davis. *Tr. 86:6-24, 87:24-88:1; RX 24; GCX 20*. During the fact finding meeting, Smith asked Blanchard follow-up questions regarding the two incidents and listened to Blanchard's responses. *Tr. 88:17-23, 413:4-6; RX 24; GCX 20*. Smith asked Blanchard if he had anything further to add to his statement, but Blanchard did not have anything significant to add. *Tr. 299:25-300:6, 413:4-6, 822:9-14; RX 24, 25; GCX 20*. Had he done so, KapStone would have taken that information into consideration. *Tr. 300:13-15*. Gallow was also given the opportunity to speak, and he did not raise

⁸ While Blanchard referred to the RMR contractor by the derogatory term of "scab," RMR did not perform any bargaining unit work during the strike. *Tr. 149:12-14*.

any objections to the thoroughness or fairness of the investigation, nor did he speak at all in Blanchard's defense. *Tr.* 563:13-564:6, 1135:20-24, 1148:2-5.

Again, Blanchard admitted to having kicked the Delta Fire Truck, but showed no remorse for having done so and made no offer to pay for the damage he had caused. *Tr.* 273:2-3, 299:9-17, 824:23, 826:9; GCX 20. While Blanchard claimed that the Delta Fire Truck had honked its horn at the picketers, there was no evidence of such honking in the video footage leading up to the kick. 292:2-10, 298:19-24.; RX 19. Even had the Delta Fire Truck driver honked his horn, that would not have excused Blanchard's conduct. *Tr.* 298:25-299:3. Smith concluded, based on his 35 years of law enforcement experience, that Blanchard's act of kicking and damaging the Delta Fire Truck constituted criminal mischief.⁹ *Tr.* 284:19-23.

Blanchard also admitted to having jumped on the hood of the RMR Truck and to hitting it with his picket sign, though he claimed it was because he feared being struck by the truck. RX 22. Blanchard's statement was not consistent with the video footage, which showed that Blanchard jumped onto the hood after the RMR truck came to a stop. *Tr.* 448:20-450:2; RX 5 at 0:08-0:10. As Gaston concluded:

[I]t's after the vehicle stops that Mr. Blanchard tries to get as much leverage as possible in terms of getting up onto the hood of the Tahoe and striking it. It doesn't appear to me that he's in fear for his life or he's feeling unsafe. He's not trying to get out of the way. He's trying to get leverage so he can strike the vehicle and he did so twice.

Tr. 449:8-14.

Smith found the RMR Truck driver's act of driving away from the scene was understandable, in light of the violence being inflicted on his vehicle. Smith even spoke with a sergeant at the Sheriff's office who was on scene and had reviewed the videos and who remarked he would have reacted in the same way as the RMR Truck driver. *Tr.* 410:6-10. But both Smith and Duncan testified that even if the RMR Truck driver had been partially at fault in driving away, it would in no way have excused Blanchard's conduct. *Tr.* 293:8-12, 1091:9-12. It later came to light that the RMR Truck driver was driving with a suspended driver's license. *Tr.* 293:13-16. That fact was not in any way under KapStone's control. *Tr.* 293:13-16. Regardless, however, that fact is immaterial to the actions of

⁹ Nevertheless, KapStone chose to pursue relief internally, rather than pressing criminal charges against Blanchard. *Tr.* 284:24-285:3.

Blanchard. *Tr.* 293:23-25, 295:1-3, 409:1-6. In Smith's opinion, based on his extensive background in law enforcement, Blanchard's actions towards the RMR Truck constituted criminal disorderly conduct. *Tr.* 304:19-24.

b. Investigation Into Froberg, Bouchard, and Elben's Misconduct

Smith also investigated the incident involving Froberg, Bouchard, and Elben's blocking of the Gardner Truck ("the Gardner Incident"). *Tr.* 314:6-8; *RX* 40. Smith reviewed the available video footage in its entirety and witness statements regarding the incident. *Tr.* 102:8-10, 111:22-23, 213:1-9, 314:9-21, 316:15-18, 340:5-8; *RX* 40. He also spoke with Harger, who confirmed that he had asked the three to move shortly after the Gardner Truck stopped. *Tr.* 219:3-6, 220:23-221:17; *RX* 40. Similarly, Smith determined from the video footage that the Sheriff's deputies had informed the three that they had no right to stand in the Right-of-Way and block the vehicle. *Tr.* 228:19-229:11; *RX* 13 at 17:14-18:38; *JX* 1; *RX* 40. His investigation confirmed that those present at the scene reasonably believed that the Gardner Truck could not have moved for a twenty-minute period without striking Froberg, Bouchard, and Elben, who refused to move out the truck's path during that time. *Tr.* 213:1-9; *RX* 40. The witnesses' impression was confirmed by the video footage, which clearly demonstrated that the three would have been run over by the Gardner Truck had the truck continued on its path. *Tr.* 230:2-11; *RX* 13, 27, 40, 48.

On September 4, 2015, Duncan sent separate letters to Froberg, Bouchard, and Elben, notifying them of the investigation into their conduct and inviting them to "provide a written statement concerning the incident to me so that we can obtain your side of the story for our investigation . . ." *RX* 31-33; *Tr.* 345:24-346:10. As with the investigation into Blanchard's misconduct, the purpose of these letters was to provide Froberg, Bouchard, and Elben with the opportunity to present information to be taken into consideration by KapStone. *Tr.* 346:6-10. Each of the employees submitted a written response. *Tr.* 346:18-20; *RX* 34-36. None of them took any responsibility for their actions in blocking the Gardner Truck, instead attempting to pin fault on Cutler, criticizing her driving skills and accusing her of swearing at the picketers and deliberately cutting the corner. *RX* 34-36; *Tr.* 352:16-21.

In his written statement, Froberg asserted:

. . . An outgoing tractor trailer apparently didn't prepare to take the outgoing corner properly and noticed that they were going to come close to us so they stopped short of crossing paths with my union brothers and I. . . . Sheriff officers arrived and discussion took place between the officers, myself and my two Union brothers standing with me on whether we were standing in the public right of way or not. The officers agreed we were standing in the public right of way but for our safety they asked us to move and we then did so.

RX 34. Froberg also claimed that Cutler was the same driver whom he alleges flipped off picketers and yelled offensive comments at them, such as, "Eat me!" and "Get the f**ck out of the way!" on two earlier occasions. *RX 34; Tr. 853:5-19, 854:25-857:6*. Smith followed up on this issue with Cutler and her supervisor, Mast, both of whom adamantly and credibly testified that Cutler never engaged in such conduct. *Tr. 346:23-347:18, 938:8-17, 960:13-961:2, 985:13-21*. Even had Cutler engaged in such behavior, which she did not, it would not have justified Bouchard, Elben, and Froberg's later conduct in blocking her truck. *Tr. 348:11-16*.

Elben represented in his written response: "I deny doing anything wrong on the date in question at the gate," and asserted that he had continued to stand in the Right-of-Way until a police officer "asked me to move so the truck could pass." *RX 35*. Elben's statement included a copy of an aerial photograph that had been altered so that it appeared as if the fog line painted on the roadway extended all the way under the Gardner Truck. *RX 35; Tr. 349:3-350:9*. In reality, the line stopped far short of the truck. *Tr. 350:7-9, 356:22-357:2; RX 40*. Bouchard testified that the three were standing "about 15 to maybe 20 feet from the end of that white line." *Tr. 621:4-9*. Elben claims that he got the picture "[o]ff my phone," stating: "I think it was sent as an email." *Tr. 689:13-20*. He claims that he does not recall who sent it to him. *Tr. 689:21-690:5, 699:23-25*. While the doctored photograph did not play a role in the termination decision, it nonetheless speaks to Elben's credibility as a witness. *Tr. 350:25-351:3*.

In his written response, Bouchard stated:

. . . I do not believe I was impeding traffic as it was exiting the gate from Kap[S]tone paper mill in Longview. . . .

I feel that this driver intentionally cut the corner short, in an attempt to get me and my fellow union brothers off the picket line. If the driver would've continued on the path of travel, I would have gotten out of the way of the trailer tires without any problem. This driver shut down the semi, in my opinion to blow things out of proportion. It was an overreaction.

RX 36. Smith's investigation did not comport with Bouchard's claims that the driver "intentionally cut the corner short, in an attempt to get [the picketers] off the picket line" or that she "shut down the semi . . . to blow things out of proportion." *RX 36; see Tr. 351:21-352:10*. Indeed, it is standard procedure to stop and turn off one's truck when the driver believes that he or she is going to hit something. *Tr. 353:19-354:4*.

While all three asserted that other trucks had been able to negotiate the turn, those trucks were not as large as the Gardner Truck and/or were not facing the same "choke point" circumstances caused by the combination of

Froberg, Bouchard, and Elben in the Right-of-Way, and the other picketers and vehicles located across Fibre Way. *Tr.* 362:11-363:1.

Smith held separate fact-finding meetings with Froberg, Bouchard, and Elben on September 10, 2015. *Tr.* 86:25-87:5; *RX* 37-39. Gallow and Davis were also present at those meetings. *Tr.* 87:6-8, *RX* 37-39. During each of the fact finding meetings, Smith asked the employee questions about the incident and asked whether he had anything else to add; each of the four terminated employees admit they were provided with that opportunity. *Tr.* 413:4-6, 414:1-2, 563:5-12, 641:23-642:1, 693:9-13, 904:25-905:18; *G.C. Exs.* 17-19; *RX* 37-39. Gallow, who was in attendance at each meeting, was given the opportunity to speak; at no time did he raise any objections to the thoroughness or fairness of the investigation process, nor did he otherwise speak up in defense of the four employees. *Tr.* 563:13-564:6, 1135:20-24, 1148:2-5. Indeed, no one with the Union ever objected at any time to the fact finding process. *Tr.* 1148:2-5.

At his fact-finding meeting, Froberg admitted that Harger had asked them to move out of the way of the Gardner Truck at a point in time when Froberg was standing with Elben and Bouchard. *Tr.* 219:17-19, 234:10-14, 348:23-25, 564:19-23; *RX* 37. Smith discussed with Froberg the fact that the video footage clearly showed the police officers telling him that he had no right to block a vehicle while standing in the Right-of-Way, a fact Froberg neglected to disclose in his written statement. *RX* 34; *Tr.* 346:4-8, 460:17-461:2.. Froberg responded that he believed he had the right to stand his ground, despite what the police officer said. *Tr.* 346:9-10. In his later and unsuccessful application to the Employment Security Department, Froberg represented that the Gardner Truck's "path was over the top of me and I held my ground . . ." *RX* 49 (*emphasis added*); see also *Tr.* 880:1-15.

At Bouchard's fact-finding meeting, Bouchard admitted that the Sheriff's officer told him, Elben, and Froberg that they had to move because the truck could not get out of the way. *Tr.* 352:11-14; *GCX* 21; *RX* 39.

Based on his 35 years of law enforcement experience, Smith concluded that the conduct of Froberg, Elben, and Bouchard violated the TRO and constituted criminal disorderly conduct. *Tr.* 313:17-314:5, 326:5-11. The fact that Froberg, Bouchard, and Elben were standing on a public right-of-way is immaterial to the assessment of whether they were violating the TRO and State law; they were still violating the TRO and the law once they blocked the Gardner Truck. *Tr.* 366:8-25.

c. The Termination Decisions

Following the fact-finding meetings with all four employees, Smith turned over his complete investigative reports to Labor Relations Manager Matt Gaston. *Tr. 96:11-14, 208:6-8, 355:12-15, 359:20-22.* Gaston reviewed the entire files, including the relevant video footage, discussed them with Smith, and recommended that Duncan discharge the employees. *Tr. 434:16-435:25, 445:19-22, 451:9.* While Gaston reviews cases and makes recommendations to Duncan, it is Duncan, as the Mill Manager, who is the sole decision-maker as to termination decisions for hourly employees at the Mill. *Tr. 208:9-18, 300:21-301:14, 426:22-427:1, 433:1-11, 436:10-12, 1083:21-1084:4.* Gaston does not make termination decisions. *Tr. 208:9-10, 301:13-14, 426:22-24.* Duncan conducted his own, independent review of the entire investigative files, including the relevant video footage and the four employees' written statements. *Tr. 274:24-275:1, 289:15-17, 302:22-303:5, 316:19-21, 323:6-8, 340:9-11, 436:14-19, 1084:20-22, 1085:3-1086:10, 1087:5-7, 1088:6-1089:23.* At no time did any of the four employees express remorse to Duncan for their conduct. *Tr. 1087:18-20.*

Duncan ultimately made the decision to terminate the four employees. *Tr. 436:14-19, 1084:23-25-1085:2, 1088:3-5.* With respect to Blanchard, Duncan concluded "that Mr. Blanchard knowingly and maliciously kicked the Delta Fire contractor's truck and damaged it." *Tr. 1088:16-19.* He additionally concluded "that Mr. Blanchard intentionally blocked a Chevy Tahoe from leaving and struck the vehicle," including the conclusion that Blanchard climbed up on the hood of the RMR Truck after it came to a stop and struck the truck with his picket sign. *Tr. 1088:20-1089:10.* With respect to Froberg, Bouchard, and Elben, Duncan concluded that they violated the TRO and State law by blocking the Gardner Truck. *Tr. 1086:11-25.* Had the four employees participated in the same conduct at a time when a strike had not been occurring, Duncan would have made the same decisions. *Tr. 368:3-6, 1087:1-4.*

Duncan notified Froberg, Bouchard, and Elben of his decisions by letters dated September 14, 2015, all of which informed them that their employment was being terminated for blocking the egress of a truck for approximately 20 minutes. *RX 41-43.* On September 15, 2015, Duncan issued a termination letter to Blanchard, notifying him of his decision to terminate Blanchard's employment, based on the Delta Fire Incident and the RMR Incident. ¹⁰ *RX 25; Tr. 300:16-301:1.*

¹⁰ KapStone and the Union have since reached agreement on a collective bargaining agreement and an agreement through which the four employees were reinstated and their terminations converted to suspensions.

II. LEGAL ARGUMENT

A. General Counsel's Exceptions and Brief in Support of its Exceptions Fail to Comply With the Board's Regulations and Should be Stricken

The Board's regulations governing exceptions require that:

Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain . . . **[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.**

29 C.F.R. § 102.46(c)(2) (emphasis added). General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge utterly fails to comply with that requirement. General Counsel submitted 161 Exceptions to the ALJ's Decision. But nowhere in General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge has General Counsel included "a specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." *Id.* To the contrary, General Counsel presents a disordered maelstrom of legal arguments without identifying clear questions to be considered by the Board, let alone clarifying to which of the Exceptions any of the arguments are intended to apply. Were this a case involving only a handful of exceptions, this deficiency might not be so egregious. Here, however, KapStone -- and the Board -- are left to speculate as to which of the 161 Exceptions each argument relates, a herculean task that greatly prejudices KapStone's efforts to submit a coherent response to General Counsel's disjointed arguments.

Nor do General Counsel's Exceptions comply with the requirement that "[e]ach exception . . . shall concisely state the grounds for the exception." 29 C.F.R. § 102.46(b)(1). While a supporting brief may substantially satisfy the requirement in Section 102.46(b)(1) by specifically linking each exception to the grounds purportedly supporting the exception, General Counsel's Brief does no such thing. Instead, as noted above, none of the 161 Exceptions are specifically referenced in General Counsel's Brief or linked in any way to General Counsel's arguments.

As 29 C.F.R. § 102.46(b)(2) holds: "Any exception which fails to comply with the foregoing requirements [of Section 102.46(b)(1)] **may be disregarded.**" (Emphasis added); see *In re Tri-Tech Servs., Inc.*, 340 NLRB 894, 896 (2003) (exceptions that do not comport with the requirements of Section 102.46(b)(1) are not properly before the Board and are to be disregarded). General Counsel's Exceptions must be disregarded in light of the complete failure to comply with Sections 102.46(b)(1) or 102.46(c)(2). See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, n.1 (2005) (failure to state, either in its exceptions or its supporting brief, on what grounds the findings should be overturned or

to meet the minimum requirements of Section 102.46(b) warranted disregarding the Respondent's exceptions); *Thriftway Supermarket*, 294 NLRB 173, n.2 (1989) (same); *Delmas Conley d/b/a Conley Trucking*, 349 NLRB 308, n.2 (2007), *enfd* 520 F.3d 629 (6th Cir. 2008) (holding that exception could be disregarded where Respondent failed to allege with any degree of particularity the grounds on which it believed the decision should be overturned).

Even were General Counsel's Exceptions properly before the Board, rather than in violation of the Board's regulations and therefore subject to disregard, the record wholly supports the ALJ's correct conclusion that KapStone did not violate Sections 8(a)(1) or (3) of the Act when it terminated the employment of Blanchard, Elben, Forberg, and Bouchard, as discussed below.¹¹

B. The ALJ's Credibility Determinations Were Entirely Appropriate and Must be Afforded Substantial Deference

General Counsel argues that the ALJ made improper credibility determinations regarding witnesses' testimony about the RMR Incident and Gardner Incident,¹² asserting "that video evidence is *the best evidence* of [the picketers'] conduct that the judge is supposed to be evaluating."¹³ *GC Br. at 44* (emphasis in original). While the video evidence of the RMR Incident is certainly solid evidence on which the ALJ should -- and did -- rely, there is absolutely nothing improper about considering testimony that provides necessary context to and explanation of the events depicted in that video evidence, as was the case here. And it is well within the ALJ's authority to make credibility determinations regarding all testimony presented at the hearing, as well as credibility determinations regarding the evidence as a whole. *See, e.g., Cooper Tire & Rubber Co.*, 2016 NLRB LEXIS 352, slip op. at *14 (2016) ("Credibility determinations do not have to rely solely upon witness demeanor or the content of witness testimony. Determinations regarding the facts of a case may rely on a variety of factors, including the weight of the evidence, established or admitted facts, reasonable inferences drawn from the record as a whole, and the inherent probabilities of the allegations.") (emphasis added). Indeed, the ALJ "found Blanchard's version of events less than fully credible," as he "gave inconsistent testimony," and "because the video evidence belies his many, different

¹¹ See Sections II(E), (F), *infra*.

¹² Notably, General Counsel raises this argument only as to the RMR Incident and the Gardner Incident, not as to the Delta Fire Incident, despite the fact that video evidence was considered in connection with all three incidents.

¹³ See *GC Br. at 44-45, 46-47*. It is impossible to determine with certainty to which Exceptions this argument is intended to apply, due to General Counsel's failure to comply with 29 C.F.R. § 102.46, but KapStone speculates that it may apply to Exceptions 6, 14, 25, 26, 32, 33, 70, and 104.

versions of the incident[.]” *Decision at 7:25-39* (emphasis added). Similarly, the ALJ “did not find Elben, Froberg, and Bouchard credible for several reasons,” including the fact that “all three men made inconsistent and often times illogical statements throughout their testimony. For example, despite that they each denied blocking the Gardner truck, the video and documentary evidence clearly proved otherwise.” *Id.* at 11:28-31 (emphasis added). The ALJ appropriately analyzed the witnesses’ testimony and the video evidence in conjunction with one another in reaching her credibility determinations.

Once made, “[c]redibility determinations may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible.” *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444-45 (D.C. Cir. 1996). “The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.” *Newcor Bay City Div. of Newcor, Inc.*, 351 NLRB 1034, n.3 (2007); see also *Medeco Sec. Locks, Inc.*, 322 NLRB 664, 664 (1996) (“[T]he judge’s credibility determination . . . is entitled to deference because credibility is a function not only of what a witness says but of how a witness says it.”); *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (“Weight is given to the administrative law judge’s credibility determinations because she sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records”) (citation omitted). Indeed, as reviewing courts have confirmed, “evidence in the record, which, when taken alone, may amount to ‘substantial evidence’ will often be insufficient when the [ALJ] has, on the basis of the witnesses’ demeanor, made credibility findings contrary to the Board’s position.” *Colson Equip., Inc. v. NLRB*, 673 F.2d 221, 223-24 (8th Cir. 1982) (citations omitted).

C. The Clear Pine Mouldings Standard Did Not Preclude the ALJ’s Consideration of Evidence of Actual Coercion and Intimidation and of Actual Intent to Coerce or Intimidate Others

Contrary to General Counsel’s assertion, the ALJ correctly applied the standard articulated in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), *enfd* 765 F.2d 148 (9th Cir. 1985), and its progeny. “In cases involving the discharge of striking employees for engaging in strike-related misconduct, . . . the General Counsel has the overall burden of proving discrimination.” *Detroit Newspaper Agency*, 342 NLRB 223, 224 (2004). The employer first need only “establish that it had an honest belief that the employee engaged in the conduct for which he was discharged . . .” *Id.* Once the employer “establish[es] that it had an honest belief that the employee engaged in the conduct for

which he was discharged, . . . then the General Counsel must affirmatively establish that the employee did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge.” *Id.* With respect to that analysis, “strike misconduct is disqualifying [from reinstatement of employment] if, under all of the surrounding circumstances, it may reasonably tend to coerce or intimidate other employees in the exercise of rights protected under the Act.” *Detroit Newspaper Agency*, 342 NLRB at 224 (citing *Clear Pine Mouldings*, 268 NLRB at 1046).

General Counsel asserts that the ALJ misapplied *Clear Pine Mouldings* and its progeny because she took into account “the subjective impact of the picketers’ conduct” and made conclusions regarding Blanchard’s, Elben’s, Froberg’s, and Bouchard’s intent in carrying out the misconduct at issue.¹⁴ The ALJ correctly noted that “[t]he *Clear Pine Mouldings* standard is an objective one and does not involve an inquiry into whether any particular employee was actually coerced or intimidated.” *Decision at 18-19* (citing *Mohawk Liqueur*, 300 NLRB 1075 (1990)). But General Counsel is incorrect in asserting that *Clear Pine Mouldings* forbids any consideration of the subjective impact of the misconduct at issue or of the strikers’ intent when there is evidence to support a finding of actual coercion and intimidation and of actual intent to coerce or intimidate.

Clear Pine Mouldings and its progeny simply clarify that the employer need not go to the extent of proffering evidence of actual, subjective impact or intent in order to prevail. The employer need only introduce evidence that the misconduct “had a reasonable tendency to coerce and intimidate other employees in the exercise of rights protected under the Act,” and need not take the extra step of showing actual coercion or intimidation -- or actual intent to coerce or intimidate. *Detroit Newspaper Agency*, 342 NLRB at 224 (citing *Clear Pine Mouldings*, 268 NLRB at 1046). Nothing precludes the employer from making that additional showing or the ALJ from taking evidence of actual coercion or intimidation, or actual intent to coerce or intimidate, into account when ruling in favor of the employer. Indeed, such evidence only strengthens the employer’s case and the ALJ’s conclusions.¹⁵

¹⁴ See GC Br. at 23-25. KapStone speculates that these arguments may apply to Exceptions 23, 24, 28, 37, 46, 74, 139, 140, 148, 154, and 155.

¹⁵ An ALJ errs only if he or she rules against the employer on the basis that there is insufficient evidence of subjective impact or intent to coerce or intimidate. See, e.g., *Univ. Truss, Inc.*, 348 NLRB 733, 735-36 (2006) (overturning ALJ’s finding that employer had not met its burden of demonstrating that it held an honest belief that misconduct had occurred, because the employer need not show actual impact or intent).

If adopted, General Counsel's position, if adopted, would mean that an employer could prevail where strikers did not intend to coerce others and where there was no actual coercion, but could not prevail if the circumstances involved the much more egregious conditions present here: actual intent and actual coercion. That is not what *Clear Pine Mouldings* and its progeny dictate.

D. The ALJ Appropriately Considered Smith's Conclusions Regarding the Picketers' Violations of Criminal Law and the TRO

General Counsel takes issue with the fact that, in her factual findings, the ALJ found that Smith concluded, during KapStone's investigation into the picketers' misconduct, that Blanchard's conduct regarding the Delta Fire and RMR Trucks constituted criminal mischief and disorderly conduct., and that Elben's, Froberg's, and Bouchard's conduct constituted criminal disorderly conduct.¹⁶ See *Decision at 14:24-30, 16:18-20*. The ALJ's consideration of that testimony was wholly proper. See *Cibao Meat Prods., Inc.*, 349 NLRB 471, 471 (2007) ("[T]he Board affirms an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion.") Smith's conclusions regarding the picketers' likely violations of state criminal statutes were directly relevant to the issue of KapStone's honest belief that they had committed misconduct, as opposed to run-of-the-mill picket line activities. His conclusions were also relevant to the question of whether the conduct at issue was sufficiently egregious to deny reinstatement. While the fact the picketers likely violated the law may not be dispositive evidence that the conduct is not protected by Section 7 of the Act, it is yet another piece of the puzzle adding up to the ALJ's sound decision that their actions fell outside the protections of the Act.

Similarly, General Counsel argues that whether Elben, Froberg, and Bouchard violated the TRO or knew that their conduct was in violation of the TRO "is irrelevant to a proper analysis of the alleged picket line misconduct."¹⁷ *GC Br. at 26*. While violation of the TRO may not be "determinative regarding whether the strikers' conduct removed them from the protection of the Act," (*id.*), it does not follow that violation of the TRO and knowledge of such violation are "irrelevant." It is still one factor to be considered in the question of whether the conduct was sufficiently egregious to justify denial of reinstatement. Evidence that the Court issued an injunction is also directly relevant to the question of whether the employer had an honest belief that strike misconduct has

¹⁶ See GC Br. at 47-48. KapStone speculates that this argument may relate to Exceptions 100-103.

¹⁷ See GC Br. at 26-27. KapStone speculates that this argument may apply to Exception 109.

occurred. See, e.g., *Precision Concrete & Building Trades Organizing Project*, 337 NLRB 211, 221 (2001) (pointing to fact “Respondent persuaded a state court judge to issue an injunction against picket line misconduct . . . , and McDevitt had a copy of the injunction at the time of the incident” in finding that the employer had an honest belief that misconduct occurred). It is also relevant to the issue of the three picketers' knowledge that their actions were not permissible, in direct contrast to their repeated assertions that they were innocent, clueless pedestrians who inadvertently caused the lengthy traffic blockage.¹⁸

E. The ALJ Correctly Concluded that KapStone Did Not Violate Sections 8(a)(1) or (3) of the Act When it Terminated Blanchard’s Employment for Serious Picket Line Misconduct

1. Substantial Evidence in the Record Supports the ALJ's Conclusion that Blanchard Engaged in Misconduct Sufficient to Deny Reinstatement

General Counsel asserts that the ALJ purportedly disregarded evidence regarding Blanchard’s misconduct and relied on “nonexistent and inadmissible evidence” in reaching her decision. See *GC Br. at 37*. To the contrary, the ALJ’s decision is soundly supported by substantial evidence in the record establishing that Blanchard engaged in two incidents of serious misconduct within the span of less than an hour.

Significantly, “[a]t all times, the burden of proving discrimination is that of the General Counsel.” *Gem Urethane Corp.*, 284 NLRB 1349, 1352 (1987). General Counsel bears the burden of “affirmatively establish[ing] that the employee did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge.” *Detroit Newspaper Agency*, 342 NLRB at 224. “Because the General Counsel Bears the burden of proving that the misconduct is shielded by the Act, any ambiguity or equivocation in the evidence on the question of the conduct’s seriousness “must be resolved in favor of the employer[.]” *Illinois Consol. Tel. Co. v. NLRB*, 837 F.3d 1, 39 (D.C. Cir. 2016) (quoting *Axelson, Inc.*, 285 NLRB 862, 864 (1987)). “It is the ‘General counsel’s obligation to carry the ultimate burden of proving that illegal discrimination has occurred,’ and ‘[t]o the extent that there is a lack of evidence’ on either the absence of misconduct or the improper response of the employer, the dispute ‘must be resolved in favor of the employer.’” *Id.* at 8 (quoting *Axelson, Inc.*, 285 NLRB at 864).

¹⁸ General Counsel erroneously asserts that “there was no evidence to support that Bouchard, Elben, or Froberg had knowledge of [the TRO].” Exception No. 45. All three testified that they were aware of the TRO. *Tr. 634:16-23, 878:25-879:2*.

a. The Delta Fire Incident

With respect to the Delta Fire Incident, General Counsel contends only that the ALJ disregarded evidence that: (1) Blanchard allegedly kicked the truck because “the driver had provoked him by blaring his horn;” and (2) Matt Gaston remarked in his affidavit to the NLRB that KapStone would not have considered the Delta Fire and RMR Incidents separately.¹⁹

As to the first contention, the ALJ did not “ignore” Blanchard’s testimony that the Delta Fire Truck driver had honked his horn. Rather, the ALJ reviewed the evidence as a whole, including video evidence with audio that did not support Blanchard’s testimony, (RX 19), and made a credibility determination regarding Blanchard’s claim. *Decision at 5:24-29*. Regardless, a vehicle honking its horn does not excuse the serious misconduct of kicking and damaging the passing vehicle. See *Richmond Recording Corp.*, 280 NLRB 615, 616 (1986) (holding that allegedly retaliatory striking of a vehicle’s hood with a stick and other retaliatory conduct constituted serious misconduct and noting that “two wrongs do not make a right”); *Cerro Wire & Cable Co., Inc.*, 1993 NLRB LEXIS 276, *26 (ALJ Dec. Mar. 23, 1993) (noting that the Board “does not allow foreign physical retaliation by one party or the other for picket line conduct. To do so is to engage in misconduct sufficient to vitiate the Act’s protection for striking employees . . .”)

Nor was Labor Relations Manager Matt Gaston’s remark in his affidavit that KapStone would not have considered the RMR and Delta Fire Incidents separately relevant to the ALJ’s decision. Gaston explained his previous “off-the-cuff response” at the hearing, testifying that it “was frankly never contemplated because we always looked at it from a totality of the circumstances perspective.” *Tr. 439:10-13, 444:3*. Gaston testified: “Had he asked me that today, I would have a different answer,” after having considered it at greater length. *Tr. 443:22-444:4*. Regardless, Gaston was not the decision-maker.²⁰ *Tr. 208:9-10, 301:13-14, 426:22-24*. Blanchard himself understood that this was Duncan’s decision. *Tr. 824:7-9*. While Gaston provides recommendations on disciplinary matters, Duncan does not blindly accept those recommendations, but often pushes back after conducting his

¹⁹ See GC Br. at 40-41. KapStone speculates that these arguments may apply to Exceptions 3, 4, 99, 112, 121, and 122.

²⁰ The Board decision on which General Counsel relies, *Cornell Iron Works*, 296 NLRB 614, 614-15 (1989), is inapposite, because it involved an unmitigated concession by an individual who “testified that he participated in the decision to discharge Austin” and because the employer “never contended to the judge, either at the hearing or in its posthearing brief, that . . . Austin should be denied reinstatement and backpay solely because of the nail board incident.”) Here, Gaston was not the decision-maker, and the actual decision-maker testified that he would have made the same decision on the basis of the Delta Fire Incident alone. *Tr. 208:9-10, 301:13-14, 426:22-24, 1097:6-17*.

independent review. *Tr. 1098:9-12*. Furthermore, Gaston never discussed with Duncan the issue of whether termination for only the Delta Fire Incident would be appropriate or not. *Tr. 1108:5-8*. This was Duncan's decision, and Duncan has testified that the Delta Fire Truck incident, standing alone, would have led him to the same decision. *Tr. 1097:6-17*.

General Counsel also erroneously asserts that, in reaching her decision, the ALJ "never concluded that [the kick] had caused any damage." *GC Br. at 40*. To the contrary, the ALJ found that "Smith reviewed video footage, the photographs of the truck's rear panel, and incident reports from Security Officers Dimitri Shilov . . . and Farrant . . . who inspected and confirmed the truck's damage. Smith also confirmed with the owner that the vehicle had been damaged by Blanchard's kick." *Decision at 13:16-20* (emphases added). The substantial evidence noted by the ALJ supports the conclusion that Blanchard's kick dented the Delta Fire Truck. See *Tr. 69:14-17, 70:17-23, 72:15-17, 207:25-208:2, 275:16-277:18; GCX 5, 6; RX 20*. The only evidence to the contrary is Blanchard's self-serving and non-credible testimony that he did not notice any damage to the truck as it sped by – which is not surprising, given that Blanchard was not even looking at the panel he had kicked.²¹ *Tr. 799:13-21; R. Ex. 19*.

b. The RMR Incident

As to the RMR Incident, General Counsel argues that the evidence does not support the ALJ's conclusions that Blanchard jumped onto the hood of the RMR Truck after it came to a stop and intentionally struck the car with his picket sign, damaging the windshield.²² However, substantial evidence in the record supports all of those findings. Blanchard himself testified that the truck was stopped when he jumped on the hood and that it did not start moving again until after he had jumped onto the vehicle and after he had hit the truck with his picket sign at least twice. *Tr. 809:18-25, 812:13-18, 815:6-13*. The ALJ's frame-by-frame review of the video evidence led her to the

²¹ Blanchard admits that he never inspected the Delta Fire Truck after he kicked it. *Tr. 798:6-7*. Instead, he merely claims he "saw it as it went by." *Tr. 798:12*. But he admits that the truck immediately took off, and that he merely "looked at it as it went by," accelerating as it entered the Mill, and did not see any damage on the moving truck in that brief moment. *Tr. 798:14-799:12*. The video footage confirms that Blanchard would have had less than a second to view the accelerating truck, that a picket sign was blocking Blanchard's view, and that Blanchard was not even looking down at the panel he had just kicked. *Tr. 799:13-21; R. Ex. 19*.

²² See *GC Br. at 37-40*. KapStone speculates that these arguments may apply to Exceptions 10-18, 31-35, 38, 40-43, 97, 116, 118, 119, 130-132, and 135.

same conclusion: that Blanchard jumped onto the hood of the truck and struck it only after the vehicle had come to a complete stop. See *Decision at 20:11-29; RX 19*.

While Blanchard attempted to excuse his conduct, insinuating that he had no choice but to jump on the hood and strike the truck after it bumped him, the ALJ appropriately found that his testimony was not credible. As noted above, Blanchard admitted under oath – and the video footage confirms – that the RMR Truck was completely stopped when Blanchard jumped on the hood and that it did not start moving again until after he had jumped onto the vehicle and after he had hit the truck with his picket sign. There was no necessity associated with Blanchard's choice to take those actions. An interesting slip in Blanchard's testimony demonstrates that the true motivation for his actions against the RMR Truck was anger, not fear. When asked whether he could understand how the RMR Truck driver might have felt panicked in the situation, Blanchard testified: "I think if [I] drove up and hit somebody with my car and they got angry . . . then there would be a little bit of panic, yes." *Tr. 811:4-8* (emphasis added). Even General Counsel concedes that Blanchard "intentionally" hit the vehicle with his picket sign at least once. *GC Br. at 39*.

Blanchard also claims that he was merely "patrolling" across the contractor exit when the RMR Truck first bumped him. But the video footage confirms that Blanchard walked towards the front of the RMR Truck as it approached, joining others in swarming the vehicle as one of his co-picketers called out "Here's another one!" *Tr. 155:12-14, 412:7-8, 764:4-6, 804:8-18; R. Ex. 5 at 0:00-0:08; R. Ex. 6; G.C. Ex. 9*. Blanchard's repeated references to the RMR Truck driver as a "scab" (despite the fact RMR performed no bargaining unit work) further confirms that his entire attitude towards the RMR Truck was one of anger and revenge, not merely an innocent "patroller's" inadvertent defensive reaction to having been bumped by a vehicle trying to escape a violent swarm of picketers. That conclusion is further bolstered by the fact Blanchard had just kicked another contractor's truck, out of purported "frustration," a short time earlier. Blanchard's outbursts of violence towards third parties were not accidental, but involved calculated conduct on his part.

General Counsel erroneously asserts that "there is not one scintilla of record evidence that Blanchard was responsible for damaging the Tahoe's windshield[.]" *GC Br. at 40*. Mendenhall, who witnessed the incident, heard "a large crashing sound," that sounded like something shattering, simultaneous with Blanchard jumping on and striking the RMR Truck. *Tr. 155:19-22, 195:24-25*. Blanchard acknowledges that he struck the truck's hood or windshield

with his picket sign. *Tr.* 815:2-10. Approximately 15 minutes after the incident between Blanchard and the RMR Truck, Mendenhall drove slowly by the parked RMR Truck and observed that the windshield had been shattered. *Tr.* 162:2-22. Mendenhall later obtained contemporaneous photographs, taken by an RMR employee, of the shattered windshield. *Tr.* 162:24-164:11; *RX* 7, 8. Sufficient evidence supports the conclusion that Blanchard's conduct contributed to the damage to the RMR Truck's windshield. Regardless, his act in jumping on and striking the RMR Truck was, in and of itself, serious misconduct.

2. The ALJ Did Not "Ignore" Blanchard's Right to Engage in Peaceful Picketing and Patrolling, But Correctly Viewed His Picketing Activities as Serious Strike Misconduct

General Counsel additionally argues that the ALJ "ignored" Blanchard's right to engage in peaceful picketing and patrolling.²³ The critical word is "peaceful," and the ALJ correctly found that Blanchard's picketing activities were not "peaceful," but instead constituted serious strike misconduct. General Counsel acknowledges that "[n]ot all conduct engaged in by strikers during the course of a labor dispute is protected by the Act." *GC Br.* at 17. Indeed, as noted above, "strike misconduct is disqualifying [from reinstatement of employment] if, under all of the surrounding circumstances, it may reasonably tend to coerce or intimidate other employees in the exercise of rights protected under the Act." *Detroit Newspaper Agency*, 342 NLRB at 224. That is precisely what occurred here.

In an apparent attempt to paint the ALJ's Decision as "antagonistic" towards "peaceful" picketing and patrolling, General Counsel takes issue with the fact that the ALJ concluded:

[T]he fact that one of the picketers can clearly be heard saying "there's another one" when the Tahoe [RMR Truck] exited the Mill led me to conclude that Blanchard and the others intended to swarm the vehicle and block its egress from the Mill.

Decision at 7:25-30; *see also id.* at 19:42-43. General Counsel does not -- and cannot -- dispute that the statement was made by an unidentified male individual among the crowd of picketers as the RMR Truck approached, a fact that was clearly captured on video. General Counsel speculates, without any support in the record, that "[t]he 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" *GC Br.* at 19. Similarly, General Counsel takes

²³ See *GC Br.* at 18-21. KapStone speculates that this argument may apply to Exceptions 8, 9, 19, 27, 28, 35, 36, 38, 39, 117, 124, and 135.

exception to the ALJ's conclusion that the picketers, including Blanchard, swarmed the RMR Truck and briefly blocked its egress. But it is the ALJ's conclusions, rather than General Counsel's conclusions, that are upheld by the record.

The clear video evidence shows that approximately a dozen picketers, including Blanchard, swarmed the RMR Truck immediately after the statement of "Here comes another one!" was made. *Tr. 155:12-14, 412:7-8, 764:4-6, 804:8-18; RX 5 at 0:00-0:08; RX 6; GCX 9.* Blanchard, who testified that he inaccurately believed the RMR employee was a "scab,"²⁴ and was therefore someone against whom Blanchard bore ill will, walked directly in front of the approaching truck and towards it at an angle, blocking its egress.²⁵ *Tr. 440:14-22, 807:25-808:19; RX 5 at 0:02-0:08.* Even Union President Kurt Gallow acknowledged that walking towards a vehicle would present a problem. *Tr. 538:1-5.* Blanchard himself testified: "There's five of us right in front of the car and then several other people around." *Tr. 765:10-11* (emphasis added). "Swarming" is commonly understood to mean "converging upon, gathering in front of, [or] surrounding,"²⁶ (*Tr. 206:11-18*), which is exactly what Blanchard admitted to doing, and which is confirmed by the video evidence. And General Counsel fully acknowledges that "[t]he video evidence . . . reveals . . . that . . . Blanchard and the other picketers impeded the Tahoe's egress," if only for a very short time.²⁷ *GC Br. at 21.* As the ALJ noted, "Procurement Manager John Mendenhall (Mendenhall), who saw the entire incident unfold, confirmed this version of events."²⁸ *Decision at 6:34-35.*

General Counsel's focus on the swarming and blocking findings ignores the broader context of the ALJ's conclusions in this regard. The ALJ did not conclude that Blanchard's termination was warranted simply due to his participation in the swarming and brief blocking of the RMR Truck. Rather, the ALJ concluded: "I find that Blanchard's conduct, which he knew was prohibited, began the chain of events in question." *Decision at 8:6-7*

²⁴ *Tr. 803:1-6.*

²⁵ If the statement were intended to "alert[] picketers to be alert on a safety front," (*GC Br. at 19*), why would the group of picketers have walked in front of and towards the vehicle, rather than avoiding its path?

²⁶ Gallow further testified: "Swarming as we train our picketers was going -- you are not to go up to the side of the vehicle or surround the vehicle. You could patrol in front of the vehicle but swarming would be going up to the side of it, knocking on the window, touching the vehicle. You are not to do that." *Tr. 536:19-23.*

²⁷ Notably, that brief blocking of the vehicle may have been much more extended had the RMR Truck driver not panicked due to the swarming and thus driven off with Blanchard on the hood.

²⁸ The ALJ stated: "Mendenhall testified that, during the strike, he saw picketers blocking and/or swarming other contractors' vehicles so as to obstruct their ability to enter or exit the Mill. I found Mendenhall's testimony credible." *Decision at 7:38-30 (citing Tr. 149-151).* See Section II(E)(5), *infra.*

(emphasis added). The swarming and brief blocking of the RMR Truck, coupled with other evidence such as Blanchard's admitted violent outburst toward the Delta Fire Truck less than an hour earlier, belied Blanchard's proffered explanation that he was merely acting in self-defense with respect to the RMR Truck. Thus, the ALJ "found Blanchard's version of events less than fully credible." *Id.* at 7:25. She correctly found that Blanchard intentionally jumped onto and struck the RMR Truck, shortly after intentionally kicking the Delta Fire Truck, and appropriately concluded that those actions were not protected by the Act. *Id.* at 19:31-20:29; see also *Richmond Recording Corp.*, 280 NLRB 615, 616 (1986) (taking into account swarming and blocking of vehicle that led to accidental bumping by picketer of vehicle, when holding that reflexive and/or retaliatory striking of the vehicle's hood with a stick constituted serious misconduct). The swarming and blocking did not occur in a vacuum, but were accompanied by Blanchard's violent actions towards two different third-party contractors - actions that the ALJ correctly held to be serious strike misconduct.

3. Board Precedent Supports Denial of Reinstatement of Blanchard

The ALJ did not, as General Counsel contends, ignore Board precedent in reaching her well-reasoned conclusion that denial of reinstatement of Blanchard is warranted.²⁹ General Counsel relies on a handful of cases that are not analogous to this situation, but that instead clarify that where a picketer lashes out at a passing vehicle, particularly in a manner that causes damage to the vehicle, denial of reinstatement is wholly appropriate. See *GC Br. at 28-29* (citing *Medite of New Mexico*, 314 NLRB 1145, 1146-47 (1994), *enfd* 72 F.3d 780 (10th Cir. 1995) (strikers "hit the foreman's car with cardboard picket signs, but . . . they did not damage the car." (emphasis added); *Preterm, Inc.*, 273 NLRB 683, 698, 704 (1984) (holding that striker's scratching of door panels on a car constituted serious misconduct and holding that while hitting a car and bus in this instance was not serious misconduct, as "[t]here is no evidence that the 'pounding' caused any damage," "[i]t is clear that some incidents of 'pounding' might constitute serious misconduct and other incidents of pounding might not constitute serious misconduct.") (emphases added); *Brown & Root USA*, 319 NLRB 1009, 1107 (1995) (striker reflexively hitting a car with his cane was not serious misconduct where there was no damage to the vehicle)). *Massachusetts Coastal Seafoods*, relied upon by General Counsel, held only that where the ALJ's credibility resolutions led to his determination that the striker "kicked the car

²⁹ See *GC Br. at 28-29*. KapStone speculates that this argument may apply to Exceptions 128, 129, 131, and 136.

of a nonstriker in a reflex reaction to his almost getting hit by the car," serious misconduct did not occur. 293 NLRB 496, 496 n.1 (1989). That is not what the ALJ in this case found based on her credibility determinations, to which the Board must defer. See *id.* ("The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.")

As to the RMR Incident, the ALJ "found Blanchard's version of events less than fully credible," as he "gave inconsistent testimony," and "because the video evidence belies his many, different versions of the incident[.]" *Decision at 7:25-39*. Furthermore, as the ALJ noted with respect to the Delta Fire Incident, "Blanchard admitted that he kicked the truck because he was frustrated at the driver" and "Blanchard thought the Delta Fire driver was a 'scab[.]'" *Id. at 5:24-27*. The ALJ determined that Blanchard's assertion that the Delta Fire Truck honked at the picketers before Blanchard chose to kick the Truck was not credible and not supported by the video evidence. *Id. at 5*. Finally, the ALJ correctly found that Blanchard's kick caused damage to the Delta Fire Truck and that the RMR Truck's windshield was damaged during the time period when Blanchard and his fellow picketers swarmed the vehicle and Blanchard climbed onto the hood and hit it with his sign. *Id. at 19-20*.

The ALJ did not ignore relevant Board precedent, but instead correctly followed the substantial Board case law relevant to the actual circumstances: that of a picketer admittedly and intentionally kicking a vehicle, causing damage to it, and intentionally jumping onto the hood of another vehicle less than an hour later, repeatedly striking it with his picket sign and likely damaging its windshield. The Board has repeatedly confirmed that such conduct does, in fact, constitute serious misconduct. "Damaging a vehicle crossing a picket line constitutes serious misconduct under *Clear Pine Mouldings* and is grounds for discharge." *Detroit Newspaper Agency*, 342 NLRB at 224; see also *CalMat Co.*, 326 NLRB 130, 135 (1998) (denying reinstatement for striker who "use[d] himself as a barrier so the driver would have no choice but to stop," and then proceeded to jump up onto the company truck and damage the vehicle). But even in the absence of damage to vehicles, the Board has repeatedly held that kicking and striking vehicles attempting to enter or exit the employer's premises is serious misconduct. See, e.g., *Siemens Energy & Automation, Inc.*, 328 NLRB 1175, 1176 (1999) (upholding discharge of striker that kicked a car passing through the picket line); *Soft Drink Workers Union Local 812 (Pepsi-Cola Newburgh)*, 304 NLRB 111, 115-17 (1991) (holding that the "blocking, hitting and kicking of vehicles by pickets" constituted picket line misconduct, as did picketers placing themselves and their children in front of company trucks as they attempted to leave); *GSM, Inc.*, 284 NLRB 174, 174

(1987) (holding that strikers engaged in serious misconduct where one “kicked a striker replacement’s car as it was leaving the plant and attempted to kick another” and where another “slapped the hood of a car as it was leaving the plant”).

In the markedly analogous case of *Richmond Recording Corp.*, a picketer was hit by a car attempting to enter the employer’s premises, and the picketer twice struck the hood of the car with a stick, first as “an instinctive warding off of the car and a reflexive reaction to being struck,” and secondly as “a retaliatory act for being assaulted by the car.” 280 NLRB at 616. The Board held that this constituted serious misconduct, in part because picketers had surrounded the car and temporarily blocked its ingress, leading to the accidental bumping of the picketer, and in part because of the striking of the car after the accidental bumping. *Id.*

The ALJ correctly concluded, based on credibility determinations to which the Board owes deference, that Blanchard’s conduct towards the RMR Truck was not a mere reflexive action, but included intentional misconduct towards the truck driver. Regardless, it is telling that General Counsel has highlighted the RMR Incident throughout its brief, attempting to largely ignore the Delta Fire Incident and its implications. Even had the RMR Incident never occurred, the Delta Fire Incident, standing alone, is sufficient to warrant denial of reinstatement.³⁰ As Board precedent has repeatedly confirmed, “[c]onduct such as kicking. . . moving vehicles is intimidating in and of itself,” constituting “violent conduct which may reasonably tend to coerce or intimidate employees in the exercise of their rights protected under the Act.” *GSM, Inc.*, 284 NLRB at 174-75.

4. The ALJ Correctly Applied the *Clear Pine Mouldings* Standard in Concluding that the RMR Truck Driver’s Suspended License and Citation Were Irrelevant to KapStone’s Decision

General Counsel further argues that the ALJ misapplied the applicable burden-shifting standard by finding that the RMR Truck driver’s suspended license and citation were irrelevant to the question of whether KapStone had an honest belief that Blanchard had engaged in misconduct.³¹ See *Decision at 20:18-20*. The ALJ correctly found that KapStone was not aware of those factors at the time it made its termination decision and thus “none of these considerations are relevant to Respondent’s decision to discharge Blanchard.” *Id. at 19-20 (citing Giddings & Lewis, 240 NLRB 441, 448 (1979); Assoc. Grocers of New England, 227 NLRB 1200, 1207 (1977) (employer’s termination*

³⁰ See Section II(E)(1)(a), *supra*.

³¹ See GC Br. at 25-26. KapStone speculates that this argument may apply to Exceptions 36, 133, and 134.

decision resulting from strike misconduct is judged on the basis of the evidence available to it when it took the disciplinary action)).

Nor, as General Counsel argues, were those factors relevant to Blanchard's misconduct. Here, the ALJ made a credibility determination and carefully reviewed the available video evidence, concluding that Blanchard jumped onto the hood of the RMR Truck after it stopped. *Decision at 6-8, 19-20*. As the ALJ correctly found, even if the RMR Truck driver did act negligently in choosing to start driving again after Blanchard jumped onto the hood of his car and began striking it with a picket sign, that fact is completely irrelevant to Blanchard's previous, independent decision to jump onto the car and strike it.³² The Board has expressly rejected the argument that misconduct may somehow be justified by another actor's alleged misconduct, holding that "two wrongs do not make a right." *Richmond Recording Corp.*, 280 NLRB at 616.

General Counsel also argues that the ALJ should have considered KapStone's purported "tolerance" of the RMR Truck driver's actions. As an initial matter, the driver was the employee of a third-party contractor, not a KapStone employee. *Tr. 149:5-14*. Thus, KapStone could not discipline him for his involvement in the incident. General Counsel cites to a completely inapposite case, *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988), which held only that where an employer tolerates certain conduct by its non-striking employees or replacements, its refusal to reinstate striking employees for the same behavior shows disparate treatment. That concept is inapplicable to a non-employee over whom KapStone had no disciplinary authority. Furthermore, KapStone did not condone the RMR Truck driver's conduct. The evidence demonstrates that KapStone reasonably believed that the RMR Truck driver never returned to the Mill after the incident in question. *Tr. 165:13-17, 1147:18-1148:1*.

³² The cases cited by General Counsel are inapposite. See *GC Br. at 25*. In *Illinois Consolidated Telephone Co.*, contrary to General Counsel's description that the picketer at issue "fell forward and struck hood of company van only because van hit him," (*id.*), there was "no evidence whatsoever that [the picketer] ever 'struck' the van," and the picketer merely "leaned his elbow on the van." 837 F.3d 1, 10 (D.C. Cir. 2016). In *Desert Inn Country Club*, the Board upheld the ALJ's conclusion that the discharged employee did not engage in the misconduct at issue because he was struck by a car while not paying attention to where he was walking. 275 NLRB 790, 796-97 (1985). The ALJ based the decision on his weighing of the credibility of the witnesses to the incident. *Id.* The ALJ's credibility determination and weighing of the evidence in this case instead supported the conclusion that Blanchard did not jump onto the vehicle until it came to a full stop. *Decision at 6-8, 19-20*.

5. The ALJ Appropriately Considered Mendenhall's Testimony

Finally, General Counsel argues that the ALJ should not have taken into consideration Mendenhall's testimony that "he saw picketers blocking and/or swarming other contractors' vehicles so as to obstruct their ability to enter or exit the Mill."³³ *Decision at 7:28-30*. The ALJ's consideration of that testimony was not contrary to her evidentiary ruling, as the ALJ held only that she would not consider "any testimony by Mr. Mendenhall regarding what conduct he may or may not have witnessed by the Union that may or may not have been the subject of the TRO and the temporary injunction that was issued." *Tr. 504:23-505:1*. The ALJ clarified: "The exception is if the conduct in question revolves around the four individuals that are the subject of this case, that stays in . . ." *Tr. 505 at 17-19*. Mendenhall's testimony was directly related to the RMR Incident involving Blanchard. Mendenhall testified that, in a 45 to 60-minute period that included the RMR Incident, he observed that:

[v]ehicles were being stopped. People were surrounding them, walking in front of them, forcing them to stop. There would be, again, profanities and things yelled at people as they were attempting to exit or enter.

Tr. 154:18-155:1; see also Tr. at 150:8-151:15 (further testifying as to swarming and blocking vehicles on the date of the RMR Incident). This was directly relevant to Blanchard's misconduct towards the RMR Truck driver. It did not contravene the ALJ's evidentiary ruling to take that relevant testimony into account. *See Tr. 505 at 17-19*.

F. The ALJ Correctly Concluded that KapStone Did Not Violate Sections 8(a)(1) or (3) of the Act When it Terminated Elben's, Froberg's and Bouchard's Employment for Serious Picket Line Misconduct

1. **Substantial Evidence in the Record Supports the ALJ's Conclusion that Elben, Froberg, and Bouchard Engaged in Misconduct Sufficient to Deny Reinstatement**

General Counsel continues to advance the argument that Elben, Froberg, and Bouchard did not block the Gardner Truck for a nearly 20-minute period, despite the clear evidence in the record to the contrary.³⁴ Not only do video footage and witness statements demonstrate that the three employees stood in the Right-of-Way, preventing the Gardner Truck from exiting the Mill's employee/truck exit for nearly 20 minutes, but Froberg, Bouchard, and Elben fully acknowledge that they did so. In fact, Bouchard testified as follows:

Q: . . . Whether or not you were in the public right-of-way, you understood, did you not, that you were blocking this truck from being able to exit?

³³ See GC Br. at 45-46. KapStone speculates that this argument may relate to Exceptions 20, 21, 25, 29, and 30.

³⁴ See GC Br. at 42-44. Kapstone speculates that these arguments may relate to Exceptions 1, 2, 47-65, 68, 69, 76, 77, 81-93, 138, 149-152, 155, and 156.

A: Yes.

Tr. 637:15-18 (emphases added). Bouchard admits that he was aware that traffic had to be diverted to the Mill's entrance because of the Gardner Truck's position, and he further admits that had he not moved from the Right-of-Way, "[t]he wheels would probably have hit me, yes." *Tr. 629:21-24, 636:14-21*. While Froberg at one point incredibly testified that he did not believe he would have been hit by the truck, he previously noted, in his statement to the Employment Security Department: "[A] truckdriver incorrectly positioned their truck to leave the mill site and its path was over the top of me and I held my ground" *RX 49* (emphasis added); see also *Tr. 880:1-15*. Froberg testified that, of the three of them, he was standing the farthest from the Gardner Truck, and he acknowledged that the Gardner Truck therefore would have run over his two colleagues, as well. *Tr. 858:21-23, 882:10-20*. The fact that the Gardner Truck would have struck the three employees had it continued was supported by the testimony of others at the scene, including the highly experienced driver of the truck.

While Elben claims that the vehicle was not actually blocked "[b]ecause she could have easily backed up and left,"³⁵ multiple witnesses testified that there was no way that Cutler could have safely backed up, nor was there any way she could have safely navigated the left-hand turn onto Fibre Way with Froberg, Bouchard, and Elben standing in the Right-of-Way and creating a "choke point" with picketers and cars along the opposite fog line. Cutler, who has 14 years of experience as a commercial truck driver, and her supervisor, Mast, who also holds a commercial driver's license, testified to the impossibility of safely turning onto Fibre Way with the three employees located in the Right-of-Way. The fact that other trucks may have been able to negotiate the turn on other occasions is inapposite. The Gardner Truck was longer than most trucks and with four locked axles, significantly impacting its turning radius, and the "choke point" situation had not previously been present.³⁶

³⁵ *Tr. 702:13-17*.

³⁶ See Section I(B)(5), *supra*. General Counsel erroneously asserts that "[o]ther contractors delivering loads from Respondent's Mill also have equally large trucks in their fleets." *GC Br. at 15*. The testimony on which General Counsel relies for this proposition involved only the statement that other companies had "large trucks," not that they had equally large trucks. *Tr. 1104:25-1105:6*. In fact, the testimony was that the Gardner Truck was one of the largest trucks to access the Mill. *Tr. 315:10-14*. Similarly, General Counsel misstates Duncan's testimony, claiming that he "denied that there was any truck from Gardner Trucking that could not fit between the two fog lines of that two-lane county road." *GC Br. at 15*. Duncan only testified that he was "not aware" of a Gardner truck that could not fit between the fog lines. *Tr. 1104:11-19*. Regardless, the point is not whether a truck could fit between the fog lines when driving in a straight line down the road, but whether the truck at issue could negotiate the sharp left turn onto Fibre Way.

General Counsel presented no evidence that the truck was not actually blocked, other than the employees' blind assertions that they believed the Gardner Truck should have been able to make the turn. The employees' testimony cannot outweigh that of experienced commercial truck drivers familiar with the type of truck at issue. While Elben has had experience driving a much smaller, dual axle commercial truck (with axles that may or may not have been locked), he admits that he "would have no idea" whether a 70-foot truck with four locked axles would be more difficult to drive, because: "I've never drove one." *Tr. 702:24-704:4*. Indeed, Elben testified:

THE WITNESS: There's room behind her to back up.

JUDGE THOMPSON: . . . How do you know that the truck would be able to navigate that if you haven't ever driven that kind of truck?

THE WITNESS: I guess I don't.

Tr. 704:21-25 (emphasis added). Bouchard and Froberg do not have commercial driver's licenses, have never driven a big rig truck, and do not have any specific knowledge or expertise regarding commercial trucks. *Tr. 622:18-623:10, 885:4-10*. Bouchard has no knowledge as to whether other trucks that were able to negotiate the turn had a similar axel setup as the Gardner Truck. *Tr. 623:11-14, 633:11-14*. Bouchard acknowledged that the "choke point" situation created by the three of them with the picketers and vehicles along the fog line on the opposite of Fibre Way created a far different scenario for the Gardner Truck than for other trucks that negotiated that turn,³⁷ while Froberg acknowledged that it would have been easier for vehicles to make the turn once the picketers and vehicles across Fibre Way were no longer there. *Tr. 883:22-884:4*. As the ALJ correctly found, the three picketers did, in fact, block the Gardner Truck's egress from the Mill.

General Counsel also erroneously asserts that it is an "un-rebutted fact" that the Right-of-Way was only intended for pedestrian use. *GC Br. at 42*. General Counsel relies wholly on the testimony of Union President Kurt Gallow, who testified only that it was "not . . . my understanding" that the Right-of-Way was also intended for vehicles, based on an inadmissible hearsay conversation he claims to have had with a Sheriff's Deputy on an earlier occasion. *Tr. 541:22-25*. But the wrongdoers themselves admit that the Right-of-Way is also a regular right-of-way

³⁷ *Tr. 625:12-16, 627:25-628:4*. General Counsel raises the "red herring" argument that KapStone somehow contributed to the "choke hold" situation through the use of "traffic candles," but the evidence in the record shows that the traffic candles had been removed prior to September 4, 2015, the date of the Gardner Incident, and therefore could not have been a contributing factor. *Tr. 373:21-374:1*. Significantly, no one testified to the traffic candles purportedly playing a role in the Gardner Truck's inability to negotiate the tight turn.

for vehicles turning out of the Mill, not just a right-of-way for pedestrians. *Tr.* 631:4-5, 714:4-5, 806:11-13.

Substantial evidence in the record confirms the fact that the Right-of-Way is not only used by the occasional pedestrian, but is also regularly and frequently used by vehicles exiting the Mill from the employee/truck exit to turn left onto Fibre Way, providing vehicles (especially large trucks) with the extra room needed to negotiate the sharp turn. *Tr.* 134:2-5, 139:23-140:3, 142:14-18, 143:1-7, 215:2-6, 987:15-988:12, 1017:13-16; see also RX 4. As Smith testified: "I have witnessed it thousands of times, in person, at the mill site." *Tr.* 143:4-5 (*emphasis added*). Mast, whose office is located on the Mill site, has seen trucks drive over the Right-of-Way "[e]very day." *Tr.* 946:20-947:2. When asked how often trucks use the Right-of-Way when exiting the Mill, Mast testified: "Probably every time they come out, depending on their length." *Tr.* 948:22-949:2 (*emphasis added*). Cutler confirmed that it is necessary for her to drive over the Right-of-Way every time she turns out of the Mill in her Gardner Truck in order to safely make the turn. *Tr.* 987:15-988:5. The evidence supports the conclusion that Elben, Froberg, and Bouchard inappropriately blocked the Gardner Truck with their refusal to move from a point in the road (the Right-of-Way) that was necessary to the Truck's successful negotiation of the turn.³⁸

General Counsel also points to Froberg's claim that, while picketing at 1:00 in the morning on an earlier occasion, two Sheriff's deputies stopped by, and the picketers asked them if they could stand "off to the side of the road." *Tr.* 845:22-846:17. Froberg claimed that the Sheriff's deputies "said it looked a perfectly fine place to be standing, not in the company's property or out in the roadway." *Tr.* 846:15-19. Even setting aside the obvious objection to General Counsel's reliance on this testimony (its status as hearsay), it is irrelevant to the circumstances of the Gardner Incident. Froberg admitted under oath that traffic was heavier during the daytime than at night. *Tr.* 843:22-24. He also testified that September 4th "was probably picking up to be one of the more busy [days] because they were trying to get things going and there was a lot of vehicles going out,"³⁹ in stark contrast to the scene at 1:00 in the morning when the alleged prior conversation with the Sheriff's deputies occurred. And Gallow admitted, when questioned whether the Sheriff's officer informed the picketers that they could block vehicles that wanted to use the Right-of-Way: "That specific thing was not brought up." *Tr.* 542:23-543:1. In addition, General Counsel asserts that

³⁸ Blanchard, a Union brother of Froberg, Bouchard, and Elben, acknowledged under oath that he would not have the right to stand in the Right-of-Way for 20 minutes and keep a vehicle from moving. *Tr.* 806:17-19.

³⁹ *Tr.* 875:6-9.

"the conclusions of . . . Cowlitz County Sheriff's deputies regarding applicable local or state criminal codes are not relevant to the determination whether the picketers' discharges were unlawful." *GC Br. at 47*. If that is the case, then their conclusions regarding the issue of whether picketers could stand in the Right-of-Way at a particular point in time are equally irrelevant to the analysis.

The critical flaw in General Counsel's reasoning is that once it was clear the picketers were blocking a vehicle, their right to stand in the Right-of-Way dissolved. Duncan aptly summarized the reality of the situation when he testified that Froberg, Elben, and Bouchard had the right to stand in the Right-of-Way if no traffic was coming, but that they had no right to stand there and block a truck from exiting. *Tr. 1118:7-24*. As the video evidence from September 4th reveals, one of the Sheriff's deputies at the scene of the Gardner Incident confirmed this point:

They can't block the road. . . . It's very simple, if 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 you are blocking the vehicle, you can't do that.

JX 1 at 1 (emphases added); *see also RX 27*.

General Counsel's repeated attempts to discount and qualify the above statement by the Sheriff's deputy on September 4th, captured on video, and to assert that it did not constitute a request for the employees to move out of the path of the Gardner Truck, does not hold up against the clear evidence. *See Decision at 21:15-17*. This is especially true in light of the fact that Froberg asked the officer: "So I can't stand there on the public right-of-way where I was?", with the officer clearly responded, "**No. You can't block a vehicle.**" *RX 48 at 0:28-0:56; JX 1 at 2* (emphasis added); *see also Tr. 112:4, 318:23-319:4, 554:5-6, 555:4-14, 558:2-6, 955:14-23, 1062:1-4*. Froberg even admitted that the Sheriff's deputy expressly told him at that time that he could not stand in the Right-of-Way and block a vehicle.⁴⁰ *Tr. 887:1-3, 888:9-20, 904:13-18; RX 37*.

Despite General Counsel's continued efforts to paint the three picketers' conduct as an innocent act that had no actual impact on the Gardner Truck, the overwhelming evidence compels the contrary conclusion. Significantly, "[b]ecause the General Counsel Bears the burden of proving that the misconduct is shielded by the Act, any ambiguity or equivocation in the evidence on the question of the conduct's seriousness "must be resolved in

⁴⁰ *Tr. 887:1-3, 888:9-20, 904:13-18; RX 37*.

favor of the employer[.]” *Illinois Consol. Tel. Co. v. NLRB*, 837 F.3d at 39 (quoting *Axelson, Inc.*, 285 NLRB at 864). General Counsel cannot meet its burden as to Elben, Froberg, and Bouchard.

2. The ALJ Did Not “Ignore” Elben’s, Froberg’s, and Bouchard’s Right to Engage in Peaceful Picketing or Applicable Board Precedent, But Instead Correctly Applied Board Precedent in Concluding that the Picketers Engaged in Serious Strike Misconduct

As with Blanchard, General Counsel complains that the ALJ “ignored” Elben’s, Froberg’s, and Bouchard’s right to engage in peaceful picketing, and takes issue with the ALJ’s entirely accurate description of the incident as a “stand-off” between the picketers and the Gardner Truck.⁴¹ “[P]eaceful picketing does not include the right to block access to the employer’s premises.” *Big Horn Coal Co.*, 309 NLRB 255, 258 (1992) (emphasis added). “Blocking of ingress and egress . . . constitute[s] . . . coercive conduct Blocking of ingress and egress of employees even for a short period of time until broken up by police to allow entrance or exit has likewise been held to be violative of the Act.” *Id.* at 258-59 (citing *Iron Workers Local 455 (Stokvis Multi-ton)*, 243 NLRB 340 (1979)).

General counsel similarly argues that the ALJ purportedly disregarded “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.”⁴² *GC Br.* at 32. But substantial Board case law holds exactly the contrary. The cases relied upon by General Counsel, (*GC Br.* at 22), only confirm the distinction between the conduct presented in this case and the type of “instantaneous blockage” that may, under certain circumstances, be excusable. “[A] momentary, noncoercive blockage will fall within that form of mischief classified as ‘minor acts of misconduct[.]’” *Ornamental Iron Work Co.*, 295 NLRB 473, 479 (1989) (emphasis added) (finding no serious misconduct where one vehicle “had to slow down” and another vehicle briefly stopped at the picket line, but “[t]here [was] no indication that Delagrang and Miller in any physical fashion impeded access of the vehicle.”). But “it is possible for a picketer to disrupt traffic in a manner exceeding the permissible bounds of strike activity” *The Hotel Roanoke*, 293 NLRB 182, 217 (1996) (addressing the contention that picketers merely slowed the flow of traffic by patrolling and finding that there was insufficient evidence of an actual disruption of traffic).

⁴¹ See *GC Br.* at 21-22. KapStone speculates that this argument may be relevant to Exception 65.

⁴² See *GC Br.* at 30-37. Kapstone speculates that these arguments may be relevant to Exceptions 137, 143, and 157-159.

Indeed, anything longer than a “momentary, noncoercive blockage” or a “slow-down” has routinely been found by the Board to be serious misconduct, even where a single instance is at issue. See, e.g., *Big Horn Coal Co.*, 309 NLRB at 258-59 (picketers who blocked gate to employer’s facility engaged in strike misconduct); *Iron Workers Local 455 (Stokvis Multi-ton)*, 243 NLRB at 346 (picketers who delayed a van exiting the premises for “several minutes” engaged in serious misconduct, “because blocking an entrance or exit even for a short period of time constitutes restraint and coercion within the meaning of the Act.”); *Gem Urethane Corp.*, 284 NLRB 1349 (holding that striking employees who “blocked a nonstriker’s ingress to the plant,” “surrounded the car of . . . a nonstriker,” and “blocked the exit gate of the plant with [a] car” engaged in serious strike misconduct). As the Board has articulated:

The absence of physical violence does not lessen the restraining effect . . . [T]he car drivers were faced with the choice of running down the pickets . . . or driving away. This interposition of passive force . . . is, we believe, a form of restraint proscribed by Section 8(b)(1)(A).

Metal Polishers, Buffers, Platers & Helpers Int’l Union, Local No. 67, 200 NLRB 335, 336 (1972) (emphasis added) (holding that blocking access of cars to the employer’s premises for only a few minutes constituted restraining and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act).

Even if a “pattern” of blockage were required (which is not the case), General Counsel’s claim that there is a lack of evidence of a “pattern” is troubling in light of General Counsel’s objection to the introduction of KapStone’s substantial evidence of other incidents of blockage during the strike. See *GC Br. at 33*. General Counsel should not be permitted to object to the relevance of such evidence at the hearing, contributing to an order precluding its consideration, then take the position that KapStone’s case fails due to a purported lack of the very evidence objected to by General Counsel. Regardless, there is evidence of a pattern of blockage here, as Blanchard and his fellow picketers blocked the ingress and egress of vehicles four days prior to the Gardner Incident.⁴³ Furthermore, the TRO serves as evidence of a pattern of conduct preceding the Gardner Incident.⁴⁴ See *GCX 2*.

Nor, as General Counsel claims, is there “absolutely no evidence in the record that [the Gardner Incident] was strategic or planned.” *GC Br. at 33*. Despite being aware of the Union’s picketing rules and the TRO prohibiting the blocking of vehicle, the three picketers stood their ground and refused to move a matter of a few feet for a 20-

⁴³ See Section II(E)(1)(b),(5), *supra*.

⁴⁴ See Section I(B)(4), *supra*.

minute period, ignoring requests from Harger and the Sheriff's deputies to do so, even though it was abundantly clear that the Gardner Truck was trapped, disrupting traffic.⁴⁵ The picketers also moved aside to allow a Waste Control truck to pass, but refused to do so for Cutler, whom they erroneously viewed as hostile to the Union.⁴⁶

3. The Evidence Demonstrates That KapStone Had an Honest Belief That Elben, Froberg, and Bouchard Engaged in Serious Strike Misconduct

General Counsel's contention that the ALJ did not properly analyze KapStone's honest belief that Elben, Froberg, and Bouchard engaged in the conduct at issue⁴⁷ falls flat in the face of the substantial evidence in the record demonstrating that KapStone easily met that element of the burden-shifting analysis.⁴⁸ "In cases involving the discharge of striking employees for engaging in strike-related misconduct, . . . the General Counsel has the overall burden of proving discrimination." *Detroit Newspaper Agency*, 342 NLRB at 224. The employer first need only "establish that it had an honest belief that the employee engaged in the conduct for which he was discharged . . ." *Id.*

KapStone honestly believed that Froberg, Bouchard, and Elben engaged in the misconduct of blocking the Gardner Truck from exiting the Mill site for a span of nearly 20 minutes. The entire incident was captured on video and witnessed by KapStone employees. KapStone engaged in a thorough investigation into Froberg, Bouchard, and Elben's misconduct, reviewing video footage, speaking with multiple witnesses, allowing the employees to submit written responses, and holding fact finding meetings at which the employees and their Union representatives were provided the opportunity to add any further information for KapStone's consideration.⁴⁹ Following the thorough investigation, Duncan accurately concluded that Froberg, Bouchard, and Elben blocked the Gardner Truck's egress from the Mill for nearly 20 minutes.⁵⁰

Significantly, KapStone's burden is only that of "establish[ing] that it had an honest belief that the employee[s] engaged in the conduct for which [they were] discharged." *Id.* (emphasis added). General Counsel points to no evidence that would support the conclusion that KapStone did not honestly believe Elben, Froberg, and Bouchard had blocked the Gardner Truck for 20 minutes. Instead, General Counsel focuses on the argument that

⁴⁵ See Section I(B)(5), *supra*.

⁴⁶ See *id.*

⁴⁷ In fact, the ALJ made extensive factual findings as to KapStone's inquiry into the misconduct and its belief as to the basis for discharge. See, e.g., *Decision at 16-17*.

⁴⁸ See GC Br. at 27. KapStone speculates that this argument may relate to Exception 153.

⁴⁹ See Sections I(B)(5),(6), *supra*.

⁵⁰ See Section I(B)(6), *supra*.

the misconduct was purportedly not serious. *GC Br. at 27*. But establishing that “the misconduct was not sufficiently egregious to warrant discharge,” is the final step of the burden-shifting analysis; after the employer “establish[es] that it had an honest belief that the employee engaged in the conduct for which he was discharged,” General Counsel bears the burden of “affirmatively establish[ing] that the employee did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge.” *Detroit Newspaper Agency*, 342 NLRB at 224. It does not speak to KapStone’s honest belief that the conduct itself -- blocking the truck for 20 minutes -- occurred.

4. The ALJ Appropriately Considered the Sheriff’s Deputies’ and Harger’s Requests to Move As Relevant Evidence

General Counsel contends that the Sheriff’s deputies and Harger’s requests that Elben, Froberg, and Bouchard move to the side to allow the Gardner Truck to complete its turn onto Fibre Way were “completely irrelevant.”⁵¹ To the contrary, the ALJ appropriately considered that evidence, because it is directly relevant to establishment of the facts that the three picketers were, in fact, blocking the Gardner Truck’s egress, and that they continued to refuse to move for an extended period of time despite their awareness that they were blocking traffic. While a mere inadvertent, momentary slow-down of traffic may not constitute serious strike misconduct, a deliberate and extended blockage of traffic certainly does.⁵² The fact that the three picketers were repeatedly instructed to move from the Right-of-Way in order to allow the Gardner Truck to exit the Mill, but ignored those directives, is patently relevant.

5. Substantial Evidence in the Record Supports the Conclusion that Elben, Froberg, and Bouchard’s Conduct Reasonably Tended to Coerce or Intimidate Others

Finally, General Counsel asserts that the ALJ should not have relied upon testimony from Heidi Mast that several Gardner truck drivers expressed fear regarding exiting the Mill during the strike because of the Gardner Incident, because such testimony involves hearsay.⁵³ As an initial matter, the ALJ’s determination of which evidence to admit was within her sound discretion. *See Cibao Meat Prods., Inc.*, 349 NLRB at 471 (“[T]he Board affirms an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion.”)

⁵¹ See *GC Br. at 47, 48*. Kapstone Speculates that these arguments may be relevant to Exceptions 59-64, 88, 89, 92, 93104, 107, 149, 152, and 155.

⁵² See Section II(F)(2), *supra*.

⁵³ See *GC Br. at 48-49*. Kapstone speculates that this argument may relate to Exceptions 144 and 145

Further, even General Counsel acknowledges that “[t]he *Clear Pine Mouldings* standard is an objective one and does not involve an inquiry into whether any particular employee was actually coerced or intimidated.” *Mohawk Liqueur*, 300 NLRB 1075 (1990). Rather, “strike misconduct is disqualifying [from reinstatement of employment] if, under all of the surrounding circumstances, it may reasonably tend to coerce or intimidate other employees in the exercise of rights protected under the Act.” *Detroit Newspaper Agency*, 342 NLRB at 224 (citing *Clear Pine Mouldings*, 268 NLRB at 1046). As discussed previously, “blocking an entrance or exit even for a short period of time constitutes restraint and coercion within the meaning of the Act.” *Iron Workers Local 455 (Stokvis Multi-ton)*, 243 NLRB at 346. Thus, Mast’s testimony was not dispositive to the ALJ’s conclusion that Elben, Froberg, and Bouchard committed serious strike misconduct.

Regardless, General Counsel is incorrect in the assertion that there is no other evidence beyond Mast’s testimony to support the conclusion that the picketers’ conduct instilled fear in others. Cutler and Mast both testified to the fact that they themselves no longer felt safe using the Mill exit. *Tr. 958:17-.22, 995:4-17*. Gardner Trucking instructed its drivers to stop using that exit for the remainder of the strike, out of concern for the safety of its drivers. *Tr. 958:6-13*. And KapStone was obligated to redirect contractor traffic to the Chip Gate in response to the contractors’ fears for their safety. *Tr. 367:9-10*. In addition, the incident caused “angst” among many other KapStone employees. *Tr. 367:14-16*. The mere fact that the 20-minute blockage occurred is sufficient to demonstrate “coercion within the meaning of the Act,”⁵⁴ but substantial evidence supports the conclusion that the misconduct of Elben, Froberg, and Bouchard had an actual coercive effect on others, as well.

G. General Counsel’s Objection to Purported Leading Questions is Outside the Scope of General Counsel’s Exceptions

In addition to the fact that General Counsel failed to comply with 29 C.F.R. § 102.46 in its lack of explanation of the grounds purportedly supporting its numerous Exceptions,⁵⁵ General Counsel also raised an overarching issue that falls outside the scope of the Exceptions. General Counsel argues that KapStone’s counsel employed what General Counsel characterizes as leading questions at points during the hearing, but that issue appears nowhere in the Exceptions. See *GC Br. at 49-50*. “Any brief in support of exceptions shall contain no matter

⁵⁴ *Iron Workers Local 455 (Stokvis Multi-ton)*, 243 NLRB at 346.

⁵⁵ See Section II(A), *supra*.

not included within the scope of the exceptions . . ." 29 C.F.R. § 102.46(c) (emphasis added). This extraneous issue should be disregarded.

Regardless, it was well within the ALJ's discretion to make evidentiary determinations regarding the propriety of particular lines of questioning. "[T]he Board affirms an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion." *Cibao Meat Prods., Inc.*, 349 NLRB at 471. Further, as General Counsel insinuates, the issue of leading questioning speaks to credibility, which is uniquely within the realm of the ALJ and to which the Board must afford great deference.⁵⁶ See *Newcor Bay City Div. of Newcor, Inc.*, 351 NLRB at 1034, n.3; *Medeco Sec. Locks, Inc.*, 322 NLRB at 664.

III. CONCLUSION

The ALJ's thorough and well-reasoned findings and conclusions with regard to all charges against KapStone should be affirmed. The record evidence and Board precedent clearly support the ALJ's decision that Blanchard, Elben, Froberg, and Bouchard engaged in serious strike misconduct and that denial of reinstatement of employment is warranted.

Respectfully submitted this 27th day of January, 2017.

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⁵⁶ See Section II(B), *supra*.

DECLARATION OF SERVICE

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

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