UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KAPSTONE PAPER AND PACKAGING CORPORATION

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

and

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

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO GENERAL COUNSEL'S EXCEPTIONS

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Pursuant to 29 C.F.R. § 102.46(h), Counsel for the General Counsel ("GC") submits the following reply brief in response to Respondent's answering brief.

1. Respondent's Contention that the GC's Exceptions and Brief Should be Stricken Is Meritless

Respondent's hyper technical argument (24-25) that the GC's Exceptions and Brief fail to comply with the Board's Rules and Regulations is meritless. Respondent argues that each exception does not state its "grounds" pursuant to § 102.46(b)(1)(iv) and insists that the GC should have set forth the argument and authority underlying the grounds for each exception in the exceptions document itself. However, Respondent ignores that the GC filed a supporting brief that fully set forth the concise grounds for the exceptions filed and that § 102.46(b)(1) explicitly provides that, when a supporting brief is filed, "the exceptions document shall not contain any argument or citation of authority in support of the exceptions." Thus, the GC's Exceptions fully comply with 29 C.F.R. § 102.46(b).

Respondent's further argument that the GC's Brief is deficient under § 102.46 because it fails to reference the specific exceptions has been consistently rejected by the Board in recent decisions. *See, e.g., Valley Health System LLC,* 363 NLRB No. 178 n.1 (2016); *Solutia, Inc.,* 357 NLRB 58 n.1 (2011). Thus, the Board should reject Respondent's argument.[1]

2. The Board Should Ignore the ALJ's Credibility Resolutions in Evaluating the Discriminatees' Conduct

As the GC argued in its Brief (44-47), the Judge made several unnecessary credibility resolutions regarding the Tahoe and Gardner Trucking incidents because the video evidence fully depicted the picketers' conduct at issue. Respondent argues (25-26) that the ALJ did consider the video evidence and cites to the oft-repeated broad-brush principles that an administrative law judge has full authority to make credibility resolutions and the Board will not overturn those resolutions unless the clear preponderance of the evidence establishes they are wrong.[2] Respondent misses the point.

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[1] None of the cases cited by Respondent are on point or support its argument. In *Holsum de Puerto Rico,* 344 NLRB 694 n.1 (2005); *Conley Trucking,* 349 NLRB 308 n.2 (2007); and *Thriftway Supermarket,* 294 NLRB 173 n.2 (1989), the Board found that the exceptions did not meet the minimal requirements of § 102.46 because the party failed to state in *either* the exceptions *or the supporting brief* the grounds on which the judge's findings should be overturned. In *Tri-Tech Services,* 340 NLRB 894, 896 (2003), the argument was included in the exceptions document, in derogation of § 102.46(b)(1)'s proscription.

[2] Respondent also finds it notable (26 n.12) that GC has not raised the same argument regarding the Delta Fire truck because video evidence also depicts that conduct. The simple answer to that comment is that, unlike the Tahoe and Gardner Trucking incidents, the ALJ did not claim that an evaluation of Blanchard's conduct regarding the Delta Fire truck turned on credibility or make any witness credibility resolutions regarding that incident. Rather, the entire issue in that matter is whether Blanchard's solitary sneaker kick that caused no damage was so egregious as to warrant his loss of employment.

The GC does not contest the ALJ's authority to make credibility resolutions. Rather, the GC notes that application of the appropriate standard renders them unnecessary to an objective evaluation of whether the strikers' conduct under the circumstances was so egregious that it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. A judge uses credibility resolutions to resolve conflicts regarding what happened, what was said, what was done, etc. Here, they were unnecessary because the video evidence fully depicts the conduct. Not only is the video evidence depicting the strikers' conduct the best evidence of the incidents, but it also contains no inherent bias, unlike the biased testimony of Respondent officials John Mendenhall and Heidi Mast, who the ALJ erroneously and unnecessarily credited.[3] Since such credibility findings should not have been made, the GC requests that the Board ignore them.

3. <u>The ALJ Repeatedly Misapplied the Objective *Clear Pine Mouldings* Standard</u>

The Board's "*Clear Pine* standard is an objective one" and "does not call for an inquiry into whether any particular employee was actually coerced or intimidated," *Mohawk Liqueur Co.,* 300 NLRB 1075, 1075 (1990), "nor does it involve inquiry into the intent of the discharged striker." *Universal Truss, Inc.,* 348 NLRB 733, 734 (2006). Despite these clear admonitions, the ALJ erroneously concluded that the four discriminatees engaged in disqualifying conduct based, in part, on her repeated inappropriate findings as to their *intent* as well as others' *subjective reactions* to their conduct. *See* GC's Brief at 23-25. Now, Respondent asserts (26-28) that the ALJ's analysis was appropriate because Board precedent allegedly permitted her to consider the strikers' "actual" intent and the "actual" coercion of employees.[4] As Respondent does not quote from any Board decision applying this "actual" intent or coercion standard – because there is none – Respondent's argument must fail and the ALJ's repeated misapplication of the objective strike misconduct standard be reversed.

4. <u>Smith's Biased Opinions Regarding State Criminal Law and the TRO Are Not Remotely Dispositive</u>

Respondent claims (28) that Smith's biased opinions that the strikers' conduct violated state criminal law and the TRO are a factor or a "piece of the puzzle" that the ALJ properly considered in reaching her decisions.[5] They are not. As

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[3] Similarly, Blanchard's credibility as to whether or how many times his picket sign hit the Tahoe's hood, for example, is irrelevant because the video evidence answers that question. Further, whether the strikers were or were not credible on the witness stand in the ALJ's estimation has no material bearing on whether their discharges violated the Act; Respondent did not discharge them because of their conduct on the witness stand.

[4] Although Respondent cites *Detroit Newspaper Agency,* 342 NLRB 223, 224 (2004), for its over-reaching proclamation that "the employer need not go to the extent of proffering actual, subjective impact or intent in order to prevail" in strike misconduct cases, that is not what the decision says. Rather, the decision clearly reinforces the objective standard, with the Board finding that the discharge of picketer Skewarczynski was unlawful because his conduct objectively would not tend to coerce or intimidate anyone. *Id.*

[5] This is despite the fact that Respondent itself clearly did not believe that any of the strikers' conduct had violated any criminal laws or the TRO because it never filed any charges against them or sought an order finding them in contempt of the TRO.

the Charging Party correctly argues in its Answering Brief (9), Board precedent is clear that the lawfulness of strikers' conduct under state criminal statutes is not "dispositive." That means that it is *not* evidence that the Board relies on to decide whether the strikers' conduct is protected under the Act. The same is true with respect to the TRO. As the Board has held:

> the Board will not abdicate its statutory responsibility . . . to another tribunal whose decision may be predicated on different considerations from those pertinent to our inquiry. For this reason, we place no reliance on the finding by the [state court] that the [strikers] were in contempt of its injunction against unlawful picket line activity.

W.C. McQuaide, Inc., 220 NLRB 593, 594 (1975) (emphasis added).

5. Blanchard's Kick Was Provoked and the Tahoe Ran Him Over While He Was Lawfully Patrolling

Respondent erroneously asserts (30) that the ALJ made a credibility resolution that the video evidence did not support Blanchard's testimony that the truck driver blared his horn at Blanchard. As painstakingly pointed out in Blanchard's testimony and the GC's Brief (40-41), the video clip relied on by the ALJ captured a *completely different period of time* than Blanchard's testimony. That, together with the fact that the ALJ never once mentioned Blanchard's unrebutted testimony regarding that provocation, renders her credibility resolution unsupportable.

Moreover, although Respondent (30) relies on *PRC Recording Co.,* 280 NLRB 615, 616 (1986), to argue that the Board never excuses strikers' conduct because it is provoked, that is not accurate. Rather, in "th[at] instance," the Board found there was "*inadequate* provocation" to excuse the strikers' "deliberate vandalism and violence." *Id.* at 616 (emphasis added). By contrast, Blanchard's reflexive solitary kick, which was directly provoked, did not cause damage and was neither violent nor evidence of vandalism.

Finally, regarding the Tahoe incident, Respondent has no response to GC's contention (37-39) that the ALJ ignored the *key* piece of evidence that the video conclusively demonstrated that the moving Tahoe first negligently struck Blanchard while he was lawfully picketing. As the GC noted, that is the only reason why the Tahoe briefly stopped before deliberately driving over Blanchard. Respondent claims (31-32) only that the evidence supports the ALJ's finding that the Tahoe "completely stopped" because it knows that it cannot refute the video evidence demonstrating that it is the Tahoe's negligent conduct that caused Blanchard to act in self-defense.[6]

[6] Curiously, Respondent contends (32) that Blanchard "slipped" in his testimony when he answered the hypothetical question about whether a striker who was hit by a vehicle might get angry. The GC submits that anyone faced with being run over by a several-ton

6. Blanchard Did Not Cause Any Damage to Either the Delta Fire Truck or the Tahoe

Contrary to Respondent's contentions (31-33), the record evidence does not establish that Blanchard caused any damage to the Delta Fire truck or the Tahoe that ran him over. Although Respondent points to Smith's hearsay testimony regarding his review of the incident reports of the security officers, and his conversation with the owner of the Delta Fire truck, this evidence is hearsay because Respondent elected not to call any of those witnesses to testify and subject them to cross-examination regarding whether they had actually observed any damage.[7] While such hearsay evidence, which the ALJ admitted over the GC's objection, is admissible to show that Respondent had an "honest belief" that Blanchard had damaged the truck, it is not admissible to prove the truth of the matter asserted, *i.e.,* that the truck in fact suffered any damage.

Incredibly, Respondent also argues (32-33) that the ALJ's completely unsupported conclusion that Blanchard damaged the Tahoe's windshield with his picket sign was correct. As fully discussed in the GC's Brief (40), however, Respondent's own officials conceded that they did not know who or what caused the windshield damage, and one even testified that the Tahoe's occupants stated that a bottle – not a picket sign – had damaged the windshield. Yet, Respondent argues that the one official's testimony that he heard "a large crashing sound" around the time that Blanchard was unsuccessfully attempting to avoid being run over by the Tahoe somehow demonstrates that Blanchard cracked the Tahoe's windshield. The GC submits that Respondent's argument that relies on this "crashing sound" testimony - which does not show what was damaged, how it was damaged, or who (including Blanchard) caused the damage – cannot stand. Moreover, it ignores that Blanchard's unsuccessful attempts to get onto the hood of the vehicle to avoid being run over by the Tahoe's negligent and unlicensed driver constituted self-defense, not serious strike misconduct.

7. The Cases Cited by Respondent Do Not Support its Termination of Blanchard

Although none of the cases cited by the ALJ support Respondent having a lawful basis for denying reinstatement to Blanchard, Respondent cites additional cases (35-37) in an attempt to bolster her decision. Respondent's cases, however, are no better.

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vehicle being negligently driven would be both afraid and angry. In any event, any anger that Blanchard might have felt does not undermine the inescapable conclusion that he was acting in self-defense.

[7] All of Respondent's witnesses who were called to the stand – including Smith and others who participated in the decision to discharge Blanchard – admitted on cross-examination that they never visually inspected the truck or washed off the dirty footprint to determine whether, in fact, there was any damage.

First, Respondent's citation to *Siemens Energy & Automation,* 328 NLRB 1175 (1999), is inapposite, as the Board found that discharge was warranted in that case because the striker had also engaged in the very serious misconduct of throwing roofing nails onto the roadway at the entrance to the employer's plant; a far cry from a single sneaker-clad kick. Second, Respondent's reliance on the § 8(b)(1)(A) case, *Teamsters Local 812 (Pepsi-Cola Newburgh),* 304 NLRB 111 (1991), is clearly misplaced. As the GC argued (28-29), such a single, soft-shoed kick is not the type of egregious misconduct at issue in that case that warrants discharge under established Board precedent. Finally, Respondent claims that *Richmond Recording Corp.,* 280 NLRB 615, 616 (1986), is "markedly analogous." It is not: it involved the discharge of a picketer who used a "baseball-bat-sized" club to twice "whack" the car driven by the daughter of a supervisor whose foot had mistakenly slipped off the brake so that the car struck the striker. Here, Blanchard and the other picketers confronted the contractor driving the Tahoe with *picket signs*, not *weapons*, to convey their message. Moreover, the Tahoe's driver *deliberately* struck and ran over Blanchard a second time after initially striking him and propelling him onto the hood. Thus, Blanchard was acting in self-defense, unlike the picketer in *Richmond Recording.* [8]

8. <u>Bouchard, Elben, and Froberg Picketed Peacefully and from a Lawful Location Throughout the Gardner Trucking Incident</u>

Respondent continues to attempt to end-run the simple fact that Bouchard, Elben, and Froberg picketed peacefully throughout the September 4 incident and from a lawful location. First, Respondent contends that "picketers had *often* stood on the shoulder of Fibre Way … *at least thirty feet* from where Froberg, Bouchard, and Elben stood in the Right-of-Way" (9) throughout the strike. While the hundreds of Respondent's employees and community members who participated in the strike picketed all along Fibre Way in many locations, these three picketers picketed from the right-of-way outside the main exit gate on September 4. To the extent that Respondent suggests that no picketers had ever stood in this particular location before, and that any picketers in the vicinity had located themselves further away from the main exit, the exhibit and transcript references Respondent itself cites provide no support for such a claim: Respondent's first (Tr. 202:18 - 203:2) and third (Tr. 945:22 - 946:16) transcript cites do not refer whatsoever to how far away other picketers had allegedly stood on other occasions; and Respondent's second transcript cite (Tr. 222:14 - 223:18) shows that, although Mendenhall initially

[8] *GSM, Inc.,* 284 NLRB 174 (1987), which Respondent also cites, is inapposite. In that case, the Board upheld the discharge of striker Attanasio who evidenced a proclivity to kick striker replacements' cars on separate occasions without provocation. In the present case, Blanchard kicked one truck one time reflexively out of frustration after the driver blew his horn at Blanchard and the other picketers to provoke and irritate them. The Board has previously found that a reflexive kick does not warrant discharge and distinguished *GSM* on the basis that the striker's kicks in that case were not provoked. *See Massachusetts Coastal Seafoods,* 293 NLRB 496 n.1 (1989).

testified that the two picketers shown in Respondent's Exhibit 11 – a random picture of picket activity from an unspecified moment during the 8-day strike – were standing "20 feet maybe" from where the three stood on the day of the Gardner Truck incident, moments later (following some prompting by counsel),[9] he changed his testimony to "20 feet would be a very conservative estimate, closer to probably 30 feet." Thus, despite this incredible testimony, there remains no record evidence in support of Respondent's contention.

Regardless, the fact that the picketers shown in Respondent's Exhibit 11 are not standing anywhere near the location immediately outside the main exit gate where Bouchard, Elben, and Froberg (and others) picketed is both irrelevant and undisputed. What is relevant is the uncontroverted testimony that Bouchard, Elben, and Froberg themselves, as well as many other picketers, picketed from the exact location in question on many occasions throughout the 8-day strike, without issue. (Tr. 584:10 - 585:1, 586:16 - 587:4, 666:12-15, 667:4-6, 842:18-21, 843:7-9; RX 34, 35, 36.) Even more, the record is clear that this spot was an appropriate location for picketing, according to direction from Cowlitz County sheriffs (Tr. 541:22-25, 542:9 – 543:3, 671:3-16, 845:17 - 847:1), and even per Respondent's admission at the hearing that the law permitted these striking employees to stand in this exact location in the right-of-way to communicate their message to people entering and exiting the Mill. (Tr. 1102:22-1103:1.) Finally, it is undisputed that the three discriminatees were nearly silent throughout the incident and engaged in absolutely zero confrontational conduct of any kind.

Respondent argues (42) that it is dispositive that Elben and Froberg had their conversation at 1:00 a.m. with the two Cowlitz County police officers who confirmed the legality of the exact location in the pedestrian right-of-way where they picketed on September 4 during the Gardner Trucking incident occurred. Respondent's inference that the officers' opinion might have been different during the daytime, when traffic was heavier, is unsupported. In fact, the instruction from the officers lacked any such caveat and referred only to the geographical location where the picketers stood (it "looked like a perfectly fine place to be standing, [because it was] not on the company's property or out in the roadway"). (Tr. 846:15-19.)

Respondent also continues to argue (8, 41) that the Gardner Trucking driver allegedly could not make the left turn on September 4 *not only* because of Bouchard, Elben, and Froberg's positioning, but also because *other* picketers were outside the opposite fog line on the opposite side of the two-lane road, causing a "choke point" as Cutler approached the

[9] The GC excepted specifically to many of the Judge's factual findings which were based purely on the results of leading questions from Respondent counsel: for example, the Judge's findings regarding Smith's purported criminal law conclusions (*e.g.,* Exception 109; Tr. 326:1-11), and her findings regarding Mast's testimony (which was also hearsay) about other Gardner drivers being fearful about further "blocking" situations (*e.g.,* Exceptions 67, 144, and 145; Tr. 958:6-22).

turn.[10] Despite Respondent's admission that these other picketers were equally responsible for creating the "choke point" that resulted in the alleged blocking, those picketers were not disciplined. (Tr. 55:14-56:5, 378:20-24.) Respondent asserts (8) that this is simply because it was "unable to identify the other picketers on the far side of Fibre Way." Such an assertion is surprising, given how seriously Respondent claims to have taken the three discriminatees' conduct, and given that Respondent had extensive photographic and video evidence of the situation to consult.

Similarly, despite that all other vehicle traffic could get past the three men in this location, Respondent argues that this single Gardner Trucking truck was uniquely sized and configured with a particular axle set-up that precluded it from turning onto the two-lane county road without cutting through the right-of-way. However, even Security Manager Smith testified that while the Gardner truck was one of the largest trucks servicing the Mill, he could think of oversize load trucks that were larger. (Tr. 315:10-14.) In addition, Gardner Trucking has an entire fleet of trucks operating regularly on the Mill site, at least many of which are the *identical* length and axle set-up. (Tr. 936:1-6.) Mill Manager Duncan, responsible for traffic into and out of the Mill, admitted that he was "not aware" of any such Gardner Truck not being able to fit between the fog lines of Fibre Way, as this driver had claimed. (Tr. 1084:17-20, 1104:11-19, 1108:11-17.) Of *all* of the other vehicles that traveled regularly into and out of the Mill throughout the strike, not a single other truck or driver had any trouble exiting around the picketers standing in this location in the public right-of-way outside the main exit.[11] (Tr. 587:5 - 588:7, 594:8 - 595:23, 667:7-25, 672:13-16, 679:3 - 680:25, 843:10 - 844:6, 848:12-20, 936:1-6, 1107:6-8.) In fact, immediately after the Gardner Trucking truck pulled away on September 4, with the police still present, Bouchard and Elben resumed their exact

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[10] As addressed in the GC's Brief (13-14), Respondent may well have contributed to a "choke point" or inevitable traffic situation at its main exit by inexplicably placing traffic candles in the exit during the strike, which directed traffic in such a way that large trucks might have been forced to take this turn at a tighter angle. In response to this, Respondent incredibly argues (34 n.27) that "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." Respondent's sole cite for this alleged fact (Tr. 373:21-374:1) directs attention to confusing testimony from Security Manager Smith that he "would think" the candles were removed well before September 4, that "[t]hey were removed long before the strike was ended," that the candles "were placed there at various times during the strike" but he was "not sure how long they were there," and that he was just, generally, "unsure." Luckily, despite Smith's clear lack of recollection on this point at best (and his dishonesty, at worst), there is extensive objective video and photographic evidence in the record from the Gardner Trucking incident itself that makes clear that the traffic candles *were* in place on September 4, during the very incident. (RX 13 at min:sec 21:11 - 23:04, RX 28.)

[11] Respondent harps on the fact that Froberg and Bouchard moved from their location in the right-of-way earlier on September 4 for a single Waste Control truck, including through reference to hearsay testimony about an alleged Facebook post, which was admitted over the objection of the GC. (Br. 9; Tr. 1019:5-11.) First, this hearsay evidence was inadmissible and should have been excluded. Second, while the hearsay testimony was that *Waste Control* had posted that it wished it could be out on the picket line in support of the Union, there is no indication that Froberg or Bouchard communicated a reciprocal friendly sentiment or that they even had such a sentiment. On the contrary, Froberg and Bouchard testified clearly that preferential treatment toward Waste Control did *not* motivate any of their actions during the strike. (Tr. 696:11-21, 915:7-13.) Regardless, even if they *had* intentionally moved for the single Waste Control truck but not for the Gardner Trucking truck, the fact is that on all occasions, the three discriminatees picketed from lawful locations in the right-of-way.

previous position (Tr. 115:11-18, 608:3-8, 609:8-10, 611:16-23, 687:1-3; RX 13); seconds later, a Hapag-Lloyd tractor-trailer navigated the turn out of the main exit around Bouchard and Elben without incident. (Tr. 611:24 - 612:9, 687:4-12; RX 13.) The objective video evidence in the record shows that this Hapag-Lloyd truck was nearly identical in size and length to the Gardner truck. (Compare RX 13 at 19:17 min:sec mark to RX 13 at 29:53 mark.)

Union President Gallow analogized this situation to a car pulling over into the right-of-way to safely send a text message. (Tr. 548:2-21.) Like our picketers standing in the right-of-way, such a car would not be "blocking traffic" by doing so. Further, Respondent's employees were not socializing or carelessly texting; they were engaged in peaceful picketing during an organized strike in response to Respondent's unfair labor practices (JD 1:1-2:2, n.2 and 3), an undisputed protected § 7 activity. The volatile reactions of Cutler, the rogue driver who cut through the right-of-way where the picketers were standing, to the picketers earlier in the strike, including on one occasion just half an hour before the September 4 incident, are strongly indicative of her anti-Union animus.[12] (Tr. 680:3-6, 852:19 - 857:6, 1132:10 - 1134:14.) Despite that Bouchard, Elben, and Froberg had brought Cutler's earlier conduct to Respondent's attention both during and after the incident, Respondent abruptly terminated its three employees after a combined 47 years of service to Respondent, while it rewarded Cutler's boss, Mast, for her role in escalating the situation (RX 27, audio transcript at JX 1), with a new job as Respondent's Transportation Specialist.[13] (Tr. 932:3-15.)

9. <u>The Cases Cited by Respondent Do Not Support its Termination of Bouchard, Elben, and Froberg</u>

Even assuming, *arguendo*, that Bouchard, Elben, and Froberg could have "blocked" the Gardner truck from their legal position in the pedestrian right-of-way, neither Respondent nor the ALJ cites any case that this isolated and peaceful incident constituted serious strike misconduct privileging Respondent to lawfully discharge the three discriminatees.

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[12] Respondent argues in its Brief (39-41) that the Gardner Truck driver would have hit the three men had she continued her errant turn into the right-of-way area where they were picketing. This is not disputed. The relevant inquiry is whether, by failing to immediately accommodate the rogue driver by moving from their lawful location in the right-of-way designed for pedestrian use, Bouchard, Elben, and Froberg engaged in serious strike misconduct sufficient to justify Respondent's termination of their employment under Board law.

[13] Respondent clearly misunderstands (29 n.18) GC Exception 45 pertaining to the ALJ's factual conclusion that the September 4 Gardner Trucking incident involving Bouchard, Elben, and Froberg occurred "against [the] backdrop" of the *injunction* that issued on September 4. The basis for the Exception is that the record is clear that the injunction hearing was being held simultaneously with the Gardner Trucking incident (Tr. 558:8-19), and there is no record evidence to indicate that, before the incident, Bouchard, Elben, or Froberg knew either that the injunction hearing was simultaneously taking place, that an injunction had or was about to issue, or any details about what such an injunction might have enjoined. Despite this, Respondent suggests that Exception 45 refers to the *TRO* that had issued days earlier (on September 1), and represents that the three discriminatees *had* testified that they were aware of that earlier TRO. It is noteworthy that Respondent has to include "[the TRO]" in brackets in its purported quote from the Exception 45 – since, of course, that Exception does not mention the TRO at all.

Respondent's fist cited case (44), *Big Horn Coal Co.*, 309 NLRB 255 (1992), involved strikers who: (1) had locked the gate to the employer's facility "with a padlock not belonging to [the employer] and… [parked] a pickup truck belonging to [a named] striker… crosswise blocking the right-hand lane that enters the gate;" (2) told the sheriff that they would not let a convoy containing non-striking employees and supervisory personnel enter the property; and (3) clearly engaged in blocking conduct that was intentional, confrontational, and coordinated by "a mass of people with the common goal, clearly, of blocking access to the mine." That is inapposite to the case at bar, where the picketing location was not even touching, let alone blocking, any entrance or exit lane, there was no confrontational conduct, and the picketers' conduct and location throughout the 8-day strike had been consistent, with all other traffic proceeding without incident.

Two of the cases cited by Respondent in support of its proposition that the discriminatees engaged in "blocking" that constituted serious strike misconduct (44-45), *Iron Workers Local 455 (Stokvis Multi-ton),* 243 NLRB 240 (1979), and *Metal Polishers, Buffers, Platers & Helpers Int'l Union, Local No. 67,* 200 NLRB 335, 336 (1972), are not even § 8(a)(3) cases analyzing whether an employer violates the Act by terminating its employees for their strike activities! Rather, these cases involve § 8(b)(1)(A) restraint and coercion allegations filed against the *Union*, requiring an entirely different analysis.

In addition to citing such inapposite case law, Respondent next contends (44) that "substantial Board case law holds exactly the contrary" of the GC's position that a single instance of blocking during a strike does not constitute per se serious misconduct. In support, Respondent relies on two of the cases cited by the GC: *Ornamental Iron Work Co.*, 295 NLRB 473 (1989), and *Hotel Roanoke*, 293 NLRB 182 (1996). This is confusing, as the Board in both cases found singular and non-coercive blocking incidents similar to that at hand *not* to constitute serious misconduct warranting discharge.

Finally, Respondent correctly, but incompletely, summarizes and then misapplies (45) the Board's holding in *Gem Urethane Corp.*, 284 NLRB 1349 (1987), as follows: "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." In so doing, Respondent omits the salient fact that the blocking conduct the Board took issue with was accompanied by violence: the picketers threatened the blocked non-strikers both verbally by screaming "I'll kill you!" and by brandishing a baseball bat and pounding on and trying to open the door of a non-striker's vehicle. In our case, no one surrounded any vehicle, and there was no blocking of the exit gate by the three picketers in the right-or-way with even a

fingertip, let alone with a car. Rather, throughout the 20-minute incident, Bouchard, Elben, and Froberg did not engage with the Gardner Trucking driver in any way, let alone violently.[14]

In sum, like the Judge, Respondent neither cited cases that support its position that the three discriminatees engaged in serious strike misconduct justifying their discharge, nor distinguished the cases cited by the GC that show they did not.

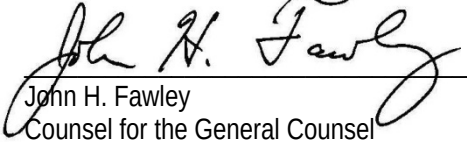
10. Conclusion

In light of the ALJ's unsubstantiated and inappropriate factual findings, as well as her erroneous legal conclusions, the GC continues to respectfully urge that the Board grant the GC's exceptions and reverse the ALJ's decision in its entirety.

DATED at Seattle, Washington, this 10th day of February, 2017.

Respectfully submitted,

Elizabeth H. DeVleming



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[14] Respondent complains in its brief (44) that "the GC should not be permitted to object to the relevance of [pattern of conduct] evidence at the hearing, contributing to an order precluding its consideration, then take the position that [Respondent's] case fails due to a purported lack of the very evidence objected to by the GC." Respondent's revisionist history ignores the record in this case. In the first place, it was *Respondent* who objected, three times in a row (Tr. 483:7-8, 487:23, 490:25–491:3), to the relevance of the GC's initial questioning of Union President Gallow to rebut the substantial testimony from Respondent's witnesses Smith and Mendenhall about other alleged strike misconduct not committed by the four discriminatees, which had entered the record with no relevance objection from the GC. The GC vehemently opposed Respondent's objections to its solicitation of this rebuttal testimony, arguing both that the evidence was relevant and that the GC would be unfairly prejudiced if not allowed to respond to the substantial amount of evidence already put on by Respondent. (Tr. 483:12–484:16, 491:22–493:9.) The ALJ closed the record for the evening to consider Respondent's objection and review the earlier record. (Tr. 493:21–495:8.) The next morning, the ALJ sustained Respondent's objection, but also struck from the record the testimony by Respondent's witnesses about alleged misconduct committed by actors other than the four discriminatees, and issued an order precluding the admission of any such evidence offered by either party going forward. (Tr. 502:19–506:25.) Despite the ALJ's erroneous ruling and order in response to Respondent's objections, which precluded the GC from putting on its relevant rebuttal evidence, Respondent remained at liberty to introduce evidence of a pattern of blocking conduct by Bouchard, Elben, Froberg, or Blanchard, without violating the order. However, there is not a scintilla of evidence in the record of a pattern of blocking by the four discriminatees, or by any other of Respondent's striking employees.

Certificate of Service

I hereby certify that a copy of Counsel for the General Counsel's Reply Brief to Respondent's Answering Brief in Response to General Counsel's Exceptions was served on the 10th day of February, 2017, on the following parties:

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