UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1,	Case No.	04-CA-136562 04-CA-137372 04-CA-138060 04-CA-141264 and 04-CA-141614
Union,		
	Case No.	04-CA-138265
DENNIS ROSCOE, An Individual,		
and		
WATCO TRANSLOADING, LLC,		
Respondent.		

WATCO TRANSLOADING, LLC'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent Watco Transloading, LLC ("Watco") submits this Reply to the Answering Briefs in Opposition to Watco's Exceptions to Administrative Law Judge Susan A. Flynn's Decision filed by the General Counsel and Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (Local) USW 10-1 ("Union") (hereinafter cited to as "GC Opp." and "CP Opp.," respectively). Most of the arguments raised by the General Counsel and Union are addressed already in Watco's Brief in Support of Exceptions and need not be repeated here. However, Watco will address the General Counsel's and Union's unsupported speculations and misstatements of the record. As Watco previously has argued, the ALJ's findings of fact and conclusions of law are not supported by a preponderance of the relevant evidence in the record and/or are contrary to established Board law or policy.

I. The ALJ Erred in Finding that Respondent Violated Section 8(a)(1) and (3) By Terminating John Peters.

A. The ALJ Provided No Basis to Discredit the Testimony of Brooke Beasley, Safrona Howard, and Brian Spiller as to the Timing of the Discharge Decision and Supported Her Own Findings With Surmise and Speculation.

As discussed in detail in Watco's Brief in Support of Exceptions, the General Counsel failed to produce evidence that Watco's termination of John D. Peters was based on union animus. In their opposition briefs, both the General Counsel and the Union argue that the ALJ properly discredited the testimony of Beasley, Howard and Spiller regarding the timing of the decision to terminate Peters. GC Opp. at 22; CP Opp. at 20. The General Counsel speculates that those managers would have made a written record of the decision if it had occurred on August 19. GC Opp. at 22. Similarly, Union asserts that Watco should have had notes or emails documenting the call. CP Opp. at 20. Such arguments amount to nothing more wildly speculative alternative facts wholly unsupported by any actual record evidence. There was no evidence that Watco follows some routine practice of documenting every phone call in which a termination decision is made with a contemporaneous written record. Indeed, there is no evidence in the record to support the claims that there should be "more evidence" in the form of notes or otherwise of the timing of the termination decision than exists.

Further, the ALJ, along with the General Counsel and Union, completely ignore the ample documentary evidence that is of record. First, there is absolutely no dispute in the record that Watco was conducting an investigation of the very serious allegations of misconduct against Peters in August pre-dating any union activity. This investigation irrefutably included interviews of Peters, the complaining employee Curtis Pettiford, and numerous possible witnesses. This was an investigation of not merely workplace misconduct, but unlawful conduct by Peters in violation of local Philadelphia law prohibiting workplace harassment on the basis of sexual

orientation (and conduct the federal courts are now construing violates Title VII). Peters' conduct required Watco to take decisive action to prevent any recurrence if the allegations were substantiated – which they were. The unrefuted evidence at hearing was that Watco terminates every employee where there is a substantiated complaint of sex-based harassment – the General Counsel and Union offered nothing to the contrary, and there is no basis in the record for the ALJ to have made any finding to the contrary. Simply put, the only evidence in the record showed that, if the investigation led Watco to conclude that Peters engaged in harassment based on sex or sexual orientation, then Peters would be terminated.

Further, the ALJ, General Counsel and Union all ignores the further paper trail showing that the decision to terminate was made prior to any knowledge of any union activity – i.e., the documentation of the August 19 telephone meeting as well as the records documenting Beasley's travel to Philadelphia to conduct the termination. Er. Ex. 5 (calendar entry corroborating phone meeting); Er. Ex. 6 (flight reservation confirmation). The fact that a flight reservation was made underscores that the decisionmakers had already decided to take the most serious disciplinary action (i.e., termination) as a result of the investigation. Lesser discipline obviously would not have necessarily required corporate HR attendance. Yet, bizarrely, the General Counsel questions why a human resources professional would endeavor to be present for the termination – ignoring that the effort to have HR present actually underscores the fact that the decision was to terminate. The General Counsel's suggestion of alternative facts, as well as the ALJ's guess that maybe there was some other business that took Beasley to Philadephia, are nothing more than rank speculation. There is no <u>evidence</u> to support the findings of the ALJ – just surmise and conjecture. The case of the General Counsel and the Union, and the decision of the ALJ (and the Board), must be based on evidence – something not present here.

B. Leroy Henderson Did Not Engage in the Same Conduct as Peters.

In an effort to show disparate treatment of employees for the same offense (something the ALJ's decision failed to do), both the General Counsel and Union argue that disparate treatment and animus was shown because Watco allegedly treated Leroy Henderson differently than Peters. GC Opp. at 27; CP Opp. at 32. Specifically, the General Counsel points to text messages allegedly sent from Henderson to Peters, which contain a number of expletives.[1] To the extent that Henderson engaged in the alleged conduct (and it can be determined fairly that Peters did not engage in similar conduct toward Henderson in texts that Peters deleted), Henderson's conduct would nevertheless be clearly distinguishable from the conduct Watco concluded that Peters had engaged in towards Curtis Pettiford.

First, Henderson's conduct happened while he was off-duty and was wholly unrelated to any work at Watco. There is no clear record evidence that Henderson's off-duty conduct violated any specific Watco policy – as opposed to Peters' conduct, which clearly did. Second, and more importantly, the text messages by Henderson (again, which clearly were responding to spoliated texts by Peters) do not contain any discriminatory or harassing statements based on any protected class. This is an overwhelmingly distinguishing feature as Watco is required to act in response to unlawful discriminatory or harassing comments based on sex, sexual orientation, and other protected classes.

Even assuming the incomplete text messages show Henderson directed profanities and other inflammatory comments to Peters, there is no evidence of derogatory comments made

[1] Watco objected to the admission of these text messages at the hearing. Tr. 172:24-174:15. Most significantly, the corresponding text messages sent from Peters to Henderson were deliberately deleted to therefore show only one side of the conversation. The content of Henderson's test messages rather obviously respond to texts from Peters that one can readily infer were similarly antagonistic, if not provocative of Henderson's responses. The incompleteness of the texts make them inherently unreliable and they should not have been admitted, much less relied upon, by the ALJ.

because of Peters' sex, sexual orientation, or other protected classification. Further, this appeared a single incident that Peters and Henderson had resolved between themselves. In contrast, Pettiford complained that Peters had been harassing him since November 2013 with derogatory comments about his sexual orientation; that he had repeatedly asked Peters to stop; and that Peters refused. Tr. at 566:8-12. Ultimately, Peters was found to have made comments towards Curtis Pettiford regarding his sexual orientation, which is protected under the Philadelphia Fair Practices Ordinance. Pettiford's accusations against Peters were corroborated by five different co-workers. Tr. at 571:16-572:2; Tr. 582:25-583:15; Er. Ex. 4. Simply put, there is no indication that the text messages between Henderson and Peters were anything more than a personal off-duty dispute between two individuals who had worked together for a number of years. Tr. 653:5-11. Spiller spoke to both Peters and Henderson about the messages and they indicated to him that the issue had been resolved. Tr. 688:18-24.

II. The ALJ Erred in Finding that Respondent Violated Section 8(a)(1) and (3) By Disciplining and Terminating Dennis Roscoe.

A. Watco's Investigation of Roscoe's September 2015 Conduct Supported Its Suspension Decision.

In arguing that the results of Watco's investigation did not support its suspension of Roscoe, the General Counsel, like the ALJ, ignores Roscoe's insubordinate behavior towards Brandon Lockley. GC Opp. at 39-40. Roscoe was suspended not only for his engaging in a verbal altercation with Joe Onuskanych, but also for ignoring the direction of his supervisor, Lockley, and telling Lockley that he did not "have the balls" to send him home. This conduct was corroborated by witnesses during the investigation and by the testimony of John C. Peters, Jr. at the hearing (and even in the investigation the Region conducted prior to the hearing). The repeated effort of the General Counsel to ignore these facts cannot be similarly disregarded by the Board here – indeed, it underscores a manifest injustice to the Respondent in even having to

defend against this claim. Regardless, that insubordination alone, which occurred shortly after Roscoe's insubordinate behavior on August 15, 2015, justified Roscoe's suspension.

B. None of the Individuals Identified by the General Counsel Engaged in the Same Threatening Conduct as Roscoe Did Towards Henderson.

Moreover, the General Counsel's argument that Watco treated Roscoe differently from other employees in terminating him after his threatening conduct towards Henderson is meritless. The General Counsel argues that Watco treated Roscoe differently from Leroy Henderson, Gary Plotts, and Joe Onuskanych. GC Opp. at 40-41. Contrary to the General Counsel's assertion, there is no evidence of record that Leroy Henderson refused to meet with Brian Spiller or otherwise engaged in insubordinate behavior. In fact, Spiller testified just the opposite – he discussed the dispute between Henderson and Peters with both of them and it appeared to be resolved. Tr. 688:18-24.[2] Further, the General Counsel's mischaracterizes Henderson's text messages to Peters, which may contain expletives and vulgar language but do not contain threats of violence. Likewise, there is no evidence of any threats by Plotts or Joe Onuskanych toward Roscoe or others. In Plotts' situation, there is (at most) a vague statement suggesting Roscoe's co-workers needed to address issues with him that might cause trouble for all of them; in Joe Onuskanych's case, the allegation is merely one of smearing oil on a sweatshirt that Roscoe had left in the employee trailer. These acts are simply and obviously not the same, and the suggestion by the General Counsel that they are is disingenuous.

Moreover, Roscoe was not remotely similarly situated to Henderson, Plotts, or Onuskanych at the time he made the corroborated threats towards Henderson. None of the three, even if they could be found to have engaged in remotely similar conduct, did not have anything remotely similar to Roscoe's overall employment record consisting of multiple acts of

[2] The General Counsel's allegation that Henderson arrived to work inebriated is nothing more than an attempt to besmirch Henderson's character and distract from the egregiousness of Roscoe's pattern of threatening behavior.

insubordination by the time of his threats towards Henderson. "A conclusion of disparate treatment, by definition, is measured by comparing whether or not an alleged discriminatee 'was treated differently than other similarly situated employees who violated work rules of comparable seriousness.'" *Marksman Metals Co., Inc. & Sheet Metal Workers' Int'l Ass'n, Local 10*, E 18-CA-15383, 2000 WL 33664306 (July 11, 2000) (quoting *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997)) (internal citations omitted). Accordingly, the General Counsel has not made any showing of disparate treatment.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Respondent Watco Transloading, LLC's Brief in Support of Exceptions to Administrative Law Judge Decision, the ALJ's Decision and Order should be rejected by the Board.

Respectfully submitted this 28th day of June, 2017.

Respectfully submitted,

/s/ *Anthony B. Byergo*

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CERTIFICATE OF SERVICE

It is certified that a copy of Watco Transloading, LLC's Reply Brief in Support of Exceptions to Administrative Law Judge's Decision in the above-captioned case has been served by email on the following persons on this 28th day of June, 2017:

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