

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CONSOLIDATED COMMUNICATIONS
HOLDINGS, INC., d/b/a CONSOLIDATED
COMMUNICATIONS OF TEXAS
COMPANY**

**Cases 16-CA-187792
16-CA-192050**

Respondent,

and

**COMMUNICATIONS WORKERS OF
AMERICA**

Charging Party.

**CONSOLIDATED COMMUNICATIONS HOLDINGS, INC.’S
MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT**

The 2-1 Board majority improperly used this case as an attempt to overturn nearly 70 years of consistent precedent regarding the Board’s treatment of slowdowns. Because of clearly established precedent, Respondent Consolidated Communications, Inc. (“Consolidated”), respectfully requests, pursuant to Section 102.48(c)(1) of the National Labor Relations Board Rules and Regulations, that the Board reconsider its Decision and Order dated August 27, 2018.

I. INTRODUCTION

Reconsideration of the Board’s Decision and Order is appropriate because the Board committed material error by failing to apply its own decades-long precedent regarding the unprotected nature of slowdowns. As the Board has repeatedly held, “it is well-established that employees who engage in deliberate ‘slowdowns’ of work or encourage others to do so are engaged in activities not protected by the Act, and their discipline for such activity does not violate the Act.” *Davis Elec. Contractors, Inc.*, 216 NLRB 102 (1975) (citing *Elk Lumber Co.*, 91 NLRB 333, 337, 338 (1950)). Since first considering this issue in *Elk Lumber Co.*, the Board

has consistently ruled that employees, such as Kim Thompson, who the ALJ ruled in this case, who participate in work slowdowns are engaging in activity that is not protected under the Act. 91 NLRB 333, 337-38 (1950); *see also DaimlerChrysler Corp.*, 344 NLRB 1324, 1325 (2005); *Gen'l Elec. Co.*, 155 NLRB 208, 220-221 (1965); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973).

The 2-1 Board majority ignored well-established precedent regarding slowdowns when it reversed the Administrative Law Judge's ("ALJ") decision that Consolidated's issuance of a verbal warning to Thompson was lawful because she instigated and participated in an unprotected work slowdown. The Board's failure to follow its own precedent is sufficient grounds for a finding of material error to grant a motion for reconsideration. *See Am Prop. Holding Corp.*, 352 NLRB 279, 280 (2008) (Board granted motion for reconsideration because "the Board committed material error by failing to properly apply its precedent."); *see also Allied Mech. Servs., Inc.*, 351 NLRB 79 (2007) (finding that reconsideration warranted when decision is contrary to Supreme Court precedent).¹

The Board majority attempted to establish a new standard for slowdowns that is wholly unsupported by precedent. Essentially, the majority utilized a multi-factor analysis of the effects of the slowdown to determine whether Thompson's slowdown was unprotected, considering (1) the length of the slowdown, (2) whether the slowdown actually resulted in a reduction of the rate of work, (3) the intent of those engaging in the slowdown, and (4) whether the slowdown caused a disruption, among other irrelevant factors. *See* Decision at 2-3. Such multi-factor analysis is

¹ Consolidated also contends that the Board committed material error by failing to properly apply *Wright Line* when analyzing the lawfulness of Thompson's discipline, which also warrants reconsideration in this case. Decision at 4, n. 13.

entirely unsupported by Board law, as is evidenced by the majority's failure to cite any applicable authority to support its newfound legal analysis. *See* Decision at 2-3. If the Board majority had properly applied the Board's precedent, as Member Emanuel did in his dissent, it would have reached the inescapable conclusion that Thompson's conduct was unprotected because she not only engaged in a deliberate slowdown, but also encouraged others to do the same during work time. *Id.* Accordingly, the Board should reconsider its Decision, apply its precedent that categorically renders slowdowns and the encouragement of slowdowns unprotected by the Act, and affirm the ALJ's findings on this basis.

To the extent the Board intended to reverse decades of precedent regarding its analysis and treatment of slowdowns in the Decision and thereby overturn a foundational principle of labor law, it did so without the request or briefing of the parties or amici. Accordingly, if the Board did indeed intend to dramatically alter the legal analysis regarding slowdowns, it should reconsider its Decision to allow the parties to brief the issue before the Board, allow the public an opportunity to weigh in on this fundamental principle of law, and engage in a more sound and rigorous legal analysis concerning Board precedent regarding slowdowns and the impact that overruling years of Board precedent on this issue may have.

In addition to applying the incorrect analysis regarding slowdowns, the Board also failed to consider relevant record evidence to support its factual findings, made factual findings that were not supported by the record evidence, and, in some instances, made factual findings that were completely contradicted by the record evidence. These errors, coupled with the Board's failure to apply its own precedent, further warrant the Board's reconsideration of its Decision. Most notably, the Board's finding that "Thompson proceeded during nonworking time to ask several coworkers to participate in such a demonstration" (Decision at 2) is belied by the record

evidence, as Thompson herself admitted that her coworkers were working while she went to talk to them at their work stations. Decision at 5, n. 2; Tr. 51-53.

II. FACTUAL AND PROCEDURAL HISTORY

The relevant facts in this case are not in dispute.² Indeed, the Board majority did not take exception with any of the ALJ's factual findings. *See* Decision at 1-4.

As affirmed by the Board, on October 13, 2016, Thompson, a Customer Service Representative and Union steward, texted and personally visited the workstations of approximately 25 of the 30 Customer Service Representatives at the facility where she worked, and encouraged them to stand at 2:00 p.m. to show their solidarity for the Union. Decision at 1-2; Tr. 25; 27-28; 31-32; 51; 66. The Board further affirmed that Thompson told the approximately 25 other Customer Service Representatives, "at 2:00 . . . to stand with us to support our Local, that what we were bargaining for would be, you know, of benefit to you." Tr. 32; Decision at 1-2, 5. Her text messages said the same thing. Tr. 32. Thompson admitted that her coworkers were working while she went to talk to them at their workstations about standing to demonstrate their Union solidarity, and they were supposed to be working when they stood at 2:00 p.m. Decision at 5, n. 2; Tr. 51-53.

As directed by Thompson, around 2:00 p.m. between five to fifteen Customer Service Representatives in the call center stood up for Union solidarity, and Thompson pulled out her

² As set forth more fully below (*see infra* Section III.C.), Respondent disputes many of the majority's factual findings on which it relied to reverse the ALJ's finding that Thompson's conduct was unprotected under the Act. While the Board's reliance on these factual findings necessarily contributed to its incorrect conclusion that Thompson's slowdown was protected, the Board should find Thompson's conduct unprotected on the undisputed facts alone.

cell phone and began taking pictures.³ Decision at 2; Tr. 105-106. Thompson admits that she stood in solidarity for the Union for two minutes and took photographs of her co-workers standing. Decision at 5; Tr. 36; 46; 48. Thompson admits that she was not working as scheduled, or “performing any function for the Company” while she was standing and taking photographs to show Union solidarity. Decision at 5; Tr. 47. As the ALJ found, and the Board affirmed, Thompson admits that while she was standing and taking photographs that she could not even reach her computer and that she did not have her hand on the computer. Decision at 2 (finding that Thompson and Kristi Lindsey took photographs using their cellphone during the demonstration, which affirmed the ALJ’s finding (Decision 8) that Thompson conceded she paused working while photographing the demonstration), 5; 8, n. 6; 9, n. 11; Tr. 45-47; GC Br at 10 (“[e]mployee either continued working or *immediately returned to working after stretching.*”) (emphasis added). The Board affirmed that Kristi Lindsey, another Customer Service Representative, was not working while participating in the stand for Union solidarity, as she had to “sit[] down when a new call entered her queue.” Decision at 2; Tr. 66-67.

However, despite making all of these findings, the Board stated that “Thompson proceeded during nonworking time to ask several coworkers to participate in such a demonstration” (Decision at 2), which is completely contradicted by this undisputed record evidence.

The Board affirmed that Customer Service Representatives spend most of their time on the phone taking calls from Consolidated’s customers regarding questions and payments for

³ The Board’s finding in footnote 12 is unsupported by the record evidence and relevant case law. Indeed, Thompson testified that she did not notify her coworkers that she intended to take pictures, or the purpose of her picture taking. Tr. 55; 66; 69.

Consolidated's services. Decision at 1. The fact that Customer Service Representatives are required to be seated in order to do their jobs was supported by multiple union and management witnesses. Decision at 1 ("representatives are generally seated to enable access to their keyboards"); 5; 6, n. 3; Tr. 72-73 (Lindsey); Tr. 102 (Mary Schnee); Tr. 45-47 (Thompson); Decision at 5; Tr. 85; 98 (Kelly and Juni).

Following the demonstration, Consolidated issued Thompson a verbal warning for her conduct for disrupting the company's workflow and ability to serve customers. Decision at 6, 8; Tr. 95-96. The Board affirmed that Kari Juni, Director of Customer Care, decided to issue the verbal warning because Thompson's conduct "disrupted our workflow, and it disrupted our ability to serve our customers. I also felt like it violated the CBA" Decision at 6; Tr. 96; *see also* Decision at 2 ("Juni testified that the disciplinary warning was necessary because Thompson interrupted work and violated the no strike/no slowdown provisions of the collective-bargaining agreement."); Jt. Ex. 1 at Article 5, section 2 (p. 8).

The ALJ determined that Consolidated did not violate the Act, because Thompson had engaged in an unprotected slowdown. Decision at 8, 9. In its August 27, 2018 Decision, the Board reversed this decision holding that Thompson's conduct was protected, and therefore her discipline for such conduct violated the Act. Decision at 1-4. Member Emanuel dissented, highlighting the Board majority's legal and factual errors in the Decision. Decision at 5-6. Regarding the legal errors committed by the Board majority, Member Emanuel correctly noted that "[t]he Board has never recognized a de minimis exception to the rule" that "any concerted slowdown or other concerted interruption of operations by employees" is not protected under the Act. Decision at 6, n. 8. Member Emanuel further disagreed with the majority's factual finding that no disruption in service occurred, correctly noting that Thompson herself testified that "she

and other employees stopped working in order to engage in the demonstration.” Decision at 6, n. 7.

III. ARGUMENT AND AUTHORITIES

The Board should reconsider its Decision, and affirm the findings of the ALJ for three reasons. First, and most critically, the 2-1 Board majority committed a material error by failing to apply well-established precedent, which explicitly holds that the participation in slowdowns and the encouragement of slowdowns are not protected by the Act. This material error is sufficient grounds to grant Respondent’s motion for reconsideration. *See Am. Prop. Holding Corp.* 352 NLRB 279, 280 (2008) (Board granted motion for reconsideration because “the Board committed material error by failing to properly apply its precedent.”); *see also Allied Mech. Servs., Inc.*, 351 NLRB 79 (2007) (finding that reconsideration warranted when decision is contrary to Supreme Court precedent). Second, the Board altered its decades-old precedent regarding the unprotected nature of slowdowns without the request or input of any parties to this case. Finally, several of the Board’s key factual findings are contradicted by, or at the very least not supported by, the undisputed record evidence in this case. These errors in factual findings, coupled with the Board’s failure to apply its own analysis regarding slowdowns, warrant the Board to reconsider its Decision, and affirm the findings of the ALJ.

A. Because the Board majority failed to apply its precedent regarding slowdowns to Thompson’s conduct, reconsideration of the Decision is proper.

Few legal principles in labor relations are as clear and absolute as Board precedent regarding the unprotected nature of slowdowns. On the issue of whether slowdowns are protected by the Act, the Board has stated that “[i]t is well-settled that employees who engage in deliberate ‘slowdowns’ of work or encourage others to do so are engaged in activities not protected by the Act, and their discipline for such activity does not violate the Act.”

DaimlerChrysler Corp., 344 NLRB 1324, 1325 (2005).⁴ This test does not call for an analysis of the effects of the slowdown to determine if the slowdown is unprotected. *Id.* Nor does the test call for an analysis of the length of the slowdown to determine if the slowdown is unprotected. *Id.* And most notably, this test does not even call for an analysis into whether a curtailment in production actually occurred to determine if the slowdown is unprotected. *Id.* (holding that those who merely encourage others to deliberately engage in slowdown are engaged in unprotected activity). Notwithstanding the foregoing, the 2-1 Board majority failed to follow precedent regarding slowdowns, and instead relied on irrelevant factors that have no basis in—and are antithetical to—applicable Board precedent. This is material error

In finding that Thompson’s conduct was protected, the Board majority makes much of the fact that the slowdown was brief, not disruptive, and did not reduce the rate of work. Not only is this finding unsupported by the undisputed facts in this case (*see infra* Section III.C), the actual effects of the slowdown are immaterial to the determination of whether Thompson’s conduct was protected under applicable Board precedent. In *DaimlerChrysler*, a case cited by the majority, dissent, and the ALJ, the Board found that the mere encouragement of others to engage in a slowdown is unprotected. *DaimlerChrysler Corp.*, 344 NLRB at 1325. Notably, no slowdown ever occurred in *DaimlerChrysler*, just an attempted slowdown. *Id.* Even though a slowdown never occurred, the Board nevertheless found the employee’s e-mail that “explicitly

⁴ *See also Davis Elec. Contractors, Inc.*, 216 NLRB 102, 106 (1975) (“Respondent’s defense is based on the well-settled principles that employees who engage in deliberate ‘slowdowns’ of work or encourage others to do so, and thus refuse to work upon the terms prescribed by their employer but continue to work only on their own terms, are engaged in activities not protected by the Act, and their discharge for such activity does not violate the Act.”); *Gen. Elec. Co.*, 155 NLRB 208, 221 (1965) (“The activity here is one which impinged on the competing right of an employer to expect his employees to devote their workday to work and to producing to the best of their abilities, that is to say, not to slow down.”).

encouraged” his coworkers to engage in tactics to undermine their employer’s production was unprotected. *Id.* The Board reasoned that the employee’s conduct was unprotected because it was “an attempt to frustrate and interfere with the Respondent’s operations in order to modify the current contract or to obtain leverage in some future negotiation.” *Id.* Similarly, Thompson not only explicitly encouraged her coworkers to participate in a slowdown to obtain leverage in negotiation, she participated in and photographed the slowdown while it occurred. Thus, the Board’s holding in *DaimlerChrysler* does not support the majority’s contention that only conduct that actually has a disruptive effect or reduces the rate of work is not protected by the Act.

As correctly highlighted by Member Emanuel in his dissent, “[t]hat the demonstration and interruption of work lasted no more than 2 minutes is irrelevant to the question of whether it constituted a slowdown The Board has never recognized a *de minimis* exception to the rule.” Decision at 6, n. 8. Here, the Board’s requirement that a slowdown meet some undefined threshold of disruption to constitute unprotected activity indicates that the Board majority disregarded and ignored precedent concerning the unprotected nature of slowdowns when deciding this case. The Board’s majority incorrectly argues that Thompson and the others were merely standing to stretch, i.e., activity they were permitted to engage in. It also incorrectly stated that Consolidated failed to establish that a “concerted interruption of operations actually occurred.” This assertion is disingenuous and belied by the facts. The effort was obviously concerted, as Thompson admits she, acting on behalf of the Union, contacted 25-30 of her coworkers during their working time to stand during their working time to show Union solidarity. Moreover, the employees were not stretching. Rather, they undisputedly stood to demonstrate their support for the Union during negotiations, and did not work while doing so.

Thus, they deliberately interfered with operations, caused lost work time, and intended to exert economic pressure on Consolidated, all of which is unprotected under the Act.

Further evidencing the majority's failure to apply precedent, the Board has consistently found employees engage in an unprotected slowdown even when they continue to meet minimum production standards set by their employer. For example, in *Phelps Dodge Copper Products Corp.*, the Board found that employees who withheld incentive production and overtime work engaged in an unprotected slowdown even though they may have met a minimum standard rate set for incentive pay purposes. *Phelps Dodge Copper Products Corp.*, 101 NLRB 360, 367-68 (1952); *see also Subject: Conbraco Indus., Inc.*, Case 11-CA-9564, 1981 WL 25992, at *2 (Mar. 31, 1981) (General Counsel opinion that a group of employees who engaged in a slowdown were engaged in unprotected activity even though they "maintained the production rate at or near the minimum standard rate. But they failed to produce at the rate...."). The *de minimis* analysis used by the Board majority's has no basis in Board precedent, which is evidenced by the lack of any citation to authority.

Accordingly, since the Board majority committed a material error by failing to apply its own precedent, the Board should reconsider its Decision. Upon reconsideration and application of the standard set forth in *Elk Lumber* and its progeny, including *DaimlerChrysler*, it should find that Thompson's instigation of, and participation in, the October 13, 2016 demonstration was an unprotected slowdown in violation of the Act, and affirm the ALJ's decision.

B. Reconsideration of the Decision is proper because of the Board's *sua sponte* reversal of Board precedent regarding slowdowns.

Through its failure to follow its own precedent, the Board has *sua sponte* overturned decades of Board precedent regarding the unprotected nature of slowdowns and has instituted a new (and unclear) test for determining whether a slowdown is protected or unprotected under the

Act. The Board made this dramatic shift in precedent without (1) request by either party, (2) notification to either party or the public, (3) or briefing by either party or the public. In her dissenting opinion in *The Boeing Co.*, wherein the Board overturned the *Lutheran Heritage* standard regarding employer work rules, Member McFerran decried similar *sua sponte* conduct and tactics by the Board majority in that case, stating that

[n]o party and no participant in this case—which involves a single, no-photography rule—has asked the Board to overrule *Lutheran Heritage*. Nor has the Board asked anyone whether it should [T]he Board majority has refused to notify the public that it was contemplating a break with established precedent. It has refused to invite amicus briefing from interested persons, even though this has become the Board's wise norm in the years following *Lutheran Heritage*. Without the benefit of briefs from the parties or the public, the majority invents a comprehensive new approach to work rules that goes far beyond any issue presented in this case and, indeed, beyond the scope of *Lutheran Heritage* itself. This is secret rulemaking in the guise of adjudication, an abuse of the administrative process that leaves Board law not better, but demonstrably worse.

The Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017) (Member McFerran, dissenting). This criticism is equally appropriate for the Board's *sua sponte* Decision here.

In its decision, the Board has overturned a fundamental principle of labor law without (1) proper briefing by the parties, (2) citation or analysis of any relevant precedent, or (3) a discussion regarding the implications that its Decision may have. Accordingly, the casual indifference with which the Board has treated its own precedent and its failure to contemplate the impact of its Decision warrant reconsideration. Upon reconsideration and application of the standard set forth in *DaimlerChrysler*, it should find that Thompson engaged in an unprotected slowdown in violation of the Act.

C. Because the Board’s factual inferences upon which it based its decision are contrary to the ALJ’s factual findings and unsupported by the undisputed record evidence, reconsideration of the Decision is warranted.

Further warranting the Board’s reconsideration of its Decision, is the fact that the ALJ made factual findings, the Board adopted those findings, and then made factual findings in its Decision contrary to those findings. The Board’s majority did not overturn the ALJ’s findings, however. The Board made incorrect factual findings that were not supported by the undisputed evidence in this case.

Most notably, the Board indicated numerous times in its Decision that the slowdown did not interfere with production or result in a loss of working time. *See* Decision at 2 (“Thompson did not refuse to perform duties or reduce the rate of work, not did the demonstration have a disruptive effect”); Decision at 3 (“Her brief demonstration did not interfere with operations or result in lost work time”) (“Respondent has failed to establish that any slowdown or concerted interruption of operations actually occurred at all.”). As the record citations in Section II make clear, this is simply false. Rather, as the ALJ found, it is undisputed that Thompson and her co-workers were not working during the demonstration. Decision at 6, n. 3; Tr. 72-73 (Lindsey); Decision at 5; Tr. 102 (Schnee); Decision at 5-6; Tr. 45-47 (Thompson); Decision at 5; Tr. 85; 98 (Kelly and Juni). As Member Emanuel noted, “the employees cannot comfortably reach their keyboard to type accurately or read their computer screens while standing.” Decision at 5.

Moreover, the Board’s finding that “Thompson proceeded during nonworking time to ask several coworkers to participate in such a demonstration” (Decision at 2) is completely contradicted by the undisputed record evidence. Thompson admitted that her coworkers were working while she went to talk to them at their workstations about standing to demonstrate their Union solidarity. Tr. 51-53.

Accordingly, the Board's factual findings that the slowdown did not interfere with production or result in loss of working time is contradicted by the undisputed record evidence, and thus reconsideration of the Decision is warranted. After reconsidering its Decision, the Board should find that Thompson's conduct was not protected under the Act.

IV. CONCLUSION

Accordingly, Consolidated respectfully requests that the Board reconsider its Decision and apply the correct legal and factual analysis to Thompson's conduct. Upon reconsideration, Consolidated requests that that Board apply its decision in *DaimlerChrysler Corp.*, and find that Thompson's instigation of and participation in a slowdown was not protected conduct, and thus Consolidated's discipline of her for her conduct was lawful under the Act.

Respectfully submitted this 21st day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that on this 21st day of September, 2018, I caused the foregoing to be electronically filed with the National Labor Relations Board at <http://nlrb.gov> and a copy of same to be served on the following parties of record via e-mail:

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