

1 UNITED STATES OF AMERICA
2 BEFORE THE NATIONAL LABOR RELATIONS BOARD
3 REGION 20
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6
7 SCHUFF STEEL

8 and

Case 20-CA-204378

9 DEREK DIXON, an Individual
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14 GENERAL COUNSEL'S EXCEPTIONS
15 TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
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22 Submitted by
23 Matthew C. Peterson
24 Counsel for the General Counsel
25 National Labor Relations Board
26 Region 20
27 901 Market Street, Suite 400
28 San Francisco, California 94103-1735

1 Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and
2 Regulations, excepts to the following portions of Administrative Law Judge Amita Baman
3 Tracy's decision in Schuff Steel, Case 20-CA-204378:
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<u>Exception No.</u>	<u>Page:Lines</u>	<u>Exceptions to Factual Findings</u>
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1.	3:17	Erroneously finding that alleged discriminatee Derek Dixon's (Dixon) Supervisor was General Foreman G.W. Swartz (General Foreman Swartz), rather than Marcel Rodriguez (Supervisor Rodriguez).
2.	6:12 & n.20	Erroneously finding that Robert Wright's Supervisor was General Foreman Swartz, rather than Supervisor Rodriguez.
3.	9:6-13	Erroneously finding that Dixon was warned for taking extended breaks.
4.	15:43-44; 7:16-17	Erroneously finding that Swartz "specifically sought to observe Dixon's break period which he observed once where Dixon again took an extended break," and that Swartz himself actually observed Dixon taking an extended break.
5.	7:14	Erroneously finding that Foreman Alex Flores (Flores) reported to Swartz that Dixon and Wright were taking a break in his area during a "non-break period."
6.	6:19-7:4 and n.22; 15:13-15	Erroneously finding that there were approximately twenty layoffs for taking extended breaks in June 2017.
7.	11:21-24; 15:17-18	Erroneously finding that warnings issued by Foreman Charles Kelly (Kelly) were not disciplinary in nature but "akin to reminders."
8.	8:23-25	Erroneously finding that unspecified documentary evidence corroborated Swartz's testimony about the layoffs he testified about.
9.	9:22-25; cf. 5:21 n.17.	Erroneously finding that Supervisor Rodriguez had never spoken to employee Mario Marcial prior to the incident described in Marcial's testimony.

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<u>Exception No.</u>	<u>Page</u>	<u>Exceptions to Evidentiary Rulings</u>
10.	4:30 and n.12-13	Erroneously excluding from evidence the unnamed apprentice's (the Apprentice) comments to Dixon about Foreman Kelly telling him to get off the jobsite based on a hearsay objection.
11.	5:4-5 and n.14; 8:40-42	Erroneously excluding from evidence Foreman Kelly's response to Dixon about what was happening with the Apprentice based on a hearsay objection.
12.	6:15 and n.21	Erroneously excluding from evidence Foreman Kelly's response to Dixon about whether he knew why Dixon was being laid off based on a hearsay objection.
13.	5:20-21 and n. 17	Erroneously relying on comments that Marcial testified that Supervisor Rodriguez had made to him about Dixon's encounter with Foreman Kelly regarding the Apprentice for their truth, rather than finding them to be admissible only for non-hearsay purposes.
14.	9:27-31	Erroneously relying on a deleted statement in Marcial's affidavit about Supervisor Rodriguez's saying Dixon had been warned for taking extended for its truth, rather than finding it to be admissible only for non-hearsay purposes.
15.	7:8-20; 7:19 n.24	Erroneously relying on comments that General Foreman Swartz testified that Foremen Kelly and Flores had made to him about their having seen Dixon taking extended breaks, and warned him for doing so, for their truth, rather than finding them to be admissible only for non-hearsay purposes.
16.	9:34-10:12	Erroneously finding it unnecessary to make adverse inferences against Respondent for failing to call key witness Supervisor Rodriguez, despite his being employed by Respondent and therefore under its control, and erroneously stating that General Counsel asked for adverse inferences with respect to Foreman Kelly, who is no longer employed by Respondent and thus not under Respondent's control.
17.	11:33-38; 7:8-20; 7:26-27; 9:10-12	Erroneously relying on General Foreman Swartz' hearsay testimony to find that Foreman Kelly truly issued Dixon warnings, instructions to end breaks, reminders, or told him to get back to work for taking extended breaks, and to find

1 that General Foreman Swartz' relied on those warnings in
2 deciding to lay off Dixon.

3 18. 11:21-24; Erroneously and incongruently finding that warnings that
4 15:17-18 General Foreman Swartz testified that Foreman Kelly
5 reported issuing to Dixon were not disciplinary in nature but
6 "akin to reminders," and relying on that finding to find that
7 Kelly was not a supervisor.

8 19. 7:8-20; Erroneously finding that there was no evidence that Foreman
9 7:26-27; Kelly was a supervisor or an agent of Respondent, despite
10 9:9-12; relying on General Foreman Swartz' hearsay testimony to
11 11:33-34 find that Foreman Kelly had warned Dixon about extended
12 breaks.

13 20. 11:33-38 Erroneously finding that Dixon's failure to report Foreman
14 Kelly for telling him to leave the project was relevant to
15 whether or not Kelly is a statutory supervisor.

16 **Exception Page Exceptions to Credibility Resolutions**
17 **No.**

18 21. 8:17-9:13; Erroneously concluding that General Foreman Swartz's
19 9:34-10:12 testimony was credible, reliable, and rebutted parts of
20 Dixon's testimony, and erroneously failing to find that it was
21 self-serving.

22 22. 8:38-9:13; Erroneously concluding that Dixon's testimony was, in part,
23 9:34-10:12 self-serving, unbelievable, and less credible and reliable than
24 that of General Foreman Swartz where contradicted, and
25 failing to find that it was not contradicted by any testimony
26 or documentary evidence.

27 23. 5:21 n. 17; Erroneously finding that Dixon's belief that Supervisor
28 8:48-9:4 Rodriguez would "take care of" the situation with the
Apprentice, as he said he would, makes it unbelievable that
Respondent would then lay off Dixon because he complained
about Kelly's treatment of the Apprentice.

29 24. 9:15-10:12; Erroneously failing to find that Marcial's testimony was
30 14:29-30 completely rebutted by any of Respondent's witnesses or
31 documents.

32 25. 9:15-10:12 Erroneously finding that Marcial's testimony was too good to
33 be true, improbable, rehearsed; self-serving, contradicted in

part by Dixon's testimony, and not credible.

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- 2 26. 9:29-30 Erroneously relying on a statement Marcial deleted from his affidavit prior to signing it to discredit his testimony.
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- 4 27. 9:27:31 Erroneously failing to credit Marcial's un rebutted testimony that he had deleted a statement from his affidavit prior to signing it because the statement had not been made.
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7 **Exception No.** **Page** **Exceptions to Legal Findings and Conclusions**

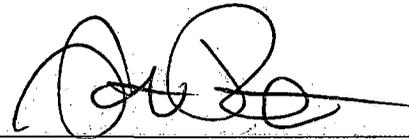
- 8 28. 13:44-15:48 Erroneously concluding that the General Counsel failed to meet its burden to show that Dixon's protected activity was a motivating factor in his layoff.
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- 11 29. 14: 1-30 Erroneously failing to impute Foreman Kelly's and Supervisor Rodriguez' knowledge of Dixon's protected, concerted activity to Respondent.
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- 13 30. 14:32-15:33 Erroneously finding that the only factor for establishing circumstantial evidence of animus was the timing of events.
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- 15 31. 14:32-15:33 Erroneously failing to find that Respondent's stated reasons for laying off Dixon were pretextual.
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- 17 32. 14:29-30; 15:35-40 Relying on erroneous credibility resolutions to find that the evidence failed to establish Supervisor Rodriguez' direct animus towards Dixon's protected, concerted activity.
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- 19 33. 16:1-9 Erroneously finding that even assuming the General Counsel met its initial burden, Respondent proved that it would have "terminated" Dixon even if he had not engaged in protected concerted activities.
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Erroneously concluding that the General Counsel failed to prove that Respondent laid off Dixon for unlawful reasons, and Respondent did not violate Section 8(a)(1) of the Act and dismissing the Complaint.

Respectfully submitted this 13th day of November, 2018.



Matthew C. Peterson
Counsel for the General Counsel

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