Exhibit A

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Consolidated Communications d/b/a Illinois Consolidated Telephone Company *and* Local 702, International Brotherhood of Electrical Workers, AFL–CIO. Cases 14–CA–094626 and 14–CA–101495

October 2, 2018

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

This case is before us on remand from the United States Court of Appeals for the District of Columbia Circuit. On July 3, 2014, the National Labor Relations Board issued a Decision and Order adopting Administrative Law Judge Arthur J. Amchan's decision finding, in part, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging Patricia Hudson on December 17, 2012, for her strike-related activity. 360 NLRB 1284 (2014). In reaching that conclusion, the Board adopted the judge's finding that Hudson did not engage in misconduct warranting forfeiture of the Act's protection when driving at highway speed proximate to a company truck occupied by two of the Respondent's managers.[1]

The Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review. On September 13, 2016, the court denied enforcement of the Board's Order with respect to Hudson's discharge. *Consolidated Communications Inc. d/b/a Illinois Consolidated Telephone Co. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016). The court rejected the Board's determination that Hudson's conduct did not lose statutory protection, finding that the Board had erroneously focused exclusively on "the absence of violence." The court described the Board's erroneous reasoning as follows:

> The central legal question before the Board was whether Hudson's driving behavior—on a public highway with vehicles traveling at speeds of 45 to 55 mph, and with uninvolved third-party vehicles in the area—" may reasonably tend to coerce or intimidate" Consolidated employees like [nonstrikers Troy] Conley and [Lawrence] Diggs. The burden of proof on that question rests squarely on the General Counsel's shoulders. The General Counsel must establish either that no misconduct occurred, or that the misconduct was not of sufficient severity to forfeit the law's protection of striker activity.
>
> The Board misapplied that standard here. The Board decision stressed the "absence of violence." But that asked the wrong question. The legal test to be applied is straightforwardly whether the striker's conduct, taken in context, "reasonably tended to intimidate or coerce any nonstrikers." While violence or its absence can be relevant factors in that reasonableness analysis, the Board had to take the next analytical step. It had to consider, consistent with precedent, *all* of the relevant circumstances, and evaluate the objective impact on a reasonable non-striker of misconduct committed on a high-speed public roadway with third-party vehicles present.

Id. (emphasis in original) (internal citations omitted).

The court vacated the Board's determination that Hudson's discharge was unlawful and remanded the case for the Board to apply the analysis set forth in *Clear Pine Mouldings*[2] and to ascertain whether, under "*all* of the relevant circumstances," Hudson's strike-related conduct "reasonably tended to intimidate or coerce any nonstrikers." *Consolidated Communications*, 837 F.3d at 18 (emphasis in original). Consistent with its determination that the General Counsel bears the burden of proof, the court instructed that any ambiguity in the evidence was to be resolved in the Respondent's favor. Id. at 19.

On March 10, 2017, the Board notified the parties that it had accepted the remand and invited them to file position statements. The Respondent, the General Counsel, and the Charging Party each filed a position statement.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the record and the position statements—and after properly examining all of the relevant circumstances and placing the burden of proof on the General Counsel, as directed by the District of Columbia Circuit and required by our precedent—we conclude that Hudson's misconduct was of sufficient severity to lose the Act's protection. Accordingly, we will dismiss the complaint allegation relating to her discharge.

Facts

During a December 2012 strike in support of union bargaining demands, striker Hudson, with fellow striker Brenda Weaver in a separate car behind her, spotted a

[1] Specifically, the judge found that "[i]f [Hudson] engaged in misconduct with regard to Conley, by preventing him from passing her, even if this was for 1-1/2 minutes and for 1-1/2 miles, this conduct was not egregious enough to warrant her termination, particularly in light of the fact that she was a 39-year employee with no prior disciplinary record." Id. at 1295. The Board adopted this finding without comment.

[2] *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

company truck travelling on Route 16 in Mattoon, Illinois. Route 16 is a 4-lane divided highway, two lanes in each direction, where the speed limit ranges from 45 to 55 miles per hour. Hudson, with Weaver joining, decided to follow the company truck to see if it would lead to the location of a commercial worksite where the Union could also picket (an "ambulatory picketing" site, in Board parlance). Driving the company truck was Troy Conley, a manager based in Mattoon. Lawrence Diggs, a manager from Texas, was a passenger in the truck. Both were working in the field to cover for strikers.

Once the strikers caught up to the company truck, Weaver used the left lane to pass both Hudson and the company truck and then returned to the right lane in front of the company truck. Hudson then also passed the company truck on the left, but remained in the left lane, travelling alongside Weaver at approximately the speed limit. By driving side by side, Hudson and Weaver prevented any cars from passing. After cars queued up behind Hudson in the left lane, she moved to the right lane in front of Weaver to allow them to pass. Conley, who recognized the strikers when they passed, began to transition into the left lane in an attempt to follow the other cars that had passed the strikers. At that point, with Conley, Weaver, and Hudson all moving at highway speeds, Hudson returned to the left lane and again began driving next to Weaver, in what could only be an intentional move to block the company truck. After braking, Conley returned to the right lane, where he had no choice but to stay behind Hudson and Weaver for approximately one mile until he was able to exit off of Route 16 in order to take a different, longer way to the worksite.

Discussion

The sole issue to be resolved on remand is whether Hudson, in the course of strike-related activity, engaged in misconduct that lost the Act's protection.[3] Nothing in our statute gives a striking employee the right to maneuver a vehicle at high speed on a public highway in order to impede or block the progress of a vehicle driven by a nonstriker, even if the maneuver is executed at or below the speed limit. Indeed, the Board has repeatedly held that the conduct of strikers blocking or impeding nonstrikers in vehicles proceeding (presumably at much lesser speeds) into or out of a company entrance is unprotected or, if attributable to a union, unlawfully coercive. There is no apparent reason why the result should be different for blocking or impeding nonstrikers on a public highway. In this respect, the court's remand opinion in this case quoted with approval the Board's statement in *Clear Pine Mouldings* that "the existence of a 'strike' in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, [or] to block access to the employer's premises."[4]

Therefore, even though Hudson's actions were otherwise protected, the totality of circumstances in this case requires the Board to find that the Act's protection was lost because of her serious misconduct. Specifically, regarding the "ultimate issue" that governs this case, it is beyond doubt that Hudson's actions "would reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights, including the right to refrain from striking."[5]

It is readily apparent that Hudson's driving would reasonably cause Conley and Diggs to fear for their safety. Two cars, driven at highway speeds by employees participating in a labor dispute with their common employer, passed the company truck and then drove side by side, with Hudson's car blocking the truck and any other vehicle from properly passing in the left lane. When traffic backed up, Hudson moved over to let other cars pass before deliberately returning to the left lane and blocking Conway's attempt to pass. By these actions, Hudson sent a clear message to Conley and Diggs that she was intentionally using her vehicle to obstruct or impede their passage. In other words, her actions would not only reasonably be viewed as intimidating, they were *calculated* to intimidate and cannot possibly be excused as some momentary emotional response in the context of a strike's heightened tensions. Not only was preventing the truck from passing in the wake of other cars dangerous, it would reasonably raise concern about what Hudson might do next. Any employees would reasonably fear that Hudson's next maneuver could cause a collision that would jeopardize their lives or the lives of other motorists on the highway.

Our finding here is consistent with the Fourth Circuit's analysis of similar misconduct in *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967), where the

[3] The court agreed with the prior Board decision that Hudson was engaged in protected ambulatory strike activity when following the company truck and did not engage in other misconduct of which she had been accused. *Consolidated Communications*, 837 F.3d at 18. Thus, these matters are established as the law of the case. We also do not address the separate issue whether Weaver's driving behavior went beyond the Act's protection. In the underlying decision, the Board found that Weaver's discharge violated Sec. 8(a)(3) and (1), 360 NLRB at 1296. As the court noted, the Respondent settled the Weaver allegation with the Union. 837 F.3d at 6 fn. 1. In any event, a determination that Weaver did not engage in serious misconduct would not affect our finding that Hudson did.

[4] 837 F.3d at 8, quoting from 268 NLRB at 1047.

[5] *Universal Truss, Inc.*, 348 NLRB 733, 735 (2006).

court reasoned that the Respondent could lawfully deny reinstatement to strikers who slowly drove their car in front of a nonstriker in a manner that prevented her from passing because (1) the misconduct "was calculated to intimidate," and (2) "obstruction of the public highway" was "inherently dangerous." Id. at 392.[6] Hudson's conduct was more egregious than that of the Oneita strikers. Like them, she obstructed the public highway with driving that was calculated to intimidate, but she did so at highway speed and with a maneuver that actually cut off the nonstrikers from passing in their truck.[7] Causing nonstrikers to reasonably fear for their safety is all that is necessary to lose protection under *Clear Pine Mouldings*, and the General Counsel failed to prove Hudson did not do so.

Thankfully, Hudson's maneuvers did not cause an accident. However, it is inherently dangerous to make such moves at highway speeds in the presence of other vehicles and to obstruct or impede their progress. It is also of no consequence that Hudson's highway-speed maneuvers and obstruction of the company truck was relatively brief, lasting only a minute or so until Conley chose to avoid continued intimidation by turning onto an alternate route to his destination. In the circumstances presented here, a miscalculation by anyone during that minute—though occurring in an instant—could have caused multiple fatalities or serious injuries.[8]

In 2017, more than 40,000 Americans died on our nation's roadways,[9] and more than 1,000 automobile fatalities occurred in Illinois alone.[10] We believe the Board must interpret our Act in light of the public safety interests at stake here. The protected right to strike does not confer immunity on employees who engage in high-speed maneuvering on public highways in a manner that interferes with other vehicles and puts targeted nonstrikers as well as innocent third-party drivers in fear of becoming a fatality statistic.

ORDER

The complaint allegation that the Respondent unlawfully discharged employee Patricia Hudson is dismissed.

Dated, Washington, D.C. October 2, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Patricia Hudson was a 39-year employee with an unblemished work record when she was fired by her employer for strike-related conduct. Two of the three incidents cited by the employer as lawful grounds for her discharge have now been definitively rejected by the Board and the U.S. Court of Appeals for the District of Columbia Circuit.[1] Left to consider, after the court's remand of the

[6] The court discussed this as "the Glisson incident." It noted that the Oneita strikers involved shouted obscene remarks at the nonstriker driving a car and called her a scab, but in finding the strikers' conduct unprotected the court relied solely on the fact it "involved obstruction of the public highway." Id.

[7] It does not matter that Hudson was driving within legal speed limits and that Conley may have sought to exceed those limits in attempting to pass. Sec. 7 does not confer police authority on strikers to enforce traffic laws.

[8] Cases where the Board has found that employees did not lose the Act's protection involved much different circumstances than present here. In *Batesville Casket Co.*, 303 NLRB 578 (1991), the judge discredited the manager's testimony that strikers "boxed in" his company van and instead found that the strikers were merely traveling on the same road, often at a distance from the van, to return to the employer's facility and "did nothing to impede the progress of the van." Id. at 580. Here, by contrast, Hudson deliberately blocked the company truck with her highway-speed maneuvers. Moreover, simply *following* nonstrikers at a safe distance, as employees did in *Altorfer Machinery Co.*, 332 NLRB 130 (2000), and *MGM Grand Hotel*, 275 NLRB 1015 (1985), plainly does not have a similar objective tendency to intimidate or coerce nonstrikers. *Gibraltar Sprocket Co.,* 241 NLRB 501 (1979)—a case involving strikers following a fast-driving nonstriker and once pulling alongside to motion the nonstriker to pull over—predated the Board's decision in *Clear Pine Mouldings*, supra, where the Board first adopted the reasonable tendency to coerce or intimidate standard applicable here and rejected that violence is required to lose protection. As the Board in *Gibraltar Sprocket* was not applying the same standard that we apply here, that decision has no bearing on this case even if it purported to make a finding under all of the circumstances presented there.

There are cases where the Board found more extreme reckless driving unprotected. See *International Paper Co.*, 309 NLRB 31, 36 (1992) (weaving alongside and almost bumping nonstrikers off the road and driving in front in a manner that risked causing a rear-end collision), enfd. sub nom. *Local 14, United Paperworkers International Union v. NLRB*, 4 F.3d 982 (1st Cir. 1993); *Teamsters Local 812 (Pepsi-Cola Newburgh Bottling Co.)*, 304 NLRB 111, 111, 117 (1991) (almost causing an accident by braking in front of a nonstriker); *PRC Recording Co.*, 280 NLRB 615, 663–664 (1986) (braking and zigzagging in front of nonstrikers, causing one to swerve into the median). Nothing in this precedent suggests that anything less reckless would not reasonably tend to intimidate or coerce a targeted nonstriker.

[9] Adrienne Roberts, *U.S. Road-Death Rates Remain Near 10-Year High*, Wall St. J. (Feb. 15, 2018), https://www.wsj.com/articles/death-rates-on-u-s-roads-remain-near-10-year-high-1518692401.

[10] Illinois Department of Transportation, *Illinois Fatal Crash Data for 2017: A Snapshot View*, http://apps.dot.illinois.gov/FatalCrash/Home/CrashData/2017 (last viewed June 7, 2018).

[1] *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1, 14–15 (D.C. Cir. 2016) (finding substantial evidence supporting the Board's conclusion that Hudson did not engage in the misconduct alleged).

case, is a highway-driving incident during which Hudson prevented a manager's company truck from breaking the speed limit to pass her, by staying in the left lane for a mile or less and for not more than 1 minute.[2]

As framed by the court, the "central legal question before the Board [is] whether Hudson's driving behavior—on a public highway with vehicles traveling at speeds of 45 to 55 mph, and with uninvolved third-party vehicles in the area—'may reasonably tend to coerce or intimidate' … employees" like those in the manager's truck.[3] The burden of proof was on the General Counsel to "establish either that no misconduct occurred, or that the misconduct was not of sufficient severity to forfeit the law's protection of striker activity."[4] Here, the court explained, the issue is whether Hudson's "conduct, taken in context, 'reasonably tended to intimidate or coerce any nonstrikers,'"and the Board must "consider, consistent with precedent, *all* of the relevant circumstances."[5]

Reversing the administrative law judge, the majority now determines that Hudson's conduct was unprotected. But its conclusion is based on a failure to carefully consider all of the record evidence, as the Board is required to do. Instead, the majority focuses narrowly on the fact that the driving incident took place at highway speeds, adopting what approaches a per se rule that strike-related conduct on the highway is "inherently dangerous" and so always unprotected. While Hudson's conduct may have annoyed or frustrated managers, it never posed any genuine danger to them, and it had no reasonable tendency to intimidate or coerce them.

I.

Hudson's contested conduct arose during a December 6 to December 13, 2012 strike, which occurred after negotiations for a successor collective-bargaining agreement had stalled. On December 10, Hudson and fellow striker Brenda Weaver[6] were driving separate cars to the employer's headquarters on Route 16 in Mattoon, Illinois, where they planned to picket. Route 16 runs between Mattoon and Charleston, Illinois, and in certain sections widens to a 4-lane divided road lined by businesses and interspersed with traffic lights.

En route to headquarters, Hudson noticed a company truck traveling east on Route 16, away from the Mattoon facility. Heeding her union's advice that strikers could conduct ambulatory picketing at the Respondent's commercial worksites, Hudson followed the truck to determine if it was going to a location where the union could picket. Weaver, who could not communicate with Hudson, assumed that Hudson had decided to follow the truck to see where it was going. The company truck, driven by Director of Network Engineering Troy Conley, with passenger Lawrence Diggs (a manager from Texas), was traveling from Mattoon to Charleston to repair a commercial cell tower.

After following Conley for about 1-½ miles, Hudson and Weaver caught up with the company truck, and Weaver passed Hudson and Conley. Without lingering, Weaver signaled, and moved safely into the right lane ahead of Conley. Hudson passed Conley soon thereafter and was momentarily parallel to Weaver's vehicle. There is no evidence that Hudson or Weaver traveled below the speed limit at any time. While Conley and Diggs testified that Hudson and Weaver may have slowed down in front of them, Conley conceded that they could have been traveling at the speed limit and was not sure if he put on his brakes. As posited by the judge, any slowdown may have been the result of reduced speed limits at an approaching stoplight or the fact that Conley, to this point, had been driving considerably *above* the posted speed limit—up to 69 miles per hour in the 45 or 55 mile-per-hour zones.

Hudson next moved into the right lane in front of Weaver to allow cars behind her to pass. Conley began to transition into the left lane to pass Hudson, but before he could do so, Hudson moved back into the left lane. The judge determined that when changing lanes, Hudson did not "cut [Conley] off" or cause him to slam on his brakes. Instead, Conley returned to the right lane and soon exited onto County Road 1200 E to take an alternative route to the jobsite. As the judge determined, in all, Hudson "prevented Conley from passing [her] by staying in the left lane, for a mile or less and not more than 1 minute." Conley did not see Hudson and Weaver after he exited Route 16.

Following these events, Conley called Sam Jurka, the employer's manager of field operations to report the incident. Conley thereafter completed an incident report,

[2] In the underlying decision (I did not participate), the Board had adopted the judge's finding that the employer unlawfully discharged Hudson for her strike-related conduct, finding that her actions remained protected under the Act. *Consolidated Communications*, 360 NLRB 1284 (2014). On appeal, the court agreed that Hudson's conduct was strike-related activity, 837 F.3d at 17–18, but found that the Board erroneously focused solely on an "absence of violence" when concluding that Hudson's conduct did not lose the Act's protection. Id. at 18. The court remanded the case to the Board to instead apply the "all of the circumstances" analysis in *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), to determine whether Hudson's conduct lost the protection of the Act. Id. at 19.

[3] 837 F.3d at 18.

[4] Id.

[5] Id. (emphasis in original).

[6] The employer also discharged Weaver for her part in these events. In the underlying decision, the Board found that Weaver's discharge violated Sec. 8(a)(3) and (1), 360 NLRB at 1296. The employer settled the Weaver allegation with the union. 837 F.3d at 6 fn. 1.

which the employer presented to Hudson at her termination meeting on December 17.

II.

As the District of Columbia Circuit observed, the Board's seminal decision in *Clear Pine Mouldings*, supra, establishes the legal test to be applied in determining whether an employee has engaged in "serious strike misconduct," i.e., misconduct "such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of the rights protected under the [National Labor Relations] Act."[7] Although *Clear Pine Mouldings* involved verbal threats,[8] the Board has applied its test to many kinds of asserted strike misconduct, including conduct involving motor vehicles. The Board's prior decisions in that area, which appropriately turn on their particular facts, do not dictate a result here. Carefully considered in light of precedent, however, the record evidence makes clear that Hudson did not engage in serious strike misconduct.

The Board has found that certain conduct involving motor vehicles did, indeed, amount to serious strike misconduct—but this case is easily distinguishable. In *International Paper Co.*,[9] for example, a striker lost protection where he tailgated striker replacements dangerously close, weaving his car alongside them, and placing them in danger of being forced off the road or into oncoming traffic. The Board adopted the judge's finding that this driving behavior, which ultimately resulted in a criminal charge for driving to endanger, ''exceed[ed] the bounds of peaceful and reasoned conduct'' and had a reasonable tendency to coerce and intimidate the strike replacements. 309 NLRB at 36. Here, there is no evidence at all that the managers' truck was in any danger of being forced off the road or into oncoming traffic, and no suggestion that Hudson engaged in anything like criminal behavior.

Nor is this a case where a striker's braking created a dangerous situation for other employees.[10] When Hudson changed into the left lane in front of the managers' truck, she did so with enough space that she did not cut off Conley, cause him to slam on the brakes, or otherwise risk causing an accident. And because Hudson continued at the speed limit when she was in front of Conley, there was no impediment to the flow of traffic that could have endangered less attentive drivers behind Conley and Hudson. Hudson's driving was potentially frustrating, but it was also fleeting: she prevented Conley from passing for no more than a mile and no longer than a minute. This fact, says the majority, is "of no consequence" because "a miscalculation by anyone during that minute … could have caused multiple fatalities or serious injuries." There is no actual evidence, however, supporting such dire speculation. Simply put, on this record, there was no even remotely close call here—and certainly nothing that would have reasonably suggested to the managers that Hudson was engaged in reckless or deliberately dangerous driving threatening them with harm, conduct that would have tended to coerce or intimidate them (as opposed to merely annoying them).

Finally, the situation here is unlike that presented in *Oneita Knitting Mills*,[11] a Fourth Circuit decision, issued before *Clear Pine Mouldings*, in which the court disagreed with the Board's determination that strikers had *not* lost the Act's protection. There, the Board's trial examiner (today, administrative law judge) explained that the nonstriking employee, Glisson, had testified that she drove home for lunch during her 30-minute lunch break and that [two strikers] would pull their car in front of hers and not let her pass, adding, "they just crept along and they would turn around and laugh and call me scab." They also used words which, according to Glisson, a lady would not care to repeat. She did not state which of the two was the driver. There was never any physical contact between the cars and Glisson was unable to state whether other cars were in the area.

Oneita Knitting Mills, Inc., 153 NLRB 51, 62 (1965). Reversing the Board, the Fourth Circuit determined that the two strikers "repeatedly drove their car in front of [the nonstriker's] car and would not permit her to pass, and that [the strikers] shouted obscene remarks and called her a 'scab.'"[12] The court concluded, as a matter of law, "that this misconduct … was calculated to intimidate the nonstrikers and … was inherently dangerous in that it involved obstruction of the public highway."[13] Here, in contrast, Hudson did not "repeatedly" drive her car in front of

[7] 268 NLRB at 1045–1046.

[8] The *Clear Pine Mouldings* Board rejected what it characterized as the Board's prior "per se rule that words alone can never warrant [loss of statutory protection] … in the absence of physical acts." Id. at 1046.

[9] 309 NLRB 31, 36 (1992), enfd. sub nom. *Local 14, United Paperworkers International Union v. NLRB*, 4 F.3d 982 (1st Cir. 1993). The District of Columbia Circuit here cited *International Paper* as illustrative of "misconduct committed on a high-speed public roadway with third-party vehicles present." 837 F.3d at 18.

[10] See *Teamsters Local 812 (Pepsi-Cola Newburgh Bottling Co.)*, 304 NLRB 111, 117 (1991) (finding that a union violated Sec. 8(b)(1)(A) when a striker repeatedly braked in front of a non-striker in a manner that almost caused an accident); *PRC Recording Co.*, 280 NLRB 615, 663–664 (1986) (finding serious misconduct where a striker passed two nonstriker vehicles and, while in front of them, applied his brakes and zigzagged, forcing one vehicle to swerve into the median) enfd. 836 F.2d 289 (7th Cir. 1987).

[11] *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967). The District of Columbia Circuit here cited *Oneita Knitting* as illustrative. 837 F.3d at 18.

[12] Id. at 392.

[13] Id.

the managers' truck, and she shouted no obscenities or insults. Nor can she fairly be said to have engaged in "obstruction of the public highway." Unlike the *Oneita Knitting* strikers, Hudson did not "creep along" (in the nonstriker's phrase): she drove at the speed limit. The majority insists that Hudson "was intentionally using her vehicle to obstruct or impede [the managers'] passage"—but this would be meaningfully true only if the managers had some legitimate need to exceed the speed limit.

Against the weight of the record evidence, then, the majority insists that Hudson's driving was "calculated to intimidate"—a baseless conclusion that the administrative law judge, who saw and heard the witnesses in this case, most certainly did not draw. Rather, this case fits comfortably with prior Board decisions finding that striker conduct involving motor vehicles did *not* lose the Act's protection.[14] Had Hudson cut off the managers' truck, had she persisted in driving in front of them for longer than she did, had she violated traffic laws, had her driving been accompanied by threatening words or gestures, had road conditions been hazardous, had she had prior hostile encounters with the managers—add some or all of these circumstances, and this would be a different, more difficult case. But these factors are missing from the record, and citing alarming statistics about roadways death (as the majority does) is no proper substitute for analyzing the evidence with care, as we are required to do.

In *Clear Pine Mouldings*, the Board rejected an earlier per se rule that strikers' verbal threats could never be serious strike misconduct. In this case, the District of Columbia Circuit similarly rejected the Board's original suggestion that the absence of "violence" was the single dispositive factor here. Now, ironically, the majority seemingly makes the same sort of error—focusing on the "inherent danger" of highway driving to the practical exclusion of the other circumstances present.

Hudson's driving incident may not have been admirable, or even advisable, but considering "all the circumstances"—as the Court of Appeals has instructed us to do–the General Counsel proved that it was not misconduct severe enough to cost Hudson the protection of the Act and so her job. Because substantial evidence simply does not support the majority's contrary conclusion, I dissent.

Dated, Washington, D.C. October 2, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[14] For example, in *Batesville Casket Co.*, 303 NLRB 578, 580–581 (1991), the Board adopted the judge's finding that a striker did not engage in serious misconduct when he pulled up alongside a company van at a stop light, deliberately pulled in front of it, and continued in this position for a short distance until the van detoured to avoid him. Acknowledging that vehicles might be used in some situations by strikers to intimidate non-strikers, the judge looked to the context in which the incident occurred and found that the incident was very short in duration, the striker did not impede the progress of the van, and there was no evidence that he or other strikers operated their vehicles "in any reckless, unsafe, or threatening manner so as to conclude that their actions reasonably tended to intimidate or coerce any nonstrikers." Id. at 581, citing *MGM Grand Hotel*, 275 NLRB 1015 (1985).

Similarly, the Board found that strikers did not lose the protection of the Act where, in the course of strike activity, they followed another driver, see *Altorfer Machinery Co.*, 332 NLRB 130, 142–143 (2000), or pulled up alongside a car at a high rate of speed and motioned for the nonstriker to pull over, *Gibraltar Sprocket Co.,* 241 NLRB 501, 502 (1979). *Gibraltar Sprocket* pre-dates *Clear Pine Mouldings*, but the Board applied a standard that aligns closely with the present standard—explaining that "each incident of alleged misconduct must be assessed in light of the surrounding circumstances, including the severity and frequency of the involved employee's actions," 241 NLRB at 501–502—and so the case remains instructive.