

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

ROSEBURG FOREST PRODUCTS,

Case No. 19-CA-213306

Respondent,

and

CARPENTERS INDUSTRIAL COUNCIL
(CIC), LOCAL UNION NO. 2949,

Charging Party.

**ROSEBURG FOREST PRODUCTS' BRIEF IN SUPPORT OF ITS EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

Respondent Roseburg Forest Products (“RFP”) excepts to the violations found by the Administrative Law Judge (“ALJ”) concerning Nick Miller’s (Miller) suspension and subsequent termination of employment.

First, the ALJ failed to apply the controlling “mere griping” standard from *Mushroom Transportation* to Miller’s conduct which culminated in a rant at a meeting with management. *Mushroom Transportation* holds that mere griping is not protected by the Act, and in order for employee conduct to be protected it must look toward group action. 330 F.2d 683 (3d Cir. 1964). The Decision and Order (“Decision”) in this case lacks any analysis of Miller’s conduct under *Mushroom Transportation*’s mere griping standard, and only in passing includes a footnote saying the mere griping standard is inapplicable to Miller’s social media activity. However, the ALJ’s Decision focuses on Miller’s conduct during a meeting on September 6, not a social media post. Properly applying the mere griping standard to Miller’s conduct during the September 6 meeting establishes Miller’s personal complaints that “no one listens to me,” “I would be way better off if I worked somewhere else,” calling supervisors present at the meeting “dumb,” “stupid,” and “idiots,” and failing to calm down despite repeated directions to do so, is personal conduct, not collective conduct, and is not protected by the Act.

Second, in the alternative, the ALJ erroneously found that Miller’s conduct was protected under *Atlantic Steel*, 245 NLRB 814 (1979). In applying *Atlantic Steel*’s four-factor test, the ALJ improperly concluded that *Pier Sixty*, 362 NLRB No. 59 (2014), could only be used to analyze an employee’s social media post, and failed to give sufficient weight to the undisputed evidence of RFP’s standard of acceptable conduct in the workplace. The ALJ’s refusal to apply *Pier Sixty* when

analyzing Miller's rant contravenes Board precedent specifically invoking *Pier Sixty* when analyzing employee conduct in meetings with management. If *Pier Sixty* allows for expanding the bounds of protected behavior in workplaces where management and employees alike regularly engage in outrageous behavior, *Pier Sixty* must consistently restrict the bounds of protected behavior in workplaces where management rigorously enforces a respectful workplace. Properly applying *Pier Sixty*'s standard of acceptable workplace conduct to Miller's behavior would have shown that Miller's conduct lost the protection of the Act under *Atlantic Steel*.

Third, in the alternative, the ALJ erroneously found that Miller's termination was unlawful under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd* 662 F.2d 899 (1st Cir. 1981). The ALJ erred by failing to conclude the evidence established that RFP would have terminated Miller's employment absent his Facebook post, and the ALJ erred by failing to appropriately consider evidence of comparator employee conduct in determining RFP's intent in the termination decision. The ALJ failed to consider uncontradicted record evidence showing that Miller was exclusively disciplined for his egregious and unprotected conduct. Properly applying the record evidence to the General Counsel's prima facie case and RFP's rebuttal would have shown that there simply is no evidence that Miller's protected conduct played any role in Miller's discipline and that his termination was lawful under *Wright Line*.

For all of these reasons, which are explained more fully below, the Board should reverse the ALJ's findings and conclusions with respect to the suspension and termination of Miller's employment with RFP.

STATEMENT OF THE CASE

This case revolves around Miller's complete decline in performance and attitude over the span of a year and a half, culminating in a meeting where Miller's intolerable behavior led to his immediate suspension. The ALJ's Decision that RFP's conduct constituted an unfair labor practice is contrary to Board precedent and longstanding labor policy which clearly allows employers to discipline employees for unprotected and unacceptable workplace conduct.

A. RFP Operations

For over 75 years, RFP has been a closely held manufacturer of wood products and operates a mill in Riddle, Oregon. Riddle is a small community and due to the size of RFP's operations there, it is not uncommon to see family members working together at RFP. The mill employs over 400 production, maintenance, and transportation employees who are represented by the Carpenters Industrial Council, Local Union No. 2949. Tr. 52:23-25. RFP and the Union have a history of a good bargaining relationship and the current working agreement between RFP and the Union covers the period of June 1, 2016 to May 31, 2020. G.C. Ex. 2.¹

B. Ramm's Culture Change at Riddle and RFP's Level of Tolerated Conduct

When Tony Ramm started as the Plant Manager for RFP's Riddle mill, he had a plan to change the workplace culture. Tr. 226:1-5. The change started with the leadership/management staff, and Ramm worked hard to build a management team that modeled the values of how to treat employees with respect. Tr. 226:13-17. It is undisputed that Ramm would not tolerate language at the mill that would damage an employee's self-esteem and that calling another employee an "idiot," "stupid," or "dumb," was beyond the bounds of acceptable conduct. Tr. 227-19-23, 228:2-

¹ "G.C. Ex." and "Emp. Ex." refer to the General Counsel's and RFP's exhibits admitted at the August 29, 2018 hearing before the ALJ on this matter.

14. The ALJ found that “the evidence establishes a culture at RFP that did not tolerate employees demeaning or insulting each other.” Decision 12:27-28.

Union shop steward and 50-year RFP employee Ed Weakley’s testimony confirmed this change in culture. Tr. 32:16-22. Weakley acknowledged “as far as company-wise” it is not acceptable to refer to other employees in disrespectful terms. Tr. 33:23-34:1. As an example of his dedication to implementing this culture change, Ramm said an employee had told supervisor and 20-year RFP employee Nick Parker that he was hitting his head on a bolt that was hanging from up above on a beltway. Tr. 226:24-227:3. Parker responded “well, duck next time.” *Id.* Ramm explained this was the type of disrespectful talk that was not tolerated and Parker received a two-week suspension even though Ramm knew many thought the discipline was overly harsh. Tr. 227:5-8. Ramm reiterated that Parker’s discipline was to make sure “everybody understood that that’s not how we treat people.” Tr. 227:7-8.

C. Miller’s Decreasing Performance and Increasingly Negative Attitude

Miller was hired at RFP in November 2003 and was a skilled Detail Saw Operator. Tr. 49:22, 50:21. Miller’s 2014 performance review showed only two areas needing improvement and supervisors wrote that he was reliable, a team player, and ready to step in and help out. Emp. Ex. 12. However, beginning in 2016, RFP noticed a decline in Miller’s engagement, attitude, and ability to work on a team. Emp. Ex. 13. Compared to 2014, Miller’s 2016 performance review showed several more areas that needed improvement. *Id.*

1. Miller’s May 2016 Written Warning

On May 13, 2016, Miller’s supervisor sent him home early due to performance and behavioral issues. Emp. Ex. 11. Supervisors Forrest Bray and Dan Cornell, and former HR Director

Tris Thayer met with Miller and Weakley and issued Miller a Corrective Action Discussion, which explains that Miller was not on his saw working when he should have been there helping a new employee. *Id.* As part of the Corrective Action Discussion, RFP provided Miller with a book that teaches people how to communicate well and appropriately with others in order to be productive. *Id.*; Tr. 187:18-188:2. During the meeting, Miller called Bray, who was sitting right there in the room, “lazy” and said that “he’s a terrible supervisor, he’s worthless.” Tr. 148:16-17. Miller refused to sign the Corrective Action Discussion form, but he was explicitly warned that his “attitude [and] future job performance, both must improve immediately for you to continue to work here.” Emp. Ex. 11.

2. No Other Employee Has Ever Lost Certified Buddy Status

As part of the same May 13, 2016 issue, former Safety Manager Deneen Dahl was called into the Corrective Action Discussion meeting with Miller to discuss Miller’s “Certified Buddy Status,” which meant that he took on the role of a supervisor in making sure an employee locks out correctly and safely. Tr. 147:13-148:18. In order to have Certified Buddy Status, employees must undergo training and are required to sign off that the lockout procedure was properly performed. Tr. 147:19-23. However, that day, Miller had signed off as a Certified Buddy for a new employee even though the lockout was not done properly. Tr. 148:4-13. When Dahl questioned Miller about his improper sign off, Miller said it was not his fault because he was really angry with his supervisor, he could not be responsible for the new employee’s safety, and the new employee should have known better because he was frustrated. *Id.* These comments were so concerning that RFP decided that Miller could not keep his Certified Buddy Status. *Id.* Importantly, no other employee at the mill has ever lost Certified Buddy Status.

3. Miller's Increasing Pattern of Poor Attitude and Performance

In Miller's December 2016 performance review, Miller had only a few areas that met expectations, and all others needing improvement. Emp. Ex. 15. Specifically, Miller needed to improve in working effectively with other employees and dealing with conflict in a constructive manner, noting that RFP "would like Nick to get better overall on teamwork." *Id.* In 2017, Plant Manager Ramm terminated supervisor Mike Miller, who is Nick Miller's father. At a crew meeting with employees in mid-2017, Nick Miller asked Ramm why he fired some supervisors, and insisted on discussing his father's termination in the large group setting.² Tr. 243:5-11. Ramm explained that it was inappropriate to discuss individual employee performance issues in a group setting and that they should have a more private conversation. Tr. 234:8-21.

D. Smoke from Forest Fires, RFP Response, and Discussions with Employees

Late August 2017, a forest fire started near the Riddle mill. Roseburg made plans to keep employees safe during smoky conditions, including handing out dust masks and opening the doors to the mill at night when the smoke dissipated. Tr.104:23-24. However, because the mill is not a sealed facility, it was impossible to keep the smoke out entirely. Tr. 104:14-16. Supervisors were instructed to allow individual employees to go home if they believed that the smoke was endangering their health. Tr. 105:1-12. On September 5, 2017, Dahl and Chad Lynch, Panel Superintendent, went to talk with the Finish End crew, including Miller and Weakley, in the lunchroom because they had heard from Ken Miller, Finish End Supervisor and Nick Miller's uncle, that employees were concerned about the smoke. Tr. 107:8-16. When Dahl asked Miller if he wanted to talk about his concerns, Miller explained that he felt it was silly to think closing the

² Miller, for the first time during rebuttal, testified he was asking questions on behalf of the group; however, there is no evidence from any other witness to support his new attempted justification.

doors and windows would keep smoke from coming in. Tr. 108:9-12. Dahl agreed it was not the best plan and asked if he had any other suggestions because she was all ears for any ideas from Miller. Tr. 108:17-24. Miller made no suggestions, saying “it’s just stupid to think you are going to be able to keep the smoke out of the mill.” Tr. 109:1-3. Dahl felt the meeting ended with the understanding that Miller would bring any concerns and ideas to her. Tr. 109:9-13.

On September 6, 2017, a bargaining unit member showed Dahl a post that Miller wrote on the Union’s Facebook group:

Apparently closing all of the doors and windows will help keep the smoke out of the plant. Even though the plant isn’t sealed and there isn’t a filtration system. This is the level of stupidity that our management team has elevated to.

Emp. Ex. 4; Tr. 213:21. Dahl thought the post was inconsistent with the conversation that she had with Miller just the day before and Dahl wanted to talk with Miller to see if he had any additional concerns. Tr. 137:4-7.

E. Miller’s Gripes and Egregious Conduct During the September 6 Meeting

Dahl called Miller in to meet with her and other RFP employees who had been part of the previous day’s conversation in the lunch room, including Lynch, Weakley and Ken Miller. The only purpose of the meeting was to hear whether Miller had any additional concerns that RFP could address. Tr. 151:13-17. Dahl explained that the group would have met in the Safety Manager’s office, but there was no table to sit around, so they used the table and chairs in the HR office just across the hall. Tr. 139:6-7. This was not an investigatory meeting. The phrase “investigatory meeting” was exclusively used by Counsel for the General Counsel at the hearing, and not a single witness used that term. Further, Weakley described how this meeting was different from an actual investigatory meeting, as a steward he had attended many investigatory meetings

in the past. Tr. 35:24-36:12. Weakley explained that in an “investigatory meeting,” he would be informed what the meeting was going to be about beforehand. *Id.* Weakley also testified that the number of people who attended the September 6 meeting distinguished it from an investigatory interview. Tr. 36:13-17. Further, unlike in an investigatory meeting and because discipline was not the purpose of the meeting, no one at RFP took notes. Tr. 83:1-3.

Critically, the record shows that the meeting went on for 30 to 45 minutes. Tr. 75:9-10, 25:24-25. Dahl expressed her confusion about Miller’s post because she thought the two had ended the conversation in the lunchroom on a positive note. Tr. 140:16-20. Weakley confirmed that he remembered the same conversation from the day before. Tr. 140:22. Miller said he did not think Dahl or Lynch were stupid, but he felt that the “rest of the management team is a bunch of idiots.” Tr. 141:11-14. After this comment, Dahl asked if he had any additional concerns about the smoke since that was the purpose of the meeting and Miller said none that they had not already discussed. Tr. 141:21. Safety Tech Dathen Walker showed Miller the photos that he had been taking to monitor the smoke levels and Dahl encouraged Miller yet again to bring any suggestions he had forward. Tr. 141:21-142:3.

Only 5 to 10 minutes into the meeting, Miller “launched into something totally separate.” Tr. 142:2-22. Miller became defensive and agitated, saying to Thayer that “Roseburg never listens to any of my ideas. I’ve had a lot of ideas and they’re not implemented. Roseburg would make way more money if they would do what I suggested. I could make more money.” Tr. 142:7-11. Miller continued to raise his voice, becoming increasingly agitated and loud stating “managers are stupid, no one listens to me. I’ve had all these ideas” and that he had “never even gotten a thank you.” Tr. 143:7-11. Dahl, Thayer, Muir, and Lynch repeatedly asked Miller to calm down and to

keep it professional, but he would not stop his rant. Tr. 144:9-12, 196:14-20. Miller was just repeating “you guys are all dumb and stupid and idiots” and raising his arms in frustration. Tr. 197:1. At this point, Dahl left the meeting and went to her office across the hall because her hope had been to address any concerns but the meeting had gone in a different direction and Miller was no longer talking about any safety or other workplace concerns. Tr. 145:1-6. Rather, Miller was griping about how he perceived RFP management as being generally incompetent and how he felt he could make more money if he left RFP. The record shows that for as long as 20 to 35 minutes, Miller had completely changed the nature of the meeting by ranting about his personal gripes completely unrelated to the initial reason for calling the meeting.

Eventually, Thayer asked Miller and Weakley to step out of the room. Tr. 145:21-146:5. When Dahl saw them leave from across the hall, Miller was still agitated, his face was red, and his body language showed his frustration. Tr. 145:12-17. Thayer asked Dahl to join him, Lynch, and Ken Miller in order to discuss Miller’s conduct at the meeting. Dahl felt that they had not been able to get the meeting back to a professional place with Miller and worried what would happen if Miller’s pattern of behavior continued to escalate. Tr. 150:13-16. According to Dahl, it is very common when someone is frustrated, as Miller was on September 6, to send the person home on suspension because it is a safety issue if employees are not in an emotional state to safely return to work. Tr. 146:3-6. Because Miller was not in a state where he could safely return to work, he was suspended pending an investigation into his behavior. Tr. 146:6-8.

F. Termination of Miller’s Employment

Ramm was not in Riddle on September 5 or 6, but returned on September 8, 2017. Tr. 199:17-18. When he returned, Ramm learned what had happened at the meeting and began an

investigation regarding Miller's conduct. Tr. 199:22-24; 231:5. As part of Ramm's investigation, he talked with Thayer, Dahl, Muir, Lynch, and Ken Miller about what had happened. Tr. 231:8-13. Ramm also evaluated Miller's employment history, including his performance reviews and prior discipline. Tr. 234:8-11. Miller's Facebook post played no role in Ramm's decision to terminate Miller's employment because Ramm did not even know of the Facebook post and had never even seen a copy of the post until the hearing on this matter. Tr. 246:16-24. Ramm decided that there was a clear and escalating pattern of behavior and that Miller was "unwilling to be a good team member." Tr. 234:11-14, 235:1-4. Miller's conduct simply did not line up with the principles and values that Ramm was working hard to establish at the mill. Tr. 235:20-22. Ramm terminated Miller's employment because even though he "was a great operator" and "super intelligent, . . . he was damaging the rest of the team." Tr. 235:17-20.

G. The ALJ's Decision Fails to Recognize the Seriousness of Miller's Conduct

The ALJ's Decision completely fails to address several of the legal arguments and sound Board precedent presented both at the hearing and in RFP's post-hearing brief. Most critical is the Decision's failure to appreciate the seriousness of Miller's rant at the September 6, 2017 meeting. Throughout the Decision, the ALJ analyzes Miller's conduct, from the September 5 lunchroom meeting, to the Facebook post, to the initial discussion at the September 6 meeting, to his 20-35 minute rant, as if none of this conduct can be distinguished or separately analyzed. The Board must appreciate the seriousness of an employee being allowed to turn a productive 5 to 10 minute conversation into 20 – 35 minutes of ranting. The egregiousness is underscored by the fact that the rant included calling supervisors "stupid," "idiots," and "dumb" to their faces, refusing to calm down when repeatedly asked to do so, and becoming increasingly agitated and loud to the point

that his supervisors felt he could not safely return to work. The ALJ refused to recognize that Miller unquestionably changed the nature of the September 6 meeting to something that no longer had anything to do with safety or other protected workplace concerns. RFP asks the Board to seriously consider how toxic an employee is to an employer's lawful efforts to maintain a respectful workplace when that employee takes a conversation aimed to address workplace concerns to something incredibly unproductive and unacceptable. The Act was never intended to protect this type of behavior and the ALJ's Decision must be reversed.

QUESTIONS PRESENTED

1. Whether Miller's history of directionless criticism in addition to his conduct during the last 20-35 minutes of the September 6 meeting was unprotected under *Mushroom Transportation's* mere griping standard;

2. In the alternative, whether Miller's conduct during the last 20-35 minutes of the September 6 meeting lost protections of the Act under *Atlantic Steel* and *Pier Sixty*;

3. Whether Miller's termination was not motivated by protected activity and he would have been terminated absent any protected activity under the *Wright Line* standard.

ARGUMENT

A. The ALJ Erred by Failing to Uphold Miller's Discipline Under the Mere Griping Standard of *Mushroom Transportation*

The ALJ failed to apply the mere griping standard in *Mushroom Transportation*, which is dispositive to this case. Decision 13:36-37. The Board has long held that, for conversations between employees to be protected concerted activity, they must look towards group action because mere griping is not protected. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). Specifically, "it must appear at the very least that it was engaged in with the object of

initiating or inducing or preparing for group action.” *Id.* at 685. Moreover, the Board held in *Lutheran Social Service of Minnesota*, behavior that is “essentially aimless and undirected, consisting of unremitting complaining about the value of management policies and the competence and good faith of their managers” may be a type of concerted activity, but it is not one that is protected by the Act. 250 NLRB 35, 44 (1980).

Despite Respondent’s post-hearing brief containing multiple pages of argument on this point, the ALJ’s Decision ignores the mere griping standard entirely as applied to Miller’s rant at the September 6 meeting. Instead, the ALJ’s Decision includes a one sentence of a footnote stating “N. Miller’s action of raising the complaint with management distinguishes the Facebook conversation from the unprotected activity of ‘mere griping’ unaccompanied by action or contemplation thereof.” Decision 11:n. 24. This highlights the ALJ’s failure to make a critical distinction in this case, Miller’s Facebook post and initial discussion at the September 6 meeting regarding any smoke or safety concerns was never the basis for his discipline. Tr. 234:8-236:4. Instead, the ALJ’s analysis jumbles Miller’s Facebook post, and the entirety of the September 5 and 6 meetings into one “subject matter;” however, it is undisputed and clear in the record that the September 6 meeting morphed into a totally distinct rant from Miller.

Further, the ALJ did “not find it significant that Miller . . . may have reiterated his comments as the conversation strayed to other workplace frustrations.” Decision 14:16-21. The ALJ also made no finding with respect to the length of the meeting despite being uncontradicted in the record that the meeting lasted 30 to 45 minutes. Tr. 75:10. The ALJ’s conclusion completely mischaracterizes the record evidence and fails to recognize the importance of the fact that the conversation did more than “stray,” because in reality it turned into Miller’s 20 to 35 minute “rant”

about his personal “workplace frustrations.” Tr. 45:9-10. It cannot be said that personal complaints about how he [Miller] could earn more money elsewhere, and calling management dumb, stupid, idiots are protected “workplace frustrations.” Decision 14:16-21. The ALJ erred in failing to find it significant that the September 6 meeting can be dissected into two very distinct conversations. The ALJ should have recognized that the basis for Miller’s discipline that day rested exclusively on the fact that despite attempting to have a productive conversation with Miller about workplace concerns, he “launched into something totally separate.” Tr. 142:3-18.

Had the ALJ properly made this critical distinction supported by the undisputed record evidence, the ALJ would have found that even if Miller was engaged in concerted activity during the first 5 to 10 minutes of the September 6 meeting, Miller was no longer protected by the Act when the rant turned the meeting into mere griping about personal concerns for 20 to 35 minutes.

The Board’s affirmation of the mere griping standard in *Lutheran Social Service* should have been applied here. In *Lutheran Social Service*, two highly skilled employees disagreed with management’s decision to implement program changes. *Id.* at 36. Their disagreement resulted in repeated complaints about the changes, but also about the program administrator personally and his “incompetence” in his role. *Id.* at 37. The administrator specifically warned the two employees that their “continued negativism about the changes could result in termination.” *Id.* at 36. After a few months of continued complaints and negative attitudes, and without any sign of improvement, the employees were terminated. *Id.* The Board upheld the ALJ’s decision which explained that while the employees’ conduct “was loosely concerted, it is hard to say that it was directed toward any particular objective . . . they filed no grievances; and they made no demands. What they did, essentially was to complain, criticize and carp from, as it were, the sidelines.” *Id.* at 41.

The *Lutheran Social Service* case holds that the Act “protects protests in which there inheres action or the possibility of action. It has been applied even in cases where the dissatisfaction is embryonic and only hints at future group behavior.” *Id.* at 33-34. Nevertheless, citing *Mushroom Transp.*, there the ALJ explained that the employees’ “conduct, though jointly engaged in by two or more individuals, really amounts to no more than ‘mere griping,’ which the Act does not seek to protect.” *Id.* The decision went even further to say that even had the employees’ conduct been protected activity, their behavior rendered them “unfit for further service” because it had reached a point, “particularly in view of the directionless nature of the carping” that “too much was enough.” *Id.* at 44.

Cases as recent as 2017 continue to utilize the *Lutheran Social Service* decision. *Mat-Su Regional Med. Ctr.*, No. 19-CA-180385, 2017 NLRB Lexis 356 (2017) (finding that an employee’s complaint to her supervisor was not protected by the Act); *Ekhaya Youth Project, Inc.*, No. 15-CA-155131, 2016 NLRB Lexis 525 (2016) (finding that the termination of two employees did not violate the Act because the employees’ text messages and discussions “had no other purpose than to demean” their superiors); *PHC-Elko, Inc.*, 347 NLRB 1425 (2006) (upholding the termination of an employee who said she would rather resign than say anything positive about the employer during a meeting the employer held to encourage employees to vote against union representation). Further, the Board has long held that general complaints about the competence of upper level managers are normally unprotected because they do not relate to wages, hours, and other terms and conditions of employment. *Retail Clerks Union, Local 770*, 208 NLRB 356 (1974).

In the present case, the ALJ failed to recognize that Miller’s increasing pattern of directionless and degrading complaints spanning over a year are just like the complaints of the

employees who were terminated in *Lutheran Social Service*. The ALJ found that as early as May of 2016, Miller had called his supervisor to his face a “liar,” “worthless,” and accused him of being lazy in a meeting specifically called to discuss Miller’s failure to follow workplace instructions. Decision 3:36; Tr. 148:16-18. However, this factual finding does not at all appear as a consideration in any portion of the ALJ’s legal analysis. Miller had been warned that his attitude and behavior needed to improve for him to continue working at RFP. Decision 4:4-6; Emp. Ex. 11. Despite the warning, Miller’s bad attitude continued, even writing on his December 2016 performance review that his supervisor was a “compulsive liar” and “over all a very bad supervisor.” Decision 4:n.10; Emp. Ex. 15. In spring of 2017, Ramm had to have a meeting with Miller again to warn him about his attitude and behavior because Miller had made rude and offensive comments about management’s decisions to fire his father (who was a supervisor at RFP) rather than the supervisor Miller did not like, in front of a large crowd. Decision 4:21-26; Tr. 242:12-14.

Nevertheless, Miller persisted in being negative and complaining about decisions that management was making. During the September 5, 2017 crew meeting in the lunchroom, Dahl specifically asked Miller if he had any ideas on how RFP could be doing better. Decision 6:1-5; Tr. 108:15-109:3. All Miller had to offer, was that management was “stupid” to think that it was going to be able to keep smoke out of the mill. Decision 6:1-3; Tr. 109:1-3. At the September 6 meeting, after again asking Miller if he had any ideas on how to improve the situation, Miller instead “launched into something totally separate.” Tr. 142:3. For 20 to 35 minutes, Miller went on and on about how everyone is stupid, idiots, dumb, no one at RFP ever listens to his ideas, how he’s had a lot of ideas that are never implemented, how the company would make a lot more money

if it would implement his suggestions, and how Miller would be better off and make more money if he worked somewhere else. Tr. 142:7-14. At that point in the conversation, Miller was raising his voice and “it really turned into, managers are stupid, no one listens to me.” Tr. 143:9-10. Multiple people in the room repeatedly asked Miller to calm down and to keep it professional, but each time Miller “just got louder and seemingly more frustrated.” Tr. 144:9-12. When the conversation reached a point where it was “out of control,” Thayer suspended Miller pending an investigation. Tr. 195:21.

Just like the denials of one of the employees in *Lutheran*, Miller denies making these negative and offensive statements. 250 NLRB at 38 n. 11. Just like the employees in *Lutheran*, Miller’s rant offered no suggestions for improvement, he made no demands, and he filed no grievances about the smoke. Simply put, he had no intention to “inhere action or the possibility of action” rather, his intention was to “complain, criticize, and carp” about not receiving enough thanks and how he could earn more money working somewhere else all while calling management derogatory names. *Id.* at 41; Tr. 143:10-11. Just like in *Lutheran*, Miller’s use of language was “very inconsistent with the overall policy, the overall philosophy” of the company. *Id.* at 38. Miller was also “expressly warned” that his continued poor behavior could result in termination, just like the warning the employees in *Lutheran* received. *Id.* at 43. Just like in *Lutheran*, Miller had “unquestioned capabilities” as a Detail Saw Operator and prior to management’s implementation of a culture change, a history of good performance reviews. *Id.* at 36.

Like the employees’ complaints in *Lutheran*, Miller’s diatribe “had transcended the issues” of the workplace and “had been transmuted into contemptuous and vulgar characterization of the managers, their capacities, and their motives.” *Id.* at 45. As with the employees in *Lutheran*,

Miller's conduct had reached a point where "it was properly thought that too much was enough." *Id.* at 43. Here, despite the ALJ making findings completely in line with the facts of the *Lutheran* case, the ALJ does not apply *Lutheran* or even the mere griping standard to Miller's history of directionless and demeaning complaints which culminated in his rant on September 6. Properly analyzing the facts of this case under the Board's long-standing mere griping standard must result in a finding that Miller's termination was because of his "aimless and undirected" complaining, which is not behavior protected by the Act.

B. The ALJ Erred by Finding Miller's Conduct on September 6 Did Not Lose Protections of the Act Under *Atlantic Steel* and Failed to Properly Apply *Pier Sixty*

Although *Mushroom Transportation* is dispositive of this case, in the alternative, Miller's conduct at the September 6 meeting lost the protections of the Act, even applying the *Atlantic Steel* framework. The ALJ erroneously concluded that "because preponderant evidence establishes that Miller was terminated for conduct that was part of the *res gestae* of his protected concerted and union activities, I find the General Counsel has met her burden to prove a violation of Section 8(a)(3) and (1) as alleged." Decision 15:8-11. Furthermore, the ALJ improperly failed to consider *Pier Sixty*'s holding when analyzing Miller's rant under the *Atlantic Steel* test. Decision 13:n. 30.

The Supreme Court has held that even if conduct is concerted, it "does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984). The Board holds that an employer "does not have to tolerate abuse and insubordination of a supervisor by an employee." *J.L.M. Inc. & Local 217*, 1991 NLRB Lexis 389, 133 and 193 (1991) (upholding termination where use of colored language and previous anger problems were noted in the employee's performance review), *modified on other grounds by* 312 NLRB 304 (1993). The Board recognizes that "there is a point when even activity ordinarily

protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy.” *Care Initiatives, Inc.*, 321 NLRB 144, 151 (1996). Here, Miller’s discipline was exactly the type of discipline that courts and the Board have clearly stated an employer does not have to tolerate and the ALJ’s improper application of long-standing Board precedent to Miller’s conduct must be reversed.

To determine when an employee’s conduct in a meeting with management rises to a level that loses the Act’s protection, the Board applies *Atlantic Steel*. That test requires reviewing four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. 245 NLRB 814, 816 (1979). Here, the ALJ improperly found that factors one, two, and three “weighed strongly in favor” of retaining the Act’s protection. Decision 14:1-15:11. On the fourth factor, the ALJ inexplicably found that “no unfair labor practice had yet occurred,” made no final determination on whether the factor weighed in favor of protection, but then concluded that Miller’s conduct was protected. Decision 15:1-11. In short, the ALJ improperly applied factors two and three to the record evidence, made no conclusion on factor four, and should have found that because three of the four factors weigh strongly against protection under *Atlantic Steel*’s framework, Miller’s conduct lost the protection of the Act.

1. The Subject Matter of Miller’s Rant Was Unprotected

The ALJ erroneously concluded that “because the subject matter of the meeting was Miller’s concerted protected/union activity, the second factor strongly militates in favor of finding that Miller’s remarks retained [sic] Act’s protection.” Decision 14:9-11. Instead, the ALJ focuses exclusively on the fact that “the meeting was called to discuss Miller’s Facebook post;” however,

the ALJ erroneously failed to consider the fact that the actual meeting topic was very different from the topic for which the meeting was called to discuss. Decision 14:14-15.

In analyzing the second *Atlantic Steel* factor, the ALJ relies on *Fresenius USA Mfg., Inc.*, 358 NLRB 1261, 1266 (2012). Decision 14:12. However, *Fresenius* has since been vacated and remanded to the Board by the D.C. Circuit. *Fresenius USA Mfg.*, 2014 U.S. App. Lexis 14894 (D.C. Cir. Aug. 1, 2014). On remand, the Board in *Fresenius* specifically declined to decide the issue of whether the employee's conduct retained the Act's protection, and it is inapplicable authority for the ALJ to rely on here. *Fresenius USA Mfg., Inc.*, 362 NLRB No. 130, *4 (2015). The ALJ's reliance on *Fresenius* underlines the erroneous finding that Miller's rant "does not change the fact, however, that the meeting was called to discuss Miller's Facebook post" and that the post was "the crux of the meeting." Decision 14:14-16.

The ALJ's invocation of *Plaza Auto Center, Inc., v. NLRB* in analyzing the second factor, is inapplicable here. Decision 14:24-25. There, the Ninth Circuit found that the subject matter of the discussion weighed in favor of protection because the conversation initially involved the employee's concerns about his compensation and then the employee started demanding information relating to the employer's vehicle cost because the employer's cost directly impacted the calculation of the employee's commission-based compensation. *Plaza Auto Ctr., Inc., v. NLRB*, 664 F.3d 286, 293 (9th Cir. 2011). The court held that the employee's "desire to know [employer's] costs related directly to [employer]'s pay structure because his complaint, in part, was that he could verify that his commissions were correct only if he knew what [employer] paid for the vehicle. *Id.* There, because the first part of the conversation and the second part of the conversation (the

employee's demands during his outburst) were both related to his commission-based compensation, the court found the subject matter factor weighed in favor of protection. *Id.*

Unlike the employee in *Plaza Auto*, Miller's 20 to 35 minute rant during the September 6 meeting was completely unrelated to the first part of the September 6 meeting, which clearly distinguishes the employee's demands in *Plaza Auto*. In this present case, Miller's rant had absolutely no substantive connection to any safety concerns Miller had raised, on Facebook or in person, with respect to the smoke. By concluding that "Miller's actions in the September 6 meeting were and remain protected," the ALJ again critically fails to distinguish the first part of the meeting lasting only 5 to 10 minutes where RFP was trying to have a productive conversation with Miller to resolve any concerns, from Miller's 20 to 35 minute rant about Miller's personal gripes complaining about how he could make more money elsewhere. Tr. 142:7-14, 196:2-5.

The record is uncontradicted that there were essentially two parts to the September 6 meeting: the first part, lasting 5 to 10 minutes, where RFP attempted to discuss Miller's concerns about smoke in the mill and to show Miller the steps RFP was taking to address the situation – the reason the meeting was called, and the second part, lasting 20 to 35 minutes, where Miller aimlessly continued about his personal gripes. Tr. 75:9-10, 76:7-13, 142:15-18, 143:14-19. Considering Miller's rant constituted the vast large majority of the September 6 meeting, it cannot be said that the entire September 6 meeting was about Miller's safety concerns.

Furthermore, the reason a meeting between management and an employee is convened does not cast protection on anything said at that meeting. The ALJ erroneously concluded "the evidence shows that the Facebook post, including the working conditions it addressed, was *the crux of the meeting.*" Rather, the record is clear that Miller's rant consisted of (1) that Miller could

make more money elsewhere, (2) complaining that RFP did not listen to Miller's ideas on how RFP could make more money, and (3) calling management dumb, stupid, and idiots multiple times. Tr. 142:6-14. Miller's rant largely consisted of verbal abuse of supervisors and aimless complaints, which the Board maintains is not protected activity. *J.L.M. Inc.*, 1991 NLRB Lexis at 133 and 193. Unlike in *Plaza Auto*, here the established facts create a clear basis for segregating Miller's protected safety concerns from his outburst on September 6 and show that the subject matter of Miller's rant itself is not of the type protected under the Act. The ALJ's application of the established facts to the second factor of *Atlantic Steel* must be reversed and weigh against protection.

2. The ALJ Should Have Found the Nature of Miller's Outburst Was Unprotected

In analyzing the nature of Miller's outburst as the third factor in *Atlantic Steel*, the ALJ improperly found that *Pier Sixty's* holding only applies to employee conduct in a social media setting and that the nature of Miller's outburst weighed in favor of protection. Decision 13:n. 30, 14:27-43. *Pier Sixty's* totality of the circumstances considerations must be applied in analyzing Miller's rant under *Atlantic Steel* and the ALJ erred in failing to apply the sound labor policy reflected in *Pier Sixty* to the nature of Miller's rant at the September 6 meeting. In fact, the Board has utilized the holdings of *Pier Sixty* to analyze whether concerted activity is protected in various settings, including in-person meetings between employees and management. See *Bates Paving & Ceiling, Inc.*, 364 NLRB No. 46, *11 (2016) (citing *Pier Sixty* when analyzing the protected nature of an in-person meeting with employees, their supervisor, and the company owner). The ALJ erred by finding that *Pier Sixty* could not be applied here.

In *Pier Sixty*, the Board explained that in order to apply the factors of *Atlantic Steel* properly, it must look to the specific facts surrounding the workplace standard of conduct. 362 NLRB No. 59 (2014). *Pier Sixty* stands for the proposition that the level of acceptable conduct of the specific workplace sets the bar for unprotected conduct. The standard of acceptable conduct varies among workplaces, and therefore each case must be closely analyzed on the facts of the particular workplace. Three key factors that the Board reviewed to determine whether the employee's post was protected included: "whether the [employer] considered language similar to that used by [employee] to be offensive; whether the employer maintained a specific rule prohibiting the language at issue; and whether the discipline imposed upon [employee] was typical of that imposed for similar violations or disproportionate to his offense. *Id.* at *9. Here, without contradiction, the record in the case reflects there is a very low tolerance for unprofessional behavior at RFP's Riddle Plywood mill, and calling another an "idiot," "dumb" or "stupid" is way beyond the limits of acceptable conduct. Miller's conduct was a complete affront to professional conduct required by RFP.

Furthermore, the ALJ cites to multiple cases in the analysis of the third factor which are distinguishable here. For example, the ALJ cites *Postal Service*, 250 NLRB 4, 6 (1980), for the proposition that calling an acting manager "a stupid ass" in a grievance meeting was part of the *res gestae* of the protected discussion." Decision 14:36-38. However, in *Postal Service*, after a union steward had called a manager on the phone asking for an explanation as to why an employee had been required to wait two hours before starting the next shift, the manager responded that the policy was so that the company did not have to pay the employee for travel time. *Id.* In response to this explanation, the steward said that was a "stupid and asinine policy" and then called the

manager “a stupid ass.” *Id.* at *5. There was no evidence that anyone during the discussion had become angry, frustrated, or increasingly agitated. The steward made the comment only once and only directly in response to the employer’s frustrating explanation for its policy. *Id.* In contrast, Miller ranted at management for 20 to 35 minutes, repeatedly called several people in the room “dumb,” “idiots,” and “stupid,” and became increasingly agitated and loud. Tr. 196:2-5. The facts of *Postal Service* are distinguishable from Miller’s conduct and the ALJ erred in utilizing that authority to find that the nature of Miller’s rant should be protected under *Atlantic Steel*.

The ALJ specifically held that “I agree with Respondent that the evidence establishes a culture at RFP that did not tolerate employees demeaning or insulting each other” and that “Miller’s Facebook statement that managers were acting stupidly was more frowned upon at RFP than it would likely have been at most other industrial plants.” Decision 12:26-20. However, the ALJ’s analysis completely misses the mark because Miller was never disciplined for his Facebook post and RFP has never alleged that Miller’s Facebook post was so egregious as to be unprotected under *Pier Sixty*. Rather, it is exclusively the egregious nature of Miller’s rant at the September 6 meeting that lost the protection of the Act. Had the ALJ applied *Pier Sixty*’s holding to Miller’s conduct at the September 6 meeting, the ALJ would have found that the nature of Miller’s rant was completely unacceptable at RFP and therefore the third *Atlantic Steel* factor weighs against retaining the protection of the Act.

The Board gives great importance to the standard of regular discourse at the particular workplace. In *Pier Sixty*, the ALJ found that the workplace regularly included profanities, vulgar insults, and shouting both from management and employees. 2013 NLRB Lexis 257 (2013). Specifically, after an employee had argued with his supervisor, the employee posted on his

Facebook: “Bob is such a NASTY MOTHER FUCKER don’t know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!!!” *Id.* at *45-46. The Board found that the employee’s vulgar language was protected because: “vulgar language is rife in the . . . workplace, among managers and employees alike. 362 NLRB at *6. For example, the executive chef “cursed at employees daily, screaming profanities such as ‘motherfucker’ and asking employees questions like ‘Are you guys fucking stupid?’” *Id.* Another supervisor would scream epithets at dishwashing employees like “asshole” and “What are you fucking guys slow?” *Id.* at *7. These are just a few examples the Board used to show that screaming, vulgar insults, and profanities were “a daily occurrence in [the] workplace, and did not engender any disciplinary response” from the employer in *Pier Sixty*. *Id.* (emphasis added).

The Board specifically noted: “the overwhelming evidence establishes that, while distasteful, the [employer] tolerated the widespread use of profanity in the workplace, including the words ‘fuck’ and ‘motherfucker.’” *Id.* at *13. Therefore, the employee’s use of that same vulgarity would not cause the employee to lose the protection of the Act because it was not “qualitatively different from profanity regularly tolerated” by the employer. *Id.* Applying that analysis here, Miller’s conduct lost the protection of the Act because: (1) RFP considers Miller’s language offensive; (2) RFP maintains specific rules prohibiting that type of language; and (3) other employees have been disciplined for language far less severe than Miller’s.

a. *RFP Considers Miller’s Language Offensive*

RFP’s culture simply does not permit employees to call each other dumb, stupid, idiots, or anything of the like and RFP expects employees to be able to speak with one another with respect. Tr. 228:2-14. Ramm specifically testified that in 2014, when he was first hired as plant manager,

his core focus was on enhancing employees' self-esteem and getting rid of certain behaviors at the plant like yelling, screaming, and any forcible communications. Tr. 226:1-5. Ramm explained that when he started in 2014, "the use of some very specific four letter words were quite prominent" but that he was requiring employees to change their behavior and to use more professional language. Tr. 230:2-8. Ramm implemented a specific strategy in order to effect the culture change "in how we treated each other." Tr. 226:1. As part of the culture change, Ramm and Dahl attended crew meetings at the end of 2016 and beginning of 2017 to talk to employees on how to treat one another and explaining that the operating principles require employees to communicate with respect. Tr. 227:14-20, 228:19-21. Ramm specifically reminded employees in these meetings that RFP defines "respectful as not using foul language or derogatory comments." Tr. 227:21-22. The evidence shows that Miller's inability to calm down and "keep it professional," despite multiple requests that he do so, in addition to his repeated and agitated name-calling of management as "dumb," "stupid," and "idiots," is highly offensive conduct at RFP.

b. *RFP Policies Prohibit Miller's Rant*

RFP's policies also demonstrate that Miller's language was unacceptable because respect, open communication, and professionalism are key at RFP. First, RFP's Core Values are paramount in demonstrating its commitment to maintaining respect and professionalism: "Sawdust in the Veins. Handshake Integrity. Driven to Win." Emp. Ex. 3. RFP's Non-Harassment Policy also explains that it will "not tolerate behavior that is inappropriate" and that "[e]ach and every employee is expected to conduct themselves in an appropriate, professional manner." Emp. Ex. 3; Tr. 103:2-8. This expectation is foremost and is communicated early on as the company's core values in hiring and as part of orientation for all employees of RFP. Tr. 104:2-5. RFP's Open Door

Policy also explains that “it is important that you have a way to address work-related issues. We strongly believe that by working together, we can resolve almost any question or concern that may arise. If you have a problem or concern, we want you to tell us.” Emp. Ex. 7. Miller even testified he “knew that Roseburg had a nonharassment policy” and that Ramm told Miller about the Open Door Policy if he ever wanted to talk with Ramm. Tr. 252:23-253:15. RFP’s policies clearly prohibited Miller’s unprofessional and disrespectful rant.

c. *Other Employees Have Been Disciplined for Similar Violations*

The record shows that other RFP employees have been similarly disciplined for lesser violations. RFP has even disciplined tenured supervisors if they do not speak to employees with respect and professionalism. For example, Ramm disciplined Nick Parker, a 20-year RFP supervisor for his inappropriate comment to an employee. There, one of Parker’s crew had raised a safety concern that he was hitting his head on a bolt that was hanging from up above on a beltway. Tr. 226:24-227:2. In response, Parker merely responded “well, duck next time.” Tr. 227:3. After learning of the supervisor’s comment, Ramm investigated and suspended Parker for two weeks. Ramm knew that some considered the suspension overly harsh, but Ramm “was making sure that everybody understood that’s not how we treat people.” Tr. 227: 5-8. The ALJ improperly dismisses the Parker example because the ALJ fails to recognize that the purpose of the example is to show how seriously RFP takes its commitment to respectful behavior in the workplace between all employees, regardless of any supervisory hierarchy. Decision 18:5-11. Because Miller’s conduct was so much more severe than a mere snide remark, it is commensurate with RFP’s pattern that his discipline would be much more severe than two weeks’ suspension.

The record shows the workplace at RFP is on the opposite side of the spectrum from the workplace described in *Pier Sixty*, where daily shouting, vulgarities, profanities, and offensive comments resulted in no disciplinary action. If *Pier Sixty* allows for the expansion of the bounds of protected behavior based on the acceptable conduct of the workplace, *Pier Sixty* must consistently stand for the proposition for the contraction of the bounds of protected behavior based on the acceptable conduct of the workplace. RFP's workplace standard simply would not allow Miller's offensive and demeaning comments in the September 6 meeting in any context, in addition to the fact that he could not calm down and keep it professional despite being asked to do so multiple times. Therefore, even if Miller was engaged in concerted activity during the second part of the September 6 meeting, his egregious behavior at the September 6 meeting lost the protection of the Act. The ALJ erred in failing to apply *Pier Sixty*'s totality of the circumstances holding and sound labor policy to the analysis of *Atlantic Steel*'s third factor to find that the nature of Miller's outburst is not protected by the Act.

Because the ALJ relied on a case that has since been vacated and remanded to the Board by the D.C. Circuit, misapplied the facts to the factors of *Atlantic Steel*, improperly found that those factors weighed towards protection, the ALJ's Decision should be reversed, and Miller's behavior during the second part, lasting 20 to 35 minutes, at the September 6 meeting was outside the bounds of conduct protected by the Act.

C. The ALJ Erred by Finding that Miller was Terminated for His Protected Activity Under *Wright Line*

The ALJ's Decision includes a finding in the alternative that Miller's termination was unlawful under *Wright Line*. The ALJ erroneously concluded that "assuming a *Wright Line*

analysis applies, I find the General Counsel has met her burden to prove Miller was suspended and terminated in violation of Section 8(a)(3) and (1) as alleged.” Decision 18:22-24.

The *Wright Line* test is used in cases where the Charging Party alleges that the employer’s discipline was in part motivated by the employee’s protected union activity. 251 NLRB 1083, 1089 (1980), *enf’d* 662 F.2d 899 (1st Cir. 1981). This standard requires the Counsel for the General Counsel to establish the discipline was motivated by or because of that activity. *See, e.g., Nordstrom dba Seattle Seahawks*, 292 NLRB 899, *enf’d* 888 F.2d 125 (1989); *Clark & Wilkens Indus., Inc.*, 290 NLRB 106 (1988), *enf’d* 887 F.2d 308 (D.C. Cir. 1989); *Hambre Hombre Enters. v. NLRB*, 581 F.2d 204 (9th Cir. 1978). In proving such an unlawful motive, General Counsel must also prove that RFP possessed union animus. *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009 (3d Cir. 1980), *cert. den.*, 449 U.S. 1078 (1981).

As set forth below, the ALJ erred in finding Miller’s termination was motivated by protected activity, in doing so the ALJ failed to appropriately consider comparator employees.

1. Miller’s Termination Was Not Motivated by Any Protected Activity

Under the prima facie test, the General Counsel must prove knowledge on the part of the employer that the employee engaged in union activity, and that the discipline was imposed because of this activity. *NLRB v. Gateway Theatre Corp.*, 818 F.2d 971 (D.C. Cir. 1987). Here, the record is undisputed that Ramm alone, possessed authority to terminate Miller’s employment. It is also undisputed that Ramm did not even know about the Facebook post at the time of Miller’s termination and instead had learned that the basis for management’s decision to suspend Miller had been when the conversation with Miller “went south” and became a rant “about how terrible it was at Roseburg.” Tr. 248:6-8. Ramm also explained that he knew the initial conversation with

Miller on September 6 “wasn’t a disciplinary discussion at all. It was really a discussion to troubleshoot” to see what RFP could have done better. Tr. 247:12-19. In fact, within about 10 minutes, the conversation moved so far away from anything to do with smoke, Miller’s comments about smoke, or ideas of how RFP might implement to combat the smoke, that Dahl left the meeting. Tr. 145:1. There is simply no evidence that Miller’s Facebook post or any other alleged concerted activity played a role in Ramm’s decision to terminate Miller.

Rather, Ramm conducted an independent review of Miller’s personnel file, and considered Miller’s history when deliberating on termination. There is no evidence that Ramm was motivated by any post or Miller’s concerns about the smoke in making the termination decision. In fact, even Miller admitted there is no evidence that his termination was because of his post. Miller testified that he just “assumed” his termination was because of his post. Tr. 91:23-25. The ALJ found that “it is abundantly clear that even if Ramm was the actual decisionmaker, he acted on the information that was fed to him about the meeting.” Decision 16:9-10. RFP does not at all dispute that Ramm considered the information he learned from management with respect to Miller’s completely disrespectful behavior at the September 6 meeting in making the decision to terminate Miller’s employment. However, the ALJ’s determination does not at all prove that Ramm based his decision to terminate Miller’s employment on Miller’s Facebook post or the initial purpose of the meeting, namely to discuss any of Miller’s remaining concerns about the smoke.

RFP presented evidence of several instances where employees aired concerns on Facebook and RFP took steps to address those employees’ concerns. Emp. Exs. 4 and 5; Tr. 114:4-134:25. Some of the subjects of those Facebook posts have discussed workplace conditions and never once has RFP terminated an employee for making any protected Facebook post or for raising concerns

to management about a workplace safety issue. The ALJ failed to address the significance of these comparators when analyzing whether the General Counsel met her prima facie case under *Wright Line*. The ALJ should have considered these comparators as compelling record evidence to show RFP has never displayed an unlawful motive or unlawfully disciplined employees when discussing workplace concerns that an employee may have initially raised on Facebook.

Had the ALJ properly applied these comparators to determining whether the General Counsel met her prima facie burden, the ALJ would have found that the comparators show RFP did not treat Miller's Facebook comments differently that it does to other employee concerns aired on Facebook and that RFP consistently addresses such employee concerns in the same manner as it did here. Further, Dahl testified that pursuant to the company's Open Door Policy, RFP's practice is to follow up with the individuals who have raised concerns on Facebook and encourage them to bring their concerns to the company so that RFP can address employees' concerns. Tr. 118:11-119:12; Emp. Ex. 7. Every one of these conversations that RFP has had with employees have been respectful and ended on a positive note, except the conversation it had with Nick Miller on September 6. Tr. 175:13-19.

Scott McCool: As one comparator, Dahl testified about when employee Scott McCool made a negative Facebook post about RFP when the company implemented a personal safety requirement that employees wear hard hats and protective coverings over their glasses. Tr. 112:24-113:23; Emp. Ex. 5. McCool had shared concerns with Dahl that he disagreed with the requirement that employees wear hardhats. Tr. 164:10. Ramm had a conversation with McCool about his concerns regarding the hardhats, but McCool was never disciplined for making the negative post about RFP. Tr. 114:22-24, 164:24.

Jay Milburn: Dahl also testified about a conversation she had with Jay Milburn because of his Facebook post. Milburn posted about using sick time for his birthday and complaining that he was scheduled to work. Tr. 120:5-19; Emp. Ex. 8. Because RFP was having a hard time with some employees abusing their sick time and using it for vacation, when Dahl saw Milburn at the plant that day, she told him that she really appreciated his coming to work and not using sick time to cover a birthday. Tr. 122:12-17. Dahl's entire interaction with Milburn about his post was positive and did not result in any form of discipline for Milburn. Tr. 124:11-17.

Becky Smith: Another employee, Becky Smith, posted multiple complaints about RFP on Facebook, none of which has resulted in discipline to Smith for making the posts. In March of 2017, Smith posted that her supervisors were treating her unfairly and that a supervisor had asked her to do something she felt was unsafe. Tr. 124:24-25, 126:5-7. Smith had already talked to Dahl about the incident with Smith's supervisor and RFP had suspended the supervisor pending an investigation. Tr. 126:10-13. Dahl was concerned that Smith felt RFP was not addressing her concerns, when Dahl had already had a conversation with Smith explaining that they took the situation very seriously and had suspended the supervisor pending investigation. Tr. 126:15-16. Dahl assured Smith that the company was going to take whatever action was appropriate based on the results of its investigation and Dahl had "stayed up all night and interviewed every single employee that worked with that supervisor and asked every single employee, had he ever asked them to do anything unsafe." Tr. 126:17-19. In talking with Smith about her post, Dahl wanted to be able to discuss if Smith really felt that her concerns were not being addressed. Tr. 127:20-128:3. Smith was never disciplined in any way for the Facebook post. Tr. 128:4-5.

On September 3, 2017, Smith posted a picture of the inside of the mill. Tr. 128:8-18; Emp. Ex. 9. Smith also posted a photo that she took while parked across the street looking at the mill. Tr. 133:1-2. HR Manager Thayer and Plant Superintendent Muir talked with Smith about her pictures, not the fact that Smith made any Facebook posts. Tr. 131:23-25. RFP wanted to address two issues with Smith: 1) taking photos inside of the mill without permission is against RFP policy, and 2) the fact that Becky was clearly offsite if she had been able to take a picture from across the road, and yet she had not clocked out. Tr. 128:18-19; 133:4-5. Taking photos of the inside of the mill without permission is a serious policy violation because it risks exposure of RFP's proprietary information. Additionally, an employee who fails to clock out when going offsite creates a safety issue for RFP because in the event of an emergency, the company would search for Smith believing that she was still in the mill. Tr. 133:5-8. RFP takes these safety policies very seriously and Smith was disciplined for failing to clock out when going offsite. Tr. 133:8-9. However, this discipline never had anything to do with the fact that Smith post on Facebook. Tr. 133:13.

R.C. Jenkins: On September 4, 2017, employee R.C. Jenkins posted a photograph of the inside of the mill. Emp. Ex. 10. RFP spoke with Jenkins after the photo that was posted, and RFP reminded Jenkins of the company's serious policy on photos of the inside of the mill. Notably, Jenkins was never disciplined for his post. Tr. 134:22-23.

All of these examples show that employees are never disciplined because they posted a negative comment or raise concerns about their employment at RFP. Rather, when the company learns of these posts, it sees them as an opportunity to discuss any concerns employees may be having and ways that RFP can improve. The ALJ's Decision completely fails to acknowledge that RFP's multiple examples of comparable union employee conduct who were not disciplined shows

Counsel for General Counsel cannot establish evidence Miller's suspension or termination were motivated by his post or any related concerted activity.

2. RFP Would Have Terminated Miller Regardless of Any Concerted Activity

The ALJ erroneously concluded that "it is clear that absent that [September 6] meeting, and the report Ramm received about N. Miller's behavior during it, the Respondent was not in the process of terminating Miller's employment." Decision 18:14-16. However, the ALJ's conclusion failed to properly address the issue, which is RFP would have terminated Miller had he, independent of any protected discussion, ranted for 20 to 35 minutes about the incompetence of management, calling management idiots, stupid, and dumb, and repeatedly failed to calm down when asked to do so. The record clearly establishes that Miller would have been terminated for such unprofessional and disrespectful conduct. *Wright Line* itself supports this determination: employers "may and should apply their usual rules and disciplinary standards to a union activist just as they would to any other employee." 662 F.2d at 901. Any other RFP employee with Miller's prior warnings and continued disrespectful behavior, would have been terminated.

The ALJ relies on the timing of the protected activity in connection with Miller's rant in applying *Wright Line*. However, "[t]iming alone is not sufficient evidence upon which to sustain an unfair labor charge." *Harper & Arterburn Co., Inc. v. NLRB*, 692 F.2d 402, 402 (6th Cir. 1982). In *Harper*, the Sixth Circuit held that an employee who was fired shortly after he requested that a union steward be placed on a company jobsite should not be reinstated. *Id.* The court noted that the evidence showed the employee to be a "difficult worker whose complaints and demands disrupted other employees and the progress of construction generally." *Id.* Ultimately, the court

found that “the fact that [the employee] was dismissed shortly after complaining about the absence of a union steward cannot by itself erase the just cause which otherwise existed for his firing.” *Id.*

Similarly, in *J.P. Stevens & Co. Inc.*, an employee who had previously engaged in protected work stoppages was subsequently discharged for poor work performance. Case 11-CA-9370, 1981 NLRB GCM Lexis 61 (Advice Memorandum, Feb. 18, 1981). Prior to his discharge, the employee had received two written warnings and oral warnings for poor work performance and the employer had offered to move him to different positions, which the employee had refused. *Id.* at *2-3. Concluding that the charge should be dismissed, the Division of Advice stated:

[A]lthough [the employee] has engaged in union activity as well as protected concerted activity, the record is devoid of any indication that such activities were ‘a motivating factor’ in [the employee’s] discharge. *Wright Line*, 251 NLRB No. 150 (1980). Moreover, it is uncontradicted that the employer issued repeated warnings to [the employee] regarding his poor work performance Accordingly, it is plain that [the employee] was discharged for legitimate business reasons, rather than for engaging in union or protected concerted activity.

Id. at *3. Despite making this argument in RFP’s post-hearing brief, the ALJ failed to address this precedent and improperly concluded that Miller was terminated in violation of the Act.

The ALJ also failed to apply the established fact that Miller was repeatedly asked to calm down and failed to do so when determining whether RFP would have terminated Miller absent any protected activity. Tr. 196:14-197:4. Instead, the ALJ improperly concluded that Miller “was acting within the bounds of reason.” Decision 14:33. However, the Board has upheld employer discipline where an employee disobeys repeated directions to calm down. *United States Postal Service*, 282 NLRB 686, 695 (1987). There, the employee “disobeyed repeated directions to calm down before he was sent home, conduct which mirrored repeated past failures to follow directions,

as a result of which he had incurred progressively stiffer penalties.” *Id.* The ALJ in *United States Postal Service* found that even though the General Counsel had established its prima facie case, the employer’s evidence showed that “it had a legitimate, permissible reason for disciplining” the employee and “for threatening to [terminate] him and that it would have done so in the absence of [the employee]’s protected activity. *Id.* Similarly, here the ALJ should have found that Miller’s failure to calm down after repeated directions for him to calm down during the course of his 20 to 35 minute rant created a legitimate and permissible reason for RFP suspending Miller pending an investigation, especially when Miller had been previously warned about his behavior. Tr. 196:8-13, 218:4-18

The record is replete with evidence that Miller’s employment was terminated because “he was damaging the rest of the team” and he simply refused to line “up with the principles and values” of RFP. Tr. 235:20-22. No one denies that Miller was a skilled Detail Saw Operator. In fact, Ramm testified that “he was a great operator. I think he was super intelligent.” Tr. 235:17-18. However, after considering declining performance reviews, the series of behavioral issues, and a prior written warning about his behavior, Ramm decided to terminate Miller’s employment because of the “repeated pattern of behavior that we saw where Nick had difficulties in following instructions and treating people respectfully.” Tr. 234:8-13. Despite a year and a half of having conversations and even warnings to Miller that his performance and attitude needed to change, the September 6 meeting only represented an increase in Miller’s level of disrespect, unprofessionalism, and unwillingness to improve based on the culture change that Ramm was working hard to effect at the mill.

Ultimately, the ALJ failed to separate Miller’s rant from the initial reason for calling the September 6 meeting. Instead, the ALJ’s Decision takes the narrow approach of assuming that 5 to 10 minutes of a conversation about an employee’s concerns tainted any other possible topic, tirade, for the duration of the conversation – no matter how long – or conduct that the employee could have launched in to from the initial conversation. Such a conclusion is unsupported in Board law. The evidence shows that Miller’s history of unprofessional and disrespectful conduct was escalating, his engagement was decreasing, and RFP saw no sign of improvement. RFP’s decision to terminate Miller’s employment was legitimate and based on multiple factors having nothing to do with any concerted activity. Accordingly, the Board should reverse the ALJ’s finding that Miller’s termination violated Sections (a)(1) or (a)(3) of the Act under *Wright Line*.

CONCLUSION

The ALJ erred by failing to apply *Mushroom Transportation’s* mere griping standard to Miller conduct during the second part of the September 6 meeting. In the alternative, the ALJ erred by failing to correctly apply the tests announced in *Atlantic Steel*, and *Pier Sixty*, by not appropriately considering the standard of acceptable behavior in RFP’s workplace in the determination of behavior within the bounds of the Act’s protection. Finally, the ALJ erred by failing to appropriately consider evidence of comparable employees when in the determination of RFP’s motivation for terminating Miller and incorrectly applied *Wright Line*.

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For the foregoing reasons, RFP respectfully requests that the Board grant RFP's Exceptions to the Administrative Law Judge's decision, revise the findings that Miller was terminated in violation of the Act, and dismiss the Complaint in its entirety.

DATE: November, 28 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, I electronically filed the foregoing **ROSEBURG FOREST PRODUCTS' BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** with the National Labor Relations Board and served it via e-mail on:

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DATED this 28th day of November, 2018.

s/Kyle Abraham

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