

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

8 and

Case 20-CA-204378

9 DEREK DIXON, an Individual  
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13 GENERAL COUNSEL'S REPLY TO RESPONDENT'S  
14 ANSWERING BRIEF  
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22 Submitted by  
23 Matthew C. Peterson  
24 Counsel for the General Counsel  
25 National Labor Relations Board  
26 Region 20  
27 901 Market Street, Suite 400  
28 San Francisco, California 94103-1735

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1 Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor  
2 Relations Board (the Board), Counsel for the General Counsel files this Reply Brief to  
3 Respondent's Answering Brief to the General Counsel's Exceptions to the Decision of  
4 Administrative Law Judge Amita Baman Tracy (the ALJ). All issues raised in Respondent's  
5 Answering Brief have been fully addressed in the General Counsel's Brief in Support of  
6 Exceptions (Exceptions Brief), which is hereby incorporated. However, this Reply Brief is  
7 necessary to rejoin some of Respondent's more significant mischaracterizations of the record  
8 and the law.

9  
10 **I. RESPONDENT'S COUNSEL'S MISREPRESENTATIONS OF FACT<sup>1</sup>**

11 **A. The Record Evidence Does Not Establish that Dixon Took Extended Breaks**  
12 **or that He Was Warned for Doing So**

13 Whether alleged discriminatee Derek Dixon had taken and been warned by Respondent  
14 for taking extended breaks on the Facebook Project, as Respondent claims and Dixon denies, is a  
15 key issue in this case. Answering Brief at 5-7, 10, 24-27; *compare with* Exceptions Brief at 10-  
16 12, 44-49. The only evidence Respondent presented to support its claim was General Foreman  
17 G.W. Swartz' uncorroborated testimony that he had received reports from Dixon's foreman,  
18 Charles Kelly, that Kelly had warned Dixon for taking extended breaks on two occasions. *Id.*  
19 Respondent's counsel misleadingly attempts to create a third example by conflating Kelly's  
20 supposed reports about Dixon's extended breaks with a report Swartz claimed he received from  
21 the foremen of another crew, Alex Flores, about Dixon supposedly sitting on a "bolt pile" in  
22  
23

24  
25 <sup>1</sup> Citations to the ALJ's decision shall be "ALJD" followed by the page number(s). Citations to the Transcript shall be  
26 "Tr." followed by the page number(s). Citations to the Joint Exhibits, the General Counsel's Exhibits, and Respondent's  
27 Exhibits shall be "Jt. Ex.," "GC Ex.," and "Resp. Ex.," respectively, followed by the page number(s). Citations to the  
28 General Counsel's Brief to the Administrative Law Judge shall be "GC Brief" followed by the page number(s). Citations  
to the General Counsel's Exceptions Brief shall be "Exceptions Brief," followed by the page number(s). Citations to  
Respondent's Answering Brief shall be "Answering Brief," followed by the page number(s).

1 Flores' area *during* the regular break time. Answering Brief at 5, 10, 13, 23-25. Respondent's  
2 conflation of the two foremen' reports is not only misleading, but also irrelevant, given Swartz'  
3 testimony that the only reason for Dixon's layoff was his alleged extended breaks, and  
4 Respondent presented no evidence that taking a break away from one's point of work was  
5 grounds for discipline, even if viewed as "inappropriate." Answering Brief at 5, 10, 13, 23-25;  
6 *Compare with* Exceptions Brief at 14-16; Tr. 299-309, 339-49.

8 Strikingly, Respondent chose not to call either of the foremen who supposedly issued  
9 Dixon the warnings, and presented no documents or other evidence that the warnings actually  
10 occurred.<sup>2</sup> Exceptions Brief at 24-25; 27-37. As Respondent's counsel points out, Swartz'  
11 testimony about receiving the reports was not objectionable for the purpose of showing that the  
12 purported reports were made and the effect that they had on Swartz. Answering Brief at 19 and  
13 n. 15; Exceptions Brief at 19-25. However, the reports are inadmissible hearsay for the purpose  
14 of showing that Dixon had actually taken extended breaks or that the foremen had warned him  
15 for doing so. Exceptions Brief at 19-25. Moreover, Respondent's failure to call Kelly or Flores  
16 to corroborate Swartz' testimony leaves Dixon's testimony completely uncontradicted and casts  
17 at least some doubt on whether the reports were truly made as Swartz described, and Foreman  
18 Kelly's hostile reaction to Dixon for sticking up for the apprentice and obvious bias against  
19 Dixon casts significant doubt on the veracity of any reports he actually made about Dixon.  
20  
21  
22 Exceptions Brief at 24-37.

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25 <sup>2</sup> Respondent has further attempted to show that Dixon was actually warned for excessive breaks by relying on a  
26 comment from absentee witness Supervisor Rodriguez during his rant to General Counsel's witness Mario Marcial  
27 about Dixon's protected concerted activity that Marcial deleted from his affidavit and testified did not actually occur  
28 (as discussed below under "Credibility and Demeanor" below), which simply stated, "Dixon has been warned about  
this several times." Answering Brief at 2-3. Even if Rodriguez' comment was made, it would be inadmissible hearsay  
upon hearsay to show that Dixon had, in fact, been warned for taking extended breaks. Exceptions Brief at 19-25.

1                   **B.     Swartz Did Not Independently Confirm the Purported Reports about Dixon**  
2                   **Taking Extended Breaks**

3                   Respondent’s counsel mischaracterizes the record by asserting that Swartz independently  
4 confirmed Kelly’s reports that Dixon was taking extended breaks. Answering Brief at 5-6, 10,  
5 23-24. If credited, at best Swartz’ testimony shows that he may have *attempted* to confirm these  
6 purported reports. Exceptions Brief at 16-17. However, Swartz admitted that he failed to  
7 actually confront Dixon, or to take any other investigatory steps, to confirm whether Dixon was  
8 actually taking an extended break on the lone occasion on which he claims he saw Dixon during  
9 working time in a break area near the restroom, and simply assumed he was taking an extended  
10 break.<sup>3</sup> Exceptions Brief at 16-17. For all Swartz knew, Dixon could have been using the  
11 restroom or taking a delayed break after mistakenly working through the normal break time,  
12 both of which were practices that Respondent permitted on the Facebook Project. Exceptions  
13 Brief at 16-17.<sup>4</sup>

14  
15                   **C.     Other Layoffs on the Project**

16                   Respondent’s counsel also misleadingly conflates all the layoffs on the Facebook Project  
17 with the layoffs specifically for taking extended breaks, as did the ALJ. Answering Brief at 10-  
18 11. Respondent certainly laid off many workers for business reasons unrelated to extended  
19 breaks, but only presented evidence of seven other layoffs for extended breaks throughout the  
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21 <sup>3</sup> Respondent’s counsel’s assertion that Dixon was “not waiting next to the bathroom” directly contradicts Swartz’  
22 testimony that he saw Dixon standing “in a rest area in Area B. So there’s bathrooms over there, and there’s a rest area  
23 over there. So he was just kind of hanging out in that area.” Tr. 345:10-13; *Compare with* Answering Brief at 10.

24 <sup>4</sup> Contrary to Respondent’s counsel’s assertions, the Exceptions Brief did not conceal Swartz’ testimony that he  
25 purportedly laid off Robert Wright (and Jesse Hernández) for taking excessive breaks based solely on reports he  
26 received from other foremen, without independently investigating to confirm that the reports were true. *See* Answering  
27 Brief 3 and n. 5, 5 and n. 8. Rather, the Exceptions Brief cites that testimony explicitly as indicia of Foreman Kelly’s  
28 supervisory authority, as one of many means to impute knowledge of Dixon’s protected concerted activity to  
Respondent, and as evidence of Respondent’s variable practice in dealing with purported break violators. *See, e.g.,*  
Exceptions Brief at 12-14, 17-18, 40, 45-46.

1 entire project. Exceptions Brief at 17-18. In addition, Respondent's counsel falsely asserts that  
2 the Exceptions Brief fails to cite record evidence of Respondent's variable practice with respect  
3 to employees who were actually caught taking extended breaks. Answering Brief at 26. In fact,  
4 the Exceptions Brief contains pages of discussion with citations to the transcript where Swartz  
5 described his practice of issuing a varying number of warnings to employees for taking extended  
6 breaks, and if they did not improve, sometimes transferring them to a different crew, and  
7 sometimes laying them off. Exceptions Brief at 12-14, 46, 49.<sup>5</sup>

9 **D. Dixon's Supervisor(s) and Respondent's Chain of Command**

10 Respondent's attempts to characterize General Foreman Swartz as Dixon's "supervisor"  
11 must be closely scrutinized. Swartz is, in fact and law, a supervisor, and the General Counsel  
12 does not dispute that he was generally responsible for all of Respondent's ironworkers on the  
13 project, or that he technically had the authority to lay off Dixon. Answering Brief at 2, 9;  
14 *Compare with* Exceptions Brief at 3-6; 16. However, the record clearly establishes that  
15 Supervisor Rodriguez was Dixon's direct supervisor (assuming that Foreman Kelly was not a  
16 statutory supervisor), and that Rodriguez was not even under Swartz' line-of-supervision. *Id.*  
17 Respondent provided no explanation for its assertion that Swartz laid off Dixon, one of  
18 Rodriguez' direct reposts, without involving Rodriguez in any way. *Id.* While Respondent may  
19 wish to use Rodriguez' purported lack of involvement in Dixon's layoff to deny its knowledge  
20 of and lack of animus towards Dixon's protected concerted activity, that purported lack of  
21 involvement is highly suspicious and casts further doubt on Respondent's actual motives for  
22 laying off Dixon. *Id.*

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27 <sup>5</sup> The citations to the record in the Exceptions Brief are contained in the Statement of the Case and are not repeated in the  
28 argument section. *See* Exceptions Brief at 12-14; *Compare with* Exceptions Brief at 46, 49.

1                   **E.     Credibility and Demeanor**

2                   Despite Respondent’s counsel’s assertions to the contrary, the General Counsel’s brief  
3 accurately cited the ALJ’s specific references to the demeanor of Respondent’s witnesses, and  
4 her lack of any specific references to the demeanor of the General Counsel’s witnesses, in  
5 making her credibility resolutions.  Exceptions Brief at 25-36; *Compare with* Answering Brief  
6 at 12, 22.  The Exceptions Brief also relied on record evidence and case law to argue that, to the  
7 extent the ALJ relied on witness demeanor, it was not the primary basis for her credibility  
8 resolutions, thereby enabling the Board to take the rare step of overturning those credibility  
9 resolutions.  Exceptions Brief at 25-37; *see also Stevens Creek Chrysler Jeep Dodge*, 357 NLRB  
10 633 (2011).  
11

12                   In an effort to attack Marcial’s credibility, Respondent’s Answering Brief also grossly  
13 misrepresents the record by insinuating, and at times even asserting, that counsel for the General  
14 Counsel solicited or encouraged Marcial to delete a line from his affidavit about Rodriguez  
15 saying, during his rant, that “Dixon had been warned about this several times.”  Answering Brief  
16 at 2-3.  There is no basis in the record for these wholly inappropriate and insulting attacks on  
17 counsel for the General Counsel’s ethical integrity or on Marcial’s credibility.  Exceptions Brief  
18 at 29-36; Tr. 211-13, 227-28, 235-36; Resp. Ex. 8 at 4 line 4.  Marcial explained that, upon first  
19 review of the affidavit, which had been drafted by the investigating Board Agent based on a  
20 telephone interview months earlier, he deleted that phrase because it did not accurately reflect  
21 his recollection of what Rodriguez said during his rant.  *Id.*  While true that the purported  
22 warnings to Dixon are a significant issue in the case, Respondent’s counsel is incorrect in  
23 asserting that Marcial’s deletion of that line was significant to that issue, given that even if  
24 Rodriguez said it, is inadmissible hearsay upon hearsay for proof that the warnings occurred.  *Id.*  
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1 Nor is there any basis in the record for Respondent's counsel's insinuation that Dixon  
2 and Marcial conferred about their testimony or affidavits. Answering Brief at 7-9. Both  
3 acknowledged freely that they spoke before and during the hearing, and that Dixon was in the  
4 room when Marcial reviewed his affidavit for the first time and signed it, but both were steadfast  
5 that they did not discuss their testimony with each other at any point. Exceptions Brief at 29-36.  
6 These and other attempts by Respondent to attack the credibility of the General Counsel's  
7 witnesses and to bolster the credibility of its own are fully addressed in the Exceptions Brief. *Id.*  
8 at 25-37.  
9

## 10 **II. RESPONDENT'S COUNSEL'S MISREPRESENTATIONS OF LAW**

### 11 **A. Layoffs for Alleged Misconduct Are Disciplinary**

12 Respondent's counsel comically asserts that it is undisputed that layoffs are not  
13 disciplinary. Answering Brief at 4-5 and n. 6, 11. It is true that layoffs for business reasons are  
14 not disciplinary, but as previously noted, Swartz acknowledged that the only reason Respondent  
15 laid off Dixon was because of his purported extended breaks. Exceptions Brief at 14-16. The  
16 disciplinary nature of a layoff for misconduct, or alleged misconduct, is inherent and obvious.  
17 *See, e.g., Napleton 1050, Inc., 367 NLRB No. 6 (Sept. 28, 2018)*(affirming judge's finding that  
18 purported layoff for productivity was pretext for discriminatory motive).  
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### 21 **B. There is Ample Evidence that the Reasons for Dixon's Layoff were False and 22 Pretextual**

23 Respondent's counsel falsely asserts that the General Counsel presented no evidence  
24 even suggesting that Swartz' reason for laying off Dixon (and Wright) was false or a pretext for  
25 discrimination. Answering Brief at 8. The Exceptions Brief is replete with citations to record  
26 evidence and legal argument demonstrating that Respondent's assertion that it laid off Dixon for  
27 taking extended breaks was simply not true and pretextual, such as the lack of any admissible  
28

1 evidence to counter Dixon's testimony that he had never taken an extended break on the  
2 Facebook Project, let alone been warned for doing so, Swartz' failure to adequately investigate  
3 the purported reports about Dixon taking extended breaks, and Swartz' disparate treatment of  
4 Dixon and deviation from past practice when he did not confront Dixon about whether he was  
5 actually taking an extended break, or give him an opportunity to correct the purported  
6 misconduct, as he had done with other employees who purportedly took extended breaks. *See*,  
7 *e.g.*, Exceptions Brief at 10-16, 19-37, 44-47.

### 9 **C. Foreman Kelly's Supervisory Status**

10 Respondent falsely asserts that there is no evidence of Kelly's supervisory status.  
11 Answering Brief at 9, 11, 21. Swartz' failure to independently investigate reports from Foreman  
12 Kelly and other foremen about warnings they had issued to Dixon and at least two other  
13 employees (Wright and Hernandez) before laying them off based on those reports is an indicia of  
14 Kelly's and the other foremen's supervisory authority. Exceptions Brief at 18-19, 40-44.  
15 Respondent's repeated attempts to hide its knowledge of Dixon's protected concerted activity by  
16 asserting that Kelly is not a supervisor whose knowledge can be imputed to Respondent, while  
17 incongruently relying on Kelly's purported warnings to Dixon, without any independent  
18 investigation (at least of the fair and adequate variety), as the sole justification for Swartz'  
19 decision to lay off Dixon, must be rejected. *Id.* If Kelly issued the warnings, Swartz' reliance  
20 on them makes Kelly a statutory supervisor, whose knowledge of Dixon's protected concerted  
21 activities can be directly imputed to Respondent. *Id.* If Kelly did not have the authority to issue  
22 warnings, Respondent cannot rely on those warnings as the basis for laying off Dixon. *Id.*

### 26 **D. The ALJ Misapplied the Hearsay Rule**

27 Despite Respondent's counsel's aspersions, Counsel for the General Counsel means no  
28 disrespect, disparagement, or insult to the ALJ in asserting that she grossly erred in her

1 application of the hearsay rule,<sup>6</sup> but stands by the arguments made in the Exceptions Brief.

2 Answering Brief at 9; 18-19; *Compare with* Exceptions Brief at 20-24.

3 **E. Respondent’s Purported “Good Faith” Belief that Dixon Had Taken**  
4 **Extended Breaks and Been Warned for Doing So Is Not Reasonable**

5 Respondent asserts that Swartz had a “good faith basis to believe Dixon was taking  
6 extended breaks and breaks away from his point of work,”<sup>7</sup> and that it can therefore show that it  
7 can make out its *Wright Line* defense that it would have laid off Dixon anyway, even absent his  
8 protected concerted activity. Answering Brief at 26. In doing so, it relies on *Sutter E. Bay*  
9 *Hosps. v. NLRB* for the proposition that an “employer with a reasonable belief employee  
10 engaged in misconduct meets its *Wright Line* burden regardless of employee’s arguable  
11 protected activity.” 687 F. 3d 424, 435-37 (D.C. Cir. 2012)(*Sutter*). The D.C. Circuit later had  
12 occasion to review the *Sutter* decision in *Ozburn-Hessey Logistics, LLC v. NLRB*, in which it  
13 outlined the contours of this “reasonable belief” defense under Board and Circuit Court law.  
14 833 F.3d 210, 220–22 (D.C. Cir. 2016)(*Ozburn-Hessey*). The Court noted that, under *Sutter*, “if  
15 [a company’s] management reasonably believed [the employee’s] actions occurred, and the  
16 disciplinary actions taken were consistent with the company’s policies and practice, then [a  
17 company] could meet its burden under *Wright Line* regardless of what actually happened.”  
18 *Ozburn-Hessey* at 221, citing *Fort Dearborn*, 827 F.3d 1067 (D.C. Cir. 2016). However, the  
19 Court emphasized that the purported belief must be *reasonable*, and agreed with the Board that  
20 the employer’s purported belief that a union supporter had used a racial epithet was not  
21 reasonable for a number of reasons. *Id.* The employee credibly denied making the remark, the  
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25 <sup>6</sup> Respondent’s counsel conveniently omits significant parts of one exchange between the ALJ and counsel for the  
26 General Counsel regarding the intended non-hearsay use of an out-of-court statement to provide useful context, which  
the ALJ erroneously refused to admit. Answering Brief at 18; *Compare with* Tr. 196-98; Exceptions Brief at 19-24.

27 <sup>7</sup> This is another example of Respondent’s counsel conflating “extended breaks” with “breaks away from his point of  
28 work.” See n. 2, *supra*.

1 witnesses who reported that the employee had made the remark were biased, the company had  
2 historically acted “inconsistent[ly] in response to racial slurs” and therefore could not show that  
3 “it parceled out discipline as it normally would when confronted with the same kind of employee  
4 misconduct that its managers reasonably believed had occurred,” and the proffered reasons for  
5 disciplining the employee were pretextual. *Id.* at 221-22 (internal citations omitted).

6  
7 Similarly here, Respondent cannot defend on the grounds that its belief that Dixon had  
8 taken extended breaks and been warned for doing so was reasonable. Dixon’s denials were  
9 credible and completely un rebutted, Foreman Kelly was clearly biased against Dixon (assuming  
10 he actually made the purported reports), Respondent has historically acted inconsistently in  
11 dealing with purported break abusers (sometimes giving them another chance, sometimes  
12 moving them to a different crew) and therefore cannot show that it disciplined Dixon as it  
13 normally would, and Respondent’s accusations about Dixon taking and being warned for taking  
14 extended breaks are false and pretextual. Exceptions Brief at 37-49.

15  
16 **III. CONCLUSION**

17 The Board should not be fooled by Respondent’s counsel’s mischaracterizations of the  
18 record and the law and should find that Dixon’s protected concerted activity motivated  
19 Respondent’s decision to lay him off, that Respondent cannot show that it would have laid him  
20 off absent his protected concerted activity, and that Respondent violated Section 8(a)(1) of the  
21 Act, as alleged in the Complaint.

22  
23 Respectfully submitted this 11<sup>th</sup> day of December, 2018.

24  
25 

26 Matthew C. Peterson  
27 Counsel for the General Counsel  
28

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20**

**SCHUFF STEEL**

**and**

**Case 20-CA-204378**

**DEREK DIXON, an Individual**

**AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S REPLY TO RESPONDENT'S  
ANSWERING BRIEF**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **December 11, 2018**, I served the above-entitled document(s) by **e-mail** upon the following persons, addressed to them at the following addresses:

Derek Dixon  
6202 Amesbury Street  
San Diego, CA 92114-6717

Email: derekdixon433@gmail.com

Patrick R. Scully , Esq.  
Sherman & Howard, LLC  
633 17th St., Ste. 3000  
Denver, CO 80202-3622

Email: pscully@shermanhoward.com

December 11, 2018

Date

Vicky Luu, Designated Agent of NLRB

Name

/s/ V Luu

Signature