

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

**ROSEBURG FOREST PRODUCTS CO.**

**and**

**Case 19-CA-213306**

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

**GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

Roseburg Forest Products Co. (“Respondent”) excepts, in 12 parts (“Exceptions”), to Administrative Law Judge Eleanor Laws’ (the “ALJ”) October 31, 2018 decision (“ALJD”) finding that Respondent violated §§ 8(a)(3) and (1) of the Act by suspending and terminating its employee Nick Miller (“Miller” or “N. Miller”) because of his concerted and union activities. Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel (the “General Counsel”) submits this Answering Brief to those Exceptions and Respondent’s Brief in support.<sup>1</sup>

Respondent’s 12 exceptions are divided into 3 categories. First, Respondent argues that Miller’s concerted activity was not protected activity, but instead was “mere griping” under *Mushroom Transportation*, 330 F.2d 683 (3d. Cir. 1964). However, as the ALJ properly found, Miller engaged in multiple acts of concerted and union activity and is well within the bounds of protected, concerted activity.

Second, Respondent argues that Miller’s modestly expressed frustrations during the meeting Respondent called him into, including Miller’s complaints about not being listened to, made Miller’s comments both unprotected and unconcerted under either *Pier Sixty*, 362 NLRB No. 59 (2015), or *Atlantic Steel*, 245 NLRB 814 (1979). To adopt Respondent’s arguments here would functionally require employees to act in a robotic, passive, and frankly inhuman way in order to retain the protection of the Act.

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<sup>1</sup> References to the ALJD will be referred to as “ALJD” followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line number(s). References to the official transcript in this proceeding will be designated as (Tr.\_\_\_\_). References to Respondent’s Exceptions Brief are designated “REB”, followed by the page number(s).

Third, Respondent excepts to the ALJ's conclusion that Respondent unlawfully discharged Miller under an alternative *Wright Line* analysis. In support, Respondent misrepresents the ALJ's consideration of the facts involved, challenges the ALJ's consideration of Respondent's proffered comparators, and reiterates its claim that Miller transmuted his protected, concerted activities into unrelated and unprotected griping. However, as will be discussed below, these claims are without merit and ignore the most salient points in the ALJ's well-reasoned analysis.

Implicit in some of Respondent's Exceptions are inappropriate challenges to the ALJ's credibility determinations about how the individuals behaved at the meeting Miller was called into. Respondent's supporting Brief, which relies very heavily on the transcript, and not the ALJ's fact-findings and credibility determinations, confirms this. The Board's long-established precedent is to defer to the ALJ's credibility findings, and the ALJ's well supported findings deserve such deference. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). However, even if *Standard Dry Wall Products* did not exist and the challenges had been appropriate, because the Exceptions themselves do not specifically mention credibility determinations but the arguments in the Brief rely on such unstated arguments, they must be rejected.

For the reasons set forth below, the General Counsel respectfully requests the ALJ's findings be affirmed in their entirety.

## **II. SUMMARY OF RESPONDENT'S DISSATISFACTION WITH THE FACTUAL RECORD AND ALJ'S FINDINGS BASED UPON THAT RECORD**

It should be noted at the outset that Respondent's Brief does not dispute that Miller's September 5, 2018 Facebook posts on the Carpenters Industrial Council (CIC), Local Union No. 2949 (the "Union") Facebook page - which detailed his concerns about

Respondent's decision to close windows and doors and therefore impose safety risks – was, in fact, protected, concerted and union activity.<sup>2</sup> It has no choice but to accept this, because the Board has held that Facebook comments protesting employer's policies regarding terms and conditions of employment, as opposed to “mere griping,” constitute protected activity unless the comments are so egregious as to take them outside the protection of the Act. *See, e.g., Nat. Life, Inc.*, 366 NLRB No. 53 (2018).

Instead, all three categories of Respondent's Exceptions are based “exclusively” on its contention that “the egregious nature of Miller's rant at the September 6 meeting that lost the protection of the Act.” REB 23. Respondent's problem is that it does not like that the ALJ already addressed this argument in her decision, based both on fact and caselaw.

A. Respondent's Strained Construction of Facts

Respondent rests its claim on a construction of the facts that is unsupported by the transcript or the ALJ's implicit and explicit credibility determinations. Specifically, it claims throughout its Exceptions Brief that Miller engaged in activity that was an extension of his concerted Facebook post for only about 5 to 10 minutes and then “ranted” for another 20 to 35 minutes about subjects unrelated to the Facebook post, and this supposed 20 to 35 minute digression was unprotected. *See, e.g., REB 8-9.*

Respondent's problem with this argument, among others, is that no witnesses testified to those specific delineations of time. As such, Respondent resorts to tortuously inferring them from a misreading of the transcript or from multiple, sometimes incongruous versions of events. For example, Miller testified at hearing that,

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<sup>2</sup> *See* REB 23.

after Human Resources Manager Tris Thayer (“Thayer”) and Safety Manager Deneen Dahl (“Dahl”) had discussed his Facebook post and the smoke issue for some time:

We went back and forth about their decision to close the doors, and I expressed my concern for not going to -- to fix the problem, all it was going to do is create another safety concern with raising the temperature in the facility. *And it continued for -- I'd say probably five or ten minutes*, and then at that point I realized that the conversation wasn't going anywhere, that it seemed like she was getting more and more agitated, and I felt that it would probably be best if we changed the subject. So I looked at Tris and explained that to him and asked him if we can move on to the next order of business.

Tr. 76:3-13 (emphasis added). The fact that a specific “back and forth” about his safety concerns “continued” for 5 to 10 minutes does not support any inference that the subject of the Facebook post was either only discussed for those 5 to 10 minutes or during the first 5 to 10 minutes of the meeting. In fact, the evidence indicates otherwise, and that this argument began and then continued only after Thayer and Dahl had already spoken at some length.

More striking is the fact that the “next order of business” Thayer turned to was the issue of “accountability” and arguing back and forth with Miller about whether or not his Facebook post was offensive, as well as whether his post was an action or a reaction. Tr. 76:18-77:1. It was at this point that Thayer excused Miller and his Union Steward, Ed Weakley (“Weakley”), from the meeting so that Respondent could caucus. Tr. 28:3-10, 77:3-5. It is unclear from any witness’ testimony whether or not this caucus was included in the estimated 30-minute length of the meeting; and, it is certainly not clear enough to support Respondent’s contention that Miller “ranted” for 20 to 35 minutes on subjects unrelated to the Facebook post and the smoke safety issue.

Respondent also references the version of events given by Dahl, who did not specify how long the meeting lasted in whole, but did claim that the meeting took a “turn” after about ten minutes. Tr. 143:19-22. However, Dahl’s testimony does not support Respondent’s contention that Miller persisted on a 20 to 35 minute “rant” unrelated to his Facebook post and safety concerns. Instead, she confirmed Miller’s testimony.

Dahl testified that Thayer and Miller had a back and forth - confirming Miller’s testimony - and that she then said:

But, you know, I was sharing, hey, you know what, you know, I asked for suggestions yesterday [at a crew meeting], you didn't come up and share anything. You want us to listen but you haven't really provided, you know, anything. I talked about some safety concerns that he shared and was very frustrated.

Tr. 142:21-143:3. As she explained during the hearing, Miller complained that the company never listened to any of his ideas, that he has had a lot of ideas that are not implemented, and that the company could make more money if they listened to his suggestions. Tr. 142:7-14, 143:7-10. She later testified that Miller was asked to calm down multiple times and could not, and then she left before the end of the meeting. Tr. 144:9-145:9. However, as explained further below, the ALJ did not credit Dahl’s claim about Miller, instead finding that Miller did not lose control or exceed the normal bounds of behavior or conversation. ALJD 7, n.18-19.

In sum, Dahl’s testimony establishes only that there was a heated back and forth concerning safety concerns, the very subject of Miller’s Facebook posts and comments. It in no way hints at any dissociative “rant” by Miller, as Respondent represents.

B. Respondent's Arguments are Incompatible with the ALJ's Reasonable Synthesis of the Testimony and Evidence

Respondent claims that Miller's conduct was egregious because Miller had "refused to calm down when repeatedly asked to do so, and [became] increasingly agitated to the point that his supervisors felt he could not safely return to work." REB 10-11. The ALJ specifically addressed this and actually found it clear that, "the exchange was somewhat heated, but that *no party lost control or approached the level of becoming violent.*" ALJD 7, n.18 (emphasis added). She affirmed her rejection of the idea that Miller was out of control, writing that "both N. Miller and Dahl were upset, and acted *within the bounds of normal behavior* in what commenced as a contentious setting." ALJD 7, n.19 (emphasis added).

She further found that, "[d]uring the exchange, voices were raised, but nobody used profanity or threatening language, and nobody left their seats." ALJD 7:19-20. While acknowledging that Miller called management "stupid" during the meeting, the ALJ specifically found that:

By any account, however, N. Miller was acting within the bounds of reason in the context of having been called to a meeting with multiple managers and a union steward and confronted with his Facebook post.

ALJD 14:32-34. Despite this, Respondent suspended Miller pending investigation about ten minutes after the meeting. ALJD 7:21-23.

Additionally, and key to Respondent's Exceptions, the ALJ specifically addressed Respondent's argument that Miller had "proceeded to go on a 'rant' about how management never listens to his ideas and he would be better off working somewhere else." ALJD 14:12-14. Immediately rejecting the argument, the ALJ noted that "the

meeting was called to discuss N. Miller's Facebook post" and that this post "was the crux of the meeting." ALJD 14:14-16.

Even if Miller reiterated his comments about management while the conversation "strayed to his other workplace frustrations," the ALJ concluded that:

it does not negate that the meeting was called to address, and did in fact address, the Facebook post and N. Miller's expressions of dismay over management's decision to deal with the smoke at the facility by closing the doors and windows, resulting in elevated temperatures.

ALJD 14:21-25. The ALJ's summation of facts show any "straying" was not spontaneous, as Dahl told Miller, "you know, *do you have other concerns*, you know, I'm confused where this post came from." ALJD 7:1-3 (emphasis added).

Respondent's Brief in support also ignores the ALJ's well-reasoned summary of the facts of the case. However, because the ALJ actually found that Miller was credible and his conduct during the meeting, as confirmed by her crediting of other witnesses as to key facts, was within the bounds of reason and normal behavior, she predictably found that he "squarely did not" lose the protection of the Act. ALJD 11:26-27. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent has proffered no basis for reversing her findings.

**III. THE ALJ PROPERLY FOUND THAT MILLER'S CONDUCT DURING THE SEPTEMBER 6, 2018 MEETING WAS NOT "MERE GRIPING" AND WAS PROTECTED, CONCERTED ACTIVITY (Answer to Exceptions 1-4).**

As is apparent from the facts above, the ALJ found that "Miller's action of raising his complaints with management distinguishes the Facebook conversation from 'mere

gripping,” as Respondent previously argued. ALJD 11, n.24. As a result, Miller’s “individual complaint to his supervisor and his affirmation of his Facebook post to the supervisors and managers at the meeting were ‘logical outgrowth[s] of the concerns of the group’ and were thus concerted.” ALJD 11:20-22, citing *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), *aff’d* 310 NLRB 831 (1993); *Every Woman’s Place*, 282 NLRB 413 (1986).

Moreover, because Miller’s post originated on an internal Union Facebook page, it also constituted union activity. ALJD 11, n.25. In the alternative, the ALJ also found that Miller’s posts and complaints about the safety issues established union activity because the collective bargaining agreement between the Union and Respondent contains a safety clause. ALJD 11 n. 25, citing *Wheeling-Pittsburgh Steel Corp.*, 277 NLRB 1388, *enfd.* 821 F.2d 342 (6<sup>th</sup> Cir. 1987).

Respondent relies very heavily on a 1980 Board case, *Lutheran Soc. Serv. of Minnesota*, 250 NLRB 35, 41 (1980), to challenge the ALJ’s determination and support its contention that Miller was merely “gripping” without acting in concert. REB 12-17. However, this reliance is misplaced, as the case is easily and wholly distinguishable.

In *Lutheran Social Services*, two employees of a program for at-risk youth engaged in a campaign of insulting the competence and intelligence of management. The two employees also wrote letters that expressed concerted concern about the quality of care being given to the young people in their care. The judge’s decision, adopted by the Board, found that two employees were only “gripping” because they had “more than 3 months of behind-the-scenes dissatisfaction without any indication of an intention to cultivate it into some more confrontational form of expression.” *Lutheran*

*Soc. Serv.*, 250 NLRB at 41. In addition, the *Lutheran Social Services* judge concluded that, while the employees' concerted complaints about quality of care were "commendable," it was "not activity which could improve the employees' 'lot as employees'[".]” *Id.* at 42 (1980) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)). Such is not the case here.

Miller posted to a Union Facebook page to bring up a specific safety issue that had arisen only days before. By arguing that closing the doors and windows would not keep the smoke out, but would only make the plant hotter and more unsafe, Miller was, at a minimum, proposing that Respondent *keep the doors and windows open* so as to protect employees. Thus, it cannot be rationally argued that Miller was failing to propose a solution, even it was just reversion to the status quo. In addition, Miller's concerted and union activities occurred within a one day span, which makes his situation diametrically opposed to the three month span in *Lutheran Social Services*.

Apparently recognizing this, Respondent attempts to link Miller's activities to his previous criticisms of management, as well as a previous "talking to" he received when he brought up concerted safety complaints at another meeting in July 2017, in order to make the cases more similar. However, the reality is that Miller was not called into the September 6 meeting to discuss his general dissatisfaction with management. As the ALJ emphatically found based on the testimony and evidence, it was specifically to confront Miller about his Union Facebook post, which was undeniably protected and concerted: "For the Respondent to say that it was simply a meeting to gather information about N. Miller's concerns about the smoke in the facility and was somehow

attenuated from his Facebook post and his related complaint to his supervisor *defies reason.*” ALJD 13:24-26 (emphasis added).

Relatedly, Respondent fails in its attempt to claim that Miller lost the protection of the Act because of the phantom “rant” it claims he went on. As exhaustively recounted above, the ALJ rejected Respondent’s construction of the events. Moreover, the fact Miller may have brought up additional safety concerns, and his frustration at not being listened to, supports his case rather than weakens it. First, as the ALJ noted, the parties’ collective bargaining agreement contains a safety clause, making his arguments a form of concerted activity attempting to protect rights and duties under that agreement. *See NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

Second, to the degree Respondent claims that Miller’s complaints were directionless or “carping,” the fact that Miller’s complaint that his concerns were unheard, and his suggestions unheeded, directly undercuts its claim. Indeed, Respondent’s implied argument seems to be that if an employee strays from merely reciting his or her protected complaint *ad nauseum*, and instead betrays a normal and justified human frustration about an employer’s actions more generally, or references themselves as an individual, an employer can latch on to that digression and punish the employee without limits. The Board has rejected this approach, instead focusing on the entire *res gestae* of an employee’s union and concerted activities. *U.S. Postal Serv.*, 250 NLRB 4, 6 (1980).

The reality is that Miller’s conduct was not “mere griping” on a personal level in the least, but was instead a bracing and immediate reaction to health and safety

concerns that other employees also shared on Facebook. Indeed,

[w]hile griping about a purely personal concern is not ordinarily considered action undertaken for mutual aid or protection, voicing concerns that pertain to working conditions affecting other employees as well as the complaining worker is protected by Section 7 of the Act.

*Phoenix Processor*, 348 NLRB 28, 46 (2006). Given this definition it is abundantly clear that Miller was engaged in concerted activity and that the ALJ was right to dismiss Respondent's 'mere griping' argument. ALJD 11, n.24.

**IV. THE ALJ CORRECTLY FOUND THAT MILLER'S CONDUCT DURING THE MEETING REMAINED PROTECTED UNDER *ATLANTIC STEEL* (Answer to Respondent's Exceptions 5-9).**

Respondent's Exceptions and Brief in support claim to propose this set of exceptions as an "alternative" to their "mere griping" argument. REB 17. However, Respondent's Brief makes it abundantly clear that these Exceptions still hinge on its peculiar argument that Miller went on a long and unprotected "rant" and that it was this "rant" that brought him outside the boundaries of the Act. REB 17-20.

As the ALJD found, and Respondent admits, the Board considers the following factors to determine whether an employee loses the Act's protection: (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 anyway, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979). Each of these factors weigh in favor of finding Miller's conduct did not lose the protection of the Act.

A. The First and Second Factors Weigh in Favor of Miller's Conduct being Protected

Respondent does not even proffer an argument regarding the first factor, as it is well established that a closed-door meeting in a manager's office weighs in favor of

protection, because the behavior of the parties in the meeting is unlikely to impact productivity or disrupt other employees. *Random Acquisitions, LLC*, 357 NLRB 303, 316 (2011) (employee comments made in office away from shop floor weighed in favor of protection); *The Salvation Army*, 345 NLRB 550, 562 (2005) (“closed door” meeting in manager’s office weighed in favor of protection).

As to the second factor, Respondent does claim in Exceptions 5 and 6, as well as its Brief, that the subject matter of the discussion was not protected, concerted activity, and so weighs against protection. It is here that Respondent resurrects its “rant”/“mere griping” argument. REB 17-18. Because the ALJ’s finding that the subject matters of the conversation were Miller’s protected Facebook post, his affirmation of that post, and his intertwined complaints about the smoke and employee health and safety, the Board should therefore find that the second *Atlantic Steel* factor weighs heavily in favor of protection.

Contrary to Respondent’s claims, the ALJ’s citation to *Plaza Auto* is appropriate and on point when evaluating the second *Atlantic Steel* factor. ALJD 14:8-25, citing *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286 (9th Cir. 2011).<sup>3</sup> The ALJ cited to a 9<sup>th</sup> Circuit case remanding *Plaza Auto* to the Board, but the Board’s commentary on remand is telling:

[the] subject matter of the meeting (factor two of *Atlantic Steel*) during which the outburst occurred favors [the employee] retaining the Act’s protection: the subject matter concerned [the employee’s] concerted complaints relating to terms and conditions of employment.

*Plaza Auto Ctr., Inc.*, 360 NLRB 972, 978 (2014).

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<sup>3</sup> The General Counsel does not dispute that the ALJ’s reliance upon *Fresenius USA Mfg.*, 358 NLRB 1261, 1266 (2012), is not dispositive, as *Fresenius USA* was vacated and, on remand, the Board decided the case based on a *Wright Line* analysis without further addressing the *Atlantic Steel* analysis.

The Board looks at the subject of the meeting, of the “discussion” as a whole. It does not look at any comment, sentence, or digression in isolation, as any individual comment is not a “discussion.” *Also see Pub. Serv. Co. of New Mexico*, 364 NLRB No. 86 (2016) (because employee attended meeting in his capacity as union steward, and the subject of the meeting related to an issue the union was grieving, it weighed in favor of protection). Here, as the ALJ rightly found, the “crux” of the meeting was Miller’s Facebook posts and his complaints about worker safety. Therefore, the second factor weighs strongly in favor of protection.

B. The Third Factor of *Atlantic Steel* Weighs in Favor of Miller’s Conduct being Protected

As to the third factor, Respondent’s Exception 8 and supporting Brief directly misstate Board law. At one point, citing *Pier Sixty, LLC*, 362 NLRB No. 59 (2015), Respondent asserts that, “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.” REB 22. While such a generic proposition may be true in some sense, it is certainly not because of *Pier Sixty*. In fact, the *Pier Sixty* Board unambiguously explained that it was not relying on *Atlantic Steel*:

we do not rely on the judge's application of the four-factor test in *Atlantic Steel Co.*, 245 NLRB 814 (1979), given that, here, the comments in question initially were made available to other employees and others in a nonwork setting and did not occur during a conversation with a supervisor or management representative.

*Id.*, slip op. at 2.

Respondent’s citation to *Bates Paving*, 364 NLRB No. 46 (2016), is similarly unhelpful. In *Bates Paving*, the Board made a passing reference to *Pier Sixty* when

explaining that “[c]oncerted activity directed toward rude, belligerent, and overbearing behavior by a supervisor that directly affects employees’ work constitutes protected activity under the Act.” *Id.*, slip op. at 3. However, this reference was in the context of a *Wright Line* analysis and not an *Atlantic Steel* analysis. And, even if it were applicable, its application would be, at worst, neutral or, at best, positive if applied to this case because the ALJ found that “both N. Miller and Dahl were upset.” ALJD 7, n.19.

Contrary to Respondent’s argument, the ALJ’s citation (ALJD 14:32-38) to *Postal Service*, 250 NLRB 4 (1980), is also on point. REB 22-23. In that case, a union steward asked a manager for an explanation about a managerial decision. Upon being told that the decision was designed to excuse the USPS from paying the employee for travel time, the steward said, “[y]ou know what, Mr. [supervisor]? You are a stupid ass” and then hung up on the manager. *Id.* at 6. The employee in question was merely suspended, but the Board found that was still unlawful under *Atlantic Steel*. *Id.* Respondent boldly argues that “there was no evidence that anyone during the [*Postal Service*] discussion had become angry, frustrated, or increasingly agitated.” REB 23. Apart from being an absurd argument, as there could hardly be a clearer example of an individual becoming “angry” or “frustrated” than calling a manager a profane name and then hanging up on them, Respondent again is simply trying to resurrect an uncredited version of Miller’s behavior that the ALJ already rejected.

Despite this, Respondent attempts to argue that its “culture” renders Miller’s use of the term “idiot,” “dumb,” or “stupid” too egregious to retain the protection of the Act. REB 25-26. However, this is yet another attempt to integrate a *Pier Sixty* analysis into its *Atlantic Steel* paradigm. The ALJ found that Miller’s use of the term “stupidly” in his

Facebook post weighed against finding it was protected – though the totality of the circumstances clearly weighed in favor of finding the Facebook post protected – she clearly noted that “[Miller’s] statements in the meeting do not fall into this paradigm.” ALJD 12:22-30, n.28. She is correct.

When an employee is disciplined for conduct that is part of the *res gestae* of their protected concerted activities, “the pertinent question is whether the conduct is *sufficiently egregious* to remove it from the protection of the Act.” *Stanford NY, LLC*, 344 NLRB 558 (2005) (emphasis added). Communications occurring during the course of otherwise protected activity remain protected unless they are “so violent or of such serious character as to render the employee unfit for further service.” *St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 204–05 (2007). Such was not the case here and it stands to reason that an employer cannot impose rules of decorum so stringent that, in the heat of a workplace dispute, any normal display of human frustration would take an employee outside the protection of the Act. As such, the third factor weighs definitively in favor of Miller remaining protected under the Act.

C. The Fourth Factor of *Atlantic Steel* Weighs in Favor of Miller’s Conduct being Protected under the Act

Based on the analysis above, it is clear that three first three *Atlantic Steel* factors strongly favor protection of Miller’s conduct and support a finding that Respondent violated §§ 8(a)(3) and (1) of the Act by suspending and discharging him. Nonetheless, Respondent briefly and vaguely argues that the ALJ did not reach a conclusion on the fourth *Atlantic Steel* factor. REB 18. Respondent is mistaken, as the ALJ made findings that go directly to the fourth factor.

As the Board in *Plaza Auto* noted, when evaluating the fourth prong under *Atlantic Steel*:

Board precedent makes clear that outbursts are more likely to be protected when the employer expresses hostility to the employee's very act of complaining than when the employer has indicated a willingness to engage on the merits.

360 NLRB at 979. Recognizing this, the ALJ found that Respondent did not hold the meeting with Miller merely to gather information about his concerns, but as an investigation into his Facebook post and his complaints. She specifically wrote: "In this regard I find management's act of calling [Union steward] Weakley to the meeting at its outset telling." ALJD 13 n. 31. Further,

[w]hile no unfair labor practice had yet occurred, N. Miller's comments were contemporaneous with and provoked by being confronted by numerous managers about his protected concerted/union activity. *Plaza Auto Center*, supra.

ALJD 15:2-4. Thus, she addressed what is required to support a finding as to the fourth factor weighing in favor of Miller's conduct remaining protected.

**V. THE ALJ'S ALTERNATIVE *WRIGHT LINE* ANALYSIS IS SOUND (Answer to Exceptions 10-12)**

Under a *Wright Line* analysis, in order to establish unlawful discrimination violative of §§ 8(a)(3) and (1) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that: (1) the employee was engaged in protected activity, (2) the employer had knowledge of that activity, and (3) the employer's hostility to that activity "contributed to" its decision to take an (4) adverse action against the employee. There can be no dispute that Respondent took adverse actions against Miller when it suspended and fired him.

Respondent first claims that Plant Manager Tony Ramm (“Ramm”) had no knowledge of Miller’s Facebook post or his protected, concerted activities. REB 28. In fact, Respondent claims it is “undisputed that Ramm did not even know about the Facebook post at the time of Miller’s termination.” REB 28. However, the ALJ addressed this claim and directly found to the contrary. ALJD 15:47-16:4. She further noted that:

the Board imputes a manager’s or supervisor’s knowledge of an employee’s protected concerted activities to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation.

ALJD 16:1-4, citing *G4S Secure Solutions*, 364 NLRB No. 92 (2016).

Here, if Ramm was indeed the final decisionmaker, he had been “fed information” about the September 6 meeting, which, as established above, was entirely focused on Miller’s concerted Union Facebook post and his concerted safety and health complaints. See ALJD 16:6-15. Conversely, Thayer actually signed off on Miller’s termination paperwork, and it is undisputed that Thayer was at the meeting and discussed the Facebook post with Miller. ALJD 16:8-9. These facts affirm that Respondent had abundant knowledge of Miller’s extensive concerted activities, including his concerted activities at the September 6 meeting itself.

In proceeding with its challenge to the alternate analysis, Respondent resurrects comparators in order to buttress its *Wright Line* case that the ALJ properly rejected. REB 30-33. These comparator employees all made social media posts and were called into meetings by management about them. One of these employees, Scott McCool, was rejected as a comparator because there was a “dearth of information” about his situation, including a total lack of first-hand testimony. ALJD 17 n.35. Another

employee, Becky Smith (“Smith”), posted on the Union Facebook page but was not disciplined. Smith was rejected as a comparator because “she, unlike N. Miller, expressed contrition when confronted by Dahl.” ALJD 17:29-33.

In addition, Smith and another employee named R.C. Jenkins (“Jenkins”) were investigated for having posted photographs of the mill on social media; Jenkins apologized and was not punished. Smith was punished, but because she had left the facility without clocking out in order to take the photo. As the ALJ properly found, Smith and Jenkins are not remotely comparators as their situations have almost no parallels to Miller and certainly no parallel to Miller’s concerted activities. ALJD 17:29-18:3

Moreover, Respondent seems naively unaware that its practice of confronting employees in closed door meetings about their concerted and Union social media complaints, and then requiring that those employees express sufficient contrition for having disagreed with management in order to avoid punishment, is serious evidence of animus; it is not in any way supportive of its case. That Respondent attempts to justify these actions through its Open Door policy (REB 30) is borderline dystopian, as it would transmute an encouragement that employees bring their concerns to management into a requirement that employees forego discussing their concerns with coworkers and only bring their concerns to management. It would, of course, be unlawful to require employees to restrict their concerted activities only to forums and methods approved by Respondent. *See, e.g., Zurn Indus., Inc.*, 255 NLRB 632, 633 (1981) (employee disciplined for voicing complaints at a safety meeting that was “outside proper channels” was unlawful).

Relying solely on a non-binding Sixth Circuit decision,<sup>4</sup> Respondent also argues that “timing alone” cannot justify a finding of animus or support the case. REB 33. This is wrong. The Board has clarified that close timing can independently and wholly support a finding of animus. *Kag-West, LLC*, 362 NLRB No. 121 (2015).

In fact, in a case parallel to this, *Bettie Page Clothing*, 359 NLRB 777, 783 (2013), *aff'd and incorp. by ref.*, *Bettie Page Clothing*, 361 NLRB No. 79 (2014), the respondent’s supervisor claimed employees were fired for insubordination and personality conflicts, among other reasons, but the ALJ and Board found the employees were fired for Facebook complaints about the immaturity of a supervisor and subsequent discussions about bringing worker rights pamphlets to work. As with Miller, those employees’ Facebook posts came to the attention of management almost immediately before the employees were discharged.

Apart from the close timing here, the ALJ properly relied on other evidence of animus. For example, stretching beyond mere timing, the ALJ relied the fact that negative comparator Mike Axtel (“Axtel”) received no discipline despite making derogatory comments about the company, about supervisors, and about new employees. ALJD 16:42-44. If Respondent were really suspending and firing Miller because of his supposedly egregious conduct, Axtel surely would have received some discipline.

She also relied on Respondent’s own evidence. Specifically, Respondent’s own termination paperwork belies its assertions:

N. Miller’s termination record states it was for “Violation of Company Loyalty”, which fits well if he was terminated for the protected activity of complaining about management’s response to

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<sup>4</sup> *Harper & Arterburn Co., Inc. v. NLRB*, 69 F.2d 402 (6<sup>th</sup> Cir. 1982).

the smoke situation at the plant. It does not fit well if he was fired for the myriad of reasons [Respondent] offered at the hearing [...]

ALJD 17:1-6. As such, Respondent's assertions that the ALJ's alternate analysis is in any way faulty must fail.

## VI. CONCLUSION

Based upon the foregoing and the record evidence considered as a whole, the General Counsel respectfully requests that the Board reject Respondent's exceptions and affirm the ALJ's findings in their entirety. Specifically, the Board should affirm that Respondent violated §§ 8(a)(3) and (1) of the Act when it suspended and discharged Miller for his protected, concerted activities, which never exceeded the boundaries of the Act.

Dated at Portland, Oregon, this 12<sup>th</sup> day of December, 2018.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge was served on the 12<sup>th</sup> day of December, 2018, on the following parties:

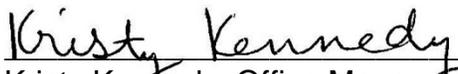
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