

**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' REPLY BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

Respondent Roseburg Forest Products (“RFP”) submits this Reply Brief in response to Counsel for the General Counsel’s Answering Brief in Response to Respondent’s Exceptions (“CGC Brief”). RFP urges the Board to dismiss this Complaint as RFP’s Exceptions to the Administrative Law Judge’s (ALJ) Decision (“Decision”) show that Nick Miller’s (“Miller”) suspension and subsequent termination of employment must be upheld because Miller’s conduct is simply not the type of conduct the Act was ever intended to protect.

ARGUMENT

RFP’s Exceptions are based on the Decision’s failure to make factual findings that are critical to the application of three dispositive legal principles here: (1) the mere griping standard of *Mushroom Transportation, Co.*, 330 F.2d 683 (3d Cir. 1964); (2) the *Atlantic Steel*, 245 NLRB 814 (1979), and *Pier Sixty*, 362 NLRB No. 59 (2014), framework for analyzing egregious employee conduct; and (3) the *Wright Line*, 251 NLRB 1083 (1980), *enfd* 662 F.2d 899 (1st Cir. 1981), test for alleged mixed motive cases.

I. The ALJ’s Decision failed to make key findings supported by the record.

Despite allegations to the contrary in the CGC Brief, RFP does not dispute the factual findings of the ALJ. Rather, RFP excepts to the ALJ’s failure to make essential factual findings, based on established record evidence, that would have changed the legal analysis of Miller’s conduct to show that it became unprotected under the Act. Most critical to the analysis of this case, is the nature and duration of the meeting that Miller had in the RFP Human Resources office on September 6, 2017. The Decision acknowledges that the meeting “started out with” a discussion about Miller’s Facebook post and then directly quotes at length from Dahl’s testimony about what happened at the September 6 meeting. Decision 6:15-7:15. Otherwise, the Decision makes only

one specific finding with respect to the timeline of events on September 6, stating: “at Thayer’s request, N. Miller and E. Weakley left the room for about 10 minutes while management, including Dahl, who had returned to the meeting, caucused.” Decision 7:20-22.

Even though the Decision clearly credits Dahl’s explanation of the September 6 meeting by quoting from large portions of her testimony regarding those details, the Decision fails to make critical findings regarding the duration and the distinct portions of the meeting. RFP’s position is consistent with the record because the evidence clearly supports that the meeting lasted as long as 30-45 minutes and that there were two distinct parts to the meeting. The first part was a 5-10 minute discussion regarding Miller’s concerns about smoke in the mill and how RFP could address any remaining concerns that he had; the second part, lasting as long as 20-35 minutes, turned into something entirely different from the smoke concerns and involved Miller ranting about management’s general incompetence and calling those present at the meeting “dumb,” “stupid,” and “idiots.” Decision 13:28-34.

The CGC Brief argues that no witnesses testified to specific delineations of time as to the conversation about Miller’s Facebook post or as to the length of Miller’s rant at the September 6 meeting. To the contrary, the record evidence shows:

- Miller testified that the meeting lasted “about 30 to 45 minutes.” Tr. 75:9-10. He also testified that “we went back and forth about their decision to close the doors” and that continued for “probably five or ten minutes.” Tr. 76:3-7. At that point, Miller testified that he felt like “the conversation wasn’t going anywhere” and that it “would probably be best if we changed the subject” so Miller asked “if we can move on to the next order of business.” Tr. 76:8-13.

- Edward Weakley, Union shop steward, testified that the September 6 meeting lasted “oh a half hour, maybe a little longer.” Tr. 25:24-25. He also testified that there was a caucus of “about maybe 10 minutes” after the meeting “before they made their mind up on the suspension.” Tr. 28:4-16.
- Deneen Dahl, former Safety Manager, testified that from the start of the meeting, “probably five to ten minutes” had passed before Miller “launched into something totally separate.” Tr. 142:2-18. Dahl explained “at that point, the interaction was more between [Miller] and Tris” and “it really turned into, managers are stupid, no one listens to me. I’ve had all these ideas and it made Roseburg money and I’ve never even gotten a thank you.” Tr. 142:21-22, 143:8-11. Eventually, Dahl “actually left the meeting” because she felt like the meeting had “gone in a different direction.” Tr. 145:1-4.

These excerpts all support that the meeting lasted between 30-45 minutes. Further, the testimony shows that the reason for calling the meeting, and the 5-10 minute conversation to discuss Miller’s remaining concerns about the smoke, were entirely different than the remaining 20-35 minutes of the meeting. The Decision fails to make any findings related to the duration of the meeting or to acknowledge clear record evidence showing that the meeting turned into something totally distinct from the initial purpose of the conversation. This distinction in the duration and nature of the meeting is key to the legal analysis of Miller’s conduct in light of Board precedent.

II. Miller’s conduct amounted to mere griping under *Mushroom Transportation*.

The fact that the September 6 meeting went from a brief conversation about what RFP was doing to address the smoke in the mill to Miller’s long-lasting rant about management’s incompetence shows that Miller was not suspended for any concerns about the smoke, but rather

for his behavior during the second portion of the meeting. The CGC Brief conflates Miller's Facebook post and initial discussion of smoke in the mill on September 6 as protecting all of Miller's conduct while at RFP, including his history of poor performance, repeated warnings to improve his ability to work on a team, and his rant at management's incompetence on September 6. However, RFP does not argue that Miller's Facebook post nor that the 5-10 minute discussion about smoke in the mill on September 6 constituted mere griping. Rather, it is the 20-35 minutes of Miller's ranting about management's incompetence, his feelings that he did not receive enough thanks, and how he could make a lot more money working elsewhere, coupled with his history of similar behavioral problems at RFP that constituted unprotected mere griping and called for his suspension on September 6 and termination on September 8.

Counter to the CGC Brief's characterization of *Lutheran Social Services*, 250 NLRB 35 (1980), the case is instructive here. The employees there, who were counselors to young children, complained about the added burden created by management's program changes requiring them to supervise more children, which the ALJ found "clearly qualify as concerning a matter of mutual aid or protection." *Id.* at 42. Despite raising concerns clearly protected under the Act, both the ALJ and the Board upheld the termination of employment for these counselors because the employees' real concerns were about management's incompetence in addressing the program changes, rather than the impact of the program changes to the employees themselves. *Id.*

The *Lutheran Social Services* employees' complaints included statements such as: rather "than dealing with the real problems" including the "competency of certain social workers, expanding the program when the social workers can't handle their present work loads & making staff rating procedures and work schedules more reasonable and fair," management had instead

“changed the program to cover the incompetencies.” *Id.* Another employee wrote: “I feel management takes this stand to cover up their mistakes instead of learning from their mistakes, and dealing with the real problems” of their lead social worker’s “incompetence, staff rating procedures & work schedules, and bringing the group size to eleven when [he] can’t handle the group now.” *Id.* The ALJ held that “these statements, viewed in light of their conduct during the months preceding their discharge” show that what disturbed the employees were “decisions by management and the concomitant perceived lack of competency of management.” *Id.* These types of complaints are unprotected because the employees “formulated no agenda, filed no grievances, [and] made no demands.” *Id.* at 41. Instead, their behavior was “aimless and undirected, consisting of unremitting complaining about the value of management policies and the competence and good faith of their managers.” *Id.* at 43.

RFP does not deny that Miller raised concerns about the smoke in the mill or that the first part of the meeting on September 6 was to address any additional concerns Miller had relating to the smoke. However, like in *Lutheran Social Services*, Miller’s rant during the September 6 meeting was altogether separate from those discussions and showed that he was complaining about management’s decisions in general, his feeling that management was not implementing his ideas to make the company money, and his repeated belief that management was “dumb,” “stupid,” and “idiots.” Tr. 142:7-14, 196:2-5. The CGC Brief conflates Miller’s comments that he felt he was not being listened to with Miller’s concerns about the smoke. Miller’s comments were not at all about smoke in the mill, rather, they were cost-saving suggestions, as Miller complained that he had lots of ideas that were not implemented, and RFP would “make way more money if they would do what I suggested.” Tr. 142:7-14. Miller’s added criticisms that he would be better off because

he could make more money elsewhere similarly cannot be said to relate in any way to his comments about the smoke.

The record shows that the subject matter of Miller's rant amounted to aimless and undirected complaints about RFP policies and management's incompetence. Like in *Lutheran Social Services*, this rant must also be viewed in light of Miller's poor attitude and misconduct over the preceding year and a half, including drastically decreasing performance reviews, a written warning that Miller's attitude needed to improve for him to remain employed with RFP, calling his supervisor "lazy" and "worthless" to his face, and losing his certified buddy status because by his own admission, Miller could not be responsible for another employee's safety when he was frustrated. Decision 3:27-4:11. Because Miller's conduct during the second portion of the September 6 meeting, coupled with his history of similar directionless complaints, was "mere griping" under *Mushroom Transportation*, his discipline must be upheld.

III. *Pier Sixty* can be used to show that Miller's conduct lost the protection of the Act.

Application of both *Atlantic Steel* and *Pier Sixty*'s holdings are appropriate here and show that Miller's rant lost the protection of the Act because RFP's standard of workplace conduct does not permit such behavior. Both the Decision and CGC Brief argue that *Pier Sixty* cannot be used to analyze Miller's behavior on September 6 because *Pier Sixty*'s holding is only applicable to employee social media posts. That contention is incorrect because the Board has reiterated that social media is the new water cooler and must be analyzed similarly to workplace interactions. See *The Kroger Co.*, 2014 NLRB Lexis 279 (2014) (finding that "the appropriate analogy for online communications is the water cooler at work").

Furthermore, the Board's analysis in *Bates Paving & Ceiling, Inc.*, 364 NLRB No. 46 (2016), supports applying *Pier Sixty*'s holding when analyzing employee workplace conduct under various legal frameworks, not exclusively to social media posts as the ALJ found in the Decision. In *Bates*, the Board was tasked with analyzing whether an employee was discharged for engaging in protected activity when he complained to the owner about a particularly abusive supervisor who yelled derogatory and racist names at the employees. *Id.* The Board specifically invoked *Pier Sixty*'s holding in *Bates* when analyzing the protected nature of the employee's conduct in the meeting with the owner. There, by applying *Pier Sixty* to its *Wright Line* analysis in a case that did not involve social media, the Board showed that *Pier Sixty*'s holding can be used when analyzing employee conduct in a multitude of settings. Therefore, the Decision must be reversed for finding that *Pier Sixty*'s holding cannot be used to analyze Miller's conduct at the September 6 meeting.

Applying *Pier Sixty* to the *Atlantic Steel* test requires looking to the totality of the circumstances, including specific standard of workplace conduct, in order to determine whether the employee's conduct exceeded the bounds of acceptable behavior. *Pier Sixty* held that because the evidence showed that that particular workplace regularly included profanities, vulgar insults, and shouting from both management and employees, that the employee's own vulgar and insulting comments were not outside the bounds of acceptable conduct for that workplace. The same must also be true when analyzing the standard of acceptable conduct at workplaces on the opposite end of the spectrum. Namely, if the evidence shows that an employer strictly enforces a respectful working environment, and does not tolerate vulgarities or name calling between employees and managers, that disrespectful comments, name calling, and any vulgarities, would necessarily be outside the bounds of acceptable conduct at such a workplace. The ALJ specifically found that

RFP maintains such a workplace, holding: “I agree with Respondent that the evidence establishes a culture at RFP that did not tolerate employees demeaning or insulting each other. N. 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. This weighs against protection.” This finding should not have been limited to analyzing Miller’s Facebook post, but should have been applied to his conduct on September 6, to find that Miller’s conduct became unprotected.

IV. A *Wright Line* analysis shows Miller was not terminated for protected activity.

RFP excepts to the misapplication of comparator employee examples in both the Decision and CGC Brief, as the comparators clearly demonstrate that Miller’s discipline was not motivated by protected activity. The first step to analyzing whether an employer’s discipline was lawful under a *Wright Line* analysis requires Counsel for General Counsel to prove that the employee’s discipline was motivated by or because of the employee’s protected activity. *See, e.g., Nordstrom dba Seattle Seahawks*, 292 NLRB 899, *enf’d* 888 F.2d 125 (1989). Properly reviewing the comparator employee examples shows that RFP has a consistent practice of trying to address employees’ issues that are brought to its attention, not to discipline employees for raising concerns. This practice is evidenced by each example in the record, where RFP learned of the employee’s concern and then tried to resolve the issue with the employee by discussing those concerns with the employee directly. This is not an unlawful practice, this is just good management.

Further, this is exactly the practice that led to calling Miller in to discuss his concerns on September 6—not to discipline him for his protected activity, but rather to try to work with Miller to resolve his concerns. Miller was never disciplined for discussing his concerns about the smoke, rather his suspension was exclusively for his rant and inability to calm down in the second part of

the meeting. The comparators show that RFP has never suspended an employee for raising concerns on Facebook, and it certainly did not do so here.

The CGC Brief argues that Miller’s case is “parallel” to *Bettie Page Clothing*, 359 NLRB No. 96 (2013). However, that case is clearly distinguishable and cannot negate that Miller was suspended for his rant and terminated for a year and a half of increasingly bad attitude and poor performance. In *Bettie Page*, the employer’s defense was that “the employees had no honest and reasonable belief” that their conduct was for mutual aid and protection, and instead, that the employees schemed to entrap their employer into firing them.” *Id.* at *5. Further, following their Facebook posts, the employees in *Bettie Page* were called to their supervisor’s office, and with no discussion at all, were informed “things were not working out,” and they were terminated effective immediately. *Id.* at *29. RFP’s conduct was completely different because it called Miller to discuss his concerns on September 6, not to immediately terminate his employment. Moreover, RFP has never argued that Miller made the Facebook post in order to entrap RFP into terminating Miller’s employment. *Bettie Page* is not persuasive here and the comparators show that Miller’s suspension on September 6, 2017 in addition to the decision to terminate his employment on September 8, 2017, were not motivated in any way by protected activity. The Board should reverse the finding that Counsel for General Counsel met its burden under *Wright Line*.

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CONCLUSION

For the foregoing reasons, RFP respectfully requests the Board grant RFP's Exceptions to the Administrative Law Judge's Decision, reverse the finding that Miller's suspension and termination constituted unfair labor practices under Sections 8(a)(3) and (1) of the Act, and dismiss the Complaint in its entirety.

DATED this 26th day of December, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2018, I electronically filed the foregoing **ROSEBURG FOREST PRODUCTS' REPLY 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 26th day of December, 2018.

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