

**No. 18-3322**

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**LOCAL 702, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

**and**

**CONSOLIDATED COMMUNICATIONS, D/B/A ILLINOIS  
CONSOLIDATED TELEPHONE COMPANY**

**Intervening Respondent**

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**REPLY BRIEF OF PETITIONER LOCAL 702, INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL WORKERS**

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Christopher N. Grant  
Schuchat, Cook & Werner  
1221 Locust Street, 2<sup>nd</sup> Floor  
St. Louis, MO 63103-2364  
Tel: (314) 621-2626  
Fax: (314) 621-2378  
cng@schuchatcw.com

*Counsel for Petitioner*

**ORAL ARGUMENT REQUESTED**

**PETITIONER'S CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1 and 28(a)(1) of the Federal Rules of Appellate Procedure, and to enable the Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel states that Petitioner International Brotherhood of Electrical Workers, Local 702 is an unincorporated association. It does not have stock. Local 702 is a labor organization and represents employees in the electrical and communications industries in disputes with their employers.

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## GLOSSARY OF TERMS

Act or NLRA	National Labor Relations Act
ALJ	Administrative Law Judge
The Board or NLRB	National Labor Relations Board
The Company or the Employer or Consolidated or ICTC	Consolidated Communications d/b/a Illinois Consolidated Telephone Company
The Union or Local 702	Local 702, International Brotherhood of Electrical Workers
GC	General Counsel
SA	Separate Appendix to Petitioner's Brief
RSA	Attached Appendix to Petitioner's Reply Brief

## INTRODUCTION TO ARGUMENT

The Board argues that it had a rational basis for concluding that Pat Hudson engaged in serious strike misconduct; but, it relies on speculation and conjecture, which runs afoul of the Act's evidentiary standard and does not amount to substantial evidence. To reach its decision in this case, the Board majority made unwarranted inferences about Hudson's intent, opined about what she "might" have done next, speculated about fatalities that "could" have happened, and relied on statistics about unrelated traffic deaths.

A careful review of the record evidence and what actually happened, shows that Hudson's actions would not reasonably tend to coerce or intimidate employees. The ALJ found that Hudson was driving the speed limit while Conley may have been speeding, credited Hudson in finding that she did not "cut off Conley," and further found that Hudson "did not block" Conley in for "any significant distance." (SA 007-008.) To avoid these findings, the Board majority falls back on the obvious point that Hudson was driving at "highway speed." As noted by the dissent in the Board case, in doing so the majority adopted a *per se* rule that driving in front of a non-striker on the highway at the speed limit is dangerous. Alternatively, it failed to undertake a careful review of all of the evidence as required by the Act. Regardless, Hudson's actions were not so serious as to lose the protection of the Act.

Further undermining the Board's claims is its head-spinning change of position. In the first appeal to the D.C. Circuit, the Board specifically stated in its brief that "Hudson's actions were not violent or dangerous." (RSA 05.)<sup>1</sup> Now, the Board has made a 180. Based on the same facts, and purportedly applying the same test, it argues that Hudson's actions were intimidating and dangerous. (Board's Brf. at p. 18.) It can only reach this conclusion, the opposite of its previous position, by going outside the record -- speculating about Hudson's intent in changing lanes and what she could have done next.

The Board also contends that the Union waived the argument that the Board erred in creating a *per se* rule by failing to seek reconsideration of the Board's decision on that issue before filing this appeal. But, the Board was on notice of the Union's arguments -- that the Board cannot too heavily stress a single factor in reaching a decision but must consider all the circumstances.

The Board's decision is also unsupported by substantial evidence. The Court of Appeals "must examine all of the evidence in context to ensure the NLRB's findings fairly and accurately represent the picture painted by the record." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. NLRB*, 544 F.3d 841, 848 (7<sup>th</sup> Cir. 2008). The Court is not empowered to merely "rubber-stamp" the Board's reasoning

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<sup>1</sup> "RSA" refers to the appendix bound with this Reply Brief.

when portions are not supported by the record. *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (7<sup>th</sup> Cir. 1981). Here, the Board failed to properly consider opposing evidence, including Hudson's credited testimony, and substituted its view based on what it mistakenly believed must have happened and not what actually happened. Hudson should not lose the protection of the Act for an incident that is at worst frustrating to a reasonable driver, and not coercive or intimidating.

Finally, the Company in its Brief is still litigating aspects of the previous appeal. It continues to cite other incidents from the day of the Conley incident as well as the conditions of the strike line to imply that Hudson was seeking to intimidate Conley. This is an odd position to take, when both the Board and the D.C. Circuit have found that Hudson did not engage in other misconduct. Just as the Company mistakenly accused Hudson of intimidating non-strikers in other incidents, the Company is mistakenly accusing her of misconduct in the Conley incident.

## ARGUMENT

### **I. The Board's decision impermissibly relies on conjecture and speculation.**

The parties agree that the Board's findings must be supported by substantial evidence in the record as a whole and its legal conclusions must have a reasonable basis. *See Bob Evans Farms v. NLRB*, 163 F.3d 1012, 1017

(7<sup>th</sup> Cir. 1998); 29 U.S.C. §§ 160(e) & (f). The Seventh Circuit has repeatedly ruled that the Board must consider all the circumstances of the case (see cases cited in Union's opening brief) and specifically that speculation and conjecture do not amount to substantial evidence. *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 738 (7<sup>th</sup> Cir. 1982) ("suspicion, conjecture and theoretical speculation register no weight on the substantial evidence scale") (citation omitted); *see also G & H Prods. v. NLRB*, 714 F.2d 1397, 1401 (7<sup>th</sup> Cir. 1983) (contention based purely on speculation and conjecture is not supported by substantial evidence in the record); *Westinghouse Electric Corp. v. NLRB*, 325 F.2d 126, 128 (7<sup>th</sup> Cir. 1963) ("mere conjecture or speculation cannot be made to substitute for evidence").

When the Board discounts the relevancy of certain evidence and factors and relies instead on speculation and conjecture, it impermissibly evades the Act's evidentiary standard. *Bob Evans Farms*, 163 F.3d at 1020 (the Board cannot tamper with the evidentiary burden under the Act by excluding certain evidence from determination of whether conduct is protected or unprotected). Whether the Board goes as far as to create a *per se* rule by excluding factors or simply renders a decision unsupported by substantial evidence, it cannot unreasonably discount opposing evidence and common sense and rely on assumptions in their place. *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 779 (7<sup>th</sup> Cir. 2001) (faulting Board decision for being divorced from

the real world and an example of “skewed and position-oriented” decision making).

The Board majority insists that Hudson’s actions were “calculated to intimidate.” (SA 057.) This is a baseless conclusion based on unwarranted inferences. The Board’s decision does not cite any testimony by Hudson or Weaver to support this claim and ignores credibility resolutions as to their actions. Notably, the ALJ credited Hudson’s testimony that she did not “cut off” Conley. (SA 007.) There is an important distinction between a driver moving in front of another car as opposed to a driver cutting off another car. The former describes two cars in relation to each other, usually with some distance (a car’s length) between them. The latter implies a close call, with a driver acting intentionally or recklessly. In crediting that Hudson did not cut off Conley, the ALJ found by extension that she did not act intentionally or recklessly. The ALJ’s credibility resolution on this point, in Hudson’s favor and against Conley and Diggs, is entitled to deference. *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1477 (7<sup>th</sup> Cir. 1992) (“An administrative judge’s credibility resolutions are entitled to deference when he must choose between two versions of the same incident . . .”).<sup>2</sup>

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<sup>2</sup> Conley and Diggs also testified that Hudson’s actions appeared intentional to them. But, their personal feelings are not dispositive. The striker misconduct test is an objective test. *Universal Truss, Inc.*, 348 NLRB 733, 734 (2006).

The Board's decision is hopelessly littered with other conjecture. In reviewing the facts, the Board majority observes that Hudson returned to the left lane, in front of Conley, "in what only could be an intentional move to block the Company truck." (SA 057.) It also writes in the discussion section that, by her actions, Hudson sent a "clear message" to Conley and Diggs that she was "intentionally" using her vehicle to obstruct or impede their passage. (SA 057.) Again, the Board does not cite to any testimony by Hudson or Weaver or statements by them that Hudson intended to move in front of Conley to block him and intended to send him a message. It also disregards Hudson's testimony about why she followed Weaver around Conley. The Board simply assumes, based on the movements of her car, that she passed him and then switched lanes in front of him in order to intimidate him. This assumption is unreasonable. Drivers move in front of other drivers at the speed limit every day.

The Board engages in more guesswork to avoid the undisputed evidence that Hudson was in front of Conley for less than one minute and evidence that Conley may have been speeding. The majority opines that any employee would reasonably fear that Hudson's next maneuver "*could* cause a collision that would jeopardize their lives." (SA 057) (emphasis added). What matters, in the Board's view, is that a "miscalculation by anyone during that one minute . . . *could* have caused multiple fatalities or serious injuries." (SA

058) (emphasis added). Of course, no accident occurred. Rather, Conley and Diggs testified that, when Hudson switched lanes, Conley was not close to having an accident. (SA 201-203, 231-232.) But, that evidence does not make a difference. Instead, the Board reaches outside the record and cites statistics about deaths on the roadways, including accidents involving alcohol and opioids and driving while using a smartphone,<sup>3</sup> that apparently trump record evidence of what actually happened.

The Board's Brief double-downs on this effort. It argues that Hudson "purposefully blocked" Conley and further that she created a "rolling blockade." (Board Brf. at p. 10.) Again, these claims are conjecture and not supported by the record as whole. The Board majority simply assumes intent, contrary to the ALJ's finding that Hudson did not cut off Conley and notwithstanding the absence of other indicators of intent like yelling or gesturing at him. The term "rolling blockade" is not even used in the decision. The Board's Brief makes this new claim insinuating that Hudson and Weaver had some predetermined plan to block Conley. But, the record evidence shows that Hudson followed Weaver around Conley because she had

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<sup>3</sup> The Board's decision cites to a Wall Street Journal article behind a paywall. That article does not distinguish between causes of accidents. Adrienne Roberts, *US Road-Death Rates Remain Near 10-Year High*, Wall St. J. (Feb. 15, 2018), <https://www.wsj.com/articles/death-rates-on-u-s-roads-remain-near-10-year-high-1518692401>

no way to communicate with Weaver and Hudson did not know where Weaver was going and wanted to stay with Weaver, something the majority does not even mention in its decision. (SA 147, 157, 166-167.)

The Board's Brief claims that Hudson's "high speed maneuvering in and out of the passing lane" injected unpredictability into the situation when even the "smallest miscalculation could be deadly." (Board Brf. at p. 18.) This is wrong on the facts and also conjecture. Hudson was driving the speed limit. It is unclear what speed the Board thinks Hudson should have been driving on the highway if not the speed limit. If she had been driving slower, it could have been dangerous; and, if she had been driving faster, it could have been dangerous. In fact, it was Conley who may have been speeding. The Board majority casually dismisses this point in a footnote to its decision, stating that Section 7 does not confer police authority on strikers to enforce traffic laws. (SA 058.) But, if Conley was speeding, he was putting himself in danger. Hudson cannot be held responsible for Conley's over-reaction.

The Board's Brief opines that one miscalculation could have proven deadly. This is a strawman. There was no accident. Conley was not even close to having an accident. This incident was no different than any other car switching lanes in front of another car on the highway -- something that regularly occurs without accident. Of course, it is possible that any miscalculation while driving could be deadly. It is also possible that yelling

on a strike line could elevate into a physical attack. But, the Board cannot use worst-case scenarios in place of record evidence.

The Board's Brief cites *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (5<sup>th</sup> Cir. 1978), *International Paper Co.*, 309 NLRB 31 (1992), and *PRC Recording*, 280 NLRB 615 (1986),<sup>4</sup> but the different facts in those cases highlight how the Board has made unwarranted inferences against Hudson. For instance, in *Moore Business Forms*, a striker overtook and passed a non-striker and slowed down in front of him, and then sped up and swerved across the road when the non-striker tried to pass. 574 F.2d at 843. The striker also positioned his vehicle across the road, blocking the highway and motioned to and made the non-striker turn around and go back. *Id.* In *International Paper Co.*, the striker followed a non-striker's car to his house and weaved alongside him on both the right and left sides in traffic and almost bumped the non-striker forcing him off the road or into oncoming traffic, and then passed him and slowed to a speed leaving only a small separation between the vehicles. 309 NLRB at 36. The same striker also followed another non-striker, backfired the engine, and weaved to within a foot of the non-striker's car several times; then, the striker gestured to the non-striker to pull over and drove directly at him. *Id.* And, in *PRC*

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<sup>4</sup> The Union's opening brief addresses other cases cited by the Board and the Company and cases that support the Union's arguments.

*Recordings*, a striker repeatedly slammed on his brakes and zig-zagged in front of a van driven by a security guard and at one point cut sharply in front of the van forcing it to swerve into the median. 280 NLRB at 663-664.

The types of maneuvers in *Moore Business Forms, International Paper Co.*, and *PRC Recording* were extreme, involved stopping and starting and/or repeated swerving, were prolonged, violated traffic laws, and in some cases were accompanied by direct gestures or words. As so, they evidenced an intent to intimidate. By contrast, driving the speed limit and moving into the passing lane in front of another car, at a distance of at least one car's length, is not extreme, is of brief duration, and does not evidence any malicious intent.<sup>5</sup>

The Board's Brief also makes much of Conley turning off the road. The Board mischaracterizes the facts and the law on this point. On the facts, the Board does not mention that after Conley moved back behind Weaver he continued to drive behind her, at the speed limit, for a short time without additional problems. (SA 007, 182-183.) He did not immediately disengage. On the law, the Board cites *Newport News Shipbuilding & Dry Dock Co. v.*

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<sup>5</sup> *Auburn Foundry, Inc.*, 274 NLRB 1317 (1985), cited by the Company, is also distinguishable. That case involved the culpability of strikers that were part of a high speed chase of up to 80 mph over 8-9 miles, where strikers were following non-strikers closely, repeatedly pulled alongside them, and blinked their lights at them, which ultimately ended with a driver sideswiping another car. *Id.* at 1325-1327.

*NLRB*, 738 F.2d 1404, 1410-1411 (4<sup>th</sup> Cir. 1984); but, the striker there completely blocked the non-striker's progress, not allowing him to pass at all, until a police officer intervened. By contrast, Conley could continue to drive the speed limit throughout the incident. He was not stopped. Moreover, the court in the *Newport News* case held that briefly impeding a non-striker's progress is not serious misconduct. *Id.* at 1410 (striker's misconduct is not serious when he briefly slowed cars "but did not attempt to stop cars"). This holding is consistent with Board case law that slowing the progress of a non-striker for a brief moment is not coercive. *See Dresser-Rand Co.*, 358 NLRB 854, 874-875 (2012) (striker's action in stepping in front of and leaning on van is not coercive where no injuries and delay was slight); *Service Employees Int'l Union Local 525 (General Maintenance Service Co.)*, 329 NLRB 638, 655 (1999) (blocking an employee from entering a building did not violate the Act when the "entire episode could not have taken more than few minutes"); *Hendricks-Miller Typographical Co.*, 240 NLRB 1082, 1098-1099 (1979) (where two employees and a foreman were delayed briefly in their attempts to enter the parking lot and one employee was shoved or jostled, the evidence falls short of establishing an intent to intimidate). Likewise, the position of Hudson's car briefly prevented Conley from driving as fast as he wanted to drive and was not coercive and does not establish an intent to intimidate.

**II. The Board's change in position from the appeal to the D.C. Circuit further shows that Board is relying on conjecture and speculation.**

Until the Board issued its decision on remand, the Board's position was that Hudson did not engage in misconduct warranting the loss of the protection of the Act. In particular, in its Brief to the D.C. Circuit, the Board recounted the same facts as set forth in the Board majority's decision -- that Conley was behind Hudson and Weaver for, at most, one mile and one minute; that there was no evidence that Hudson was driving slower than the speed limit; and that Hudson's actions simply prevented Conley from driving faster than the speed limit. (RSA at 05.)<sup>6</sup> Based on this evidence, the Board contended that "substantial evidence supports the Board's finding . . . that Hudson's actions were not violent or dangerous." (RSA at 05.) The Board also argued in the same Brief that Conley's failure to call the police undermined the credibility of any subsequent claim of egregious conduct. (RSA at 05-06.)

What has changed? The D.C. Circuit ordered the Board to reconsider the Conley incident, without stressing the absence of violence, and considering all of the relevant circumstances and the objective impact on a reasonable non-striker. But, the Board's argument to the D.C. Circuit cites to

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<sup>6</sup> A full copy of the Board's Brief to the D.C. Circuit is available on PACER.

the same facts as in the decision on remand. And, now the Board has concluded that Hudson's actions, based on those same facts, were designed to intimidate Conley. Likewise, the Board's Brief to this Court repeatedly claims that Hudson's actions were inherently dangerous and could have turned deadly, notwithstanding the arguments to the D.C. Circuit that Hudson's actions were not dangerous and that Conley did not call the police.

To make that head-spinning change in position, the Board failed to do what the D.C. Circuit instructed it to do - to consider all the circumstances. Instead, as the dissenting opinion notes, (SA 061), the Board majority swung too far the other way. It relies on conjecture and speculation, placing undue stress on the location of the occurrence and the "inherent dangers" of highway driving in place of opposing evidence, context, and common sense. It relies on what could have happened and the consequences of possible miscalculations instead of what did happen. It also relies on new evidence about highway death rates, not in the record. As explained in Petitioner's opening brief, in doing so the Board majority created in effect a *per se* rule that driving on the highway constitutes misconduct. Alternatively, in relying on conjecture and speculation, and failing to properly consider, the facts, context, and common sense, the Board's decision is not supported by substantial evidence. Either way, the Court should revoke the Board's order. Pat Hudson did not commit serious misconduct.

**III. The Board was on notice of the Union's argument that the Board cannot create a *per se* rule by focusing on one factor -- the alleged dangers of highway driving -- to the exclusion of other factors.**

The Board and Company make two arguments regarding the Union's contention that the Board impermissibly created a *per se* rule, causing a striker to lose the protection of the Act if she moves in front of a non-striker driver at highway speed. They both claim that the Union waived this argument by not filing a motion for reconsideration. They also argue that the Board did not create a *per se* rule. Both arguments fail.

First, the purpose of Section 10(e) is to put the Board on notice of an issue, so it can address the issue first. *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1478 (7<sup>th</sup> Cir. 1992). The Board had such notice. This case, since the ALJ considered Hudson's discharge, has been about the application of the Board's striker misconduct test. In particular, the D.C. Circuit scolded the Board for suggesting that one single factor - the absence of violence -- was dispositive. This is the argument that the Union now makes. Though involving a different factor, the Union contends that the Board stressed one factor -- the inherent dangers of highway driving -- over others. This is the problem of a *per se* rule, which is a generalized standard that excludes the relevancy of certain evidence. The Board cannot claim that it was not on notice of this issue when the D.C. Circuit spoke on this issue. The dissent

emphasizes this very point, saying the majority makes the same sort of error as it did before - not considering “all the circumstances.” (SA 061.)

Further, the Union put the Board on notice of the *per se* rule issue by urging the Board on remand to consider all the factors in this case. The Union wrote in its position statement to the Board that Hudson’s conduct, “when viewed in context,” did not seek to intimidate Conley, (RSA 10-11), and that “common sense and context” dictate that Hudson’s conduct was not coercive, (RSA 13). Accordingly, when the Board majority focused on the “inherent dangers” of highway driving, to the exclusion of other circumstances like common sense, the Union did not need to assert its dissatisfaction by a motion for reconsideration because the Board was already on notice of the Union’s argument and had the chance to rule on it . *See Roundy’s Inc.*, 674 F.3d 638, n.2 (7<sup>th</sup> Cir. 2011) (motion for reconsideration is not mandatory; procedures set forth in Rule 102.48 help ensure that the Board has adequate notice of objections); *see also HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016) (when issues are made evident in context in which they are raised, Section 10(e) is not a bar).

There are also extraordinary circumstances allowing the Union to raise this issue on appeal. Over six years have elapsed since Pat Hudson’s termination. Filing a motion for reconsideration could have led to further delay. Moreover, as noted, the issue of the Board’s application of the striker

misconduct test has been an important part of this case since the ALJ first considered Hudson's discharge. The parties have twice argued to the Board about the test and the D.C. Circuit has ruled on the Board's application of the test. The Union should not have to argue the issue to the Board a third time before filing an appeal. *Independent Elec. Contrs. of Houston, Inc. v. NLRB*, 720 F.3d 543, 550-552 (5<sup>th</sup> Cir. 2013) (Section 10(e) is not jurisdictional; court will consider arguments raised on appeal based on the extraordinary circumstances exception where eight years had elapsed between decisions and appellant had previously raised issue in general in arguments in case).<sup>7</sup>

Second, the claim that the Board majority did not create a *per se* rule is contradicted by the reasoning of the decision. While the Board did not use the phrase "*per se* rule," it created one in effect; and, even if just a factual *per se* rule about inferences to draw from the evidence, it is just as problematic. *NLRB v. A & T Mfg. Co.*, 738 F.2d 148, 151-152 (6<sup>th</sup> Cir. 1984) (the Board "in effect has established a *per se* rule" that, once an employer decides to

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<sup>7</sup> *NLRB v. KSM Indus., Inc.*, 682 F.3d 537 (7<sup>th</sup> Cir. 2012), is not to the contrary. In that case, the appellant raised a completely new issue - due process -- for the first time on appeal. By contrast, the parties here have already argued twice to the Board about application of the striker misconduct test. *But see NLRB v. Dominick's Finer Foods*, 28 F.3d 678, 686 (7<sup>th</sup> Cir. 1994) (extraordinary circumstances exist "only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time").

discharge an employee for an illegal reason, it is impossible to adopt an additional legitimate reason; “[t]his *per se* factual rule comports neither with reality nor with the Board's own precedent.”). Under the Board's view, the mere fact that a striker moves in front of a non-striker's vehicle at highway speed, preventing him from passing for no more than one minute, whether intentionally or not, causes the striker to lose the protection of the Act, because another driver may fear what the striker “might” do or the next maneuver “could” cause a collision. As explained in Petitioner's opening brief, this rule neither comports with reality nor complies with case law. And, contrary to the Board's Brief, the Union is not suggesting the Board should not have considered the dangers of highway driving at all. Rather, the Union urges that one driver moving in front of another driver, at the speed limit, is a common occurrence despite the dangers of highway driving. Such actions are not intimidating, but situations which drivers regularly handle with aplomb.

The Board argues that it referenced context and other circumstances in its decision. But, giving short shrift to such factors is not proper consideration, but rather minimizing them to the point of excluding them. Following the reasoning of the Board's decision, it is hard to imagine how a striker could not lose the protection of the Act for moving in front of a non-striker, for a brief moment, at the speed limit, while driving on a highway. If

circumstances such as the flow of traffic required the striker to switch lanes and put herself in front of a non-striker's car, or if the striker was simply inattentive and did not see the non-striker moving into the passing lane behind her, an employer could claim that the striker was seeking to intimidate the non-striker simply because driving can turn deadly.

The Board's Brief repeatedly argues that Hudson's case is different because she was driving at "high speed." (Board Brf. at pp. 26 & 28-29.) But, it is undisputed that she was driving approximately the speed limit. Since the important point for the Board is that Hudson created a danger because of her "high speed," then any driving at the speed limit on a highway can lose the protection of the Act. This is how the Board's decision creates in effect a generalized rule, a *per se* rule, about the inherent dangers of highway driving that minimizes other factors, to the point of excluding them, contrary to case law requiring the Board to carefully consider all the circumstances including duration, context, and common sense. It is also this reasoning that is impossible to square with the right to engage in ambulatory picketing and the D.C. Circuit's finding that Hudson was engaged in strike-related conduct when she was driving on the highway in front of Conley.

The Board cites *Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333 (5<sup>th</sup> Cir. 1977), in claiming that it is not required to wait until conduct causes or nearly causes an accident. But, the facts of that case were

far worse. There, strikers trailed a supervisor in a car for fourteen miles at night to his house and then down a lonely dead-end country road where they temporarily blocked his egress. Here, Hudson drove in front of a manager for a brief moment, for no more one mile, at the speed limit, during the day, while the manager was on his way to a job. The Board's failure to recognize such a difference, and that the actions in the *Associated Grocers* case when viewed objectively reasonably tend to intimidate, while Hudson's action do not, shows the extreme nature of the rule it has created.

**IV. The Board failed to properly consider all of the evidence and, as so, its findings are unsupported by substantial evidence.**

Even if the Board did not establish a *per se* rule, the Court should still reverse the Board's decision as unsupported by substantial evidence. This is not a close call involving two conflicting views. Rather, the Court cannot conscientiously find substantial evidence to support the decision.

The remaining arguments by the Board that the majority considered opposing evidence and context but reasonably discounted those factors are disingenuous. Referring to that evidence in a decision, but rejecting it in favor of speculation, is not real consideration and does not obey the requirement to base a decision on substantial evidence. The Court must "examine all of the evidence in context." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 544 F.3d at

848. The Court “is not empowered to rubber-stamp the Board’s order when, as here, review of the record shows that major portions of that order simply are not supported by substantial evidence.” *Atlas Metal Parts Co.*, 660 F.2d at 308.

The Board contends that it was entitled to discount opposing evidence because it considered that other vehicles on the road were traveling in the flow of traffic, the presence of third parties, and Conley’s role in limiting the incident’s duration. (Board Brf. at p. 31.) The Board also pinpoints the moment of coercion, stating the non-strikers, once blocked, had no practical way to avoid the strikers. (Board Brf. at n. 10.) But, these claims are not supported by record evidence and further are not made worse by the speed which Hudson was driving.

First, the flow of traffic and the presence of other vehicles did not exacerbate the situation. When Conley was first behind Hudson and Weaver, he did not testify to having anyone on his bumper. (SA 195, 199.) And when Conley tried to pass Hudson and Weaver after some other cars had passed them, (SA 199-200, 224), Conley stated that he was not following those cars closely, (SA 200).

Second, as the Board concedes, Hudson was driving within the legal speed limit. Other drivers and Conley may have been exceeding the speed limit, but Hudson should not also have to speed in order to maintain the

protection of the Act.<sup>8</sup> The Board's Brief speaks of "high-speed" maneuvers insinuating that Hudson was constantly moving in and out of traffic in a dangerous manner over a long period of time in order to toy with Conley. But, this does not comport with the evidence. Hudson passed Conley and then drove next to Weaver at approximately the speed limit. (SA 057.) Conley stated that he had to slow down, but admitted that he could have simply let off the accelerator. (SA 192.) A short while later, as Conley was preparing to pass, and Hudson switched back into the left lane in front of him, Conley testified that he did not need to slam his brakes. (SA 201.) He also admitted that Hudson could have thought the distance to move into the passing lane was safe, (SA 202), and that he was not close to having an accident, (SA 203). When Diggs, his passenger, was asked on cross-examination whether "there was any danger that [Conley] was going to hit [Hudson] at this point," Diggs answered "No." (SA 231-232.) As the Board's Brief notes, Conley had to apply his brakes at this instant. But, the record evidence shows Conley did that to get him to the speed that Hudson was driving, which was the speed limit, and to get behind Weaver again. (SA 232.) It was not to dodge an accident.

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<sup>8</sup> Around the location of the incident, the speed limit drops from 55 mph to 45 or 50 mph. (SA 007, 116.) It may well be that other drivers ignored this drop in speed limit or were accelerating in anticipation of the speed limit increasing further down the road.

The Board points to Conley's efforts to avoid the situation by turning off the road. Conley may have been aggravated by the situation, but his feelings are not dispositive.<sup>9</sup> Moreover, as Hudson and Weaver were going the speed limit, they could not have "blocked" Conley in any meaningful sense of the word. Conley could have continued to drive behind Hudson and Weaver at the speed limit. He could not drive as fast as he wanted or as fast as other cars, but he would not be in danger. In the real world, a car moving in front of you, whether intentionally or not, and having to drive at a speed slower than you want to drive, may be something that you do not like, or even want to avoid, but it happens almost on a daily basis and is not intimidating.<sup>10</sup>

The Board also argues that Hudson passing and then switching lanes in front of Conley had to be intentional. The Board ignores Hudson's testimony, which is uncontradicted, that she was following Weaver, did know where she was going, and wanted to stay with her. (SA 147, 157, 166-167.)

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<sup>9</sup> There is also doubt as to the legitimacy of his feelings. Conley did not call the police after the incident as non-strikers had been instructed to do in case of problems. (SA 92, 205, 217-218.)

<sup>10</sup> The Board misunderstands the Union's argument that Hudson's threats were "ambiguous" given that drivers are regularly stuck behind slower cars on the highway. The point is that the Board cannot ignore common sense. The Seventh Circuit has faulted the Board before for decisions "divorced from the real world." *6 West Ltd. Corp.*, 237 F.3d at 779.

This evidence belies any premeditated plan to get in front of Conley and then to block him. The ALJ credited Hudson's testimony. (SA 008.) It is not rational for the Board majority to disbelieve a witness that has been credited by a judge, who heard and observed the witnesses, and substitute its own view based on what it mistakenly believes must have happened.

**V. The Company's claims about other strike line events are irrelevant and, in fact, support the view that Hudson's actions were not calculated to intimidate.**

The Company continues to litigate the past unfair labor practice charges that it lost. The Company's Brief re-hashes claims about "raucous" strike line conditions and allegations of striker misconduct. (Company Brf. at pp. 2, 5-6, n. 16.) But, the Company was found to have disciplined two other strikers -- Mike Maxwell and Eric Williamson -- in violation of the Act. (SA 23-31.) Furthermore, the Board and D.C. Circuit found that Hudson and Weaver did not engage in any misconduct in two other incidents -- the Greider and Rankin incidents.<sup>11</sup> The Company overreacted to allegations made by non-strikers in those incidents (SA 078-082), accusing Hudson of trapping and harassing them, (SA 085), when the evidence demonstrated

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<sup>11</sup> The Company's Brief alleges that Hudson also obstructed traffic around the strike line. (Company Brf. at p. 6.) The evidence refutes this claim (for instance, Hudson testified that she was trying to get out of the way of cars (CSA 080-081)). In addition, the Company did not discipline Hudson for any of these alleged actions. The Company is engaged in post-hoc rationalizations to muster up some intent that Hudson did not act with.

that “Hudson’s car ended up in front of non-strikers by coincidence” and that Hudson was “driving slowly because of activity and congestion in the road and not to harass or annoy [non-strikers],” (SA 034). Notwithstanding the false accusations against Hudson in the other two incidents, the Company (and the Board) insist that Hudson acted with intentionality in the Conley incident. That Hudson is innocent in the other two incidents but then suddenly acted with the purpose to intimidate Conley defies belief and undercuts the Company’s (and the Board’s) assumptions about the Conley incident.

Many of the Company’s other arguments mirror those of the Board, which the Union’s responds to above. The Company also adds an argument that public policy supports the Board’s order. (Company’s Brf. at pp. 27-29.) But, just as important as safety on a highway is the right of strikers to engage in ambulatory picketing and to be protected from unlawful terminations. The Company’s policy arguments about the safety aspects of highway driving underscore how the Board majority has placed undue stress on one factor over consideration of all the evidence, so that actions that differ little if any from incidents that occur on highways every day result in a striker unfairly losing the protection of the Act.

## CONCLUSION

For the foregoing reasons, the Union respectfully requests the Court to set aside the Board's Supplemental Decision and Order and find that Pat Hudson did not engage in misconduct sufficiently severe to forfeit the protection of the NLRA and that the Company terminated her in violation of the Act.

/s/ Christopher N. Grant  
Christopher N. Grant  
Schuchat, Cook & Werner  
1221 Locust Street, 2<sup>nd</sup> Floor  
St. Louis, MO 63103-2364  
Tel: (314) 621-2626  
Fax: (314) 621-2378  
cng@schuchatew.com

*Counsel for Petitioner,  
Local 702, International  
Brotherhood of Electrical Workers*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Union certifies that its brief contains 6,122 words of proportionally spaced, 13-point typeface, using Microsoft Word.

/s/ Christopher N. Grant  
Christopher N. Grant  
Schuchat, Cook & Werner  
1221 Locust Street, 2<sup>nd</sup> Floor  
St. Louis, MO 63103-2364  
Tel: (314) 621-2626  
Fax: (314) 621-2378  
cng@schuchatcw.com

*Counsel for Petitioner,  
Local 702, International  
Brotherhood of Electrical Workers*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of April 2019, the foregoing was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, which will send notification on all parties.

/s/ Christopher N. Grant  
Christopher N. Grant

*Counsel for Petitioner,  
Local 702, International  
Brotherhood of Electrical Workers*

No. 18-3322

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**LOCAL 702, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS**

**Petitioner**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

and

**CONSOLIDATED COMMUNICATIONS, D/B/A ILLINOIS  
CONSOLIDATED TELEPHONE COMPANY**

**Intervening Respondent**

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**REPLY BRIEF SUPPLEMENTAL  
ATTACHED SHORT APPENDIX**

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Christopher N. Grant  
Schuchat, Cook & Werner  
1221 Locust Street, 2<sup>nd</sup> Floor  
St. Louis, MO 63103-2364  
Tel: (314) 621-2626  
Fax: (314) 621-2378  
cng@schuchatcw.com

*Counsel for Petitioner*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of April 2019 the foregoing was filed with the Clerk of the United Court of Appeals for the Seventh Circuit using the CM/ECF system, which will send notification on all parties.

/s/ Christopher N. Grant  
Christopher N. Grant

*Counsel for Petitioner,  
Local 702, International  
Brotherhood of Electrical Workers*

**Nos. 14-1135, 14-1140**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**CONSOLIDATED COMMUNICATIONS d/b/a  
ILLINOIS CONSOLIDATED TELEPHONE COMPANY**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
AFL-CIO, LOCAL 702**

**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF  
AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**JILL A. GRIFFIN**  
*Supervisory Attorney*

**JOEL A. HELLER**  
*Attorney*

*National Labor Relations Board*  
1099 14th Street NW  
Washington, DC 20570  
(202) 273-2949  
(202) 273-1042

**RICHARD F. GRIFFIN, JR.**  
*General Counsel*

**JENNIFER ABRUZZO**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*  
*National Labor Relations Board*

argument is beside the point. And the cases that Consolidated cites are again distinguishable. Unlike here, many of those cases involved picketers purposefully blocking ingress and egress and then attacking or damaging the blocked cars. *See, e.g., Stroehmann Bros. Co.*, 271 NLRB 578, 578 (1984) (striker blocked a truck from exiting, jumped on it, and pounded on the windows as other strikers beat the truck with two-by-fours and broke the windshield). And contrary to Consolidated's suggestion, temporarily blocking egress is not per se egregious misconduct. *See Detroit Newspaper Agency v. NLRB*, 171 F. App'x 352, 353 (D.C. Cir. 2006) (“[E]mployees’ participation in picket disrupting traffic [is] not ‘of itself particularly serious misconduct.’” (quoting *Va. Holding Corp.*, 293 NLRB 182 (1989))); *Ornamental Iron Work Co.*, 295 NLRB 473, 479 (1989) (“[A] momentary, otherwise noncoercive blockage will fall within that form of mischief classified as minor acts of misconduct . . . .”) (internal quotations omitted), *enforced*, 935 F.2d 270 (6th Cir. 1991) (Table).

**b. Hudson’s conduct related to Conley was strike related and did not cause her to lose the Act’s protection**

The Board’s finding that Hudson’s conduct related to Conley did not cause her to lose the protection of the Act is similarly supported by substantial evidence and is consistent with precedent. As an initial matter, and contrary to Consolidated’s claim (Br. 23-28), her conduct was “associated with the strike,” *Detroit Newspapers*, 342 NLRB at 228, even though it occurred away from a

picket line. The Board analyzes conduct by strikers away from the line in the same manner as conduct at the line. *See id.* at 265 (“[I]t is the alleged discriminatee’s status as a striking employee at the time of his discharge, not the location or nature of the incident for which he was discharged, that determines whether or not [the strike-misconduct standard] applies.”); *Consolidated Supply*, 192 NLRB at 988-89 (striker conduct on the road); *Gibraltar Sprocket Co.*, 241 NLRB 501, 501-02 (1979) (same). In *Detroit Newspapers*, for example, the Board analyzed as strike misconduct an incident that occurred away from the picket line after the strike had ended. 342 NLRB at 235.

Hudson was actively involved in the strike. She had just left a picket site when she saw the company truck that Conley was driving, and she followed the truck to determine if it was going to a commercial worksite where employees could picket. Such ambulatory picketing at remote jobsites is protected strike activity. *Int’l Bhd. of Teamsters Local 807*, 87 NLRB 502, 506-07 (1949). In addition, she proceeded to another picket site immediately after Conley exited Route 16. Consolidated makes much (Br. 24-27) of Hudson’s position in front of Conley for part of the time, but the relative location of the drivers is not dispositive as to whether the conduct was strike related. In *Consolidated Supply*, the Board applied a strike-misconduct analysis to strikers who drove in front of a non-striker. 192 NLRB at 989; *see also Int’l Paper Co.*, 309 NLRB 31, 36 (1992), *enforced*, 4 F.3d

982 (1st Cir. 1993) (Table); *PRC Recording Co.*, 280 NLRB 615, 615, 663-64 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987). Consolidated cites cases that involved strikers following non-strikers (Br. 25-27), but none of those cases *require* that particular line-up of cars for the driving strikers' conduct to be associated with the strike. Further, even when Hudson temporarily was in front of Conley, she still could see where he was going and could gauge the likelihood that it would be appropriate for ambulatory picketing. (JA 482.)

Further, as the Board recognized (JA 12), Consolidated “dealt with this incident . . . through the procedures that it had established to deal with strike misconduct.” *See Detroit Newspapers*, 342 NLRB at 235 (applying the strike-misconduct standard when the employer “handled the incident according to the procedures that it had set up for reporting, investigating, and taking action on incidents of alleged strike misconduct”). Conley filed a Huffmaster report, channeling the incident through one of the mechanisms that Consolidated put in place for handling alleged strike misconduct. (JA 59-62, 736.) In addition, at the December 13 meeting, Consolidated referred to Hudson’s behavior “during the strike” as the basis for her suspension pending investigation. (JA 52); *see Detroit Newspapers*, 342 NLRB at 255 (noting that “the Personnel Action Report generated in connection with [the striker’s] discharge states that the reason for his termination was ‘strike related activities’”). Consolidated’s treatment of the

Conley incident as strike misconduct thus supports the Board's finding that it was associated with the strike.

Next, the Board reasonably concluded that, even if Hudson engaged in misconduct related to Conley, that misconduct was not sufficiently egregious to cause her to lose the protection of the Act. (JA 9, 13.) Conley was behind Hudson and Weaver for, at most, one mile and one minute. There is no evidence that they were driving slower than the speed limit during that period. Hudson testified that she was going the speed limit, and both Conley and Diggs acknowledged that she could have been. (JA 530, 550, 597.) Thus, Hudson's actions simply prevented Conley from driving faster than the speed limit for approximately one mile.

Further, substantial evidence supports the Board's finding (JA 8-9) that Hudson's actions were not violent or dangerous. Conley did not remember even having to brake when Weaver and Hudson were first in front of him. (JA 549.) The Board's determination (JA 8) that Hudson did not "cut off" Conley when she returned to the left lane is likewise supported. Both Conley and Diggs testified that Conley did not have to slam on his brakes when he was behind Hudson and that there was no danger of hitting her or any other type of accident. (JA 555-57, 599-600.) According to Diggs, Hudson was at least one car-length ahead of them when she entered the left lane, because they had not yet begun to pass Weaver, who was between them and Hudson. (JA 598-99.) Moreover, Conley did not call the police

to report that he had witnessed dangerous driving, undermining the credibility of any subsequent claim of egregious or illegal conduct.<sup>7</sup>

The Board's finding is also consistent with precedent. *Gen. Indus. Employees Union, Local 42*, 951 F.2d at 1314. In *Consolidated Supply*, 192 NLRB at 989, the Board found that a striker who followed a non-striker's truck and then "got ahead of the truck and slowed down, forcing [the non-striker] also to drive slowly" and, another time, "followed [a different non-striker] . . . , cutting in once or twice" over the course of half a mile did not lose the Act's protection. Such "incidents[] of following the truck or blocking it momentarily, are the sort of trivial, rough incidents which are to be expected during a long, contested strike where an employer attempts to continue operating with nonstrikers." *Id.* Similarly, the strikers in *Gibraltar Sprocket*, 241 NLRB at 501, did not forfeit the protection of the Act by following and driving alongside a non-striker, who drove "at a high rate of speed" to escape them. *See also Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408, 413 (1975) (conduct of driving strikers not egregious when "it did not place [non-strikers] in any danger"), *enforcement denied on other grounds*, 542 F.2d 18 (6th Cir. 1976).

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<sup>7</sup> The Board explicitly declined to adopt the administrative law judge's statements that Conley was not credible because he was a manager or because he was angry, finding it "unnecessary to rely on the judge's speculation as to what might have motivated Troy Conley's testimony." (JA 1 n.2.) Consolidated's attack (Br. 35-36) on those statements is thus misplaced.

By contrast, the lawfully disciplined strikers in the cases cited by Consolidated (Br. 43) all engaged in significantly more extreme conduct than Hudson. Hudson did not, as in *International Paper*, 309 NLRB at 36, and *NLRB v. Teamsters Local 115*, 1995 WL 853551, at \*4 (3d Cir. Jan. 13, 1995), drive the wrong way on a highway directly at a non-striker's car. Nor did she stop her car in the middle of the road and block Conley or force him to travel in reverse, as did the strikers in *International Paper*, 309 NLRB at 36, and *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978). And unlike the strikers in *International Paper*, who weaved back and forth on both sides of the non-striker's car and attempted to force it off the road or into oncoming traffic, 309 NLRB at 36, and *Teamsters Local 812*, 304 NLRB 111, 117 (1991), who "almost caused an accident," Hudson did not place Conley at risk of a collision. (JA 556-57, 599-600.) Unlike those cases, what happened on Route 16 did not reach the high bar of serious strike misconduct that would "reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 NLRB at 1046.

Finally, Consolidated's contention that the Board "apparently required all three alleged incidents committed by Hudson to have occurred in order to uphold the termination" (Br. 44) mischaracterizes the Board's decision, which found that *none* of the alleged incidents justified Hudson's discharge. The Board thoroughly

analyzed Hudson's conduct related to Conley (JA 6-9) and found that it was insufficiently egregious for her to lose the protection of the Act. The Board independently considered her alleged misconduct related to Greider and Rankin and found that those incidents did not occur. Because none of the three allegations provided a lawful basis for discharging Hudson, a 39-year employee with no disciplinary record, the discharge was an unfair labor practice.<sup>8</sup>

**3. Williamson did not intentionally strike Redfern's mirror, and did not lose the Act's protection based on a single crude gesture**

Substantial evidence supports the Board's finding that the conduct related to Redfern for which Williamson was disciplined did not occur and that his misconduct related to Walters did not cause him to lose the protection of the Act. Like Maxwell and Hudson, Williamson was disciplined for "actions in violation of the Company handbook/workplace violence policy," and, like Maxwell and Hudson, he did not engage in "acts or threats of violence." (JA 31-32.)

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<sup>8</sup> Contrary to Consolidated's assertion (Br. 29-30), the Board articulated and applied the correct burden of proof as to whether Hudson's conduct was egregious. It explained that "the burden shifts to the General Counsel to show that the striker did not engage in the misconduct or that it was not serious enough" (JA 3, 13) and concluded that "the General Counsel met its burden" (JA 12). *Cf. Shamrock Foods*, 346 F.3d at 1135 (finding that "the ALJ properly assigned the burden" when "his opinion states both that the General Counsel has the burden . . . [and] has sustained his burden" (internal quotations omitted)). The Board's conclusion was based on factual findings, credibility determinations, and precedent, not, as Consolidated claims (Br. 29), on "resolving ambiguities against [Consolidated]."

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONSOLIDATED COMMUNICATIONS d/b/a )	
ILLINOIS CONSOLIDATED TELEPHONE )	
COMPANY, )	
)	
Respondent, )	Case 14-CA-094626 and
)	14-CA-101495
and )	
)	
LOCAL 702, INTERNATIONAL )	
BROTHERHOOD OF ELECTRICAL )	
WORKERS, )	
)	
Charging Party. )	

**CHARGING PARTY’S STATEMENT OF POSITION WITH RESPECT TO  
THE ISSUES RAISED BY THE D.C. CIRCUIT’S REMAND**

COMES NOW, Local 702, IBEW (“Local 702”), by and through counsel, and pursuant to Board’s March 10, 2017 letter submits the following as its statement of position with respect to the issues raised by the remand:

**I. BACKGROUND**

**A. Pat Hudson’s history at the Company and the Union’s strike.**

At the time of the events in question, Pat Hudson had worked for the Company for 39 years. (Tr. 761.) She had no disciplinary history with the Company. (Tr. 762.)

Hudson joined the Union’s strike against the Company. (Tr. 765.) She and her co-workers picketed various Company locations. (Tr. 765.)

Following the conclusion of the strike, the Company terminated Hudson for violation of its “handbook/workplace violence” and employee conduct rules. (G.C. Ex. 14.) Company representatives concluded that Hudson had engaged in “harassing, intimidating, threatening and reckless behavior” towards non-strikers with “extremely

anything dangerous or illegal.” (ALJ Dec. at p. 12, ll. 8-11.) The implied finding is that Hudson’s conduct was not dangerous or illegal.

The D.C. Circuit found that the Board misapplied the governing standard in strike misconduct cases – first in stressing the “absence of violence” and second in holding that “any ambiguity as to whether [Hudson’s misconduct] was serious enough to forfeit protection of the Act should be resolved against [Consolidated].” *Consolidated Communs*, 837 F.3d at 18-19. The D.C. Circuit held that the Board had to consider all of the relevant circumstances of the Conley incident. *Id.* The Court also held that the Board improperly shifted the burden of proof and that the General Counsel must prove that misconduct is shielded by the Act. *Id.*

## II. ARGUMENT

Applying the correct legal standard to the accepted facts in this case, the Board should find that Hudson was unlawfully terminated. Hudson did not engage in conduct during the Conley incident serious enough to forfeit the protection of the Act.<sup>1</sup>

### A. Hudson’s conduct is not the type that reasonably tends to intimidate employees in the exercise of rights protected under the Act.

Accepting the Court’s decision -- that the Board wrongly stressed the absence of violence -- the evidence does not show that Hudson’s conduct, under the circumstances existing, would reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Rather, the evidence shows Conley was only prevented from driving as fast as he wanted for about one minute and about one mile. This

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<sup>1</sup> There is no need for the Board to remand this case to the ALJ for further findings. The sole issue on remand is application of the governing standard in striker misconduct cases, which is a legal question, which the Board may decide on its own. This case was fully litigated below. The ALJ made all the necessary credibility findings and the Board may rule based on the existing record.

conduct, when viewed in context, does not make employees scared to work and does not seek to intimidate them because of their choice not to strike.

The question, according to the D.C. Circuit, is what is the “objective impact on a reasonable non-striker of misconduct committed on a high-speed public roadway with third-party vehicles present.” The Court’s decision cites two cases to guide the Board. Both use similar language. In *Oenita Knitting Mills*, the Fourth Circuit found that strikers engaged in serious misconduct “which was calculated to intimidate the non-strikers, and which was inherently dangerous.” *Oenita Knitting Mills v. NLRB*, 375 F.2d 385, 392 (4<sup>th</sup> Cir. 1967) (emphasis added). Similarly, in *International Paper Co.*, the Board held that a striker forfeited protection of the Act where he engaged in “hazardous driving designed . . . to intimidate replace employees and other of Respondent’s personnel.” *International Paper Co.*, 309 NLRB 31, 36 (1992) (emphasis added).

Here, the ALJ made specific findings supporting a conclusion that, under the circumstances existing, Hudson’s conduct was not calculated or designed to intimidate a non-striker and was not inherently dangerous. First, the ALJ credited Hudson’s testimony that she followed Conley to see if he was going to a commercial site. There was no plan to harass him. She was engaged in lawful activity related to ambulatory picketing. Second, the ALJ noted Conley’s concession that Hudson could have been driving the speed limit,<sup>2</sup> and found that Hudson never “cut off” Conley and credited Hudson’s testimony that she did not do so. In fact, the ALJ noted Conley’s testimony that he was not close to having an accident. (ALJ Dec. at p.10, ll. 34-25; Tr. 893.)<sup>3</sup>

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<sup>2</sup> Diggs also testified that Hudson could have been driving the speed limit. (Tr. 965.)

<sup>3</sup> Diggs also admitted that there was no danger of Conley hitting Hudson’s car. Diggs further stated that the reason Conley put on his breaks was to slow down and get

Third, the ALJ found no credible evidence that Conley was “stuck” behind Hudson and Weaver for “several miles.” The ALJ refused to credit Conley’s claim that he tried to pass Hudson twice. And, fourth, in noting that Conley and Diggs did not call the police, the ALJ implicitly found that Hudson was not “doing anything dangerous or illegal.”

The ALJ’s finding is that the position of Hudson’s car, in the left lane, “prevented Conley from passing . . . for a mile or less and not more than one minute.” The ALJ found that Hudson “did not block Conley in for any significant distance or period of time.” The term “block” has a specific meaning - an action designed to impede movement and to prevent a non-striker from working. The ALJ specifically concluded that Hudson did not block Conley in a manner that intimidated him in the exercise of his rights. Conley could continue to work.

Hudson’s conduct did not rise to the level of unlawful restraint or coercion. The circumstances do not show Hudson harassing Conley – i.e., weaving in and out of traffic, repeatedly hitting her brakes, or coming very close to Conley or other cars. The evidence supports the ALJ’s implied finding that Hudson did not create a dangerous situation. Conley was not cut off, was in control of his car, and slowed when Hudson was in front of him to move behind Weaver. (Tr. 967-986.) Conley did not feel threatened enough to report the incident to the police. In reality, the evidence shows Hudson’s car shifting in front of Conley, when she was at least a car length in front of his truck, and then slowing to a speed that could have been around the speed limit. (Tr. 966-967.) Conley even admitted that Hudson could have thought that shifting over, in front of him, was safe. (Tr. 892.)

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behind Weaver again, not to avoid Hudson’s car. (Tr. 967-968.)

Common sense and context dictates that Hudson's conduct was not coercive. Conley was in a situation that happens to people every day on the highway – driving in the fast lane when a car shifts in front of you at a slower speed than you and not knowing why the person in front of you is driving like that or whether they think it is safe. The event may be annoying. It may require you to slow down. But, this type of conduct does not reasonably tend to coerce people in the exercise of their right to continue to work. If it were otherwise, then a commonplace occurrence, which may not turn on any fault, could be used to keep a striker from returning to work. This cannot be the case.

The ALJ's conclusion that Hudson did not engage in misconduct, in preventing Conley from passing her by staying in the left lane for not more than one minute, is consistent with Board cases finding that strikers do not violate the Act when they briefly impede a non-striker's progress. For example, in *Service Employees Int'l Union Local 525 (General Maintenance Service Co.)*, 329 NLRB 638 (1999), the Board agreed that the union did not violate the Act by allegedly blocking an employee from crossing a picket line and entering a building, where "the entire episode could not have taken more than a few minutes" and even assuming the incident qualified as blocking, "it was momentary and noncoercive, amounting to an inconsequential act of misconduct." *Id.* at 638 & 655. The Board has long held that minor mix-ups incidental to lawful picketing activity do not rise to unlawful restraint and coercion. See *Hendricks-Miller Typographical Co.*, 240 NLRB 1082, 1098-1099 (1979) (where "two employees and a foreman were delayed briefly in their attempts to enter the parking lot; one employee was shoved or jostled; and a picket threw himself on the hood of the other employee's car. No damage was done. No one was injured. No threats were made. No employee

was prevented from working. . . . the evidence falls short of establishing an intent to intimidate or interfere with the employees' right to refrain from joining the pickets, or that the pickets' conduct tended to, or did, have such an effect").

The Company will likely cite testimony that Conley and Diggs believed Hudson's driving to be unsafe and Conley's feeling that he was trapped to explain why he turned off the highway. This testimony is contrary to the ALJ's findings and credibility resolutions, which have been accepted by the Court. This remand is not an opportunity to re-litigate the facts.

Moreover, the personal feelings of non-strikers are not controlling. The test is objective and whether the conduct was "designed" or "calculated" to intimidate replacement employees. If the test centered on subjective feeling, then the Section 7 rights of strikers would rise and fall on the personal fortitude of a particular non-striker. The Act is not so delicate. Tensions run high on both sides during a strike; and, the conduct – picketing and following company vehicles - lends itself to disputes and misunderstandings. *See Hotel Roanoke*, 293 NLRB 182, 207 (1989) ("long ago the Supreme Court noted that during strikes, employees sometimes engage in 'moments of animal exuberance'" (citing *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941))). For this reason, the Board should not deny a striker the protection of the Act where the evidence does not show an overall scheme to engage in strike misconduct, lest the denial of reinstatement curtails the right to the strike.

Company representatives have, from the beginning, mistakenly relied on feeling and misassumptions about Hudson (and Weaver). The Company has sought to characterize Hudson, a 39 year employee with no disciplinary history, as on a mission.

It viewed the various incidents – the Greider, Rankin, and Conley incidents – as arising from a deliberate plan to harass non-strikers. (G.C. Ex. 17.) But, just as the evidence failed to support the claim that Hudson engaged in misconduct in the Greider and Rankin incidents, and in fact showed that her position in relation to them was a coincidence (and the result of security guards), and that she was driving slowly and cautiously because of the activities around her, with the Company mistakenly assuming the worst, the evidence does not show that Hudson intended to engage in misconduct in the Conley incident. Hudson was lawfully following Conley, and then followed Weaver around Conley (in order to stay with Weaver), and then was in front of Conley for a short period of time. Hudson denied any effort to trap Conley. (Tr. 786, 851.) She did not have a pre-conceived scheme to block Conley (or Greider and Rankin) and she did not block Conley (or Greider or Rankin).<sup>4</sup> Accordingly, Hudson did not engage in any conduct that would tend to intimidate or coerce non-strikers.

**B. The General Counsel has carried its burden of proof that Hudson did not engage in misconduct serious enough to lose the protection of the Act.**

The D.C. Circuit also faulted the Board for stating that “any ambiguity as to whether [Hudson’s misconduct] was serious enough to forfeit protection of the Act should be resolved against Respondent.” The simple answer to this issue is there is not “any” ambiguity under the facts or the law.

The Union’s position is that Hudson did not engage in any misconduct. But, even if Hudson’s driving on Highway 16 constitutes a form of misconduct, the record

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<sup>4</sup> The Company may point to the hand motions between Hudson and Weaver as evidencing a plan to block Conley. That is a lot to draw from a few hand motions. Moreover, the ALJ did not find that Conley was blocked for a significant period of time or distance. Hand motions do not make a situation dangerous.

shows, and the GC has established, that it was not so serious to forfeit the Act's protection. As outlined above, Hudson only prevented Conley from passing for about one minute by staying in the lane in front of him. She did not swerve into, cut off, or drive so close to Conley as to place him, Diggs, or other persons in danger.

Multiple Board cases support the conclusion that Hudson did not engage in serious misconduct. In *Consolidated Supply Co.*, 192 NLRB 982, 989 (1971), the Board affirmed an ALJ finding that a striker was unlawfully denied reinstatement despite evidence that he followed a replacement worker to a job, attempted to get between the Company truck and a car driven by another non-striker, maybe squeezed a car onto the shoulder, and then drove ahead of the Company truck and slowed down forcing the Company truck to slow down and pull over. The ALJ noted that neither the squeezing nor the slowing down endangered anyone, and concluded that the incidents – the following of the truck and blocking it momentarily – were “the sort of trivial, rough incidents” which are to be expected during a strike. Similarly, in *Gibraltar Sprocket Co.*, 241 NLRB 501, 501-502 (1979), the Board reversed an ALJ finding that a driver engaged in serious misconduct when, in following a speeding company car, the driver pulled alongside and motioned to the replacement worker to pull over. The Board noted that the striker had not driven dangerously close to the replacement worker and had not attempted to force him off the road. See also *Altorfer Machinery Co.*, 332 NLRB 130, 144 (2000) (striker did not engage in misconduct where testimony was limited to general assertions that “the green truck stayed behind me most of the time” but the driver never drove so close to the non-striker as to be regarded as “tailgating”); *Laredo Coca Cola Bottling Co.*, 258 NLRB 491, 499 (1981) (no misconduct where striker did not attempt to

force non-striker off the road or drive recklessly to endanger others); *Otsego Ski Club-Hidden Valley*, 217 NLRB 408 (1975) (strikers who tailgated a supervisor on between 2 and 5 consecutive days did not engage in serious misconduct where the driving may have been annoying but did place passengers in danger).<sup>5</sup>

By contrast, the cases upholding the discharge of strikers involve misconduct more egregious than Hudson is accused of. For instance, in *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5<sup>th</sup> Cir. 1978), the striker slowed down in front of the non-striker and speed up and swerved across road whenever the non-striker tried to pass him. Then, the striker stopped and positioned his vehicle across the highway creating a roadblock for several minutes. In *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 392 (4<sup>th</sup> Cir. 1967), a non-striker testified that on several occasions her car was followed and on one occasion, strikers “repeatedly” drove their car in front of her car and would not let her pass and shouted obscene remarks and called her “scab.” And, in *International Paper Co.*, 309 NLRB 31, 36 (1992), the Board affirmed an ALJ finding that a striker harassed several replacements who were on the way home by “following their car dangerously close,” and by “driving and weaving his car alongside them on both left and right so closely as to almost bump their vehicle and thereby placing them in danger of being forced off the road or into oncoming traffic,” and by passing them and “driving at a speed designed to assure only a small separation between the two vehicles thus creating a danger of collision.” There was also testimony

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<sup>5</sup> Some of these driving cases pre-date the Board's decision in *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), but that does not put their outcomes in question. The Board in *Clear Pine Mouldings* rejected a per se rule that words alone can never warrant a denial of reinstatement. It did not change cases in which the Board considered whether nonverbal conduct may coerce or intimidate employees.

that the one of the strikers struck his middle finger at a non-striker before they started to follow them.

Here, the ALJ credited Hudson that she did not cut off Conley and the evidence showed that Conley was not close to having an accident. Hudson did not swerve across the road, she did not weave in and out of traffic, and she did not drive so close to Conley to almost cause an accident. In addition, the ALJ credited the lawful reason that Hudson gave for following Conley -- to see whether he was performing bargaining unit work -- and accepted her explanation for why she followed Weaver around Conley and noted that she could still see Conley in her rearview mirror. Hudson also did not yell at Conley or gesture at him, suggesting some design by her to intimidate him. Further, this was a one-time, brief incident. Unlike the strikers in the other cases, Hudson did not repeatedly follow Conley, did not stop her car in the road for several minutes, and was going around the speed limit.

The ALJ's line about ambiguity is best read as a reflection about Conley's credibility. But, accepting the Court's admonishment, this error does not preclude the Board from finding that Hudson's misconduct, if any, was not so serious to forfeit the protection of the Act. The facts and the law show that it was not serious enough.

### **III. CONCLUSION**

For the foregoing reasons, the Union requests the Board to find that Pat Hudson was discharged in violation of the Act, to order her reinstated and made whole per Board law, and to order Respondent to comply with any other remedy which the Board deems just and proper.