Consolidated Communications d/b/a Illinois Consolidated Telephone Company *and* Local 702, International Brotherhood of Electrical Workers, AFL-CIO. Cases 14–CA–094626 and 14–CA–101495

July 3, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On November 19, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief to the General Counsel's answering brief, a reply brief to the Charging Party's answering brief, and an answering brief to the Charging Party's cross-exceptions. The General Counsel filed an answering brief. The Charging Party filed cross-exceptions, a supporting brief, an answering brief to the Respondent's exceptions, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below, and to adopt the recommended Order as modified herein.[4]

AMENDED CONCLUSIONS OF LAW

Insert the following Conclusion of Law 3:

"3. Respondent violated Section 8(a)(5) and (1) by refusing to bargain collectively with the Union by unilaterally reassigning and eliminating the job duties of the unit position of Office Specialist-Facilities Department, formerly held by Brenda Weaver, without giving the Union sufficient notice and an opportunity to bargain about the change."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Consolidated Communications d/b/a Illinois Consolidated Telephone Company, Mattoon, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

"(b) Refusing to bargain collectively with Local 702, International Brotherhood of Electrical Workers, AFL–CIO, the exclusive collective-bargaining representative of the Respondent's unit employees, by unilaterally reassigning and eliminating the job duties of Office Specialist-Facilities Department without giving the Union sufficient notice and an opportunity to bargain about the change."

2. Insert the following for paragraph 2(f) and reletter the subsequent paragraphs.

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[1] We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the Respondent asserts that the judge's findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contention is without merit.

We find it unnecessary to pass on the Union's exception to the judge's failure to find that the Respondent lacked an honest belief that the disciplined employees engaged in serious misconduct because such a determination would not affect the outcome. See, e.g., *Augusta Bakery Corp*., 298 NLRB 58, 58 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992) (assuming, without deciding, that employer held an honest belief that employees engaged in strike misconduct, the Board nonetheless found their discharges unlawful because the General Counsel established that the misconduct did not occur).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by terminating employees Patricia Hudson and Brenda Weaver, we find it unnecessary to rely on the judge's speculation as to what might have motivated Troy Conley's testimony.

[3] We have modified the judge's conclusions of law to include our additional finding that the Respondent violated Sec. 8(a)(5) by reassigning and eliminating the job duties of Office Specialist-Facilities Department, formerly held by employee Weaver, without providing the Union sufficient notice and opportunity to bargain about the change. The judge found it unnecessary to rule on this 8(a)(5) allegation because he found that Weaver's termination was unlawful, and the Respondent conceded that it must return her to her prior or similar position if her termination was found to violate the Act. However, we find that the judge's make-whole order returning the position of Office Specialist in the Facilities Department to the status quo that existed at the time of Weaver's discharge does not fully remedy the Respondent's clear violation of Sec. 8(a)(5). The Respondent had a duty to notify and bargain with the Union before implementing its decision to reassign job duties and eliminate Weaver's position, as they are mandatory subjects of bargaining. See *Finch, Pruyn & Co.,* 349 NLRB 270, 277 (2007).

[4] We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

"(f) Before implementing any changes to the job duties of Office Specialist-Facilities Department, notify, and on request, bargain in good faith with Local 702, International Brotherhood of Electrical Workers, AFL–CIO."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 3, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, terminate, refuse to recall, or suspend you because of your union or concerted protected activities, including your participation in a legal strike.

WE WILL NOT refuse to bargain collectively with Local 702, International Brotherhood of Electrical Workers, AFL–CIO, the exclusive collective-bargaining representative of our unit employees, by unilaterally reassigning and eliminating the job duties of Office Specialist-Facilities Department without giving the Union sufficient notice and an opportunity to bargain about the change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Patricia Hudson and Brenda Weaver full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Patricia Hudson, Benda Weaver, Michael Maxwell, and Eric Williamson whole for any loss of earnings and other benefits resulting from their discharge or discipline, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Patricia Hudson, Brenda Weaver, Michael Maxwell, and Eric Williamson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Patricia Hudson and Brenda Weaver, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions of Michael Maxwell and Eric Williamson, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspension will not be used against them in any way.

WE WILL restore to the position Office Specialist in the Facilities Department those duties that were performed by Brenda Weaver prior to her discharge.

WE WILL, before implementing any changes to the job duties of Office Specialist-Facilities Department, notify, and on request, bargain in good faith with Local 702, International Brotherhood of Electrical Workers, AFL–CIO.

CONSOLIDATED COMMUNICATIONS D/B/A
ILLINOIS CONSOLIDATED TELEPHONE COMPANY

The Board's decision can be found at www.nlrb.gov/case/14-CA-094626 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Paula B. Givens, Esq., for the General Counsel.
David C. Lonergan, Esq., and *Robert T. Dumbacher, Esq. (Hutton Williams LLP),* of Dallas, Texas, and Atlanta, Georgia, for the Respondent.
Christopher N. Grant, Esq. (Schuchat, Cook & Werner), of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Mattoon, Illinois, from August 19–23 and on September 17, 2013. IBEW Local 702, the Charging Party Union, filed the charge in Case 14–CA–094626 on December 11, 2012, an amended charge on December 17, and the charge in Case 14–CA–101495 on March 28, 2013. The General Counsel issued a consolidated complaint on May 30, 2013.

The Charging Party Union went on strike on the evening of Thursday, December 6, 2012. The Union offered to return to work unconditionally on the evening of December 11. Most strikers returned to work on Thursday, December 13. On December 13, Respondent, Consolidated Communications (CCI), suspended four employees indefinitely for alleged misconduct related to the strike. On December 17, it terminated the employment of two of these unit employees, Office Specialists Brenda Weaver and Pat Hudson. It suspended the other two employees, janitor Michael Maxwell and switchman Eric Williamson for 2 days. The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) in imposing this discipline on all four employees.

Hudson had worked for Respondent for 39 years and had received no prior disciplinary action. Weaver had worked for Respondent for 13 years and had not received any prior discipline. Hudson and Weaver were terminated for alleged misconduct in three incidents on December 10, 2010. The first incident was allegedly harassing and intimidating nonunit employee Sarah Greider by trapping her in her car between their cars as she left Respondent's premises. The second was harassing and intimidating nonunit employee Troy Conley in his work van with their vehicles on the highway while he drove to a work assignment. The third incident was allegedly intimidating and harassing nonunit employee Kurt Rankin as he left Respondent's premises. The reasons given for termination in documentation presented to Hudson and Weaver were workplace violence and/or violation of company conduct and work rules policies.

Maxwell was suspended for impeding, harassing, and intimidating nonunit employee Leon Flood as he left Respondent's Taylorsville, Illinois garage on December 8. Eric Williamson was suspended for 2 days for allegedly striking nonunit employee Dawn Redfern's car mirror as she left Respondent's premises on the evening of December 10 and making an obscene gesture directed at nonunit employee Tara Walters on the morning of December 11.

In March 2013, Respondent eliminated the job previously held by Brenda Weaver and distributed her duties to employees in other positions. The General Counsel alleges that Respondent violated Section 8(a)(3), (4), (5), and (1) in doing so.

The legal principles generally applicable to these disciplinary measures are that the Board must first consider whether Respondent proved that it had an honest belief that the disciplined employee engaged in strike misconduct of a serious nature. If Respondent meets this burden, the Board will find the discipline lawful unless the General Counsel shows that the striker did not engage in the alleged misconduct or that the conduct was not serious enough for the employee to forfeit the protection of the Act. *Clear Pine Mouldings,* 268 NLRB 1044, 1046 (1984); *Universal Truss, Inc.,* 348 NLRB 733 (2006), and cases cited therein.[1]

The case law does not require much for Respondent to meet its burden. Thus, in this case the critical issues are whether the disciplined employees actually engaged in the alleged conduct, whether their actions in fact rise to the level of misconduct and whether their misconduct was serious enough to warrant discharge in the cases of Hudson and Weaver or a 2-day suspension in the cases of Maxwell and Williamson.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed

[1] Respondent argues that these principles do not apply to Hudson and Weaver's conduct on the highway in the Conley incident. That argument will be addressed herein.

[2] The statement at Tr. 120, LL> 3–5, is mistakenly attributed to this judge.

by the General Counsel, Respondent, and the Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a telecommunications company. It operates in several States. This case involves its facilities in Mattoon, Illinois, which is located approximately halfway between St. Louis and Indianapolis. Respondent derives gross revenues in excess of $250,000. It purchases and receives goods valued in excess of $50,000 at its Illinois facilities directly from places outside of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union and Respondent had a collective-bargaining agreement that expired on November 15, 2012, covering approximately 175 unit employees.[3] Contract negotiations continued after the expiration of the agreement. On December 5, a company proposal was rejected by a vote of bargaining unit employees, apparently due to dissatisfaction with the proposal relating to health insurance issues. The next day, which was the 22d bargaining session, Respondent informed the Union that there would be no further bargaining sessions unless the Union made concessions on pension issues. That evening bargaining unit members voted to strike.

Friday, December 7, was the first full day of the strike. The Union picketed 10 locations consistently. However, only three of these locations have any relevance to this case. The Taylorsville garage, the Rutledge Building in Mattoon, and the corporate headquarters in Mattoon.[4]

The Michael Maxwell Incident at the Taylorsville Garage on Saturday, December 8

On Saturday morning, December 8, about six employees picketed Respondent's garage in Taylorsville, Illinois. The pickets walked back and forth across the entrance to the driveway of the garage parking lot. Sometime in the midmorning, Leon Flood, one of Respondent's IT systems analysts, left the garage building in a company van. Frank Fetchak, a network engineer called in from Pennsylvania to work during the strike, rode in the passenger seat.

As the van approached the street, it stopped briefly in front of the pickets, who were moving back and forth. Then Flood inched forward and his van hit Michael Maxwell, one of the pickets.[5] Maxwell was moving when the van hit him. He fell forward and braced himself by putting his forearm on the hood. As Maxwell tried to regain his balance he was pushed towards the driver's side of the van. He gave Flood the finger and yelled, "Fuck You!" at Flood.

Leon Flood apparently completed a CCI incident report on December 8 and then spoke with Gary Patrem, CCI senior director of central services, on December 10. The immediate supervisors of three of the disciplined employees in this case, Maxwell, Hudson, and Weaver report to Patrem. Patrem instructed Flood to fill out a Huffmaster[6] incident report, which he did on December 11, 2012.

On December 12, Anna Bright, a human resources manager, informed Union Representative Brad Beisner via email that the Company would be issuing disciplinary actions to Maxwell, Pat Hudson, and Brenda Weaver on December 13. Beisner immediately emailed Bright requesting all pertinent information used by CCI in investigating the three employees including, but not limited to, written statements, video, pictures, identity of eye witnesses, and police reports (GC Exh. 11).

On December 13, Patrem met with Maxwell and union representatives. Patrem provided the Union with none of the documentation it requested. He informed Maxwell that he had been accused of impeding, threatening, intimidating, and harassing CCI employees. Specifically, Patrem told Maxwell he struck a company vehicle, proceeded to the front of the vehicle and leaned on the hood for an extended period of time, and then proceed to the driver's window and verbally harassed him (GC Exh. 23). Maxwell told Patrem that Flood drove aggressively and had hit him.

CCI suspended Maxwell indefinitely. On December 16, CCI informed Maxwell that he had been suspended for 2 days and that he should report to work on Monday, December 17. On December 17, Patrem gave Maxwell a document stating that he had been suspended for violating Respondent's policy regarding workplace violence (GC Exhs. 12(a)–(c). At the December 17 meeting, Patrem told Maxwell that he had threatened and intimidated Leon Flood and that he had impeded the progress of Flood's vehicle. Respondent suspended Maxwell for violating its workplace violence policy.

Maxwell did not threaten anyone or commit any acts of violence on December 8, 2012. He briefly impeded Flood's progress in leaving the Taylorsville garage. However, he did so no more than the other five picketers and was not suspended for failing to move out of the way when Flood approached the picket line. Since Respondent suspended Maxwell for offenses he did not commit, I find it violated Section 8(a)(3) and (1) as alleged.

Sunday, December 9, 2012

On Sunday, December 9, Respondent held a meeting for individuals who would be working during the strike with representatives from the Huffmaster Security Company. The meet-

[3] Respondent and the Union reached agreement on a new contract on March 28, 2013, after the events pertaining to this case.

[4] The Rutledge Building is more formally known as the Mattoon service center or general warehouse. Respondent has two offices on route 16, Charleston Avenue, which are about 1-1/2 a miles from Rutledge. The corporate office is at Rt. 16 and 17th Street. The central office (CO) is at Rt. 16 and 15th St. (the 1501 building).

[5] Flood, who continues to work for Respondent, did not testify in this proceeding. The incident report completed by Flood on December 11, 2012, is hearsay evidence and to the extent, if any, that it contradicts Maxwell, I do not credit it. Frank Fetchak did not contradict Maxwell's testimony in any material way; thus, I credit Maxwell's account of the incident.

[6] Huffmaster is the security company hired by Respondent during the strike.

ing was held at the Rutledge Building located at 2116 S. 17th Street in Mattoon, in which Respondent set up a command center for the strike. Attendance was not taken but many management employees and supervisors from Mattoon, company workers called in from other locations, and nonunit employees were at the meeting, including some of the 27 customer service representatives who work in Mattoon.

A Huffmaster representative instructed the attendees as to how to conduct themselves during the strike. The representative told the attendees that Huffmaster guards would be stationed at the picket lines and they should follow the guards' instructions in crossing the picket lines. He also told employees to approach picket lines slowly and to keep their windows rolled up. Respondent distributed Huffmaster's written instructions (GC Exh. 21), to the individuals who attended the meeting; others received the instructions via email.

The Huffmaster written instructions advised these workers to report any damage to their vehicles to the police and to file a police report. The instructions advised employees who are followed when leaving company property to drive directly to the nearest police facility or return to company property if it is closer (GC 21, p. CCI-0020). These instructions also advised CCI personnel to watch for cars that may be following them when parking at a remote location. Huffmaster told employees who thought they were being followed to drive the nearest police department or drive back to the parking location. The instruction also stated:

> If you encounter any problems during the course of your normal day, contact the local police department and Huffmaster security personnel for instructions. File a report. Id., at CCI page 0019.

In none of the instances in which the striking employees were disciplined, did anyone contact the Mattoon Police Department or file a report with the police.

Monday, December 10, 2010

On Monday, December 10, numerous pickets began arriving at the Rutledge site prior to 7:30 a.m. They gathered near the north exit to the parking lot leading to South 17th Street, which runs north to south. The south entrance to the lot was barricaded, so that traffic had to enter and exit the Rutledge parking lot at the north exit. The pickets were making a lot of noise by yelling and with air horns (deafening noise according to Police Chief Branson) and some were shaking picket signs at people entering the parking lot to report for work. Between 7:30 and 8:30 a.m., Jeffrey Branson, the chief of the Mattoon Police Department, arrived at Rutledge. He found that picketers were congregating in the roadway on 17th Street. He informed the picketers and/or union officials that they could not do that; the picketers complied and got out of the roadway. He also cautioned a picketer who Respondent alleges was Eric Williamson, about getting too close to cars.[7]

Several Huffmaster security guards were stationed at the north entrance/exit and were controlling traffic into and out of the Rutledge parking lot and were stopping traffic on 17th Street to allow cars to exit the CCI lot . Branson went into the Rutledge Building and met with Sam Jurka and Michael Croy, two senior managers based in Mattoon. Croy called the Mattoon Police frequently on Monday (Tr. 420). Croy is the direct supervisor of Pat Hudson and Brenda Weaver, the two employees whose discharges are at issue in this case. There were a number of people inside the building who were very upset. Branson observed several female employees who were crying. Croy was so angry that Branson tried to avoid talking to him; preferring to speak with Jurka instead. Croy complained to Branson about the speed at which cars were driving down 17th Street. Respondent conducted a meeting for workers at the Rutledge Building at about 8:30 a.m. because many were very upset and angry about the behavior of the pickets (Tr. 999–1000).

Pat Hudson/Brenda Weaver and the Sarah Greider incident

Nonstriker Sarah Greider is an employee communications coordinator. She normally works at a corporate building at 121 South 17th Street. However, during the strike she reported to the Rutledge Building. She attended the Huffmaster briefing on December 9.

At about 10 a.m. on December 10, Greider left the Rutledge Building to go to an 11 a.m. personal appointment in Champaign, Illinois. As she exited the building, Greider called her husband and put her phone on speaker (Tr. 1087). She rolled down her car windows a bit and told her husband that she wanted him to listen to the pickets. As Greider approached 17th Street, a Huffmaster guard briefly stopped her car to allow Pat Hudson to pass by the exit in her car (Tr. 1067). Then the guard put his hand up and stopped Brenda Weaver, who was behind Hudson, to allow Greider to exit the parking lot (Exh. R-1; Tr. 309–311, 1067–1068, 1075–1077). Then the guard allowed Weaver to proceed. For a distance of 135 to 165 feet, Greider's car was between Hudson's and Weaver's.

There is absolutely no basis for questioning the testimony of Hudson and Weaver that they were on their way from Rutledge to the corporate building to picket at the latter site. There is absolutely no basis for concluding that Greider's car ended up between Hudson and Weaver's vehicles other than by coinci-

[7] Chief Branson also testified about talking to a picket, who was a "hothead." It is not at all clear to me that this was Williamson. The chief's description of this individual at Tr. 558 does not comport with the picture of Williamson in Exh. R-10. The chief described the hothead as almost bald. In the photo of Williamson in Exh. R-10, from which Branson identified Williamson, he is wearing a San Francisco 49ers cap and a hood. It was cold on December 10, about 30 degrees Fahrenheit, and there is no evidence that Williamson took his cap and hood off at any time that day. My recollection of Williamson, who testified, is that he is not almost bald. Indeed, I have skepticism as to the accuracy of Chief Branson's testimony at Tr. 1113, identifying Williamson as the person he spoke to on December 10.

I find that there is no probative value to the testimony of police officer Eric Finley. Finley did not see the incident for which Williamson was disciplined. Williamson testified that he spoke to Officer Scott Robison after the incident. Officer Robison did not testify. Moreover, the individual Finley identified as the person to whom he spoke, in Exhibit R-10 (a) and (b), Tr. 1104, is not Mr. Williamson.

dence and the traffic control actions of the Huffmaster guard. There is no basis for concluding that Hudson and Weaver intentionally blocked Greider's car in.[8]

As soon as Greider noticed Weaver behind her, she became angry and said to her husband, "You are not going to believe what these bitches are doing to me" (Tr. 1079). Pickets were next to Greider's car on both sides of 17th Street and further north (Tr. 1081). 17th Street, which is 22-feet wide and whose pavement is unmarked, had been reduced to one lane. Greider could not pass Hudson safely on 17th. Hudson was driving very slowly. There is no evidence that she did so to harass or annoy Greider. Greider put on her turn signal and turned left into the first entrance to the parking lot of the Pilson Automobile dealership, 135 to 165 feet from where she turned onto 17th Street. Greider was afraid Weaver was going to follow her, but noticed that Weaver did not turn into Pilson's.

After cutting through the Pilson's lot, Greider turned right onto Land Lake Boulevard (a/k/a Rt. 121/45) and drove to Charleston Avenue (Rt. 16), the main road between Mattoon and Charleston, Illinois. On Charleston Avenue she turned right towards the East and Interstate 57, which is a north-south highway. Greider turned north on I-57 and proceeded to Champaign.

On Charleston Avenue, Hudson and Weaver passed Greider driving east before Greider reached the Interstate. Although she testified that she did not know whether Hudson and Weaver saw her, Greider told her husband that the two unit employees had followed her or caught up to her.

Greider called Respondent's command center and reported that Hudson and Weaver blocked her in, as soon as she got off the phone with her husband (Tr. 1059). Greider's coworker, Jonell Rich, also a nonstriker, texted Greider that she saw what Hudson did to her. When Greider returned from her appointment in Champaign, between 12:30 and 1 p.m., Gary Patrem asked her to fill out an incident report (GC Exh. 16). She described what happened to a group of people in the command center including Patrem and Ryan Whitlock, Respondent's director of employee and labor relations on December 10 (Tr. 428–429,1063).[9] The next day, Greider also spoke to Respondent's chief executive officer, Robert Curry. Greider told Curry that she was blocked in for a minute, for about 100 feet, and may have told Curry that she thought she was being followed (Tr. 1063–1064, 1077). She did not tell Curry that Hudson was starting and stopping in front of her.

Greider filled out a Huffmaster incident form on December 12 (GC Exh. 12). She listed Jonell Rich as a witness to this incident. Nobody from management talked to Rich about the Greider incident until February 14, 2013.[10] In her report, Greider stated that, "Pat refused to move or moved very slowly." She did not allege that Hudson was stopping and starting as she did at Transcript 1057. There is no evidence that Greider made such a claim at the command center in front of Gary Patrem and Ryan Whitlock either (Tr. 283–287, 428–429). I find there is no credible evidence that Hudson was stop/starting while in front of Greider (see Exh. R-1 (a video), Tr. 309–316). To the contrary, I find that the testimony of Greider and Jonell Rich to this effect is solely the result on their animus towards Hudson, arising at least in part from the strike.

Finally, as Respondent notes in footnote 25 at page 47 of its brief, the conduct with which Hudson and Weaver are accused is, according to the Mattoon police chief, a police matter. Despite this, neither Respondent nor Greider reported the incident to the Mattoon police, even though Mike Croy called the city police several times the same morning (Tr. 420).

I also rely on the fact that Bernice Dasenbrock, a witness called by Respondent, testified that she saw Greider "in the road, and she turned left and went into Pilson's parking lot" (Tr. 1202). Her testimony as to how much of the incident she observed is somewhat ambiguous (Tr. 1184), but she certainly did not notice Hudson or Weaver harassing Greider, or anything else unusual.

In summary, I find that the record establishes there was absolutely no misconduct by either Hudson or Weaver with regard to Greider. In so finding, I also rely in part of the fact that Greider did not file a police report as she had been instructed prior to this incident.

Hudson/Weaver and the Troy Conley Incident

Prior to December 10, the Union advised the strikers that they could picket at commercial sites at which replacement employees were performing work. This was described to the employees as "ambulatory picketing." After Sarah Greider turned into the Pilson's Auto lot, Hudson, with Weaver behind her, drove by a park where they believed some company work trucks were parked. Not seeing any company vehicles they drove down 14th Street with the intention of picketing the central office, the 1501 building, at Charleston Avenue and 15th Street. This is about 1-1/2 miles from Rutledge. Hudson then noticed a company van driving east on Charleston Avenue. She decided to turn right and follow the van rather than turn left towards Respondent's central office. Weaver followed Hudson in her automobile.

Hudson testified that she intended to follow the truck to determine whether it was going to a commercial worksite. If so, she testified that she intended to inform union officials so that they could decide whether or not to picket at that site.

Once Hudson and Weaver turned east onto Charleston Avenue, after another 1-1/2 miles they passed Greider. Shortly thereafter they passed under I-57 and caught up to the van which was driven by Troy Conley, Respondent's director of network engineering, near a BP gas station. Conley and his

[8] Greider conceded that Hudson may have been waiting for Weaver, Tr. 1056–1057.

[9] At Tr. 1062–1063, Greider indicated that she had discussions with Whitlock when she returned to the Rutledge Building on December 10. At Tr. 1073–1074, she testified that Whitlock was in the area when she was describing the incident to others. This comports with Whitlock's testimony.

[10] I give no weight to Rich's testimony regarding the Greider incident. In addition to the fact that she was first interviewed 2 months after the incident, her testimony is inconsistent on material matters. It is also clear that with respect to the Greider incident and the Rankin incident, Rich's recollection is either inaccurate or incomplete. As to inconsistency, at Tr. 1120, Rich testified that she did not know if Hudson came to a complete stop in front of Greider, Tr. 1120, and then changed her testimony at Tr. 1135–1137.

passenger, Larry Diggs, a manager from Texas, were on their way to repair a commercial wireless tower in Charleston. The parties stipulated that it is about 3 miles from the BP station to the Road 1200 E, where Conley testified he turned south off of Route 16.

Since this is the only incident by which Respondent could possibly justify the discharge of Hudson and Weaver, it is important to analyze the testimony of the four individuals with firsthand knowledge, particularly where it conflicts. While I recognize that the testimony of Hudson and Weaver is self-serving and thus should be approached with some degree of caution, the same is also true with regard to Troy Conley, and to some extent Larry Diggs.

Respondent asserts that the fact that neither Hudson nor Weaver made any statements in their defense at the suspension and termination meetings in December should be weighed against them in making credibility determinations.[11] Despite the fact that Respondent provided little in the way of specifics at the suspension meetings, I question whether it was wise for Hudson and Weaver to remain silent. However, their silence has very little relevance in resolving credibility. The credibility issues can be resolved largely on the basis of the testimony of Respondent's witnesses, their consistency with the contemporaneous reports they filed and the consistency of Respondent's witnesses with each other.

Conley is a manager who understands that his employer terminated Hudson and Weaver and that his employer would very much like them to remain terminated. Moreover, it is quite clear that many of Respondent's managers were very angry about the strike and the conduct of the strikers at Rutledge. Conley is likely to have been angry about the fact that Hudson and Weaver were following him.

Witness Testimony and Credibility Resolutions

Conley testified that he first noticed Weaver, who had passed Hudson, three quarters to a half-mile east of the BP station which is located just east of I-57, at the intersection of Rt. 16 and Miller Road. However, he also testified that it was a half a mile or less than that (Tr. 874–875). This is about 1-1/2 miles from where Hudson and Weaver began to follow him.

Where Conley first saw Weaver is significant in determining how far and for how long he was "trapped" behind Hudson, or alternatively, merely prevented from passing Hudson and Weaver (assuming this was the case). Both Hudson and Weaver testified that they passed Conley near the Sarah Bush Hospital or even further east on Charleston Avenue.[12] If Conley did not see Weaver for three quarters or a half a mile and then a minute passed before he saw Hudson, as he testified at Transcript 877–878, this would indicate that Hudson and Weaver's testimony is more accurate than Conley's. I credit Hudson and Weaver that Hudson passed Conley in the area of the Sarah Bush Hospital or further east.

Conley testified that Weaver honked at him, signaled, and then got into the right lane in front of him. He noticed a picket sign in her car. According to Conley, Weaver did not loiter next to him and got into the right lane at a safe distance in front of him.[13] At this time, Conley did not see Hudson (Tr. 877). This leads me to conclude that he could have passed Weaver at this point, if he chose to do so. Charleston Avenue at this point is a divided highway with two lanes in each direction (see Jt. Exhs. 9A & B).

Conley testified that less than 1 minute later, Hudson passed him (Tr. 877–878), motioned to Weaver and that both Hudson and Weaver slowed down. Conley stated he moved into the left lane but that Hudson stayed in the left lane and thus he could not pass. Then he went back into the right lane behind Weaver. Conley does not know the speed at which any of the cars were travelling. He conceded that Weaver and Hudson could have been travelling at the speed limit. The speed limit on Rt. 16 east of I-57 is 55 mph in most places, but is 45 or 50 mph near a stop light at Loxa Road (which might explain why Hudson and Weaver slowed down) (Tr. 322). Conley is not sure that he ever put on his brakes at this point (Tr. 882). At one point on Rt. 16, Conley was driving at 69 miles per hour; 14 mph over the speed limit. Thus, it is possible that Hudson was driving at the speed limit or over it when Conley slowed down behind her, if he did so (Tr. 583–584).

On cross-examination, Conley was somewhat tentative about where Hudson first pulled parallel to Weaver. In response to the General Counsel, Conley testified that he did not think this occurred as far east as the Sarah Bush Hospital, which would be about 1-1/2 miles at most from where he testified that he turned south (Tr. 881–883, 888). However, if Conley was boxed in west of Sarah Bush, he could have avoided travelling behind Hudson and Weaver by turning north into the road leading to Sarah Bush, south into the Airport Road or a little further east on Loxa Road, either north or south (Tr. 905–912).

At some point, according to Conley, three cars came up behind Hudson in the left lane and she moved into the right lane to allow them to pass her. Conley testified that he signaled left, moved back into the left lane, but could not pass because Hudson moved back into the left lane. She denies this (Tr. 780–786). Hudson testified that she passed Conley and Weaver and then moved into the right lane in front of Weaver. Further, she testified that she did not move back into the left lane and that Conley did not try to pass her before he turned south. I credit

[11] Weaver denied noticing Grieder's car in front of her at her termination meeting on December 17. I credit that testimony because there was no reason for her to notice which car the Huffmaster guard let out of the parking lot in front of her.

[12] Hudson's and Weaver's testimony differs from Conley's regarding the location where they passed Conley. They both testified, as did Conley, that they caught up to Conley's truck near the BP station at Miller Road. Both testified that Weaver passed Conley near Sarah Bush Hospital or further east, Tr. 613, 780. The airport entrance and Sarah Bush are located fairly close to one another about 11/2 miles east of the BP station; one half mile west of Loxa Road (County Road 1100 E) and 1-1/2 miles west of County Road 1200 E. The airport entrance is on the right as one drives east; Sarah Bush is on the left.

[13] When testifying, Conley apparently abandoned his contention that Weaver "cut in front" of him as he wrote in his Huffmaster statement. Alternatively, when he used the word "cut" in that statement he meant nothing more than Weaver and Hudson changed lanes in front of him, GC Exh. 16; Tr. 877.

Conley to the extent that at some point he was in the left lane on Route 16 behind Hudson.

Conley testified he applied his brakes when getting behind Hudson in the left lane, but did not slam them on. He does not recall whether or not Hudson signaled before moving back into the left lane (Tr. 892). Conley did not believe Hudson nearly caused an accident when she moved back into the left lane.

Conley's passenger, Lawrence Diggs, testified that when Hudson pulled back into the left lane, Conley had not begun to try to pass Weaver (Tr. 966–967). This corroborates the testimony of Hudson and Weaver that Hudson never "cut off" Conley. I credit Hudson that she did not do so.

Conley testified that he got back into the right lane prior to Loxa Rd. (County Road 1100) and turned right (south) on Road 1200 E.[14] He did not see Hudson or Weaver after that.

Conley does not know how long he was in the left lane behind Hudson (Tr. 888). Similarly, Lawrence Diggs did not offer any testimony as to how long or for what distance Conley was behind Hudson in the left lane or was prevented from passing. Diggs also did not corroborate (or refute) Conley's testimony that Conley had to drive an extra 4.97 miles to reach the jobsite. However, if, as Conley testified, he got back into the right lane prior to Loxa Road, Conley could have turned right or left (north or south) on Loxa rather than continue on Rt. 16 for another mile to County Road 1200 E, as he testified.

Conley completed a Huffmaster report, Exh. 16. Unlike the other Huffmaster reports in this record, Conley's is undated. Conley testified that he "believes" he was directed to fill out this report on December 11.[15] In that report, he states:

> Traveling eastbound on Hwy 16 between Mattoon and Charleston car # 1 (Plate Weave 9) approached in passing lane honking horn (pick sign on passenger side seat) and cut in front of company truck and slowed speed. Another car approached (Driver Pat Hudson) and paralled [sic] the first car, both slowing. I proceeded to pass with other traffic and (Pat Hudson) car # 2 cut back in front of me slowing down creating a blockade to the front. After several miles, I turned south on county road and rerouted to Charleston.[16]

In this account, Conley did not specify on which county road he turned south. Similarly, there is nothing in his statement about driving 4.97 miles out of the way to get to the cell tower. I find that Hudson prevented Conley from passing him by staying in the left lane, for a mile or less and not more than 1 minute. If Conley had been blocked in for any significant period of time, Lawrence Diggs would remember this. The fact that he does not leads me to credit Hudson and Weaver that they did not block Conley in for any significant distance or period of time.

A major reason I credit Hudson and Weaver over Conley is the fact that Conley did not bother to report this incident to the police as he had been instructed. Conley testified that he called Sam Jurka after the incident on the telephone (Tr. 871–872). Thus, Conley could have called the police or had Diggs call the police if Hudson and/or Weaver were doing anything dangerous or illegal. In making credibility resolutions regarding this incident, it is very significant that Conley did not contact the police. Jurka did not testify and there is no evidence as to what Conley told Jurka. Jurka apparently did not take any notes. It is also significant that Jurka did not call the police. The fact that he did not do so is notable because he was working the morning of December 10 with Mike Croy, who called the police on numerous occasions. If Conley related to Jurka that Hudson and Weaver were endangering him and/others on Highway 16; one would think Jurka or Conley would call the Mattoon police since they had Hudson and Weaver's license plate numbers (GC 16).

Conley also testified that he spoke to Gary Patrem twice about the incident twice prior to Hudson and Weaver's discharge (Tr. 894–895). Patrem testified that he never discussed the incident with Conley or Diggs (Tr. 317–318). This raises some doubt as to the recollections and/or credibility of one or the other, or both. If Conley did discuss the incident with Patrem, there is no evidence as to what was said.

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[14] I take judicial notice of Google Maps, which were introduced and relied upon by Respondent, Tr. 868; R. Exh. 6. Google Maps, which are much clearer than the one introduced as R. Exh. 6 show that Loxa Road is also County Road 1100. They also show that Old State Rd. intersects with County Road 1100 south of Rt. 16 and that one can drive back to Rt. 16 and towards Charleston by going south on Loxa and then heading to the northeast on Old State Road.

Google Maps also show that one can turn left at County Road 1050 E that leads to Sarah Bush Hospital and then turn right on Dewitt Avenue (County Road 800 N) to get to Loxa Road north of Rt. 16. A driver would then have to turn south on Loxa to return to Rt. 16 or drive further south to pick up Old State Road to Charleston.

There is also an airport road on the south side of Rt. 16, which would allow a driver to essentially pass a bottleneck on Rt. 16 at some points and come out further east on Rt. 16. Thus, there was no need for Conley to remain boxed in by Hudson and Weaver if Hudson got into the left lane much west of Sarah Bush.

Weaver testified as Conley did, that he turned south on County Road 1200, Tr. 659–662; Hudson testified Conley turned at Loxa, Tr. 789. Respondent's GPS records might show which is correct, Tr. 384. Regardless, I find there is no credible evidence that Conley was stuck behind Hudson and Weaver for several miles.

[15] I have doubts as to when Conley filled out his Huffmaster report. Conley "believes" he did so on December 11, Tr. 894. Patrem "believes:" he directed Conley to fill out the report, Tr. 329, but also testified that he did not interview, or talk to Conley directly, Tr. 305–306, 317–319. Patrem is also unaware of any other manager speaking to Conley, Tr. 330.

Conley testified that he believes that Jurka, who did not testify, told him to fill out the report on December 10, Tr. 895. Conley's incident report was presented to Hudson, Weaver, and the Union at the termination meetings on December 17.

[16] In this account, Conley did not contend that Weaver and Hudson drove parallel to each other "for some time" as asserted in Respondent's brief at p. 30, or by Conley in response to a leading question at Tr. 865–866. He also did not assert that he tried to pass Hudson twice as he did at Tr. 866. Diggs testified to only one attempt by Conley to pass Hudson, Tr. 957, 964–968. I do not credit Conley's testimony that he tried to pass Hudson twice.

Lawrence Diggs also had no recollection of how long it was before Hudson pulled in front of Weaver in the right lane. I do not credit Conley's testimony regarding the period of time that Hudson and Weaver were parallel to each other.

Conley and HR Director Whitlock had a discussion about this incident apparently prior to Hudson and Weaver being discharged (Tr. 900–903, 430–438). Whitlock's account, which appears to be inaccurate in at least so far as Larry Diggs' presence is concerned, contains nothing about how long or how far the incident lasted, which road Conley turned off onto and the route Conley took to get to the worksite. There is no written record of any communication between Whitlock and Conley. Nobody apparently advised Conley to contact the police per the Huffmaster instructions.

Lawrence Diggs' Testimony

Lawrence Diggs, a manager from Texas, was Conley's passenger. Diggs returned to Texas on Friday, December 14. He testified that he spoke to nobody in management about the incident between December 10, 2012, and late July or August 2013 (Tr. 959–960, 968–969). This contradicts Ryan Whitlock's testimony at Transcript 428. Diggs never saw Conley's incident report, which lists him as a witness, nor was he present if Conley spoke to Gary Patrem and Ryan Whitlock in December. The fact that nobody from management interviewed Diggs or took a statement from him undercuts Respondent's contentions as to how serious it considered the alleged misconduct of Hudson and Weaver.

Diggs did not testify about the most disputed facts regarding this incident, which are where on Rt. 16 Conley was prevented from passing, how long he was prevented from passing and where he turned south to get off of Rt. 16. I find this very significant in making a credibility resolution between Conley on the one hand and Weaver and Hudson on the other. If something very usual happened, such as Weaver and Hudson driving for 1-1/2 miles in a manner that Conley could not pass them, I would think that Diggs, a witness favorably disposed to Respondent would remember it. Thus, I conclude that this did not happen.

There is also probative value to Diggs' testimony in that he did not recall seeing Weaver's brakes lights when she pulled into the right lane in front of Conley and his concession that Weaver and Hudson may have been driving at the speed limit.

In summary, this record establishes that Weaver engaged in absolutely no misconduct with regard to Conley. Assuming there was misconduct, it was, insubstantial: honking, passing Conley, and switching into the right lane in front of him. Similarly, misconduct by Hudson, if any, provides no justification for Hudson's discharge. Neither Hudson nor Weaver committed an act of violence, nor has Respondent demonstrated that either violated any company policy regarding employee conduct.

Hudson/Weaver and the Kurt Rankin Incident

After Hudson and Weaver lost sight of Conley they returned to the corporate building. Weaver parked and got into the back seat of Hudson's car. Another employee got into the front passenger seat. Hudson then drove south on 17th Street past the Rutledge Building waving and greeting the pickets at that site. She then turned around and headed north.

As Hudson drove north, at about 11:36 a.m., Kurt Rankin, Respondent's director of network operations, was approaching the north exit of the Rutledge parking lot in his vehicle. He had just left a meeting at Rutledge and was on his way to 1501 Charleston, where he normally works.

Huffmaster guards were controlling traffic in and out of the lot and on 17th Street near the exit. A Huffmaster guard held Rankin up while Hudson passed the exit. Then Rankin turned right behind Hudson, who was driving very slowly. There were pickets on both sides of 17th Street with barely enough room for two cars abreast. There were also people on the roadway on 17th Street. A four-wheel drive vehicle with picketers in the back approached Hudson from the north and stopped beside Rankin's vehicle as he drove north.

There is no evidence that Rankin could not have turned into the Pilson's lot and cut through to Landlake Boulevard as Greider had done about an hour previous to this incident. Instead he drove past two entrances to the lot and then sped past Hudson on her left on 17th Street.

On December 10, Rankin returned to the Rutledge Building and requested a Huffmaster incident report. He filled it out, and then reviewed it with Phillip Donahue of Huffmaster on December 12. He did not talk to anyone in management about the incident.

On the cover of the incident report (GC Exh. 16), Rankin listed two suspects, Hudson and Weaver. The latter was mentioned because he saw Weaver in the back seat of Hudson's vehicle. Contrary to Respondent's assertion in discharging Weaver, it is 100-percent certain that she was not in a vehicle behind Rankin.[17] Rankin's description of the incident in his Huffmaster report, which is the only evidence relied upon by Respondent in terminating both employees in part for this event is as follows:

> When pulling out of company parking lot a vehicle pulled in front of my vehicle and a vehicle was behind me blocking me on a one lane path unable to pull forward or backwards. The vehicle proceeded to move very very slow and at some times stopped when strikers continued to yell, scream and whistle. I was unable to pass the vehicle in order to get out of the compromising situation. I felt totally threatened, vulnerable and trapped. It was only when there were no vehicles on the side of the roadway that I was able to pass the vehicle.

At trial, Rankin added some details not contained in his statement. He testified that strikers signaled to Pat Hudson to get in front of him, a contention for which there is no evidence other than his testimony. I find this to be untrue. It is clear that Hudson was in front of Rankin only because the Huffmaster guard prevented him from turning onto 17th Street in front of her.

[17] Quite surprising for witnesses who wish to be credited, both Gary Patrem and Ryan Whitlock testified that they still believe that Weaver was in an automobile behind Rankin, Tr. 238-239, 444.

None of Respondent's other witnesses to this incident saw any vehicle behind Rankin. Respondent's witness, Tara Walters, testified that she did not see Hudson stop/start as alleged by Rankin, Tr. 1032; Exh. R-1, the Huffmaster video, doesn't show this either although it cuts off while Rankin was still behind Hudson on 17th Street, Tr. 242, 252, 277.

Rankin testified that Hudson moved to the left of the road to block him from passing. This is also an allegation not contained in his statement, which I do not credit as a result. On the other hand, Rankin's testimony that he passed Hudson's vehicle only when there were no cars on the side of the street supports her testimony that she was driving very slowly because of the parked cars and people in the street; not to harass Rankin.

The record establishes that neither Hudson nor Weaver committed any act of workplace violence regarding Rankin, nor did they violate any CCI policy regarding employee conduct. In so finding, I rely in part of the fact that no police reports were filed for their conduct, such as stop/starting in front of vehicles, which is clearly illegal.

Respondent's Other Witnesses to the Rankin Incident

Tara Walters, Jonell Rich, and Bernice Dasenbrock testified that they observed this incident from the second floor of the Rutledge Building (Tr. 1028, 1122–1122, 1178). Walters did not see Hudson swerve (Tr. 1049). Assuming Hudson's car moved laterally there is no basis for concluding she did so to harass Rankin. It is just as likely that she did so to avoid hitting cars, people or in reaction to the truck coming towards her from the north. Neither Walters nor Jonell Rich saw anything that prevented Rankin from turning into the Pilson's lot, as Greider did an hour earlier to avoid travelling behind Hudson (Tr. 1035, 1137–1138).

However, neither Walters, nor Rich, nor Dasenbrock are particularly reliable witnesses as to what transpired. Not one of them remembered the truck or car passing Hudson and Rankin going south. Rankin, Weaver, and Hudson all testified that this occurred while Rankin was behind Hudson or trying to pass (Tr. 466–467, 622, 790). Dasenbrock's testimony that Hudson stopped and blocked Rankin at the exit to the parking lot (Tr. 1186–1189) is clearly inaccurate. The video evidence (Exh. R-1), clearly shows this did not occur. Dasenbrock and Rich's testimony regarding the Rankin incident is inconsistent in several material respects.

Moreover, Rich was not interviewed about it by anyone until February 14, 2013, and then only about the Greider incident (Tr. 1144). In fact, there is no credible evidence as to when anyone discussed the Rankin incident with any one of the three women. This raises doubt in my mind as to what they actually remember or observed about the Rankin incident. Gary Patrem's testimony is that he discussed the Greider incident with Rich, Walters, and Dasenbrock; there is no evidence as to when anybody from management first discussed the Rankin incident with them (Tr. 351–353, 441–442).

Rankin did not identify any witnesses to his encounter with Hudson on his Huffmaster report, whereas Greider identified Rich. Rankin also did not orally identify Walters, Rich, or Dasenbrock as witnesses to the incident (Tr. 457–458). In the termination meeting for Weaver on December 17, Gary Patrem discussed Rich as a witness to the Greider incident, not the Rankin incident (GC Exh. 23). His testimony indicates that he only relied on Rankin's Huffmaster report in factoring in the Rankin incident in determining that Hudson and Weaver had engaged in misconduct regarding Rankin (Tr. 353). Ryan Whitlock's testimony also indicates that Respondent's information about the Rankin incident as of December 17, was limited to Rankin's Huffmaster report and Huffmaster's video recording of part of the incident (Tr. 442).

Dasenbrock's testimony at Transcript 1200–1201, that she spoke to Patrem about the Rankin incident in the presence of Tara Walters on December 10 is not corroborated by any other of Respondent's witnesses. I do not credit this testimony. The Charging Party's brief at page 23 is incorrect in stating that Tara Walters testified that she spoke to Gary Patrem about the Rankin incident. To the contrary, Walters testified that she spoke about it, "just with the girls in my pod" (Tr. 1028).

In its January 4, 2013 response to the Union's information request of December 17, Respondent did not identify any witnesses to any of the incidents other than those identified in the Huffmaster reports (Exhs. U-1 and 2).

Gary Patrem told the Union at the suspension or termination meetings that Rich, Walters, and Dasenbrock were witnesses to the Greider incident, and apparently did not mention that they witnessed the Rankin incident (Tr.. 288–289). However, Walters testified that she did not see the Greider incident, and Dasenbrock testified she only saw part of it and never spoke to Patrem about it (Tr. 1028, 1184, 1203).

It is not uncommon for witness to testify about events that occurred months previously. However, Walters, Rich, and Dasenbrock were not participants in the Rankin incident, which lasted for a very brief period and it did not affect them personally. Many of the customer service representatives were very upset about the conduct of the strikers. Rich was certainly one of those, give her assumptions about Pat Hudson's motives while driving in front of Greider and Rankin. By the time of anyone talked to Walters about the Rankin incident, she certainly was upset about her encounter with Eric Williamson on December 11.

Incidents for which Eric Williamson was Suspended for 2 Days

Contact with Dawn Redfern's Car Mirror

Eric Williamson is a switchman who had been working for CCI for 12 years prior to December 2012. Respondent had not disciplined him prior to December 13, 2012. During the strike, Williamson picketed every day for 12 hours 6:30 a.m. to 6:30 p.m., except Sunday, December 9, when he was on the picket line for about 7 hours. On Friday, he picketed at the corporate headquarters, but on subsequent days he was picketing at the Rutledge Building.

On the evening of December 10, workers at the Rutledge Building were advised to leave the parking lot in a caravan. Customer Service Representative Dawn Redfern was fifth in line when the caravan started to pull out of the parking lot at about 5 p.m. Picketers were standing very close to the cars as they exited the lot.

As Redfern turned right onto 17th Street, she heard a loud smack. Redfern stopped, turned on the interior light, and rolled down the window. She noticed that the mirror on the passenger side of her car had folded in.

She addressed a picket, later identified as Eric Williamson, and said that he had hit her car. Williamson responded that Redfern had hit him. It is not clear whether Williamson moved

closer to the car as Redfern turned, or whether Redfern turned more sharply than other cars. In any event, there is no evidence that Williamson intentionally struck the mirror. Redfern never told anyone that she thought that Williamson struck her mirror intentionally. In fact, she testified that Williamson could have come in contact with her mirror accidently.

A Huffmaster guard advised Redfern to continue driving. She called her supervisor and a coworker about the incident and they agreed to meet at a CITGO gas station. At the gas station, Redfern checked her car for damage and saw none. When she arrived at her house, Redfern's husband folded the mirror back into place.

Redfern's supervisor advised her to call management at the Rutledge Building. She did so and spoke to Sam Jurka, who advised her to report the incident to the police. Redfern did not do so. On December 11, Redfern met Gary Patrem, who drove her to work. They discussed the mirror incident. Redfern told Patrem that there was no damage to her car.

Obscene Gesture

On Tuesday, December 11, Tara Walters, another customer service representative, arrived at work at about 7:20 a.m. She looked towards a group of picketers and saw Eric Williamson grab his crotch.[18] Williamson was facing her but far enough away that Walters could not tell if he made eye contact with her (Tr. 1038).

Walters did not report the incident to management. She did mention it to coworkers on Tuesday. On Wednesday, December 12, Walters' supervisor, Mary Beth White, asked Walters if she wished to fill out an incident report. Walters answered affirmatively. She filled out a Huffmaster report in which she stated, "Eric Williamson, a picketer, grabbed his crotch towards me." Walters also filled out a CCI report stating that Williamson turned and grabbed his crotch (GC Exh. 13).

Walters' testimony at trial was somewhat inconsistent as whether Williamson was intentionally making an obscene gesture directed towards her.

At Transcript 1024, Walters testified that Williamson "grabbed himself, lifted up as a mean, hateful gesture." She testified further that she thought so because "it was the demeanor. It was a big handful of crotch, and the way he lifted it up. He wasn't shifting it to the side."

However, on redirect by Respondent's counsel, Walters backed off from her testimony on direct:

> Q. You understand all the questions about looked at, looked towards, looked in the direction?
>
> A. Yes.
>
> Q. Do you understand, do you see a distinction between the three?
>
> A. No, because I can say we did not make eye contact.
>
> Q. Okay.
>
> A. I know that for sure. He was looking in my direction. I was the only one out there, so I would say he was looking at me, but he could have been looking past me.
>
> Q. Okay.
>
> Q. BY JUDGE AMCHAN: Are you sure that the gesture was directed at you?
>
> A. I cannot be positive, but I was the only one in my area where he was looking at. [Tr. 1048–1049].

Nevertheless, since Williamson testified that he addressed the epithet "scab" at Walters, I find that he grabbed his crotch as a hostile gesture directed at her.

On December 18, Respondent informed Williamson that he was receiving a 2-day suspension for workplace violence and sexual harassment.

Alleged 8(a)(5) violation: unilaterally combining the Position of Office Specialist in the Fleet Department (Hudson's position) with the Position of Office Specialist in the Facilities Department (Weaver's Position)[19]

In January or February 2013, Respondent decided to fill Pat Hudson's job as office specialist in the fleet department, but not Weaver's job in the facilities department. A unit employee, Heather Winkleblack, was awarded the job in the fleet department. The Union was not notified until February 26 that Respondent was not filling the position of office specialist in the facilities department. Respondent assigned some of the duties formerly performed by Weaver to Winkleblack. Respondent did not provide the Union with advance notice or an opportunity to bargain about its decision not to fill Weaver's position, which reduced the number of bargaining unit members by one. The collective-bargaining agreement that expired in November 2012 did not require Respondent to replace a terminated employee.

On March 1, the Union demanded in writing a return to the status quo and bargaining over the change (Jt. Exh. 2). On April 18, 2013, Respondent advised the Union that it was transferring some of Weaver's former duties outside the bargaining unit on June 19.

Respondent concedes at page 64 of its brief that it must return Brenda Weaver to her prior or similar position if her termination is found to violate the Act. In light of the fact that I do find that her termination violated the Act, I find it unnecessary to rule on whether Respondent otherwise violated the Act in not filling her position and transferring her duties to other employees.

Legal Analysis

Upon unconditional offers to return to work, former economic strikers are entitled to reinstatement to their former or substantially equivalent positions. One exception to this rule is that an employer may refuse to reinstate a former striker if the employer has a good-faith belief that the former striker engaged in strike misconduct that may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights, including their right to refrain from striking or from supporting

[18] Williamson denies doing so. He testified that he yelled scab when Walters parked and that is all, Tr. 712-716. Williamson and Walters were casual acquaintances outside of work. I find that Walters did not make this incident up and she saw Williamson move his hand to his crotch.

[19] This is also alleged as an 8(a)(3) and (4) violation.

the strikers, *Clear Pine Mouldings,* 268 NLRB 1044 (1984), affd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

Initially, the General Counsel must show that employee was a striker and that the employer took action against the employee for conduct related to the strike, *Avery Heights,* 343 NLRB 1301, 1302 (2004). The burden has been met with regard to the all the allegations in this case. While there is no issue in this regard concerning Maxwell and Williamson, there may be with regard to Hudson and Weaver. However, I credit their testimony that they followed Troy Conley in order to determine whether he was going to perform bargaining unit work at a commercial site, so that the Union could decide whether to picket that worksite.

While it is peculiar that Hudson and Weaver would get ahead of Conley if they were following him to a worksite, they were keeping track of him in their rear view mirrors. I conclude that their conduct was strike related and protected, *Teamsters Local 807 (Schultz Refrigerated Service),* 87 NLRB 502 (1949).

Respondent argues that the conduct of Hudson and Weaver was not strike related and is outside of the Board's purview. However, the fact that Respondent did not contact the police but rather dealt with this incident only through the procedures that it had established to deal with strike misconduct (filing a report with Huffmaster) belies this assertion. Finally, I would note that the Board has analyzed alleged driver conduct away from the picket line no differently than alleged misconduct at the picket line in a number of cases, including *Consolidated Supply Co.,* 192 NLRB 982, 988–989 (1971); *Otsego Ski-Club,* 217 NLRB 408 (1975); *Gibraltar Sprocket Co.,* 241 NLRB 501, 502 (1979);[20] and *Federal Prescription Service,* 203 NLRB 975, 993 (1973), which are discussed in more detail below.

Once the General Counsel has shown that an employee or employees have been disciplined for strike-related conduct, the burden shifts to the employer to demonstrate that it had a honest belief that that the employee engaged in misconduct. As noted in *Avery Heights,* supra at 1303, Board precedent establishes "a relatively low threshold" for the employer on this issue. Basically, any information linking the misconduct to the accused employee will satisfy the employer's burden. It need not even interview that employee. It is also not clear whether the employer must show that it had an honest belief that the misconduct was serious enough to warrant the discipline imposed. I need not spend a lot of time on this issue because with regard the all the instances in this case I find that the misconduct either did not occur, or was not sufficiently egregious to warrant the discipline imposed.

However, there are serious issues as to whether Respondent had an honest belief that Weaver engaged in any misconduct. It did not even interview Rankin, who would have told management that Weaver was a passenger in the car in front of him; not the driver of any car which might have been behind him. Had it examined its own video evidence, it would have determined that Weaver was behind Greider because the Huffmaster guard stopped Weaver before Greider exited the parking lot. Had it interviewed Conley and Diggs, management would have known that Weaver did nothing more than pass Conley and pull into the right lane.

With regard to Williamson and the mirror incident, Respondent could easily have determined by interviewing Dawn Redfern that she had no reason to believe that Williamson contacted her car mirror intentionally.

With regard to Maxwell, had Respondent bothered to talk to its employee Frank Fetchak, it would have determined that there was no reason to conclude that Mike Maxwell intentionally struck Leon Flood's van and no reason to believe that Maxwell threatened Flood.

Finally, one can question whether Respondent had a good-faith belief that the conduct of Hudson and Weaver warranted discipline in inhibiting the travel of Greider and Rankin for a distance of a couple of hundred feet. There is no evidence of harassment in the Huffmaster videos, or in the Huffmaster statements of Greider and Rankin, which is all Respondent relied upon in disciplining the two women for these incidents.

Assuming that Respondent met its burden of showing an honest good-faith belief as to all these instances of misconduct, I find that the General Counsel met its burden of proving that the misconduct either did not occur or was insufficiently egregious to forfeit the protections of the Act, to wit:

Mike Maxwell did not intentionally strike Leon Flood's vehicle and did not threaten or intimidate Leon Flood. Flood inched forward and struck Maxwell. While Maxwell impeded Flood's exit from the Taylorsville parking lot for a very short period of time, he did not engage in the conduct for which he was suspended.

Brenda Weaver engaged in no misconduct at all. She was behind Greider only because the Huffmaster guard held her up to allow Greider to exit the Rutledge parking lot. Weaver's only involvement in the Rankin incident was sitting in the back seat of Hudson's car, which was in front of Rankin. Her involvement in the Conley incident was following him on Route 16, Charleston Boulevard, passing him and moving into the right lane in front of him. There is no credible evidence that she did anything threatening or dangerous. While Conley may have been intimidated by the fact that strikers were following him to his worksite, they had a protected right to do so. The Board has held, in circumstances far more egregious than the instant matter, that simply following a nonstriker, in the absence of violence, is insufficient to deprive a striker of the protections of the Act, *Gibraltar Sprocket Co.,* 241 NLRB 501, 502 (1979).

In *Gibraltar Sprocket,* the striker followed a nonstriker from the employer's plant, pulled alongside the nonstriker's car and motioned to him to pull over. The nonstriking employee called the police who came and talked to him. When he left the police officer, the nonstrikers followed him again. On the way back to the employer's facility, the striker threw an empty beer can in the direction of the car of the employer's vice president, which missed. The Board found that the striker's misconduct was not sufficiently serious to warrant his termination and the employer's refusal to reinstate him. The Board noted that the record did not indicate that the striker drove dangerously close to the

[20] Cited in the Union's brief as *Advanced Pattern & Machine Corp.*

nonstriker or attempted to force him off the road. It also emphasized the lack of violent action on the part of the striker.

A similar case is *Otsego Ski-Club,* 217 NLRB 408, 409 fn. 4, 410, 413 (1975). Strikers in that case followed a supervisor's car on 2 days, honking the horn. There was a dispute as to how close they came to the supervisor's car, but they never drove alongside it or forced it off the road. Like Hudson's conduct, the strikers' conduct may have been annoying, but the Board found it was insufficiently aggravated to warrant their discharge for misconduct. Indeed, Member Fanning wrote a concurring opinion in part to emphasize this point.

In *Federal Prescription Service,* 203 NLRB 975, 993 (1973), the Board at page 976 footnote 4, agreed with the judge that two employees, who followed a nonstriker away from the strike line and to her home, did not engage in conduct that rendered them unfit for further employment.

In *Consolidated Supply Co.,* 192 NLRB 982, 988–989 (1971), the Board concluded that following an employer's truck or blocking it momentarily did not forfeit the protection of the Act, where as in the instant case, the striker did not endanger nonstriking employees.

Pat Hudson engaged in no misconduct with regard to Greider or Rankin. If she engaged in misconduct with regard to Conley, by preventing him from passing her, even if this was for 1-1/2 minutes and for 1-1/2 miles, this conduct was not egregious enough to warrant her termination, particularly in light of the fact that she was a 39-year employee with no prior disciplinary record.

Moreover, Respondent terminated Hudson for three incidents; not solely the Conley incident. With regard to the Greider and Rankin incidents, I find there was absolutely no misconduct by Hudson. Even assuming some degree of misconduct by Hudson in the Conley incident, any ambiguity as to whether it was serious enough to forfeit the protection of the Act should be resolved against Respondent.

Williamson engaged in no misconduct by coming into contact with Dawn Redfern's mirror. He did engage in misconduct by grabbing his crotch and making an obscene gesture directed at Tara Walters.

Once the Employer has established a good-faith belief of striker misconduct, 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 to deny the discriminatee the protection of the Act, *Clear Pine Mouldings,* supra. I also conclude that the General Counsel may prove that although misconduct occurred, it was not serious enough to warrant the level of discipline imposed.

The instances in which the Board has found that strikers have forfeited the protection of the Act in almost all cases involve violent acts or threats of violent acts, which may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. In *Clear Pine Mouldings,* supra, strikers carried clubs, tire irons, baseball bats, and ax handles. One striker in fact swung a club at a nonstriker. In *Detroit Newspapers,* 340 NLRB 1019, 1028, 1030 (2003), the employer was found to have legally discharged one employee for vandalizing its property and another for taking part in an assault.

On the other hand, the Board has found employee misconduct not sufficiently egregious to forfeit the protection of the Act by hitting a foreman's car with cardboard picket signs in a brief incident not resulting in damage, *Medite of New Mexico, Inc.,* 314 NLRB 1145–1147 (1994).

There is no case that supports a discharge for the type of conduct engaged in by the discriminatees in this case. Even Williamson's gesture does not justify his suspension. The Board's decisions in *Briar Crest Nursing Home,* 333 NLRB 935, 937–938 (2001); *Callope Designs,* 297 NLRB 510, 521 (1989); *Universal Truss,* 348 NLRB 733, 780–781 (2006); and *General Chemical Corp.,* 290 NLRB 76, 83 (1988), lead to the conclusion that for a striking employee to forfeit the protection of the Act, an implied threat of bodily harm must accompany a vulgar or obscene gesture. Williamson's gesture certainly does not meet this standard.[21]

Williamson is an outside switchman and Walters is an office-bound customer service representative. While his gesture was totally uncalled for, and very unpleasant, it is difficult to see how it could have been perceived as an implied threat of violence or even future mistreatment (whatever that means) or have discouraged Walters from continuing to report to work during the strike. The cases cited by Respondent, *Romal Iron Works Corp.,* 285 NLRB 1178, 1182 (1987), and *Bonanza Sirloin Pit,* 275 NLRB 310 (1985), involve employer threats of retaliation to employees, couched in obscene language. These cases are not relevant to issues of striker misconduct.

Williamson's suspension was based on two incidents, one of which I find did not constitute misconduct. Therefore, even assuming that Williamson's conduct forfeited the protection of the Act, I conclude that it is Respondent's burden under the *Wright Line*[22] doctrine to establish that it would have suspended Williamson solely on the basis of the Tara Walters incident. It has not done so, therefore, I find that his suspension violated Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(3) and (1) by discharging Brenda Weaver and Patricia Hudson on December 17, 2012.

2. Respondent violated Section 8(a)(3) and (1) by suspending Michael Maxwell and Eric Williamson in December 2012.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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[21] Williamson's gesture cannot be legitimately characterized as "sexual harassment." In Title VII cases, a plaintiff generally cannot prevail on the basis on a single incident not involving physical contact, e.g., *Pomales v. Cellurlares Telefonica,* 441 F.3d 79 (lst Cir. 2006). The record, herein, of course is barren as to whether Respondent has ever applied it sexual harassment policy, see GC Exh. 13, to a single incident not involving physical contact.

[22] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil & Gas Co.,* 337 NLRB 1120, 1123–1124 (2002)

The Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Consolidated Communications, Inc., Mattoon and Taylorsville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, refusing to recall, or otherwise discriminating against any employee for engaging in union or protected concerted activities, including participation in a strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Brenda Weaver and Patricia Hudson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, rescind the December 2012 suspensions of Michael Maxwell and Eric Williamson.

(c) Make Brenda Weaver, Patricia Hudson, Michael Maxwell, and Eric Williamson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Patricia Hudson and Brenda Weaver and the unlawful suspensions of Michael Maxwell and Eric Williamson, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

(e) Return the position of office specialist in the facilities department to the status quo that existed at the time of Brenda Weaver's discharge.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Mattoon and Taylorsville, Illinois, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 13, 2012

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 19, 2013.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, terminate, refuse to recall, or suspend you because of your union or concerted protected activities, including your participation in a legal strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Patricia Hudson and Brenda Weaver full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Patricia Hudson, Benda Weaver, Michael Maxwell, and Eric Williamson whole for any loss of earnings and other benefits resulting from their discharge or discipline, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Patricia Hudson, Brenda Weaver, Michael Maxwell, and Eric Williamson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Patricia Hudson and Brenda Weaver, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions of Michael Maxwell and Eric Williamson, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspension will not be used against them in any way.

WE WILL restore to the position office specialist in the facilities department those duties that were performed by Brenda Weaver prior to her discharge.

CONSOLIDATED COMMUNICATIONS D/B/A ILLINOIS CONSOLIDATED TELEPHONE COMPANY