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Kapstone Paper and Packaging Corporation and Association of Western Pulp and Paper Workers Local 153, affiliated with the United Brotherhood of Carpenters and Joiners of America.
Cases 19-CA-160107, 19-CA-160108, 19-CA-160161, and 19-CA-160175

April 20, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On November 17, 2016, Administrative Law Judge Lisa D. Thompson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent and the Charging Party each filed answering briefs,¹ the General Counsel filed a reply brief to the Respondent's answering brief and the Respondent filed a reply brief to the Charging Party's answering 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 exceptions² and briefs³ and has decided to affirm the judge's rulings, findings,⁴ and conclusions and to adopt the recommended Order.

¹ Although formally styled as an "Answering Brief," the Charging Party's brief actually endorses the General Counsel's exceptions, rather than opposes them.

² The General Counsel has excepted to 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 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 judge's findings.

³ The Respondent requests that the Board disregard the General Counsel's exceptions and brief pursuant to Sec. 102.46 of the Board's Rules and Regulations because the legal arguments in the General Counsel's brief fail to reference the exceptions to which they relate. The Board has discretion in determining compliance with its regulations, and we find that the General Counsel's exceptions and brief substantially comply with the applicable rules. See, e.g., *Solutia, Inc.*, 357 NLRB 58, 58 fn. 1 (2011), *enfd.* 699 F.3d 50 (1st Cir. 2012).

⁴ We adopt the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of Act by discharging Steve Blanchard. In so finding, we agree that, pursuant to *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enfd.* mem. 765 F.3d 148 (9th Cir. 1985), *cert denied* 474 U.S. 1105 (1986), Blanchard's conduct—kicking a contractor's truck as it entered the Respondent's mill, and blocking and jumping on a contractor's truck as it exited—would have reasonably tended to coerce or intimidate employees in the exercise of rights protected under the Act. See *Siemens Energy & Automation, Inc.*, 328 NLRB 1175, 1176 (1999); *GSM, Inc.*, 284 NLRB 174,174 (1987).

In adopting the judge's conclusions that the strikers' actions were not protected, we do not rely on her assessment of subjective considera-

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. April 20, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

John Fawley and Elizabeth DeVleming, Esqs., for the General Counsel.

James Shore, Esq. (Stoel Rives, LLP), for the Respondent.

Robert Lavitt, Esq. (Schwerin, Campbell, Barnard, et al.), for the Charging Party.¹

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, Administrative Law Judge. The Association of Western Pulp and Paper Workers Local 153, which is affiliated with the United Brotherhood of Carpenters and Joiners of America (Charging Party or the Union), filed four unfair labor practice (ULP) charges against Kapstone Paper and Packaging Corporation (Respondent) alleging violations of the National Labor Relations Act (NLRA or the Act).² The Union filed 10 additional ULP charges against Respondent.³ The Regional Director for Region 19 (Regional Director) consolidated all 14 charges and issued a consolidated complaint and notice of hearing.

The consolidated complaint initially alleged that Respondent committed numerous unlawful acts in violation of Section 8(a)(1), (3), and (5) of the Act. However, the parties settled 10

tions, including her analysis of the strikers' intentions and how employees reacted to their misconduct. See *Universal Truss, Inc.*, 348 NLRB 733, 734-736 (2006). Nor do we rely on the judge's assessment of the strikers' conduct under State law, the temporary restraining order, or the Union's picketing rules.

¹ Although Mr. Lavitt entered his appearance in the case, he did not appear or participate during the hearing.

² Cases 19-CA-132955, 19-CA-132964, 19-CA-145721, and 19-CA-152277.

³ 19-CA-156582, 19-CA-156586, 19-CA-159073, 19-CA-159390, 19-CA-159574, 19-CA-160107, 19-CA-160108, 19-CA-160161, 19-CA-160167, and 19-CA-160175.

of the 14 charges prior to the hearing.⁴ Cases 19–CA–160107, 19–CA–160108, 19–CA–160161, and 19–CA–160175 remained pending for hearing.

For the remaining cases pending for hearing, the General Counsel alleges that Respondent violated Sections 8(a)(1) and (3) of the Act when it discharged employees Steve Blanchard, John Bouchard, Melvin Elben, and James Froberg for engaging in protected, concerted picketing activity. Respondent filed its answer and several amended answers denying all material allegations and setting forth its affirmative defenses to the complaint.⁵

This case was tried before me in Portland, Oregon, from March 1–4, 2016. The trial resumed and concluded on March 8, 2016.

All parties were afforded a full opportunity to appear, introduce evidence, examine and cross-examine witnesses, argue orally on the record, and file briefs. After carefully considering the entire record, including the demeanor of the witnesses and the parties' posthearing briefs, I make the following⁶

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Kapstone Paper and Packaging has been a corporation with its headquarters in Northbrook, Illinois. Respondent operates a paper and pulp mill and has a facility in Longview, Washington. It is undisputed that, during the calendar year of 2015, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Longview facility goods valued in excess of \$50,000 directly from points outside the State of Washington. Accordingly, at all material times, Respondent admits and I find that it has been an employer within the meaning of Sections 2(2), (6), and (7) of the Act.

It is also undisputed, and I find that, at all material times, the Association of Western Pulp and Paper Workers, Local 153, affiliated with the United Brotherhood of Carpenters and Joiners of America has been a labor organization within the meaning of Section 2(5) of the Act.

⁴ The parties entered into a non-Board settlement on Cases 19–CA–132955, 19–CA–132964, 19–CA–145721, 19–CA–152277, 19–CA–156582, 19–CA–156586, 19–CA–159073, 19–CA–159390, 19–CA–159574, and 19–CA–160167.

⁵ Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for the Joint Exhibits, "GC Exh." for the General Counsel's exhibits, "R. Exh." for Respondent's Exhibits, "GC Br." for the General Counsel's brief, and "R. Br." for Respondent's brief.

⁶ On April 26, 2016, Respondent moved to correct the transcript of the hearing, citing what it believes were multiple transcription errors found upon its review of the transcript. Respondent attached Exhibit A which was a declaration as to the specific errors in the transcript and the proposed corrections. The General Counsel did not respond to the motion. Accordingly, hearing no objection, I grant Respondent's motion and incorporate by reference the corrections to the transcript identified in Exhibit A. Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Respondent's Longview facility

In order to better understand the unfair labor practices alleged in this case, it is important to describe the location of Respondent's Longview facility (the Mill). Respondent operates a pulp and paper mill. The Mill is situated in a remote location, accessible by a single, one-mile road—Fibre Way. There are no residential or commercial developments on the portion of Fibre Way that lead to the Mill. Virtually everyone, including all Kapstone employees, drives private vehicles to the Mill on a daily basis.

Respondent employs approximately 1000 employees. In addition, there are hundreds of third-party contractors, truck drivers, and visitors that enter and exit the Mill via Fibre Way on a daily basis. In total, including employees, contractors, and visitors, over 1000 vehicles enter and exit the Mill on a given day.

The Mill has separate entrance and exit gates for employees, commercial trucks and contractors. All of these entrances and exits flow into and out of Fibre Way. As one drives down Fibre Way toward the Mill, the first offshoot to the right is the contractor entrance. Continuing down Fibre Way, the next offshoot is the contractor exit, and last, the employee/truck entrance and exit.⁷

2. The Union and the alleged discriminatees

The Union represents a wall-to-wall unit of employees who work at the Mill. The four alleged discriminatees were unit employees. Prior to his termination, Steve Blanchard (Blanchard) served as a helper on the Kamyrd digester—a machine that creates pulp by cooking the raw wood chips.

John Bouchard (Bouchard) was employed as a millwright prior to his termination. Melvin Elben (Elben) was a fairly new employee of Respondent. He served as a Journeyman "A" electrician prior to his discharge. James Froberg (Froberg) was also employed as a Journeyman "A" electrician at the time of his termination.

It is undisputed that the parties' latest collective-bargaining agreement expired on May 31, 2014. The Union and Respondent had been embroiled in unsuccessful contract negotiations. When the Union threatened a strike in the spring/summer of 2015, on June 2015, Respondent's labor relations manager, Matt Gaston (Gaston), wrote to the Union, outlining Respondent's expectations in the event of a strike. Specifically, the letter warned:

Please also be aware that any employee who engages in serious strike misconduct (e.g. violence, damage to property, threats of bodily harm) or violations of other applicable

⁷ R. Exhs. 3–4. In R. Exh. 3, the red truck depicted in the photograph is entering the Mill on Fibre Way. The white truck depicted by a small building (the guard's station) is exiting the contractor's exit out of the Mill approaching Fibre Way. In R. Exh. 4, the red and silver trucks depicted in the foreground of the photograph are driving on Fibre Way. The white truck depicted in the background of the photograph is entering the contractor's entrance into the Mill.

laws will not be protected by the National Labor Relations Act and will be subject to serious discipline, up to and including discharge.⁸

It is undisputed that the Union received Gaston's letter.

By August 2015, contract negotiations resulted in an impasse and the Union filed several ULP charges against Respondent.⁹ It is against this backdrop that the Union authorized a strike of its unit employees.

3. The August 27—September 4, 2015 strike

On August 27, 2015, the Union called a strike. Before the picketing began, Local 153 President Kurt Gallow (Gallow) conducted a series of required training sessions for all members who intended to participate in the strike. Members were told to exhibit normal, respectful behavior on the picket line. Members also were given the Union's "Picket Line Dos and Don'ts" which described in detail how they were to conduct themselves on the picket line.¹⁰

Specifically, members could patrol/picket on public property, including in front of the entrances and exits to the Mill, but not on Respondent's property. They could stand/picket in what was known as the "public right-of-way,"—an area in the middle of the street on Fibre Way, directly across from the employee/contractor's exit. However, the right-of-way was also used by trucks to enable them to negotiate the sharp left out of the truck exit onto Fibre Way.¹¹

Members were also told they could not block or obstruct vehicles' ingress or egress. Similarly, they could not "interfere with or swarm persons or vehicles entering or leaving" the Mill.¹² The prohibition on "swarming" persons or vehicles meant that members could not stand collectively in front of or surround vehicles or obstruct vehicles' entrances or exits. Rather, they were required to continually patrol in a timely fashion across the entrances and exits with their picket signs. Members could not make physical contact with others, engage in conversations with drivers or Respondent's security guards, and must avoid confrontations with others.

To reinforce the strike rules, strike team captains were responsible for certain teams of picketers and to ensure that picketers followed the strike rules. Team captains were trained to be the liaisons to speak on behalf of the Union. Elben served as a strike team captain during the strike. All members were provided with copies of the Picket Line "Do's and Don'ts" to take home to review.¹³ The strike lasted from August 27, 2015 to September 4, 2015.

⁸ R. Exh. 15.

⁹ Those ULP charges are not at issue in this case.

¹⁰ R. Exh. 12 at 3–4.

¹¹ As an example, see R. Exh. 4. The rear tires on the red truck depicted in this photograph cross over the "public right-of-way"—the area in the middle of the street which enables the truck to negotiate the sharp left turn out of the exit onto Fibre Way.

¹² R. Exh. 12 at 3.

¹³ Tr. 580–581, 663–664, 840–841; see also R. Exh. 12 at 3–4.

B. Specific Incidents of Alleged Unlawful Conduct

1. Blanchard incidents

a. Blanchard kicks a Delta Fire/GMC truck

It is undisputed that Blanchard participated in the union strike. Union leaders trained Blanchard (and others) on how to conduct themselves on the picket line. Blanchard admitted he was aware of the Union's Picket Line "Do's and Don'ts" and had been instructed not to engage in any contact with Respondent's guards or drivers, not to block or impede vehicles/traffic and that strikers could not swarm vehicles.

On August 30, 2015, Blanchard and approximately 10–15 union members were picketing at the contractor's entrance to the Mill. Around 5:50 p.m., as a white GMC truck that belonged to Delta Fire (one of Respondent's contractors) entered the Mill, Blanchard kicked the passenger side rear panel of the truck as the driver drove into the Mill.¹⁴ The entire incident was caught on video.¹⁵ While there was considerable dispute whether Blanchard's kick caused any damage, photographs of the truck's passenger side panel show a foot impression and shadowing where Blanchard's foot made contact with the rear panel.¹⁶

For his part, Blanchard admitted that he kicked the truck because he was frustrated that the driver (and several other drivers) blew their horns and taunted picketers. However, the video at Respondent's Exhibit 19 does not support Blanchard's account. While Blanchard thought the Delta Fire driver was a "scab"—that is, someone taking bargaining unit work from union members, it is undisputed that the driver was not performing any bargaining unit work at the Mill.¹⁷

In any event, Blanchard admitted that he understood that kicking the truck was not permitted under Respondent's strike rules or the Union's Picket Line "Do's and Don'ts."

b. The white Chevy Tahoe incident

The substance of what occurred regarding the white Tahoe incident turns on an evaluation of credibility.¹⁸ Having carefully reviewed the record, I find the following facts:

Approximately one hour after Blanchard kicked the Delta

¹⁴ During the hearing, the Delta Fire truck was also referred to as the RMR truck or the GMC truck. These terms were used interchangeably to identify the kicking incident.

¹⁵ R. Exh. 19; see also R. Exh. 20.

¹⁶ GC Exhs. 5–6; see also R. Exh. 20 at 4–5.

¹⁷ R. Exh. 23; see also Tr. 148–149, 791, 801–802.

¹⁸ I based my credibility findings on multiple factors, including, but not limited to, the consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; the witness' demeanor while testifying; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Daikichi Susshi*, 335 NLRB 622, 633 (2001), enf'd, 56 Fed. Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997). Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622.

Fire truck, Blanchard and 10–15 union members were again picketing—this time, near the contractor’s exit gate. A white Chevy Tahoe was exiting the Mill through the contractor’s gate.¹⁹ When the driver first approached the exit, there were no picketers in the roadway. However, as the driver neared the edge of Respondent’s property line, an unidentified male picketer said “there’s another one [meaning another truck/contractor exiting the Mill].”²⁰ At that point, Blanchard and about 8 to 10 fellow picketers (with their signs in hand) gathered in front of the truck and blocked the vehicle’s egress. Although there was considerable dispute as to what happened next, after carefully viewing the video evidence, I find that the Tahoe came to a brief, but full stop, with Blanchard and his fellow picketers gathered in front of and swarming the vehicle. While swarming the vehicle, the picketers appear to hit the vehicle with either their picket signs or picket sticks.²¹ The Tahoe tried to inch forward to clear a path to leave the scene, however Blanchard and the others did not clear the roadway.

While the vehicle briefly stopped, Blanchard, with his picket sign in hand, attempted to jump onto the hood of the vehicle. Although Blanchard testified that the vehicle was moving so he jumped onto the hood to avoid being run over and/or swept under the truck, again, the video evidence does not support his account. Rather, I find that, when the vehicle paused for a brief second, Blanchard jumped onto the hood, and as he did so, his picket sign twice made contact with the windshield of the Tahoe. Blanchard ultimately admitted this version of events in his testimony.²²

In any event, faced with several picketers swarming his vehicle and Blanchard on top of the hood, an opening in the crowd appeared so the Tahoe increased its speed and drove off the property. Blanchard was thrown from the hood to the ground onto Fibre Way. At that time, there were approximately 100 people picketing, walking, driving and/or traversing on Fibre Way. Procurement Manager John Mendenhall (Mendenhall), who saw the entire incident unfold, confirmed this version of events.²³

Mendenhall testified that, after he heard Blanchard being thrown from the Tahoe’s hood onto Fibre Way, he drove to the area where he saw approximately 100 people exiting Fibre Way. Mendenhall described the scene as “pandemonium.” Thereafter, he drove past the Tahoe where he saw the shattered windshield from the incident.

After being thrown off the hood of the Tahoe, Blanchard was transported to the hospital via ambulance. However, Blanchard left the emergency room without being treated (against medical advice), because his medical insurance through Respondent had been cancelled and he was concerned about the out-of-pocket costs. Blanchard returned to the picket line some time later so he could report the incident.

¹⁹ During the hearing, the white Tahoe truck was also referred to as the white GMC truck. These terms were used interchangeably to identify the second incident.

²⁰ R. Exh. 5.

²¹ R. Exh. 21.

²² Tr. 809, 812, 815. The windshield of the Tahoe was shattered at this time.

²³ Tr. 155–157, 159–163.

It is undisputed that, in the immediate aftermath of the incident, Respondent closed off the contractor’s exit for 10 to 15 minutes and redirected traffic out of the Mill in order to secure the scene and restore order on Fibre Way. Thereafter, Respondent bused several employees and contractors into the Mill because, according to Mendenhall, they were afraid to take their vehicles across the picket line.²⁴

In making the above findings, I relied on the video evidence and credit Mendenhall’s testimony concerning this incident. Specifically, I found Mendenhall credible, in that he listened carefully to the questions asked and maintained the same demeanor regardless of who examined him. His testimony was direct and non-evasive. Moreover, Mendenhall’s recollections of what occurred were specific and unambiguous.

I found Blanchard’s version of events less than fully credible. First, the fact that one of the picketers can clearly be heard saying “there’s another one” when the Tahoe exited the Mill led me to conclude that Blanchard and the others intended to swarm the vehicle and block its egress from the Mill. In fact, Mendenhall testified that, during the strike, he saw picketers blocking and/or swarming other contractors’ vehicles so as to obstruct their ability to enter or exit the Mill.²⁵ I found Mendenhall’s testimony credible.

Second, and more importantly, Blanchard gave inconsistent testimony regarding the Tahoe incident. Specifically, at the hearing, Blanchard initially denied that he pounded on the Tahoe’s hood with his fists or his picket sign. Then, on cross examination, he admitted to hitting the Tahoe with his picket sign “once.” However, the video evidence, which shows Blanchard’s picket sign hit the Tahoe several times, directly contradicts Blanchard’s account.²⁶ In fact, Blanchard’s testimony at the hearing is inconsistent with his Board affidavit (also known as a *Jencks* statement) where he admitted hitting the Tahoe with his picket sign “two or three times.”²⁷ In short, because the video evidence belies his many, different versions of the incident, I find Blanchard’s testimony unreliable.

Lastly, while Blanchard’s reason for jumping onto the hood of the truck seems plausible (i.e., he had no other choice because the truck kept moving forward and he would have been swept under it had he not jumped onto the hood), his explanations failed to excuse his behavior in swarming and blocking the Tahoe’s egress. In fact, the evidence shows that Blanchard and the other picketers *first* swarmed and blocked the vehicle which caused the Tahoe to push his way through the crowd. I find that Blanchard’s conduct, which he knew was prohibited, began the chain of events in question. Therefore, I conclude that, about an hour after Blanchard kicked the Delta Fire truck, Blanchard and several other picketers, with their picket signs in hand, walked over to the Tahoe and swarmed and blocked the vehicle’s egress. When the Tahoe briefly stopped at Respondent’s property line, Blanchard jumped onto the hood of the truck, and his picket sign struck the Tahoe’s windshield. At that moment, there was an opening in the crowd, and the driver

²⁴ Tr. 174.

²⁵ Tr. 149–151.

²⁶ *Id.*

²⁷ Tr. 818.

sped up and drove off the property. Blanchard was thrown off the hood of the truck onto Fibre Way.

2. Respondent's injunction

As a result of the picketing incidents involving Blanchard (and other incidents not relevant to this case), on September 1, 2015, Respondent moved for and obtained a temporary restraining order (TRO) against the Union and its members. The TRO mandated the following, in relevant part:

- (1) All parties, their officers, members and representatives, are to conduct themselves in a manner which does not cause a breach of the peace, and will not violate any section of the criminal laws of the State of Washington within 500 yards of the entrance and exit gates to the Longview, Washington Kapstone mill site.
- (2) No one will attempt to block or impede traffic entering or leaving the Kapstone mill site. . . .²⁸

It is undisputed that Respondent served the TRO on the Union the same day it was issued. The Union informed all strike captains, including Elben, about the TRO, and Elben, in turn, informed all other union members under his charge as they came on site to picket.

On September 4, 2015, after an evidentiary hearing, Respondent obtained a preliminary injunction ("the Injunction"), which expressly incorporated the Union's "Picket Line Do's and Don'ts," including its instructions not to obstruct entrances or exits, interfere with vehicles, or picket in the streets. The Injunction also mandated: "Drivers entering or leaving will not proceed until they can do so safely."²⁹ It is against this backdrop that the following incident involving Bouchard, Elben and Froberg occurred.

3. Bouchard, Elben, and Froberg stand in the right-of-way preventing a third-party contractor from exiting the Mill

As stated above, once the TRO was issued, the Union informed its members, including Bouchard, Elben and Froberg, about the Order, where the employer's property lines were, where they could safely and legally picket, and how to conduct themselves while picketing. Specifically, the Union again informed its members not to obstruct entrances or exits and/or interfere with or block a vehicle's ingress or egress. It is undisputed that Bouchard, Elben and Froberg were aware of the contents of the TRO, the "Picket Line Do's and Don'ts," and, specifically, the prohibitions on blocking vehicles/traffic.

On September 4, 2015, the day the Injunction was issued, Bouchard, Elben and Froberg participated in the union strike. On that day, Bouchard and Froberg stood, with their picket signs in hand, in the public right-of-way located in the middle of Fibre Way. Although the public right-of-way is not part of Respondent's property and can be used for picketing, trucks also have the right to utilize this area to give them additional latitude in turning left out of the exit gate onto Fibre Way.

In any event, at some point during the day, a large 18-wheel tractor-trailer rig, owned by Gardner Trucking (another one of

Respondent's contractors), and driven by Diane Cutler (Cutler), attempted to leave the Mill out of the employee exit gate. To do so, Cutler had to make a wide left-hand turn out of the gate onto one of two lanes on Fibre Way.³⁰ However, on September 4, Cutler was faced with a very small area in which to make a tight left turn to exit the Mill.

First, there were at least seven parked cars parked on the sideline of Fibre Way on what became the passenger's side of the truck after the turn. Moreover, several picketers stood in front of the parked cars. To make matters worse, when the Gardner truck made its left turn out of the gate, Bouchard and Froberg stood in the public right-of-way in the middle of Fibre Way. This created a "choke hold" giving the Gardner truck a very tight turn radius with which to navigate the left turn out of the exit gate onto Fibre Way. In other words, if Cutler pulled out onto the right lane of Fibre Way, she would hit the row of parked cars and/or picketers standing in front of the parked cars on Fibre Way. On the other hand, if Cutler swung the truck onto Fibre Way too quickly, the front of the rig would hit Bouchard and Froberg who stood in the public right-of-way.

In any event, as Cutler pulled out of the exit gate onto Fibre Way, the truck could not complete its left turn because Bouchard and Froberg stood in the right-of-way on what became the left of the driver's side of the truck. As such, Cutler stopped the truck to avoid hitting Bouchard and Froberg. The entire incident was videotaped.³¹

When Cutler saw that she could not clear the left turn, she called her supervisor, Heidi Mast (Mast). Mast told Cutler to turn off the truck then Mast called the Cowlitz County sheriff's department. Mast immediately drove to the location, and once she arrived, she spoke to Cutler, assessed the situation and began videotaping the incident.³² Mast did not believe Cutler could safely reverse the 18-wheel truck in order to renegotiate the turn.³³

Meanwhile, Union captain Elben walked over toward Bouchard and Froberg to assess the situation. Simultaneously, Respondent's Main Gate Operator Darren Harger (Harger), who observed the incident from the security guard's station, saw the truck stopped in the middle of Fibre Way, walked over and asked Bouchard, Froberg, and Elben if they would take a few steps away from the truck so it could complete the left turn. In response, Elben hit Froberg on the shoulder, told Froberg words to the effect that, "we don't have to talk to them [meaning Respondent's personnel]," to which Froberg folded his arms and turned his back to Harger. Bouchard, Froberg, and Elben refused to move.³⁴

³⁰ Tr. 936.

³¹ R. Exh. 13 (security footage of Gardner truck incident. The video is 30:06 minutes in length and shows the truck pulling out of the mill gate and getting stuck in the turn, as well as where Bouchard and Froberg were standing and where cars were parked. Froberg is standing in the red shirt in the middle of Fibre Way. Bouchard is standing next to Froberg and Elben is at the far left of the video). See also still photographs of incident at R. Exh. 28.

³² Tr. 939-941; see also R. Exh. 27. (video [with audio] taken by Mast from her cell phone).

³³ Tr. 941.

³⁴ R. Exh. 13; see also R. Exh. 40 (Harger's statement).

²⁸ GC Exh. 2.

²⁹ GC Exh. 3.

At some point thereafter, three Cowlitz County Sheriff's deputies arrived on the scene to converse with Union picket captain Dan Eckersly (Eckersly), Elben, and several others about the incident. Once the deputies were informed about the situation, one of the deputies told Eckersly and the group that they could not stand in the public right-of-way and block traffic. Specifically, the deputy said words to the effect, "They [meaning Bouchard and Froberg] can't block the road . . . It's very simple, if there's a car coming through, a vehicle, and you are in the way of that vehicle, then you are in the way of the vehicle. . . . [I]f you are blocking the vehicle, you are blocking the vehicle, you can't do that."³⁵ At that point, Froberg walked over to the deputies and asked whether he could stand in the right-of-way, to which one of the deputies responded, "No, you can't block a vehicle [meaning the Gardner truck]."³⁶ While Froberg spoke to the deputy, Elben walked over and stood next to Bouchard in the right-of-way.

Despite this directive, Froberg returned to stand in the right-of-way with Bouchard and Elben. Eckersly and the deputies subsequently walked over to speak with Bouchard, Froberg, and Elben in the right-of-way where the deputy again told the three men that they could not stand in the right-of-way and block a vehicle. After some continued discussion, the deputy asked the men, "can you do me a favor" and move a few feet so the truck could complete its left turn. Eckersly replied words to the effect, "you're the law, if you tell me to move, we will move."³⁷ At that point, Bouchard, Elben, and Froberg took three to four steps away from the truck, and Cutler completed the turn and left the scene. Bouchard, Froberg, and Elben stood their ground in the public right-of-way for 20 minutes before moving to allow the truck to complete its turn. The Sheriff's deputies did not arrest anyone or issue any citations at the scene.

It is undisputed that, during the standoff with Bouchard, Froberg, and Elben, Respondent was required to find alternate routes for the numerous trucks, cars, and employees entering and exiting the Mill. Specifically, with approximately 500–1000 trucks passing through the Mill daily, in a 10-hour day and with 50 large trucks per hour entering or exiting the Mill, approximately 16.5 tractor-trailers and 21 trucks had to be rerouted during the 20-minute standoff. In addition, Mast testified that several of the Gardner truckdrivers told her they were afraid to exit the Mill during the strike because they were fearful of their safety and/or that they would encounter a similar blocking situation by the Union. As a result, all Gardner trucks were instructed not to use the contractor's exit until the strike ended.³⁸

It is also undisputed that, minutes before the Gardner truck incident, a waste truck exited out of the main gate and proceeded to turn left onto Fibre Way in the exact same fashion as the Gardner tractor trailer. Again, Bouchard and Froberg stood in the exact same location in the public right-of-way in the middle of Fibre Way as they had when the Gardner 18-wheeler rig

exited the Mill. However, when the waste truck entered the intersection to turn left, Bouchard and Froberg moved to the left of the truck to allow it to negotiate the left turn. When the waste truck turned and passed, Bouchard and Froberg returned to the spot where they stood on Fibre Way.³⁹

In making the above findings, I primarily relied on the video/audio evidence of the incident and credit Mast's testimony. Specifically, Mast's recollection of the incident was direct and specific. She was not evasive in her testimony and her demeanor remained consistent throughout questioning. In addition, her testimony was corroborated by the video evidence. Moreover, I relied on Mast's trucking expertise in determining the propriety and safety of a blocked 18-wheel truck, because, as a site supervisor, her primary responsibility was ensuring her subordinate truck drivers drove their trucks safely.⁴⁰ Lastly, because Mast was not an employee of Respondent at the time of the incident, her testimony lacked bias or prejudice.⁴¹ As such, I found Mast's testimony particularly reliable regarding this incident.

By contrast, I did not find Bouchard, Elben, and Froberg credible for several reasons. First, all three men made inconsistent and oftentimes illogical statements throughout their testimony. For example, despite that they each denied blocking the Gardner truck, the video and documentary evidence clearly proved otherwise. In fact, when confronted with the video of the incident and asked if he realized that he (and the others) were blocking the Gardner rig, Elben testified that he "didn't understand that the truck was blocked because no one told him [that the truck was blocked or that there was an issue that prevented the truck from turning]." Elben's explanation is ridiculous, and I found him completely unbelievable.

In any event, Bouchard, Elben, and Froberg insisted that they believed they had the right to stand their ground in the right-of-way, even if they blocked a vehicle ingress/egress. However, when confronted with the videos of the incident, the Union's picket line "Do's and Don'ts" and the TRO, which they knew prohibited them from blocking a vehicle's ingress/egress, they provided no cogent explanation for their "stand their ground" belief. Moreover, the fact that Bouchard and Froberg moved for the waste truck which drove out of the Mill 15–20 minutes before they refused to move for the Gardner 18-wheeler rig totally undermines their testimony. Even when confronted with the fact that the sheriff's deputies told the men at the scene that they could not stand in the right-of-way and block a vehicle, Froberg (and the others) repeatedly stated that they believed they had the right to stand their ground. In short, their testimony in this regard is beyond belief, and their blind reliance on nonsensical explanations for their conduct made them not credible.

Bouchard, Elben, and Froberg also blamed Cutler's poor

³⁵ R. Exh. 27 (The officer's conversation with the Union).

³⁶ *Id.*; see also R. Exh. 48.

³⁷ R. Exh. 27 (at 3.30–3.43 minutes).

³⁸ Tr. 957–958.

³⁹ See R. Exh. 14 (video of the waste truck leaving the Mill, turning left onto Fibre Way, the location of Bouchard and Froberg, how they moved out of the right-of-way to allow the waste truck to pass, and how they returned to their position in the right-of-way); see also R. Exhs. 28, 29 (same).

⁴⁰ Tr. 930–933.

⁴¹ Since the incident, Mast is currently employed as a transportation specialist for Respondent effective February 15, 2016. See Tr. 932.

driving skills for the incident, noting that other trucks were able to negotiate the left turn with the men standing there. However, as seen on the videos, not all of the trucks were as long as the Gardner 18-wheeler rig. More importantly, many of the other trucks had a wider turn radius to make the left turn than the Gardner truck since there were no cars or picketers located on the right sideline of Fibre Way. However, when confronted with these facts on cross-examination, they were evasive and non-responsive in their answers. In fact, while Bouchard admitted that the turn radius was wider for the waste truck than what was afforded the Gardner rig, he was again unresponsive when asked why he chose to move for the waste truck but refused to move for the Gardner rig. Bouchard's (as well as Elben and Froberg's) lack of candor on this issue made their testimony.

Neither Bouchard, Elben, nor Froberg gave plausible explanations when asked why they refused to move for the Gardner rig (but moved for the waste truck). In fact, Froberg denied moving for the waste truck at all, but when confronted with the video, his only response was he "didn't recall" it. Similarly, all three men were equally evasive and/or non-responsive when asked whether the Gardner truck also had a right to use the *public* right-of-way to turn as they had to stand their ground.⁴² Lastly, although Bouchard testified that he thought the Gardner truck driver intentionally "blew the incident out of proportion," when asked why he thought so, he was unable to respond. Rather, the documentary evidence shows he never reported such a belief in his Board affidavit (aka, *Jencks* statement) or at any time prior to the hearing. In sum, I did not find Bouchard, Elben, or Froberg reliable, forthcoming or truthful in their testimony.

Accordingly, I find that, when the Gardner truck exited the Mill, Cutler had a very limited turn radius with which to turn left out of the gate since Bouchard, Elben, and Froberg stood in the public right-of-way and other picketers and parked cars were located on the right sideline of Fibre Way. Cutler nevertheless attempted to navigate the left turn but could not due to the size of the truck and the limited turn radius she was afforded. Cutler stopped the truck when it was clear she would hit the three men standing in the right-of-way. Instead of moving aside, as they had for other trucks, Bouchard, Elben, and Froberg stood in the middle of Fibre Way blocking Cutler's egress. As such, the truck was stopped in the middle of Fibre Way blocking traffic. Main Gate Operator Harger asked Bouchard, Elben, and Froberg if they would step aside to allow the truck to pass but the men refused to move. At that point, the Sheriff's deputies were called to the scene, because none of Respondent's employees or other drivers or contractors could access the Mill or Fibre Way during the standoff. Once the Sheriff's deputies were advised of the situation, the deputies told the Union (and Froberg specifically) that they could not stand in the public right-of-way and block a vehicle. Despite this instruction, the three men refused to move, except when the deputy *asked* them to step aside to allow the vehicle to pass. Only at that point, some 20 minutes later, did the men comply and moved aside, the truck completed its turn and left the Mill.

⁴² Because it was a public right-of-way, trucks also had a right to use the public right-of-way.

4. Respondent's investigations

Respondent's Security Manager, David Smith (Smith) investigated the incidents involving Blanchard, Bouchard, Elben and Froberg. Because Smith had previously worked as a Cowlitz County Sheriff's deputy for 35 years, he was familiar with the Washington state criminal statutes, particularly those involving disorderly conduct and malicious mischief. It is undisputed that Smith conducted numerous investigations for Respondent prior to the incidents involving Blanchard, Bouchard, Elben and Froberg.

a. Blanchard's conduct

Regarding the "kicking" incident, Smith reviewed video footage, the photographs of the truck's rear panel, and incident reports from Security Officers Dimitri Shilov (Shilov) and Farrant (first name unknown) who inspected and confirmed the truck's damage.⁴³ Smith also confirmed with the owner that the vehicle had been damaged by Blanchard's kick. Although Smith requested a damage assessment from the owner, the owner did not want to pursue the matter and told Smith he was reluctant to return to the Mill.

With respect to the white Tahoe incident, Smith reviewed multiple videos and spoke to witness Mendenhall. While Smith initially believed that Blanchard shattered the truck's windshield, he later concluded that he could not determine how or by whom the windshield had been broken, even though it occurred at or about the time Blanchard jumped onto the hood of the truck and struck it with his picket sign.

On September 1, 2015, Respondent's Mill Manager, Paul Duncan (Duncan) notified Blanchard that Respondent was investigating the Delta Fire and white Tahoe incidents.⁴⁴ Duncan requested that Blanchard "provide a written statement concerning the incidents . . . so that we can obtain your side of the story for our investigation." Blanchard complied.⁴⁵

In his written statement regarding kicking the Delta Fire truck, Blanchard admitted to engaging in the conduct in for having done so. Specifically, he stated: question but expressed no remorse or reasonable justification

The other incident that you reference in your letter happened while a scab was coming into the mill, not exiting as you state in your letter. He was honking his horn antagonizing picketers. I believe I kicked at the vehicle while it was entering the contractor gate.⁴⁶

With respect to the white Tahoe, Blanchard explained that he was merely "picketing, walking" when "the vehicle struck me as I was walking." According to Blanchard, he was afraid of being hit so he "jumped onto the hood of the vehicle. I believe that I hit his hood with my picket sign to try and get the vehicle

⁴³ Tr. 275; GC Exhs. 5-6 (photographs of truck panel), 7 (Shilov's incident report), 8 (Officer Farrant's incident report. The pictures attached to his report are found at GC Exhs. 5 and 6); see also R. Exh. 20.

⁴⁴ R. Exh. 22.

⁴⁵ GC 11; also found at R. Exh. 23.

⁴⁶ Id.

to stop (everything happened extremely fast).⁴⁷

After reviewing Blanchard's response, on September 11, 2015, Smith held a fact finding meeting with Blanchard, Union President Gallow and Respondent's representative Stacy Davis (Davis).⁴⁸ During the meeting, Blanchard admitted he kicked the Delta Fire truck, although he stated that the driver honked his car horn to antagonize the picketers. However, he also admitted other picketers and contractors honked their car horns as well.⁴⁹ Again, the video footage does not support Blanchard's account.

In any event, Smith asked Blanchard follow-up questions regarding the two incidents, and Davis recorded Blanchard's responses. Smith also asked if Blanchard had anything further to add to his statement, to which Blanchard said "no."⁵⁰ Gallow was also given the opportunity to speak, but he did not raise any objections to the thoroughness or fairness of the investigation, nor did he speak at all in Blanchard's defense.

After reviewing all of the evidence, Smith concluded that Blanchard's conduct in kicking the Delta Fire truck constituted criminal mischief.⁵¹ Moreover, from his review of the video footage regarding the Tahoe, Smith concluded that multiple picketers swarmed the truck when it came to a complete stop, then Blanchard climbed onto the hood of the vehicle and swung his picket sign at the windshield area several times before being thrown off the vehicle.⁵² In sum, Smith believed Blanchard's conduct regarding the Tahoe constituted disorderly conduct.⁵³

b. Bouchard's, Elben's, and Froberg's conduct

Smith also investigated the incident involving Bouchard, Elben, and Froberg blocking the Gardner Truck. Smith reviewed the video footage, the photographs, and witness statements regarding the incident. He also spoke with Harger, who confirmed that he asked the three men to move shortly after the Gardner Truck stopped in the middle of Fibre Way and they refused.

On September 4, 2015, as he did for Blanchard, Duncan sent separate letters to Bouchard, Elben, and Froberg, notifying them of the investigation into their conduct and inviting them to "provide a written statement concerning the incident to me so that we can obtain your side of the story for our investigation."⁵⁴ Each of them complied and submitted a written response.⁵⁵

In his written statement, Froberg blamed Cutler for the entire incident. He also asserted that Cutler cursed and yelled profanities at the picketers prior to the incident in

question.⁵⁶ However, Smith followed up with Cutler and Mast, both of whom denied that Cutler ever engaged in such behavior. Similarly, I credit Mast's and Cutler's testimony at the hearing on this point. Specifically, Cutler denied she ever yelled profanities at the picketers. She appeared soft spoken, her tone and demeanor was composed and steady. Cutler recalled the main points of the incident clearly, and like Mast, her testimony was unambiguous and forthcoming. They both struck me as committed to speaking the truth. Lastly, because Froberg failed to mention in his statement or at the hearing that the sheriff told him directly that he could not stand in the right-of-way and block a vehicle, I found his testimony and account of the incident less than forthcoming.

In his written response, Elben denied any responsibility for the incident, arguing that he stood in the right-of-way until the Sheriff's deputy asked him to move. While Elben testified similarly at the hearing, I found his overall testimony not credible for the reasons stated earlier in this decision. Moreover, with respect to his written statement, Elben included a copy of an aerial photograph of the white fog line on Fibre Way which extended under the Gardner Truck. This white fog line represented the end of Respondent's property and the designation of the public right-of-way area. However, a Google map of the public right-of-way area shows that the white fog line stopped far short of where the Gardner truck stopped in Elben's photograph. In essence, the white fog line appears to have been extended in Elben's copy of the right-of-way.⁵⁷ While I do not find that Elben doctored the photograph, his credibility was further diminished because he failed to satisfactorily explain why his photograph was so markedly different from the view of the right-of-way found on the Google aerial view.

In any event, in his written statement, Bouchard also blamed Cutler for the incident, alleging that her poor driving skills caused her to "cut the corner short in an attempt to get me and my fellow union brothers off the picket line . . . This driver shut down the semi, in my opinion to blow things out of proportion."⁵⁸ However, Smith's investigation, my review of the testimonial evidence and the videos of the incident, does not comport with Bouchard's account. Further, none of the three men took into account that, due to the size and length of the Gardner truck, Cutler had a very restricted turn radius in which to negotiate the left turn with the three men standing in the right-of-way and the row of cars and other picketers located across Fibre Way. As such, I did not find Bouchard's testimony credible on this point.

On September 10, 2014, Smith held separate fact-finding meetings with Bouchard, Elben and Froberg.⁵⁹ Gallow and Davis were also present. During each of the meetings, Smith asked the men questions about the incident and whether they had anything else to add. Each of them responded "no."

⁴⁷ Id.

⁴⁸ R. Exh. 24. The parties stipulated that Smith, Gallow and Davis were present in each of the fact finding meetings involving Blanchard, Bouchard, Elben and Froberg.

⁴⁹ R. Exh. 24.

⁵⁰ Id.

⁵¹ R. Exh. 2. I took judicial notice of this Washington state statute.

⁵² Tr. 290–291.

⁵³ R. Exh. 1. I took judicial notice of this Washington state statute.

⁵⁴ R. Exhs. 31 (Froberg), 32 (Elben), 33 (Bouchard).

⁵⁵ R. Exhs. 34 (Froberg), 35 (Elben), 36 (Bouchard).

⁵⁶ R. Exh. 31.

⁵⁷ R. Exh. 35. Compare with the video at R. Exh. 13 and the photographs at R. Exh. 40.

⁵⁸ R. Exh. 36.

⁵⁹ R. Exhs. 37 (Froberg's fact finding), 38 (Elben's fact finding), 39 (Bouchard's fact finding).

Gallow was again given the opportunity to speak but at no time did he raise any objections to the thoroughness or fairness of the investigation, nor did he otherwise speak up in defense of Bouchard, Elben, or Froberg.

After reviewing all of the evidence, Smith determined from the video footage that the Sheriff's deputy informed the three men that they had no right to stand in the right-of-way and block the Gardner truck. Moreover, Smith's investigation confirmed that those present at the scene reasonably believed that the Gardner truck could not have safely reversed or continued forward for a 20-minute period without hitting Bouchard, Elben, and Froberg. He also found that the three men refused to move out of the truck's path during that time. Smith further found the witnesses' impressions were confirmed by the video footage, which demonstrated that the men would have been run over by the Gardner Truck had the truck continued on its path. Smith concluded that Bouchard's, Elben's, and Froberg's conduct (blocking a vehicle) violated the TRO and constituted criminal disorderly conduct.

5. Respondent terminates Blanchard, Bouchard, Elben, and Froberg

Smith compiled his investigative report and turned it over to Labor Relations Manager Gaston. Gaston reviewed the evidence, including the videos, the photographs, Smith's investigative report, the written responses from Blanchard, Bouchard, Elben, and Froberg, and the notes from the fact-finding meetings. Gaston also consulted with Smith, Randy Nebel, the department manager for the four men, and Respondent's Mill Operations Vice President/Mill Manager Paul Duncan (Duncan), who made the ultimate decision to terminate the four men.

Regarding Blanchard's conduct, after reviewing the pictures of the Delta Fire truck, Gaston concluded that Blanchard kicked the truck to the point it left a dent in the rear panel. Regarding Blanchard's conduct concerning the white Tahoe, after reviewing the videos, Gaston rejected Blanchard's account that he was in fear for his safety. Rather, Gaston determined that Blanchard climbed on top of the hood after the Tahoe came to a complete stop in order to gain leverage to inflict damage to the vehicle.

Regarding Bouchard, Elben, and Froberg's conduct, after reviewing the videos of the incident involving the Gardner truck, Gaston concluded that the three men were told they could not stand in the public right-of-way and block a vehicle/traffic. He determined that, although Froberg was specifically told by the deputy that he could not stand in the right-of-way and block a vehicle, he not only refused to move but failed to admit this in his written statement. Accordingly, based upon all the evidence, Gaston recommended to Duncan that Blanchard, Bouchard, Elben, and Froberg be terminated.⁶⁰

⁶⁰ While I generally found Gaston's testimony straight-forward and non-evasive as well as his tone and demeanor composed and steady, I note that he remained in the courtroom and overheard the testimony of Smith and Mendenhall before giving his testimony. Thus, his credibility is called into question as I cannot be certain that his testimony is based solely upon his personal knowledge.

After Duncan received Gaston's discharge recommendation together with the investigative reports, photographs, the witnesses' statements, the employees' written statements, and the fact-finding notes, he conducted an independent review of the materials relative to the incidents involving Blanchard, Bouchard, Elben, and Froberg. He also conferred with Smith who conducted the fact-finding meetings and compiled the investigative reports. He subsequently agreed with Gaston's assessment regarding the incidents involving Blanchard, Bouchard, Elben, and Froberg. Accordingly, on September 14, 2015, Duncan terminated Bouchard, Elben, and Froberg for gross and willful misconduct during the work stoppage, engaging in disorderly conduct under Washington state law and violating the TRO issued prior to their conduct.⁶¹ On September 15, 2015, Duncan terminated Blanchard for gross and willful misconduct during the work stoppage and engaging in disorderly conduct and malicious mischief under Washington state law.⁶²

In making these findings, I relied on the documentary evidence and credited Smith's testimony over Bouchard's, Elben's, and Froberg's. Specifically, I found Smith credible in that he listened carefully to questions and maintained the same demeanor regardless of who examined him. Smith was forthcoming in his responses, was not vague, ambiguous or evasive on direct or cross examination. Lastly, his testimony comported with the documentary evidence.

Despite that Gaston overheard the testimony of Smith and Mendenhall, I found Gaston credible overall in that he was not vague or evasive in his answers and testified specifically and completely on direct and cross examination. Most importantly, I found Gaston's testimony was supported by the documentary evidence.

Although Duncan's demeanor appeared moderately hostile, particularly on cross-examination and he gave evasive and/or guarded testimony that initially presented as less than forthright, the documentary evidence corroborated his testimony. I found Duncan particularly credible when I asked him how he was able to determine that Blanchard intentionally climbed onto the hood of the Tahoe to inflict damage to the vehicle instead of out of fear for his safety. In his answer, I found that he let his guard down considerably and made a genuine effort to explain his assessment. In that instance, I found Duncan's testimony particularly forthcoming and credible.⁶³

By contrast, as stated earlier in this decision, I found Bouchard, Elben, and Froberg incredible on many points. They made inconsistent, and frequently, illogical statements concerning their actions regarding the Gardner truck. Moreover, I found their testimony evasive, particularly on cross examination, which struck me as less than forthright. In fact, Bouchard and Froberg were only forthcoming (to the extent they were) when confronted with the documentary evidence which proved their testimony unreliable. However, even when confronted

⁶¹ R. Exhs. 41 (Bouchard), 42 (Elben), 43 (Froberg).

⁶² R. Exh. 25.

⁶³ See *Daikichi Sushi*, 335 NLRB 622, 622 (2001) (credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony).

with video and other documentary evidence, Elben often gave nonsensical answers that made him wholly incredible. On balance, I did not find Bouchard, Elben, or Froberg credible or reliable in their testimony.

III. DISCUSSION AND ANALYSIS

A. Legal Principles

In cases involving the discharge of striking employees for engaging in strike misconduct, the General Counsel has the overall burden of proving discrimination.⁶⁴ Initially, the General Counsel must establish that the employees in question were strikers and that the employer took action against them for conduct associated with the strike.

At that point, the burden shifts to the employer to establish that it had an honest belief that the employees in question engaged in the conduct for which they were discharged. The employer's burden of establishing its "honest belief" is no more than that and does not require it to prove that the strikers did in fact engage in misconduct.⁶⁵ It does, however, require more than the mere assertion that it had such a belief. There must be some specificity, linking particular employees to particular allegations of misconduct.⁶⁶ The employer's "honest belief" may be based on hearsay sources, such as the reports of non-striking employees, supervisors, security guards, investigators, or the police.⁶⁷ Whether or not the employer had an "honest belief" is judged on the basis of the evidence available to it when it took the disciplinary action and it need not attempt to get the strikers' side of the story before doing so.⁶⁸

If the employer satisfies its burden, then the General Counsel must affirmatively establish either that the employees did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge.⁶⁹ Not all misconduct is sufficient to disqualify a striker from further employment.⁷⁰ In *Clear Pine Mouldings*, 268 NLRB 1044 (1984), the Board held that strike misconduct is disqualifying if, under all of the surrounding circumstances, it may reasonably tend to coerce or intimidate other employees in the exercise of rights protected under the Act.⁷¹ The *Clear Pine Mouldings* standard is an objective one and does not involve an inquiry into whether any particular employee was actually coerced or intimidated.⁷² Moreover, this standard applies to misconduct directed at

nonemployees such as supervisors, security guards, and independent contractors.⁷³

B. Analysis

1. Whether Blanchard's termination violated the Act

With respect to Blanchard's strike misconduct and applying the above burden shifting standard, the General Counsel has met their initial showing. That is, I find that Blanchard was a striker and that Respondent terminated him for kicking the Delta Fire truck as well as swarming, blocking and jumping on the hood of the white Tahoe which caused damage to the truck's windshield.

I also conclude that Respondent held an "honest belief" that Blanchard engaged in the conduct in question. Specifically, Blanchard admitted, and video and photographic evidence proves, that he kicked the Delta Fire truck. Moreover, regarding the second incident, video and photographic evidence demonstrates, and I find that Blanchard (and others) intentionally swarmed the white Tahoe and blocked its egress from the Mill. While the Tahoe was stopped briefly, Blanchard jumped on the hood of the truck, and in so doing, his picket sign hit the truck causing damage to the windshield. Lastly, after investigating the incident, including reviewing the drivers' and employees' statements, Respondent discharged Blanchard for engaging in said misconduct.

At this point, in order to prevail, the General Counsel must demonstrate that Blanchard did not engage in the misconduct in question or that his misconduct was not sufficiently egregious to warrant his discharge. However, the General Counsel cannot satisfy its burden, because Blanchard admitted to engaging in the conduct in question, and I find that Blanchard's act in kicking the passenger side rear panel of the Delta Fire truck, for no legitimate reason, is sufficient to warrant denial of reinstatement.

Specifically, I find that, by kicking the truck, Blanchard intended to instill fear on the contractor's part, not to return to the Mill during the strike. Moreover, the fact that Blanchard admitted that he knew he was prohibited from any contact with third party contractors or their vehicles but kicked the rear panel notwithstanding this prohibition led me to conclude that his actions were reasonably intended to intimidate and coerce Respondent's contractor to refrain from entering the Mill.

I also conclude that Blanchard's conduct regarding the white Tahoe, which occurred less than an hour after kicking the Delta Fire truck, was unprotected. Specifically, Blanchard intentionally swarmed and blocked the Tahoe's egress from the Mill, an act intended to intimidate the contractor (and others) from coming to the Mill. This is particularly true given that an unidentified picketer can be heard saying, "there's another one," as the Tahoe left the Mill site, which further proved Blanchard's (and his cohorts) intention was to intimidate the contractor. Moreover, Blanchard engaged in such conduct despite admitting that he was aware that his actions were prohibited by the Union's picketing rules as well as the Cowlitz County Court's TRO. More importantly, by surrounding the truck and slamming his

⁶⁴ *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964); *Gem Urethane Corp.*, 284 NLRB 1349, 1352 (1987).

⁶⁵ *Axelson, Inc.*, 285 NLRB 862, 864 (1987); *Gem Urethane*, supra at 1352.

⁶⁶ *Beaird Industries*, 311 NLRB 768, 769 (1993); *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980).

⁶⁷ *Clougherty Packing Co.*, 292 NLRB 1139, 1142 (1989); *Newport News Shipbuilding*, 265 NLRB 716, 718 (1982); *General Telephone Co.*, supra at 739.

⁶⁸ *Giddings & Lewis, Inc.*, 240 NLRB 441, 448 (1979); *Associated Grocers of New England, Inc.*, 227 NLRB 1200, 1207 (1977).

⁶⁹ *Gem Urethane*, supra at 1352; *Laredo Coca Cola Bottling Co.*, 258 NLRB 491, 496 (1981); *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, 611 (1952).

⁷⁰ *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1146 (1994).

⁷¹ *Clear Pine Mouldings*, supra at 1046.

⁷² *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990).

⁷³ *General Chemical Corp.*, 290 NLRB 76, 82 (1988); *PBA, Inc.*, 270 NLRB 998 (1984).

picket sign on/near the truck, Blanchard reasonably intended to not only threaten and instill fear of harm in Respondent's contractor, but to potentially engage in violence in an effort to keep this contractor and others from returning to the Mill. In fact, the evidence reveals that Respondent bused several of its contractors and employees to the Mill after receiving reports that they were afraid to drive their vehicles across the picket line. Such conduct has been found by the Board to be inherently threatening, coercive and intimidating and unprotected under the Act.⁷⁴

Similarly, after carefully reviewing the video evidence (frame by frame), I find that Blanchard's act in jumping on the hood of the Tahoe and the subsequent damage to the truck's windshield was unprotected. Here, the General Counsel claims that Blanchard's actions did not warrant his discharge because he jumped onto the hood of the suburban to save his life since, according to Blanchard, the truck would have swept him under it and potentially killed him. However, as stated in the findings of fact section, supra, the video evidence fails to support this account. Rather, I conclude that Blanchard jumped onto the hood of the truck in order to gain a tactical advantage and further intimidate the contractor. Although the General Counsel made much to do about the fact that the contractor's driver's license was suspended, and as a result of speeding away from the scene, the contractor's reckless driving caused Blanchard to be thrown off the vehicle onto Fibre Way, none of these considerations are relevant to Respondent's decision to discharge Blanchard.⁷⁵ Rather, Respondent's discharge decision was based upon Respondent's investigation which revealed that Blanchard and his fellow strikers swarmed and blocked the Tahoe's egress, Blanchard climbed onto the hood of the vehicle with his picket sign in hand, and the contractor's windshield was damaged. Subsequently, the contractor informed Respondent that he sped away and left the scene, because he was surrounded by picketers who blocked him from leaving, feared for his safety and would not again return to the Mill as a result of the incident. As such, I find that Blanchard's strike misconduct was sufficiently egregious (and coercive) that it warranted his termination.

2. Whether Bouchard's, Elben's, and Froberg's terminations violated the Act

Similarly, despite that the General Counsel satisfied their initial burden of proof, I conclude that the actions of Bouchard, Elben, and Froberg were unprotected. The evidence reveals that Bouchard, Elben, and Froberg stood in the public right-of-

⁷⁴ *Clear Pine Mouldings*, supra at 1047 (Board stated its view that, during a strike, picketers have no right ". . . to block access to the employer's premises . . ."); see also *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB 426, 431 (1995) (union blocking vehicles, during picketing, even for a short period of time, is coercive and violates the Act); *Longshoremen ILA Local 1291 (Trailer Marine)*, 266 NLRB 1204 (1983) (Board held that the union's blocking ingress/egress from employer's facility constitutes coercive conduct).

⁷⁵ See *Giddings & Lewis*, 240 NLRB at 448; *Associated Grocers of New England*, 227 NLRB at 1207 (employer's termination decision resulting from strike misconduct is judged on the basis of the evidence available to it when it took the disciplinary action and it need not attempt to get the strikers' side of the story before doing so).

way for approximately 20 minutes and blocked the Gardner truck from exiting the Mill because they believed Cutler hurled insults and profanities at picketers during the strike and they believed they had a right to stand their ground. Their conduct was clearly intended to retaliate against Cutler and intimidate her from returning to the Mill. Even if Cutler had hurled profanities toward fellow picketers (which I have found she did not), her behavior would not have justified Bouchard's, Elben's, and Froberg's actions in blocking the Gardner truck from leaving the Mill.⁷⁶

Bouchard's, Elben's, and Froberg's conduct also had the effect of intimidating/discouraging other employees and contractors from coming to the Mill during the strike. The record shows that several employees and contractors were afraid to cross the picket line. Moreover, the men's actions caused such a disruption that Respondent was required to redirect numerous vehicles away from Fibre Way, the only access to the Mill, for 20 minutes during the standoff. Moreover, I find Bouchard's, Elben's, and Froberg's actions particularly egregious in that they were fully aware that the Union's picket line rules and the Court's TRO prohibited them from blocking the Gardner truck. Yet despite these rules, and even after the Sheriff's deputy told them and the Union they could not stand in the public right-of-way and block a vehicle, they refused to move to allow the Gardner truck to pass.

While the General Counsel focused on the fact that the sheriff never told the men that they were unlawfully blocking "that" vehicle (meaning the Gardner truck), this argument is patently ridiculous. Rather, the audio and video evidence clearly shows that these gentlemen stood in the middle of Fibre Way for 20 minutes blocking Cutler from leaving the Mill. It was their actions against the Gardner truck, not some other vehicle, to which the deputy admonished the men.

In sum, the evidence clearly demonstrates that Respondent terminated Bouchard, Elben, and Froberg because they unlawfully blocked the Gardner truck from exiting the Mill. The men knew their conduct was prohibited, were told such on multiple occasions; yet they refused to cease and desist. I find the actions of the three men inherently coercive and intimidating, and therefore, unprotected under the Act.⁷⁷ Accordingly, I conclude that Bouchard's, Elben's, and Froberg's terminations did not violate the Act.

Accordingly, I am persuaded that Respondent did not violate Sections 8(a)(1) or (3) of the Act. For that reason, I recommend that the complaint be dismissed.

Dated: Washington, D.C., November 17, 2016

⁷⁶ *Clear Pine Mouldings*, supra at 1047 (blocking ingress/egress of vehicle unprotected in Board's view).

⁷⁷ *Id.* See also *General Chemical Corp.*, 290 NLRB at 82; *PBA, Inc.*, 270 NLRB 998 (1984).