

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

AMGLO KEMLITE LABORATORIES, INC.

and

CASE: 13-CA-065271

BEATA OSSAK, An Individual

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

Respectfully Submitted,

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electronically filed

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the Acting General Counsel files this Answering Brief to Respondent's Cross-Exceptions to the Administrative Law Judge's Decision in this matter.¹

Counsel for the Acting General Counsel notes initially that it has filed Exceptions and a Brief in Support of Exceptions challenging the ALJ's Decision. The Acting General Counsel submits that the ALJ failed to make several critical findings in this case, the most serious of which was its failure to find that Respondent violated Section 8(a)(1) of the Act by repeatedly threatening to terminate, and then by terminating its entire work force, solely because they initiated a protected work stoppage to protest a longstanding wage freeze. The ALJ also failed to find that Respondent violated Section 8(a)(1) of the Act by transferring the employees' production work and machinery from its Bensenville, Illinois facility to an associated facility located in Mexico, and by failing to reinstate twenty-two employees after the strike ended.

¹ In this Brief, the Administrative Law Judge will be referred to as "the ALJ", the National Labor Relations Board will be referred to as the "Board," and Amglo Kemlite Laboratories, Inc. will be referred to as "Respondent." Citations to the ALJ's Decision will be referred to as "ALJD" followed by the specific page(s) and if applicable, the lines of the page(s) referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The Acting General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent's exhibits will be designated as "R" followed by the exhibit number.

Despite clear and convincing evidence showing that Respondent terminated all of its production employees on the first day of the strike, the ALJ decided that Respondent took advantage of the strike to accelerate the lay-off of a significant portion of its workforce. The Acting General Counsel has taken Exception to the determination that Respondent's employees were laid-off instead of being terminated. Respondent's treatment of its predominantly Polish-language speaking employees in response to their strike reasonably led the employees to believe that they had been terminated. Specifically, on the first day of the strike, Respondent's managers told striking employees that once the Owner learned about the strike half of them would be gone, that the Owner no longer cared for his "Polish" work force, that the work they were performing could be carried out at Respondent's other facilities, and that they would only lose. (Tr. 36, 199, 128, 207, 282-284) After it became clear to the managers that the employees were not going to be bullied into ending their strike, the managers told the employees that they should punch out and leave the facility, and that they had resigned and were fired. (Tr. 36, 128, 141, 198., GCX 5) When the employees returned to work the following morning, they discovered that the door leading into the facility was locked and that the lock had been changed in order to prevent employees who possessed keys from entering. (Tr. 43, 45, 90, 141-142, RX 5) They were confronted by their managers and the police as they waited outside the facility. The managers again told the employees that they had fired themselves by initiating their strike and refusing to work. Accordingly, the evidence supports finding that the employees were all terminated on the first day of the strike.

Counsel for the Acting General Counsel submits that the evidence does not support the ALJ's conclusion that Respondent took advantage of the strike in order to "accelerate" the lay-off of employees. Respondent instead failed to reinstate twenty-two employees following the

strike in order to send a clear message to the employees who were reinstated, that any future concerted demands for improved wages or engagement in a lawful work stoppage seeking to improve work conditions would not be tolerated.

Accordingly, Counsel for the Acting General Counsel requests the Board to find that Respondent violated Section 8(a)(1) in the manner presented in its Exceptions and Brief in Support of Exceptions, and that the Board deny Respondent's Cross-Exceptions in their entirety.

The Record Evidence Supports that Respondent Terminated the Employees on the First Day of the Protected Work Stoppage. (Respondent's Cross-Exceptions 3-5, 9, 11, 21, 28-30, 34-40, 43, 47-52).

Respondent in its cross-exceptions denies that its managers made threatening remarks, terminated all of its employees, locked out the employees from the facility, or that its manager told employees to fill out new employment applications. Counsel for the Acting General Counsel's Exceptions reference that the record in this case is replete of credible testimony from current and former employees accounting for the factual details of September 20 and the week that followed:

1. As referenced in Acting General Counsel Exceptions 1 and 5, by stating that the employees are fired, sign the resignation papers and go away (GC 5, Tr. 36, 128);
2. As referenced in Acting General Counsel Exceptions 2 and 5, by stating that the employees are going to lose² (Tr. 128);
3. As referenced in Acting General Counsel Exceptions 3 and 5, by stating that there are companies that are moving production to Mexico, the owner has four other companies on different continents and it would be so easy to make a decision (Tr. 128);

² Plant Manager Czajkowska reaffirmed that employees' concerted action would result in discharge by her implied threat that the employees would only lose if they continue their protected work stoppage.

4. As referenced in Acting General Counsel Exceptions 4 and 5, by stating to employees that they are fired, go away (Tr. 36, 41, 128);
5. As referenced in Acting General Counsel Exception 7, by stating that the owner is no longer “pro-Polish” as he once was³ (Tr. 85);
6. As referenced in Acting General Counsel Exception 8, by stating that the owner would tell the managers to get rid of half of the employees if they continued the strike (Tr. 128); and
7. As referenced in Acting General Counsel Exception 10, by stating that the employees fired themselves when they walked off the job. (RX 15 at 2, Tr. 136, 142)
8. As referenced in Acting General Counsel Exception 6, in the afternoon of first day of the strike, by telling employees Kopec, Wilusz, and Koscieniak that they had been fired and to go away. (Tr. 40, 41, 215)
9. As referenced in Acting General Counsel Exceptions 9 and 11, on the morning of September 21, 2011, by telling the employees that they had fired themselves and they had to leave Respondent’s property. (Tr. 45, 142-143, RX 15 at 2)
10. As referenced in Acting General Counsel Exception 14, on Friday, September 23, 2011, by telling a group of employees seeking to return to work that they had to fill out new employment applications. (Tr. 97, 186)

The ALJ ignored the evidence referenced above when he concluded that the Respondent did not terminate its employees based solely on the self-serving testimony of Respondent’s managers. ALJD at 9, lines 17-18 (ALJ stating, “I credit the testimony of the Respondent’s

³ In addressing the group of employees at the onset of the work stoppage by stating that it is futile to present their grievance to the owner of the company because the owner no longer cares for its predominantly Polish employees at its Bensenville facility, together with statements that the owner can replace these employees with other workers outside the country, is an implied threat of discharge statement.

witnesses that it did not fire any employees”). Acting General Counsel submits that the record evidence clearly supports a finding and conclusion that Respondent discriminatorily fired its employees within the first hour of the protected strike as a knee-jerk reaction to get the employees to abandon the strike. The ALJ erred by taking the Respondent’s testimony at face value when it was clearly contradicted by the verifiable objective evidence found in this case. The ALJ should have analyzed whether a discharge occurred under established Board precedent, holding that a discharge is judged from the employees’ perspective, and the employer is held responsible “when its statements or conduct create an uncertain situation for the affected employees.” *Kolkka Tables & Finish-American Saunas*, 335 NLRB 844, 846 (2001). If the ALJ had done so, he would have concluded that telling the employees that they had resigned when they refused to return to work and that had fired themselves supports finding that they had been terminated. He would have also found that Respondent’s decision to change the locks at its facility, to transfer work to Mexico, to hire new employees, and to tell returning employees that there was no work for them also evidenced Respondent’s desire to rid itself of employees because they engaged in a strike and to show the employees that it decided to reinstate following the strike the futility of engaging in protected activity in an effort to address their concerns about their wages.

I. To the Extent with Which Respondent Excepts to the ALJ’s Credibility Determinations, the ALJD Should Not be Disturbed. (Exceptions 1-5, 9, 12, 20, 21, 25, 31, 32, 50)

Respondent objects to all of the credibility findings made by the ALJ that are unfavorable to its position. However, the Board’s established policy is not to overturn an ALJ’s credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that the findings are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362

(3d. Cir. 1951). The Board has held that specific detailed testimony is more trustworthy than general denials. *Williamson Memorial Hospital*, 284 NLRB 1144, 1147 (1986) (details support credibility of witnesses). Significantly, the testimony of employees adverse to the interests of their employer and which could put their jobs at risk serves to enhance their credibility. *The Good Samaritan*, 319 NLRB 392 (1998); *Georgia Rug Mills*, 131 NLRB 1304, 1305, fn. 2 (1961).

Respondent's first exception to the ALJD with respect to the ALJ's finding that the evidentiary record lacks "any material differences between the testimony of current employees Katarzyna Dziekan and Beata Ossak and the testimony of management's witnesses." ALJD p. 2, fn. 3. Generally, Dziekan and Ossak, as well as employee Jesse Kopec, testified that Respondent President Christian and Plant Manager Czajkowska threatened the group of employees on the first day of the plant-wide strike, terminated the mass work force of employees that day, and that the employees' termination was confirmed by management in the days that followed. Dziekan and Ossak's testimony was not automatically credited by the ALJ, but rather, their testimony was credited based on their consistency and detailed account of the events they each witnessed.

III. The Employees' In-Plant Work Stoppage Remained Protected. (Exceptions 10, 12, 13, 15, 17- 20, 21- 23, 26, 28).

The ALJ correctly concluded that the employees engaged in protected concerted activity when they collectively engaged in an in-plant work stoppage and that the work stoppage remained protected throughout its duration. The Acting General Counsel, however, takes the position that the employees' presence at the facility remained protected because the Respondent's management condoned the employees' presence in the facility. After Respondent discharged the employees, discussed above, no manager re-approached the group of employees

to tell them to leave the plant throughout the remainder of that day's strike. The Acting General Counsel takes the position that in the absence of any positive action by the Respondent to have the employees leave the premises, the employees could reasonably believe Respondent condoned their continued presence in the plant. Given Respondent's lack of affirmative action to remove the employees from its facility, it was unnecessary for the ALJ to evaluate whether the employees lost their protection under the Act under the multi-factor balancing test cited in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005).

Assuming arguendo that the Respondent did not condone the employees continued presence on its premises, the Acting General Counsel agrees with the ALJ's application of *Quietflex*. However, Acting General Counsel excepts and the Respondent cross-excepts, for different reasons, to the ALJ's *Quietflex* analysis as it applies to the instant case. With respect to the Acting General Counsel's position, the ALJ's *Quietflex* analysis is flawed because he based his analysis on the false premise that the employees, as discussed above, were never terminated for engaging in a protect work stoppage. Notwithstanding the ALJ's flawed analysis, the ALJ was correct in concluding that the employees' work stoppage remained protected.

In *Quietflex*, *supra*, the Board cited a multifactor-balancing test in striking a balance between employee Section 7 rights and the private property rights of employers. The Board in *Quietflex* identified the following ten factors to use in determining which party's rights prevail with respect to an on-site work stoppage: 1) the reason the employees have stopped working; 2) whether the work stoppage was peaceful; 3) whether the work stoppage interfered with production, or deprived the employer access to its property; 4) whether employees had adequate opportunity to present grievances to management; 5) whether employees were given an warnings that they must leave the premises or face discharge; 6) the duration of the work stoppage; 7)

whether employees were represented or had an established grievance procedure; 8) whether employees remained on the premises beyond their shift; 9) whether the employees attempted to seize the employer's property; and 10) the reason for which the employees were ultimately discharged. 344 NLRB at 1056-67.

Acting General Counsel submits that the ALJ was correct in finding that an application of the *Quietflex* multi-factor analysis to the instant case falls on the side of the employees' exercise of their rights under Section 7 of the Act. "To determine at what point a lawful on-site work stoppage loses its protection, a number of factors must be considered, and the nature and strength of competing employee and employer interest must be assessed." *Quietflex.*, *supra* at 1056., quoting *Cambro Mfg. Co.*, 312 NLRB 634 (1993). The Board has held that "the precise contours within which such [a work stoppage] is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed." *Id.*, quoting *Waco, Inc.*, 273 NLRB 746 (1984). The "locus of [the] accommodation [between the employer and employee rights]...may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context." *Id.*, quoting *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). It is clear in applying the ten factors set forth in *Quietflex* that the employees work stoppage on September 20 remained protected under Section 7 of the Act during its entirety:

- 1) and 2) The reason for the work stoppage and it remained peaceful.

Acting General Counsel submits that the work stoppage was a peaceful effort by employees to press their demand for a pay increase on Respondent without otherwise disrupting Respondent's operation. See *Roseville Dodge v. NLRB*, 882 F.2d 1355 (8th Cir. 1989). enforcing *City Dodge Center*, 289 NLRB 194 (1988). (Peaceful work stoppage on the shop floor, lasting

several hours, protected, concerted activity); *compare NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252, 255 (1939). (employees seized and retained possession of employer's plant for several days engaged in illegal trespass).

Through their work stoppage the employees were able to present their dissatisfaction concerning employee wages in a more persuasive manner because, for many years, other methods of communication had proven futile. (Tr. 29, 79, 122). There was no evidence to show that the striking employees unlawfully threatened, restrained or coerced other employees. Respondent, in its opening statement, stated that some of the employees who wanted to work on September 20 were intimidated from doing so. In support of this argument, Respondent solicited testimony from Czajkowska who testified that while she and Christian were with the group of employees in the assembly area, employee Marius Cwik told Czajkowska that he wanted to work but he was afraid to turn on his machine. (Tr. 203). Czajkowska further testified that she observed that employee Stanislaw Pietras appeared to be returning to work but as she began to move, one of employees from the group told Pietras to be quiet. (Tr. 205). Respondent further stated in its opening statement that it would present evidence that an employee's machine was physically turned off while attempting to work. (Tr. 18). However, Respondent failed to present either Cwik or Pietras to corroborate the manager's self-serving testimony and no evidence was presented to show that the strikers prevented any employee from returning to work by shutting off their machines. In this regard, the ALJ was correct in not crediting Czajkowska's self-serving testimony. ALJ at 6, Ins 40-45. Respondent's cross-exceptions that the aforementioned evidence is sufficient to demonstrate that the work stoppage was anything but peaceful is misplaced and factually deficient. While telling a fellow co-worker to quiet herself may detour from social grace, this alleged comment, in the absence of further aggravating conduct, does not

move an otherwise peaceful work stoppage from protection under the Act. Moreover, the employees kept their protest to one area in the plant and there is nothing in the record to imply that any damage occurred to the equipment or to any product. (Tr. 115, 140). Contrary to any implication, Czajkowska testified that she, as well as Christian, toured the plant after 2:45 p.m. on September 20 and that there was no damage to the facility. (Tr. 182). Given this, there is no evidence of any misconduct or sabotage by the employees.

3) The work stoppage did not interfere with production or deprive Respondent access to its property.

The ALJ correctly found that the work stoppage did not interfere with production. ALJD p. 7, lns 9-14 and p. 8, lns 1-4. In the case at hand, the entire workforce stopped working, to include the production employees, office personnel, and supervisors.⁶ It is not considered an interference with production where employees do no more than withhold their own labor. *Quietflex.*, 344 NLRB at fn. 6. Similarly, there is no evidence that the employees who participated in the work stoppage deprived the employer of access to its property, to include the assembly area. In fact, the employees stayed gathered in the assembly area, in anticipation for Czajkowska and Christian to return to the employees after management spoke to the owner of Amglo, Jim Hyland, regarding their written demands. (Tr. 88).

4) Respondent did not give the employees an adequate opportunity to present their grievance.

The employees, unrepresented and without an established grievance procedure, were presented with an opportunity to confront top management, President Christian, given that she was visiting from Respondent's Florida plant. (Tr. 32). Under these circumstances, and in the

⁶ The supervisors joined in the work stoppage with the employees. They also remained within the assembly area on the first day of the strike. Respondents cross-excepts to the ALJ's finding that the entire workforce engaged in the strike because of contrary testimony, referencing Czajkowska's testimony that there were thirteen employees on either second shift, working in a different building, or on a leave of absence. Absent these few employees excused from the September 20 first-shift Bensenville facility work, in all intents and purposes, the entire workforce that was present during the first shift on September 20 engaged in the strike.

absence of an established procedure for handling grievances, the employees had to speak for themselves as best they could. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In doing so, the employees asked for management to present their grievance to the owner. Czajkowska and Christian, in response to the employees' request to speak to the owner, intimidated and threatened the employees that they are not going to do anything, they would lose, and that he does not care about "Polish" people like he used to. (Tr. 85, 128, 132). However, at no point in time did Czajkowska or Christian confirm whether they would present the employees' wage demands to the owner.

In *Fortuna Enterprise*, 354 NLRB 17 (2009),⁷ the employees were engaged in a protected work stoppage and after demanding to speak to senior management, the Respondent suspended 77 employees. The Board adopted the ALJ's finding that the employees were engaged in protected concerted activity at the time they were suspended and that the employees' continued presence on the Respondent's property at the time of their suspension still served an immediate protected interest. *Id.* As management had yet to hear and consider the employees' grievance, the Respondent was not yet entitled to assert its private property right. *Id.*

Like the 77 employees in *Fortuna*, the 96 employees in the instant case were similarly fired because they were engaged in a work stoppage and likewise were not afforded any opportunity to present their grievance to Respondent owner. The Respondent cross-excepts that the employees had sufficient opportunity to make known their demands and that they were flatly rejected. However, the record evidence clearly demonstrates that not only were the employees terminated for engaging in a work stoppage after attempting to voice their complaints, the two on-site managers berated their unison effort to present their grievance to the company owner.

⁷ Remanded by Court of Appeals to assess further under the *Quietflex* multifactor balancing test because the employer had a longstanding "open door" policy, facts which are not present in the instant case.

- 5) The employees were not given warnings that they must leave the premises or face discharge.

In *Quietflex*, the Board found that the employees' concerted work stoppage on company property lost its protection after a reasonable period of time. A "reasonable" time being defined by all the circumstances. The employer addressed the employees' grievances in a meaningful way and after many hours, warned the employees on two occasions to either return to work or continue the work stoppage off the employer's premises. As the employees failed to comply, the employer thereafter lawfully discharged the employees. *Quietflex*, *supra* at 1058-59. The instant case is distinguishable from *Quietflex*. Unlike *Quietflex*, the case at hand involves Respondent's refusal to address the employee demands or to engage in any effort to resolve their grievance and the immediate termination of the employees absent any warning to first leave the facility. In this case, Respondent's employees were told that there would be no discussion of their grievance, to get to work or accept termination. In other words, a callous "take it or leave it" ultimatum was delivered by the managers in response to the employees' lawful activity.

- 6) The duration of the work stoppage was minimal, as it only lasted one hour before management terminated the employees.

Acting General Counsel submits that Respondent's actions in the first hour of the strike and conduct during the course of the day were the factors that led to the employees' decision to remain in the facility during the remainder of that day. As noted previously, when Respondent's manager's initially met with the employees, they refused to enter into any discussion with the employees to address or resolve their complaints. The managers immediately cut off any chance for discussion and ordered the employees to return to work or resign, and told them that they were fired. Thus, less than an hour after the work stoppage started, Respondent terminated the employees.

Respondent's managers then ignored the striking employees for the remainder of the day. No effort was made to remove the employees from the facility and no actions were undertaken against Respondent's supervisors who were participating in the strike, even after they refused to meet with the managers that day.⁸ This set of facts serves to distinguish the work stoppage found in this case for those found to be unprotected in prior Board cases.⁹ In the instant case, Respondent took no action to remove the employees from the facility. There is nothing in the record to show that Respondent's managers acted on any concern over the continued presence of the employees within its facility after it told them that they were fired and to get out. Despite the fact that Respondent's management acquiesced to the employees' presence, (Respondent did not return to the assembly room area after its initial meeting with the employees to make sure that the employees had left the facility, did not call the police or carry out any other measure to remove the strikers from its property) Respondent now incorrectly argues that the length of the strike *alone* places it outside the protection of the Act. Given all the factors in this case, even considering the full length of time the employees were in the Respondent's facility, the protection of the Act should not be removed from these employees because they were engaged in conduct that is fundamental to protection under Section 7 of the Act, in the face of a Respondent that instantly terminated the employees and thereafter neither attempted to resolve the dispute nor remove the employees from the facility.

⁸ In fact, there is no indication that the supervisors suffered any adverse consequences for their participation in the strike and refusal to meet with their managers.

⁹ In *Waco, Inc.*, the Board ruled that the employees "were occupying the facility in manner which was unprotected" because they continued to occupy the employer's premises for several hours *after* they had been directed to leave if they were not returning to work and they failed at any time during the occupation to "communicate to the Respondent the particulars of their grievances so as to facilitate a discussion or possible resolution of their concerns." 273 NLRB 746, 746-47 (1984) (emphasis added). In *Cambro Mfg. Co.*, the Board stated that while "the employees were entitled to persist in their in-plant protest for a reasonable period of time... [there came] a point at which the Respondent was entitled to reclaim the use of its entire premises," taking into consideration that the employees had been assured the opportunity to meet with the employer's general manager, in accordance with the established past practice, under the open door policy 312 NLRB 634, 636 (1993).

- 7) The employees at Respondent's facility are unrepresented and Respondent does not have an established grievance procedure.

There is no evidence in this case that the employees had a grievance procedure or any means to resolve their complaints outside of the action they took. Respondent failed to introduce any evidence that the employees had any means of adjusting their complaints. To the contrary, the record shows that the employees concerns were completely ignored by the Respondent.

- 8) The employees remained on Respondent's premises beyond their shift.

Similarly, to the extent that the majority of the employees remained at the plant until the conclusion of the later first shift, this one and a half hour difference cannot be viewed as a particularly disruptive act as there was no disruption to any other shift work or other negative consequence that came from the employees concertedly leaving together. All of the employees from both shifts were withholding their service and given this, there was no disruption of work due to some employees staying beyond their shift. *Quietflex.*, 344 NLRB at fn. 6 ("It is not considered an interference of production where the employees do no more than withhold their own services").

- 9) The employees did not attempt to seize Respondent's property.

Based upon the facts and arguments stated above, the employees in the case at hand did not attempt to seize Respondent's property.

- 10) The employees were discharged because they engaged in an in-plant work stoppage.

Based upon the facts and arguments stated above, the employees in the case at hand were discharged because they engaged in a protected concerted work stoppage at Respondent's facility.

Weighing all the *Quietflex* factors clearly favors the finding that the employees retained the protection of Section 7 of the Act throughout their entire withholding of their services and peaceful presence in the plant on September 20, 2011. For all the foregoing reasons, Acting General Counsel respectfully submits that the Board affirm the ALJs findings and conclusion that the employees' in-plant work stoppage remained protected and that Respondent's cross-exceptions be rejected.

IV. Respondent Unlawfully Transferred Machines and Production Work from its Bensenville, Illinois Facility in Retaliation for its Employees Engaging in a Protected Work Stoppage. (Cross-Exceptions 47-49).

In its cross-exceptions, Respondent incorrectly asserts that it presented substantial and undisputed evidence that only a miniscule amount of work product was transferred to Juarez from Bensenville after the strike. The General Counsel submits that Respondent's exhibits in which it relies were barely legible and the explanation given as to the content in these exhibits was often unclear and confusing. The General Counsel takes the position that Respondent is drastically downplaying its post-strike retaliatory conduct in moving production work so as to justify its failure to reinstate the remaining twenty-two strikers.

The evidence shows that the Respondent has taken action to make sure it does not need the twenty-two employees that it has refused to reinstate since their termination on September 20. Respondent's actions specifically conform to its managers' threats that once the owner learned about the strike, half of the employees would be gone. It also was in keeping with Respondent President's admonishment to the employees at the start of the strike that Respondent had several production facilities to which their work could be transferred, including the one in Mexico (Tr. 131). The Respondent repeatedly instructed the employees that because of their strike, the company was not reinstating the employees and was moving production to its plant in

Mexico. First, on September 27, where a group of approximately 60 employees that remained on strike assembled at the Bensenville facility and signed unconditional offers to return to work, Christian told striking employee Ossak that the company could not give Ossak a timeline on when the employees would be called to work because the company was re-organizing production by moving the work to Mexico because of the strike. (Tr. 148-149). Second, Respondent's management sent letters to each of the twenty-two employees who have yet to be reinstated reiterating that the company was not reinstating the employees because of the work stoppage and that the company was instead moving production work to its Mexico plant. (GC 6). Finally and most telling, is the admission from Respondent's plant manager that a decision was made to accelerate the transfer of production to Mexico because of the strike. (Tr. 285).

In the instant case, the ALJ properly found that the Respondent accelerated a transfer of production work to Mexico because of the strike, at ALJD p. 10, ln. 12-16. However, the ALJ failed to conclude that Respondent's transfer of production work was in retaliation of the employees protected activity, in violation of Section 8(a)(1) of the Act. Respondent's transfer of production work to Mexico was motivated by the employees protected concerted work stoppage and therefore in violation of Section 8(a)(1) of the Act. Where the evidence may support a lawful and/or unlawful motivation, *Wright Line* guides the analysis into the employer's motivation. *Wright Line.*, 251 NLRB 1083, 1089 (1980)., enfd. 662 F.2d 899 (1st Cir. 1981)., *cert. denied* 445 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish that the unlawful activity was motivated at least in part by Respondent's animus to its employee's union or protected concerted activity. In this case, Acting General Counsel established that the work stoppage was the sole motivating factor in Respondent's decision to transfer its production and machines to its Mexico facility. *Id.* at 1083. Moreover, the Board has long held that where

adverse action occurs shortly after employees have engaged in protected activity, an inference of unlawful motive is raised. *McClendon Electrical Services.*, 340 NLRB 613, fn. 6 (2003), citing *LaGloria Oil.*, 337 NLRB 1120 (2002). Once the Acting General Counsel has established a prima facie case, Respondent has the burden of establishing that it would have taken the same action even in the absence of the protected conduct. *Wright Line.*, 251 NLRB at 1089.

In Respondent's brief in support of its cross-exceptions, Respondent bullets asserted undisputed evidence to demonstrate that work was not transferred from its Bensenville plant to its facility in Mexico. Respondent claims that its conduct is excused because the Bensenville and Juarez, Mexico facilities are "sister" sites that make essentially the same products and that the Bensenville facility is an "incubator" site. However, Respondent's records show that unless a product is earmarked for production in its Mexico plant, products were and continue to be made in its Bensenville facility. (R 9, 10, 11, 12). The evidence does not support that Bensenville is anything but one of Respondent's production plants. Respondent did not submit evidence that customer orders have changed, its costs as a whole are lower in its other facilities, or that there were any fixed or definite decisions made to transfer any machines or production work but for the strike.¹⁰ Rather, following the strike, in retaliation for its employees' protected strike,

¹⁰ Margaret Chlipala serves as Respondent's Product Transfer Coordinator and is responsible in keeping a transfer list updated and coordinating the distribution of information and materials necessary for the Mexico plant to build existing and new product as well as the alleged ongoing efforts to transfer production work from Respondent's Bensenville facility to its Mexico facility. (Tr. 193-194, 246). Respondent failed to call Chlipala to testify at the hearing despite making a point of having her testify about the coordination of products and equipment placed on the transfer list during its opening statement. (Tr. 193-194, 238-239). General Counsel submits that based upon the records Respondent submitted at the trial, Chlipala would have substantiated that a decision had not been reached prior to the strike to transfer a substantial portion of production work to the Mexico facility such that would have justified the failure to reinstate employees. Accordingly, Respondent's failure to call this witness warrants that an adverse inference is drawn. *DMI Distribution of Delaware Ohio, Inc.*, 334 NLRB No. 59, slip op. at 5, fn. 15 (2001); see also *Property Resources Corp.*, 285 NLRB 1105, 1105 fn. 3 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988). (An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may be assumed to be favorably disposed to the party).

Respondent transferred two machines and production¹¹ work to its Mexico facility. (Tr. 268, 286). The record is clear that as of September 20, the day the employees initiated the work stoppage, no decision had been made to transfer machinery to Mexico. (R. 9, Tr. 289-290). In fact, the last time Respondent moved a machine from its Bensenville facility to its Mexico facility was in 2009. (Tr. 284). The transfer of equipment and production executed the unlawful threats made on the first day of the work stoppage and cemented Respondent's message to employees that supporting each other's efforts to engage in protected, concerted activity will lead to a serious adverse employment action.¹² (Tr. 131). Given the foregoing, Acting General Counsel met its burden under *Wright Line* to support the inference that the employees' protected conduct was the motivating factor in Respondent's decision to transfer machinery and production to another facility. *Id.*

The ALJ properly found that Respondent failed to demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. ALJD p. 10, ln.17-22.

Given Respondent's egregious threats and the fact that there is no credible evidence to substantiate Respondent's fabricated "incubator" and ordinary course of business contentions, it is clear that Respondent's only motivation to transfer machines and production to the Mexico facility was solely in retaliation to the employees' protected concerted activity. As the record evidence clearly demonstrates, the strike was of short duration and there was no need to transfer production or machinery but for a purely retaliatory motive. Accordingly, in keeping with the ALJ's factual findings, Acting General Counsel submits that Respondent's transfer of machines and production work violated Section 8(a)(1) of the Act and a conclusion of law to this effect should be made.

¹¹ Respondent's transfer of 50 units of work to meet its production demands during the strike did not violate the Act. However, Respondent's decision to add 9,000 units of laser lamp production to its transfer list after the strike was clearly retaliatory (R 9, 11, 13).

¹² Also, on October 21, Respondent confirmed, in writing, that they made good on the threats to transfer production work from Bensenville to Mexico. Respondent's letter to the twenty-two un-reinstated employees reads: "While most, if not all of our employees offered to return to work by September 27th, based on our assessment of the economy and our continued movement of production to our plant in Mexico (which we continue to assess), we have determined we do not currently have jobs for all of our employees who offered to return to work on September 27th." (GC 6).

V. ***Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1963),, does not support a limitation on the application of Section 8(a)(1) to situations in which an employer terminates its work force and transfers work they were performing to another facility because the employees engaged in protected concerted activity including a strike to protest a longstanding wage freeze.**
(Cross-Exception 54)

In *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), which involved a plant closure, the Court held that some employer decisions are so peculiarly matters of management prerogatives that they would never constitute violations of Section 8(a)(1), whether or not they involved sound business judgment unless they also violated Section 8(a)(3). In its Cross-Exceptions, Respondent appears to take the position that, based upon the *Darlington* holding, the transfer of machinery and bargaining unit work from its Bensenville, Illinois facility to a related facility located in Mexico in retaliation for its Bensenville employees engaging in a protected strike cannot serve as the basis for finding a violation of Section 8(a)(1) of the Act. Acting General Counsel notes however that the *Darlington* case concerned a decision to close a plant facility. The circumstances of this case differ significantly. This case does not involve a plant closing; it instead involves the Respondent's retaliatory termination of its employees for engaging in protected concerted activity, and the re-allocation of work and machinery between its facilities. Acting General Counsel submits that the holding in *Darlington* does not preclude the Board from finding that Respondent unlawfully transferred machinery and production work from its Bensenville facility to its facility in Mexico, or from fashioning an order requiring Respondent, with an ongoing business in Bensenville, to return the machinery to Bensenville and to allocate work between its Bensenville and Mexico facility in the manner it was allocated prior to the strike.

Conclusion

Based on the foregoing, including Counsel for the Acting General Counsel's Exceptions and Brief in Support of its Exceptions to the Decision of the Administrative Law Judge, it is submitted that Respondent's Cross-Exceptions and its Brief in Support of its Cross-Exceptions are without merit and should be rejected by the board. Therefore, Counsel for the Acting General Counsel respectfully requests that Respondent's Exceptions be overruled in their entirety.

DATED at Chicago, Illinois, this 8th day of August, 2012.

Cristina Ortega by [signature] filed electronically
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CERTIFICATE OF SERVICE
13-CA-065271

I certify that on this 8th day of August 2012, a true and correct copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge and Respondent's Brief in Support of its Cross-Exceptions to the Decision of the Administrative Law Judge was served upon the following parties in the manner indicated below:

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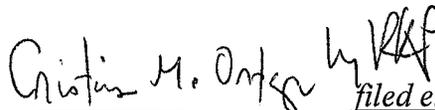
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