

American Postal Workers Union, Queens Area Local (Postal Service) and Rhonda Johnson and Diane Harrison. Cases 29-CB-7753-P and 29-CB-7754-P

March 5, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On February 14, 1992 Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions, a supporting brief, and a brief answering the Respondent's exceptions and moved to strike part of the Respondent's argument. The Respondent thereafter filed an opposition to the General Counsel's motion to strike.

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

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

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis or reversing the findings.

We deny the General Counsel's motion to strike the Respondent's argument that, because employees Johnson and Harrison were acting as supervisors on the days when the Respondent's agent, DeGennaro, conditioned the further processing of their grievances on their joining the Respondent, they were not covered by the Act. For the reasons stated by the judge, we find no merit in the argument.

Even assuming, arguendo, that Johnson and Harrison were acting as supervisors on the days of the coercion in question, we note that the Respondent does not dispute that they would return to the unit in the future. In this respect, the circumstances are analogous to those in the construction industry where, as the Board has observed, employees frequently cycle in and out of supervisory jobs. The Board has held that such individuals are protected from union coercion with respect to their rights as employees under Sec. 8(b)(1)(A) because, regardless of when the coercion occurs, the coercion can carry over to intimidate the individual when he or she again becomes a statutory employee. See *Plumbers Local 725 (Powers Regulator Co.)*, 225 NLRB 138 (1976), enfd. 572 F.2d 550 (5th Cir. 1978). Likewise, in this case the Respondent's refusal to continue processing the women's grievances would have likely intimidated them in the exercise of their Sec. 7 rights when they later returned to employee status.

²The judge found that the Respondent unlawfully coerced employee Rhonda Johnson to sign a dues-checkoff authorization form, but apparently inadvertently failed to conclude that the conduct violated Sec. 8(b)(1)(A). We, therefore, grant the General Counsel's exceptions 7, 8, and 10, and amend the conclusion, and modify the recommended Order and notice to correct this omission. We also grant

AMENDED CONCLUSIONS OF LAW

Insert the following as paragraph 2(d).

"(d) Coercing any employee to sign a dues-checkoff authorization form."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Postal Workers Union, Queens Area Local, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(d) Coercing any employee to sign a dues-checkoff authorization form."

2. Substitute the following for paragraph 2(a).

"(a) Reimburse Johnson for all dues that have been deducted from her pay since she executed the dues-checkoff authorization in about September 1990, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

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

the General Counsel's exception 9 and change the style of the notice to read "Notice to Employees and Members."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees of the United States Postal Service that their grievances would be processed only if they joined American Postal Workers Union, Queens Area Local and signed a dues-checkoff authorization.

WE WILL NOT threaten employees of the Postal Service that in order for them to be successful in their grievances, they first have to join the Union.

WE WILL NOT threaten employees of the Postal Service that unless they joined the Union their grievances would be delayed.

WE WILL NOT coerce employees to sign a dues-checkoff authorization form.

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

WE WILL rescind and revoke the membership of Rhonda Johnson and WE WILL inform her, in writing, that this has been done.

WE WILL reimburse Johnson, with interest, for all union dues deducted from her pay since September 1990.

AMERICAN POSTAL WORKERS UNION,
QUEENS AREA LOCAL

Jonathan Leiner, Esq., for the General Counsel.
Joel C. Glanstein, Esq. (O'Donnell, Schwartz, Glanstein & Rosen), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 6, 1991, in Brooklyn, New York. The consolidated complaint, which issued on November 27, 1990, was based on unfair labor practice charges filed by Rhonda Johnson and Diane Harrison on September 20, 1990.¹ The complaint alleges that American Postal Workers Union, Queens Area Local (Respondent) engaged in the following activity in violation of Section 8(b)(1)(A) of the Act:

1. On or about September 9, by Arthur DeGennaro, at the JFK facility, informed Johnson that he would process her grievance only if she joined Respondent.

2. On or about September 9, by DeGennaro, at the JFK facility, coerced Johnson to sign a dues-authorization check-off card for Respondent, by conditioning the further processing of her grievance upon her executing such a checkoff authorization.

3. On or about September 9, by DeGennaro, at the JFK facility, informed Harrison that in order to win her grievance, she would have to join Respondent.

4. On or about September 9 and 10, by DeGennaro, at the JFK facility, attempted to coerce Harrison into signing a dues-checkoff authorization form by repeatedly presenting her with the form and demanding that she sign it.

5. On or about September 13, by DeGennaro, at the JFK facility, told Harrison that unless she joined Respondent her grievance would be delayed.

On the entire record,² including the briefs received and my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that the Board has jurisdiction over the United States Postal Service by virtue of the Postal Reorganization Act, 39 U.S.C. § 1209(a).

¹ Unless indicated otherwise, all dates referred to relate to the year 1990.

² The unopposed motion of General Counsel, in his brief, to correct the transcript is granted.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The postal facility is located at JFK Airport in Queens, New York; it dispatches mail that arrives at the airport. United States Postal Service (Postal Service), and American Postal Workers Union, AFL-CIO (APWU), have had a collective-bargaining relationship for many years. The collective-bargaining agreement (Agreement) in effect at that time of the events herein, was effective for the period July 21, 1987, through November 20. This agreement does not contain a union-security clause and neither Harrison nor Johnson were members of Respondent at the time of the incidents alleged herein. Each has been employed by the Postal Service for about 10 years, Harrison as a records clerk and Johnson as a distribution clerk. Johnson, was never a member of Respondent; Harrison became a member of Respondent when she began her employ with the Postal Service. She resigned from the Respondent in either 1985 or 1987 and has not been a member since. The other principal actor herein is Arthur DeGennaro, Respondent's clerk craft director, and an admitted agent of Respondent.

The agreement contains provisions governing the assignment of overtime hours. In order to be eligible for overtime work, eligible employees must place their name on an "Overtime Desired" list, and overtime assignments are made from this list. Harrison and Johnson each filed a grievance, pursuant to the agreement, with Steward Robert Griesbeck in about the end of July alleging that they were denied overtime work on July 23. At the step 1 meeting these grievances were denied, and on August 27 they each appealed to step 1A, which is handled by DeGennaro. It is the conversations that DeGennaro had with Harrison and Johnson, on September 9 and 10, regarding these grievances, that are alleged to violate the Act.

Harrison testified that on September 9, DeGennaro approached her at her work station and said that if she did not join the Respondent she would lose her arbitration. She asked if that meant that she had to join the Respondent and he said yes, and he would bring her the required forms to sign at a later time. This conversation, as well as the others involving Harrison and Johnson were one-on-one with, apparently, no one overhearing them. Harrison testified that, about an hour later, DeGennaro again approached her and gave her dues-authorization checkoff forms and told her to sign them. She said that she wanted to read them first and he said that there was no need to read them, "just sign them." She repeated that she had to read them first, and he left. Subsequently that day she had about four more conversations with DeGennaro; on each of these occasions, he asked for the signed checkoff authorization form and she said that she hadn't yet had an opportunity to read it. On the final occasion that day, DeGennaro said that he needed the form because he was leaving work early to go to the union hall and he wanted to be sure to get her free T-shirt.³ DeGennaro

³ The Respondent was, at the time, conducting a promotion to increase membership. Included in this promotion were free T-shirts, a credit card, and a raffle for a free weekend trip.

testified that he spoke to Harrison on a number of occasions that day. On the first occasion, he approached her and told her that he was handling her grievance at step 1A, told her of the strategy he would be using and that there was a very good chance that the grievance would be settled or sustained in her favor. She did not respond. Later that day he told her that the grievance had been settled in her favor and that she would be receiving overtime payments. He also asked her if she was interested in joining Respondent. He told her of the promotion Respondent was conducting to obtain new members. She said that she would think about it. A little later that day he gave her a dues-authorization checkoff form and told her that if she wanted to join she should fill it out and return it to him. She said that she would read it and return it to him later that day. Later that day he “ran across her” and asked her if she had filled out the form. She told him that she had not had a chance to read it, but as soon as she did she would get back to him. DeGennaro testified that he never told Harrison that she would lose her grievance or would not receive the overtime she sought unless she joined the Respondent.

DeGennaro also spoke to Harrison on September 10. Harrison testified that on that day, while she was at her letter sorting machine, DeGennaro approached her with a paper in his hand and said that she had won her case, but if she did not sign he would delay her pay claim. She asked if that meant that she wouldn’t get the money and he said yes. She told him that was illegal and he said that it didn’t matter since nobody overheard the conversation. A few minutes later her supervisor told her that DeGennaro wanted to speak to her. She went to see him and he gave her another set of papers for union membership and dues-checkoff authorization and told her to sign them. She said that she wouldn’t sign them. He threw the papers on the desk and said that he would leave them there and see what happened. DeGennaro testified that in the early part of that day he asked Harrison if she had signed the papers. She said that she had misplaced them and asked for another set of papers. About an hour later he gave her another set of papers. He never threw anything down at her.

Respondent’s grievance appeal form states that Harrison’s grievance was settled at step 1A by paying Harrison for 8 hours at the overtime rate. It is signed by DeGennaro, and the date and “Date Decision Given” is listed as September 10. DeGennaro testified that the settlement was arrived at on September 9, the date he informed Harrison of the settlement, and the September 10 date is the date he filled out the form. Harrison testified that she still has not been paid by the Postal Service pursuant to this settlement. She asked a clerk in the finance office of the facility about it and she said that she didn’t know anything about it. She did not speak to the Respondent about it. DeGennaro testified that he is not aware whether the Postal Service paid Harrison pursuant to the settlement. She never complained to him about the lack of payment and, “I’m not privy to her pay stubs.”

As stated above, Johnson also filed a grievance regarding the denial of overtime work on July 23. She testified that on September 9,⁴ DeGennaro approached her at work and said

⁴One of Respondent’s defenses, at the hearing and in its brief is that on September 9 and 10, Harrison and Johnson were acting supervisors and were therefore not covered employees under the Act.

that her case was in arbitration and that he was handling it; “for it to be settled I needed to join the union.” She said that she didn’t want to join the Union and he said that to settle the case she should join the Union. He then told her about “perks” for joining the Respondent—T-shirts, a trip, and other things. She asked if they provided a charge card and DeGennaro said that Respondent offered a charge card to its members. He again said that she had to join the Respondent to get her case settled. She said that she might be interested. DeGennaro then gave her Respondent’s authorization for deduction of dues, which she signed and returned to him, and he left. On the following day DeGennaro told her that her case had been settled, and a couple of months later she received her money pursuant to the settlement. DeGennaro testified that he had two conversations with Johnson on that day. In the first one, he approached her and told her that he was handling her grievance at step 1A. He told her of the procedure that he would follow and that, technically, she was not entitled to the money because she was an acting supervisor on the day in question. Later that day, prior to the case being settled, he approached Johnson and asked her if she was interested in joining Respondent; he told her of the membership incentive program Respondent was employing at the time.⁵ She asked if they provided charge cards and he told her that the bank “usually only” processed card applications for Respondent’s members. She asked him for an application for Respondent and an application for a charge card. About 45 minutes later he returned, and gave her a membership application (presumably, an authorization for deduction of dues), together with pamphlets about membership and a charge card application. He asked her to fill out the application for membership, which she did. She asked about the charge card application, and he said that she should wait about 2 weeks until her membership application was processed. Later that day, he met with the Postal Service’s tour superintendent, who said that he would give him an answer the following morning. On the following morning, the Postal Service informed him that they agreed to a settlement of 8 hours at the overtime rate and 3 hours at the penalty rate. Later that day DeGennaro gave Johnson a copy of the settlement and she thanked him.

Johnson testified that shortly after she was informed of the settlement, Griesbeck told her that if she wanted to withdraw her application for membership in Respondent she should speak to somebody in personnel at the Postal Service. On the following day she asked the personnel assistant at the facility if she could get her card back. This woman told Johnson that

I reject this defense for a number of reasons: initially, Respondent admitted in its answer that Johnson and Harrison were bargaining unit employees, which for a majority of their working time, they were. The fact that on the days the threats were made to Johnson and Harrison, they were temporarily acting as supervisors, does not deprive them of the protection of the Act since the threat emanated from their bargaining unit duties and rights.

⁵In answers to questions on cross-examination, DeGennaro testified that he discussed joining the Respondent and its charge card at the “first conversation” while in his direct examination, he testified that the first conversation only involved her grievance. I do not find this very significant. On direct examination he testified that he had two conversations with Johnson on that day, yet, he testified to three separate incidents. I find it likely that he put the first and second incident together in his testimony on cross-examination.

she couldn't find her card, but that the usual procedure was to withdraw on the anniversary date of membership. She gave her a form to fill out for this purpose. She filled out the form, but it was returned to her because she needed "written permission" from Respondent to withdraw. She called Respondent's office and left her name and telephone number and asked him to have someone return her call; nobody did. Ronald Suslak, president of Respondent, testified that from September 9 to the date of the hearing, he received no notice, oral or in writing, from Johnson that she wanted to withdraw her membership in the Respondent. He testified that there is a 10 day "window period"—from 20 days prior to the membership anniversary date to 10 days before the anniversary date—when members can resign their membership. DeGennaro testified that subsequent to September 9 and 10, Johnson never asked him about revoking her membership in Respondent.

IV. ANALYSIS

It is an undisputed proposition that a union must fairly represent all the employees in a unit, whether or not they are members of the union. One aspect of such representation is to pursue and handle grievances of all unit employees, union or nonunion, in a fair and impartial manner. A threat by a union representative that he would not grieve a matter for a nonmember unless that individual became a member of the union clearly violates Section 8(b)(1)(A) of the Act. *Lea Industries*, 261 NLRB 1136 (1982); *Plumbers Local 195 (Bethlehem Steel)*, 291 NLRB 571 (1988); and *Mail Handlers Local 305 (Postal Service)*, 292 NLRB 1216 (1989). The issue herein is whether DeGennaro made such a threat to Harrison and Johnson.

This case involves a difficult credibility issue because I found Harrison, Johnson, and DeGennaro all, apparently, credible witnesses. Although there are no obvious reasons to discredit any of them, there are a number of factors which lead me to credit Harrison and Johnson. The fact that at the time in question the Respondent was conducting an organizing drive among the unit employees makes it more likely that the events occurred as testified to by Harrison and Johnson. It would not be unusual or unheard of for a steward, or other union representative, to feel some pressure to sign up employees with an aggressive organizing drive such as this, and a pending grievance is a good vehicle to employ in such a circumstance. An additional reason for crediting Harrison and Johnson is that I can see no reason for them to lie. They had no apparent grudge against Respondent or DeGennaro and had won their grievances, although for some unexplained reason Harrison never was paid the money involved by the Postal Service. Fabricating this story would serve them no purpose. For all these reasons, I credit the testimony of Harrison and Johnson over that of DeGennaro. Having made this difficult credibility finding, the next step is relatively easy as the complaint "tracks" the facts very well. I therefore find, as alleged in paragraphs 9 and 10 of the complaint, that DeGennaro informed Johnson that he would process her grievance only if she joined Respondent, and coerced her to sign a dues-checkoff authorization card on behalf of Respondent by conditioning the further processing of her grievance upon her doing so. I also find, as alleged in paragraphs 11 and 13 of the complaint, that DeGennaro told Harrison on September 9, that if she did not join the Re-

spondent she would lose her grievance, and told her on September 10 (alleged incorrectly in the complaint as September 13), that unless she joined the Respondent her grievance would be delayed. On the basis of the cases cited above I find that, by this activity, Respondent has violated Section 8(b)(1)(A) of the Act.

The only remaining allegation is paragraph 12, which alleges that DeGennaro attempted to coerce Harrison into signing a dues-checkoff authorization by repeatedly presenting her with the form and demanding that she sign it, in violation of Section 8(b)(1)(A) of the Act. Harrison's credited testimony establishes that on September 9, about an hour after DeGennaro told her that if she did not join the Respondent she would lose her arbitration (or grievance), he approached her at work and gave her a dues-authorization checkoff form and told her to sign it. When she said that she wanted to read it, he said that there was no need to read it, she should just sign it. When she repeated that she wanted to read it, he left. On about four more occasions that day DeGennaro asked her for the signed checkoff authorization form and she said that she had not yet had an opportunity to read it and he left. It is alleged that by repeatedly presenting her with the form and asking her whether she had signed the form, Respondent has violated Section 8(b)(1)(A) of the Act. As there is no evidence that DeGennaro threatened Harrison during any of these repeated visits, I find that this does not constitute a violation of the Act. Being a pest is not a violation of Section 8(b)(1)(A) of the Act, and I recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the Postal Service by virtue of the Postal Reorganization Act, 39 U.S.C. § 1209(a).
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(b)(1)(A) of the Act by:
 - (a) Threatening employees that their grievances would be processed only if they joined Respondent and executed a dues-authorization checkoff form.
 - (b) Threatening employees that in order to win their grievance they had to join Respondent.
 - (c) Threatening employees that their grievances would be delayed unless they joined Respondent.
3. Respondent did not violate the Act as further alleged in the consolidated complaint.

REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this regard, I shall recommend that Respondent be ordered to rescind Johnson's membership in Respondent and to reimburse her for all dues deducted from her pay, with interest, within 30 days of the final Order herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, American Postal Workers' Union, Queens Area Local, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees of the Postal Service that their grievances would be processed only if they joined Respondent and executed a dues-checkoff authorization form.

(b) Threatening employees of the Postal Service that in order to win their grievance they had to join Respondent.

(c) Threatening employees of the Postal Service that their grievances would be delayed unless they joined Respondent.

(d) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Reimburse Johnson for all dues that have been deducted from her pay since she executed the dues-authorization checkoff in or about September 1990.

_____ adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Rescind and revoke the membership of Johnson and inform her in writing that this has been done.

(c) Post at its offices, meeting places and facilities, and, if the Postal Service is agreeable, at the JFK facility involved herein, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the allegation contained in paragraph 12 of the consolidated complaint be dismissed.

⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."