

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

and

Case 27-CA-18936-1

**NATIONAL ASSOCIATION OF
LETTER CARRIERS, BRANCH 47**

Renee C. Barker, Esq., and Sheryl S. Josephson, Esq.,
Denver, CO, for the General Counsel.
Thomas B. Buescher, Esq., Denver, CO, for the
Charging Party.
Roderick D. Eves, Esq., Denver, CO, for the
Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Denver, Colorado, on June 14 and 15, 2004. National Association of Letter Carriers, Branch 47 (the Union or the Charging Party) filed an unfair labor practice charge in this case on February 9, 2004. Based on that charge, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued a complaint on April 30, 2004.¹ The complaint alleges that the United States Postal Service (the Respondent or the Postal Service) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for the Respondent, and my observation of the demeanor of the witnesses,² I now make the following findings of fact and conclusions of law.

¹ All dates are in 2004 unless otherwise indicated.

² The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

Findings of Fact

I. Jurisdiction

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The Respondent provides postal services for the United States of America and operates various facilities throughout the United States in the performance of that function, including its facility located at 46th Avenue in Denver, Colorado (the Sunnyside Station). The Board has jurisdiction over the Respondent and this matter by virtue of Section 1209 of the Postal Reorganization Act, 39 U.S.C. Section 1209. Also, the complaint alleges, the answer admits, and I find that the Respondent is an employer subject to the jurisdiction of the Board.

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Further, the complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. The Dispute

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In substance, the complaint alleges that the Respondent coerced a union steward, who was representing an employee at an investigatory interview, by informing the steward that vigorous representation would not be tolerated. Allegedly, the Respondent's supervisor threatened the steward with a warning letter, and ultimately called the police and filed a criminal complaint against him, all because the steward asserted his rights as a representative of the Union and engaged in vigorous representation of a bargaining unit employee. According to the General Counsel, immediately following the incident the Respondent took the steward "off the clock," and subsequently issued to him a 14-day working suspension, because he engaged in activity protected by Section 7 of the Act.

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The Respondent's answer denies the commission of any unfair labor practices. According to the Respondent, the steward was not engaged in union activity, but, rather, was being disruptive during a meeting between a supervisor and a bargaining unit employee. When later asked by the supervisor not to be disruptive, the steward allegedly called the supervisor a "bitch," and engaged in conduct that the supervisor considered intimidating, threatening, and harassing. The Postal Service contends that the steward's actions did not constitute legitimate union activity under the Act, and also that his actions violated the Respondent's codes of conduct, policy against sexual harassment, and the parties Joint Statement on Violence and Behavior in the Workplace. Allegedly, the Union waived the right of its stewards to act in the manner in question when it became a party to the Joint Statement. Further, the Postal Service claims that the steward was insubordinate by refusing to leave his supervisor's office when instructed to do so. It is the Respondent's position that by taking these actions, the steward lost the protection of the Act. Concomitantly, it is argued that any action taken by the supervisor or the Postal Service against the steward was an appropriate response to the steward's unprotected, intimidating, threatening, and harassing conduct.

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As a final affirmative defense, the Respondent contends that the claims raised in the complaint should not be litigated before the Board, as they are allegedly deferrable under the Board's "Collyer policy."³ Apparently, the Union filed grievances regarding these matters under the terms of the collective-bargaining agreement between the parties, and the Respondent has

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³ *Collyer Insulated Wire*, 192 NLRB 837 (1971).

agreed to waive applicable time frames in order to facilitate the processing of these grievances. However, the General Counsel takes the position that it would be inappropriate to defer these issues to the contract grievance-arbitration process as the dispute arose because of the Respondent's animosity toward the employees' exercise of protected rights. As the matters in dispute allegedly go to the heart of those Section 7 rights protected by the Act, the General Counsel argues that any deferral would constitute an inappropriate abrogation of the Board's statutory responsibility.

B. The Facts

Ricard Nordeng is employed by the Postal Service as a carrier technician, which involves the delivery of mail over specific routes. He has been employed in this capacity at the Postal Service's Sunnyside Station in Denver, Colorado (the only facility involved in this proceeding) for approximately eight years. During some of this time, he served as an alternate union steward, and since January 2004 has been the union steward at the station. Anita Chavez has been the supervisor of customer service at the station since December 27, 2003. She has been employed by the Postal Service as a supervisor, both temporary and permanent, at eight different postal facilities. The manager of customer service (station manager) at the Sunnyside Station is Lavon Dates. Also, another supervisor of customer service at the station is Angelo Ceja.

For the most part, the events in question all occurred on February 5, 2004. While the parties disagree somewhat as to what transpired on that date, these differences are, in my view, relatively minor. The parties argue that credibility is a determining factor in this case. I do not believe that to be accurate. While I will make specific credibility determinations, the resolution of the issues in dispute do not, for the most part, depend on a resolution of credibility. Regarding credibility, I would note preliminarily that I found neither principal protagonist in this case, Nordeng and Chavez, to be completely credible.

On February 5, Chavez had an "unofficial discussion"⁴ with letter carrier Tom McLaughlin to discuss McLaughlin's job performance on the previous day, specifically his use of unauthorized overtime and failure to return to the station by 5 p.m. Chavez asked Nordeng to attend the discussion, which took place in the supervisors' office. The meeting did not go well. Chavez asked McLaughlin some questions about his work the previous day, and she gave him examples of unacceptable reasons for incurring overtime, such as taking a long lunch. At some point, Nordeng interrupted Chavez and requested that she speak to McLaughlin without using a "demeaning and sarcastic" tone.⁵ The discussion between Chavez and McLaughlin continued, but Nordeng interrupted again, accusing Chavez of "belittling" McLaughlin. Nordeng testified that Chavez told him twice to be quiet, that he was only there to witness the discussion, and that she did not want any more interruptions. Nordeng responded that he was there to represent McLaughlin, and that if she prevented him from doing what he thought was necessary, that he

⁴ It is undisputed that the collective-bargaining agreement between the Postal Service and the Union does not contain a provision for an "unofficial discussion." This discussion does not constitute discipline and is not "grievable" under the terms of the contract. As practiced, it is apparently intended simply as a method by which management alerts an employee to some perceived deficiency in the employee's work performance. As explained by Andrew Peterson, the vice president for the Union, any information obtained during these discussions cannot be used to support future discipline.

⁵ In her testimony, Chavez admits that during her conversation with McLaughlin she did "take it to a third grade level."

would end the interview. According to Nordeng, Chavez told him that he did not have the right to do that and that he was out of line. At this time Nordeng told McLaughlin to stand up and said that they were leaving the meeting.

5 Nordeng admits that during the meeting he became emotional and raised his voice. According to Chavez, she did not raise her voice. In any event, through the point at which Nordeng ended the meeting, the parties are in substantial agreement as to what had transpired. However, there is some disagreement as to what was said next. According to Chavez, as
10 McLaughlin departed, she instructed Nordeng to remain, and followed him out the door directing him to return to her office, and giving him a “direct order” to do so. Nordeng testified that it was only as he walked toward his workstation that Chavez approached and told him that she was not done with him, and that he needed to return to the office. Nordeng responded that he was busy, at which time she said that she was giving him a “direct order” to return. Regardless of
15 which version is more accurate, the significant point upon which all parties agree is that when he received an unequivocally conveyed “direct order” from Chavez, Nordeng returned to her office.

20 The supervisors’ office is small, approximately 6 by 8 feet, with two desks, one directly in front of the door, and the other desk to the right of the door. Chavez and supervisor Ceja share this office. However, Ceja had not been present earlier for the meeting with McLaughlin, and was not present initially when Nordeng returned to the office with Chavez. She immediately went to her desk, the one directly in front of the door, and sat down. Chavez’ desk is approximately three feet from the door. Nordeng and Chavez disagree as to exactly what
25 happened next.

After he entered the office, Nordeng closed the door. According to Nordeng, Chavez told him that he was “way out of line,” and that she wouldn’t “tolerate that type of behavior” from him, and that he was not to raise his voice to her. He responded by saying that it would be more productive if they could discuss matters without raising their voices. Nordeng testified that
30 Chavez said that “[he] had a NTOL-3 on [his] file, and that [he] should not go down that road.”⁶

According to Chavez, she told Nordeng that she wasn’t yelling, and he did not need to yell at her. She testified that he agreed with her, saying, “Yeah, you’re probably right about that.” At the hearing, Chavez denied that she made any reference to a NTOL-3, and claimed
35 that since she was new at the Sunnyside Station, she had no knowledge of Nordeng’s disciplinary history.

In any event, Chavez testified that Nordeng’s “face was red...eyes were kind of glassy... [and] he was very angry.” According to Chavez, he referenced that the door was closed, leaned
40 over her desk, pointed his finger at her face, perhaps 10 inches away, and said, “You’re a bitch.” The remark allegedly stunned her. She testified that she stood up, and asked him, “What did you say?” Allegedly he again pointed his finger at her and repeated, “You’re a bitch.” Chavez responded, “That’s it. You’re out of here. Get off the clock.” She told him, “You need to go.” However, he replied, “I’m not going to. You can’t make me.” It was at that point that she called
45 911 for the police department.

50 ⁶ According to station manager Dates, the acronym NTOL stands for “no time off letter,” and the number 3 refers to the third level, which under the terms of the contract is the last level of discipline before possible removal from the Postal Service.

According to Nordeng, after Chavez mentioned the NTOL-3, he responded by saying that she was “being a bitch,” that she was being disrespectful toward the carriers, and that she needed to find a way of communicating with the carriers that was more productive. Chavez, in apparent disbelief, asked him what he said, and Nordeng repeated that she was “being a bitch,”
 5 and was being disrespectful, and he could not allow her to continue acting that way. He acknowledges that she told him, “That’s it. I’m taking you off the clock.” According to Nordeng, he responded that he was in her office in a “protected status,” as the door was closed. Further, he told Chavez that she did not have the authority to take him off the clock. At that point, she told him she was calling 911. He testified that during the conversation both he and Chavez had
 10 raised their voices, but that they were not shouting at each other.

As I stated earlier, I did not find either Nordeng or Chavez to be totally credible. While the differences in their testimony are not substantial, there are subtle differences, which I attribute to both witnesses attempting to portray themselves in the best possible light. After
 15 observing Nordeng’s demeanor, I am of the view that he exhibited a certain amount of bravado, bordering on arrogance. He admitted having a temper, and I would concur with that self-assessment, and suggest that he also has a tendency to act in a bullying fashion.⁷ On the other hand, he obviously takes himself and his role as union steward very seriously. I conclude that he reluctantly returned to Chavez’ office when she gave him a “direct order” to do so. Further, I
 20 have no doubt that he closed her door, leaned over her desk, pointed his finger within 10 inches of her face, raised his voice, got red in the face, and told her, “You’re a bitch.”⁸ I credit her testimony in this regard, as it is inherently plausible.

Regarding Chavez, she seemed very tense and nervous when testifying, more so than
 25 would be normal for a management witness with her background. She seemed somewhat uncertain of herself and her answers. I do not credit her denial of having mentioned Nordeng’s prior NTOL-3. This is simply not the type of matter that Nordeng would likely make up “out of thin air.” I can almost hear the words coming out of Chavez’ mouth as she attempted to use Nordeng’s prior discipline to her advantage against what she felt was his inappropriate conduct.
 30 As a supervisor, she clearly had access to his personnel file. Thus, her claim that as a new supervisor at the station she was unaware of his prior record is highly implausible.⁹ Therefore, I conclude that as testified to by Nordeng, Chavez reminded him that he had a NTOL-3 in his file, and “should not go down that road.”

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⁷ Station manager Dates credibly testified that after being elected steward, Nordeng told him that he knew he had a problem with his temper, and he believed that was one of the reasons
 40 why the membership elected him. He told Dates the members wanted him to give management “hell,” or words to that effect.

⁸ In reality, I see very little difference between the accusation that someone is “being a bitch,” and the accusation that the person is “a bitch.” It is a “distinction without a difference.” However, for what ever it may be worth, I credit Chavez that Nordeng twice told her, “You’re a
 45 bitch.” Nordeng certainly did not seem to me to be the type of person who would moderate, or “mince words.”

⁹ This is even more implausible in light of the testimony of postal inspector Brian Evans, who testified that he had received at least one phone call from Chavez prior to February 5, complaining about the conduct of Nordeng. If Chavez took the time to call Evans and complain
 50 about Nordeng, surely she took the time to examine his personnel file to determine exactly what his employment history was with the Postal Service.

Finally, there is really no dispute that the conversation began with Chavez telling Nordeng that his conduct during the earlier unofficial discussion with McLaughlin had been “way out of line” and she wouldn’t “tolerate that type of behavior” from him. She does not deny making this statement. Further, there is no dispute that at the end of the conversation, she told Nordeng that she was taking him “off the clock,” and that he needed to “go.” Concomitantly, there is really no dispute that Nordeng refused to leave the facility, telling her she did not have the authority to take him off the clock, or words to that effect.¹⁰

Chavez alleges that she was “frightened,” because of Nordeng’s “size”¹¹ and “demeanor.” She claims that because of their close proximity, and Nordeng’s words, gestures, and actions that she “didn’t know what he was going to do.” According to Chavez, “The entrance was blocked, so I couldn’t leave my office. So I did the next best thing, and that was to get help.” She called 911. The police department was only about a block away, and she “knew they could be there right away.”¹² Chavez testified that she did not try to call station manager Dates, not knowing whether he had yet arrived at work, nor did she attempt to summon for help any of the approximately 25 to 35 letter carriers at work outside her office. Regarding the carriers, it was allegedly her belief that “usually they don’t want to get involved,” and that they would be unlikely to help her.

As Chavez began to call 911, Nordeng opened the door and called to supervisor Ceja to come into the office.¹³ Nordeng proceeded to explain to Ceja his version of what had just transpired. At the same time, Nordeng overheard Chavez speaking into the telephone and saying that there was a carrier resisting leaving the premises and that she needed assistance. After she finished her call, Chavez left the office. Nordeng and Ceja remained in the office temporarily to finish their conversation. Ceja testified that in response to Nordeng’s assertion that Chavez did not have the authority to take him “off the clock,” Ceja told Nordeng that if he was told by Chavez to do so, he should “get off the clock and grieve it later.” The two men decided to go to station manager Dates’ office “to see what they could work out.”

Once in Dates’ office, Ceja and Nordeng began to explain what had transpired. According to Dates, Nordeng admitted that he had called Chavez “a bitch,” and that he knew he had a “problem” with his “temper” and needed to control it. Dates told Nordeng that his conduct had been improper, and that at the Postal Service they did not treat each other that way, but rather with dignity and respect. Nordeng told Dates that he felt that since he had been in Chavez’ office as the union steward that they were “on equal terms,” and she didn’t have the authority to take him off the clock. Coincidentally, during the conversation in Dates’ office, union president Linda Wishon-Temple called looking for Nordeng, and Dates put her on the speakerphone and she participated in the remaining part of the conversation.

¹⁰ Whether Nordeng said that he was in “a protected status” or not, it is clear that he was taking the position that he did not need to leave the facility, because Chavez did not have the “authority” to “make [him].”

¹¹ Counsel for the Postal Service emphasizes the disparity in the relative size of Chavez and Nordeng. Chavez is 5 feet, 2 inches tall and weighs 125 pounds, while Nordeng is 5 feet, 10 inches tall and weighs 235 pounds.

¹² It is undisputed that the Postal Police are no longer available for assistance, and management has been instructed that in an emergency the local police should be contacted.

¹³ According to Ceja, when he entered the office he observed that Chavez was “very upset. She was shaking. She was teary-eyed. She was scared.” Ceja observed the Nordeng was “red-faced. He was upset.”

After about 10 to 15 minutes, two police officers entered Dates' office. According to Nordeng, Dates told the officers that he had just learned that they had been called, and he wished that there were something he could do to "make them turn away." However, the officers indicated that Chavez had decided to file charges, and they had no choice but to follow through on the incident. The police took written statements from McLaughlin and Chavez. (Res. Exh. 2; 5 G.C. Exh. 8.) They issued Nordeng a ticket for the criminal charge of disturbing the peace, and told him that he needed to appear in court on the date written on the ticket.

Nordeng was placed "off the clock" for the remainder of his shift on February 5. While 10 Dates testified that in his view Nordeng's conduct in refusing the order of his supervisor to leave the facility warranted being sent home without pay, he decided that in order to "control the situation," he would pay Nordeng for the time he was off the clock. On April 9, Nordeng was issued a 14-calendar day suspension, previously referred to as a NTOL-3, for "unacceptable conduct." (G.C. Exh. 3.) As noted earlier, under this discipline, although technically a 15 suspension, the employee continues to work and does not lose pay. The letter of suspension was signed by Dates.

Specifically, the letter of suspension lists a number of actions allegedly engaged in by Nordeng as being improper. These included being loud and obnoxious toward Chavez at the 20 unofficial discussion with McLaughlin, refusing initially to return to Chavez' office, calling Chavez "a bitch," acting in a threatening manner toward Chavez, and refusing to leave the facility when instructed by her to do so. The letter lists a number of specific Postal Service rules and regulations, which Nordeng allegedly violated. It concludes with a warning that future misconduct may lead to other disciplinary action, including termination. (G.C. Exh. 3.)

In response to the criminal charge against Nordeng, the Union hired a lawyer to 25 represent him, and Nordeng attended at least one court proceeding to contest the charge. Ultimately, the charge was dismissed on the motion of the county attorney. (G.C. Exh. 4.) Further, as noted earlier, the parties stipulated that the discipline issued to Nordeng, consisting 30 of his being placed "off the clock" and being issued a 14-day working suspension, has been "grieved" under the provisions of the parties collective-bargaining agreement, and is pending in the grievance process.

35 C. Analysis and Conclusion

1. The Deferral Argument

It is the position of the Postal Service that the matters in dispute before the Board should 40 be deferred to the parties' contractual grievance-arbitration process. Counsel argues that where there is a "reasonable chance" that such a process will resolve the dispute, that deferral is appropriate. *Dubo Manufacturing Corp.*, 142 NLRB 431 (1963). In his post-hearing brief, counsel cites the seminal case of *Collyer Insulated Wire*, 192 NLRB 837 (1971) (an alleged violation of Section 8(a)(5) of the Act) for the proposition that the Board favors deferral when five 45 requirements are met. Those requirements are (1) the parties have a long-standing collective-bargaining relationship, (2) there is no "enmity" on the part of the employer toward employees' exercise of protected rights, (3) the employer indicates its willingness to arbitrate, (4) the contract's arbitration clause covers the dispute before the Board, and (5) the contract and its meaning lie at the center of the dispute. Counsel notes that the Board's deferral policy has 50 been extended to include alleged violations of Section 8(a)(1) and (3) of the Act. *National Radio Co.*, 198 NLRB 527 (1972); *United Technologies Corp.*, 268 NLRB 557 (1984). As the

Respondent has indicated its willingness to process the Union's grievance all the way through the contract's binding arbitration procedure, if necessary, counsel contends that all the requirements for deferral have been met.

5 Counsels for the General Counsel and the Union contend that in the circumstances of this case, deferral is not appropriate. In her post-hearing brief, counsel for the General Counsel argues that since Nordeng was disciplined because of his representational activities and conduct as a steward, his discipline constituted a frontal attack on the grievance procedure embodied in the collective-bargaining agreement between the parties. Under such
10 circumstances, the Board has long held that deferral is not appropriate, because the employer's conduct constitutes a "rejection of the principles of collective bargaining." *United Technologies Corp., supra*. Further, in *North Shore Publishing Co.*, 206 NLRB 42 (1973), the Board concluded that where an employee was discharged for invoking the very grievance procedure to which the employer would have the Board defer, and since the employer's action constituted an
15 attack on the viability of that very procedure itself, deferral would not be appropriate. In a similar case, *Joseph T. Ryerson and Sons, Inc.*, 199 NLRB 461 (1972), the Board held that a charge alleging an employer's statement to a union official that he would "have a hard time" if he pursued a grievance could not be deferred, as it constituted a threat of reprisal for participation in the grievance procedure, and sought to "inhibit or preclude access to the grievance
20 procedures."

I am in agreement with the General Counsel and the Union, and believe that deferral of this case would be most inappropriate. The Respondent has clearly expressed its willingness to process the Union's grievance to arbitration, if necessary. However, the Union cannot have full
25 faith in that process, when the underlying dispute involves the allegation that Nordeng was punished because of his vigorous representation of a bargaining unit employee under the terms of the contract containing that very grievance-arbitration procedure. The accusation against the Postal Service goes to the very heart of Section 7 of the Act, that being an employee's right to seek "mutual aid or protection" from his union steward through vigorous representation. In my
30 view, deferral of this issue would constitute an abrogation of the Board's statutory authority.¹⁴

2. The Waiver Argument

Counsel for the Respondent argues that in the final analysis, it does not matter whether
35 Nordeng was engaged in union activity or not, as the Union waived the right of its members to engage in union activity that violates the terms of the parties Joint Statement On Violence and Behavior in the Workplace. (Res. Exh. 5.) The Postal Service, and most of its unions and management associations, including the Union involved in this case, entered into the Joint Statement on February 14, 1992. It was drafted and signed following, and as a result of, a
40 horrific incident occurring at a Postal Service facility in Royal Oak, Michigan, in which a disgruntled employee killed four supervisors and himself after an arbitrator upheld his removal.

45 ¹⁴ I am, of course, aware that if the issue were deferred, the Board could retain jurisdiction to entertain a motion for further consideration upon a showing that either the dispute had not been resolved through the grievance process, or because that process resulted in a decision that was not fair and regular, or was repugnant to the Act. *U.S. Postal Service*, 270 NLRB 114 (1984).
50 However, such a result would merely protract the proceedings, and delay the resolution of issues involving fundamental Section 7 rights, which, in my opinion, should not be deferred in the first instance.

5 The Joint Statement speaks for itself, but in summary it commits the parties to it to “do everything within [their] power to prevent further incidents of work related violence.” It establishes a no tolerance policy of “violence or any threats of violence,” and of “harassment, intimidation, threats or bullying by anyone.” All employees are to treat each other with “dignity, respect and fairness,” and those who do not “will be removed from their positions.” Counsel for the Postal Service emphasizes that the Joint Statement has been the subject of a national class action arbitration in which the arbitrator expressly ruled that it constituted a “contractually enforceable agreement between the parties” to it that can be enforced through the parties’ grievance-arbitration process. (Res. Ex. 6, p. 23.)

10 Certainly, every person of good will would be pleased to note the efforts being made by the Postal Service and its unions and management associations to end violence at its facilities. The Joint Statement and the arbitrator’s decision that it can be contractually enforced would appear to be positive steps in that direction. However, I am at a loss to understand counsel’s argument that somehow the Joint Statement serves as a waiver of the Union’s right to represent its bargaining unit members in a vigorous, but law abiding manner. Counsel contends that Nordeng’s representational activities on February 5, even assuming they constituted protected union activity, could not be properly engaged in because they were allegedly “intimidating and bullying” and, therefore, had been waived by the Union in the Joint Statement. In my view, this constitutes a “leap of faith,” which is neither supported by the facts nor the law.

25 The Board has consistently held that for employees to be deprived of rights guaranteed to them by the Act, the waiver must be “clear and unmistakable.” In *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949), the Board declined to interpret a “Management’s Functions” clause as a waiver of the right to bargain over retirement benefits, because there was no specific waiver of that right. Both the Board and the Courts have repeatedly held that a union’s waiver of bargaining rights will not merely be inferred, but must be clearly and unequivocally conveyed. *Carevelle Boat Company*, 227 NLRB 1355 (1977). See also *Johnson-Bateman Company*, 295 NLRB 180, 185 (1989)(holding that for a waiver to exist, there must be a showing that the issues were fully discussed and consciously explored, and that the union consciously yielded or clearly and unmistakably waived its interest in the matter); *Metropolitan Edison Company*, 460 U.S. 693, 708 (1983)(the waiver must be explicitly stated and be clear and unmistakable in order for there to be an inference that the parties intended to waive rights protected under federal labor law); *Mt. Sinai Hospital*, 331 NLRB 895, 910-911 (2000).

35 In the matter at hand, the Respondent does not argue that the contract between the parties contains a direct waiver by the Union of statutory rights. Instead, counsel for the Postal Service seems to contend that a waiver is implicit in the language of the Joint Statement, which an arbitrator has determined is contractually enforceable. However, there is certainly no “explicit language” in the Joint Statement as would indicate that the Union was clearly and unmistakably waiving the right to engage in vigorous representation of the bargaining unit employees. In a case with the same Respondent and the same national union, the Board held that the union had not waived the employees’ *Weingarten* rights as the contract between the parties contained no such explicit language, and there was no evidence showing that the union had any such “collateral intent.” Further, the Board held that any evidence of collateral intent would need to be established clearly and unequivocally for it to constitute a waiver of employee rights. *U.S. Postal Service*, 256 NLRB 78, 79 (1981).

50 I do not believe that counsel for the Postal Service has “connected the dots,” and established any connection between the language in the Joint Statement and a waiver by the Union of vigorous representation of its bargaining unit employees. I see no language that would explicitly and unequivocally convey a waiver of these Section 7 rights. Assuming for the sake of

5 this discussion that Nordeng was engaged in lawful, protected union activity on February 5, I simply can not conclude that there was any “clear and unmistakable” language in the Joint Statement as would establish a waiver of the employees’ right to be represented in this fashion by Nordeng. Accordingly, I reject counsel’s argument, and conclude that the Joint Statement does not contain a waiver of employees’ Section 7 right to have the Union engage in vigorous representation of them. There has been no waiver of statutory rights.

3. Nordeng’s Union Activity at the Initial Meeting

10 It is axiomatic that a union steward, acting in that capacity, is engaged in union activity protected by Section 7 of the Act. *Metropolitan Edison Company*, 460 U.S. 693 (1983). The only reason that Nordeng was present at the “unofficial discussion” between supervisor Chavez and letter carrier McLaughlin was because Nordeng was representing McLaughlin’s interests. McLaughlin was a member of the bargaining unit represented by the Union, and Nordeng was
15 the Union’s designated steward. The fact that Chavez invited Nordeng into the meeting is irrelevant. It is also irrelevant that the unofficial discussion is not provided for in the collective-bargaining agreement between the parties, or that in principle discipline could not be based on any matters discussed at the meeting. Nordeng was not involved in a “frolic of his own,” but, rather, was present at the meeting as a representative of the Union, who was protecting the
20 interests of a bargaining unit member. Beyond any doubt, this constituted union activity.

It is undisputed that during this initial meeting, Nordeng spoke up and indicated his unhappiness with the manner in which Chavez was conducting the meeting. He felt that she was being demeaning and condescending of McLaughlin, and told her not to do so. It is also
25 undisputed that Chavez resented his interruptions, and told him to be quiet. He responded that he would not be quiet and would end the meeting if she continued “belittling” McLaughlin. At some point Nordeng, and possibly also Chavez, raised their voices. She told him he had no right to terminate the meeting, and he did exactly that, getting McLaughlin to exit the office.

30 I am of the view that there was nothing improper about Nordeng’s conduct at this initial meeting as would remove his actions from their protected status as union activity. He was engaged in vigorous representation of McLaughlin, as he attempted to protect him from what he felt were the demeaning remarks of a supervisor. The Act does not require that a union representative act in a docile, submissive manner toward management. To the contrary, under
35 the Act, stewards have considerable leeway to vigorously represent the Union and bargaining unit employees when dealing with management. Regarding grievance meetings, the Board has held that the parties relationship “is not a master-servant relationship but a relationship between [c]ompany advocates on one side and [u]nion advocates on the other side, engaged as equal opposing parties in litigation.” [Citations and internal quotations omitted.] *Hawaiian Hauling Service, Ltd.*, 219 NLRB 765, 766, fn. 6 (1975).
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Whether or not it was necessary for Nordeng to have raised his voice with Chavez at the initial meeting is not something that I need to consider. Certainly, neither a raised voice nor a series of interruptions at the meeting would constitute conduct that could not legitimately be
45 engaged in by a union steward. Even counsel for the Respondent does not make this argument for the initial meeting. Rather, he argues that as the “unofficial discussion” was not provided for in the contract and could not lead to discipline that Nordeng was not engaged in union activity when he attended the meeting. This is simply illogical. If Nordeng was not present in his capacity as a union steward, then why was he there? Clearly, he was present to represent
50 McLaughlin in any way necessary to fulfill his responsibility as the union steward. In this capacity, his conduct at the meeting was protected union activity under the Act.

4. Nordeng's Union Activity at the Subsequent Meeting

As noted above, while Nordeng ended the meeting with McLaughlin, Chavez was not through with Nordeng. She directed him to return to her office. There is some dispute as to whether Chavez ordered Nordeng to return once or twice, however, I do not see this as significant. Although it is fairly clear that Nordeng was reluctant to return to Chavez' office, telling her that he was busy, it is obvious to me that when he realized that she was giving him a direct order to return, he did so. His conduct was not insubordinate.

I credit Nordeng that upon returning to Chavez' office, she immediately told him that his previous conduct was "way out of line," and she wouldn't "tolerate that type of behavior" from him, and that he was not to raise his voice to her. I accept Nordeng's version because it is logical. Obviously Chavez was mad at Nordeng, and she called him back to tell him why she was angry. What had so upset her was his interruptions of her discussion with McLaughlin, his characterization of her conduct as "demeaning," his decision to end the meeting, and the fact that he had raised his voice. However, all of Nordeng's actions and conduct, of which Chavez disapproved, constituted protected union activity.

By telling Nordeng that his "actions were way out of line," and that she would not "tolerate that type of behavior" from him, and that he was not to raise his voice to her, Chavez was interfering with, restraining, and coercing Nordeng in the performance of his duties as a union steward. It constituted a not very subtle threat that if he continued his vigorous representation of bargaining unit employees that something unpleasant was likely to happen to him. Such statements from supervisors would tend to have a chilling effect on the willingness of employees, including Nordeng, to engage in Section 7 activities. A steward worried about being disciplined by his supervisor for vigorously representing employees would likely take a less aggressive stance with management. Section 7 activities should not be so restrained, and this conduct by supervisor Chavez was a violation of the Act. Accordingly, I find that on February 5, the Respondent, acting through Chavez, violated Section 8(a)(1) of the Act, as alleged in paragraph 5(a) of the complaint.

Similarly, Chavez' next statement also constituted a violation of the Act. For the reasons noted earlier, I have credited Nordeng and concluded that Chavez told him that he had a NTOL-3 in his file and that he "should not go down that road." A NTOL-3 letter is the disciplinary step in the progressive discipline process immediately proceeding possible removal from the Postal Service. Thus, this statement was a direct threat by Chavez that Nordeng's further vigorous representation of employees might lead to discharge. There was nothing subtle about this statement at all. She was angry about his previous conduct in her office, specifically the manner in which he had represented McLaughlin. As I have said, statements such as that made by Chavez would likely have a chilling effect on the willingness of employees to engage in Section 7 activities. In order to avoid further discipline, Nordeng might well be more cautious and less vigorous in his future representation of employees. As such, the statement by Chavez interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. Accordingly, I find that on February 5, the Respondent, acting through Chavez, further violated Section 8(a)(1) of the Act, as alleged in paragraph 5(b) of the complaint.

Counsel for the Postal Service argues that this second meeting between Nordeng and Chavez constituted an entirely separate matter from the first meeting, and was unrelated to Nordeng's representation of McLaughlin. According to counsel, Chavez initiated the second meeting to discuss what she perceived to be Nordeng's improper conduct, and, therefore, did not involve Section 7 activity. I disagree. The two meetings were interrelated, and cannot be

In *Consumer Powers Company*, 282 NLRB 130 (1986), the Board rejected the employer's argument that an employee was lawfully discharged for acting inappropriately toward his supervisor when he raised his fists at the supervisor after the supervisor shook a finger in the employee's face. The Board held that the employee was protected by the Act because "the Board has long held that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 accords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." The Board found that the employee was entitled to the protection of the Act because he was discussing working conditions.

The Board has traditionally held that some profanity and even some disrespect must be tolerated during confrontations over contractual rights, or over the issues involving wages, hours, and working conditions. The cases often make distinctions between protected conduct occurring in the heat of argument as "animal exuberance," and that "opprobrious" conduct that "crosses the line," and is so inappropriate as to become unprotected. See *Chelsea Laboratories, Inc.*, 282 NLRB 500 (1986)(holding that protection is not lost because grievance is presented in rude and disrespectful manner); *Burle Industries, Inc.*, 300 NLRB 498 (1990) (holding that employee protesting unsafe working conditions was engaged in protected concerted activity and protection was not lost when he twice called his female supervisor a "fucking asshole"); *Thor Power Tool Co.*, 148 NLRB 1379 (1964), *enfd.* 351 F.2d 584, 587 (7th Cir. 1965)(conduct protected even though employee called his manager a "horse's ass"); *Severance Tool Industries*, 301 NLRB 1166 (1991)(protection not lost because employee raised his voice at the president of the company and called him a "son of a bitch"). However, as noted, where the employee's behavior was found to be sufficiently outrageous, the Board has found that the protection of the Act was lost. *Trus Joist MacMillan*, 341 NLRB No. 45 (2004) (employee called a supervisor a "prostitute" and "lying bastard" and grabbed his crotch); *New Process Gear, Division of Chrysler Corp.*, 249 NLRB 1102, 1105-06 (1980)(employee called a supervisor a "mother fucker, asshole, cock sucker," yelled and refused to leave the office).

Where the Board finds that the employee's conduct did not "cross the line," it often concludes that the questionable conduct was part of the *res gestae* of the grievance processing, and as such did not lose the protection of the Act. *U.S. Postal Service*, 250 NLRB 4 (1980), *supra* (holding that if the steward did call his supervisor a "stupid ass," the utterance came in the course of a protected discussion and, thus, was also protected as part of the *res gestae*).

In my opinion, Nordeng's conduct in pointing his finger in Chavez' face, leaning over her desk, raising his voice, and twice telling her "You're a bitch" was rude, crude, obnoxious, and boorish behavior. However, the question remains whether such conduct, which comes as the steward's representational activities are being challenged, loses the protection of the Act. The Board has established a four-part test for determining whether an employee's conduct is so egregious as to "cross the line" and lose the protection of the Act. In *Atlantic Steel Company*, 245 NLRB 814 (1979), the Board set forth the test as follows: 1) the place of the discussion (away from the production floor and other employees usually weighs in favor of protection); 2) the subject matter of the discussion (collective-bargaining issues or terms and conditions of employment weigh in favor of protection); 3) the specific nature of the employee's outburst; and 4) whether the outburst was, in any way, provoked by the employer's unfair labor practice.

In the matter before me, and applying the *Atlantic Steel test*, I must conclude that Nordeng's conduct, as unpleasant as it was, did not lose the protection of the Act.¹⁵ It was not so egregious as to "cross the line." To begin with, the discussion with Chavez took place in her office, with Nordeng having closed the door, and away from the production floor. Thus, the statement Nordeng twice directed to Chavez, "You're a bitch," could not be heard by others, and was not disruptive of the work being conducted on the production floor. As I have already determined, the subject matter of the discussion was Chavez' unhappiness with the manner in which Nordeng was representing a bargaining unit employee at an "unofficial discussion." I concluded that this subject involved union activity, as it was a direct continuation of the meeting that had just ended where Nordeng was representing employee McLaughlin.

The nature of Nordeng's outburst was, as noted, the physical movement of leaning over Chavez' desk, pointing his finger within 10 inches of her face, raising his voice, and saying, "You're a bitch." He repeated the statement after Chavez, clearly shocked, asked him what he had said. I am of the opinion that Nordeng's reference to Chavez as a "bitch" was a highly offensive, personal remark, made even more disrespectful because the supervisor was a woman. His physical movements and raised voice only served to emphasize Nordeng's rude comment. However, the remark immediately followed Chavez' statements to Nordeng that at the unofficial discussion his "actions were way out of line," she would not "tolerate that type of behavior from him," and he was not to raise his voice to her. Further, she told him that he had a NTOL-3 letter in his file, and "should not go down that road." I have already concluded that these statement by Chavez constituted unfair labor practices in violation of Section 8(a)(1) of the Act. I believe that it is logical to further conclude that it was these threatening statements by Chavez that precipitated Nordeng's remark that she was a "bitch." Therefore, I must also conclude that, to some degree, Nordeng's "bitch" remark was provoked by Chavez' statements, which constituted unfair labor practices.

Applying the *Atlantic Steel test*, I conclude that Nordeng's conduct was not so egregious as to forfeit the protection of the Act. Under existing Board precedent, his remark to Chavez constituted "animal exuberance," and was so closely connected with his union activity in representing a bargaining unit member that his conduct did lose the protection of the Act. *Burle Industries, supra*. While I am certainly not condoning Nordeng's rude comment, Chavez is not without some blame, as it was her threats to Nordeng, which precipitated his remark. In any event, under existing Board law, Nordeng's conduct did not "cross the line," and did not render him unfit for further service, or permit the Respondent to take disciplinary or other action against him. *Caterpillar, Inc.*, 322 NLRB 674 (1996); *Union Carbide Corporation*, 331 NLRB 356 (2000).

6. The Respondent's Reaction to Nordeng's Continued Union Activity

Chavez' reaction to Nordeng's reference to her as a "bitch" was to inform him that she was taking him "off the clock." This was a euphemism for suspending him, potentially without pay. He responded that as he was in a "protected status," and the "door was closed," she did not have the authority to take him off the clock. Apparently considering this a refusal to leave the premises, Chavez' informed Nordeng that she was going to call 911, and she proceeded to

¹⁵ Irrespective of whether Nordeng's conduct was protected by the Act, it would appear that the Union would be better served by having its steward conduct himself in a more courteous, mature, and professional manner when representing the bargaining unit. There certainly should be a level of civility expected from those individuals involved in labor-management relations. Nordeng would be well served to exercise self-control, learn to better manage his temper, and act in a more temperate fashion when dealing with management.

contact the police. Of course, she also testified that because of his mannerisms, demeanor, statements, tone of voice, and physical position in front of her desk that she was frightened and felt that Nordeng was blocking her exit from the office.

5 As mentioned above, Nordeng summoned supervisor Ceja and as he enter the office, Chavez departed. Nordeng and Ceja then moved to station manager Dates' office where he was apprised of the situation. Shortly thereafter, the police arrived, and Nordeng was issued a ticket for "disturbing the peace." Following the departure of the police, Dates put Nordeng on "emergency placement," taking him "off the clock" for the remainder of his shift, although
10 ultimately he was paid for this time as if he had continued working.

On April 9, more than two months after the incident, the Respondent issued Nordeng a 14-day working suspension for the events in question. (G.C. Exh. 3.) He was charged with "unacceptable conduct" in violation of a number of Postal Service codes of conduct, policy
15 against sexual harassment, and the parties Joint Statement on Violence and Behavior in the Workplace. While the suspension did not result in a loss of pay, the letter of warning informed Nordeng that the working suspension could be cited as an element of past discipline pursuant to the terms of the parties collective-bargaining agreement. Further, he was apprised that "future deficiencies" would result in more severe disciplinary action, including removal from the Postal
20 Service.

As noted, I have found that Nordeng was engaged in union activity at the time of the two conversations with supervisor Chavez on February 5, and he did not forfeit the protection of the Act by virtue of his actions and comments. Further, it is apparent that he was disciplined for
25 engaging in that protected conduct, by being placed "off the clock" on February 5, and by the issuance on April 9 of a warning letter of a 14-day working suspension. The fact that he did not directly lose any income does not cause the two suspensions to be anything less than discipline under the terms of the parties collective-bargaining agreement.

30 The Postal Service does not dispute the obvious fact that Nordeng was issued two suspensions for his conduct and actions toward supervisor Chavez on February 5, arguing simply that those actions were unprotected. Having concluded otherwise, I must also conclude that each suspensions constituted a separate violation of Section 8(a)(3) and (1) of the Act. It is important to note that this in not a dual motivation case under *Wright Line*.¹⁶ As there is no
35 dispute as to the reason for the discipline, the Respondent's motivation is not at issue, and the *Wright Line* analysis would not be appropriate. Rather, in these circumstances, the proper analytical framework is that found in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). In that case, the Supreme Court affirmed the Board's rule that an employer violates the Act by discharging or disciplining an employee based on its good-faith, but mistaken belief that the employee
40 engaged in misconduct in the course of protected activity. *Id.* at 23-24.

The Postal Service may well have had a good-faith belief that Nordeng was either not engaged in union activity or lost the protection of the Act when he confronted Chavez in her office and referred to her in a rude and disrespectful manner. In my view, the motivation of the
45 Respondent is not an issue before me, and I am certainly making no finding of union animus on

50 ¹⁶ *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989.

the part of the Postal Service.¹⁷ However, I am concluding that the Postal Service was mistaken in its belief that Nordeng was not under the protection of the Act when he and Chavez had their altercation. Having concluded that he was so protected, it follows that the Postal Service was not lawfully permitted to discipline him for engaging in that protected conduct. *La-Z-Boy Midwest*, 340 NLRB No. 10 (2003). Accordingly, I conclude that by suspending Nordeng on February 5 (placing him “off the clock”), and by suspending him on April 9 (issuing a 14-day working suspension letter), that the Respondent has violated Section 8(a)(3) and (1) of the Act, as alleged in paragraphs 6(a) and (b) of the complaint.

7. The Call to the Police

It is undisputed that on February 5 supervisor Chavez called the police immediately following Nordeng’s statement that she did not have the “authority” to take him “off the clock,” or words to that effect. Chavez did not warn Nordeng, or discuss it with him. She merely said that she was calling 911, and did so. She testified that she feared for her safety. Chavez described Nordeng as being red in the face, leaning over her desk, raising his voice, and pointing his finger within 10 inches of her face. He was standing between her desk and the closed door to her office. She contends that she was fearful because of Nordeng’s demeanor and the difference in their physical size. According to Chavez, the door to her office was “blocked,” because of where Nordeng was standing, and so rather than try and get around him, she called the police. She testified, “The entrance was blocked, so I couldn’t leave my office. So I did the next best thing, and that was to get help.” Chavez testified that the police station was close, and she knew “they could be there right away.” Following the arrival of the police, Chavez filed a complaint and gave a statement to the officers. (G.C. Exh. 8.) Subsequently, the police issued a ticket to Nordeng for disturbing the peace. This is a criminal offense, which is prosecuted by the county attorney. However, ultimately, the matter was dismissed on the motion of the county attorney. (G.C. Exh. 4.)

I am of the view that Chavez has greatly exaggerated and embellished her alleged “fear” of Nordeng on February 5. I have no doubt that she did have some concerns about Nordeng, having contacted postal inspector Brian Evans on some prior occasion to complain about Nordeng allegedly creating a “hostile work environment.”¹⁸ On February 5 she was also very upset about the manner in which he had conducted himself during the “unofficial discussion” with McLaughlin. Further, she was apparently shocked that Nordeng would refer to her as a “bitch.” However, the question that must be answered is whether Chavez had a “reasonable” fear of Nordeng, as would result in a legitimate need to contact the police. I do not believe that she had such a reasonable fear.

¹⁷ As motivation is not an issue properly before me, I find it unnecessary to address the Respondent’s argument that its disciplinary action toward Nordeng was based on legitimate business considerations, and that there was no disparate treatment of him. Even assuming, for the sake of argument, this to be true, it still would not privilege the Postal Service to discipline Nordeng for engaging in activities protected by the Act.

¹⁸ Nordeng’s previous use of profanity and prior disciplinary record with the Postal Service is not relevant, and does not establish that Chavez had a reasonable fear that he might harm her. Nothing in Nordeng’s employment record or history with the Respondent indicates that he is capable of committing a violent act. There is ample evidence of his use of profane language, discipline for failure to properly perform the job, and failure to follow instructions, but no evidence that he ever acted in a violent or physically threatening manner toward either management or fellow employees. Nordeng is certainly no model employee, but nothing from his past history would reasonably indicate that he is a danger to others.

Having observed Chavez' demeanor while testifying, I am of the opinion that she is a rather nervous and emotional individual. Those traits would account for some of her "fear" of Nordeng, who is certainly very assertive, vocal, and who at times seems to act aggressively. However, when testifying about the events in question, I believe Chavez engaged in histrionics. Although she testified that she feared for her physical safety, the signed statement, which she gave to the police immediately after the incident with Nordeng, clearly states that he did not hit her nor did he physically threaten her. Although the statement was not intended to be an exhaustive description of the events, and she was undoubtedly emotionally upset at the time, it is still significant that Chavez does not mention any of Nordeng's mannerisms, demeanor, or physical movements, which she testified had so frightened her. A comparison of her testimony with the statement she gave to the police establishes significant discrepancies, and certainly does not help Chavez' credibility.

The strongest evidence that Chavez did not have a reasonable fear of Nordeng was the inherent implausibility of her testimony. She testified that she called the police because Nordeng blocked her exit from the office, and she knew they could arrive quickly. However, she also testified that right outside her door were approximately 25 letter carriers. Further, station manager Dates and supervisor Ceja might have been available to assist her. Never the less, she made no attempt to call any of them. Her contention that the letter carriers did not want to get involved and were not likely to help her, and that she was not sure that Dates had arrived at work yet, are not plausible explanations for her failure to attempt to call any of them. Obviously, they were potentially a lot closer than the police, who were not on site. Ironically, this proved to be true when following Chavez' announcement that she was calling 911, Nordeng opened the door and summoned Ceja to come into the office, which he immediately did.

Chavez remained on the telephone with the police dispatcher even after the office door was opened and Ceja entered the room. Her exit from the office was no longer impeded, and a fellow supervisor was present. Still, Chavez continued with her call to the police for immediate assistance. Why did she do that? Certainly she was no longer concerned that her exit was blocked, since as soon as she finished with her phone call, she left the room. Ceja and Nordeng remained in the office as she departed. Not only did she not tell the police while the dispatcher was still on the phone that she no longer needed them, but upon their arrival at the Sunnyside Station, she filed a criminal complaint against Nordeng for disturbing the peace. Why was that necessary?

I do not believe that it was necessary for Chavez to have either called the police for assistance, or to have filed a criminal complaint. I believe that she took that action out of spite and pettiness. In my opinion, Chavez did not have a reasonable fear that Nordeng was likely to harm her in some way. She was obviously upset with the manner in which he had represented McLaughlin at the "unofficial discussion," and, of course, with his reference to her as a "bitch." The call to the police and the filing of a criminal complaint was a way for Chavez to attempt to get back at Nordeng. However, I have found that Nordeng was engaged in the vigorous representation of McLaughlin, which despite Nordeng's rude and disrespectful conduct did not lose the protection of the Act. Therefore, any attempt to retaliate against him for that representation would constitute a violation of the Act.

The Board has repeatedly held that an employer violates the Act if it summons the police to arrest or remove employees or union representatives engaged in activity protected by Section 7 of the Act, when it does not have a valid reason for doing so. Although these cases typically

involve individuals who were distributing union literature,¹⁹ an analogy can certainly be drawn to other types of activity protected by Section 7 of the Act, such as a steward's vigorous representation of a bargaining unit member.²⁰

5 By contacting the police and filing a criminal complaint against Nordeng for disturbing
the peace, when she did not have a reasonable basis for doing so,²¹ Chavez was certainly
interfering with, restraining, and coercing Nordeng in the exercise of his Section 7 right to
vigorously represent McLaughlin. Such conduct on the part of the Respondent would be likely
10 to have a chilling effect on the willingness of employees to engage in any form of union activity.
Accordingly, I conclude that on February 5, the Respondent, through Chavez, by calling the
police and filing a criminal complaint against Nordeng, has violated Section 8(a)(1) of the Act, as
alleged in paragraph 5(c) of the complaint.²²

8. Summary

15 As is reflected above, I find that the Respondent has violated Section 8(a)(1) of the Act
as alleged in paragraphs 5(a), (b), and (c) of the complaint. Further, I find that the Respondent
has violated Section 8(a)(3) and (1) of the Act as alleged in paragraphs 6(a) and (b) of the
complaint.

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Conclusions of Law

1. The Respondent, United States Postal Service, is an employer over which the Board
has jurisdiction pursuant to Section 1209 of the Postal Reorganization Act.

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2. The Union, National Association of Letter Carriers, Branch 47, is a labor organization
within the meaning of Section 2(5) of the Act.

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3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the
Act:

(a) Threatening union steward Ricard Nordeng that his vigorous representation of an
employee would not be tolerated;

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¹⁹ See *CSX Hotels, Inc.*, 340 NLRB No. 92 (2003); *Valeo Sylvania, LLC*, 334 NLRB 133
(2001); *Eby-Brown Company*, 328 NLRB 496 (1999); *Clark Manor Nursing Home Corp.*, 254
NLRB 455 (1981); *Baptist Memorial Hospital*, 229 NLRB 45 (1977).

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²⁰ In *U.S. Postal Service*, 270 NLRB 114 (1984), although the matter was ultimately deferred
to the contract grievance-arbitration procedure, the complaint alleged that the Respondent's
conduct in causing the police to escort an employee, who was engaged in protected activity, out
of the facility constituted a violation of the Act.

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²¹ Obviously, had Chavez possessed a reasonable fear of harm from Nordeng, she would
have been warranted in contacting the police and filing a criminal complaint, in which event,
there would be no violation of the Act.

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²² The complaint alleges this conduct as a violation of only Section 8(a)(1) of the Act.
However, in their post-hearing briefs, both counsel for the Union and counsel for the General
Counsel contend that this conduct also constitutes a violation of Section 8(a)(3) of the Act. I do
not agree. The act of contacting the police and filing a criminal complaint, although a severe
form of retaliation for union activity, does not directly involve the hire, tenure, or terms and
conditions of Nordeng's employment. Accordingly, I find the conduct in question to be a
violation of only Section 8(a)(1) of the Act.

(b) Threatening union steward Ricard Nordeng that because he already had a warning letter in his file that he should not continue to vigorously represent employees; and

5 (c) Contacting the police and filing a criminal complaint against union steward Ricard Nordeng, because he engaged in the vigorous representation of an employee and other union activities.

10 4. By the following acts and conduct the Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) Suspending Ricard Nordeng by taking him “off the clock” on February 5, 2004, because of his vigorous representation of an employee and other union activities; and

15 (b) Suspending Ricard Nordeng by issuing him a letter dated April 9, 2004, for a 14-day working suspension, because of his vigorous representation of an employee and other union activities.

Remedy

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

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My recommended order requires the Respondent to expunge from its records any reference to the “off the clock” suspension of February 5, 2004, and the written 14-day working suspension letter of April 9, 2004, given to Ricard Nordeng, and to provide him with written notice of such expunction, and inform him that the unlawful conduct will not be used as a basis for further personnel actions against him.²³ *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Also, 30 the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against Nordeng in any other way.

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The recommended order further requires the Respondent to reimburse Nordeng and the Union for all reasonable legal fees and expenses incurred by them, in connection with the defense to the criminal complaint for disturbing the peace made against Nordeng on February 5, 2004. *Clark Manor Nursing Home Corp.*, 254 NLRB 455 (1981).

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Finally, the Respondent shall be required to post a notice that assures the employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

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²³ As the two suspensions did not result in the loss of any wages, there is no backpay for which Nordeng might otherwise be entitled.

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²⁴ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall

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1. Cease and desist from:

(a) Threatening its employees, who are union representatives, that their vigorous representation of other employees at an “unofficial discussion” with management would not be tolerated;

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(b) Threatening its employees, who are union representatives, that their vigorous representation of other employees at an “unofficial discussion” with management could lead to discipline;

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(c) Contacting the police and filing a criminal complaint against its employees, who are union representatives, because they engage in vigorous representation of other employees, or because they engage in other representational activities;

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(d) Issuing suspensions of any kind, including time “off the clock” and 14-day working suspensions, because its employees, who are union representatives, engage in vigorous representation of other employees, or because they engage in other representational activities; and

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

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

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(a) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful suspensions of Ricard Nordeng, which include the time “off the clock” suspension of February 5, 2004, and the 14-day working suspension issued on April 9, 2004, and within 3 days thereafter notify Nordeng in writing that this has been done and that the suspensions will not be used against him in any way;

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(b) Reimburse Ricard Nordeng and the Union for all reasonable legal fees and expenses incurred by them, in connection with the defense to the criminal complaint for disturbing the peace made against Nordeng on February 5, 2004;

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(c) Within 14 days after service by the Region, post at its 46th Avenue facility in Denver, Colorado copies of the attached Notice marked “Appendix.”²⁵ Copies of the Notice, on forms provided by the Regional Director for Region 27 after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the

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²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

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pendency of these proceedings, the Respondent has closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at its 46th Avenue facility in Denver, Colorado at any time since February 5, 2004; and

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

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Dated at San Francisco, California on August 13, 2004.

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Gregory Z. Meyerson
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT threaten any of you, including those of you who are union representatives, with disciplinary action, because you engage in the vigorous representation of other employees at an "unofficial discussion" with management, or because you engage in other union or protected concerted activity.

WE WILL NOT call the police and file a criminal complaint against any of you, including those of you who are union representatives, because you engage in the vigorous representation of other employees at an "unofficial discussion" with management, or because you engage in other union or protected concerted activity.

WE WILL NOT suspend any of you, including those of you who are union representatives, because you engage in the vigorous representation of other employees at an "unofficial discussion" with management, or because you engage in other union or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of Ricard Nordeng, include the suspension for time "off the clock" issued on February 5, 2004, and the 14-day working suspension issued on April 9, 2004.

WE WILL reimburse Ricard Nordeng and the National Association of Letter Carriers, Branch 47 for all reasonable legal fees and expenses incurred by them in connection with the defense to the criminal complaint for disturbing the peace made against Nordeng on February 5, 2004.

UNITED STATES POSTAL SERVICE

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433

(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-6647.