

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

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 391

and

CASE 11-CB-04150

BARRY SAWYERS, An Individual

Jasper C. Brown, Jr., Esq.,
for the General Counsel.¹

*J. David James, Esq. (Smith, James,
Rowlett & Cohen, LLP),*
for the Respondent.²

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. This case was tried in Winston-Salem, North Carolina, on November 1, 2010. Barry Sawyers (Charging Party or Sawyers) filed the charge in this matter on February 19, 2010, and the Acting General Counsel (the Government) issued a complaint on August 27, 2010.

The complaint alleges that International Brotherhood of Teamsters, Local 391 (Union) by Business Agent Chip Roth, violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) on February 4, 2010, by threatening retaliation against Charging Party Sawyers because he filed an unfair labor practice charge against the Union with the National Labor Relations Board (the Board).

¹ I shall refer to counsel for General Counsel as counsel for the Acting General Counsel or the Government.

² I shall refer to Counsel for the Respondent as the Union, Teamsters Local 391 or Teamsters.

Finding of Fact

I. Jurisdiction

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The Employer, United Parcel Service, a Delaware corporation (Employer or UPS) is engaged in intrastate and interstate transportation of freight with a terminal located at Winston-Salem, North Carolina. During the past 12 months the Employer, in the course of its business operations, derived in excess of \$50,000 in gross revenues from the transportation of items from the State of North Carolina directly to points outside the State of North Carolina. The Union admits, and I find, the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. It is admitted Business Agent Chip Roth is an agent of the Union within the meaning of Section 2(2) and 2 (13) of the Act.

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II. Alleged Unfair Labor Practices

UPS transports and delivers freight through its terminals located in all states of the United States and around the world to businesses, individuals and/or other customers.

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Specific to this case, is UPS's actions related to its transferring of certain feeder driver jobs from its Winston-Salem facility to its Greensboro facility. At its Greensboro terminal UPS employs over 200 feeder drivers, approximately 300 package car drivers, along with part-time package sorters and others for a total work force in excess of 2000. UPS employees approximately 30 to 35 feeder drivers at its Winston-Salem facility along with approximately 200 package car drivers, and with its 50 to 60 part-time employees and others, has a work force of approximately 325.

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Feeder drivers are paid more than the other employees. Feeder drivers operate tractor trailers, sometimes double trailers, moving freight from one location to another by dropping freight filled trailers and picking up empty ones at terminals or wherever a customer may have placed a filled trailer. There are also feeder driver cover positions. This classification fills in for drivers who are on vacation or for drivers that work a 4-day 10-hour week. Package car drivers operate smaller trucks delivering and picking up packages directly at businesses, private residences or other drop points. Part-time employees sort packages at terminals.

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Employees at the UPS facilities herein, as well as nation wide, are represented by the Union for collective-bargaining purposes. The National Master United Parcel Service Agreement and Atlantic Area Supplemental Agreements are applicable for the employees herein. The current collective-bargaining agreement expires July 31, 2013. Teamster's Local 391 services the employees herein and Chip Roth serves as their business agent of the Local. Roth is assisted by, among others, Shop Steward Allen McBride.

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Shop Steward McBride was first notified about the change or relocation of feeder drivers from the Winston-Salem facility to Greensboro facility. UPS Division Feeder Manager David

Sherman, in the summer of 2009, told Steward McBride at the Greensboro facility that UPS had come up with a plan to move eight feeder driver runs from the Winston-Salem hub to the Greensboro hub along with three cover runs and would eliminate one feeder driver run. It appears UPS actually moved 12 runs from Winston-Salem to Greensboro.

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On September 1, 2009, UPS posted a required semiannual fall bid list for Winston-Salem feeder drivers allowing feeder driver positions to be rebid by the drivers based on seniority. McBride noticed 12 less bid runs compared to the spring, April 1, 2009 bid list. According to Union Shop Steward McBride, the 12 lost runs were a direct result of work being moved by UPS from its Winston-Salem hub to its Greensboro hub.

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On September 1, 2009, Union Shop Steward McBride filed a grievance regarding the runs lost from the Winston-Salem hub. The grievance was signed by all 12 affected feeder drivers and the remedy sought would allow the 12 drivers “to follow our work to the Greensboro Hub as laid out in the contract language and have our seniority dovetailed into the Greensboro Feeder Department.”

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The Union met with UPS on September 30, 2009, to discuss the transferred jobs grievance. UPS took the position moving the feeder driver jobs from Winston-Salem to Greensboro was an intra-feeder department move, namely, UPS was just realigning the runs as opposed to changing its operations. As such, UPS contended it could make the moves without coming under of the parties’ collective-bargaining agreement that addressed changes in operation by UPS. The Union took the position feeder drivers should be allowed to follow the jobs to Greensboro including cover feeder drivers. The Union viewed the matter as urgent because it displaced the feeder drivers and if they were not allowed to follow the transferred jobs it would take up to a year and half for the matter to work its way through the grievance process to arbitration. The parties arrived at a settlement of the grievance on that date. The settlement, which was reduced to writing, called for allowing eight feeder drivers to follow the work to Greensboro, and have their seniority dovetailed into the Greensboro seniority list. Following bidding and other exceptions six of the eight feeder drivers would transfer to Greensboro effective October 19, 2009 and the remaining two would be given the option to fill, by seniority, the next two vacancies at Greensboro. The agreement did not provide transfer relief for four of the positions. The parties signed the settlement of the grievance on September 30, 2009.

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Union Shop Steward McBride discussed the settlement terms with the Winston-Salem feeder drivers and posted a copy of the settlement agreement for the drivers to read. Union Business Agent Roth noted the vast majority of the drivers accepted the settlement but acknowledged some drivers wished it had gone differently and had included the cover drivers. Feeder driver Louis Randall Melvin and certain others discussed their dissatisfaction with the settlement agreement mainly because it only covered 8 of the 12 jobs transferred from the Winston-Salem hub to the Greensboro hub.

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Charging Party Sawyers drafted a grievance, which feeder driver Melvin filed with Shop Steward McBride on November 12, 2009, addressing the failure of the September 30, 2009, settlement agreement to cover four of the jobs transferred to Greensboro from Winston-Salem. Sawyers said he did not file the grievance himself because he was not a member of the Union.

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Union Shop Steward McBride filed Melvin's grievance with UPS. UPS asked the Union to withdraw the grievance because of the grievance settlement signed off on by the parties on September 30, 2009. McBride discussed the Union's position with Union Business Agent Roth. The Union agreed the matter had been resolved by the September 30, 2009 settlement agreement. Union Business Agent Roth told Union Shop Steward McBride that the Melvin grievance had no merit and explained it was important for the Union to honor its settlement agreement with UPS and he withdrew and dismissed the grievance. Union Shop Steward McBride said there was some "irritation" by Melvin, and perhaps others, over the handling of Melvin's grievance and the fact it had not been heard.

Thereafter, Union Shop Steward McBride told Sawyers that Union Business Agent Roth had withdrawn the grievance because the matter had been resolved by the September 30, 2009 settlement agreement. Charging Party Sawyers testified that on about December 23, 2009, he telephoned Union Business Agent Roth and asked why Melvin's filed grievance had been withdrawn. Roth told Sawyers the matter had already been settled. Sawyers told Roth he was glad some of the feeder drivers were able to follow the jobs by the settlement agreement but was very displeased the Union had not followed the parties' collective-bargaining agreement and gotten all of the drivers the right to follow their jobs to Greensboro. Sawyers still wanted Roth to pursue the grievance. Roth refused. Sawyers testified he told Roth he would file a charge with the Board. Roth told Sawyers he would be wasting his time on the Board and said he would appreciate it if Sawyers did not waste his time filing charges. Union Business Agent Roth could not recall any such telephone conversation with Sawyer but said it was entirely possible he did so because he spoke with a number of Winston-Salem feeder drivers about this and other matters. Roth did not recall Sawyers telling him he would file a charge with the Board.

On December 31, 2009, Charging Party Sawyers filed a charge with the Board regarding the Union's failure to continue to process the November 12, 2009 grievance he drafted and feeder driver Melvin filed. The Regional Office of the Board dismissed Sawyers charge and the Region's dismissal was upheld on appeal.

February 4, 2010

Roth visits the Winston-Salem and Greensboro hubs several times monthly and positions himself at the hubs to be seen by the most feeder drivers. It is undisputed Business Agent Roth visited the Winston-Salem hub during the morning hours of February 4, 2010.

Ronald Key, a 35-year Winston-Salem feeder driver spoke with Roth that morning about his grievance regarding pay for certain holidays. Other feeder drivers were also present at the time while others passed by without stopping. Charging Party Sawyers came out of an office area at the hub that morning but did not join those in conversation with Roth. Key testified Roth made reference to Sawyer stating, "that fucking scab" and asked for the feeder drivers help "in keeping Barry from filing charges because he said it was using the local's money defending these charges by that 'fucking scab.'" Key said Union Business Agent Roth was specifically referring to the Board charge filed by Sawyers.

5 Feeder driver Melvin testified he was present when Union Business Agent Roth and
 10 feeder driver Key were discussing Key’s holiday pay grievance. Melvin talked with Roth about
 the disposition of his November 12, 2009 grievance. According to Melvin, Roth said, “Now stop
 guys. We have a serious problem here in Winston-Salem,” and, continued, “[S]omebody has
 filed NLRB charges against the Union.” Roth asked if they had any idea who, and, the feeder
 drivers guessed Barry Sawyers. Melvin testified Union Business Agent Roth then said, “Yes,
 that is the fucking scab.” Roth continued, “the fucking scab needs to be stopped because his
 NLRB charges has no merit and would cost the union members— any members paying dues
 money to hear this— hear the charges, the NLRB charges.” After Melvin left the meeting with
 Roth he told Sawyers Roth had called him a fucking scab and he needed to be stopped because
 his charges had no merit.

15 Union Shop Steward McBride testified various grievances were discussed at the February
 4, 2010 meeting with Business Agent Roth and the others. According to McBride, Roth brought
 up “some frustration over a...complaint that was filed by Barry Sawyers.” McBride observed
 that Roth, “was frustrated and irritated” over Sawyers’ complaint. McBride testified he did not
 want to put words in anyone’s mouth but stated Roth said, “it’s very frustrating that your dues
 money, being union paying peop . . . is having to be utilized to defend this complaint.” McBride
 said Roth called Sawyers a “f’ing scab” and added there “was maybe just a little more talk about
 20 that.” McBride denied Roth asked for action to be taken against Sawyers or that Sawyers needed
 to be stopped.

25 On cross-examination by the Government, McBride acknowledged Roth probably said
 the matter with Sawyers was serious and that Sawyers was wrong about filing these charges with
 the Board that it was a waste of time. McBride did not hear Roth say Sawyers needed to be
 stopped but added, “I’m not saying he did not say he needed to be stopped . . . I do not recall
 these words being said.”

30 Engineering mechanic Tim Mays, who is also a shop steward, testified he spoke with
 Union Business Agent Roth regarding a minor issue the morning of February 4, 2010, but said
 the subject then changed to the larger issue of the transfer of feeder driver positions and
 observed, “no one was happy with the situation.” Mays recalled Roth mentioning, “he just didn’t
 like spending union resources on scabs wanting to file grievances with the Labor Board.” Mays
 specifically said Roth told them, “I hate spending your money on scabs.” Mays said Roth did
 35 not identify the scab but he knew it was Barry Sawyers.

40 Union Business Agent Roth testified the most important issue addressed at the February
 4, 2010 meeting with feeder drivers related to feeder drivers being bumped back into the package
 car ranks. Roth said he spoke with 20 to 30 drivers that morning including Kevin Patton, Ron
 Key, Neal Newsome, Allen McBride, and Randy Melvin. Roth acknowledged he told them, “the
 Union was encumbered with having to pay for a legal defense of a Labor Board charge that he
 [Sawyers] had filed against the Local Union over the settlement of the change of operations issue
 with Greensboro.” Roth explained to feeder driver Melvin that Melvin’s November grievance on
 the same matter was without a foundation to advance because the Union would honor its
 45 settlement with UPS regarding the feeder driver jobs being transferred to Greensboro from
 Winston-Salem because he believed it was a good settlement that worked well for the

5 membership. Roth said he also explained to Melvin, in Union Shop Steward McBride's presence, it was a shame the Union was having to expend dues money to defend the Local Union on a settlement that worked so well for the membership. When asked to be more specific as to exactly what he said, Roth testified he told them; "It's a shame that we have to spend dues money to defend the Local when a fucking scab takes a shot like -- like being taken at the Union." Roth added, "I can't remember the specifics of what I said beyond that," Roth had no memory of saying Sawyers needed to be stopped but added he did not make any kind of threat against Sawyers. Roth denied saying he needed help from the feeder drivers to stop Sawyers from filing charges with the Board.

10 **Credibility Determinations**

15 In making my credibility resolutions I was greatly impacted by impressions I formed while watching the witnesses as they testified. Stated somewhat differently the impressions I gathered were based on a combination of the witnesses' mannerisms, how they spoke and their overall bearing on the witness stand. I "sized up" the witnesses in deciding whether their testimony impressed me as candid, fair, and believable. Having said that I certainly am not unmindful that resolutions of credibility conflicts are often difficult, requiring the weighing of plausible narrations of testimony by witnesses who appear truthful and no more biased or prejudice than others testifying differently. Indeed, resolutions by a judge, or a jury in a jury trial, are simply a practical solution, not a mark of absolute truth. I also note that by not accepting selected portions of a witness's testimony does not indicate I reject all, or other portions of, the witness' testimony.

25 While not essential to a resolution of what was said at the February 4, 2010 meetings, it is somewhat helpful to decide if a the telephone conversation Charging Party Sawyers testified he had with Union Business Agent Roth, on or about December 23, 2009, actually took place. I am persuaded Charging Party Sawyers spoke by telephone with Business Agent Roth on December 23, 2009, to find out why the grievance he, Sawyers, had drafted and feeder driver Melvin had filed on November 12, 2009, had actually been withdrawn. I credit Sawyers' testimony. He impressed me as generally a truthful witness although he and Roth do not appear to care too much for each other. Roth did not specifically deny the conversation with Sawyers, only that he could not recall such, but, added it was entirely possible he spoke with Sawyers. I find that after Roth told Sawyers the September 30, 2009 settlement of the first grievance regarding the transfer of jobs from Winston-Salem to Greensboro would preclude further processing the November grievance, Sawyers still wanted Roth to continue to pursue the November grievance. After Roth again told Sawyers he would not pursue the grievance I conclude Sawyers told Roth he would file a charge with the Board over the failure to further process the November 12, 2009 grievance. I likewise credit Sawyers testimony Business Agent Roth told him he would be wasting his time filing Board charges and he would appreciate it if Sawyers did not waste Roth's time filing the charges. It is undisputed Sawyers filed such a charge with the Board on December 31, 2009.

45 It is undisputed Union Business Agent Roth met with various feeder drivers at the UPS Winston-Salem hub during the early morning hours of February 4, 2010. It is likewise established that when Roth spoke with a number of feeder drivers some of the conversations, took place in the presence of Union Shop Steward McBride. It is likewise undisputed the

transfer of feeder driver jobs from the Winston-Salem hub to the Greensboro hub and the ramifications of those transfers were still actively being discussed between the feeder drivers and their union representatives. It is clear that at the time of this meeting Sawyers had already filed a charge with the Board related to the November 12, 2009 grievance. It is likewise undisputed Union Business Agent Roth was irritated Sawyers had filed a charge with the Board or that he referred to Sawyers as a “fucking scab.”

It is against this back drop that I must decide what additional comments, if any, Union Business Agent Roth may have made related to, or about, Sawyers. I credit feeder driver Key’s testimony Roth stated to him, and other feeder drivers, he needed their help in keeping Charging Party Sawyers from filing charges with the Board because it was using the local’s money to defend against these charges by that “fucking scab.” Key appeared to be testifying truthfully. I make this finding in as much as I am persuaded Roth, in his irritation at Sawyers for filing the charge and for his frustration with Sawyers over carrying out his late December stated intention to file such a charge, Roth sought help from the others to stop Sawyers even though Roth could not recall doing so. Roth’s anger and frustration at Sawyers is also demonstrated by feeder driver Melvin’s testimony, which I credit, that Roth sought the drivers help to stop Sawyers from filing charges with the Board. Melvin credibly testified Roth asked if the drivers knew that someone had filed charges with the Board. The drivers guessed Sawyers. Union Business Agent Roth already knew who had filed the charges because he had a copy of the charge signed by Sawyers. Likewise, Sawyers had told him in December he was going to file such a charge. It appears Roth wanted Sawyers to be identified by the other feeder drivers so he could, as testified to by Melvin, ask them to help him because, “the fucking scab needs to be stopped because his [Board] charge . . . has no merit and would cost the union members . . . dues money to hear . . . the NLRB charges.” Additionally I note, Union Shop Steward McBride acknowledged he was not testifying Roth did not say Sawyers needed to be stopped, only that he did not recall those words being used.

Having found that Union Business Agent Roth on February 4, 2010, told feeder drivers they had a serious problem and asked feeder drivers for help to stop the fucking scab, Charging Party Sawyers, from filing a charge or charges with the Board that had no merit and would cost the members their dues money to defend the charges. I now address whether such comments in the context herein violates the Act.

Before specifically addressing that issue it is instructive to note the Board’s guidance on this type issue.

First, it is clear Union restraint and coercion of Section 7 rights is regulated under Section 8(b)(1)(A) of the Act. More specifically “Section 8(b)(1)(A)’s proper scope . . . is to proscribe union conduct . . . that . . . impairs access to the Board’s process . . .” *Office Employees Local 251 (Sandia National Laboratories)* 331 NLRB 1417, 1418 (2000). Threats of physical violence by union agents against members/employees are coercive within the meaning of Section 8(b)(1)(A) of the Act. *Food & Commercial Workers Local TR (Longmont Foods)* 347 NLRB 1016 (2006). More specifically, threats of physical violence by union agents against members for invoking the Board’s processes has been found to violate Section 8(b)(1)(A), *Oil Workers Local 2-947 (Cotter Corp.)* 270 NLRB 1311 (1984), see also *Petersburg Associates* 239 NLRB 1091, 1104 (9179).

The issue herein; however, is whether the comments made by Union Business Agent Roth, on February 4, 2010, constitute a threat of retaliation against Charging Party Sawyers because he filed an unfair labor practice charge with the Board against the Union. I am fully persuaded Roth's comments do not constitute, an implied or actual, threat of any kind. This entire case
 5 grew out of the transfer of feeder drivers from UPS's Winston-Salem hub to UPS's Greensboro hub. A grievance was filed and signed by all 12 drivers involved. Charging Party Sawyers job was not affected by the feeder driver transfers. Union Business Agent Roth negotiated a settlement with UPS that permitted two thirds of the drivers to follow the transferred work from Winston-Salem, to Greensboro. Roth believed the settlement was a good one that worked well
 10 for the membership. Sawyers drafts, but does not sign, a grievance regarding the one third of the feeder drivers that were not allowed to follow the transferred work. The Union withdrew that grievance, as Roth and Shop Steward McBride explained, because the entire matter of the transfers was resolved by the earlier settlement. Union Business Agent Roth explained to Charging Party Sawyers, when Sawyers tried to persuade Roth, on December 23, 2009, to still
 15 pursue the grievance related to the 4 jobs that the drivers were not allowed to follow, that the grievance was without a foundation to advance. Roth explained to Sawyers the Union would honor its negotiated settlement with UPS. Sawyers then told Roth he would file charges with the Board regarding the Union not processing the grievance any further. Roth did not threaten Sawyers. Roth simply told Sawyers, as testified to by Sawyers, that he, Sawyers, would be
 20 wasting his time at the Board and he (Roth) would appreciate it if Sawyers did not waste his time filing charges. It is clear at this point that Roth believed the settlement with UPS was a good one that worked well although it did not resolve the issue to everyone's complete satisfaction. Roth did not want any additional grievances filed because he believed such to have no merit. Roth also did not wish to see charges filed with the Board because he did not believe such would have
 25 merit. Roth expressed his appreciation if Sawyers did not waste time pursuing the matter further at the Board. Sawyers however went ahead and filed such a charge with the Board. Sawyers' charge was dismissed by the Regional Office of the Board and the Region's dismissal was up held on appeal.

30 On February 4, 2010, Roth told various feeder drivers, in reference to Sawyers that the members had a serious problem in the Winston-Salem hub because, "the fucking scab" needed to be stopped or kept from filing Board charges, because his charges had no merit and it would cost the union member's their dues money to defend against these charges. I am persuaded Roth was again attempting, with the help of others, to persuade Sawyers not to continue to pursue charges,
 35 even at the Board because the issue already had been settled in final form. I find no threat in Roth's comments. The fact Roth was frustrated, irritated, and called Sawyers a "fucking scab" does not elevate his comments to a threat nor require a different result than I reach herein. I note the Board has held that calling a nonunion member a "scab-ass" was "merely name calling" *Letter Carriers Local 3825 (Postal Service)* 333 NLRB 343, 344 (2001). In summary, I am
 40 persuaded the help Roth was seeking was to have Sawyers stop filing meritless charges and nothing more.

The case the Government would rely on to support a finding Roth's statement constitute a threat is distinguishable. In *Carpenters Local 215* 241 NLRB 1043, 1047 (1979). Judge James
 45 T. Youngblood found a threat of unspecified reprisal in violation of Section 8(b)(1)(A) of the Act where a union agent stated at a union meeting that included employees Griswold, Fox and Funk,

“he had been on pins and needles for 2 months, that he was tired of running the Local by the book and not being able to place men on different jobs, and that he did not want any more charges from the Board. Mr. Griswold, Mr. Fox, or Mr. Funk.” However in that same conversation, the union business agent told one of the three individuals involved he should be brought up on charges for not returning a union membership list he had obtained; and further told the individual, he was making all kinds of mistakes because he did not know the international union’s laws. While Judge Youngblood seems to limit the evidence he concluded violated Section 8(b)(1)(A) of the Act to the “pins and needles” comments, he clearly discusses and considered the other comments about charges and mistakes of an individual involved. Any fair reading of the *Local 215* decision in its entirety reflects more to the case than just a “pins and needles” comment. The isolated comment herein by Business Agent Roth reflects no reference to any other actions.

Conclusions of Law

1. UPS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union has not violated the Act in any manner alleged in the complaint

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

Dated Washington, D. C. December 28, 2010

William N. Cates
Associate Chief Judge

³ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, these 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.