

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

HYUNDAI AMERICA SHIPPING AGENCY, INC.

and

Case 28-CA-22892

SANDRA L. McCULLOUGH, an Individual

ACTING GENERAL COUNSEL'S REPLY BRIEF

Hyundai American Shipping Agency, Inc. (Respondent), in its Answering Brief, fails to respond to most issues raised by the Exceptions and Brief in Support of Exceptions filed by Counsel for the Acting General Counsel (CAGC), and instead attempts to divert the Board's attention by misrepresenting CAGC's exceptions as being objections to credibility determinations by Administrative Law Judge Gregory Z. Meyerson (ALJ). To the contrary, CAGC's Exceptions are supported by the record and extant case law, while, as discussed below, Respondent's attempts to buttress the ALJ's findings and conclusions at issue are without merit.

I. RESPONDENT'S ANSWERING BRIEF FAILS TO SUPPORT THE ALJ'S DECISION OR REBUT CAGC'S EXCEPTIONS REGARDING McCULLOUGH'S DISCHARGE FOR VIOLATION OF RESPONDENT'S UNLAWFUL RULES

Respondent fails to, and cannot, distinguish the applicable extant Board law which plainly holds that an employee's discharge for violation of an unlawful rule is a *per se* violation of the Act. Although Respondent attempts to side-step the issue by asserting that only two of the six reasons given for McCullough's discharge referenced unlawful rules, leaving four purportedly "valid" reasons to justify her termination, Respondent's argument ignores its own agent's testimony that each and every reason cited for McCullough's

discharge was a “motivating factor” in the termination decision. (ALJD at 23) As a result, Respondent cannot argue now that it would have discharged McCullough even in the absence of her violation of Respondent’s unlawful policies.

More to the point, Respondent simply ignores the fact that the Board has consistently held that an employer’s discipline or discharge of an employee for violation of an unlawful rule is a *per se* violation of the Act. See *Northeastern Land Services, Ltd.*, 352 NLRB at 744, 745-46 (2008) (stating that “[u]nder extant Board precedent, an employer’s imposition of discipline pursuant to an unlawfully overbroad policy or rule constitutes a violation of the Act”); *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n. 3 (2004) (finding that “where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule”).

Accordingly, McCullough’s discharge, which Respondent does not dispute, and which the ALJ properly concluded was at least in part motivated by McCullough’s violation of a rule found by the ALJ to be unlawful (ALJD at 23), was itself unlawful, without the need to engage in an analysis under *Wright Line*. Thus, the ALJ erred by failing to find that McCullough’s discharge violated Section 8(a)(1) of the Act as a matter of law.

II. RESPONDENT’S ANSWERING BRIEF FAILS TO SUPPORT THE ALJ’S DECISION OR REBUT CAGC’S EXCEPTIONS REGARDING RESPONDENT’S MAINTENANCE OF AN UNLAWFUL ELECTRONIC COMMUNICATIONS AND INFORMATION SYSTEMS POLICY AND RESPONDENT’S UNLAWFUL DISCHARGE OF McCULLOUGH FOR VIOLATION OF THAT POLICY

Respondent’s Answering Brief mostly ignores CAGC’s arguments that the ALJ erred in failing to find that the mere maintenance by Respondent of its Electronic Communications and Information Systems Policy is itself an independent violation of the Act. Respondent fails to address CAGC’s arguments, based on the Court’s analysis set forth in *Republic*

Aviation Corp. v. NLRB, 324 US 793 (1945), that an employer rule restricting employees' exercise of Section 7 rights (in this case Respondent's restriction of access to its email system) must be examined by balancing an employee's Section 7 rights with an employer's business interests. Further, Respondent's Answering Brief fails to acknowledge, much less address, CAGC's assertion that Respondent's discharge of McCullough for blind copying employees with e-mails (an act that the ALJ expressly found resulted in her discharge) was itself a violation based on the application of Respondent's unlawful policy.

Even if the Board rejects CAGC's contention that Respondent's maintenance of its Electronic Communications and Information Systems Policy, as a whole, violates the Act, it should uphold the ALJ's finding that the provision of the policy prohibiting employees from disclosing information or messages from Respondent's electronic communications and information system to unauthorized persons is itself a violation of the Act.

Moreover, in terms of the application of that part of the policy to McCullough, the record shows that McCullough's discharge, which the ALJ found was prompted by her blind copying of employees on e-mails, was imposed because she violated Respondent's unlawful policy (in particular, the final sentence of the Electronic Communications and Information Systems Policy, which the ALJ found to violate the Act (ALJD 13:16-28)). Based on such findings -- the nexus between them apparently overlooked by the ALJ -- it follows that her discharge was an act which is itself a *per se* violation, as discussed above.

Accordingly, the Board should find, for the reasons stated in CAGC's Brief in Support of Exceptions, that by maintaining its Electronic Communications and Information Systems Policy, Respondent violated Section 8(a)(1) of the Act. The Board should also find that by discharging McCullough for violating that policy -- both the policy as a whole and the part of

that policy already found by the ALJ to be impermissibly overly broad -- it also violated Section 8(a)(1) of the Act.

III. RESPONDENT'S ANSWERING BRIEF FAILS TO SUPPORT THE ALJ'S DECISION OR REBUT CAGC'S EXCEPTIONS REGARDING McCULLOUGH'S UNLAWFUL DISCHARGE FOR ENGAGING IN PROTECTED CONCERTED ACTIVITIES

- A. The ALJ properly found that CAGC established a *prima facie* showing that McCullough's protected concerted activity was a motivating factor in Respondent's decision to terminate her, but the ALJ erred in failing to find that McCullough's act of paying demurrage was protected concerted activity.**

First, Respondent in its Answering Brief challenges the ALJ's finding that CAGC made a *prima facie* showing that McCullough's protected concerted activity was a motivating factor in Respondent's decision to terminate her. Respondent, however, did not file a cross-exception to this finding by the ALJ; therefore, Respondent's challenge to this finding in its Answering Brief is improper. The ALJ correctly found that McCullough engaged in significant concerted activity, and that such activity was a motivating factor in Respondent's decision to fire her (ALJD 20, 21, 22:17-37).

The ALJ erred, however, in failing to find that McCullough engaged in protected concerted activity when she paid demurrage fees on behalf of a customer to protest what she viewed as management's lack of service to customers (ALJD 25:25-26:8). CAGC's exception should be granted because the record evidence plainly establishes that McCullough's act was one of defiance in protest of working conditions and done in furtherance of employees' mutual aid and protection, thereby conduct protected by Section 7. Respondent's Answering Brief does not rebut that fact.

Respondent argues that because the payment of demurrage by McCullough was a customer issue, it was not related to concerted activities of employees and therefore not

protected under the Act, citing *Waters of Orchard Park*, 341 NLRB 642 (2004). Respondent ignores extant Board law, which instructs that complaints related to customer issues (and, by way of analogy, complaints related to patient care in a health care setting) are protected if the employees' concerns are directly related to the performance of their work. See, e.g., *Parr Lance Ambulance Service*, 262 NLRB 1284 (1982), *enfd.* 723 F.2d 575 (7th Cir. 1983). In the instant case, it is apparent, from McCullough's repeated complaints to management about the manner in which managers handled demurrage issues, that McCullough's act of paying demurrage on behalf of a customer was directly related to her own work duties and those of other customer service representatives and in protest of Respondent's policies that impact on all employees in that position. McCullough's act of protest, and subsequent attempts to conceal that act from management, relate directly to the working conditions of all employees in her job classification and were for the purpose of mutual aid and protection of employees. As a result, such conduct is both protected and concerted. The ALJ erred in failing to recognize them as such. See also *Brighton Retail, Inc.*, 354 NLRB No. 62, 2009 WL 2366520, * 8 (2009) (holding that employees engaged in protected concerted activities when they complained about a supervisor's treatment of customers); *Holy Rosary Hospital*, 264 NLRB 1205, 1210 (1982) (“[t]o a health care professional ... the handling of patient care is a condition of employment”).

B. The ALJ erred in failing to find that Respondent's discharge of McCullough was a pretext for violation of McCullough's Section 7 rights.

Respondent argues that because no other employee engaged in the exact acts or conduct in which McCullough engaged, and as a result no employee provides “an exact comparison” or “an exact match” to McCullough, her termination cannot be pretextual. In a sense, Respondent asserts that because there is no precise, exact, matching situation in the

past, it must be true that McCullough's discharge for alleged misconduct is lawful. That argument is simply without merit and further ignores the record evidence that other employees who engaged in conduct similar to that cited for McCullough's discharge, and in some cases more egregious conduct, were not terminated, as discussed in CAGC's Brief in Support. Respondent would have the Board believe that in order to establish pretext, CAGC must show that another employee in Respondent's history, who was alleged by Respondent to have engaged in the same six acts of misconduct that were cited as the reasons for McCullough's termination, but who did not engage in significant protected concerted activity, was also discharged. That is not what Board law requires.

Moreover, rather than address CAGC's argument regarding the overwhelming record evidence to establish pretext – including Respondent's knowledge of McCullough's protected concerted activity; the coincidence in timing between the protected concerted activity and McCullough's discharge; manifestations of animus toward McCullough's protected concerted activities, including Respondent's attempts to chill McCullough's and other employees' Section 7 rights through the promulgation, maintenance, and enforcement of unlawful rules; Respondent's departure from past practice and from its own written policies, such as drug testing; and Respondent's disparate treatment of McCullough as compared to other employees – Respondent simply ignores CAGC's arguments and the record facts supporting them. Instead, in its Answering Brief, Respondent merely rehashes the factual bases it cited for terminating McCullough, but does so in a manner which selectively presents facts in an

apparent attempt to undermine McCullough's credibility¹ while summarily stating that its reasons were not pretextual, with no further discussion, argument, or citation to legal authority in support of its arguments.

Respondent's Answering Brief fails to address or rebut CAGC's exceptions concerning McCullough's discharge as pretext for violation of the Act. Respondent's failure to address or respond to CAGC's exceptions regarding the issue of pretext highlights the overwhelming record evidence in support of CAGC's exception with regard to this issue.

IV. CONCLUSION

Based on the foregoing, the Board should find that Respondent violated the Act as described in CAGC's Exceptions, as well as with respect to the other violations found by the ALJ in his Decision, and issue an order so finding and providing for an appropriate remedy.

Dated at Phoenix, Arizona, this 27th day of December 2010.

Respectfully submitted,

/s/Eva Shih Herrera

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¹ For example, on page 18 of its Answering Brief, Respondent asserts that "McCullough admitted she smoked marijuana, which is unlawful." First, there was no admission related to whether such conduct is or is not unlawful, and the ALJ made no finding which relies on her smoking being unlawful. McCullough testified that she had nerve damage and used marijuana for medical purposes. (Tr. 241) Respondent goes beyond the record evidence, apparently in an attempt to portray McCullough in a bad light, perhaps because Respondent is unable to otherwise rebut the legal arguments set forth by CAGC with regard to the exceptions at issue. Second, and more to the point, Respondent fails to acknowledge that McCullough admitted to smoking marijuana *outside of working hours*, an omission by Respondent that ignores the record evidence before the Board. In any event, it is undisputed that McCullough's admitted drug use was outside of working hours and, based on Respondent's failure to investigate or apply its drug testing policies, is otherwise of no avail to Respondent in this case.

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in HYUNDAI AMERICA SHIPPING AGENCY, INC., Case 28-CA-22892, was served via e-filing, or as otherwise set forth below on this 27th day of December 2010, on the following:

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