JD–32–11
Algonquin, IL

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

RW BRISCOE AND ASSOCIATES, INC.

and Case 13–CA–45866

ARTHUR JOHNSON, An Individual

Elizabeth Salgado-Cortez, Esq., for the
General Counsel.
Ralph Briscoe, pro se, of Palatine, Illinois,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 28, 2011. The charge was filed on February 19, 2010,[1] and the amended charge was filed on March 28, 2011. The complaint, first amended compliance specification, the order consolidating them, and notice of consolidation hearing issued March 31, 2011.

The Charging Party, Arthur Johnson, contends that his former employer, RW Briscoe and Associates, Inc. (the Company), violated Section 8(a)(4) and (1) of the National Labor Relations Act (the Act) by discharging him because he threatened to call the "Labor Board" about continuously late paychecks. The amended compliance specification alleges that Johnson is due $3200 in backpay, plus accrued interest, as the result of the unlawful termination.[2] The Company denies the material allegations.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation with its principal office in Algonquin, Illinois, is engaged in the business of providing armed security guards at various Foot Locker stores in the Chicago, Illinois metropolitan area where it annually provided services to Protection Plus Security Corporation, which is directly engaged in interstate commerce. The Company admits, and I find,

[1] All dates are in 2010, unless otherwise indicated.
[2] Without objection, the General Counsel's motion to amend paragraph IX of the First Amended Compliance Specification to reduce the total amount of backpay from $12,720 to $3,200, not including interest, was granted (Tr. 7-8.) In addition, it is noted that the requested relief seeks backpay for Johnson, but not his reinstatement. (First Amended Compliance Specification, pp. 2–3; Tr. 9–10.)

that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. The Company's Operations

Ralph Briscoe is the Company's president. He is assisted by two supervisors, project manager Gary Bogo and supervisor Rodney Lee.[3] Together, Bogo and Lee supervise 20–30 guards.[4] The first line of supervision was Lee, followed by Bogo, and then Briscoe.

The Company's employee handbook includes several provisions relating to this controversy. In a section on "Open Door Policy," the Company states:

> Complaints and concerns should first be brought to the attention of the employee's supervisor. This will most often result in a satisfactory resolution. On those occasions where resolution is not satisfactorily reached or if the complaint is regarding the employee's supervisor, the employee may communicate the complaint in either verbal or written form to the next level of Management. If resolution is still not attained, employees may continue up the chain of-of-command. Please note failure to follow the management chain-of-command, i.e., making complaints to a client, client company or other entity without first attempting resolution through [the Company's] management is cause for immediate termination of employment. [5]

The Company's disciplinary process includes several levels of discipline, any of which may be utilized depending on the circumstances:

> Disciplinary action may call for any of four steps: verbal warning, written warning, suspension or termination of employment. Depending on the severity of the problem and the number of occurrences, there may be circumstances when one or more steps are bypassed.
>
> While it is impossible to list every type of behavior that can be deemed a serious offense, the "inappropriate Conduct" section of this handbook provides examples of conduct that may result in immediate suspension or termination. It also lists less serious offenses that may trigger one of the initial steps of discipline. A written warning need not pertain to the same or similar offense for which the verbal counseling was given. Insubordination or failure to follow the management chain-of-command will be grounds for immediate termination.[6]

Examples of inappropriate conduct, as referred to in the disciplinary context, are listed in another section on "Standards of Conduct." Conduct that "may result in disciplinary action, up to

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[3] The Company's answer admitted that they were all supervisors within the meaning of Sec. 2(11).

[4] Bogo's testimony did not, however, explain how the guard supervision was split between them. (Tr. 40.)

[5] GC Exh. 4 at 6.

[6] Id. at 11–12.

and including termination," includes "insubordination, including improper conduct toward a supervisor" and "abusive or vulgar language."[7]

B. Arthur Johnson

Arthur Johnson was employed by the Company as a security officer at a Foot Locker store from August 2009 to February 12, 2010. Johnson worked 40–48 hours per week before being terminated. During the previous 5 years, he worked in the same position at the same store for Intel, the prior security contractor.[8] As a security officer, Johnson was responsible to patrol, check bags, and watch customers. His performance was adequate, and he had all of the necessary training and qualifications for the position. Certifications necessary for the job included a Permanent Employee Registration Card (PERC) required of private security guards in Illinois, and an Illinois-issued firearms control card (FCC). The Company informed Johnson shortly after taking over that he needed to renew his PERC card; he did that and provided the Company with the receipt. At some point, the Company returned Johnson's FCC card to him with an instruction to have the card transferred from his former employer, Intel, to the Company. Johnson started that process and Officer Lee deducted $50 from his paycheck for the registration for the applicable 2-day course. However, Lee denied Johnson's request for time off to take the course due to staffing shortages. As a result, Johnson was unable to process an FCC card transfer during the remainder of his employment with the Company. Moreover, the Company never issued a warning to Johnson or otherwise documented this issue in his file.[9]

Employees were to be paid on a biweekly basis every other Monday. On approximately 3–4 occasions between October 2009 and February 2010, Johnson complained to Lee about the late paychecks.[10] On several occasions, Lee told Johnson to speak with Briscoe about the problem.[11] Lee gave Johnson Briscoe's telephone number and Johnson followed up by calling him by cellular telephone from Foot Locker. Each time, Briscoe told Johnson that he would get paid when the Company got paid.[12] Johnson called Briscoe again about late paychecks in

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[7] Id. at 8–9.

[8] I credit Briscoe's unrefuted assertion that Johnson, notwithstanding his PERC card status, was kept on as an accommodation because the store manager was comfortable with Johnson. (Tr. 60.)

[9] References by Bogo and Briscoe to their concerns about Johnson's need to renew his expired PERC card further diminished their credibility. The PERC card was renewed and Bogo was provided with a receipt as proof. With respect to the FCC card, neither Briscoe nor Bogo refuted Johnson's credible testimony that he began the FCC transfer process, requested the 2 days off from Officer Lee to process the FCC card, but was denied because of staffing needs. (Tr. 41–44, 61–68, 71–72; GC Exhs. 5–6.)

[10] Johnson credibly testified that during his employment, ranging from August 2009 to February 2010, he was paid on time only once. (Tr. 13.)

[11] Johnson asserted that paychecks were late four to five times, while Bogo conceded they were late on two to three occasions. (Tr. 20, 44; GC Exh. 2.) On the other hand, Johnson concedes that he was always eventually paid. (Tr. 31.)

[12] Johnson provided credible and unrefuted testimony that he contacted Lee each time before being told to contact Briscoe. (Tr. 13–18.) I also credited his testimony over that of Bogo that he contacted Bogo to complain about a paycheck discrepancy, but never about late pay. (Tr. 34–35, 45.) Johnson was more credible on this point because he conceded that he did not follow the chain of command by contacting Lee and then Briscoe. Second, I do not credit the Employee Warning Notice allegedly written on February 12, 2010, 1 day after Johnson threatened to go to the Labor Board. The form referred to warnings issued in November and

Continued

November 2009. In several instances, Johnson used vulgar language, but Briscoe understood why Johnson was upset.[13] Briscoe again told Johnson that he would get paid when Foot Locker paid the Company. Johnson remarked that he needed his paycheck because his mortgage was due. On that occasion, Briscoe hung up the telephone.[14]

Sometime in January, Johnson spoke to Briscoe by telephone. He insisted that he needed to be paid immediately and, if not, he might have to file a complaint with the "Labor Board." On February 8, Johnson went to work, but did not get paid. He called and spoke with Lee that day between 3–4 p.m. Lee said to call him back. Johnson called back at 6 p.m. and was told that he would not get paid until Friday. On February 9, Johnson called Briscoe between 3–4 p.m., complained to him about having to wait until Friday to get paid, and insisted he needed to pay his mortgage. On February 11, he spoke with Briscoe and insisted he needed to get paid. He also warned that he would go to the "Labor Board" if he was not paid immediately. Later that day, Lee delivered a paycheck to Johnson. There were insufficient funds to cash the check and Johnson attempted to contact management.[15]

During the evening of February 12, Lee called Johnson and left a message that he was being taken off the schedule. Johnson managed to contact Lee during the morning of February 13. Lee told Johnson that he was discharged and could call Briscoe to discuss further. Johnson called Briscoe that evening. Briscoe, however, told Johnson that he was discharged for threatening to file charges with the "Labor Board."[16]

Subsequent to his discharge, Johnson did not secure equivalent employment elsewhere until April 12, 2010. Had he not been discharged, Johnson would have received net pay totaling $3,200 for the two month period of time that he was unemployed.[17]

December 2009, which were never communicated to Johnson. (Tr. 63–64; GC Exh. 7.) Briscoe testified that initial warnings were not usually documented unless it was a serious matter, which would usually result in termination. (Tr. 63.)

[13] Judging by Johnson's demeanor while testifying about the Company's shortcomings with the payroll, I credit the testimony of Briscoe and Bogo that Johnson used vulgar language in demanding to be paid on time. (Tr. 45, 61.) Briscoe, however, hardly considered his choice of words inappropriate under the circumstances: "[u]nderstandably, Mr. Johnson was upset when his pay was late. I fully understood that." (Tr. 69.)

[14] Johnson's credible testimony of his conversations with Lee, who did not testify, reveals that Lee told him to call Briscoe. Without Lee's testimony to refute the allegations, I do not credit Briscoe's assertion on cross-examination of Johnson that Lee previously warned Johnson about sidestepping Bogo in the chain of command. (Tr. 35–36.)

[15] I based this finding on Johnson's credible testimony and Briscoe's position statement conceding that Johnson mentioned the Labor Board in late January. (Tr. 17–22; GC Exh.10.)

[16] I credited Johnson's version of the conversation over that provided by Briscoe. (Tr. 23.) Briscoe's testimony denying that Johnson did not mention the Labor Board until after he was discharged on February 13 was contradicted by his March 25 position statement. (Tr. 60–63; GC Exh. 10.)

[17] The First Amended Compliance Specification alleged at paragraph VII, and the Company admitted in its answer, that the net pay owed Johnson for each quarter, without interest, is $3,200. At trial, the General Counsel amended, without objection, paragraph IX to allege that the total net backpay sought is $3,200, without interest. (Tr. 7-8.)

III. Legal Analysis

The complaint alleges that the Company violated Section 8(a)(4) and (1) by discharging Arthur Johnson because he threatened to contact the Labor Board concerning continuously late payments of his paycheck. The Company denies that charge and asserts that Johnson's discharge was based on his insubordination and failure to follow company policy.

An employer's discharge of an employee because he files or threatens to file charges or give testimony under the Act constitutes an unfair labor practice in violation of Section 8(a)(4). 29 U.S.C. 158. Section 8(a)(4) violations are analyzed under the *Wright Line* framework. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). The General Counsel must first make a prima facie showing that the employee engaged in protected activity, the employer was aware of the activity, and the activity was a motivating factor in the employer's decision. *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 673 (2004). Upon making such a showing the burden then shifts to the employer to demonstrate that he would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980). If the evidence establishes that the reasons given by the employer are pretextual, in that they are either false or were not relied upon by the employer in making the termination decision, then the employer has failed to show that he would have taken the same action absent the protected conduct. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

With regard to the type of conduct protected by Section 8(a)(4), this section is to be construed broadly to include more than just formal charges and formal testimony. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). Consistent with such an interpretation, the Board has found that employee threats to bring disputes before the "Labor Board" are to be considered protected under Section 8(a)(4). See *Grand Rapids Die Casting Corp.*, 279 NLRB 662, 664 (1986) (finding an 8(a)(4) violation where the employee threatened to go to the "Labor Board" with her dispute); *First National Bank & Trust Co.*, 209 NLRB 95, 95 (1974) (finding an 8(a)(4) violation where employee was terminated because of employer's belief that employee had filed, or was about to file, charges with the "Labor Board").

Johnson credibly testified that he warned Briscoe, the Company's president, that he would pursue his complaint with the "Labor Board" if he did not get paid on time. That conduct constituted protected activity within the ambit of Section 8(a)(4). See *Grand Rapids*, 279 NLRB at 664, 667. Moreover, Briscoe conceded in his position statement that he was aware of Johnson's threat to go to the "Labor Board" prior to his discharge. A more extensive analysis, however, is involved in determining whether the discharge was unlawfully motivated.

Johnson's credible testimony and strong circumstantial evidence demonstrates that Johnson's protected activity was a motivating factor in Briscoe's decision to discharge him. First, the timing within which the termination occurred is sufficient to support an inference that Johnson's protected conduct was a motivating factor in Briscoe's decision. See *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (timing of employer's action in relation to protected activity provides reliable evidence of unlawful motivation); *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003) (citing *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. mem. 71 Fed Appx. 441 (5th Cir. 2003) (Board has long held that where adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised); *Senftner Volkswagen Corp.*, 257 NLRB 178, 186 (1981) (finding an 8(a)(4) violation where the employer withdrew an offer of reemployment 1 day after learning of employee's pending unfair labor practice charge). Here, Johnson threatened to complain to the Labor Board on February 11; he was discharged on February 13. Coupled with that utterly suspicious timing is the fact that Briscoe generated a warning notice—containing backdated alleged infractions to November and

December 2009—after taking Johnson off the schedule and deciding to discharge him. As previously found, Johnson was never told prior to his discharge that his use of vulgar language constituted insubordination or that he failed to follow the chain-of-command. See *American Lumber Sales, Inc.*, 229 NLRB 414, 421 (1977) (employer's asserted reason for termination was not credible where the evidence failed to show that the employee in fact received any warning notices).

Second, the warning notice issued to Johnson relied on two grounds: insubordination and failure to follow the chain-of-command. At trial, however, Briscoe alluded to an additional reason—Johnson's failure to update his PERC card and convert his FCC card from his former employer to the Company. Neither card became a significant issue during Johnson's tenure with the Company; the PERC card was renewed, and Johnson was precluded by his supervisor from taking the necessary time off to have his FCC card transferred to the Company. In any event, the fact that those concerns surfaced for the first time at trial constitutes a shifting reason for the adverse action taken. See *McClendon Electrical Services,* 340 NLRB at 614 (inferring that the true reason for termination was discriminatee's protected conduct where employer raised new, but undocumented, reasons at trial).

Lastly, the Company's reliance on the handbook's reference to the chain-of-command for employee complaints is unfounded. First, Johnson's credible and unrefuted testimony established that his supervisor, Lee, directed him to call Briscoe. Briscoe failed to provide any explanation as to why Johnson should not have adhered to his immediate supervisor's directive. Moreover, the handbook provision specifically referred to termination *only* in cases where an employee complained to a client or other outside entity—neither of which was involved here.

The General Counsel having established a prima facie case that Johnson was discharged because he engaged in protected conduct, the burden shifted to the Company to demonstrate that it would have discharged Johnson even in the absence of such conduct.

Briscoe conceded that initial warnings were not usually documented unless they were serious, in which case termination would usually be in order. The Company's disciplinary records revealed two other disciplines resulting in discharges. The first involved a threat of injury to another officer; the second resulted from the failure to renew a PERC card after a verbal warning to do so. There is no evidence that Johnson threatened to injure anyone, and he did in fact renew his PERC card. The only arguable misconduct that can be attributed to Johnson is that he used vulgar language while insisting on being paid. Given Briscoe's concession that he "fully understood" why Briscoe was upset, it is extremely unlikely that Johnson's choice of language alone would have resulted in Briscoe terminating Johnson. *See Finesilver Mfg. Co*., 220 NLRB 648, 649 (1975) (one of the proffered reasons for the termination was pretextual where the employee cursed in a highly emotional context); *Chemvet Laboratories, Inc*., 201 NLRB 734, 742 (1973) (employer's reliance on employee's cursing as a basis for discharge found to be pretextual where the language was not unusual for that used in the plant).

Under the circumstances, the Company's discharge of Arthur Johnson because he threatened to complain about late payments to the Labor Board violated Section 8(a)(4) and (1) of the Act.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Arthur Johnson on February 13, 2010, because he threatened, 2 days earlier, to call the Labor Board to complain about late payment of wages, the Company has been discriminating against employees in violation of Section 8(a)(4) and (1) of the Act.

3. The above-described labor practices affect commerce with the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Company has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company violated Section 8(a)(4) and (1) of the Act by discharging Arthur Johnson, it must be ordered to make him whole for any loss of earnings or other benefits suffered as a result of the Company's unlawful actions against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

As part of the remedy for the unfair labor practices found above, an order shall issue requiring reimbursement of $3200, the amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination. Further, that the Company be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate calendar quarters.

The Company, having discharged employee Arthur Johnson because he engaged in protected concerted activity, must make him whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them. Backpay in the amount of $3,200, with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Company shall also be required to remove from its files the Employee Warning Notice, dated February 12, 2010, any and all references to the unlawful discharge of Arthur Johnson. The Company shall notify Johnson in writing that this has been done and that the unlawful references will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Company, RW Briscoe and Associates, Inc., of Algonquin, Illinois, its officers, agents, successors, and assigns, shall

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

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they threaten to file charges with a Labor Board, National Labor Relations Board, or any other Federal agency relating to their terms and conditions of employment.

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

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

(a) Within 14 days from the date of this Order, make whole Arthur Johnson by remitting to him a payment in the amount of $3200, with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), minus tax withholdings required by Federal and State Laws.

(b) Within 14 days from the date of this Order, the Company shall also be required to remove from its files the Employee Warning Notice, dated February 12, 2010, and any and all references to the unlawful discharge of Arthur Johnson. The Company shall notify Johnson in writing that this has been done and that the unlawful references will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its Algonquin, Illinois facility copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since February 13, 2010.

(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 Company has taken to comply.

Dated, Washington, D.C. May 25, 2011

Michael A. Rosas
Administrative Law Judge

[19] 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."

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 discharge you because you threaten to complain to the National Labor Relations Board, a Labor Board, or any other Federal agency concerning your terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, make whole Arthur Johnson by remitting to him a payment in the amount of $3200, plus interest, representing the total loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files the Employee Warning Notice, dated February 12, 2010, any and all references to the unlawful discharge of Arthur Johnson. The Company shall notify Johnson in writing that this has been done and that the unlawful references will not be used against him in any way.

RW BRISCOE AND ASSOCIATES, INC.

(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.nlrb.gov.

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-5208
(312) 353-7570, 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, (312) 353-7170.