

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

AMERICAN POSTAL WORKERS UNION,
LOCAL 886

and

Cases 17-CB-6651

SHERYL BISHOP, an Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

Counsel for the Acting General Counsel, pursuant to Section 10(c) of the Act and Section 102.46 of the Board's Rules and Regulations, submits the following exceptions to the decision of Administrative Law Judge George Carson II (ALJD) in the above-captioned case. The General Counsel excepts to the following findings of fact and conclusions of law:

1. The ALJ failed to apply the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), concluding, without supporting evidence, that Respondent excluded Sheryl Bishop from a class action grievance settlement because her "area of work was not being violated," ALJD p. 4, line 33, while ignoring evidence that Bishop performed work that was the subject of Respondent's grievances, and by ignoring

evidence that Respondent treated Bishop differently than similarly-situated union members.

2. The ALJ's conclusion, "The Union did not unlawfully exclude Bishop from the class action grievances," ALJD p. 7, line 24, is unsupported by the record and erroneous as a matter of law.
3. The ALJ's conclusion, "There is not a scintilla of evidence that the Union requested that the Postal Service exclude Bishop from the settlement," ALJD p. 6, lines 22-23, mischaracterizes the record and is erroneous.
4. The ALJ erroneously relied on evidence that Bishop neither filed a grievance nor requested that Respondent file a grievance on her behalf, ALJD p. 7, lines 11-16, 27, to support his conclusion that Respondent did not violate the Act by excluding Bishop from a class action grievance settlement.
5. The ALJ's conclusion that Respondent did not hold Bishop "to a different standard" than other clerks, ALJD p. 7, lines 12-16, is unsupported by the record and erroneous.
6. The ALJ's conclusion, "The criterion for inclusion in the class actions grievances herein was a violation of work assignment or overtime which determined the identity of the employees to be compensated," ALJD p. 7, lines 7-8, is not supported by the record and is erroneous.
7. The ALJ supported his conclusion that Respondent did not violate the Act and did not discriminate against Bishop based, in part, on the unsupported and erroneous finding that Respondent included another nonunion clerk, Kevin Risbey, in the grievance settlement. ALJD p. 3, line 3; p. 4, line 27; p. 5; line 10; p. 6, line 35.

8. The ALJ mischaracterized the record to support his conclusion that Respondent's President David James did not admit that Respondent did not include Bishop in the grievance settlement because she was not a union member. ALJD, p. 6, lines 30-35.
9. The ALJ discredited the testimony of impartial witness Brad Johnson that Respondent's President David James admitted that he would not file a grievance on behalf of a nonmember, ALJD p. 5, lines 3-12, by mischaracterizing the record and without adequate evidentiary support.
10. The ALJ's conclusion, "The Respondent did not violate the National Labor Relations Act," ALJD p. 7, line 32, is unsupported by the record and erroneous as a matter of law.

For the foregoing reasons, as set forth more fully in the accompanying Brief in Support of Exceptions, the Counsel for the Acting General Counsel requests that the Board reverse the ALJD and find that Respondent violated the Act as alleged in the Complaint.

Dated:

January 12, 2012

Respectfully Submitted,



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BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF
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Counsel for the Acting General Counsel's Brief

Counsel for the Acting General Counsel respectfully files this brief with the National Labor Relations Board. This case is before the Board based on a Complaint alleging that Respondent, American Postal Workers Local 886, violated Section 8(b)(1) (A) and (2) of the National Labor Relations Act by excluding Sheryl Bishop from a class action grievance settlement on December 24, 2010, because Bishop was not a union member. Following a hearing on October 20, 2011, Administrative Law Judge George Carson II issued a decision (ALJD), dated December 15, 2011, in which he concluded that the Respondent did not violate the Act by excluding Bishop from the settlement agreement, finding that Bishop did not seek representation from Respondent and was ineligible for payment based on her job duties.

As discussed below, in reaching his decision, Judge Carson disregarded relevant record testimony and misapplied Board precedent. The record establishes that Respondent treated Bishop differently than similarly-situated union members without a legitimate basis to support its actions. Whereas Respondent included other clerks in a class action grievance settlement without requiring them to file a grievance, the Judge relied on evidence that Bishop did not file a grievance to find that Respondent lawfully excluded her. Likewise, the Judge ignored evidence that Respondent included other clerks in the grievance settlement without regard to whether non-clerks were performing their work, instead adopting Respondent's unsupported defense that it excluded Bishop from the grievance settlement because her primary work area had not been violated.

The record clearly demonstrates that Respondent treated Bishop in a discriminatory manner because she was not a union member. Accordingly, Counsel for the Acting General Counsel requests that the Board reverse the ALJD and find that Respondent violated Section 8(b)(1)(A) and (2) of the Act by excluding Bishop from the class action grievance settlement.

FACTS

A. Background

Respondent represents between 30 and 40 employees, including clerks, maintenance employees, custodians, and building maintenance employees, at the sole postal facility in Salina, Kansas. (T. 10) David James serves as Respondent's president, and Kyle James, no relation to David James, is Respondent's Tour 1 steward.

Beginning sometime prior to June 2010, Respondent experienced a number of complaints that managers and employees from other crafts were performing clerk craft work. (T. 11) Although David James initially attempted to resolve the complaints by filing grievances solely on behalf of employees who were available to work overtime, the number of complaints apparently made processing the grievances prohibitively time consuming. (T. 12, 24, 31-32) Accordingly, Kyle James assumed responsibility for future grievances and created a worksheet to allow clerks to report instances in which they observed non-clerks perform clerk work. (GC 3; T. 16) As violations were reported, James filed grievances seeking payment for the hours that non-clerks allegedly performed clerk work, affixing the applicable worksheets to each grievance as substantive proof. (T. 17-18; GC 6 and GC 7)

Rather than attempting to match the hours from each alleged violation to a particular clerk or group of clerks, James decided to distribute the hours to clerks on a rotational basis. (T. 24, 31-32) To aid this effort, James created a computer spreadsheet and simply copied the clerks' names into the spreadsheet in order of seniority, regardless of whether they were eligible to work overtime.¹ (GC 4; T. 21, 37)

¹ Although Respondent also represents maintenance employees and custodians, James did not include their names on the spreadsheet because their duties do not include clerk work. (T. 22-23)

B. Grievance Settlement

Between July 22 and November 12, 2010, James filed and settled 23 grievances alleging that non-clerks performed clerk craft work. (GC 5; T. 26-27) Although the Postal Service settled the grievances almost immediately, they were not paid until December 24, 2010, when Supervisor Troy Rathbun was assigned to pay the grievances. (T. 19-20, 28-29, 82) Rathbun received a paper copy of the spreadsheet prepared by Respondent (GC 4), and, using the spreadsheet to determine which employees were entitled to compensation, submitted the grievances for payment. (T. 84) On December 24, the 29 clerks included on Respondent's grievance spreadsheet received payment for a total of 1065.6 hours, or approximately 38 hours per clerk. (T. 24-25, 85; GC 4) Sheryl Bishop was the only clerk who was omitted from the spreadsheet.²

As word of the grievance settlement traveled throughout the Salina facility, Brad Johnson, Salina Branch President of the NALC, learned that Bishop, the lone nonunion clerk, had been excluded from the class action grievance settlement. (T. 70) The following day, Johnson informed Supervisor Rathbun of his discovery (T. 70, 86), and Rathbun, who was concerned that Respondent's actions were unlawful, unsuccessfully attempted to rectify the matter by filing an amended grievance to include Bishop in the settlement. (T. 86-87)

Rathbun's attempt to pay Bishop eventually led Respondent's President David James to confront both Rathbun and Johnson. Although, as addressed below, there is a dispute about whether James told Rathbun and Johnson the reason that Respondent excluded Bishop, it is clear that James was not pleased about the prospect of Bishop's inclusion. Undisputed testimony establishes that James approached Johnson on multiple occasions and accused him of attempting to represent Bishop by coercing management to include Bishop in the grievance payout. (T. 71-74)

² As discussed below, the Judge erred in comparing Bishop to union member Becky Hertel. Although Hertel is represented by Respondent, she is employed as a secretary for the Manager of Postal Operations. (T. 14) Like the maintenance employees and custodians referenced above, Hertel does not perform clerk work.

C. Sheryl Bishop

Prior to her retirement in July 2011, Sheryl Bishop served a clerk at the Salina postal facility. (T. 56) Bishop was primarily responsible for distributing accountables mail to carriers, reconciling business reply trust accounts and postage due accounts, and sorting throwback mail -- mail that had been incorrectly included in the wrong carrier's route. (T. 57-58) Bishop worked on Tour 2, the day shift, along with three window clerks and the bulk mail technician. (T. 39-41) Although otherwise eligible to work overtime, Bishop had not volunteered to work overtime during the period from June 2011 until December 2011. (GC 2)

Although Bishop did not file a grievance alleging that non-clerks were performing work in her area, the record establishes that, during the period covered by the grievances, Bishop performed clerk work that was being performed by supervisors and other non-clerks. Bishop testified without contradiction that she worked in the box mail section and also sorted city mail (T. 60-61), and, as Respondent's grievances demonstrate, the December 24 grievance settlement included compensation based on non-clerks performing this work. (T. 62; GC 4; GC 7) For example, Grievance SAL 908-10, includes eight allegations that non-clerks performed box section work. (GC 7(d), (l), (q), (u), (y), (z), (bb), and (dd)) Yet, Respondent did not include Bishop in the grievance settlement. (GC 4; T. 88)

EXCEPTIONS

A. Statement of Exceptions

As analyzed further below, a clear preponderance of the record evidence demonstrates that Respondent excluded Bishop from the December 24, 2010, grievance settlement simply because she was not a union member. The Judge misapplied the appropriate legal framework by ignoring key evidence to conclude that Respondent did not violate the Act by excluding Bishop from the grievance settlement. **Exceptions 1, 2, 3, and 10.** Contrary to the Judge's conclusion that

Respondent would have represented Bishop if she would have filed a grievance, the record establishes that other clerks were included in the settlement even though they did not file grievances. **Exceptions 4 and 5.** Additionally, the Judge endorsed Respondent's assertion that it excluded Bishop because her work area had not been violated, notwithstanding evidence that Respondent included at least two similarly-situated employees in the settlement. **Exceptions 1 and 6.**

Rather than scrutinizing Respondent's defenses, the Judge erroneously accepted Respondent's self-serving declarations at face value and supported his decision with factual findings and credibility determinations that are not substantiated by the record. **Exceptions 7, 8, and 9.** Accordingly, the Board should reverse the ALJD and find that Respondent violated the Act as alleged in the Complaint.

B. Legal Framework

Pursuant to Section 8(b)(1)(A), a union has a duty "to represent all members of a designated unit . . . without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Although a union enjoys wide discretion, it violates Section 8(b)(1)(A) when it acts to the detriment of a member or members of the bargaining unit for reasons that are arbitrary, discriminatory, or in bad faith. *Air Line Pilots Assn. v. O'Neil*, 499 U.S. 65, 75-78 (1991); *Teamsters Local 101 (Allied Signal)*, 308 NLRB 140, 144 (1992); *Auto Workers Local 909 (General Motors Corp.-Powertrain)*, 325 NLRB 859, 865 (1998). A union's duty of fair representation extends to all functions and includes its role in distributing the proceeds from a grievance settlement. See, e.g. *Mine Workers District 5 (Pennsylvania Mines)*, 317 NLRB 663 (1995) (finding union unlawfully refused to distribute proceeds of an arbitration award); *Letter Carriers Branch 6070*, 316 NLRB 235, 236 (1995). Accordingly, a union clearly engages in unlawful conduct when it refuses to include

employees in a grievance settlement because of their union status or activities. *District 65, Distributive Workers*, 214 NLRB 1059, 1059 (1974); *Puget Sound Area Local 298 (Postal Workers)*, 352 NLRB 792, 792 (2008) (Chairman Shaumber and Member Liebman participating).

In cases in which a union is alleged to have discriminated against or attempted to cause an employer to discriminate against an employee in violation of Section 8(b)(1)(A) and (2), the Board applies the analytical framework laid out in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982). *Electrical Workers Local 429*, 347 NLRB 513, 515 (2006); *Teamsters Local Union No. 657 (Texia Productions, Inc.)*, 342 NLRB 637, 637 fn. 1 (2004). Under this test, the General Counsel bears the burden of establishing by a preponderance of the evidence that protected conduct was a substantial or motivating factor in the respondent's decision. If the Government meets its burden of persuasion, the burden then shifts to the respondent to demonstrate by a preponderance of the evidence that it would have taken the same action even if the alleged discriminate had not engaged in protected activity. If the reasons advanced by the respondent are found either not to exist or were not in fact relied upon, the General Counsel has established a violation.

C. Argument

1. The Judge Failed To Consider Evidence That Bishop Was The Only Clerk That Respondent Excluded Because She Did Not File A Grievance

To support his conclusion that Respondent did not discriminate against Bishop, the Judge observed that Bishop neither attempted to file a grievance nor requested that Respondent file a grievance on her behalf. (ALJD p. 7, lines 11-16, 27) In the context of this case, Bishop's failure to file a grievance does not support the Judge's conclusion that Respondent was privileged to exclude Bishop from the grievance settlement. Rather, considering that Respondent included other clerks

who did not file grievances, Respondent's reliance on this baseless defense demonstrates that it discriminated against Bishop.

First, contrary to the Judge's assertion that "[t]here is not a scintilla of evidence that the Union requested that the Postal Service excluded Bishop from the settlement," Kyle James admitted that he was solely responsible for filing the grievances and determining which clerks would be compensated. (T. 21, 24-25, 37, 46, 48) James compiled the list of eligible employees, and the Postal Service merely paid the employees on its list. (T. 82-84)

Second, by emphasizing that Bishop did not file a grievance, the Judge ignored the fact that Steward Kyle James admittedly filed every grievance included in the settlement. (T. 23-24) Other clerks did not file grievances; yet they were included in the grievance settlement without question. James acknowledged that there was no correlation between whether an employee reported a violation and whether Respondent included that employee in the settlement of a grievance. (T. 24) This fact is illustrated by the manner in which Respondent resolved grievance SAL 292-10. (GC 6) As support for the alleged violation underlying grievance SAL 292-10, Respondent relied on twelve worksheets completed by four clerks and a custodian. (GC 6; T. 30-31) Three clerks, Heather Hill, Flo Jones, and Jo Dickson, received no portion of the hours from SAL 292-10 even though they submitted written complaints, and Dianne Stratmann, the only other clerk who made a written complaint, received only one hour. (GC 6(b)) In sum, 19 other clerks, including David James and Kyle James, were compensated even though they had not reported a single violation. (GC 6(b))

Given the evidence, it is puzzling that the Judge concluded that Respondent could use Bishop's failure to file a grievance as a basis to exclude her from the settlement. Respondent clearly treated Bishop differently than the other clerks. In fact, Respondent's President David James as much as admitted that Respondent believes that it is appropriate to treat members and nonmembers

differently, testifying that he told Bishop that “she wasn’t included with everyone else because she had not filed a grievance, and if she had filed a grievance, we would have represented her.” (T. 96) Thus, even though Respondent automatically included union clerks in the settlement (T. 23-24), Bishop, a nonmember, was held to a different standard and required to file her own grievance. Yet, the Judge ignored this disparity, instead relying on Respondent’s “credible testimony” that an aggrieved employee “can notify a union steward...and we’ll file a grievance on their behalf.” (ALJD p. 7, lines 15-16). Even assuming that Respondent would have processed a grievance on Bishop’s behalf, the Judge’s circular reasoning fails to answer the real issue: Why was Bishop required to file her own grievance to be included in the settlement when union clerks were automatically included? Respondent certainly failed to offer any legitimate explanation. Nevertheless, the Judge’s decision rests on the faulty premise that a union is permitted to treat its members more favorably than nonmembers.

2. The Judge Credited Respondent’s Defense Without Considering Evidence That Similarly-Situated Employees Were Included in the Settlement

To support his finding that Respondent had a legitimate basis for excluding Bishop from the grievance settlement, the Judge concluded, “The criterion for inclusion in the class action grievance herein was a violation of work assignment or overtime which determined the identity of employees to be compensated.” (ALJD p. 7, lines 7-8) The Judge’s conclusion, which is based solely on the unsupported testimony of Steward Kyle James, is demonstrably false.

James testified that clerks were eligible for inclusion in the grievance settlement if either a non-clerk performed work in the clerk’s “principal assignment area” or performed work that deprived the clerk of overtime opportunities. (T. 46) According to James, who acknowledged that he had no personal knowledge about the violations that occurred on Bishop’s Tour (T. 38, 53), he excluded

Bishop simply because he received no reports that non-clerks had performed Bishop's "postage due work." (T. 49)

There are multiple reasons to doubt James' testimony that he evenly applied the above-described selection criteria to exclude Bishop from the grievance settlement. If James actually limited inclusion in the grievance settlement to clerks based on their principal duty assignments and overtime eligibility, the eligibility list would have looked much different. As the following examples demonstrate, Respondent included at least two similarly-situated employees in the grievance settlement while excluding Bishop, thus proving that its entire defense is a pretext.

Respondent included union member M. Regnier in the grievance settlement, and she received compensation from 12 grievances filed between July 22 and November 12, 2010. (GC 4) During the relevant timeframe, Regnier, who worked on the same tour as Bishop, held the principal duty of bulk mail technician. (T. 39) Like Bishop, Regnier did not sign the overtime-desired list. (GC 2)

Kyle James admitted that he included Regnier in the grievance settlement even though he had no evidence that non-clerks had performed Regnier's work. (T. 42) In fact, James acknowledged that he did not even investigate whether Regnier's work area had been violated until after Bishop filed a charge, and the Board Agent investigating this case asked him to explain why Regnier had been included in the settlement. (T. 42, 54-56) James clearly included Regnier in the settlement without any regard to whether she was deprived of overtime (she could not have been; she was not on the overtime-desired list) or whether her work area had been violated (James obviously did not know, and apparently did not care).

Likewise, Respondent included John Doll in the settlement for reasons that do not square with Bishop's exclusion. Doll worked as a window clerk on the same tour as Bishop. (T. 39, 42) Although James acknowledged that he had no evidence that Doll's principal duty area had been

violated (T. 42), he claimed that he included Doll in the settlement because Doll was available to perform box section work. (T. 46-47) The evidence does not support this contention.

As James acknowledged, box section work can be performed by any clerk. (T. 46, 51) It was no more Doll's principal duty than Bishop's. Doll spent his hours on Tour 2 performing his principal duty assignment, working as a window clerk. Unlike Bishop, who testified without contradiction that she routinely worked in the box section (T. 60-61), there is no evidence that Doll ever even performed box section work. Furthermore, like Bishop, Doll was not eligible for overtime, as he had removed himself from the overtime-desired list during the relevant time period. (GC 2; T. 16) Accordingly, there is no legitimate basis for concluding, as James asserted, that Doll was available to perform the box section work while Bishop was not.

Even without the examples of disparate treatment, Respondent's assertion that it dispersed the grievance award to clerks based on their principal assignment areas is highly dubious. According to James, he developed the list of eligible employees (GC 4) in or about June 2010 to allow him to easily rotate the grievance hours among those clerks whose areas had been violated. (T. 31-32, 48-49) James also testified that he had to rely on the worksheets that employees completed and submitted to him to determine which areas had been violated. (T. 48, 53) Given that James began filing grievances in July 2010, immediately after employees started submitting the worksheets to him (T. 18; GC 5), he obviously compiled the list of eligible employees in June 2010 without any evidence concerning which areas had been violated. If James actually developed the list of eligible employees based on which "principal job areas" and overtime opportunities had been affected by the violations, he would have had to have created the list much later in 2010. Furthermore, given that James ostensibly created the eligibility roster to avoid the daunting task of matching each violation "hour per hour" with employees on the overtime-desired list (T. 24, 31), it defies logic to believe that James accomplished his goal by adding another category, "principal duty area," to

determine which employees would be eligible, thus forcing him to compare each reported violation to every clerk's duty assignment.

It is obvious that Respondent included other clerks in the grievance settlement without any consideration of their "principal duty areas" or overtime eligibility. As the Board has explained, a respondent cannot meet its burden of persuasion under *Wright Line* simply by advancing a seemingly legitimate justification for its actions as a substitute for its real motivation. See *North Carolina Prisoner Legal Services, Inc.*, 351 NLRB 464, 469, fn. 17 (2007). In an effort to explain Bishop's exclusion, Respondent merely sought selection criteria that might possibly explain why Bishop was the only clerk excluded. When applied to other clerks, however, Respondent's defense does not withstand scrutiny. If Respondent honestly scrutinized clerks' principal duty areas in deciding which clerks would be eligible, Kyle James would have known long before Bishop filed this charge whether M. Regnier should have been included in the grievance settlement. Likewise, if overtime eligibility was a true selection criterion, John Doll would have been excluded. Yet, the Judge completely ignored this relevant evidence and erroneously accepted Respondent's unsupported defense.

3. The Judge Relied On Non-Probative Facts To Conclude That Union Membership Was Not a Consideration In Bishop's Exclusion

In support of the conclusion that Respondent did not discriminate against Bishop based on her nonunion status, the ALJD repeatedly asserts that Respondent excluded member Becky Hertel from the grievance settlement (ALJD, p. 4, line 33; p. 7, line 25) and included nonmember Kevin Risbey. (ALJD p. 3, line 3; p. 4, line 27; p. 5; line 10; p. 6, line 35) The Judge's reliance on Respondent's treatment of Hertel and Risbey is misplaced.

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Hertel is a union member, and she was excluded from the settlement agreement. Nevertheless, the inference that the Judge drew from these facts is unwarranted. Hertel clearly had no claim to the proceeds of grievances alleging that non-clerks performed clerk work. Unlike Bishop, Hertel is not a clerk but instead the secretary to a regional manager. (T. 14) As Kyle James acknowledged, Hertel does not even work for the Salina post office. (T. 14) Accordingly, Hertel and Bishop were not similarly-situated employees, and the Judge improperly relied on Hertel's exclusion to justify Respondent's decision to exclude Bishop.

Likewise, Respondent's decision to include Risbey in the settlement does not excuse Respondent from excluding Bishop. On December 24, 2011, when the grievance settlement was paid, Bishop and Risbey had three things in common: they were clerks represented by Respondent; they performed work that was covered by the grievance settlement; and neither filed a grievance alleging that non-clerks performed clerk work. Unlike Bishop, however, Risbey became a union member on December 18, 2010, six days before clerks received payment for the grievances. (T. 77-78) Even assuming that Respondent included Risbey in the settlement agreement before he actually became a member, the Judge's attempt to compare Risbey and Bishop falls short.

There is a significant difference between a new unit employee who has yet to join a union and a long-tenured employee who refuses to join. An appropriate analogy would be an employer who willingly hires an employee with past union experience but refuses to hire an employee intent on organizing the employer's workforce. The former union employee's presence does not serve as defense against the employer's refusal to hire the union organizer. See *H.B. Zachry Co.*, 332 NLRB 1178, 1183 (2000). Likewise, it is much different for Respondent to share the proceeds of a grievance settlement with Risbey, a new unit employee who was likely to be (and was) persuaded to join Respondent's membership, than Bishop, an established employee who has already made her union feelings clear.

Notwithstanding the stark contrasts between Bishop, Hertel, and Risbey, the Judge repeatedly pointed to Hertel and Risbey to justify Respondent's treatment of Bishop. Rather than substantiating the Judge's conclusion, the Judge's repeated reliance on such non-probative evidence clearly demonstrates the frailties in Respondent's defense.

4. The Judge Mischaracterized The Record To Disregard Direct Evidence of Discrimination

In dismissing the allegation that Respondent excluded Bishop from the grievance settlement because she was not a union member, the Judge discredited testimony that Respondent's President David James confirmed Respondent's unlawful motive to two unbiased witnesses. It is well settled that the Board attaches great weight to an administrative law judge's credibility findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). In particular, the Board lends particular weight to credibility resolutions that are made on the basis of demeanor. See, e.g., *Pet Inc.*, 229 NLRB 241, 241 fn. 2 (1977). Nevertheless, the Board maintains the responsibility to draw conclusions from the facts, and it is not bound by an administrative law judge's credibility resolutions that are contrary to a clear preponderance of all relevant relevance. See *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 618 (1978), *enf. denied* 607 F.2d 1208 (7th Cir. 1979); *Diversified Chemicals Corp.*, 231 NLRB 982, 983 fn. 7 (1977).

In this case, the Judge's credibility resolutions are neither based on the demeanor of the Government's witnesses nor any relevant evidence. Rather, the Judge mischaracterized or misunderstood record testimony to reach a conclusion that is not supported by the record.

Supervisor Troy Rathbun testified that, within a day or two after he tried to amend Respondent's grievance to include Bishop in the grievance settlement, he was approached by Respondent's President David James. Rathbun testified to the following conversation:

A. [James] was questioning why I had submitted a payment for Ms. Bishop, and I told him the same thing. I thought that Kansas was a Right-To-Work state and that I was just trying to keep everybody out of trouble and his comment was that she was not intended to be included in the matrix [GC 4].

Q. Okay. And did he offer any explanation why she wasn't intended?

A. It was mentioned that she was a non-union member and that they were filing on behalf of union members and that if she wanted to be included, she could file her own grievance.

(T. 89)

Rejecting Rathbun's testimony that James confirmed that Bishop was not included in the grievance settlement because she was not a union member, the Judge explained, "Rathbun did not name David James when he testified that 'it was mentioned that she was a non-union member.'" (ALJD p. 4, lines 19-20) On this basis, the Judge surmised that Rathbun mistakenly attributed the statement to James instead of NALC President Brad Johnson. (ALJD p. 4, lines 23-24)

Although Rathbun did not *name* David James in the quoted passage, it is clear from the context of his response to the question that he *identified* James as the speaker. As Rathbun testified, James was the only other party to the conversation. (T. 88) So, when Rathbun responded to the question, "did he offer any explanation?" the only reasonable conclusion to draw is that his answer included James' response. Although Rathbun acknowledged that an earlier conversation with Brad Johnson led him to attempt to include Bishop on the settlement (T. 86), a reasonable reading of the record does not support the Judge's speculation that Rathbun was testifying about his discussion with Johnson when he was specifically asked what David James said. The question was clear, and Rathbun's answer was clear. It is also equally clear that by relying on the phraseology of Rathbun's answer to suggest that Rathbun was uncertain about the messenger, the Judge completely mischaracterized the record.

The Judge compounded this error by using David James' blanket denial about whether he ever stated that he would not represent a nonmember as a basis for discrediting Rathbun's testimony that James told him that the Union filed the grievances "on behalf of union members." (ALJD p. 4, lines 22-26) There is a distinction between James telling Rathbun that Respondent filed a grievance on behalf of its members, and James telling Rathbun that he would not represent nonmembers. Rathbun did not testify that James said he would not represent nonmembers, yet the Judge used James' self-serving testimony about one matter to discredit Rathbun's testimony about another.

The Judge also discredited Brad Johnson's testimony based on a highly unusual reading of the record. Johnson testified that, when Johnson questioned James about why Bishop was the only clerk excluded from the grievance settlement, James responded that "he has never filed [a grievance] for a non-union member and he would not." (T. 74) In discrediting Johnson's testimony, the Judge observed that Johnson testified on cross examination that the comment was "what I believe [I] heard." (ALJD p. 5; lines 4-12)

Johnson's answer came from the following examination by David James:

Q. Anyone can file a grievance?

A. Anyone can file a grievance.

Q. So, in this case, Ms. Bishop could have filed a grievance?

A. I guess she could have.

Q. And if she filed a grievance, and I chose not to push it further, then a comment or statement that you allegedly said happened probably would have some type of foundation?

A. Yes.

Q. Other than that, it's just an accusation?

A. It's a comment that I believe I heard, yes.

Q. Okay, do you have any facts to support that?

A. It is what I believe [I] heard.

(T. 75)

Absent a recording, the only possible evidence to this conversation is Johnson's belief about what he heard. By using Johnson's answer as a basis to discredit his testimony, the Judge again erroneously injected uncertainty into a witness's testimony.

Unlike David James, Johnson and Rathbun have no financial stake in the outcome of this case and no motive to fabricate their testimony. More importantly, unlike James' self-serving denials, other record evidence corroborates Johnson and Rathbun. Looking at the manner in which Respondent treated Bishop compared to similarly-situated employees Regnier and Doll, it is more likely than not that James explained Bishop's exclusion in a manner consistent with Rathbun's and Johnson's testimony. In fact, the record demonstrates that Respondent steadfastly maintained that it was privileged to exclude Bishop from the settlement because she did not file her own grievance, notwithstanding the fact that it filed on behalf of other clerks. That is essentially the message that James delivered to Rathbun and Johnson. Yet, instead of examining the entire record to determine Respondent's true motive, the Judge simply credited James' testimony on the ultimate question of fact and stretched the record – mischaracterizing some evidence and ignoring other evidence – to support his conclusion. As such, the Board is not bound to the Judge's erroneous findings.³ See *Diversified Chemicals*, 231 NLRB 982, 983 fn. 7 (1977).

³ James' statement to Brad Johnson is a violation of Section 8(b)(1)(A) even though Johnson is not a member of the bargaining unit represented by Respondent. It is well settled that statements made to third parties violate the Act if they are made in such circumstances that it is reasonable to expect that they would be communicated to employees. See, e.g., *National Association of Government Employees*, 327 NLRB 676, 680 (1999). In this case, James undoubtedly expected that Johnson would relay his remarks to Bishop, as Johnson's un rebutted testimony establishes that James repeatedly accused Johnson of attempting to represent Bishop. (T. 71-73) See, e.g., *Cedar Grove Manor Convalescent Center*, 314 NLRB 642, 652-653 (1994) (finding threats made by one union agent against another were intended to coerce employees). Accordingly, Respondent violated Section 8(b)(1)(A) by informing Johnson that it would not file grievances on behalf of nonmembers.

CONCLUSION

The record establishes that Respondent violated the Act by excluding Sheryl Bishop from the December 24, 2010, grievance settlement because she was not a member and by telling employees that Respondent would not file grievances on behalf of non-members. Accordingly, Counsel for the Acting General Counsel requests that the Board reverse the ALJD and issue an appropriate order requiring Respondent to cease and desist from such unlawful conduct and to make Sheryl Bishop whole, with interest, for any losses that she suffered as a result of Respondent's unlawful actions. Additionally, the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of lump-sum payments and taxes that would have been owed had there been no discrimination, and an order requiring Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

Dated: January 12, 2012

Respectfully submitted,



Michael E. Werner

Counsel for the Acting General Counsel

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STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Exceptions on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Board and by electronic mail to Respondent and the Charging Party.

Dated: January 12, 2012



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