



United States Government
NATIONAL LABOR RELATIONS BOARD
Region Four
615 Chestnut Street - Seventh Floor
Philadelphia, PA 19106-4404

Telephone: (215) 597-7601
Fax: (215) 597-7658

February 3, 2012

Lester Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: CWA Local 13000
Case 4-CA-38123

Dear Mr. Heltzer:

Attached please find Counsel for the Acting General Counsel's Brief in Opposition to Respondent's Brief in Support of Exceptions in the above-captioned matter. Copies of the Brief have been served on this day to the parties listed below by email.

Very truly yours,

Patricia A. Garber /KMT
PATRICIA GARBER
Counsel for the Acting General Counsel

cc:

Richard Markowitz, Esq., Markowitz and Richman, 121 S. Broad Street, Philadelphia, PA 19107 (kbrookes@markowitzandrichman.com)

Ms. Pamela Tronsor, 1212 Martin Avenue, Ephrata, PA 17522 (ptronsor@gmail.com)

James Gardler, President, CWA Local 13000, 2124 Race Street, Philadelphia, PA 19103 (jgardler@cwalocal13000.org)

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

COMMUNICATIONS WORKERS
OF AMERICA LOCAL 13000

and

Case 4-CA-38123

PAMELA TRONSOR, an Individual

**BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL
IN OPPOSITION TO RESPONDENT'S BRIEF
IN SUPPORT OF EXCEPTIONS**

Respectfully submitted,

Dated: February 3, 2012



PATRICIA A. GARBER
Counsel for the Acting General Counsel
National Labor Relations Board
Fourth Region
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106

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I. PROCEDURAL HISTORY

On October 16, 2003, Pamela Tronsor (Tronsor) filed an unfair labor practice charge against Communications Workers of America Local 13000 (Respondent) in Case 4-CA-38123. GCX-1(a) and (b).¹ On August 31, 2011, the Regional Director for Region Four of the Board (Regional Director) issued a Complaint and Notice of Hearing in Case 4-CA-38123 alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, (the Act) by attempting to cause Tronsor's employer, Communications Workers of America District 13, to discharge or otherwise discriminate against Tronsor, and by advising Tronsor and other employees that it was attempting to do so because Tronsor appeared at a Board proceeding against Respondent and because Respondent believed Tronsor was seeking to publicize that proceeding through the media. GCX-1(c). Respondent filed an Answer to the Complaint that admitted the filing and service of the charges, but denied jurisdiction and the commission of unfair labor practices. GCX-1(d). A hearing on the allegations of the Complaint was held before Administrative Law Judge Joel Biblowitz on October 24, 2011. At trial, paragraph 2(b) of the Complaint was amended to read "During the past year, Respondent, in conducting its business operations described above in subparagraph (a), received gross revenues in excess of \$500,000 directly from Communications Workers of America in Washington, D.C., which revenues are derived from membership dues collected by employers employing members of CWA Local 13000 and remitted to Communications Workers of America." Tr. 6-7.² On December 16, 2011, Administrative Law Judge Biblowitz issued a Decision and Order finding that Respondent had violated the Act as alleged in the Complaint.

¹ Citations to General Counsel's Exhibits will be designated herein as "GCX."

² Citations to the transcript will be designated herein as "T."

II. STATEMENT OF THE CASE

A. Background

For eight years, Charging Party Pamela Tronsor has been employed as an organizing coordinator for Communications Workers of America District 2-13³ or its predecessor District 13, working with the District's constituent local unions to plan and execute organizing campaigns. T. 18, 22. Tronsor reports to Edward Mooney, the Executive Vice President of District 2-13. T. 20, 22.

Among the local unions within District 2-13's jurisdiction is CWA Local 13000 (herein called Respondent), the largest of the locals. T. 23. James Gardler has been the President of Respondent for three years. T. 64-65. In that capacity, Gardler has contact with Mooney at least a couple times per week. T. 75. District 2-13 provides staff representatives to service its local unions, including Respondent, and provides support for their organizing campaigns. T. 21-22. Tronsor testified, without rebuttal, that she has worked with Gardler "frequently" on organizing campaigns for Respondent.⁴ T. 23-24.

The employees of CWA are represented by a national union called the CWA Staff Union (herein called Staff Union). T. 22. For about a year and a half, until August 2011, Tronsor held the position of District 13 representative with the Staff Union. T. 23.

B. Unfair Labor Practices

In August 2010, Respondent removed its employee Harry Arnold from his position as organizer for Respondent. T. 24. The Staff Union filed an unfair labor practice charge against

³ Inexplicably, Respondent has filed an exception to the ALJ's finding that Tronsor was and is employed by District 2-13 despite Tronsor's repeated and uncontradicted testimony to that effect. T. 18-19, 20, 22, 23, 39.

⁴ Equally inexplicably, Respondent filed an exception to the ALJ's finding that Tronsor "frequently" worked with Gardler on campaigns, again despite her uncontradicted testimony on that count.

Respondent with the National Labor Relations Board over its decision to remove Arnold from his position. T. 24, 43. On February 28 and March 1, 2011, an unfair labor practice trial was held on Arnold's removal. T. 24. Subpoenaed by the General Counsel, Tronsor, who at the time was still serving as Staff Union representative, attended both days of the hearing but did not testify because the trial settled on its second day. T. 24-25.

At the conclusion of the first day of trial, Tronsor telephoned Bill Ross. T. 27. Ross is the executive director of Local 38010, The Newspaper Guild/CWA. T. 26, 82. As found by the ALJ, Tronsor told Ross that she had been subpoenaed to appear at the trial, and she asked if he could get a reporter to cover the trial. T. 83; ALJD at 5.⁵

Shortly thereafter, Ross sent a letter to Mooney describing Tronsor's telephone call to Ross:

Pam called to ask me if I was aware of the firing of an organizer and NLRB complaint filed against Local 13000? I said I was not aware. She asked if I knew if one of my members Jane Von Bergen a business reporter was going to cover the story? I said I didn't know, and I don't get into any news coverage decisions.... She told me she was subpoenaed to testify on Tuesday, and I wished her luck.

T. 84; RX-1.⁶

After Mooney received the letter, he showed it to Gardler. T. 77. Gardler made arrangements to speak to Ross several weeks later, and took notes of the conversation, "[b]ecause I wanted to be aware of exactly what he was telling me so it would stay fresh in my head. So, as I can understand that someone would actually take these steps and go this far related to a Board hearing that could cause so much harm to our local." T. 78. Pressed as to why he believed he needed to take notes, Gardler admitted that it was "[t]o express my displeasure to what someone on staff at District 13 would actually do and which I do for anyone on staff at District 13. If I have an

⁵ Citations to the Administrative Law Judge's Decision will be designated herein as "ALJD."

⁶ Citations to Respondent's Exhibit 1 will be designated herein as "RX-1."

issue with the work that's being performed, I'll notify Mr. Mooney that I have a problem because those people are servicing the members of our local." T. 78-79.

Over a week and a half after he spoke to Ross, Gardler sent a letter to Mooney, dated April 5, in which he detailed what he had discovered:

This letter is being sent on behalf of CWA Local 13000 pertaining to the conduct of the District 13 Organizer, Pamela Tronsor. Our Local has always been one of the strongest supporters and participants in all facets of organizing in the CWA, but *we cannot in good conscience allow this staff member's actions pertaining to recent Labor Board charges filed against our Local to go unaddressed.* It was quite disturbing on the day of the hearing to see your organizer appear on behalf of the charging party since it is crystal clear that our Local had not violated the law. It is also disturbing when you put it in perspective what the ramifications this charge would have had if by some small chance this charge was upheld. The organizing program of not only Local 13000 and District 13, but of the entire CWA as a whole would have been damaged. But as you may be aware her actions following the 1st day of hearings on the evening of February 28th are what are most appalling regarding this charge and cannot be tolerated.

Following a conditionally approved withdrawal of the charge that absolved the Local of any wrong doing (sic), we became aware of a phone call that was placed after the initial day of hearings to Bill Ross, Executive Director of TNG-CWA Local 10. Apparently District Organizer Tronsor contacted Mr. Ross in an attempt to get this hearing publicized through the local media. She asked Mr. Ross if he had heard about the Labor Board hearing against Local 13000 and that she was testifying in a hearing against Local 13000. Mr. Ross explained that District Organizer Tronsor advised him that she felt they should have someone covering the story for the media. Mr. Ross said he advised District Organizer Tronsor that he does not assign reporters to stories. Mr. Ross and I went on to discuss the mutual respect both of our Locals have for one another and the commitment we have to support each other's issues, which is why he was so surprised to be receiving this call from District organizer Tronsor. Mr. Ross went on to explain that District Organizer Tronsor question (sic) him about his relationship with you, Vice-President Mooney, presumably in an attempt to discredit the District or you as well.

It is beyond comprehension to think that this person is not only on staff for District 13 but responsible for the same organizing activities she sought to jeopardize. Her actions demonstrate contempt for the Local that provides more man hours and voluntary support for organizing than any other Local within District 13. This Local assisted in performing her job responsibilities even when she was nowhere to be found. *There is no place for this type of behavior in District 13 or anywhere in the CWA.*

As you can clearly understand this Local has no interest in working with someone that would put the CWA and more specifically this Local in harm's way. We would appreciate any and all steps necessary to remove this person from any dealings with the members of this union. *She clearly cannot be trusted and without a doubt she is not deserving of a position on staff at District 13 or anywhere else within the CWA.*

GCX-2 (emphasis added).

Tronsor herself knew nothing about the letter until early May, when she emailed Gardler at Mooney's request to discuss an organizing campaign. T. 28-29. In response, Gardler emailed her back, forwarding with it a copy of the April 5 letter. In his email to Tronsor, Gardler wrote,

Pam maybe you misunderstood the letter that Local 13000 provided to VP Mooney concerning your blatant attack on Local 13000. As I stated in the letter *you are not deserving of a staff position or any position within the CWA.* This Local and our members will not work with you on any level. You have no respect for organizing, no respect for the position you hold within the District and no respect for the CWA. *The fact that you still hold a staff position at the District is disturbing.* Attached as an FYI is the letter that was sent to VP Mooney to remind you of your stupidity. I have also CC (sic) several others pertaining to the issue so they can understand and protect themselves from future attacks. This Local is committed to organizing and will do any and everything necessary to succeed. It just WILL NOT be with YOU.

GCX-3 (emphasis added).

According to Gardler, he wrote the letter “[b]ecause I was upset that this action had occurred with Mr. Ross trying to gain publicity for a Board hearing that was, in my mind, something we shouldn't even have been dealing with at the time. But, that someone from [Mooney's] office would actually take these steps to gain publicity for a hearing, like I said, that was just about to be resolved.” T. 72. Explaining his reaction upon speaking to Ross, Gardler testified that he “couldn't understand how someone who has an organizing position within the CWA would request that a reporter go over to cover a Board hearing....” T. 70-71. When asked why he said in his email to Tronsor that it was “disturbing” that she “still [held] a position with the District,” Gardler admitted that it was “[b]ecause someone in that capacity from our local's

perspective was trying to cause harm to our local and that was disturbing to us that someone would still hold that type of a position.” T. 81.

III. ARGUMENT

A. The Administrative Law Judge Correctly Found that Tronsor Engaged in Protected, Concerted Activity

Respondent has excepted to the ALJ’s legal conclusion that Tronsor was engaged in protected, concerted activity when she attended the trial and sought to publicize the hearing. The exception has no foundation.

1. Tronsor’s Conduct Was Protected

Section 7 of the Act safeguards the right of employees to utilize the Board’s processes. See *Anheuser-Busch, Inc.*, 337 NLRB 3, 15 (2001), and cases cited therein. Among other things, that includes the right to appear to give testimony at an unfair labor practice trial on behalf of a charging party. *Norris Concrete Metals*, 282 NLRB 289, 289 (1986) (threat to discharge employees if they testify before the NLRB, unlawful); see *NLRB v. Scrivener*, 405 U.S. 117, 123-24 (1972) (concluding that Section 8(a)(4) prohibits discrimination against employees who appear at Board hearings pursuant to subpoenas without testifying). There is no question that Tronsor’s “appear[ance] on behalf of the charging party,” as Gardler described in his letter, is protected conduct.

With respect to the issue of seeking publicity through a newspaper, the Board has repeatedly found that “the protection of Section 7 of the Act encompasses employee communications about labor disputes with newspaper reporters.” *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995); *Roure Bertrand Dupont*, 271 NLRB 443, 443 fn. 1 (1984); see *Trump*

Marina Casino Resort, 355 NLRB No. 107 (Aug. 23, 2010)⁷, enfd. sub nom *Trump Marina Associates, LLC v. N.L.R.B.*, 435 Fed.Appx. 1 (D.C.Cir. May 27, 2011) (finding, on a motion for summary judgment, that a work rule restricting employees’ access to media violated Section 8(a)(1), observing that “[a] rule that prohibits employees from exercising their Section 7 right to communicate with the media regarding a labor dispute is unlawful,” 354 NLRB No. 123, at 1 fn. 2). That is because “as a general proposition, Section 7 of the Act protects employee communications to the public directly related to an ongoing labor dispute....” *Hacienda de Salud-Espanola*, supra, 317 NLRB at 966 (quoting *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3d. Cir. 1980)).

Clearly, Gardler’s letter to Mooney stemmed in substantial part from his reaction to being told that Tronsor sought publicity for the unfair labor practice trial. As he stated in his letter, “Apparently District Organizer Tronsor contacted Mr. Ross in an attempt to get this hearing publicized through the local media. She asked Mr. Ross if he had heard about the Labor Board hearing against Local 13000 and that she was testifying in a hearing against Local 13000. Mr. Ross explained that District Organizer Tronsor advised him that she felt they should have someone covering the story for the media.” Three times in his testimony, Gardler himself confirmed his perception of Tronsor’s objectionable conduct, first stating that he “couldn’t understand how someone who has an organizing position within the CWA would request that a reporter go over to cover a Board hearing,” next testifying to his reaction to Ross in learning “that someone would take these steps to contact you and put someone in a position to come in and cover a hearing that was

⁷ The original Board decision in this case, reported at 354 NLRB No. 123 (December 31, 2009), was set aside by the Board after the Supreme Court’s ruling in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), that the NLRB had improperly attempted to delegate its authority to a two-member panel in a series of cases. The subsequent case incorporated by reference the original decision.

just about settled,” and finally explaining that he sent the letter “[b]ecause I was upset that this action had occurred with Mr. Ross trying to gain publicity for a Board hearing....” Thus, Gardler himself established beyond argument that he believed Tronsor was seeking to publicize Arnold’s unfair labor practice hearing against Respondent.

Although the letter makes clear that the greater part of Gardler’s concern arose from his hearing that Tronsor had engaged in the protected conduct of seeking press coverage of the unfair labor practice trial, Gardler also emphasized that he was motivated in part by the fact that she had been present at the trial as a witness for Arnold: “[i]t was quite disturbing on the day of the hearing to see your organizer *appear on behalf of the charging party*.... It is also disturbing when you put it in perspective what the ramifications this would have had if by some small chance this charge was upheld” (emphasis added). Had Tronsor’s appearance at the trial as a witness for Arnold not been a factor in Gardler’s writing the letter, presumably he would not have given it the attention he did, or even any attention at all, nor would he have twice deemed it “disturbing.”

2. Tronsor’s Conduct Was Concerted

Respondent further argues that Tronsor’s act of seeking press coverage of Arnold’s unfair labor practice trial did not amount to concerted activity under the Act as she did it “solely on her own behalf.” As found by the ALJ, Tronsor was subpoenaed to give testimony at an unfair labor practice hearing in support of another employee who suffered an adverse employment action, and sought to have the press publicize the trial. On these facts, there is simply no colorable argument that Tronsor could have been acting as a “single individual solely on her own behalf.” See *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001), enf. denied on other grounds, 78 Fed. Appx. 469 (6th Cir. 2003). Respondent presented no evidence that Tronsor had any personal interest in obtaining publicity for the trial. Instead, the sole inference that can be drawn from the evidence is that any

publicity sought was for the same purpose employees typically seek publicity of a labor dispute: to apply pressure on the employer involved to effect a positive resolution of the dispute – in this instance, settlement.⁸ Such conduct falls squarely within Section 7’s protection of conduct undertaken for “mutual aid and protection.”

B. The Administrative Law Judge Correctly Found that Gardler’s Email Was an Attempt to Have Tronsor Discharged

Despite Gardler’s denials on the subject at trial, there can be no doubt that when he wrote his letter to Mooney, he was urging District 13 to terminate Tronsor’s employment. As the Board has made clear, an “indirect attempt” to interfere with Section 7 rights is as unlawful under the Act as a direct one. *Wild Oats Community Markets*, 336 NLRB 179, 181 (2001).

In *Wild Oats*, the employer, a grocery store, telephoned the manager of the property it leased to report union representatives picketing on the sidewalk. The employer further inquired about the property owner’s policy regarding such activity. Although the employer did not ask that the picketers be expelled, the manager of the property unsuccessfully attempted to expel them.

On these facts, the Board concluded that the employer’s conduct, despite the lack of a direct request to remove the picketers, “constituted an indirect attempt to expel the union representatives and, consequently, constituted interference with employee Section 7 rights.” *Id.* at 181.

Here, Gardler began his letter to Tronsor’s employer by detailing the alleged facts he had learned from his conversation with Bill Ross. He then went on to state in summary, “It is beyond comprehension to think that this person is not only on staff for District 13 but responsible for the same organizing activities she sought to jeopardize.... *There is no place for this type of behavior in District 13 or anywhere in the CWA* (emphasis added). As you can clearly understand this Local

⁸ The ALJ found that at the close of the hearing on the first day, the administrative law judge hearing the case encouraged them to settle rather than going forward. ALJD at 2. Tronsor testified that she did not hear the judge’s discussion about settlement. T. 47.

has no interest in working with someone that would put the CWA and more specifically this Local in harm's way. We would appreciate any and all steps necessary to remove this person from any dealings with the members of this union. *She clearly cannot be trusted and without a doubt she is not deserving of a position on staff at District 13 or anywhere else within the CWA.*" And if there were any remaining question as to Gardler's intent, it was made clear as day in his email to Tronsor, where he reiterated that she was "not deserving of a staff position or any position within the CWA," and remarked that the "fact that you still hold a position at the District is disturbing."

That Gardler had insidious motives in writing his letter well beyond his self-serving claim that he merely wanted to express displeasure with Tronsor is supported by the fact that much of what he detailed in the letter was information that he knew Mooney himself had long ago learned from the Ross letter to Mooney. Thus, Gardler wrote that "following a conditionally approved withdrawal [of the Arnold charge] *we became aware* of a phone call that was placed after the initial day of the hearings to Bill Ross" (emphasis added). In fact, Gardler became aware of the fact from Mooney himself. Odder yet, Gardler remarked earlier in the letter, "*as you may be aware* her actions following the 1st day of hearings on the evening of February 29th are what are most appalling regarding this charge and cannot be tolerated." Again, it was from the letter that Mooney himself showed Gardler, that Gardler first learned of Tronsor's "actions following the first day of hearings." Finally, Gardler admitted at trial that he speaks to Mooney on a regular basis, at least "a couple times a week," yet despite his regular engagement with Mooney, he wrote a lengthy letter to detail his views on Tronsor rather than just speaking to Mooney about it.

All of these peculiar facts add up to the reasonable conclusion that Gardler's intent was to do more than just complain or express "displeasure" with Tronsor's actions or perceived actions. Instead, Gardler engaged in the formality of sending Mooney a lengthy letter – detailing facts about

which Mooney already knew – because Gardler was pressing Mooney to do precisely what Gardler was later “disturbed” to learn “still” had not been done despite his urging: terminate Tronsor’s employment with District 13. Gardler’s “indirect attempt” to obtain Tronsor’s discharge because of her Section 7 activity violated the Act just as surely as a direct request would have. *Wild Oats Markets*, supra.

With respect to Respondent’s argument in its exceptions, that an employer cannot violate the Act as to another employer’s employees, the law is settled that an employer violates Section 8(a)(1) when it seeks the discharge of the employee of another employer with whom it has a business relationship because of the employee’s Section 7 activity. *International Shipping Assn.*, 297 NLRB 1059, 1059 (1990); *Dews Construction Corp.*, 231 NLRB 182, 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d. Cir. 1978). Here, District 13 and Respondent had a close working relationship, with District 13 providing the staff representatives to service Respondent and organizing support through Tronsor. Moreover, Respondent was the biggest local in the district, and Gardler dealt with Mooney on a regular basis, a couple times weekly. As Gardler took pains to remind Mooney in his letter to him, “[Respondent] provides more man hours and voluntary support for organizing than any other Local within District 13.”

Given that relationship, Gardler obviously believed that he could influence Mooney to terminate Tronsor, which is why he was “disturbed” a month later that Tronsor “still [held] a staff position at the District” despite his letter to Mooney. By sending the letter, Gardler unlawfully sought Tronsor’s discharge in violation of Section 8(a)(1). *International Shipping*, supra, 297 NLRB at 1059. And by forwarding the letter to Tronsor and other employees, he sent them the clear message that he would not tolerate their exercise of certain Section 7 rights, and would seek the ultimate retribution – termination of employment – for that exercise, thereby coercively chilling

them in the future exercise of their Section 7 rights in violation of Section 8(a)(1) the Act. See *George L. Mee Memorial Hospital*, 348 NLRB 327, 327 fn. 8 (2006) (supervisor's statement to employee, a leading union adherent, that she had been told to get rid of the employee, an unlawful threat of job loss).

C. Section 8(c) of the Act Does Not Protect Respondent's Actions

Respondent vainly seeks to sweep Gardler's unlawfully coercive statements into the penumbra of protection afforded employers by Section 8(c) of the Act. Section 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c).

As Respondent notes, the Supreme Court described the contours of Section 8(c)'s protections in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). As the Court explained, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." *Id.* at 617. Importantly, "an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c)."

Here, Gardler did not simply offer an opinion about Tronsor's protected, concerted activity, he urged adverse consequences because of it, and told her and other employees he had done so. Respondent cites not a single case for the proposition that Section 8(c) protects one employer's statement to another, that its employee should no longer be employed because she engaged in Section 7 activity. And it could not. An employer's First Amendment protections under Section

8(c) end when the employer makes remarks, as Respondent did here, that are threatening and coercive in violation of Section 8(a)(1). See *Wild Oats Markets*, supra, 336 NLRB at 182 (rejecting the employer’s First Amendment and Section 8(c) defenses, noting that if the employer had directly requested the picketers’ removal, its conduct would have violated the Act, and “it would be anomalous to accord the Respondent’s communication of the same message greater First Amendment protection simply because the Respondent sought to accomplish indirectly that which it was prohibited from doing directly”).

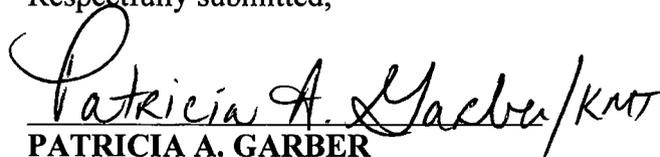
D. The Administrative Law Judge Correctly Precluded Respondent from Introducing the Collective Bargaining Agreement Covering Tronsor’s Employment

Respondent excepts to the ALJ’s refusal to permit it to introduce into evidence the grievance and arbitration provision covering Tronsor’s employment, and in particular the “just cause” provision, because that ruling prevented Respondent from arguing that Tronsor’s failure to file a grievance over a threat to discharge would prove there was no such threat. As Respondent undoubtedly knows, Tronsor could not file a grievance against it pursuant to a collective bargaining agreement to which it is not a party, and there is no allegation in this case that her employer threatened her. The collective bargaining agreement simply had no bearing on the issues in this case, and the ALJ correctly refused to admit it.

IV. REMEDY

Based on the foregoing, it is hereby requested that the Board deny Respondent’s Exceptions and affirm the Administrative Law Judge’s Findings of Fact and Conclusions of Law.

Respectfully submitted,


PATRICIA A. GARBER

Counsel for the Acting General Counsel
National Labor Relations Board