

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

**LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 872, AFL-CIO
(No Employer Named)**

and

Case 28-CB-065507

STEPHANIE SHELBY, an Individual

**BRIEF IN SUPPORT OF ACTING
GENERAL COUNSEL'S EXCEPTIONS**

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I. INTRODUCTION

The Administrative Law Judge (the ALJ) erred in dismissing the Section 8(b)(1)(A) allegation that Laborers' International Union of North America, Local 872, AFL-CIO (Respondent) threatened to exclude member Stephanie Shelby (Shelby) from its hiring-hall facility and summoned the police to remove Shelby from Respondent's facility because she engaged in union and other concerted activities. Furthermore, the ALJ applied the wrong standard and failed to articulate the standard utilized in finding that Shelby removed herself from the protection of the Act in her interaction with Respondent. Additionally, the ALJ erroneously relied upon Board decisions including *Longshoremen's Ass'n., Local No. 341, AFL-CIO*, 254 NLRB 334 (1981), *Wal-Mart Stores, Inc.*, 341 NLRB 796 (2004), and *Air Contact Transport, Inc.*, 340 NLRB 688 (2003), which are distinguishable from the facts of this case. Additionally, the ALJ erred in applying the Board's reasoning in *Atlantic Steel Co.*, 245 NLRB 814 (1979), when he found that Shelby removed herself from the Act's protection. The ALJ further erred by making a distinction between swearing generally and swearing at someone in the context of a union member disagreeing with her union.

This case offers a unique opportunity to address an unresolved area of Board law. The Board has previously passed on the issue of whether a heightened duty of fair representation applies to a union operating an exclusive hiring hall. Here, despite the request by the Counsel for the Acting General Counsel (the General Counsel) that the ALJ make an alternate finding on whether a heightened duty of fair representation standard should apply in the event that no violation was found under the Board's duty of representation standard, the ALJ failed to address the issue.

The ALJ also erred in dismissing the allegation that Respondent attempted to cause and subsequently succeeded in causing an employer to discriminate against its employees in violation of Section 8(b)(1)(A) and (b)(2) of the Act when it imposed a rule restricting Shelby's access to Respondent's facility without police escort. While the ALJ correctly found that each of the elements for finding a violation existed, he nonetheless concluded that Respondent did not violate Section 8(b)(1)(A) or (b)(2) of the Act. Curiously, the ALJ's ultimate holding that there was no Section 8(b)(2) violation is inconsistent with the analysis he applied and with the very title preceding the section: "The Respondent union has failed to show adequate justification . . . in violation of Section 8(b)(1)(A) and (b)(2) of the Act." (ALJD at 16:7-9)¹

II. FACTS

A. Respondent's Operations

Respondent operates an exclusive hiring hall for construction work at its facility at 2345 Red Rock, Las Vegas, Nevada, (the Red Rock facility) where the alleged violations of

¹ ALJD__:_ refers to page followed by line or lines of the ALJ's decision in JD(SF)-24-12 (May 18, 2012); GCX__ refers to General Counsel's Exhibit followed by exhibit number; RX__ refers to Respondent's Exhibit followed by exhibit number; JTX __ refers to Joint Exhibit followed by exhibit number; "Tr. _:_" refers to transcript page followed by line or lines of the unfair labor practice hearing held February 22 and 23, 2012.

Section 8(b) of the Act arose. (ALJD at 3:1-4; Tr. 10:9-25, 11:1-3) Respondent maintains collective-bargaining agreements with employers requiring that Respondent be the exclusive source of employment referrals through Respondent's employment referral system at its Red Rock facility. (ALJD at 2:30-34) At the time of the hearing, Respondent had approximately 3,400 members who were primarily construction workers. (ALJD at 3:30-31; Tr. 35:4-5; 109:11-13; 158:4) Members are required to periodically report to the Red Rock facility in order to maintain their eligibility for employment referrals. (ALJD at 2:35-39) Respondent's unemployed members are placed on an out-of-work list and progress up the list until they are employed by dispatch or requested by name. (ALJD at 3:31-35; 4:24-28) Members must periodically call-in and appear at the Red Rock facility; otherwise, they lose their spot and drop to the bottom of the out-of-work list for the purpose of job dispatches. (ALJD at 3:37-41) At the time of hearing, Respondent had approximately 1,200 members who were on the out-of-work list, and the wait was over a year to move to the top of the list. (ALJD at 3:43-44) Members are able to check the out-of-work list at Red Rock facility to determine their placement and how quickly they are moving up the list. (ALJD at 3:50-52) Respondent also maintains a dispatch list at the Red Rock facility which shows the dispatched jobs and which members were dispatched to those jobs. (ALJD at 3:52, 4:1-2)

Respondent's members, including Shelby, have specific skills which are used by Respondent to refer its members to employers. (ALJD at 4:4-6; Tr. 40:15-20) The skills that Respondent credits to a member affect the member's ability to obtain employment, even if the member is number one on the out-of-work list. (ALJD at 4:6-9; Tr. 40:18-22) In order for a member to keep their skills updated, they must provide documentation to Respondent's

employees who are behind the bulletproof dispatch window at the Red Rock facility.

(Tr. 4:14-22, 30-35)

Joe Taylor (Taylor) has held the position of labor director of Southern Nevada Laborers, Employers Cooperation Education Trust for Respondent for seven years prior to the hearing. (ALJD 3:10-14; Tr. 32:2-3, 11; 33:3-5) Taylor markets and procures work for Respondent, deals regularly with Respondent's members, and interacts with contractors, owners, and developers from his office at the Red Rock facility. (ALJD 3:13-18; Tr. 33:11-12; 34:3-5) During the three and a half years the Red Rock facility has been opened, Taylor has removed five or six persons from the building and escorted an individual out of the facility previously used by Respondent. (ALJD at 5:24-26, 30-32; Tr. 52:17-21, 25; 53:1-2; 73:5-8; 73:18-21; 90:6-11) Respondent uses Taylor's unpublished "procedure" to deal with irate members. (ALJD at 5:15-18; Tr. 98:3-23)

Rocio Lucero (Lucero) had held the position of dispatcher for Respondent for approximately four years prior to hearing. (ALJD at 4:42-44; Tr. 107:5-9, 20-23) Dispatchers send members to work, put the members back on the out-of-work list, record members' skills which are used to match members to employers, update skills, handle members' dues payments, and provide information about filing grievances. (ALJD at 4:30-34; Tr. 108:1-6, 23-25; 109:14-25, 110:1-8; 110:15-23; 111:8-11; 112:1-3; 162:22-25, 163:1-2)

B. Shelby's Protected Concerted Activities from August 1 through October 4

Shelby has been a member of Respondent since 2003, obtaining work exclusively through Respondent. (ALJD at 3:25-27; Tr. 157:19-25) During her eight years as a laborer, she acquired several skills which allowed her to perform tasks such as stacking sheet rock,

demolition, packing dirt with a machine, cleaning construction sites, flagging, and operating a water truck, forklift, and electric power jack. (ALJD at 3:26-28; Tr. 158:4-8, 13-15) She has contacted Respondent many times, including at least once a month by phone or personal visit to the Red Rock facility from 2009 through December 2011.² (Tr. 182:16-25, 183:1) During 2011, Shelby was not dispatched from Respondent's out-of-work list and only found employment when she was name-requested in November and December. (Tr. 163:8-12)

From August 1 through October 4, Shelby visited the Red Rock facility and had several discussions with Lucero concerning problems affecting her employment including the listing of her skills, her placement on the out-of-work list, a disputed missed roll call, and filing a grievance over the missed roll call. (ALJD at 6:6-38; Tr. 113:1-21; 139:20-25, 140:1, 140:7-13; 141:6-10) In August, Shelby learned her skills were deleted by Lucero when she picked up a copy of her dispatches and examined the initials next to the deletion, a description of "deleted by" and the date listed for deletion. (ALJD at 6:13-15; Tr. 165:14-16; 189:2-8; 223:14-18) On August 26, Shelby talked to cashier Ian Thienes and dispatcher Susan Martin (Martin) to ask for a printout of her skill sheet. (ALJD at 6:17-18; Tr. 166:25, 167:1-4; 189:11-13) On September 12, Shelby asked Lucero about her date on the out-of-work list and learned of a disputed missed roll call in November 2010. (ALJD at 6:20-30; Tr. 165:16-25, 166:1-3) On September 16, Shelby spoke with Lucero and asked if she could file a grievance about the disputed missed roll call. (ALJD at 6:32-33; Tr. 166:3-8) Lucero yelled at Shelby, saying "are you kidding me" and "you don't have nothing [sic]." (ALJD at 6:33-35; Tr. 166:5-7) After yelling at Shelby, Lucero ended the conversation by yelling "bye, bye." (ALJD at 6:37-38; Tr. 166:10) Lucero acknowledged a heated confrontation over some of the issues including raised voices, but the police were not called, Shelby was not escorted out,

² All dates are in 2011, unless otherwise noted.

and she was not trespassed.³ (ALJD at 6:40-44; Tr. 114:1-6; 115:1-13) Shelby again tried to resolve the missed roll call issue on September 27, when she paid her dues, and asked Martin for a printout of roll call. (ALJD at 6:49-52; Tr. 166:10-14) Although Martin did not provide the printout, there was no confrontation between Martin and Shelby. (ALJD at 6:50-52; Tr. 166:11-14) On October 3, Shelby went to the Red Rock facility for her required in-person roll call and tried to update her skill sheets, but she did not have her certifications with her. (ALJD at 7:1-5; Tr. 166:14-17)

Shelby also sent letters to Respondent's headquarters. These letters included an August 15, letter to Respondent's International President O'Sullivan about sexual harassment; (ALJD at 7:25-28; Tr. 217:17-19, 218:1-3) a September 16, letter to O'Sullivan about Lucero's deletion of Shelby's skills (ALJD at 7:28-29; Tr. 222:7-12, 23-25); a letter about a September 12, phone call from Respondent which was sent to headquarters (ALJD at 7:29-30; Tr. 223:19-21); a letter dated September 19 about the out-of-work list (ALJD at 7:30-31; Tr. 224:7-13); a letter regarding a Joe Ford III (ALJD at 7:30-31; Tr. 224:21-24; 225:4-5); a letter regarding her request for a roll call printout (ALJD at 7:31; Tr. 225:8-16); and a letter regarding the deletion of her skills. (ALJD at 7:31-32; Tr. 225:17-25) Shelby sent the letters to Respondent's headquarters to inform them of the problems and to resolve the issues internally. (ALJD at 7:32-33; Tr. 232:14-24) The issues had not been resolved prior to October 4. (ALJD at 7:33; Tr. 113:22-25)

C. The October 4 Incident

On October 4, Shelby returned to the Red Rock facility to resolve one of the issues raised in the prior two months. (ALJD at 7:38-41) She dropped off her transcript to Lucero to update her skills and had turned to walk away when Lucero said the transcript was not a

³ Trespassed is a term whereby an individual is banned from a facility.

certification. (ALJD 7:45-48; Tr. 123:13-18; 167:19-24) Shelby brought transcript sheets to update her skills, but she did not understand that Lucero needed more to do so. (Tr. 123:22-25, 124:1-3) Lucero did not offer an explanation other than saying that the transcript and skill card were not certifications. (Tr. 167:23-25, 168:1-2) The two talked for about 10 to 15 minutes before Lucero raised her voice with Shelby and said why do you have a problem with me? (ALJD at 7:49-50; 8:19-20; Tr. 142:19-21; 168:3; 194:16-17; 195:4-5; 196:16-18) Lucero admittedly raised her voice during the conversation with Shelby. (ALJD at 8:23-24; Tr. 145:19-25) Shelby responded by saying look bitch, I'm not going to let you disrespect me the way that you did last week, although Shelby actually meant two weeks prior on September 16. (ALJD at 8:1-3; Tr. 124:4-7; 168:5-7; 168:25, 169:1-5; 195:5-8; 195:25, 196:1-3) In response to the word "bitch," Lucero decided the conversation was over although the skill issue was not resolved and in spite of the fact that other members have cursed in front of Lucero. (ALJD at 8:29-32; Tr. 125:7-12; 146:6-14; 150:15-19; 154:1-3; 154:16-18) Shelby tried to get her transcript papers back, but Lucero took them. (ALJD at 8:4-6; Tr. 168:8-9; 169:9-11) Lucero did not call for another dispatcher who could have assisted Shelby, although she had previously called other persons to assist in situations where a member did not understand her or if the member was getting upset. (Tr. 127:6-14; 150:20-25, 151:1-15; 153:15-24; 154:23-25, 155:1-8; 169:18-20) Instead, she threatened to call the police, and then picked up the phone and called Taylor. (ALJD at 8:8-12; Tr. 124:8-12; 143:21-23)

Prior to October 4, Lucero witnessed one disturbance in Respondent's facility which required police intervention, but it involved an actual threat. (ALJD at 5:36-38; Tr. 128:23-25, 129:1-4) Shelby never threatened Lucero nor did anything to lead Lucero to believe she

had a weapon either before or after Lucero called Taylor. (ALJD at 8:12-16; Tr. 124:15-22; 129:5-8) Lucero and Shelby were separated by bulletproof glass during the entire conversation. (ALJD at 8:14-15; Tr. 124:23-25) The ALJ discredited Lucero's claim that she was intimidated. (ALJD at 8 fn. 6; Tr. 151:16-23)

Members have raised their voice to Lucero prior to Shelby. (Tr. 143:1-3) Members have cursed around Lucero before, but she never called for a member to be escorted out for cursing. (ALJD at 8:30-34; Tr. 125:16-22) Other members who became irate around Lucero left and later apologized to Lucero. (ALJD at 6:44-47; Tr. 146:13-18) Although Lucero stated that Shelby was yelling, she did not hear her cursing. (Tr. 127:20-23) Lucero and Shelby did not talk after Lucero called Taylor. (Tr. 126:11-14; 169:12-17) Lucero thought a male member was present although she could not remember who he was. (ALJD at 9:20-21; Tr. 143:7-9; 145:1-5)

D. Respondent's Reaction and Response

Lucero did not tell Taylor what Shelby was upset about, or what he could do to calm Shelby down; Taylor did not ask. (ALJD at 8:36-39; Tr. 55:24-25; 56:4-5; 57:7-9; 126:7-10; 126:18-25, 127:1-5) Taylor left his office and headed for the lobby with the single purpose of removing someone from the lobby. (ALJD at 9:14-15; Tr. 56:11-14; 57:22-25) When Taylor left his office, he heard yelling, but did not hear any cursing. (ALJD at 9:2-3; Tr. 72:18-24) He came down the stairs to the lobby. (ALJD at 9:5-14; Tr. 56:12; 169:22-23; 196:25, 196:1) When Taylor entered the area, Shelby was away from the dispatch window and was just inside the lobby area near the first of two exit doors as she prepared to walk out of the Red Rock facility. (ALJD at 9:18-20; Tr. 56:12-14; 74:11-13; 197:2-13)

Taylor, who had not met Shelby before, stepped toward Shelby with his arms held in front of him and his hands open as if he was going to grab her. (Tr. 57:12-19; 74:22-25; 95:16-18; 170:3-25, 171:1; 198:10-24) Taylor did not tell her who he was, and he was not wearing a Union shirt to identify him with the Union. (Tr. 169:23-25; 172:12-18) He did nothing to explain to Shelby how he was affiliated with the Union in any way even though he knew Shelby had no idea who he was. (ALJD at 9:26-27, 30-31; Tr. 90:1-5; 97:18-19; 97:21-24) He did not ask her why she was upset or ask her any questions. (Tr. 57:20-21; 58:1-3) Instead, Taylor came at Shelby, yelling and screaming at her. (ALJD at 9:17-18; Tr. 169:22-23) Consistent with his single purpose of getting Shelby out of the building, he yelled get out, you have to leave, and you are “86.” (ALJD at 9:22-23; Tr. 169:25, 170:1, 5-6; 202:15-16) “86” is understood to mean trespassed off the property. (ALJD at 9:23 fn. 7; Tr. 61:9-11; 130:14-20)

Taylor was initially blocking Shelby’s way out as he was coming through the first set of doors to exit the lobby as Shelby was leaving. (Tr. 202:7-14, 23-24) Shelby put Taylor on notice that she had a dispute with Respondent about her terms and conditions of employment when she mentioned the deletion of her skills and her papers. (ALJD at 9:36-37; Tr. 75:24-25, 76:1; 96:21-23; 97:25, 98:1-2) At that point, Shelby had no idea of the identity of the man advancing on her. She stepped back and put Taylor on notice that she was concerned he was going to touch her by yelling “motherfucker don’t you touch me.” (ALJD at 9:24-26; Tr. 57:1-4; 95:19-21; 170:4-5, 11-12) Shelby stepped back away from Taylor toward the door. (ALJD at 9:33-36; Tr. 75:11-14) Although Taylor initially paused, he advanced on her even though he *knew* that Shelby was concerned about him approaching her. (Tr. 96:2-20;

200:3-4) Shelby stepped through the doors, and left the building. (Tr. 76:21-24; 173:2-3; 203:4-6) Taylor followed her out through the lockable doors. (Tr. 76:25, 77:1-2; 97:5-13)

Taylor called 911 only after Shelby was out of the lobby and 40 feet away from the building entrance. (ALJD at 9:46-49, 10:1-2; Tr. 58:11-12, 17-23; 77:18-21; 79:2-8; 203:10-15; 204:4-7) Shelby never got physical with Taylor, never pulled a weapon, never threatened Taylor, or took any actions which suggested that she had a weapon. (ALJD at 9:46-48; Tr. 58:4-12) Taylor did not hide behind bulletproof glass, the key-coded lockable door, or even lock the building doors after Shelby left the building. (Tr. 67:3-7) While Taylor was on the phone with 911, Shelby told him to call the police and said that she was not leaving because she was concerned *about what the police would do* if she left. (Tr. 171:20-25; 231:19-24) Taylor never asked Shelby why she was upset, asked her any questions, or tried to resolve the issue. (Tr. 60:15-21) He neither knew nor asked about the issues Shelby had with her skills. (Tr. 91:14-19)

Although Shelby calmed down and was crying when the police arrived, they put her in handcuffs. (ALJD at 10:18-22; Tr. 83:21-25; 98:24-25, 99:1-4; 173:5-10) When asked by the police, Taylor said he wanted Shelby trespass. (ALJD at 10:19-20, 28-29; Tr. 60:22-25, 61:1; 85:7) The police issued Shelby a trespass notice based on Taylor's statement. (ALJD at 10:29-30; Tr. 61:14-16; GCX 2) Taylor read from a piece of paper which the police gave him. (ALJD at 10:30-37; Tr. 61:17-19; 85:11-12; 156:18-25, 157:1-6; 173:16-20; GCX 5) Following Shelby's exit from the property, Taylor did not submit a report, an email, or anything else to document the incident. (ALJD at 11:12-13; Tr. 99:17-25, 100:1)

It is not normal practice to call the police to remove an irate or very upset member. (ALJD at 10:2-4; Tr. 82:23-25, 83:1-6) Although Taylor previously removed persons from

the Union hall, it was for different circumstances. During the prior two years, two persons were trespassed from the Red Rock facility for making threats of violence. (ALJD at 5:33-36; Tr. 65:2-13, 16-17; 88:13-19) One individual, Charles Porter, was escorted out for making threats of violence to kill someone with a knife but was later allowed to return without a police escort. (ALJD at 5:33-36; Tr. 89:7-9, 16-18; 93:21-25, 94:1-13) George McDonald was trespassed for threats of violence. (ALJD at 5:33-36; Tr. 93:16-20; 94:23-25, 95:1-4; GCX 4) David McCann was trespassed because he busted a window. (ALJD at 5:33-36; Tr. 94:20-22) Taylor had not removed a person from the Union hall simply for yelling. (Tr. 91:20-25, 92:1-2) Taylor previously called the police on one other occasion, but hung up because the individual left during the phone call. (Tr. 73:22-24) The individual became physically aggressive by hauling his fist up and taking steps towards Taylor. (ALJD at 5:26-30; Tr. 92:3-8, 17-23) The member was not trespassed then, and there was no follow-up to have the individual trespassed. (Tr. 92:17-23)

E. Shelby's Status at the Hiring Hall After October 4

Shelby called Respondent and apologized. Respondent's Business Manager and Secretary-Treasurer Tommy White and its Business Agent John Stevens both advised Taylor of this apology. (ALJD at 11:17-31; Tr. 67:8-18; 67:25, 68:1-12; 175:9-19) When the trespass notice issued, Taylor did not realize it would carry an ongoing requirement, believing it was only for the purpose of removing her from the property that day. (ALJD at 11 fn. 9; Tr. 62:9-15) He was surprised to later learn of the police escort requirement when she returned with a police escort. (ALJD at 11:37-38; Tr. 62:16-22; 63:5-7; 66:3-5) Taylor did nothing to lift the trespass requirement. (ALJD at 12:6-10; Tr. 66:8-18) Shelby visited the

facility with a police escort several times since October 4, without incident. (ALJD at 12:14-16; Tr. 66:19-25, 67:1-3; 87:3-13; 129:18-22; 143:24-25, 144:1; 175:1-3)

Even though the police requirement was an unplanned consequence of Taylor's request and even though trespass notices had only been maintained against members who performed acts much more serious than Shelby's, Respondent has maintained the trespass notice and police escort requirement from October 4 through the hearing. (Tr. 64:18-25, 65:1; 174:20-25) Since the October 4 incident, there has been at least one other confrontation at one of Respondent's facilities. On February 6, 2012, at a Union meeting was held at Respondent's Bonanza facility at 1402 E. Bonanza, there was a heated argument involving cursing and threats, but the police were not called. (Tr. 176:15-25; 177:5-24)

III. ANALYSIS

A. The ALJ Erred by Failing to Find that Respondent Unlawfully Threatened to Exclude Shelby from Respondent's Facility and Summoned Police to Remove Shelby from Respondent's Facility Because she Engaged in Union and Other Concerted Activities in Violation of Section 8(b)(1)(A) of the Act [Exception No. 1]

The ALJ erred in failing to find that Respondent violated Section 8(b)(1)(A) when it threatened to exclude Shelby, and summoned police to remove Shelby from its facility because she engaged in union and other concerted activities. (ALJD at 16:3-5) While the ALJ noted that Shelby was engaged in protected activities leading up to her outburst of profanities, he found that once she directed her first profanity against Lucero and was asked to leave the premises, her protected activity became unprotected. (ALJD at 14:36-40) He also found that there was no protected activity once Shelby continued to direct profanities against Lucero and Taylor. (ALJD at 14:40-41) The ALJ reasoned that the matter escalated because of Shelby's loss of temper and her inability to control her actions as opposed to escalating

because of the actions of Respondent. (ALJD at 14:41-42, 15:1-2) The ALJ distinguished Shelby's cursing from the common cursing which regularly occurs in the hiring hall because Shelby directed her cursing *at someone* as opposed to cursing generally. (ALJD at 15:4-6, 9-11) The ALJ rejected both *Atlantic Steel Co.*, 245 NLRB 814 (1979), as advocated by Respondent, and *Longshoremen Local 333*, 267 NLRB 1320 (1983), as advocated by the General Counsel, as the applicable standard in this case. (ALJD at 15:13-22) The ALJ reasoned that Shelby's conduct was unprotected once she started using profanity, and Respondent did not violate the Act when it asked her to leave or when it escorted her off the premises because Respondent's actions were necessary for the effective performance of representing its constituency. (ALJD at 15:40-43, 16:1-5)

1. The ALJ Applied the Wrong Standard and Failed to Articulate the Standard Used in Finding that Shelby Removed Herself from Protection of the Act

In *Atlantic Steel Co.*, 245 NLRB 814 (1979), the Board established a framework to analyze when an employee's misconduct towards an employer removes the employee from the protection of the Act. This framework consists of four factors: 1) the place of the discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst; and 4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.* at 816.

The Board has held that *Atlantic Steel* is not the applicable standard for evaluating a member's conversation with a union official. *Longshoremen Local 333*, 267 NLRB 1320, 1324 (1983) (finding the union violated Section 8(b)(1)(A) and 8(b)(2) and holding the administrative law judge erred in invoking *Atlantic Steel* to evaluate a confrontation between a member and the union's delegate notwithstanding the administrative law judge's

characterization of the confrontation as an “insubordinate attack on a union official who was enforcing the Union’s rotation procedure” and was “rebellious conduct” to ignore the delegate’s instructions and “intended to belittle a union official in the performance of his duties and to undercut that authority” and “jeopardized the Union’s ability to perform one of its most important obligations under its labor contract – to provide a stable labor force when and where needed.”) The Board stated that “[i]t is well established that an employee has a statutory right to voice dissatisfaction with a union’s conduct and its policies, regardless of their propriety, without suffering reprisal by being deprived of work for so doing.” *Id.* at 1320. The Board reasoned that the situations are completely different - the case did not involve an employee’s record and work performance; it involved *his protected right to question the union’s authority*. *Id.* “That [the individual] resorted to strong language which is not unusual [in the area], albeit not in conformity with Emily Post standards of etiquette customary in more genteel surroundings, cannot justify the Union’s reprisal” *Id.* Accordingly, *Atlantic Steel’s* standards for an employee’s conduct removing the Act’s protection is inapplicable to a union member’s interaction solely with the union.

Although the ALJ concluded that Shelby’s conduct removed her from the Act’s protection, it is not clear what standard the ALJ applied in reaching this conclusion. The ALJ did not specify the Board standard upon which he relied in concluding that Shelby’s actions removed her from the Act’s protection. The cited cases reflect the reasoning that an employee loses protection under the Act regarding the *employee’s actions with an employer*. The ALJ acknowledged that the analysis in *Atlantic Steel* addresses the relationship between an employer and employee, but made a particular qualification regarding “the distinction between profanities commonly used in the workplace as not jeopardizing protection under the

Act versus the uncommon practice of directing profanities at an individual” (ALJD at 15 fn. 12) The ALJ relied on two cases, *Wal-Mart Stores, Inc.*, 341 NLRB 796 (2004), which involved an *Atlantic Steel* analysis, and *Air Contract Transport, Inc.*, 340 NLRB 688 (2003), another case dealing with the employer-employee relationship. Thus, the ALJ erred when he exclusively relied on cases which applied an *Atlantic Steel* analysis and an employer-employee relationship which he previously rejected as inapplicable. (ALJD at 15 fn. 12)

In setting the standard for a union’s duty of fair representation, the ALJ also relied on *International Longshoremen’s Ass’n., Local No. 341, AFL-CIO*, 254 NLRB 334, 337 (1981). Although this *Longshoremen* case involved a charge against a union, the Board’s analysis involved two key points: first, the fact of a union’s expulsion of the employee from its hiring hall based on the employee’s actions; and second, the Board’s conclusion that expulsion did not violate the Act where the employee removed himself from protection of the Act in his actions *taken against his employer*. *Id.* at 336. In that case, the union expelled the employee from the hiring hall following a union meeting where charges were brought against the employee-member and a committee investigated the charge, concluding that the employee-member violated the union’s constitution and the collective-bargaining agreement. *Id.* The employee-member instigated an impromptu *wildcat strike against the employer based on his disagreement with the union*. *Id.* at 335-336. He picketed the entrance while drinking beer and holding an unauthorized picket sign with the union’s name on it, attempted to induce other employees to join him, and verbally abused employees crossing his picket line, all in violation of the no-strike clause of the collective-bargaining agreement. *Id.* at 336.

The administrative law judge in *Longshoremen 341* noted that the employee’s actions were not protected under the Act and found that the expulsion because of the unprotected

conduct did not violate the Act. *Id.* at 336-337. The judge specifically noted that the expulsion was not based on the member's protected activity. *Id.* at 337. Because of the employee's unprotected actions against the employer, the union's actions in denying the employee access to the hiring hall was necessary for the effective performance of the union's function in representing its constituency and did not violate the Act. *Id.*

Longshoremen 341 is inapplicable in the instant case because it involves removal of protection based on the employee's actions against the employer where an *Atlantic Steel* analysis applies. Also, *Longshoremen 341* involved a union's expulsion based on that conduct and the absence of protected activity. Here, there is no interaction between Shelby and an employer to make *Atlantic Steel* or *Longshoremen 341* applicable. Additionally, it is uncontested that Shelby engaged in protected activity.

Here, the ALJ drew a subtle distinction between cursing generally and cursing at a Union representative. This subtlety does not appear to be supported in cases *against a union*. In contrast, *Longshoremen Local 333*, 267 NLRB 1320 (1983), involved a profane direct attack on the union representative intended to belittle, undercut authority and which jeopardized the union's ability to perform its obligations. *Id.* at 1320. The Board specifically held that it was error for the administrative law judge in that case to apply an *Atlantic Steel* analysis. *Id.* The ALJ's reliance on the subtle difference between cursing and cursing at someone does not appear to hold water under this analysis.

Atlantic Steel is inapplicable as are the cases cited by the ALJ. The applicable standard is *Longshoremen Local 333*, 267 NLRB 1320 (1983). Shelby, a union member engaged in protected activity, was entitled to question and even voice her dissatisfaction with the appropriate Union representative she interacted with regarding her skills. The propriety of

her conduct, including the use of profanity, did not remove her from protection of the Act and did not justify Respondent's reprisal. The applicability of *Longshoremen Local 333* is further strengthened by the acknowledged use of profanity which was common in Respondent's hiring hall. Further, contrary to the ALJ's finding, Shelby continued to engage in protected activity as she told Taylor that Respondent had deleted her skills. (ALJD at 9:36-37; Tr. 75:24-25, 76:1; 96:21-25, 97:1; 97:25, 98:1-2) Cf. *Longshoremen Local 333*.

2. The ALJ Failed to Address Whether Respondent Violated the Act under a Heightened Duty of Fair Representation Standard in its Operation of an Exclusive Hiring Hall

The ALJ did not make an alternate holding under a heightened duty standard applied to exclusive hiring halls, although it was specifically requested by the General Counsel. (GC Brief p. 24) As noted in the brief, the Board has not addressed whether a union that operates an exclusive hiring hall is held to a heightened duty standard. In its other cases, the Board has applied a duty of fair representation standard.

The Ninth and District of Columbia Circuit Courts of Appeals have held a union to a heightened duty of fair representation when it operates an exclusive hiring hall. *Lucas v. NLRB*, 333 F.3d 927, 935 (9th Cir. 2003), and *Jacoby v. NLRB*, 233 F.3d 611, 617 (D.C. Cir. 2000). However, the Board has not adopted the heightened duty of fair representation other than as the law of the case. *Electrical Workers Local 48 (Oregon-Columbia Chapter)*, 344 NLRB 829, 830 fn. 5 (2005) (passing on whether the heightened duty of representation standard was the correct standard as the union violated the Act under either standard); Cf. *Teamsters Local 631 (Vosburg Equipment)*, 340 NLRB 881, 881 fn. 4 (2003).

The Board summarized the law applicable to departures from hiring hall rules without addressing the heightened duty of fair representation standard in *Electrical Workers Local 48*

(*Oregon-Columbia Chapter of NECA*), 342 NLRB 101, 105 (2004), holding that “a union breaches its duty of fair representation by conduct toward a member of the collective-bargaining unit that is ‘arbitrary, discriminatory, or in bad faith[]’” and this standard “applies to all union activity, including the operation of a hiring hall.” *Id.* (citing *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999))

In *Plumbers Local 342 (Contra Costa Electric)*, the Board explained:

When a union purposely departs from the rules governing the operation of its hiring hall, it dramatically displays its power to affect employees’ livelihood. Such a deliberate departure constitutes arbitrary, discriminatory, or bad-faith conduct in violation of the duty of fair representation, and violates Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was pursuant to a valid union-security clause or was necessary to the effective performance of its representation function. *Id.* (citing *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 550 (2001))

The Board did not need to address the heightened duty standard for a deliberate departure from the hiring hall rules, as the deliberate departures were unlawful under either the Board standard or the heightened duty standard, and rejected the administrative law judge’s finding that the union demonstrated its departures were necessary to the effective performance of its representation function. *Electrical Workers Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB at 105 fn. 13.

The Board should hold that a union operating an exclusive hiring hall is held to a heightened duty of fair representation for reasons set out in *Lucas v. NLRB*, 333 F.3d 927, 932-935 (9th Cir. 2003), and *Jacoby v. NLRB*, 233 F.3d 611, 615-617 (D.C. Cir. 2000). The reasons to hold a union that operates an exclusive hiring hall to a heightened duty of fair representation are demonstrated here, where Respondent took immediate action to end Shelby’s protected conduct in response to the word “bitch,” resulting in an escalated confrontation. Further, Respondent treated Shelby differently than other members by

trespassing her from the property even though she did not threaten violence as did the other trespassed members. Respondent persisted in this disparate treatment of Shelby by maintaining the trespass requirement against her in spite of her apologies to Respondent. Although the police escort requirement was an unplanned consequence of the incident, Shelby has subsequently visited the property several times without incident, albeit with a police escort. In the face of her apology, Respondent maintained the trespass requirement throughout the investigation of the charge, the Region's issuance of complaint, and during the hearing. Respondent continues to demonstrate its power over Shelby by maintaining the trespass requirement in an attempt to push Shelby away with one hand, while demanding monthly dues with the other hand.

Respondent's actions of threatening to exclude Shelby and summoning the police should be found to violate the Act under the Board's duty of fair representation standard. In the event the Board finds that Respondent did not violate the Act under this standard, it should decide whether a union operating an exclusive hiring hall is held to a heightened duty of fair representation. If so, the Board should decide whether it will outline the analysis to apply and decide whether Respondent violated the Act under a heightened duty, or, in the alternative, remand the case to the ALJ to analyze whether Respondent violated the Act under a heightened duty of fair representation.

B. The ALJ Erred by Failing to Find that Respondent Unlawfully Attempted to Cause and Caused an Employer to Discriminate against its Employees in Violation of Section 8(b)(2) of the Act [Exception No. 2]

The ALJ erred when he found that Respondent did not unlawfully cause and caused an employer to discriminate against its employees in violation of Section 8(b)(2). (ALJD at 19:2-6) The ALJ found that Respondent violated Section 8(b)(1)(A) of the Act by its ongoing

denial of access rule, but did not violate Section 8(b)(2) and recommended dismissal of the Section 8(b)(2) allegation. (ALJD at 19:2-6) The analysis followed a heading that “[t]he Respondent union has failed to show adequate justification for permanently barring Ms. Shelby from unfettered use of its exclusive hiring hall system in violation of Section 8(b)(1)(A) and (b)(2) of the Act.” (emphasis modified)

1. The ALJ’s Conclusion is Inconsistent with his Earlier Findings and the Board Law Relied Upon by the ALJ

The heading and analysis cast doubt on the ALJ’s conclusion. Section C of the ALJ decision states “The Respondent union has failed to show adequate justification for permanently barring Ms. Shelby from unfettered use of its exclusive hiring hall in violation of Section 8(b)(1)(A) and (b)(2) of the Act.” (ALJD at 16:7-9) Seemingly consistent with the title, the ALJ found that Respondent’s access rule causes or attempts to cause her from utilizing the hiring hall in spite of her status as a dues-paying member and interferes with her employment or otherwise impairs her job status. (ALJD at 17:1-6) The ALJ also found that

[T]he restricted access rule demonstrates the Respondent’s power and influence over Ms. Shelby’s livelihood so dramatically as to compel an inference that the effect of the Respondent’s actions in implementing the restricted access rule is to encourage union membership on the part of all employees who have perceived the display of power. (ALJD at 17:6-10)

The ALJ stated that a union “violates Section 8(b)(2) and 8(a)(3) where there is some impact upon the employment relationship or when the union affects the employment of a member.” (ALJD at 17:20-22) Further, both Sections 8(b)(1)(A) and (b)(2) are violated when a union purposely departs from the rules governing the operation of its hiring hall, and the burden is on the union to show the departure was necessary to the effective performance of its representation function. (ALJD at 17:34-43) The ALJ found that Respondent impacted Shelby’s employment and failed in meeting its burden. (ALJD at 18:13-20) Further, the ALJ

found that Respondent treated Shelby arbitrarily and disparately in restricting her access to the Red Rock facility. (ALJD at 18:30-33) Curiously, the ALJ concluded that Respondent violated Section 8(b)(1)(A) but not 8(b)(2). (ALJD at 18:40-45, 19:1-6)

The ALJ erred when he found that Respondent did not unlawfully cause and caused an employer to discriminate against its employees in violation of Section 8(b)(2). The ALJ found that Respondent met all of the necessary elements for a violation, yet it appears that the ALJ improperly found no Section 8(b)(2) violation. His conclusion is inconsistent with the stated heading, reasoning, and other findings in the decision.

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's erroneous rulings as set forth above, and find that Respondent committed the additional violations of Section 8(b)(1)(A) and 8(b)(2) as discussed above, and affirm the remaining findings of the ALJ.

Dated at Las Vegas, Nevada, this 28th day of June 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS in LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 872, AFL-CIO, Case 28-CB-065507, was served by E-Gov, E-Filing, and E-Mail, on this 28th day of June 2012, on the following:

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