

**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

ACTING GENERAL COUNSEL'S REPLY BRIEF

**TO: Lester A. Heltzer, Executive Secretary
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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel (the General Counsel) files this Reply Brief to Respondent's Answering Brief to General Counsel's Exceptions to the Decision (ALJD) of Administrative Law Judge Gerald Etchingham (ALJ) in the captioned case.

I. Introduction

In its Answering Brief, Respondent makes numerous sweeping arguments in support of its position that the exceptions filed by the General Counsel lack merit. In making its arguments, however, Respondent overlooks the basis of the General Counsel's exceptions, the reasoning behind the well-established Board principles upon which such exceptions rely, and the factual distinctions in the instant case.

II. Argument

A. Respondent Makes Assertions of Fact Which are Not Supported by the ALJ's Decision, the Transcript, or Admitted Evidence

In its Answering Brief, Respondent stated that the Exceptions of the Acting General Counsel conceded that "the requirement for a police escort was caused by the Las Vegas

Police” (RAB 1; 3)¹ Respondent goes further, stating that it “was proper to *acquiesce* in the police escort requirement which was generated by the police.” (RAB 5) (Emphasis added.) Respondent erroneously asserts that the Acting General Counsel’s brief somehow conceded that the police caused the property access requirement. Respondent’s argument is unsupported by the General Counsel’s Brief in Support of Exceptions Brief, the hearing transcript, or the ALJ decision. Contrary to Respondent’s assertions, the record establishes and the ALJ correctly found that the trespass and the police escort requirement imposed on Stephanie Shelby (Shelby) was initiated by Respondent when Joe Taylor (Taylor) called the police and responded in the affirmative when asked by a police officer as to whether he wanted Shelby to be trespassed from the property. (ALJD 10:1-10) The Las Vegas Metropolitan Police Department lacks the property interest and thus the authority to exclude an individual who is lawfully on the property without being requested to do so by an individual or entity with the requisite property interest. Respondent’s repeated efforts to argue that the trespass requirement imposed on Shelby was an unintended consequence of her actions is without merit as it was initiated by Respondent and Respondent failed to take any action to remove the requirement despite adequate opportunity. (RAB 3)

Respondent argues that it has not requested a permanent restriction on Shelby. (RAB 3) However, the ALJ found the ongoing maintenance of the property access requirement violated the Act. (ALJD 17:1-10; 18:13-22, 26-30, 40-45; 19:1-5) It was Respondent’s maintenance of the requirement, and its ongoing refusal to lift the requirement from October 4, 2011, to the present, which the ALJ found was unnecessary, and “so far outside a

¹ RAB ___ refers to Respondent’s Answering Brief to General Counsel’s Exceptions followed by the page number. General Counsel’s exhibits are shown as GCX followed by the exhibit number and exhibit page, if applicable. Transcript references are (Tr.__:__) showing the transcript page and line, if applicable. ALJD__ refers to JD(SF)-24-12 issued by the ALJ on May 18, 2012, followed by the page number.

wide range of reasonableness as to be irrational.” (ALJD 16:30-32; 18:40-45, 19:1)

Respondent’s argument is undercut by Taylor, whose inconsistent testimony demonstrated that he was told of the permanent nature of the restriction yet failed to take any affirmative action to lift it. (ALJD 11:47-51) Respondent’s assertion also ignores the fact that Shelby lacks the means to lift the property access restriction as removal of the restriction is solely within Respondent’s control.

Respondent repeatedly claimed in its Answering Brief that Shelby has suffered no interference with her ability to work. (RAB 2; 4; 7; 8; 9) Respondent goes so far as to assert that there is “no evidence” that Shelby attempted to visit the Respondent’s office for “any matter concerning the [Respondent’s] exclusive representation” of Shelby. (RAB 4) Additionally, Respondent claims the property access requirement is “at best an inconvenience to Ms. Shelby” and “is only a speculative future inconvenience with respect to the hiring hall” and cannot support a violation under Section 8(b)(1)(A). (RAB 7) Respondent further claims that Section 8(b)(2) “does not deal with the very indirect impact which this police escort restriction has with respect to Ms. Shelby’s use of the hiring hall.” (RAB 8) The ALJ correctly found that the restricted access rule impacted Shelby’s employment “by attempting to cause or preventing her from being employed or impairing her job status as the rule interferes with Ms. Shelby’s ability to maintain her skills, file grievances, and participate in the Respondent’s out-of-work list by arbitrarily restricting her access to the hiring hall.” (ALJD 18:13-18) Respondent ignores the fact that Shelby is required to periodically access Respondent’s hiring hall in order to maintain her employment eligibility. (ALJD 2:35-39) Moreover, she needs access to Respondent’s facility for other needs, such as accessing the health and benefits office. (ALJD 2:46-48) In its post-hearing,

Respondent even conceded the inconvenience caused by the access restriction imposed by the escort requirement, as noted by the ALJ. (ALJD 16:17-24, 40-42; 18:4-9)

Claims by Respondent that Shelby has worked consistently since the October 4, 2011, incident and has “had no need to use the hiring hall for any purpose” are without merit. (RAB 5) Contrary to Respondent’s assertions that Shelby obtained work continuously since the October 4, incident, in 2011, Shelby worked only two days in November and the last 16 days in December. (Tr. 160:5-16) The ALJ correctly noted that Shelby did not work during 2011 until November and December when she was name requested as opposed to dispatched by the Respondent. (ALJD 6:3-4) Respondent’s arguments are unsupported by the admitted evidence and applicable Board law, and also demonstrate the lack of respect it has for Shelby’s rights under the Act, including the right to be free from restraint or coercion by Respondent.

Respondent incorrectly attempts to distinguish Rocio Lucero (Lucero) as an office clerical employee. (RAB 3; 8) Respondent asserts that Lucero is simply an office clerical employee who is not an elected officer of Respondent. Respondent, however, omits the fact that Lucero is an appointed union representative and is the correct person for Shelby to interact with to resolve issues related to her applicable skills and several other terms of employment. (ALJD 4:30-43; 6:6-10, 14-17) As the appointed union representative for dealing with members, the correct standard to apply is a member’s interaction with a union representative, instead of an interaction with an employer’s office employee as Respondent suggests. Taylor is also an appointed union representative who has *not* been elected to office. (ALJD 3:10-13) Curiously, Respondent makes no claims regarding Taylor’s authority to act on behalf the Union.

Although Respondent cites no cases in its Answering Brief, Respondent appears to suggest the analysis used in *Atlantic Steel*, 245 NLRB 814 (1979), should apply in analyzing the interaction between Shelby and Lucero, as opposed to an analysis between a union member and a union representative. An *Atlantic Steel* analysis is incorrect because this case does not deal with an employee's interaction with an employer. Instead, it deals with a union member's interaction with a union representative. Accordingly, *Atlantic Steel* is inapplicable. Instead the Board should apply the standard adopted by the Board in *Longshoremen Local 333*, 267 NLRB 1320 (1983). Additionally, in framing its argument that Lucero should be afforded special status for protection from profanity, Respondent omits the fact that profanity is commonly used at Respondent's facility, including in the presence of its principal actors – Lucero and Taylor. (ALJD 3:1-10; 8:29-32) In this context, the ALJ correctly found that Shelby was permanently banished from Respondent's hiring hall simply for cursing, as opposed to threats of violence made by other members who were banished. (ALJD 13:15-18) The ALJ correctly noted that the issue presented in this case is limited to cursing as there were no acts or threats of violence which would have otherwise justified Respondent's actions. (ALJD 5:40-42; 8:12-17, 46-51; 9:46-48; 13:15-18)

Respondent asserts that Shelby's conduct "would undermine the [Respondent's] ability to represent all of its members." (RAB 5) Respondent asserted that Shelby's conduct interfered with the Respondent's "function in preserving work opportunities for all applicants and members" and "restricted the ability of other members to seek work because of concerns about coming to the hall and being exposed to these kinds of outbursts." (RAB 8) These assertions are unsupported as no evidence was presented at hearing that there was a negative impact on other members as a consequence of Shelby's outbursts. (RAB 5) In fact, the record establishes that members use profanity quite regularly at the Union hall.

Respondent further argues that Shelby is required to request that the trespass and escort requirements be lifted as a justification for Respondent's failure and refusal to lift the requirement. (RAB 3; 7) The ALJ correctly found that the maintenance of the requirement violates the Act even without a request to lift the trespass. (ALJD 17:12-18; 19:2-5) Shelby is not required to take further action in order to prompt Respondent into ceasing its unlawful conduct. If Respondent's argument were accepted, it would allow a respondent to maintain unlawful requirements without consequence so long as no one requests the unlawful actions to stop. There is no such requirement, and Respondent's insistence on such a request demonstrates the lack of respect which Respondent has for Shelby's rights to access the Respondent's hiring hall.

Finally, the ALJ's observations on the factual inaccuracies contained in Respondent's post-hearing brief should not be overlooked. The ALJ documented no less than seven inaccuracies contained in Respondent's post-hearing brief and summarized that the "long string of factual inaccuracies by Respondent raises issues as to the overall veracity of its positions in this case." (ALJD 13:27-44) Respondent's numerous inaccuracies in its Answering Brief amplify questions as to the veracity of its assertions as they are unsupported by record evidence.

B. Respondent's Arguments Regarding the Heightened Duty Do Not Address Whether the Board Should Adopt a Heightened Duty Rule

Respondent contends the General Counsel "has deliberately ignored the Board's recent pronouncements with respect to application of the duty of fair representation standard to the administration of union security." (RAB 7) Respondent does not address the fact that the ALJ specifically stated that union security issues did not apply to this case. (ALJD 14:50-51) The cases cited by Respondent are inapplicable as they do not involve the

standard applied to a union operating an exclusive hiring hall. (RAB 7) (citing *United Autoworkers Local 376*, 356 NLRB No. 164 (2011) and *International Association of Machinists Local 2777*, 355 NLRB No. 177 (2010)). Moreover, Respondent does not explain how the cases it cited are applicable to the operation of an exclusive hiring hall and does not address whether a union operating an exclusive hiring hall should be held to a heightened duty of fair representation under the cases cited by the General Counsel in its exceptions. Accordingly, Respondent has not addressed the arguments raised by the General Counsel that the Board should determine whether a heightened duty standard applies to a union operating an exclusive hiring hall.

III. Conclusion

Respondent's Answering Brief to General Counsel's Exceptions, as discussed above, lacks merit and is not supported by the record or by legal precedent. It is respectfully requested that the Board grant General Counsel's exceptions and otherwise affirm the decision of the ALJ.

Dated Las Vegas, Nevada, this 26th day of July 2012.

Respectfully submitted,

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 872, AFL-CIO (No Employer Named), Case 28-CB-065507, was served by E-Gov, E-Filing, E-Mail, and regular mail on this 26th day of July 2012, on the following:

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