

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

METRO-WEST AMBULANCE SERVICES,
INC.,

Cases 36-CA-10801
36-CA-10802

and

TEAMSTERS JOINT COUNCIL #37,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS.

METRO-WEST AMBULANCE SERVICE,
INC.,

Cases 36-CA-10835
36-CA-10893
19-CA-67859
19-CA-69371

and

TEAMSTERS LOCAL #223,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS.

**RESPONDENT METRO WEST AMBULANCE SERVICE, INC.'S REPLY BRIEF TO
ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent Metro West Ambulance Service, Inc. ("Metro West" or "Respondent") respectfully submits this Reply to Acting General Counsel's ("General Counsel") Answering Brief to Respondent's Exceptions to the Administrative Law Judge's ("ALJ") Decision ("Decision"). Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board ("Board").

I. INTRODUCTION

Metro West filed Exceptions and a supporting Brief in the instant matter, seeking to have the Board review and overturn portions of the ALJ's Decision issued in this matter on November 9, 2012. The General Counsel sets forth in her Answering Brief her arguments for why these portions of the ALJ's Decision should be upheld. All positions in this regard have thus been fully addressed by the parties. Metro West submits this Reply Brief to address the General Counsel's contentions that: 1) the ALJ's findings that Metro West violated Section 8(a)(4) of the Act are supported by the facts and law (GC Answering Brief, pgs.29, 35); 2) the General Counsel's mischaracterizations of the evidence regarding Metro West's alleged "tolerance" of employees' parking "off-post" from their assigned posts (GC Answering Brief, p. 37); and 3) the General Counsel's incorrect assertion that the termination of Travis Schlegel in October 2011 was motivated by "his display of Union posters in the windshield of his personal vehicle outside the offices of [Metro West's] owner and highest-level manager and by [Metro West's] receipt of a printout of a critical pro-Union post from Schlegel's MWA Medicguy Facebook page." (GC Answering Brief, p. 39.)

II. ARGUMENT

A. **The ALJ Erred in Finding that Metro West Violated Section 8 (a)(4) of the Act by Issuing the March 2011 Corrective Action Plan and the July 2011 Performance Improvement Plan to Schlegel.**

As explained in its Brief in Support of its Exceptions, the ALJ erred in concluding that Metro West violated Section 8(a)(1) and (4) of the Act by extending Schlegel's corrective action plan on March 7, 2011. (ALJD 37:20-21; Respondent's Brief in Support of Exceptions, p. 36.) In particular, the ALJ erred in concluding that Metro West violated Section 8(a)(4) of the Act by extending Schlegel's corrective action plan because she did not make any specific

findings of fact on which to base her conclusion. The General Counsel disagrees and says that the ALJ “did note that [Metro West] had received the charge [that allegedly motivated Metro West to extend the Corrective Action Plan] only recently before Schlegel’s discipline, and that [Metro West] has expressed displeasure about the charge and about other subsequently filed charges and objections.” (GC Answering Brief, p. 29; ALJD 36:27-37:6.) These sections of the Decision cited by the General Counsel, however, are not specific to the Section 8(a)(4) allegations and do not support the ALJ’s finding that Metro West violated Section 8(a)(4). In these sections the ALJ was discussing, in general terms, her finding that the issuance of the March 2011 corrective action plan was motivated by union animus. She notes the fact that unfair labor practice charges had been filed on February 23, and cites a March 4, 2011, letter sent to employees by Larry Boxman and J.D. Fuiten in which Boxman and Fuiten refer to the charges. (ALJD 36:40-37:1.) She then makes the statement that Metro West’s “assertion that decision-maker Boxman was free from Union-related animus toward Schlegel lacks credence.” (ALJD 37:5-6.)

This statement regarding Boxman is entirely out of place in this section of the Decision because Boxman was not the decision-maker with regard to the March 2011 corrective action plan. Kevin Riensche was responsible for the issuance of the March 2011 corrective action plan. Boxman was generally aware that the corrective action plan was being issued, but had no involvement in its issuance. It was decided upon by Riensche, in consultation with Paul LeSage. So if its issuance violated Section 8(a)(4) of the Act, it would have to have been because *Riensche* was unlawfully motivated by the filing of unfair labor practice charges. Yet, the ALJ did not make any findings to show that Riensche was motivated by the filing of unfair labor practice charges. Boxman’s motivation, and Fuiten’s for that matter, are irrelevant and

cannot sustain the ALJ's conclusion that Metro West violated Section 8(a)(4) of the Act.¹ This conclusion should therefore be overturned.

The ALJ also erred in concluding that Metro West violated Section 8(a)(1) and (4) of the Act by issuing a performance improvement plan to Schlegel on July 11, 2011. (ALJD 40:25-26; Respondent's Brief in Support of Exceptions, pgs. 36-39.) The General Counsel says that the "ALJ made a specific finding that the issuance of the performance improvement plan violated Section 8(a)(4) of the Act." (GC Answering Brief, p. 35.) That is true, the ALJ did make such a finding (ALJD 40:25-26), but she did not base this finding, or conclusion rather, on any specific findings regarding the Section 8(a)(4) allegations. In fact, she did make mention of any unfair labor practice charges in this section of her discussion at all, and the only charges to which she had previously referred were those filed on February 23, almost six months before the performance improvement plan was issued to Schlegel. Thus, she did not make any findings supporting her conclusion that Metro West violated Section 8(a)(4) of the Act when it issued the performance improvement plan to Schlegel and this conclusion should be overturned.

¹ As noted in its Brief in Support of Exceptions, it is troubling that the ALJ based her findings of animus on communications distributed by Metro West to its employees in which Metro West lawfully describes its position with regard to the Union's ongoing campaign at Metro West. (Respondent's Brief in Support of Exceptions, pgs. 36-37.) Section 8(c) of the Act "implements the First Amendment" such that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). It is unconscionable to use an employer's communications that are otherwise lawful and protected under the Act against that employer as evidence of anti-union animus in unfair labor practice proceedings, and will have an improper chilling effect on employers' rights to communicate with their employees regarding union matters.

B. Metro West did not Tolerate Employees' Parking "Off-Post" from their Assigned Posts

The General Counsel contends that the ALJ's conclusion that Metro West violated Section 8(a)(1), (3) and (4) of the Act by issuing a corrective action memorandums to Travis Schlegel and Randy Watkins is supported by the facts and law. (GC Answering Brief, p. 36-37). In this regard, the General Counsel claims that "Respondent produced no documented evidence of standards permitting deviations from this policy," and that "Respondent's tolerating deviations from the policy for paramedics at Post 13 but not for Schlegel and Watkins is therefore significant." (GC Answering Brief p. 37.) First of all, Metro West's failure to produce "any documented evidence of standards permitting deviations" from its policy that ambulance crews may park their ambulances .2 miles from the designated post is due only to the fact that it did not have any such documented evidence at the time of hearing. Instead, Metro West introduced reliable testimony establishing that this is the policy of Metro West. (Tr. 554-55.)

In response to Metro West's argument that the ALJ erred in finding that Metro West was aware that employees were posting off-post at a Wal-Mart store in Cornelius, Oregon, but did not discipline employees and instead only advised them not to park there, the General Counsel contends that Metro West's argument in this regard is "fatally undercut" by the testimony of Metro West witness David Weeks, who testified that Metro West "addressed the crew" that parked off-post at Wal-Mart when it learned the crew had parked at Wal-Mart. (GC Answering Brief, p. 37; (Tr. 970:16-971:8.) To the contrary, the fact that Mr. Weeks addressed the issue with the crew who had parked at the Wal-Mart demonstrates that Metro West did not tolerate crews parking off-post.

The General Counsel further argues that it is "significant" that Metro West "tolerated" deviations from the policy for paramedics at Post 13 but not for Schlegel and

Watkins posting off post from Post 1. As explained in its Brief in Support of Exceptions, Post 13 falls in the middle of an intersection, so crews must park their ambulances near to the intersection but cannot actually park in the intersection. (Respondent's Brief in Support of Exceptions, p. 39; Tr. 774.) Metro West is not therefore "tolerating" deviations from the posting policy for paramedics posting at Post 13. The paramedics who park near the intersection are not actually considered to be off-post.

On the other hand, Schlegel and Watkins parked nearly .9 miles away from Post 1 when they made the decision to park at the John Deere Parking lot. There is no dispute about whether or not they were off-post, and both the ALJ and the General Counsel ignored completely the fact that Schlegel and Watkins both *admitted* that they *knew* they were off-post when they chose to park at the John Deere parking lot and that Watkins had willfully misinformed dispatch about their locations when he called in to report they were posted at Post 1. (Tr. 240, 299, 285, 303, 1017-18; R. Ex. 29.)

C. Travis Schlegel's Termination in October 2011 was Not Motivated by "His Display of Union Posters or by Metro West's Receipt of a Printout of a Critical Pro-Union Post from Schlegel's MWA Medicguy Facebook page.

Finally, the General Counsel contends that the ALJ's finding that Metro West unlawfully discharged Schlegel in October 2011 because of his Union and other protected concerted activities and the filing of unfair labor practice charges is supported by the facts and law. (GC Answering Brief, p. 38.) The General Counsel argues that this finding is supported by the facts that on the day of the incident that precipitated Schlegel's termination he posted Union posters in the windshield of his personal vehicle outside the offices of Respondent's owner and highest-level manager and by Metro West's "receipt of a printout of a critical pro-Union post from Schlegel's MWA Medicguy Facebook page." (GC Answering Brief, p. 39.) It was

established at hearing, however, that those posters could not be viewed from the offices of Respondent's owner and highest-level manager. (Tr. 650:17-20; R. Ex. 6, p. 3.) Also, it was undisputed at hearing that numerous employees posted Union posters in the windshields of their personal vehicles and Metro West never asked them to remove those posters and that other employees who posted such posters were never disciplined by Metro West or the subject of unfair labor practice charges. (Tr. 651)

It was also established at hearing that the "printout of a critical pro-Union post from Schlegel's MWA Medicguy Facebook page" was apparently received by non-supervisory employee Justin Scott, whose name appears on GC Exhibit 48. (GC Answering Brief, p. 39; GC Ex. 48.) At hearing, the GC was unable to establish that any Metro West supervisor, including Boxman, had received a copy of GC Ex. 48 or had ever seen a copy of GC Ex. 48. (Tr. 662: 20-24; 800:14-21; 923:22-924:3; 990:19-24.)

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III. CONCLUSION

The General Counsel has failed to offer record evidence to support the ALJ's erroneous findings and conclusions. The Board should conclude that the ALJ's erred in finding that Metro West violated the Act by suspending, demoting, issuing discipline to, and eventually discharging, former employee Travis Schlegel, and by issuing a Corrective Action Memorandum to employee Randy Watkins. The Board should overrule the ALJ's finding on these issues and dismiss the relevant portions of the Complaint.

DATED: February 1, 2013.

Respectfully Submitted,

BULLARD SMITH JERNSTEDT WILSON

By /s/ Jennifer A. Sabovik
Jennifer A. Sabovik

Attorneys for Respondent Metro West Ambulance
Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2013, I served a full, true and correct copy of the foregoing **RESPONDENT METRO WEST AMBULANCE SERVICE, INC.'S REPLY BRIEF TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** on the following persons via the methods indicated below:

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