UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COUNCIL 30, UNITED CATERING, CAFETERIA AND
VENDING WORKERS, RWDSU/UFCW
Respondent

and Case 7–CB−083076

LORAINE WHITFIELD SCUSSEL, an Individual
Charging Party
and

AWREY BAKERIES, LLC
Party in Interest

Rana S. Roumayah, Esq.
for the General Counsel.
Patrick J. Rorai, Esq., (McKnight, McClow, Canzano, Smith and Radtke, P.C.)
Southfield, Michigan
for the Respondent Union.
William Nole Evans, Esq. (EvansPletkovic, P.C.) Huntington Woods, Michigan
for the Charging Party.
Joshua Gadharf, Esq., (McDonald Hopkins, PLC) Bloomfield Hills, Michigan
for Awrey Bakeries, Party-in-Interest.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan on February 10 and 11, 2013. Loraine Whitfield-Scussel filed the charge on June 13, 2012. The General Counsel issued the complaint on November 27, 2012.

The General Counsel alleges that Respondent, hereinafter referred to as Council 30 or the Union, violated Section 8(b)(1)(B) of the Act in restraining and coercing Awrey Bakeries in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.[1] More specifically the complaint alleges that on about May 23, 2012, Union President Joseph Silva conditioned the granting of concessions in bargaining and approval of a

[1] Paragraph 10 of the complaint tracks the exact language of the statute in this regard.

collective bargaining agreement upon Awrey discharging the Charging Party, who was Awrey's Director of Human Resources. Awrey terminated Ms. Whitfield-Scussel's employment on May 30, 2012.

5 On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Union and the Charging Party, I make the following

FINDINGS OF FACT

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I. JURISDICTION

In 2011 and 2012 Awrey Bakeries produced and sold baked goods from two facilities; one in Livonia, Michigan and the other in Noblesville, Indiana. During 2011 it derived gross
15 revenue in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from places outside the State of Michigan. Awrey Bakeries is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

The Union has represented employees at Awrey's Livonia, Michigan facility for decades. It has negotiated collective bargaining agreements with Awrey Bakeries, the most recent of which covers the period from September 1, 2010 through August 31, 2015.

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Awrey's negotiating team in the 2010 collective bargaining negotiations consisted or four individuals; Robert Wallace, Awrey's Chief Executive Officer, Greg Gallagher, Awrey's Chief Financial Officer, Michael Kaldorf, Awrey's Vice President of Operations and the Charging Party, Lorraine Whitfield-Scussel, the Director of Human Resources (hereinafter Whitfield-
30 Scussel).

Awrey hired Ms. Whitfield-Scussel as its Director of Human Resources in October 2005. In this position she was the principal management representative who negotiated with the Union with respect to grievances. Whitfield-Scussel settled grievances and denied grievances. She
35 represented Awrey at 3 arbitrations and approved all terminations, albeit with further review by CEO Bob Wallace. Ms. Whitfield-Scussel also negotiated about 10 memorandums of understanding with the Union.

Awrey lost money in every year between 2005 and 2012, with the exception of 2009. By
40 May 2012, the company was deeply in debt. As a result, on about May 7, 2012, Awrey's Board

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[2] Tr. 19, line 18 and Tr. 154, line 15 incorrectly identify the presiding judge.

I grant the General Counsel's unopposed motion to supplement the record. Thus, I receive into evidence Jt. Exhibit 1, the Union's February 8, 2013 letter to Ms. Whitfield-Scussel. In the letter, the Union stated it had no objection to her employment with Awrey and that on January 16, 2013, it had requested that Awrey consider her reinstatement.

of Directors hired Barry Kasoff, President of Realization Services, Inc., to make the company profitable or sell its assets.

Kasoff first met with the Union and Awrey's management team, including Ms. Whitfield-Scussel on May 14, 2012. At this meeting, Kasoff said there would have to be lay-offs of both hourly bargaining unit employees and salaried employees. Joseph Silva, the Union's President, asked if Bob (CEO Wallace), Greg (CFO Gallagher) and Loraine (Ms. Whitfield-Scussel) were going to be laid-off or terminated. He stated that the Union wanted these individuals to be gone. Kasoff did not respond to Silva, Tr. 27, 139, 202-03.[3]

Whitfield-Scussel was unpopular with some unit employees, but, on the other hand, had a good relationship with some union representatives. One particular issue which made her unpopular with some bargaining unit employees was her role in negotiating a new provision in the current collective bargaining agreement. This clause provided health insurance benefits to employees only if they worked 1560 hours during a 12-month rolling period, Tr. 309, 320—22, G.C. Exh. 2, p. 20, This particularly impacted Awrey's "flex" employees who worked as replacements for the regular workforce.

The individuals that met on May 14, met again on May 16. Scott Mazey, the Union's attorney, was charged with the task of drafting a Memorandum of Understanding in which the Union would agree to certain mid-term contract concessions. There was another meeting on May 17 during which the Union stated it would hold a meeting to present the proposed concessions to its membership on Sunday, May 20.

On May 20, the union membership voted on a Memorandum of Understanding (MOU) which the union leadership had at least agreed could be presented for the membership's consideration. That MOU proposed to amend the September 1, 2010 collective bargaining agreement in a number of ways. First it provided for the lay-off of 26 unit employees by May 25, based on plant-wide seniority. The MOU also provided that, "It is further agreed that there shall also be job eliminations of management personnel in a similar percentage of the management workforce, " G.C. Exh. 8.

The proposed MOU reduced the hourly pay of the remaining employees by $2 per hour and made a similar reduction in pay for the remaining management personnel. The 26 employees were provided with recall rights, including recall in the event that the Noblesville, Indiana operations were moved to Livonia. At the first meeting, the membership rejected the concessions and the MOU.

On May 23, Kasoff met and spoke with unit employees in the parking lot of the Livonia plant to try to win their support for the concessions. Kasoff entertained questions from the employees. One or several employees asked whether the three top managers, meaning, in the employees' view, Wallace, Gallagher and Ms. Whitfield-Scussel, were going to lose their jobs,

[3] Silva's testimony at Tr. 258-61 does not directly contradict Whitfield-Scussel, Gallagher and even Kasoff as to what he said on May 14.

Tr. 268, 278-9, 305. The Union membership rejected the concessions following Kasoff's speech to them. [4]

Almost immediately following this meeting, Kasoff met with Union officials at the entrance to the plant. While they were talking Security Guard James Pallarito brought mail into the plant from his guard shack. As he passed by Kasoff and the Union representatives he overheard Kasoff ask why the concessions in the MOU were rejected. Union President Joseph Silva replied that the reason was that Kasoff did not "give them the Big 3," meaning the terminations of Wallace, Gallagher and Whitfield-Scussel. Kasoff replied that he could not terminate all three but that he would terminate Whitfield-Scussel immediately and Gallagher in 60 days, Tr. 108.[5]

Kasoff shut the plant down for the rest of May 23, and for several days thereafter. On May 29, unit employees ratified a revised version of the MOU. The revised version of the MOU, G.C. Exh. 9, provided in the second paragraph, for the elimination of management personnel in a similar percentage to that of the union employees. However, it also stated, "It is further agreed that 2 of the 3 highest management employees currently employed by Awrey Bakeries (being the CEO, CFO and Human Resources Director) shall be terminated, one being immediately, and one being in 60 days."

The new MOU also added a provision granting laid-off union employees a $1500 severance payment. The new MOU phased in the wage reduction called for in the first MOU. It provided for a $1 pay cut on June 1, 2012 and then another $1 cut on September 1. Unit

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[4] Joseph Silva and union committee chairperson David Bullion testified that Kasoff promised to terminate 2 of the 3 before the second vote, Tr. 269, 284, 293. I do not credit this testimony. If this were so, such a provision would have been in the first draft of the MOU; not merely the second. Moreover, I credit the testimony of Security Guard James Pallarito that Kasoff promised to terminate Gallagher and Whitfield-Scussel after the second vote, Tr. 108. Despite Pallarito's personal friendship with Whitfield-Scussel, his boss, there are a host of reasons to credit his testimony. Kasoff didn't directly contradict Pallarito's testimony, he merely testified that he did not recall either telling the Union that he would fire 2 of the 3, or that Silva guaranteed ratification if Kasoff terminated Whitfield-Scussel, Tr. 209-11. Bullion confirmed that Pallarito passed within 2 feet of Kasoff and the union representatives while they were talking, lending circumstantial corroboration of Pallarito's testimony, Tr. 309-11. Additionally, Pallarito's testimony is consistent with the changes in the MOU between the second vote and third vote. Finally, Pallarito's testified the Gerald Mull, a union committeeman and agent, told him that that MOU was approved on May 30 because Kasoff promised to get rid of Gallagher and Whitfield-Scussel. Mull did not testify and Pallarito's May 30 email at 9:08 a.m. to Whitfield-Scussel, G.C. Exh. 7 [the reason for the overwhelming vote was the promise of Greg and your heads.] adds credibility to his testimony.

[5] Respondent attacks Pallarito's credibility on the grounds that he could not have heard the conversation about which he testified during a period of 5 seconds. I reject this argument. Respondent's witness Bullion testified Pallarito was within earshot for 5 seconds; Pallarito's testimony indicates he could hear what was being said for a longer period of time, Tr. 106-109.

I also rely on the fact that Respondent's witnesses Kasoff, Silva and Bullion testified after Pallarito's very damaging testimony. Respondent did not ask Kasoff anything about Pallarito. Silva denied seeing him during the post-vote meeting on May 23. This is unlikely given the fact that Pallarito is 6'8" tall and is otherwise a very big man.

employees approved the revised MOU and Kasoff terminated Whitfield-Scussel that day. Gallagher worked another 60 days as called for in the MOU. After Whitfield-Scussel's termination her duties have been performed in succession by Janet Lewis, Awrey's benefits manager, then Mike Kaldorf, who was rehired as chief operations officer, and then by Chris Heiden, Awrey's current human resources manager.

Why I discredit Barry Kasoff's testimony that he had decided to terminate Whitfield-Scussel prior to May 23.

I find that the Union coerced Awrey to terminate the employment of Whitfield-Scussel and Gallagher. Moreover, it is not all certain that Kasoff would have terminated either one but for the pressure from the Union. I do not credit the testimony of Barry Kasoff that he decided to terminate Whitfield-Scussel prior to May 23.

At Tr. 189, Kasoff testified that he decided to lay-off Whitfield-Scussel and Gallagher on May 12, before he ever met them. However, Kasoff also testified that Whitfield-Scussel was terminated in part due to his evaluation of her performance as human resources director, Tr. 192-95. At Tr. 216, Kasoff testified that he added the language promising to terminate 2 of the 3 "top management" because he "was at the intolerance level as it related to Loraine and Greg Gallagher." If Kasoff decided to terminate Whitfield-Scussel before he ever met her, her job performance would not have mattered to him.

On May 23, after the second vote on the MOU, Kasoff met with Whitfield-Scussel and Gallagher and told them that the Union was very angry with them. He told Whitfield-Scussel that the Union wanted her terminated and asked her when was the last time she was out on the plant floor, Tr. 43, 57, 146-50. 222-24. This conversation would have made no sense had Kasoff decided to terminate Whitfield-Scussel on May 12, or anytime prior to May 23.

Legal Analysis

Board law is crystal clear that employees, unions and employers have to the right to select whomever they choose to represent them for purposes of collective bargaining and grievance adjustment. Conversely, the other parties must deal with the other's chosen representative except in extraordinary circumstances not present in this case. Section 8(b)(1)(B) provides that it is an unfair labor practice for a labor organization to "restrain or coerce…an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances, *United Parcel Service,* 330 NLRB 1020, n. 1 (2000).

I find that Union President Joseph Silva conditioned the granting of concessions in bargaining upon Awrey discharging the Charging Party, Lorraine Whitfield Scussel, Awrey's Director of Human Resources. Thus, I conclude that the Respondent Union violated Section 8(b)(1)(B) as alleged, *Local 259, Automobile Workers,* 225 NLRB 421 (1976).

Respondent Union relies on *Teamster Local 507 (Klein News),* 306 NLRB 318 (1992) in arguing that the complaint should be dismissed because the General Counsel has not shown a nexus between its conduct and Whitfield Scussel's functions as Awrey's collective bargaining representative. That reliance is misplaced. As that decision makes clear, there are two kinds of

Section 8(b)(1)(B) violations: those applied directly against an employer and those indirectly applied against the representative in order to "adversely effect" the manner in which the representative performs his or her duties such as grievance processing.

The latter class of cases emanates from the Board's decision in *San Francisco-Oakland Mailers Union No. 18 (Northwest Publications Inc.),* 172 NLRB 2173 (1968). The distinction between the two types of cases is discussed in detail in the Supreme Court decision in *NLRB v. International Brotherhood of Electrical Workers, Local 340,* 481 US 573 (1987). These cases often concern a union member who performs some supervisory type functions for his or her employer (i.e. grievance adjustment at step 1)—sometimes in addition to performing functions consistent with being a rank and file employee. The requirement in *Teamster Local 507* that the record establish a sufficient nexus between the Respondent's coercive conduct and the representative's performance of functions related to his or her status as an employer's representative for collective bargaining, only applies to the second class of cases.

Moreover since the Charging Party in the instant case almost exclusively performed functions related to collective bargaining, I would find the record shows a sufficient nexus assuming such a showing was required. Indeed, there is no explanation for the Union's hostility towards her other than that emanating from the performance of her duties in collective bargaining and grievance adjustment. Indeed, the Union concedes that some of it members "were not pleased with Ms. Scussel's performance in terms of reducing benefits for the flex group," Tr. 309.

The Charging Party is entitled to a make-whole remedy

In order to violate Section 8(b)(1)(B), the Respondent Union need not have been successful in coercing Awrey to terminate the Charging Party. However, I conclude that Respondent Union's coercion was at least a contributing factor in Awrey's decision to terminate the Charging Party. The Respondent certainly did not establish that Awrey would have discharged Whitfield-Scussel in the absence of its coercion. I analogize this case to the Board's analysis in cases involving discrimination by employers.

In order to establish that an employer violated Section 8(a)(1) in discharging or disciplining an employee, the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

The Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. "It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act." *Wright Line,* 251 NLRB 1083, at 1089 fn. 14; accord: *Bronco Wine Co.*, 256 NLRB 53, at 54 fn. 8 (1981).

Having found a causal relationship between the Charging Party's discharge and Respondent's violation of Section 8(b)(1)(B), I conclude that she is entitled to a make whole remedy. The Board granted such relief to Anthony Dazzo, a manager who lost his job due a union's violation of Section 8(b)(1)(B), *Local 259, Automobile Workers,* 225 NLRB (1976).[6]

CONCLUSIONS OF LAW

By conditioning the grant of concessions in bargaining with Awrey Bakeries upon the discharge of Loraine Whitfield-Scussel Respondent has restrained and coerced Awrey Bakeries and thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

Remedy

The Respondent, having contributed to the discharge of the Charging Party, it must make her whole for any loss of earnings and other benefits. It shall also reimburse Loraine Whitfield Scussel for any out-of-pocket expenses incurred searching for work. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Reimbursement interest shall be computed in the same manner.

I have granted the General Counsel's motion to supplement the record with Joint Exhibit 1, which establishes that Respondent Union contacted Awrey on January 16, 2013 and requested that the Employer consider the Charging Party's reinstatement. The Employer declined. Respondent mailed a letter to the Charging Party on February 8, 2013, informing her of its contact with the Employer and stating that it had no objection to the Charging Party's reinstatement, or her role as a representative of the Employer for purposes of collecting bargaining or grievance adjustment.

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the Charging Party for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

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[6] In *Teamsters Local 70,* 183 NLRB 1330 (1970), the Board declined to order a make-whole remedy for a Section 8(b)(1)(B) violation. That case is distinguishable from the instant case in that the employer's bargaining representative was not an employee of the employer and thus was not discharged as a result of the union's coercion.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Council 30, United Catering, Cafeteria and Vending Workers, RWDSU/UFCW, Warren, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Coercing or restraining Awrey Bakeries regarding the discharge of Loraine Whitfield Scussel and conditioning the grant of concessions in bargaining upon her discharge.

(b) In any like or related manner, restraining or coercing the aforesaid Employer or any other employer in the selection of its representative for purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Loraine Whitfield Scussel whole for any loss of earnings and other benefits suffered by reason of its unlawful conduct through February 8, 2013 in the manner provided in the section entitled "Remedy." Reimburse Loraine Whitfield Scussel for any out-of-pocket expenses incurred searching for work with interest as computed in the Remedy section.

(b) Within 14 days after service by the Region, post at its Warren, Michigan office copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and members and former employees and members employed by the Awrey Bakeries at any time since May 14, 2012.

(c) Sign and return to the Regional Director for Region 7 sufficient copies of the notice for physical and/or electronic posting by Awrey Bakeries, if willing, at all places or in the same manner as notices to employees are customarily posted.

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8 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 4, 2013.

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT condition the grant of concessions upon Awrey Bakeries discharging Loraine Whitfield Scussel.

WE WILL NOT in any like or related manner restrain or coerce Awrey Bakeries, or any other employer in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

WE HAVE sent a written notice to Loraine Whitfield Scussel and notified Awrey Bakeries that we have no objection to her employment or selection as a representative for the purposes of collective bargaining or the adjustment of grievances by Awrey Bakeries and that we will not question her reemployment or reinstatement.

WE WILL make Loraine Whitfield Scussel whole for any loss of earnings and other benefits suffered by reason of our unlawful conduct.

WE WILL reimburse Loraine Whitfield Scussel for any out-of-pocket expenses incurred in searching for work.

COUNCIL 30, UNITED CATERING, CAFETERIA
AND VENDING WORKERS, RWDSU/UFCW
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.