

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

DHL EXPRESS (USA), INC.,	:	
	:	
Respondent,	:	
	:	
and	:	Cases 9-CA-079842
	:	9-CA-080777
AMERICAN POSTAL WORKERS	:	
UNION, AFL-CIO,	:	
	:	
and	:	
	:	
AMERICAN POSTAL WORKERS	:	
UNION, CINCINNATI AREA LOCAL	:	
164,	:	
	:	
Charging Parties.	:	

**RESPONDENT DHL EXPRESS (USA), INC.'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

David A. Kadela
Little Mendelson, PC
Fifth Third Center
21 E. State Street, Suite 1600
Columbus, Ohio 43215
Attorney for DHL Express (USA), Inc.

Dated: May 20, 2013

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**RESPONDENT DHL EXPRESS (USA), INC.’S EXCEPTIONS TO THE
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Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, Respondent DHL Express (USA), Inc. hereby submits the following exceptions to the decision and recommended order issued in these cases by Administrative Law Mark Carissimi on April 22, 2013.¹

1. DHL excepts to the ALJ’s finding that on the evening of April 25, 2012, Joshua Flick (“Flick”) was wearing a vest that had “UNION MAN” written on it. (ALJD p. 6)

2. DHL excepts to the ALJ’s finding that on the evening of April 25, 2012, while walking past Richard Eric Landers (“Landers”), Flick pulled on his vest attempting to get Landers to notice the vest. (ALJD p. 7)

¹ DHL Express (USA), Inc. is referred to herein as “DHL” or the “Company.” The American Postal Workers Union and Cincinnati Area Local 164 of the American Postal Workers Union are referred to individually and collectively as the “APWU” or the “Union.” The Administrative Law Judge is referred to as the “ALJ.” The Acting General Counsel is referred to as the “General Counsel.” References to the ALJ’s Decision are abbreviated, “ALJD p. ___.”

3. DHL excepts to the ALJ's finding that Flick observed Landers walk up to Richard Armstrong ("Armstrong") and begin speaking to him on the evening of April 25, 2012, and heard Landers say "vest" as he was pointing to Flick. (ALJD p. 7)

4. DHL excepts to the ALJ's failure to credit the testimony of Landers, Armstrong and Tommy Lee ("Lee") to the effect that Landers and Armstrong did not have a conversation on the evening of April 25, 2012, in the vicinity of Flick. (ALJD p. 7, n.8)

5. DHL excepts to the ALJ's findings that, at a meeting in the administration building on the evening of April 25, 2012: (a) "Armstrong asked Flick if he knew that writing on his reflective vest was against company policy and that Flick would not be permitted to wear his vest in the future"; (b) Flick replied that other employees besides him had writing on their safety vests"; (c) "When Flick asked Armstrong if he could get his own vest and write on it, Armstrong replied that he could"; and (d) Flick responded that he would do that and write "Union Man" on it because he would not stop supporting the Union because of this rule change." (ALJD p. 7)

6. DHL excepts to the ALJ's finding that Landers was "aware of the writing on Flick's vest indicating his for the Union and spoke to Armstrong about it on April 25." (ALJD p. 8, n.9)

7. DHL excepts to the ALJ's failure to credit Armstrong's testimony regarding his meeting with Flick on April 25, 2012, regarding Flick's safety vest. (ALJD p. 8)

8. DHL excepts to the ALJ's speculation that Armstrong would not have decided to adopt the rule prohibiting writing on safety vests and to begin to implement the rule in the middle of a shift "unless Landers had indicated to him his displeasure over the writing on Flick's safety vest." (ALJD p. 8)

9. DHL excepts to the ALJ's finding that Philip Laconte walked over to Flick and began speaking to him on April 26, 2012, at approximately 3:00 a.m. (ALJD p. 8)

10. DHL excepts to the ALJ's finding that Flick responded to Lee's question about the daily safety brief on April 26, 2012, in a voice that mimicked that of a mentally impaired person. (ALJD p. 8)

11. DHL excepts to the ALJ's crediting Laconte's testimony regarding Lee's asking Flick about the daily safety brief and Flick's responses. (ALJD p. 8)

12. DHL excepts to the ALJ's finding that, in their meeting on April 26, 2012, Flick told Armstrong that he had made the statement, "watch out for other retards," in a joking manner and did not mean anything by it. (ALJD p. 9)

13. DHL excepts to the ALJ's finding that, in response to a question from Carla Ford ("Ford") regarding whether he understood why he was being terminated, Flick "responded that he understood that he was being terminated, but that he was not clear as to what the reason was." (ALJD p. 9)

14. DHL excepts to the ALJ's failure to credit the testimony of Armstrong, Ford and Lee regarding what was said at the meeting on April 26, 2012, at which Flick was advised of his termination. (ALJD p. 9, n.12)

15. DHL excepts to the ALJ's finding that the Company harbored animus toward union activity of its employees based upon the Board's decisions in *DHL Express, Inc.*, 355 NLRB No. 224 (2010), and *DHL Express, Inc.*, 357 NLRB No. 145 (2011). (ALJD p. 10)

16. DHL excepts to the ALJ's finding that the Company harbored union animus based upon the Company's allegedly interfering with the distribution of union literature in its cafeteria on May 2, 2012. (ALJD p. 10)

17. DHL excepts to the erroneous factual findings made by the ALJ in concluding that the “abruptness of the discharge and the timing, shortly after Flick indicated to Armstrong that he would continue to be a strong union advocate, is persuasive evidence that the Respondent’s motive in discharging Flick was his union activity,” including his errors in finding that on April 25, 2012, Landers observed Flick wearing a safety vest with the words “UNION MAN” written on it and discussed it with Armstrong, and that when Armstrong informed him that writing was no longer permitted on vests, Flick responded that “he would buy his own safety vest and write ‘Union Man’ on it and that the change in policy would not stop him from supporting the Union.” (ALJD p. 10)

18. DHL excepts to the ALJ’s findings that the Acting General Counsel established a prima facie case under *Wright Line*. (ALJD p. 11)

19. DHL excepts to the ALJ’s finding that the burden shifted to the Company to establish that it would have terminated Flick regardless of his union activities. (ALJD p. 11)

20. DHL excepts to the ALJ’s determination that to meet its *Wright Line* burden, an employer must establish that it has consistently and evenly applied its disciplinary rules. (ALJD p. 11)

21. DHL excepts to the ALJ’s finding that the situations surrounding the terminations of the other employees whom the Company has terminated for insubordination and similar misconduct was “quite different” from that of Flick. (ALJD p. 11)

22. DHL excepts to the ALJ’s finding that “there is no evidence that the Respondent has discharged other employees for engaging in conduct similar to that of Flick.” (ALJD p. 11)

23. DHL excepts to the ALJ’s conclusion that the Company did not meet its *Wright Line* burden. (ALJD pp. 11, 14)

24. DHL excepts to the ALJ's reliance, in finding that the Company unlawfully terminated Flick, upon the fact that the Company did not produce any documents regarding its reasons for terminating Flick. (ALJD pp. 11, 14)

25. DHL excepts to the ALJ's reliance, in finding that the Company unlawfully terminated Flick, upon evidence that Flick had a friendly relationship with Lee, that Flick and Lee joked about a variety of issues, and that they sometime mimicked the voice of a mentally impaired person from the movie "Scary Movie." (ALJD p. 11)

26. DHL excepts to the ALJ's reliance, in finding that the Company unlawfully terminated Flick, upon evidence that Lee did not inform Flick that his responses to the question about the safety brief bothered him, and that Lee did not recommend that any disciplinary action be taken against Flick. (ALJD p. 11)

27. DHL excepts to the ALJ's findings that the circumstances surrounding the terminations of Joseph Miller, John McBroom, Michael Glacken, Thomas Schroerer, Joshua Snowball, and Michael Williams were materially different in kind and nature from those surrounding Flick's termination and that the termination of those employees does not support a finding that Flick would have been terminated regardless of his union activities. (ALJD pp. 12-14)

28. DHL excepts to the ALJ's reliance, in finding that the Company unlawfully terminated Flick, upon evidence that "Flick had only one chargeable accident during his employment and scored well on safety tests." (ALJD p. 14)

29. DHL excepts to the ALJ's reliance, in finding that the Company unlawfully terminated Flick, upon the absence of evidence that the Company had discharged another

employee with a safety record similar to that of Flick or discharged any other employee for not knowing the answer to a question about what the daily safety brief contained. (ALJD p. 14)

30. DHL excepts to the ALJ's finding that Flick's termination "did not occur according to the Respondent's normal processes." (ALJD p. 14)

31. DHL excepts to the ALJ's finding that Flick's discharge violated Sections 8(a)(1) and (3) of the Act.

32. DHL excepts to the ALJ's finding that the Company committed a violation of the Act warranting a remedy by prohibiting the distribution of union literature in the cafeteria of its facility on May 2, 2012. (ALJD p. 17)

33. DHL excepts to the ALJ's finding that the Company committed a violation of the Act warranting a remedy by threatening to escort employees from its facility on May 2, 2012, unless they ceased distributing union literature in the cafeteria of the facility. (ALJD pp. 17-18)

34. DHL excepts to the ALJ's conclusions of law. (ALJD pp. 17-18)

35. DHL excepts to the ALJ's recommended remedy. (ALJD p. 18)

36. DHL excepts to the ALJ's recommended order. (ALJD pp. 18-19)

37. DHL excepts to the ALJ's recommended notice to employees.

38. DHL excepts to the Board's considering this case, as the Board is currently constituted, on the grounds that the recess-appointments of Members Block and Griffin are constitutionally invalid, as a result of which the Board does not have the statutorily-mandated three-member quorum required for it to act and therefore does not have the power, authority and jurisdiction to adjudicate this case at this time.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David A. Kadela", is written over a horizontal line.


David A. Kadela
Littler Mendelson, P.C.
Fifth Third Center
21 E. State Street, Suite 1600
Columbus, Ohio 43215
Telephone: 614.463.4211
Facsimile: 614.221.3301
Email: dkadela@littler.com
Attorney for DHL Express (USA), Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May 2013, I e-filed the foregoing Exceptions on the NLRB's E-Filing system and served a copy of it by electronic mail upon:

Daniel A. Goode, Field Attorney
National Labor Relations Board
Region 9
John Weld Peck Federal Bldg.
550 Main Street – Room 3003
Cincinnati, Ohio 45202-3271
Counsel for the General Counsel

Lisa Manson, Esq..
O'Donnell, Schwartz & Anderson, P.C.
1300 L Street, N.W., Suite 1200
Washington, D.C. 2005
Attorney for Charging Party


David A. Kadela