

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

**PHILLIPS 66 (Sweeny Refinery),**

**Respondent,**

**and**

**Cases 16-CA-087373  
16-CA-089250 and  
16-CA-089036**

**INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL  
UNION NO. 564,**

**Charging Party.**

**RESPONDENT PHILLIP 66'S REPLY TO  
GENERAL COUNSEL'S ANSWERING BRIEF TO PHILLIPS 66'S EXCEPTIONS**

Respondent Phillips 66 ("Phillips") submits this Reply to the Acting General Counsel's Answering Brief to Phillips' Exceptions in the above-referenced cases, and respectfully shows the Board as follows:

**ARGUMENT**

**A. The record does not support the ALJ's determination that Schroller unlawfully threatened Bennett.**

General Counsel attempts to downplay Schroller and Bennett's friendship by claiming the two of them were not friends at the time they engaged in the conversation at issue. This is simply not true. Bennett did not deny he and Schroller were friends, but rather testified that he "guessed" the filing of the unfair labor practice charge "may have caused a little bad feelings." (Tr. 82:9-16). The friendly nature of their relationship at the time of the discussion is further evidenced by the fact Bennett himself testified that he considered Schroller a friend. (Tr. 75:7-8).

General Counsel's argument that Schroller's observation that lead operators could become salaried was inherently threatening is similarly unfounded. General Counsel speculates, without citing any record evidence or authority, that making lead operators salaried "could constitute a significant and detrimental change in benefits for operators." Answering Brief at 13. However, there is no evidence in the record to support this assumption. Moreover, not only is there no record evidence that making lead operators salaried would have a negative impact on operators, but there is likewise no evidence that Bennett considered such a change to be adverse. General Counsel proclaims that Bennett told Schroller "he would abandon his lead position if he were made salaried." *Id.* However, General Counsel does not cite the record to support this claim, no doubt because there was no testimony that Bennett made such a comment.

In reality, the record evidence demonstrates the ALJ's determination that Schroller unlawfully threatened and/or coerced Bennett in violation of Section 8(a)(1) is contrary to the evidence and the applicable case law. The General Counsel did not put on any evidence whatsoever that called into question whether lead operators at Phillips' other refineries are salaried; nor did the General Counsel put on any evidence as to whether the lead operators at the Sweeny refinery work any overtime. Because the undisputed evidence establishes lead operators at some of Phillips' other refineries are in fact salaried, Schroller's statement was hardly a misrepresentation or threat, but rather constituted a "prediction . . . carefully phrased on the basis of objective fact" that conveyed Schroller's "belief as to demonstrably probable consequences beyond his control." *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969). Such a statement is protected by the First Amendment and cannot, as a matter of law, amount to a violation of Section 8(a)(1).

**B. The record does not support the ALJ’s determination that Cromwell unlawfully interrogated Bush.**

General Counsel erroneously claims Cromwell’s purpose in meeting with Bush was to campaign against the Union. Answering Brief at 14. There is no evidence to support this assertion, as the record evidence clearly shows it was Bush — not Cromwell — who initiated the meeting by asking Cromwell if she would come along with him on a ride to see where the hydrilla plants were infesting the canals. (Tr. 115:14-116:8).

General Counsel’s claim that Cromwell and Bush were not on a friendly basis is similarly unfounded. Bush testified that he has a good relationship with Cromwell and that “she is a fine supervisor — one of the best I’ve had.” (Tr. 106:4-6). Moreover, Bush admitted Cromwell did not threaten or intimidate him, raise her voice, tell him anything he felt was untrue or inaccurate, ask how he was going to vote, or say anything that affected how he voted. (Tr. 105:4-8, 106:2-18, 106:24-107:3). At no point during their conversation did Bush attempt to get out of the vehicle or tell Cromwell he did not want to discuss the organizing campaign. (Tr. 105:12-106:1). While General Counsel attempts to downplay these facts as “low [in] relevance,” the fact of the matter is that the record evidence establishes Bush and Cromwell had a good relationship, and nothing Cromwell said to Bush caused him to feel threatened or coerced.

Contrary to General Counsel’s claim, the fact that Bush asked Cromwell if he could ask her a “personal question” — whether she would be telling him the same thing if he were her relative — does not prove Bush felt threatened or coerced by Cromwell. If anything, Bush’s characterization of the question as “personal,” together with the substance of the question (essentially asking that she treat him like a family member), shows he felt comfortable with Cromwell and trusted she would be honest with him. The nature of their friendship is further evidenced by the fact Bush invited Cromwell to come down and eat lunch with him. If Bush had

felt threatened or coerced, he would not have asked her a personal question, nor would he have invited her to lunch.

**C. The record does not support the ALJ's determination that Phillips unlawfully interfered with the Union's organizational activities.**

The Union's claim that HR Director Saiz told Fire Chief Peterson he did not want a new union conducting an organizing event on company property is a blatant distortion of the record. Nothing in the record suggests Phillips' disapproval of the barbecue had anything to do with the fact it was being hosted by a "new union" or that the event was held in conjunction with the Union's organizing campaign. In reality, this was not even a "new" union, as this union in fact represents other employees at the Sweeny Refinery. This is a speculative, conclusory allegation that finds no support in the record.

General Counsel makes much of the fact Phillips has allowed other Union activities at the firehouse, but speculates Phillips denied the Union access in this instance due to the fact the barbecue was an organizing event. This argument is flawed for two independent reasons. First, the fact that Phillips has allowed several other Union activities at the firehouse in the past undermines, rather than supports, the General Counsel's claim that Phillips had any discriminatory animus toward the Union. It makes no sense that Phillips would regularly allow Union meetings to be held at the firehouse, but deny the Union the use of the firehouse in this instance to conduct Union-related activities.

Second, General Counsel is comparing apples to oranges. In reality, there is no evidence in the record that **similar activities** have been held at the firehouse. Indeed, the only other activities held there consisted of small group meetings, and no evidence that any food was served. In order to show discriminatory animus, General Counsel would have to prove Phillips has permitted events similar to barbecue in size and scope, but disallowed such an event in this

instance. There is simply no evidence in the record sufficient to make this showing or to justify the ALJ's determination that Phillips violated Section 8(a)(1) through its actions.

**D. General Counsel does not dispute that a company-wide posting requirement is unjust.**

General Counsel appears not to dispute that the ALJ's order requiring company-wide posting of the remedial notice is unjust. Again, the ALJ provides no basis in his Decision for requiring the notice to be posted at all of Phillips' numerous refineries throughout the United States, as there is no allegation that Phillips engaged in "widespread or flagrant" violations of the Act. There is no evidence that the underlying allegations involved a nationwide guideline or practice or that the actions at issue in any way extended beyond the confines of the Sweeny Refinery.

**CONCLUSION**

The determinations by ALJ as set forth in Phillips' exceptions are not supported by the record evidence or the law. Phillips therefore requests the Board sustain its exceptions to the adverse findings of fact, conclusions of law, and/or policy determinations of the ALJ, and grant Phillips such other and further relief to which it is entitled.

Respectfully submitted,

**OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.**

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**ATTORNEYS FOR RESPONDENT**

**CERTIFICATE OF SERVICE**

I certify that on June 4, 2013, a copy of the foregoing document was e-filed via NLRB.gov. A copy of this document was also served upon Dean Owens on behalf of General Counsel, 1919 Smith Street, Houston, Texas 77002, via Federal Express; and one copy to Charles Singletary via email @ [charlie@local564.com](mailto:charlie@local564.com).

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