

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

CARAVAN KNIGHT FACILITIES MANAGEMENT, INC.

Respondent Employer

and

CASE 07-CA-081195

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO,
AND ITS LOCAL 1700**

Respondent Unions

and

CASE 07-CB-082391

ARETHA A. POWELL, an Individual

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT EMPLOYER'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE DECISION**



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Counsel for the Acting General Counsel (CAGC), pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Answering Brief.

I. Procedural History

On April 3, 2013¹, Administrative Law Judge Michael A. Rosas issued his decision and dismissed the Complaint in this matter in its entirety. On May 31, CAGC filed a number of exceptions to the ALJ's Decision. On June 14, Respondent Employer filed cross-exceptions and a brief in support. CAGC respectfully requests that Respondent Employer's cross-exceptions be denied in their entirety and responds as follows:

II. Respondent Employer Cross-Exception 1: Walle's Investigation was flawed.

The ALJ found that Respondent Employer's site manager Shoun Walle's investigation was flawed, noting that there was no credible explanation by Walle as to whether he even considered the testimony of employees other than union officials Tanner and Faircloth regarding the alleged threat, even though the ALJ credited a number of witnesses who stated that they did not witness a threat or altercation, or that Powell never threatened Tanner. (ALJD P 8, L 13-15, FN 36; P 11, L 15-16, and 22-23) The record evidence supports a finding that the investigation was flawed, and the ALJ's determination as to Walle's credibility regarding the statements he relied upon supports his finding that the investigation was flawed.

Respondent Employer's investigation into Aretha Powell's discharge is flawed for many reasons. Walle terminated Powell within a week of the alleged threat, before he interviewed all of the witnesses who were in the room the day the alleged threat was made. Keys testified that

¹ All dates are 2013 unless noted otherwise.

she told Walle she never heard Powell threaten or speak to Balinda Tanner that morning, was not aware of any incidents that morning, and that Walle did not ask her to write a statement. (Tr 217-218, 545, 547-548, 583) Walle asked Larry Moore and Eddie Bullard about the altercation between Powell and Tanner and both said they had not heard or seen any altercation. Walle testified that he never spoke to Nathaniel Hudson initially, and it wasn't until June that he first spoke to him. Hudson told Walle that there was no altercation or threat made by Powell. (Tr 113-118, 217-218, 781-784, 787, 804-805) Patrice Williams, Dishan Longmire, Shantell Thomas and Deborah were never interviewed by the Respondent Employer. (Tr 745, GC 5) Walle failed to immediately remove Powell from the plant after being informed of the alleged threat, indicating he did not immediately consider the threat viable. Upon finding that some of the witnesses allegedly disputed being contacted by Walle he coercively interrogated Keys regarding her statement to the Board Agent. Also, after Walle restarted his investigation in June, Walle never contacted Powell who was one of the three critical witnesses to the alleged threat, but did manage to speak to Faircloth and Tanner again. (GC 5) Finally, on June 20, while Walle was re-investigating the alleged threat, Respondent Employer Human Resource Director Ruth Ann Little informed the NLRB that too much time had passed to reinstate Powell and there was nothing he (Walle) could do. (GC 5) This is especially interesting because Respondent Employer reinstated Kendall Shepard months after he engaged in a tirade against Respondent Union steward Faircloth and a Respondent Supervisor on the plant floor in the presence of Shepard's coworkers and employees of Respondent Employer's customer Chrysler Corporation. Under these circumstances, the investigation was clearly flawed.

Respondent Employer argues that no witness corroborated Powell's version of the events, but that is simply not true. Multiple witnesses including Keys, Bullard, Moore, and Hudson told Walle they never heard a threat made, and Walle, as the ALJ noted, never gave any credible reason as to why he only credited Tanner and Faircloth. (ALJD P 11, L 15-24) Regarding the inadequacy of the investigation, the only reason listed for Powell's May 12 suspension and May 16 termination is that she allegedly threatened an employee on May 11. (GC 8 or 9) No other reasons are given to support the suspension and termination. Any arguments that Walle or Little relied on other behaviors or threats in substantiating the suspension and discharge lack merit. First and most importantly, Little, who consulted with Walle on the suspension and discharge, was not aware of an alleged incident between Longmire and Powell until the hearing in November, 6 months later. (Tr 868)

Second, the bounty statements and threats assertedly made by Powell towards Faircloth and Tanner are not supported by the record evidence. Tanner testified she heard the threats in a conversation with employees Keys, Williams, Harris and Thomas. But Keys, Williams and Harris all testified that they were not involved in any such conversations and heard no such threats, directly contradicting Tanner. (Tr 458-460, 470, 570, 640-641, 773) Any reference to what Thomas said or told Tanner is uncorroborated hearsay, because Thomas did not testify. Third, these alleged unusual behaviors and additional threats assertedly made by Powell are not documented anywhere in Respondent Employer's records. They are not in any discipline issued, nor in any file note, memorandum or email, including Faircloth's and Tanner's May 11 statements against Powell provided to Respondent Employer. (GC 8-9 and RU 10-11) The lack of detail in Faircloth's statement is especially noteworthy because of the detail Faircloth included in her statement against employee Shepard, where she documented several prior instances of

Shepard accosting her, and plant chairperson Davis intervening to speak to Shepard about it on several occasions. (GC 7 D 1-2) Nowhere in Faircloth's May 11 statement against Powell does she mention any prior incidents with Powell.

In addition, it would seem that an experienced human resource professional and experienced site manager would be thorough in reviewing evidence presented to them orally and document it accordingly, if in fact it was shared with them, before they would terminate the livelihood of an employee. This is especially true when the alleged unusual events and threats Powell assertedly made support a discharge decision, and assertedly occurred in the two week period leading up to Powell's discharge.

Finally, it appeared Walle was selective in his investigation. While he claims that he could not rely on the other witnesses who supported Powell that no threat was made because they would not write a statement for him, he asserts he relied on information orally provided to him by Davis, Faircloth and Tanner related to Powell's alleged misconduct, and that were never documented. (Tr 161-162, RU 10 -11) Yet Walle relied on those oral reports and refused to consider all the employees who told him that they never saw or heard an altercation claiming he could not rely on them because they were not written in statements. (Tr 161-162) In addition, there is no evidence that Walle discussed this late discovered evidence of misconduct with Little, who assertedly consulted him on the discharge and jointly approved Powell's termination. (Tr 52, 56) See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (Animus may be inferred from circumstantial evidence such as: (1) timing; (2) pretextual defense; (3) shifting reasons for justifying action; (4) disparate treatment; and (5) a good work record of the discriminatee).

The record evidence establishes that Walle was not credible as the ALJ noted, and that his investigation was flawed.

III. Respondent Employer Exception 2: Faircloth was not in the room when the alleged threat was made.

Respondent Employer challenges the ALJ's credibility resolution that Respondent Union steward Faircloth was not in the room when the alleged threat was made.

It is well established that the Board's policy is not to overrule an ALJ's credibility resolution unless the clear preponderance of all the relevant evidence convinces the Board that the ALJ's findings are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). Based on the record as a whole, the preponderance of all the relevant evidence clearly supports the ALJ's credibility resolution in this matter, crediting Hudson's testimony *that Faircloth was not in the room*, and, therefore, it should not be overturned.

The ALJ stated in his decision:

"I find, based on the credible testimony of Hudson that Faircloth was not present at the time." (Emphasis added)

ALJD P 8, L 5-7, FN 35 referencing the alleged threat.

Hudson credibly testified that he saw Faircloth entering the room as he was on his way out, and as Faircloth was just entering the doorway to the cage area as he was leaving. (Tr 785, 795-796). Further, Respondent Employer concedes that Powell testified that after she spoke to Tanner on May 11 in the breakroom, she got up, tapped Nate (Hudson) on the back, and said "that's a man, that's a man". Powell further stated that *all* Tanner said is that ain't gonna

happen. (Tr 473) Powell clearly places Hudson in the room when the conversation occurred in the picnic table area. Hudson clearly places Faircloth entering the room as he was leaving. Respondent Employer's assertion that there was a separate conversation that occurred after Hudson left is speculative, and a back door attempt to get around a credibility resolution. Clearly, the ALJ's crediting Hudson in this matter is supported by the record evidence, and the weight of all the relevant evidence establishes that the ALJ was correct in crediting Hudson and Powell by finding that Faircloth *was not present* when the alleged threat was made.

IV. Conclusion

For the reasons advanced above, CAGC respectfully asks that Respondent Employer's cross-exceptions be denied in their entirety, and that the relief requested in CAGC's Exceptions be granted in its entirety.

Dated at Detroit, Michigan this 27th day of June 2013.



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**RE: Caravan Knight Facilities Management, Inc.
Case 07-CA-081195
and
International Union, United Automobile, Aerospace, and Agricultural Implement
Workers of America (UAW), AFL-CIO, and its Local 1700
Case 07-CB-082391**

CERTIFICATE OF SERVICE

I certify that on June 27, 2013, I caused copies of Counsel for the Acting General Counsel's Answering Brief to Respondent Employer's Cross-Exceptions to the Administrative Law Judge Decision to be served on all parties of record, by electronic mail or express overnight mail upon the following persons, addressed to them at the following addresses:

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