UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

CARAVAN KNIGHTS FACILITIES MANAGEMENT, INC.,
Respondent Employer,

CASE 07-CA-081195

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

CASE 07-CB-082391

And

ARETHA A. POWELL, an Individual,
Charging Party.

Robert Drzyzga Counsel for the General Counsel National Labor Relations Board 477 Michigan Ave, Room 300 Detroit, MI 48226	Aretha A. Powell, Charging Party *In Pro Per* 10026 Rutland Street Detroit, MI 48226
Michael Nicholson, General Counsel Blair K. Simmons, Associate General Counsel UAW International Union Attorneys for Respondent Unions 8000 W. Jefferson Avenue Detroit, MI 48214	Darcie R. Brault (P43864) McKNIGHT, McCLOW, CANZANO, SMITH & RADTKE, P.C. Attorneys for Respondent Unions 400 Galleria Officentre, Suite 117 Southfield, MI 48034 248-354-9650
Daniel G. Cohen (P41735) PILCHAK COHEN & TICE, P.C. Attorneys for Respondent Employer 3062 East Walton Boulevard Auburn Hills, MI 48326 248-409-1900	

RESPONDENT UNIONS' ANSWERING BRIEF IN RESPONSE TO EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

The Charging Party was terminated because she threatened a fellow bargaining unit member with physical harm. The Charging Party rejected a grievance settlement reached by Local 1700 returning her to work. The Charging Party alleged, against the Respondent Unions, violations of Section 8(b)(1)(A), 8(b)(2) and 8(a)(3). On April 3, 2013, Administrative Law Judge Michael A. Rosas issued a decision dismissing the Complaint in its entirety.

Counsel for the Acting General Counsel (hereinafter "CAGC") filed exceptions to the Administrative Law Judge's decision. Specific to the portion of the decision related to the Respondent Unions, the CAGC excepted to the following findings and conclusions:

> 1. ... that Powell conceded the availability of overtime work information in sources other than the posted list. (ALJD P 3, L 27-31, FN 9-10)
>
> 3. … that Powell's behavior was perplexing as to why Powell pursued the posting of the overtime list. (ALJD P 4, FN 16, FN 18)
>
> 5. … that sometime in early May, Powell stated that she wanted to fight Faircloth and offered to pay $100 to anyone who would fight her. (ALJD P 7, L 19-24, FN 42, 45)
>
> 10. … there was no credible evidence to suggest that Davis, Faircloth, Tanner or anyone else from the Local Union exerted undue influence regarding Walle's discharge decision. (ALJD P 9, FN 45).
>
> 11. …that the Union did not violate Section 8(b)(1)(A) because Powell was offered a reasonable deal and turned it down. (ALJD P 13, L 25).
>
> 12. … that the Local Union did not violate Section 8(b)(1)(A) because Tanner and Faircloth both were acting in their capacities as employees involved in, or witness to, and incident and were required to submit statements during the resulting Respondent Employer investigation, and, because they had positions with the Local Union, were not required to refrain from cooperating with a workplace investigation or take some other action, relying on, *IBEW, Local 45,* 345 NLRB 7 (2005); *Building and Construction Trades Council, Local 397,* 132 NLRB 1564 (1961). (ALJD P 13, L 40-45).
>
> 13. … that the Local Union did not violate Section 8(b)(2) by causing or attempting to cause Powell's discharge under *Acklin Stamping Co.,* 351 NLRB

> 1263 (2007), because Tanner and Faircloth were not acting as union agents and that there is no credible proof that they did anything, separate and apart from submitting their required employee witness statements, to cause the Company to terminate Powell. *North Hills Office Services, Inc.*, 346 NLRB 96 (2006). (ALJD P 14, L 8-13).

Exceptions of Counsel for the Acting General Counsel to the Administrative Law Judge's Decision, pp. 2-4.

The ALJ's factual findings and decision are supported by the record evidence and are based upon a proper application of the law.

II. FACTS

Aretha Powell was a bargaining unit employee of Caravan-Knights Facilities Management, Inc. (Respondent Employer, or "Caravan-Knights") worked as a janitor at Chrysler's Sterling Heights Assembly Plant ("SHAP"). The bargaining unit is represented by the UAW Local 1700 (Local Union) and the UAW International Union. ("International Union") Their first collective bargaining agreement ("CBA") was effective December 1, 2009, a year after Powell was hired and remained in effect through November 2012. GC 2, R. 269-270. See also, ALJD P 2, L 31-37, P 3, L 1-2.

Depending on the plant schedule, there could be "mandatory" overtime, where all janitors work overtime, and/or "voluntary" overtime, where janitors volunteer for overtime. R. 71-72. ALJD P 2, L 37-39.

On the third shift, for voluntary overtime, the janitors were "canvassed" to determine who wanted to work. See Ex. GC2, §15 pp. 11-12 of 34. Caravan-Knights would post a sign-up sheet indicating how many volunteers were needed and the volunteers would then sign up, e.g. Ex. RE 20. If there were no volunteers for overtime, then the person with the fewest overtime hours was required to work overtime. R. 132-133, 136. ALJD P 3, L 23-25. Notably, no

employee complaints or grievances were filed over how employees were canvassed or how voluntary overtime hours were filled. R. 137, 971-972.

Request for Posting of the OT Equalization List[1]

The Local Union Steward[2] for Powell's unit, Marge Faircloth, testified that Powell asked to have the Overtime Equalization list[3] posted.[4] R. 1043-1044, 1083-1084. Faircloth brought the issue to the Local Unit Chair, LeVaughn Davis. R. 1085.[5] Davis approached Shoun Walle, the Caravan-Knights Site Manager, and asked that the Overtime Equalization List be posted in the common area. Site Manager Walle agreed and testified he "didn't even think two thoughts about it" that it was not a "big deal." R. 147.

[1] The Complaint alleges that the Respondent Unions refused "to process to arbitration a grievance concerning the discharge" and "attempted to cause and caused Respondent Employer to discharge the Charging Party" "because of the Charging Party's requests that Respondent Employer post overtime and seniority lists as required by the collective bargaining agreement" Ex. GC1¶¶ 16- 25.

[2] Faircloth is a working steward, with about 5% of her time spent on union business and the rest of her time working as a janitor. R. 1044.

[3] The "Overtime Equalization" List contained the number of overtime hours worked or credited per employee so that it could be determined who had the least hours and would be required to work in the absence of volunteers, e.g. Ex. RE 5. The numbers were the same, whether posted or not. R. 79, 1084. ALJD P 3, L 19-23.

[4] The lists posted in the common areas were frequently being ripped down and defaced. R. 90, 145-146, 992-993. However, the janitors could see their hours by looking at the list, asking their supervisor, or by going to the computer. R. 90, 993, 1084. ALJD P 3, L 19-23, 27-29, FN 9.

[5] Davis also worked as a janitor and was limited in the amount of time he spent handling union business.

Powell's request that the Overtime Equalization list be posted (or not) had no effect on the interactions between the Local Union officials and Powell: R. 980-981 (Davis), 1085-1086 (Faircloth), 1132 (Tanner).[6]

The ALJ correctly found that Powell's behavior in requesting that the list be posted was perplexing. ALJD P. 5, FN 18. Powell testified that she **did not want** the Overtime Equalization list posted, but that she had said it was *supposed* to be posted. R. 281, 435-436.[7] Powell testified that on approximately April 11, 2012, she had a conversation with fellow janitors Marquetta Harris, Shantell Thomas and Faircloth. Powell's testimony was that she asked why the Overtime Equalization List was not posted and Faircloth responded that she did not know, "Did you want it posted?" and Powell responded, "It's supposed to be posted." Faircloth then stated she would have to ask LeVaughn Davis. Contrary to Faircloth's testimony, Powell claims that Faircloth offered to talk to Davis and that Powell told her no. R. 279, 417. Powell testified that she was "through with it" after that conversation. R. 418. See ALJD P 4, L 20-24.

However, Powell was not through with it: The ALJ determined that she spoke to Walle directly about the posting of the list on April 12. ALJD P 5, L 20-26.

She also requested that the list be posted, again, on April 16, 2012. Shawn Dean is the UAW Local 1700 Vice President assigned to the Caravan-Knights unit. R.65-66. Dean met with Powell on April 16, 2012, with LeVaughn Davis, the Local Unit Chair. Powell called and requested the meeting, stating she had concerns about the overtime list not being posted. R. 74-

[6] Tanner was a Local Union Executive Board Member and a janitor at Caravan-Knights. She described her responsibilities as attending meetings and voting on things. The Local Union Executive Board Members are not involved in the grievance process. R. 1127-1128.

[7] Powell's limited understanding of the function of the list and the consequences of her drawing a distinction between asking for it to be posted and simply saying that it was *supposed* to be posted, bordered on unreasoned. R. 282-284, 405-406, 409, 414, 440, 445.

75. At the meeting, they talked about the Overtime Equalization list for a couple minutes and Dean agreed that the list should be posted and instructed Davis to get the list posted. R. 77-78.[8] The Employer posted it immediately. R. 979-980. ALJD P 5, L 2-4, P 6, L 6-7.

Powell did not claim she did not get overtime hours to which she was entitled. R. 407-408. Powell was one of the employees with the least overtime hours. R. 358. Her perception – that she was "constantly" working weekends - was not reality. R. 415-416, 446. Powell's concern was that ***she did not want to work overtime***. R. 276-278, 357. ALJD P 4, FN 16, P 5, FN 18, P 5, L 22-25.

Powell also did not want to be assigned to work in "body wash." Powell and Harris apparently determined, at some point in time *after* they requested that the Overtime Equalization list be posted, that there was some relationship between posting the list and being required to work in the body wash assignment. R. 281, 617. ALJD P 4, FN 16, P 5, FN 18.

Powell and Harris then engaged in angry confrontations about why the list was posted even though they had requested it be done. R. 616-617, 1086-1087. Powell admits she was upset

[8] The rest of the meeting involved a discussion of personal issues that were not covered under the collective bargaining agreement. R. 80. ALJD P 6, L 12. The Charging Party had a number of complaints about the way Margaret Faircloth (the Steward) and LeVaughn Davis (Unit Chair) treated her, that she did not like Faircloth, etc. However, Powell did not have specific complaints about her representation, e.g. that the union officials failed to file a grievance or failed to fairly represent her. R. 97-98, 100, 974-977. Apparently, the Charging Party called Davis "arrogant" and they were "heated" with each other. R. 94. The Charging Party admitted "we both was getting loud." R. 294-295. Dean asked Davis to leave the room to diffuse the situation. R. 99. Dean talked to Powell about being respectful. R. 82-85. Dean offered to set up a meeting to work through the personal issues. No one ever called him back to set up that meeting. R. 84-85. Powell admitted that Davis had successfully avoided discipline for her and "got her out" of a lot of write-ups - that Davis "had her back." R. 978. By the time the meeting was concluded, Powell thanked Dean and left. R. 295. She did not ask Davis to file a grievance or ask him to do anything for her as her union representative. R. 979.

that the list was posted. She felt it was blown "out of proportion."[9] R. 436-437. ALJD P 5, L 6 – 13.

Assignment to Body Wash

Powell claimed that the Employer assigned her to body wash for the first time in 2012 on May 5, 2012 in retaliation for having requested that the Overtime Equalization List be posted. R. 297. Relative to the Respondent Unions, she admits she did not ask for a grievance to be filed. Powell testified that she believed the union should have spoken up for her, spontaneously, when she was assigned to the body wash area, even though she also believed that such an assignment was the natural result of the list being posted (as she requested). R. 368, 509-510.

The Week Prior to May 11, 2012

Write-Up for Leaving the Meeting May 10, 2012

Each morning, the janitors gathered in the cage area for a morning pre-shift meeting. In the week of May 11, Lamont Richie, a Caravan-Knights supervisor, told Local Union Unit Chair Davis that Powell had been walking out of the morning meeting and being disruptive. R. 999. Co-worker and steward Faircloth also observed Powell in the morning meetings with headphones on, singing loudly while the supervisor was talking. Faircloth's supervisor asked Faircloth to talk to Powell about it. Faircloth talked to her three or four times because her supervisor asked her to do so. R. 1047-1048. ALJD P 6, FN 25. Management also addressed everyone, without singling Powell out, about being respectful in the meetings. R. 918, 998.

After that directive, Powell was written up on May 10, 2012 for failing to perform her job as designated or assigned. Ex. RE 6(o). The Employer Site Manager, Shoun Walle, testified that

[9] The Charging Party blamed Local Union Unit Chair Davis, in part. She stated that it was Davis' job to investigate before he went to management and requested that the Overtime Equalization List be posted after Faircloth reported to him that Powell said it was supposed to be posted. R. 481. She believed it was Davis' job to "find out the source of everything." R. 482.

he observed Powell on that day, forty to fifty feet away from the morning meeting, looking at the informational board. R. 152. Supervisor Lamont Ritchie testified that he observed Powell leave the meeting while Scott Paulson (another Caravan-Knights supervisor) was conducting the safety talk and that, when questioned at the end of the meeting, Powell could not repeat the safety tip of the day. R. 256-257. ALJD P 6, L 30 - P 7, L 11.

With respect to the Local Union's involvement with the May 10, 2012 write-up, Powell testified that on May 10, 2012, she had contact with Local Union Vice President Shawn Dean and the Local Union President, Bill Parker, about the write-up and that Parker told her someone would get back to her. R. 306-307. ALJD P 7, L 11-13. Powell testified that Unit Chair Davis and Steward Faircloth did get back to her on May 11, 2012. Powell testified that by the end of their conversation she thought "**everything was smoothed out**." R. 317-320.[10] Powell never asked the Union to file a grievance. R. 355, 919, 1049-1050. ALJD P 7, L 14-15.

Parking Lot Threat

Also within the week prior to May 11, 2012, Balinda Tanner testified that she was engaged in conversation with her janitor co-workers, Powell, Patrice Williams and Jackie Keys, in the parking lot. Powell was angry and threatened Faircloth. Powell stated that she wanted to fight Faircloth and then said she would pay someone else $100 to do it. R. 1129-1130, 1132. The next day, Tanner told Faircloth about the threat and told her to watch her back. R. 1131. ALJD P 7 L 19-22. Powell called Faircloth and apologized. As a result of the apology, Faircloth did not make a statement or press a complaint. R. 1050-1051, 1060-1061. Faircloth advised Davis of the threat, but also that Powell had apologized and that she did not want to write a statement. R. 923-924, see also 1133. ALJD P 7, L 20.

[10] The ALJ incorrectly stated that Davis and Faircloth believed that "everything was smoothed out," but this was Powell's testimony. ALJD P 7, L 13-15.

Per Tanner, the next day, Employer Supervisor Ritchie told everyone at the mandatory morning meeting that people have to work together and cannot be threatening each other. R. 1134.

Conflict with ex-boyfriend co-worker May 10, 2012

Powell admitted that she had a physical altercation at the plant with Dishan Longmire (a fellow janitor and Powell's ex-boyfriend) on May 10, 2012 - the day before Powell threatened Tanner. The altercation occurred because Longmire was seen embracing Tanner. R. 434, 452-454. Powell thought Longmire was trying, deliberately, to make her jealous by embracing Tanner. Powell believed that Tanner was against her in some[11] way. R. 454. Powell admitted to pushing Longmire on May 10, 2012 when Powell confronted him about it. R. 455. ALJD P 7, L 25-27.

Bargaining unit employee Longmire approached Local Unit Chair Davis and advised him that there had been an altercation with Powell on May 10, 2012 because he had hugged Tanner. R. 900-901. Davis asked Longmire if he wanted to go to the Employer and write a statement. Longmire did not do so. R. 920-921. Davis advised him to keep his distance from Powell and advised Site Manager Walle and Faircloth of the incident. R. 921-922.

There was widespread knowledge of the Longmire incident amongst Powell's co-workers: Nate Hudson, a co-worker, testified that he was aware of the incident between Powell and her former boyfriend. R. 812. Marquetta Harris testified that she knew there was an altercation between Powell and Longmire on May 10, 2012 and that it was about Tanner. R. 643-644. She knew Powell was angry with Tanner just before the meeting May 11, 2012. R. 645.

[11] Powell stated that she had the incident with Longmire on May 10 and she believed Tanner was against her on that day, but when asked why, she stated because Tanner reported that Powell threatened her. However the threat incident did not occur until May 11. When confronted, Powell changed her answer. R. 454-455.

Marquetta Harris also testified that one of the supervisors told Powell to stay away from Longmire. R. 644-645. Harris admitted at the end of her testimony that Ritchie told Powell to stay away from Balinda Tanner. R. 669. Faircloth was advised of the incident with Powell and Longmire by Shantell Thomas, Longmire himself, and Davis. R. 1058.

Faircloth also heard Powell, in the week before May 11, irate, talking on the phone, making threatening statements to whomever she was speaking in the week before the threat, including "If you're not careful, they're going to be walking all three of us out of here." R. 1051-1052.

The ALJ credited the testimony of the co-workers who indicated Powell engaged in the fight with Longmire because of Tanner and that Powell provided inconsistent and less than credible reasons for the fight. ALJD P 7, FN 33.

May 11, 2012

On May 11, 2012, during the janitor's morning meeting, Powell threatened Tanner ("I see I'mma have to tear off into your motherfucking ass.") R. 1135-1138. ALJD P 8, L 5-7. Tanner worried that Powell would escalate the matter into something further. R. 1137-1140. Faircloth witnessed the threat to Tanner.[12] R. 1062-1066. Tanner was upset and told Faircloth she was sick

[12] Respondent Unions are mindful that the ALJ found that Margaret Faircloth "was not present at the time" based upon the testimony of Hudson, which the ALJ credited. ALJD P 8, FN 35. However, the presence of Faircloth is not inconsistent with Hudson's testimony. Hudson testified he left the scene before Powell and Tanner left, and that he passed Faircloth as she was walking in R. 785, 795. His recollection of what was said was different compared to Tanner *and* Powell and he indicated he did not witness any threat. From the totality of the testimony, it appears Hudson left the scene before the incident. R. 782-784, 787, 795, 796 (describing seeing "commotion" going on from outside the cage area after he left). His testimony is consistent with having left the vicinity before the threat occurred. See also Respondent Caravan Knight Facilities Management, Inc.'s Cross Exceptions to the Administrative Law Judge's Decision.

of being threatened. R. 1066-1067, 1139-1140. Faircloth asked her what she wanted to do and Tanner said she wanted to talk to Unit Chair Davis. R. 1067.

On May 11, 2012, Tanner and Faircloth approached Davis, who was outside the cage and told him what happened. R. 1138-1139. Davis asked Tanner if she wanted to make a statement and she said, "Yes." R. 927. Faircloth advised him that she had witnessed what happened. R. 1068. Davis then went and spoke to Site Manager Walle, letting him know that there was a complaint from some of the janitors that Tanner that was threatened at the morning meeting and that Tanner wanted to make a statement. R. 928-929. ALJD P 8, L 9-10.

Site Manager Walle questioned the witnesses, Tanner and Faircloth. Tanner told Walle that she wanted to have something on record that the threat had taken place. R. 1140-1141. Tanner gave the Employer a truthful statement. Ex. RE8, R. 1142-1143. Faircloth gave the Employer a truthful statement because of Powell's behavior and because if there was a confrontation, she did not want to be at fault for allowing it to escalate. R. 1075. ALJD P 8, L 10-11.

The Employer Investigation that Led to Powell's Termination

The Employer conducted an investigation. Site Manager Walle called people down to the cage, including Keys, Moore and Bullard. R. 173-174, 184. Davis was present when union members were questioned. R. 930-931, 938. Keys and Hudson both indicated they did not have any knowledge of anything happening in the cage. R. 174, 184-186, 547, 560, 939-940. ALJD P 8, L11-12.

Site Manager Walle called Powell down and asked her if she had a verbal altercation with Tanner. She said, "Yes, she did." R. 187. Walle asked Powell for a statement. She indicated she would provide it later. R. 187. Davis, who was present at the meeting, then took Powell to the

union trailer so that she could write her statement in a less stressful environment. R. 932. The two of them talked about what happened. R. 934. Powell wrote a statement for the Employer. Ex. RE7. ALJD P 8, L 26-30.[13]

Site Manager Walle told Local Unit Chair Davis that the Employer was suspending Powell because the statements received showed her as the aggressor. R. 948. Ex. GC8. At the time the employer suspended her, Faircloth and Davis were present. R. 191, 949. Powell refused to sign and provided no explanation on the discipline form. Ex. RU 7. The ALJ indicated that no one "spoke up during the suspension" even though Powell admitted Faircloth told her she would file a grievance. ALJD P 9, L 7-8, cf. R. 327, 398, 492, 509.

The Employer Terminated Powell on May 16, 2012

Powell was terminated on May 16, 2012 for threatening Tanner on May 11. ALJD P 9, L12. See also, Ex. GC9. The ALJ specifically found that the driving force behind the decision to terminate Powell for the threat was his "problem with her attitude." ALJD P 9, L15-16. The ALJ determined that Walle's issues with Powell predated Walle's investigation into the threat and were not in any way connected to her alleged protected concerted activities. ALJD P 11, L 25-31 (dismissing the Section 8(a)(3) charge against the Respondent Employer).

It was unrebutted that no union official, including Balinda Tanner, was involved in the decision to terminate Powell. R. 56-57, 861, 1074. Powell believed the union was involved in the decision to terminate but there is no evidence to support that claim. R. 422-424. The ALJ correctly found that there was no credible proof that the Respondent Unions did anything to cause the Company to terminate Powell. ALJD P 14, L 8-13.

[13] The ALJ credited Powell's version of events and notes that she "downplayed any recent communication with Tanner." Indeed, Powell told Davis she had not spoken to Tanner at all "in a month." R. 322. ALJD P 8, L 26- P 9, L 2. Notably, Powell criticized Davis for failing to investigate her claims even though she was not truthful with him from the start.

Grievance

Steward Faircloth wrote the grievance protesting the termination and reviewed it with Local Unit Chair Davis before she submitted it at the first step on May 18, 2012. Ex. GC 10. R. 954-955. The grievance was timely. R. 194. ALJD P 9, L18-19. Faircloth specifically indicated "unjust termination" and for the relief sought, asked for the immediate reinstatement of Powell. R. 194-195, 1077. [14]

The grievance was denied by management at Step 1, which was not unusual. R. 166. There was no irregularity with respect to the first step of the grievance and no reason to think Faircloth was not acting in good faith. R. 957.

The Local Union advanced the grievance to Step 2. Site Manager Walle met with Local Unit Chair Davis for the Step 2 grievance meeting and the grievance was settled. R. 166, 961, 1025. The resolution was that the Employer would reinstate Powell with no backpay provided she completed an anger management class[15] and submit to a 90 day last chance agreement. Powell would receive the same pay rate and retain her seniority. R. 167, 956-957. *See also* Ex. GC 10. ALJD P 9, L 22-24.

[14] The ALJ found that Faircloth "remained silent" during the first step meeting which was not contested. ALJD p. 9 FN 46. However, the first step of the grievance process does not require or include a meeting. GC Exh. 2, p. 9 of 34. See also, R.1124-1125. Faircloth followed the collective bargaining agreement grievance process just as she customarily did. R. 1077-1078.

[15] The ALJ determined that Davis did not inform Powell that he spoke to a Chrysler EAP representative who could help set up a class, without expense to Powell. R. 958-960. To the contrary, Davis testified he told Powell of the settlement terms and advised her that he was working on getting the class paid for. R. 960-961. However, since the ALJ correctly found that she would have rejected the offer regardless, the credibility assessment is irrelevant. ALJD P 10, FN 51.

Powell rejected the offer. ALJD P 10, L5. Davis tried to convince Powell it was a good deal, over a few telephone calls, but she refused it. R. 962-963. Faircloth also discussed the settlement with Powell. R. 1079-1080.[16]

Powell testified that she wanted the union to arbitrate the grievance. R. 497-498. She felt that if it had gone to arbitration, she would have been reinstated with back pay and without being required to take anger management or to return under a last chance agreement. R. 498.

The Local Union considered the merits of the grievance and all the facts and circumstances and determined that the grievance should be settled on this basis and not be advanced to Step 3. R. 88, 965. The decision to settle the grievance is reached between the contracting parties – The union and the employer, regardless of whether the bargaining unit employee consents. The Local Union assisted Powell with her workplace concerns, represented her in her meetings with the Employer, wrote a grievance to protest her termination, presented the grievance at Step 1, advanced the grievance to Step 2, held a Step 2 grievance meeting and reached a reasonable resolution of the grievance that was, in the Local Union's judgment, more favorable to Powell than if the grievance had been advanced to the next step. Powell simply wanted her grievance advanced all the way to arbitration. She disagreed with the Local Union's determination and settlement.

NLRB Charge

When Powell filed her charge with the NLRB against the Respondent Unions, her allegation was that Faircloth and Tanner complained to the Employer about Powell's actions and caused her termination. R. 392, 394. The Complaint against the Unions include alleged violations of 8(b)(1)(A) (restraint or coercion in the exercise of Section 7 rights), 8(b)(2)

[16] After the first step, Faircloth had no further involvement in processing the grievance except to call Powell to try to convince her to take the settlement after the grievance was settled. R. 1079.

(causing or attempting to cause the Employer to discriminate against the charging party in retaliation for protected concerted activities), and breach of the duty of fair representation.

III. ARGUMENT

The ALJ correctly found that the factual evidence developed at trial was insufficient to support the alleged violations of the Act against the Respondent Unions. 29 U.S.C. Sec. 151 *et seq*.

A. RESPONSE TO EXCEPTION NO. 1: The record supports the ALJ finding that Powell conceded the availability of overtime work information in sources other than the posted list.

Aretha Powell testified that her paycheck stubs indicated the number of overtime hours she worked, which is the information that would be reflected on the Overtime Equalization list. R. 408-409. There was also testimony from others that the information contained on the Overtime Equalization could be obtained by asking a supervisor or checking on the computer system. R. 993, 1084-1085.

Counsel for the Acting General Counsel contends that the ALJ finding that Powell conceded the availability of overtime work information in other sources is erroneous because the ALJ also found that other employees complained about the lists not being posted, inferring that "other employees" could not access the information, and then further inferring that the information was, therefore, not accessible.

First, Powell admitted she never tried to keep track of her overtime hours (R. 408-409), so she would not have had any reason to seek alternative sources of the information. However, she did concede that she was provided the information in her pay stub. Thus, stating that the information was not accessible impeaches Powell's own testimony.

Second, there were no complaints about the 2009 decision not to post the overtime equalization list until Powell and Harris complained in April of 2011. There was also no evidence that any other employees complained besides Powell and Harris. ALJD P 5, L 20-23.[17] Neither Powell nor Harris wanted the list posted. ALJD P 5 FN 16. There was evidence that there were no complaints about how the canvassing and overtime work assignments were made. R. 137, 971-972.

Third, there was certainly no evidence, not even within Powell's testimony, to support the CAGC contention that "the computer tracking system and payroll stub information were not benefiting other unit members because it required knowledge that the systems existed, and could be used." CAGC Brief, p. 3. CAGC may not create new facts on this record, particularly where there is record evidence to the contrary: Faircloth testified that she told employees how to access

[17] The CACG mischaracterizes the record repeatedly and with increasing inaccuracy. For example, at page 2 of its brief, CACG claims that "Powell, as well as other unit employees, were complaining about the assignment of overtime work" (without any citation and without appreciating the fact that Powell and Harris did not want overtime work and did not complain about the *assignment* of overtime work, but rather the *posting* of the Overtime Equalization list). Then at page 3 the CAGC states that "other unit employee**s**, not only Powell, were complaining that overtime and seniority lists were not posted" (referencing the ALJD opinion which refers back to Davis' testimony that Harris (one other employee) also complained about the Overtime Equalization list not being posted). At pages 14 and 15, the CACG states that the reason the list was not posted was because the second and third shift employees were complaining about not receiving enough overtime opportunities. The time period is unclear since the list had not been posted for several years. Notably, none of the citations indicate that "Not only did Powell and Harris lodge complaints, but bargaining unit employees on other shifts also made similar complaints" as stated at page 15 of the brief. The record testimony was to the contrary – there were no complaints that the list was not posted and as soon as there were, the list was posted. Unbelievably, the CACG then states on page 30 that "Powell's complaint regarding overtime equalization was *prevalent* among second and third shift employees" mischaracterizing the cited testimony still further. Not only was there no evidence of the content of the second and third shift employees' "complaints" being similar to Powell and Harris' complaint (that the list should be posted), there was no testimony, anywhere that any such charges were "prevalent." The CACG utterly fails to respect the standard of review which requires it to adhere to the actual record.

the information, by looking at their paycheck stubs and by asking Davis or Walle to pull it up on the computer. R. 1084.

This exception should be denied.

B. RESPONSE TO EXCEPTION NO. 3: Powell's behavior was perplexing as to why Powell pushed the posting of the overtime list. (ALJD P 4, FN 16, FN 18)

The ALJ correctly noted that the complaint alleged the Respondent Unions refused to process Powell's discharge grievance to arbitration and caused the Respondent Employer to terminate her "because" she requested the Company post overtime and seniority[18] lists. ALJD P 12, L 27-34.

Credibility findings should not be overruled "unless the clear preponderance of all of the relevant evidence" demonstrates the resolutions are incorrect. *Standard Dry Wall Products, Inc.* 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3rd Cir. 1951).

The evidence demonstrated that Powell's behavior related to her request to post the list was inconsistent and perplexing. In other words, the basis for the alleged retaliation – the alleged protected activity – changed over time, was irrational, and contained a significant motivational hole.

As stated more fully in the fact section, above, Powell's testimony was irrational and without logical progression. She vacillated from insisting the list should be posted, to stating it was supposed to be but that she **did not want** the Overtime Equalization list posted, etc. The ALJ found that Powell criticized Davis for pursuing the posting issue on her behalf after she insisted that the list was supposed to be posted. ALJD P 6, L 11-12. The ALJ correctly found that her positions did nothing to advance her stated goal of not working overtime or in the body wash

[18] There was no evidence presented at trial related to "seniority" lists.

assignment. The ALJ also correctly noted that Powell lied to the Board about the amount of overtime she was working. ALJD P 5, FN 18.

This record evidence supports the ALJ finding that Powell's motivation in pursuit of the posting of the Overtime Equalization list was perplexing because it was inconsistent with her desire not to work overtime and, in particular, not to perform the body wash assignment. It is also puzzling that she apparently changed her position from wanting the list to be posted, to objecting to the Respondent Unions' efforts to get the list posted (consistent with the collective bargaining agreement), and then to complaining that she was being treated unfairly because she requested that the list be posted. [19] For these reasons, the finding that her behavior was perplexing was well supported by the evidence and the exception should be denied.

[19] CAGC injects into its brief a reference to "complaints about the quality of her representation" which the CAGC contends (now) to be the "primary purpose" of the April 16 meeting. While the ALJ noted that Powell "expressed her displeasure with the Union's representation and wanted to leave the bargaining unit" at the April 16 meeting (ALJD P 6, L 8-9), there was no testimony that the "primary purpose" of the meeting was to complain about her representation as the CAGC asserts. Indeed, the record evidence showed that her **criticisms were personal and not related to her representation** at all. The April 16 meeting involved a discussion of personal issues that were not covered under the collective bargaining agreement. R. 80. The Charging Party had a number of complaints about the way Margaret Faircloth (the Steward) and LeVaughn Davis (Unit Chair) treated her, that she did not like Faircloth, etc. However, Powell did not have specific complaints about her representation, e.g. that the union officials failed to file a grievance or failed to fairly represent her. R. 97-98, 100, 974-977. Apparently, the Charging Party called Davis "arrogant" and they were "heated" with each other. R. 94. The Charging Party admitted "we both was getting loud." R. 294-295. Dean talked to Powell about being respectful. R. 82-85. Dean offered to set up a meeting to work through the personal issues. No one ever called him back to set up that meeting. R. 84-85. Powell admitted that Davis had successfully avoided discipline for her and "got her out" of a lot of write-ups - that Davis "had her back." R. 978. By the time the meeting was concluded, Powell thanked Dean and left. R. 295. She did not ask Davis to file a grievance or ask him to do anything for her as her union representative. R. 979. Powell further testified that on May 10, 2012, she had contact with Local Union Vice President Shawn Dean and the Local Union President, Bill Parker, about her write-up for walking out of a meeting. Parker told her someone would get back to her. R. 306-307. Powell testified that Unit Chair Davis and Steward Faircloth did get back to her on May 11, 2012. Powell testified that by the end of their conversation she thought "**everything was smoothed out**." R. 317-320. Powell

C. RESPONSE TO EXCEPTION NO. 5: The record supports the ALJ finding that sometime in early May, Powell stated that she wanted to fight Faircloth and offered to pay $100 to anyone who would fight her. (ALJD P 7, L 19-24, FN 42, 45).

The ALJ found that:

> ... in early May, Powell was speaking in the parking lot with Balinda Tanner, Patrice Williams and Jackie Keys. During that conversation, Powell stated that she wanted to fight Faircloth and offered to pay $100 to anyone who would fight her. Tanner passed along the comment to Faircloth the next day. Powell, learning that her comments reached Faircloth, apologized to the latter.

ALJD P 7, L 19-24.

The record evidence is consistent with this finding. *Standard Dry Wall Products, Inc. infra.* Balinda Tanner testified that she was engaged in conversation with her janitor co-workers, Powell, Patrice Williams and Jackie Keys, in the parking lot. Powell was angry and threatened Faircloth. Powell stated that she wanted to fight Faircloth and then said she would pay someone else $100 to do it. R. 1129-1130, 1132. The next day, Tanner told Faircloth about the threat and told her to watch her back. R. 1131.

Faircloth testified that both Tanner and another employee, Shantell Thomas, came to Faircloth and told her that Powell threatened to have her beat up for $100. R. 1060. Powell called Faircloth and apologized. As a result of the apology, Faircloth did not make a statement or press a complaint. R. 1050-1051, 1060-1061. Faircloth advised Davis of the threat, but also that Powell had apologized and that she did not want to write a statement. R. 923-924, see also 1133.

Per Tanner, the next day, Employer Supervisor Ritchie told everyone at the mandatory morning meeting that people have to work together and cannot be threatening each other. R. 1134.

---

never asked the Union to file a grievance. R. 355, 919, 1049-1050. Powell never contacted the International to try to resign from the Union despite her awareness of how to do so. R. 506.

The ALJ also considered that Powell had engaged in a fight at work with Dishan Longmire because he embraced Tanner. ALJD P 7, L25-27, FN 33.

These record facts corroborate the testimony of Faircloth and Tanner, which the ALJ credited. The ALJ found Tanner and Faircloth's testimony to be credible and that the testimony of the others did not refute their testimony.

D. RESPONSE TO EXCEPTION NO. 11:[20] The record supports the ALJ conclusion that that the Union did not violate Section 8(b)(1)(A) because Powell was offered a reasonable deal and turned it down. (ALJD P 13, L 25).

The ALJ correctly stated the allegation against the Respondent Unions, that they "refused to process to arbitration" Powell's termination grievance. ALJD P 12, L 27-29.

The duty of fair representation requires a union to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct" *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A union breaches the duty of fair representation "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca* at 190. A union's actions are considered arbitrary under the duty of fair representation "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

The law carefully protects the union's discretion. *Vaca* at 191-193.[21] Arbitrary or perfunctory representation is not established, merely because the Union might have conducted a

[20] The organization of Respondent Union's argument reflects the ALJD rather than the CACG's numbering of the exceptions.

[21] *See generally, Brown v. IBEW Local 58*, 936 F.2d 251 (6th Cir. 1991); *Perry v. Million Air*, 943 F.2d 616 (6th Cir. 1991), *Marantette v. Autoworkers Local 174*, 907 F.3d 603, 615 (6th Cir. 1990).

more thorough investigation, or failed to raise particular arguments in support of a grievance. As the Board has observed, "the issue here is not whether the Respondent discharged its obligations with maximum skill and adeptness, but whether, in undertaking its efforts, it dealt fairly. The duty of fair representation does not require that every possible option be exercised or that a grievant's case be advocated in a perfect manner." *Local 355 Teamsters* (*Monarch Institutional Foods,)* 229 NLRB 1319, 1321 (1977); *Accord, Local 76B Furniture Workers (Office Furniture Service),* 290 NLRB 51, 67 (1988); *Diversified Contract Services,* 292 NLRB 603, 605 (1989). See also *Local 327 Teamsters (Kroger Co.),* 233 NLRB 1213, 1217 (1977) (although Union official did not seize upon possible inconsistencies in witnesses' testimony, "the duty of fair representation in representing employees in grievances does not require that each case be handled with the expertise of a trial lawyer.")

Even if the Union's handling of the situation was mistaken, which is denied in this matter, there *still* would be no breach of the duty of fair representation, for "mere negligence, even in the enforcement of a collective-bargaining agreement, does not breach the duty of fair representation…." *United Steelworkers of America v. Rawson,* 495 U.S. 362, 100 S. Ct. 1904 (1990). Mere negligence, poor judgment or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation. Something more than mere negligence must be established in order to find arbitrary conduct. *Local 195 Plumbers (Stone & Webster),* 240 NLRB 504, 507-508 (1979); *Local 692 Teamsters (Great Western Unifreight System),* 209 NLRB 446, 448 (1974). The wide range of reasonableness affords a union discretion to evaluate the merits and account for conflicting interests of the employees it represents. See *Humphrey v. Moore*, 375 U.S. 335, 349–350 (1964).

In *Vaca*, the Supreme Court made clear that a union is not required to advance every grievance to arbitration: "[W]e do not agree that the individual employee has an absolute right to have [a] grievance taken to arbitration…" 386 U.S. at 191. A union has broad discretion in deciding which grievances it will pursue and how it will pursue them. Within that range of discretion, a union is not required to advocate the employee's position; it may seek an amicable adjustment different than that sought by the employee or agree with the employer regarding the merits of a grievance and refuse to further advance a grievance. *Hotel and Restaurant Employees, Local 64 (HLJ Management)*, 278 NLRB 773 (1986). The Union's handling of the discharge grievance cannot be said to be so far outside a "wide range of reasonableness as to be irrational." *International Brotherhood of Teamsters, Local 101*, 308 NLRB 26 (1992).

On this record, the ALJ correctly found that there was no discernible or credible evidence that the Respondent Local Union proceeded arbitrarily or in bad faith at Step 1 or 2. ALJD P 13, L 17-18.

The ALJ correctly found that Faircloth filed a timely grievance challenging Powell's discharge. ALJD P 9, L18-19. When Powell was terminated, Faircloth prepared a grievance stating that the termination was unjust and that it violated the contract. Faircloth was acting as a Local Union steward in handling Step 1 of the discharge grievance.[22] There was no evidence that she mishandled, botched or sabotaged the grievance. Faircloth was not involved in the grievance after Step 1. Management denied the grievance and declined to reinstate Powell at Step 1.

[22] The ALJ found that Faircloth "remained silent" during the first step meeting which was not contested. ALJD p. 9 FN 46. However, the first step of the grievance process does not require or include a meeting. GC Exh. 2, p. 9 of 34. See also, R.1124-1125. Steward Faircloth followed the collective bargaining agreement grievance process just as she customarily did. R. 1077-1078. Faircloth specifically indicated "unjust termination" and for the relief sought, asked for the immediate reinstatement of Powell. R. 194-195, 1077. There was no irregularity with respect to the first step of the grievance. R. 957.

Per the contract, Ex. GC2, p. 9 of 34: "If the grievance is not resolved in Step One (1), it will be addressed in a meeting between the appropriate Chairperson and Management for resolution schedule within seven (7) working days of Step One (1). If resolution is not forthcoming within seven (7) workdays from that meeting, the grievance will go to Step Three (3)."

The ALJ found that:

> The Local Union proceeded to Step 2. After Davis met with Walle, the Company agreed to settle the grievance by reinstating Powell, with no backpay, on the condition that she complete an anger management class and submit to a 90-day last chance agreement.

ALJD p. 9, L 22-24.

The ALJ found that the terms of the settlement were consistent with past practice.[23] ALJD P 9, L 24-27.

Powell rejected the offer and Davis settled[24] the grievance. ALJD P 10, L 5-6.

The CACG rambles over several pages contending that the Local Union had an obligation to do a variety of things, including meeting with Powell and Tanner and attempting to diffuse the situation (despite the request by bargaining unit member Tanner that the situation be reported to management), re-contacting and meeting with all the witnesses (despite Davis'

[23] The Shepard grievance had been recently resolved on similar terms. Kendall Shepard was terminated for a Group 1 Major Violation after he threatened Margaret Faircloth on June 14, 2011 Ex. RE 14A. The Union filed a grievance on his behalf, which was resolved on a conditional reinstatement. Ex. RE 14B. Mr. Shepard was required to complete twelve anger management classes before he was reinstated, he was also required to submit to a last chance agreement. R. 170. He certified that he completed those classes in December of 2011. He was reinstated. Ex. RE 14C. R. 966-967. ALJD P 9, L 24-27.

[24] This hyperbolic reference to a settlement that was found to be reasonable by the ALJ does not constitute an assertion of error and does not lend any legal or evidentiary support for a claim of error.

presence at the initial interviews), implying that Faircloth had an obligation to advise Powell of her witness statement, etc. culminating with the outrageous assertion that "Davis quickly killed the grievance effectively cutting off her backpay forever" at page 31 of the brief. These arguments were made below and rejected in light of the Local Union's procurement of a reasonable settlement.

The CAGC relies upon the decision in *Pacific Intermountain Express*, 215 NLRB 588 (1974) for the proposition that Faircloth's failure to tell Powell that she wrote a statement about Powell threatening Tanner somehow "obstructed" Powell's ability to defend herself. That case is inapposite. First, the decision in *Pacific Intermountain Express* contains a lengthy factual record in which the ALJ determined that the union was aware that there was a falsified affidavit underlying the decision to terminate and not only did it not advise the charging party, the union affirmatively represented on the record that the charging party may have been provided a copy. The Board found that the charging party was robbed of a "no notice" defense which the union knew to be true. This fact was only one of many facts that indicated bias against the charging party, all of which are distinguishable from the instant case.

Second, even accepting that Faircloth was not present at the time the threat was made, as the ALJ found, Faircloth's statement reflects Tanner's statement and contradicts Powell's statement. Tanner's version was credited by the employer in the decision to terminate and by the ALJ. Therefore, even if Powell had known of Faircloth's statement, it would not have provided her any defense against Powell's own false statement, contrary to the facts in *Pacific Intermountain Express.*

Third, any defense Powell could have raised was rendered moot when she rejected a reasonable settlement.

The CACG also relies upon *Teamsters Local 896 (Anheuser-Busch),* 280 NLRB 565 (1986) in which a union failed to inform its members of changes in their contract which affected terms and conditions of employment, including a new call-in policy. This lack of notice could have been a "potentially persuasive" defense to the charging party who was disciplined for failing to follow the new call in policy. The union was found to have breached the duty of fair representation on this fact as well as many others, including altering documents to make it appear that notice was provided to the charging party. None of the facts in this case are similar to those in *Teamsters Local 896 (Anheuser-Busch).*

All of the other cases cited by the CAGC are distinguishable and not even remot ely similar to the instant case: *Teamsters Local 299 (McLean Trucking),* 270 NLRB 1250 (1984) (Members were not informed of an Employer "work stoppage" notice to which the Union did not reply, subjecting the members to discipline), *Teamsters Local 282 (Transit-Mix Concrete),* 267 NLRB 1130 (1983), enf'd. 740 F.2d 141 (2nd Cir. 1984) (Union failed to notify members of an arbitration award directly affecting seniority and recall rights).

The Local Union wrote a grievance to protest her termination, presented the grievance at Step 1, advanced the grievance to Step 2, held a Step 2 grievance meeting and reached a reasonable resolution of the grievance that was, in the Local Union's judgment, more favorable to Powell than if the grievance had been advanced to the next step. Powell simply wanted her grievance advanced all the way to arbitration. She disagreed with the Local Union's determination and settlement.

The ALJ correctly stated the "duty of fair representation does not grant individuals the absolute right – especially in a case where the Union negotiated a settlement – to have his

grievance taken to arbitration..." ALJD P 13, L 18-21. Powell "was offered a reasonable deal and turned it down." ALJD P. 13, L 25-26.[25]

The CACG's position is that there could "never" be a reasonable deal for Powell even if, as the ALJ found, she threatened a co-worker with physical violence.[26] This position is not consistent with the law which declines to impose such an onerous burden on unions. *Vaca*.

Counsel for the General Counsel also argues that the representation provided to Powell by the Respondent Unions was tainted by hostility over Powell's request to post the Overtime Equalization List. There was no evidence admitted at trial to indicate that Powell's request to have the Overtime Equalization list posted affected the manner in which the discharge grievance was handled.

There was no evidence presented that the only two Local Union officials involved in the discharge grievance were at all bothered by Powell's request to have the Overtime Equalization list posted or that the request in any way affected the Local Union's actions. The unrebutted testimony of the union representatives who handled Powell's discharge grievance was that they had no objection or issue with the Overtime Equalization list being requested or posted. R. 980-

[25] The CACG misrepresents the record in many instances, including, for example, claiming that the ALJ determined that Davis was passive in his approach in the handling of Powell's discharge grievance" at page 30. This statement is directly contrary to the ALJ finding that Davis ultimately negotiated a reasonable settlement for Powell. The ALJ citation actually referred only to Davis' role in *Walle's* interviews of witnesses, not the grievance process.

[26] In its brief at page 30 and 31, the CACG references an incident that occurred after Powell made her charges, the facts of which were disputed and distinguishable as well as post facto. The CACG fails to appreciate that the Respondent Employer, not the Respondent Unions, made the decision as to what discipline would ensue in both instances. These unsupported "facts" do not belong in a discussion of whether the duty of fair representation was breached.

981 (Davis), 1085-1086 (Faircloth). There is simply no evidence of any grudge or hostility arising from it.[27]

The CACG cites to *Glass Bottle Blowers Association, Local 106 (Owens-Illinois, Inc.),* 240 NLRB 324 (1979) in which the duty of fair representation is breached because of "hostility"[28] toward the grievant. In *Glass Bottle Blowers*, the Board determined that the duty of fair representation was breached due to the perfunctory processing of a grievance. Unlike the facts in this case, the ALJ found that there was "considerable backgrounds evidence of hostility ... toward the skilled trades in general" and the charging party, more particularly. Also, the ALJ found that the union resisted filing a grievance and made contemporaneous expressions of hostility during the resistance (refused to file the grievance, forcing the charged party to write his own grievance and stated "all you guys in the Forming Department ... do is whine and cry and file grievances"). The ALJ also found that the Union failed "to confront" the charging party related to the reason the union had concluded that the charging party had waived his operator seniority. Finally, the Board relied upon the finding that the Union indicated its agreement with the Employer's position at grievance meetings without presenting the position of the charging party. The ALJ found that not only did the company acquiesce in the company's position, but agreed with it, without justification. The instant facts are far to the contrary.

---

[27] The ALJ suggests that Davis may have benefitted if the Overtime Equalization list was not posted because he worked a lot of overtime. However, Davis worked a lot of overtime because he volunteered for it and did not mind the body wash assignment. If the Overtime Equalization list was posted, there is no evidence that the workers who preferred not to work body wash or overtime would have suddenly volunteered to do so, or that he would have been prevented from working if he volunteered. ALJD P 2, L 37-39, P 3, L35 – P 4, L10.

[28] The ALJ did not find that any union official was hostile toward Powell, though he did acknowledge that there were communication problems and bad relations between Powell and Tanner and Faircloth.

The CAGC also cites to *Combustion Engineering*, 272 NLRB 957 (1984) (in which a union business manager filed charges against a member related to a heated exchange between them that culminated in threats. The member was assigned to demeaning work fifteen minutes later and fired the next day for "inadequate performance"). This case is distinguishable because the charging party's discharge grievance was handled solely by the business manager with whom he had quarreled and was discontinued after the first step. There was also evidence that the business manager influenced the decision to terminate: He pointed to the exit and told him to leave if he was unhappy, he penalized the worker and filed charge against him with the International, he conducted the investigation regarding whether the decision to terminate was supported by just cause (despite obvious conflict) and the timing of the discharge was circumstantial evidence of influence. Further, the business manager's testimony was inconsistent regarding his knowledge of the discharge decision and not credited.

There is no similar evidence in the instant case. There is no finding that any union official was "hostile" to Powell. The ALJ did not find that Faircloth submitted a false statement as argued by the CAGC at page 32 of its brief. Indeed, the ALJ accepted Tanner's version of events which is what is reflected in her statement. The CAGC engages in hyperbolic misrepresentation when it avers that Faircloth sat "in silence as Powell begged for her job." There is no record support for this outrageous assertion. In addition, Faircloth's involvement in the grievance process ended at the first step, unlike the business manager in *Combustion Engineering.* The facts in the instant case cannot be equated to those in *Combustion Engineering*.

There was no breach of the duty of fair representation in settling the termination grievance and refusing to take the grievance to arbitration under these circumstances, and

therefore no Section 8(b)(1)(A) violation based upon a breach of the duty of fair representation. The exception should be denied.

> **A. RESPONSE TO EXCEPTION NO. 12**: The record supports the ALJ conclusion that the Local Union did not violate Section 8(b)(1)(A) because Tanner and Faircloth both were acting in their capacities as employees involved in, or witness to, and incident and were required to submit statements during the resulting Respondent Employer investigation, and, because they had positions with the Local Union, were not required to refrain from cooperating with a workplace investigation or take some other action, relying on, *IBEW, Local 45,* 345 NLRB 7 (2005); *Building and Construction Trades Council, Local 397,* 132 NLRB 1564 (1961). (ALJD P 13, L 40-45).

The CAGC contended that Tanner and Faircloth acted as Local Union agents and restrained or coerced Powell in violation of Section 8(b)(1)(A) but submitting witness statements against her because she insisted that the overtime list be posted.

The ALJ rejected this contention, noting that the motivation of Tanner and Faircloth in making the statements was personal and unrelated to the overtime list posting, and also determined that the CAGC failed to meet its burden of proving that Tanner and Faircloth acted as Union agents when they submitted their witness statements. ALJD P 13, L 29-47.

Motivation

In this matter, the Complaint alleged that Powell's request that "overtime and seniority" lists be posted was the protected, concerted activity that the Unions sought to restrain. Addressing the issue of motivation, the ALJ correctly found that the problems between the parties related to personal situations that were happening in the workplace, not any alleged protected activity. ALJD P 13, L 33-35.

Powell threatened Tanner because she was angry that Longmire was seen embracing Tanner the night before and was ***unrelated*** to any request that the overtime equalization list be posted (or not) a month prior to the threat. Powell admitted she had a physical altercation with

Longmire on May 10, 2012. Clearly, the threat stemmed from personal issues between Tanner and Powell related to Longmire. The ALJ correctly noted that "There is no doubt that [the Longmire/Tanner embrace] touched off bad feelings between Powell and Tanner." ALJD P 7, L 25-27. The ALJ also found that the credible evidence of coworkers indicated that Tanner engaged in the fight "because of Tanner." ALJD P 7, FN 33. The ALJ credited Tanner's testimony as more credible "than the tentative and inconsistent testimony of Powell" in determining that Powell threatened Tanner. ALJD P 8, FN 34.

There was no evidence that Tanner ***even knew*** about the request to post overtime. R. 480-481. Tanner denied filing a false report of a threat by Powell because she wanted her fired and she denied being upset with Powell because Powell requested the overtime list be posted. R. 1148-1149. **Even Powell admitted that she thought each individual who she claims treated her unfairly had their "personal reasons."** R. 502 (emphasis added).

There was substantial record evidence that Powell's alleged protected activity did not motivate either Faircloth or Tanner in making their witness statements, see discussion above. Moreover, the ALJ found that the "bad relations between Faircloth and Powell" existed "even before the latter raised the issue of posting the overtime list." The ALJ noted that there was evidence that Tanner "knew anything about the overtime list issue." ALJD P 13, L 33-36. These findings, to which the CACG did not except, precludes a determination that Tanner's actions were motivated by Powell's asserted protected activity, as opposed to personal issues between co-workers.

The cases cited by the CACG do not support its argument that the witness statements against Powell were motivated by hostility to her request to post the Overtime Equalization list, see *Paperworkers Local 1048,* 323 NLRB 1042 (1997) and *Town & Country Supermarkets,* 340

NLRB 1420, 1411 (2004), relied upon by the CAGC. In those cases, the Board found that the accusations made against the charged party were bogus and asserted by the union against dissident members because of their protected activity. Here, Powell threatened Tanner and Tanner's version of the events was credited. There was no evidence that Tanner's report of the threat was made in her capacity as a union official or that she even knew of the alleged protected activity engaged in by Powell. There is certainly no evidence that the threat was "not viable" as argued for the first time by CACG in its brief at page 34. Powell had recently threatened to pay $100 to have Faircloth beaten up and engaged in a fight with Longmire then night before. Tanner, Davis and Faircloth all knew about these events.

Agency

The ALJ correctly noted that the CAGC has the burden of proving that Tanner and Faircloth acted as Union agents when they submitted witness statements accusing Powell of threatening Tanner, citing *Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004). ALJD P 13, L 38-40. There was no such evidence presented.

Whether someone acts as an agent must be determined by common law principles of agency. *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 (1991).

> Common law agency principles recognize three characteristics of an agency relationship: (1) the power of the agent to alter the legal relationships between the principal and third parties and the principal and himself; (2) the existence of a fiduciary relationship toward the principal with respect to matters within the scope of the agency; and (3) the right of the principal to control the agent's conduct with respect to the scope of the agency. Restatement (Second) of Agency, Sections 12-14 (1958). The most important of these characteristics is that the principal have the right to control the agent's conduct. The Restatement comments that "if the existence of any agency relation is not otherwise clearly shown, as where the issue is whether . . . an agency has been created, the fact that it is understood that the person acting is not to be subject to the control of the other as to the manner of performance determines that the relation is not that of agency. Restatement (Second) of Agency, Section 14, comment b. See also *Sable v. Mead Johnson & Co.*, 737 F. Supp. 135 (D. Mass. 1990).

Burns International Security Services and United Government Security Officers of America, Local 15, 324 NLRB 485, 490 (1997)

The CAGC sets forth a portion of the holding in *Tyson* in support of its exception. However, the citation has no bearing on the ALJ holding: Even if Tanner and Faircloth were agents of the Local Union for certain purposes, those purposes did not include the writing of their witness statements to the employer. *IBEW, Local 45*, 345 NLRB 7 (2005) (distinguishing a situation when a union who also happens to be a steward acts as an individual from an agent's act). See also, *Building and Construction Trades Council, Local 397*, 132 NLRB1564 (1961) (a steward may not be foreclosed from individual freedom of action simply by reason of his office).[29]

It is very likely the case that under **some circumstances**, Faircloth, and to a lesser extent, Tanner, acted with the authority of Local 1700, e.g. when voting, engaging in union activities, etc. However, under **these circumstances** – the reporting of a workplace threat – CAGC has not submitted any evidence that Tanner or Faircloth acted as union agents when they reported the threat Powell made. Indeed, the evidence was to the contrary:

Neither Faircloth nor Tanner were employees of the Local Union or of the International Union. Powell, Faircloth and Tanner were all bargaining unit employees of Caravan-Knights. As employees of Caravan-Knights, they each gave statements to their Employer about a workplace

[29] CAGC failed to address the holdings in these cases, insisting that on every occasion there is a collective bargaining agreement and union officials who process grievances, then actual and apparent authority exists. Indeed, the logical extension of the CAGC's argument is that once a worker is elected Steward, every action taken by that person is attributable to her labor union – a conclusion which is clearly not supported by the law.

incident they each witnessed while they were at work. In short, they participated in an Employer investigation[30] about a workplace incident.

Tanner was not a Steward and not even a Committeeperson. Tanner was not involved in handling the discharge grievance. When she wrote her statement, Tanner was not acting as an Executive Board member. R. 1148. There was no evidence the Local Union Executive Board was even involved in handling the discharge grievance. In providing her statement to the Employer, Tanner was acting as a bargaining unit employee with Section 7 rights of her own. If a bargaining unit employee is threatened on the job, she certainly has a right to advise her employer of the threat regardless of whether she holds a union position.

Even Powell admitted she could not say whether Tanner was acting as a union officer when she made the statement against her. R. 422.

Faircloth was a steward and a bargaining unit employee. She was a witness to the threat. When questioned by the employer, she gave a truthful statement as a witness and bargaining unit employee also with her own Section 7 rights. Faircloth submitted Ex. RE9. R. 1070-1071. She was not acting as Steward, but as a co-worker, when she wrote it. R. 1073-1074. It should be noted that Faircloth did not have a right to withhold her observations under the Act, as the Employer was not requesting her to disclose information she obtained as a result of her function as Steward. *Cook Paint and Varnish*, 258 NLRB 1230, 1232 (1981).[31]

[30] The CACG contends at page 30 of its brief that it was the Unions' responsibility to investigate the complaint that one of their bargaining unit members threatened another bargaining unit member. This argument has no basis in the parties' contract or in law. It was the Respondent Employer's investigation, not the Unions' investigation. The Union acted appropriately in response to the Employer's disciplinary action when that action was taken.

[31] Contrary to the CAGC's assertions, this case did not involve questions of agency, but rather, whether an employer could obtain discovery of notes that the union steward made in his representational capacity. The Board found that the notes, which reflected the steward's notes of

The CAGC also argues, under the doctrine of apparent authority, that Walle believed that Tanner was "acting in concert" with Davis and Faircloth, and since they all held union positions, they were present to file a grievance, and were "present in their representative capacity," then Tanner was acting as the Local Union. CAGC Brief, p. 26. The CAGC provides no record support for this apparent authority argument because there is none.

Contrary to the unsupported "facts" stated by the CAGC in its brief, Walle did not think either Faircloth or Tanner were acting as union agents when they reported what they saw and heard. R. 189-190.

Walle testified as follows:

> Q. ... Do you ever have any dealings with respect to Ms. Tanner and her position as an executive board member for Local 1700?
>
> A. One day a month I get a letter that says I have to let her out of work at 1 o'clock instead of 2:30, and that's it.
>
> ...
>
> Q. ... was there anything about Ms. Tanner's interactions with you that caused you to believe she was acting as an executive board member of Local 1700 as opposed to someone who witnessed something?
>
> A. No ma'am, not at all.

R. 189, see also 190 (with respect to Faircloth).

The CAGC is not entitled to a post-trial inference of fact that flatly contradicts the record evidence.

---

conversations he had with two employees as he attempted to "straighten out" a dispute between them over a paint spill, were privileged. The evidence included that the two workers "approached" him and "returned" to "discuss further developments." It was clear on those facts that the steward was acting as a steward when he wrote the notes and they were, therefore, privileged. In contrast, Faircloth's statement was provided to the employer as a witness statement and is not arguable privileged.

There is nothing in the record to show that the Local Union or the International Union controlled, instigated, supported, ratified or encouraged Tanner and Faircloth to report to their Employer what they saw and heard in the workplace. *Battle Creek Health System and Local 79, SEIU, AFL-CIO*, 341 NLRB 882 (2004), citing with approval *Kitchen Fresh, Inc. v. NLRB*, 716 F.3d 351 (6th Cir. 1983). When the Local[32] Union did become involved, it was able to effectively redress Powell's termination through the grievance process, as discussed above.

Because the CAGC failed to meet its burden of producing evidence that Tanner or Faircloth acted as union agents when they reported the threat Powell made, the exception should be denied.

B. RESPONSE TO EXCEPTION NO. 10: The record supports the ALJ finding that there was no credible evidence to suggest that Davis, Faircloth, Tanner or anyone else from the Local Union exerted undue influence regarding Walle's discharge decision. (ALJD P 9, FN 45); AND

RESPONSE TO EXCEPTION NO. 13: The record supports the ALJ conclusion that that the Local Union did not violate Section 8(b)(2) by causing or attempting to cause Powell's discharge under *Acklin Stamping Co.*, 351 NLRB 1263 (2007), because Tanner and Faircloth were not acting as union agents and that there is no credible proof that they did anything, separate and apart from submitting their required employee witness statements, to cause the Company to terminate Powell. *North Hills Office Services, Inc.*, 346 NLRB 96 (2006). (ALJD P 14, L 8-13).

The Complaint alleged that Local 1700, through its "agents" Tanner and Faircloth, presented witness statements to the Respondent Employer to cause or attempt to cause Powell's termination because Powell requested that the Overtime Equalization List be posted. ¶¶19-21 and 25.

[32] The International Union was not involved in any of the actions complained of here, whether through its agents or otherwise, and there was no record evidence that the International Union committed any violations of the Act. The ALJ granted the International Union's prima facie motion to dismiss. ALJD P 14, L 15-22. No exceptions were made related to this finding.

Section 8(b)(2) of the Act provides:

> … It shall be an unfair labor practice for a labor organization or its agents—
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) …

A necessary element of a violation of 8(b)(2) is to demonstrate that a labor organization caused or attempted to cause the discharge of an employee. *Acklin Stamping Co.*, 351 NLRB 1263, 1263 (2007). Specifically, there must be proof that the *union* demanded or requested that the employer take adverse action against the employee. *Heavy & Highway Construction Workers*, 280 NLRB 1100 (1986).

As stated above, the ALJ determined that neither Faircloth nor Tanner acted as agents for the Respondent Unions. Turning to the question of causation, the ALJ found:

> Even if Tanner and Faircloth were acting as union agents – they were not – there is no credible proof that they did anything, *separate and apart from submitting their required employee witness statements*, to cause the Company to terminate Powell.

ALJD P 14, L 8-13 (relying upon *North Hills Office Services, Inc.* 346 NLRB 96 (2006).

The ALJ credited Tanner's testimony that the threat occurred, finding the testimony more credible than Powell's. ALJD P 8, FN 34. The CACG failed to except to the finding that Powell made the threat. Even if the CACG had excepted to the finding, there was significant evidence that undermined Powell's credibility. Powell's testimony, particularly regarding the threat to Tanner, was not credible: Powell's version of the events on May 11, 2012, was 1) internally inconsistent, 2) without support from other witnesses, and 3) in conflict with the testimony of other witnesses. R. 310-317.

Internal inconsistencies include the following:

- Powell's written statement to the Employer (Ex. RE 7) did not include a number of things that were contained in her Board affidavit. Powell added to the statement that

she said, "Those who laugh least laugh last." She also added that she touched Nate [Hudson] on the back and said, "That's a man; now that's a man." R. 472-473.

- Powell's notes (handwritten notes produced by General Counsel in response to the Respondent Unions' subpoena) indicated she stated, "Enough is enough" as she was getting up, but she testified at trial that she did not say it out loud. R. 475-476.

- Powell never provided anything to the Company identifying Nate Hudson or Patrice Williams as witnesses. R. 370-371.

- Powell wrote a statement to unemployment telling them what happened on the date of the incident. Ex. RU 17. Powell told the government that it was proved that there was no threat- that there were seven witnesses who supported her (but she could only recall four). She admitted her statement to the government was inaccurate. "Sorry about that." R. 505-508.

Powell claimed that Patrice Williams, Jackie Keys and Nathaniel Hudson were present on May 11, but they did not corroborate her version of events:

Despite Powell's assertion that **Jacquie Keys** was near her, and Keys' claim that she was there "the whole time," Keys denied having heard any of the things *that Powell admitted to saying*. R. 573-574. She stated she did not hear what they were saying and therefore cannot credibly testify that there were no threats. R. 575. Keys could not hear what Powell, Larry and Eddie were talking about and could not make out what Powell was saying. R. 545. She admitted on cross examination that she told Walle that she did not know who was there. R. 567.

Patrice Williams testified she did not hear the threat, but she admitted there was talking going on that she did not hear. R. 741-745, 757. She did not corroborate Powell's claims about specific statements Powell made and reiterated in her statement. R. 772. Ms. Williams could not corroborate Powell's claim that Margaret Faircloth, was not in the room at the time of the threat. R. 754-755, 756.

Nate Hudson also denied hearing most of the things that Powell claimed that she herself said on May 11. He did testify that he heard Powell say, "I'm grown and I haven't got my ass whooped" but he left that out of his NLRB statement. R. 804-805-807. From the totality of the testimony, it appears Hudson left the scene before the incident. R. 782-784, 787, 795, 796 (describing seeing "commotion" going on from outside the cage area). Note: Though he testified he knew Powell was terminated within days regarding the incident in the cage area, Hudson did not approach anyone to report what he saw and/or heard until more than six weeks later. R. 798, 797, 802.

Marge Faircloth denied hearing the statements contained in Powell's statement. R. 1072. Ex. RE7.

Witness testimony conflicted with Powell's claims in many important respects:

- Powell referenced "touching" Nate Hudson on the back as she walked away, but Nate did not. He claimed he left before Powell. Cf. R. 316, 372 and 780-784.

- Jacquie Keys did not remember Nate Hudson being present. R. 544.

- Nate Hudson testified Margaret Faircloth was coming into the room as he was leaving, contrary to Powell's testimony and sworn statement that Faircloth was not in the room. R. 508-509, cf. 784-785, 795.

- Powell testified she was put out that Balinda "got into" her conversation with Larry because Powell wasn't talking to Balinda. R. 479-480. The testimony from others present was that everyone was talking, *infra.*

There are also permissible inferences, based upon the testimony, which may be made relative to credibility:

- Powell testified that she said, "I said something to someone and it got twisted." Powell claimed she was referencing the posting discussion that had occurred a month prior to the May 11, 2012 meeting. R. 469. Powell denied that she was really referring to Tanner telling Faircloth that Powell threatened to beat Faircloth up earlier that week in the parking lot. R. 469-470. Powell's next statement was "I'm grown and I still haven't got my ass whooped." R. 470. This statement suggests she was talking about the threat to Faircloth, not the posting discussion. Her next admitted statement, "Shit never gonna happen," also suggests that the topic of conversation is still related to someone getting beat up as opposed to the posting of an Overtime Equalization List. R. 470-471.

- Powell told a Chrysler employee that Tanner was a "shit starter" on May 11, 2012, before she supposedly knew about the alleged threat. R. 477-479.

- Powell had been in an altercation with Longmire the day before related to him being friendly with Tanner, which provides a more contemporaneous and credible motive for the threat to Tanner. R. 480.

- Powell testified that when she was asked, on May 12, 2012 whether she had "been in a confrontation of any sort in the last [24-48 hours] …" she responded "no." … When told someone said she threatened them, she said "Who? Balinda?" R. 322, 373. If, in fact, Powell was testifying truthfully, Longmire would have been the logical answer, since she admitted to having a physical altercation with him on May 10. If she were really being blindsided by the threat allegation, she would not have immediately guessed the victim correctly.

The weight of the evidence supports the ALJ decision to credit Tanner's testimony that the threat was made.

The ALJ found that Powell was terminated on May 16 for threatening Tanner on May 11. The ALJ also found that Walle considered Powell's bad attitude and personal demeanor in arriving at his decision. ALJD P 9, L 12-16. The ALJ correctly found "no credible evidence to suggest that Davis, Faircloth, Tanner or anyone else from the Local Union exerted undue influence into that decision" ALJD P 9, FN 45. In contrast, the CAGC contends that "representatives acted in their capacity as Union agents when they falsified[33] statements that led to the suspension and discharge" of Powell and that "they" exerted "undue influence" in the discharge decision.

The ALJ found that Walle considered the witness statements, but that the driving force behind his decision to terminate Powell was her attitude. "It is clear that Walle had a significant problem with Powell's attitude and that was the driving force behind his decision to terminate." In other words, Walle made the decision to terminate only partly based upon the statements of Tanner and Faircloth – statements which were not attributable to the Respondent Unions through the principles of agency.

The CACG does not specify any other action taken by the Local Union, other than the statements of Tanner and Faircloth, that it contends was taken in order to cause Powell's

[33] The CACG fails to incorporate the finding that Tanner gave a truthful statement which reflects the testimony that the ALJ credited. The CACG's argument waxes patronizing when it contends that "Tanner, just like all five-year olds, knows it's wrong to lie." The CACG goes on to claim that Tanner's report was "false." Of course, **the person who the ALJ determined was less credible than Tanner was Powell**. Using the CACG's logic, where Tanner's statement is credited and Powell's statement is not – Powell lied. The ad hominem attack on Tanner is entirely without citation to the record, not supported by the record, and not related to any exception proffered by the CACG.

termination. Indeed, it argues that "the only reason relied upon by Respondent Employer in discharging Powell is the threat she assertedly made to Tanner on May 11" CACG Brief, p. 6.

The ALJ correctly concluded that there was no credible evidence that anyone from the Local Union exerted undue influence into Walle's termination decision. ALJD P 9, FN 45. The ALJ conclusion should be affirmed. It is supported by the weight of the credited evidence and the CACG has not demonstrated any error.

IV. CONCLUSION

Respondent Unions respectfully request that the National Labor Relations Board affirm the findings and conclusions of the Administrative Law Judge dismissing the Complaint against the Respondent Unions in its entirety.

Respectfully submitted,

McKNIGHT, McCLOW, CANZANO,
SMITH & RADTKE, P.C.

By: /s/ Darcie R. Brault
DARCIE R. BRAULT (P43864)
Attorneys for Respondent Unions
400 Galleria Officentre, Suite 117
Southfield, MI 48034
(248) 354-9650
dbrault@kmsmc.com

Dated: July 15, 2013

PROOF OF SERVICE

I hereby certify that on July 15, 2013 I e-filed the Respondent Unions' Answering Brief in Response to Exceptions of Counsel for the Acting General Counsel to the Administrative Law Judge's Decision and served same upon:

Aretha A. Powell by First Class U.S. Mail with postage affixed thereon

Daniel G. Cohen via email: dcohen@mi-worklaw.com
Robert Drzyzga via email: Robert.Drzyzga@nlrb.gov

By: /s/ Darcie R. Brault

DARCIE R. BRAULT (P43864)
McKNIGHT, McCLOW, CANZANO,
SMITH AND RADTKE, P.C.
Attorneys for Respondent Unions
400 Galleria Officentre, Suite 117
Southfield, MI 48034
248-354-9650
dbrault@michworklaw.com

P:\UAW\Caravan Knight - Powell\Pleadings\Response to Exceptions.docx