UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

MURTIS TAYLOR HUMAN SERVICES SYSTEMS		
and	**CASE**	**08-CA-061918**
ALTON HILL, An Individual		
MURTIS TAYLOR HUMAN SERVICES SYSTEMS		
and	**CASES**	**08-CA-066225** **08-CA-080403**
SERVICE EMPLOYEES INTERNATIONAL UNION DISTRICT 1199, WV/KY/OH, THE HEALTHCARE AND SOCIAL SERVICES UNION		**08-CA-086181**
MURTIS TAYLOR HUMAN SERVICES SYSTEMS		
and	**CASE**	**08-CA-087325**
CLOVER ENGLISH, III, An Individual		

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWER TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE PAUL BOGAS' DECISION

INTRODUCTION

THE ALJ CORRECTLY DETERMINED RESPONDENT VIOLATED ALTON HILL'S SECTION 7 RIGHTS, MADE AN UNLAWFUL UNILATERAL CHANGE, AND DISCHARGED CLOVER ENGLISH

In its Exceptions, Respondent goes to great length to make it appear that each of Respondent's discriminatory actions taken against union representative Alton Hill occurred in a vacuum. It ignores the record evidence that between July 18, 2011 and September 2011, the Respondent violated the Act seven times.

It is undisputed that Hill was one of four union delegates at Respondent's facility. The record evidence shows that in this capacity, he vigorously represented his co-workers. There is substantial evidence to show that he filed numerous grievances and represented employees during both grievance meetings and administrative hearings. Hill was also a member of the Union's bargaining committee and played a significant role in negotiating successor contracts. (ALJD, p. 17:30-33)

Properly evaluating the record evidence, the ALJ concluded that the record, as a whole, substantiated a finding of anti-union animus. In this connection, the ALJ correctly found that Respondent discriminated against Hill when it: requested Hill provide confirmation of his immigration status, issued Hill a 10-day suspension, initiated a Medicaid fraud investigation, taped off and searched Hill's office, restricted his access to its facilities and required his insurance declaration page. While Respondent contends that these incidents were somehow unrelated, coincidental and insubstantial, the record is clear that Hill's union and protected concerted activities were known to the Respondent and its actions against him were motivated by anti-union animus.

The ALJ correctly determined that Respondent made a material, substantial and significant change to its administrative hearing transcript procedure, in violation of Section 8(a)(5) of the Act, and that Employee Clover English was discriminatorily discharged because of his refusal to sign the hearing transcript, in violation of Section 8(a)(3) of the Act.

Response to Exceptions One, Two, and Three: Weingarten Representation and Alton Hill's Suspension

The ALJ correctly determined that Respondent violated Section 8(a)(1) and (3) of the Act when it suspended Hill for 10 days because of his representation of union member Christina Zeh during an administrative hearing.

Under Weingarten, an employee at a union-represented workplace has a Section 7 right to ask for union representation at an investigatory interview. The union representative is entitled not only to attend the investigative interview, but to provide advice and active assistance to the employee. A union representative cannot be made to sit silently like a mere observer. NLRB. Weingarten, 420 U.S. 251 (1975); Barnard College, 320 NLRB 934 (2003). (ALJD, p. 11:24-30) A union representative's right to participate and give meaningful representation in an interview does not evaporate because the employer does not like the way the representative is advising his member.

On this point, Respondent ignores the Board's guidance in United States Postal Service, 288 NLRB 864 (1988) defining and differentiating protected and unprotected conduct in an investigatory interview. The Board adopted the ALJ's finding that the union steward's actions in an investigatory interview were protected. In that case, the steward attempted to participate in the interview and protect the employee even after the employer asked the steward not to interrupt. The steward's questions challenging the employer were found to be protected.

Here, the ALJ correctly relied on longstanding Board precedent that Hill's conduct fell well within his rights as a Weingarten representative. Hill simply advised his member not to answer vague questions about a potential conflict of interest until the Respondent was more specific.

The cases on which Respondent relies are easily distinguishable and the ALJ's decision clearly demonstrates that those cases involved conduct unquestionably more severe than the conduct engaged in by Hill. (ALJD, p.12-13:-30)

The ALJ correctly found that Hill's actions fall well within the boundaries set by the Board for conduct a steward's conduct in an investigatory interview. It necessarily follows that his 10-day suspension because of his protected activity was unlawful. (ALJD, p. 13:41-42, fn. 12; p. 14:48-50)

In so doing, the ALJ gave appropriate weight to Respondent's human resources manager William Newsome admittance that Respondent suspended Hill to "send a message to Mr. Hill as well as any other union representatives" that during an "investigation that that type of behavior would not be allowed, would not be permitted, but put them also on record that the gravity of such could ultimately…lead to discharge." (ALJD, p. 7:21-38) And, Respondent's 10-day suspension of Hill sent an effective message. At the time Hill was suspended for 10 days, Respondent admits that it was not aware of any suspensions lasting more than five days. (ALJD, p. 7:42-50, p. 8:5-6) The ALJ correctly concluded that "the timing of the suspension – during a 2-month period when Hill was subjected to a barrage of intimidating conduct by Respondent—also tends to support the view that a desire to, in Newsome's words, 'send a message' to 'union representatives' was a motivating favor for Hill's suspension." (ALJD, p. 14:29-33)

Response to Exception 7: Denial of Access

When Hill returned from his suspension, Respondent restricted his free access to a facility to which he previously had access. (ALJD, p. 19:30-41) This denial should be analyzed under the framework set forth in Wright Line, 251 NLRB 1083 (1980). Here, the record evidence is overwhelming that the Acting General Counsel established its prima facie case. Hill was a

union delegate and previously suffered retaliation for his protected activities in the Weingarten incident. Thus, as the ALJ found, Respondent issued him a 10-day suspension, initiated a Medicaid fraud investigation against him, and searched and taped off his office. Respondent also unlawfully demanded that he prove his immigration status. All of this occurred prior to Respondent's decision to deny Hill access to the facility. (ALJD, p. 19:43-48)

The Acting General Counsel having met its initial burden, the burden then shifted to Respondent to show by a preponderance of evidence that it had a legitimate reason for denying Hill access to other facilities and that it would have taken the action even without the protected activity. Hicks Oil & Hicksgas, 293 NLRB 84, 85 (1989). The ALJ rejected Respondent's attempt to demonstrate it would have taken action despite Hill's conduct. First, the ALJ found that the policy Respondent asserts it was enforcing, does not prohibit access to other facilities. Second, Respondent admitted the policy had not been enforced prior to Hill's suspension. In any event, under these circumstances, Respondent's effort to suddenly enforce a policy to restrict access was only triggered by Hill's effort to access a facility after he returned from his suspension. (ALJD, p. 19:51-55; p.20:5-9)

The ALJ correctly rejected Respondent's pretextual reasoning for denying access and found that Respondent's action would "reasonably be expected to discourage Hill's, and other employees', exercise of their section 7 rights." (ALJD, p. 20:8-11)

Response to Exception Four: Medicaid Fraud Investigation and Hill's Office

Respondent admits that it launched a Medicaid fraud investigation of Hill, searched his office, and used caution tape to block it off from other employees; all of this because of Hill's alleged obstructionism during the Weingarten incident. (ALJD, p. 15:15-19) In this connection, Respondent maintains that the ALJ relied only on Newsome's testimony that he was sending a

message to Hill and other union representatives as evidence of animus. However, Respondent fails to acknowledge that the ALJ also relied on ample, independent evidence to support his finding of anti-union animus.

Notably, the ALJ duly considered the fact that while Respondent claimed it was conducting an investigation of Hill's entire team, it searched and taped off only Hill's office. Furthermore, when the Respondent had conducted searches of offices in the past, a union representative was present, but this courtesy was not extended to the Union when the Respondent searched Hill's office. Respondent's justification for searching Hill's office in the first place was related to its investigation of the misconduct allegedly engaged in by Zeh. However, it is uncontroverted that there was no overlap between Hill's team and Medicaid clients with Zeh. As the ALJ found, "Respondent does not attempt to explain how or why Hill would have involved himself in the billing and timekeeping fraud of another employee in another group." (ALJD, p.15:34-55)

In defense of its conduct, Respondent argues that in searching Hill's office, it was not engaged in taking an adverse action against Hill or, in the alternative, that even if this could be viewed as an adverse action, it was an action that Respondent would have taken in any event because it had a history of investigating employees for Medicaid fraud and searching employees' offices in connection with such investigations. Based on these assertions, Respondent maintains that there cannot be a finding of a Section 8(a)(3) violation because there is no evidence of disparate treatment being dealt out to Hill. In the face of these claims, the ALJ correctly concluded that the initiation of the fraud investigation, the resulting search of Hill's office and other conduct directed against Hill were all predicated upon Respondent's animus towards Hill

because he had engaged in protected concerted activity in his representation of Zeh in the initial Weingarten investigation. (ALJD, p. 15:47-54, p. 16:29-31)

Response to Exceptions Five and Six: Insurance and Immigration Status

Respondent does not argue with much vigor that the ALJ erred in finding that it had violated Section 8(a)(1) when it requested that Hill provide proof that he is an American citizen and also that he produce his auto insurance declaration page. The reason for its reticence is not surprising.

The General Counsel met its Wright Line burden for both acts of discrimination. As discussed above and demonstrated throughout the record, there is ample evidence that Hill was engaged in protected activity, that Respondent was aware of that activity, and that Hill's activity was a substantial motivating reason for Respondent's actions.

As the record shows, Respondent's policies mandate that it obtain immigration documentation at the time of hire. It is uncontroverted that Hill had provided that documentation at the time that he was hired. Respondent attempts to justify its decision to require Hill to do again what he had done before is that it had decided to conduct a review of these documents to ensure that all documentation was complete. Respondent's human resources manager Jennifer Harden testified that a decision was taken to review all documentation to ensure that it was complete. The problem for Respondent is that Harden also testified that this process was to be done in alphabetical order. However, contrary to that representation and without explanation, Respondent chose to begin its examination of documentation with Hill. (Tr. 455, 462, 605, 607) (ALJD, p. 18:5-10) Moreover, only after Hill challenged Respondent as to why he had initially been singled out, did Respondent move on to request documentation from other employees. (ALJD, p. 17:5-10) Finally, Respondent's transparent explanation that it was merely a matter of

shoddy execution on its part that explains why it targeted Hill, falls of its own weight. (ALJD, p. 17:47-49; p. 18:5-24)

The same reasoning and analysis applies to Respondent's request for Hill's automobile insurance declaration page. Just two weeks after Hill returned from his unlawful suspension, Respondent demanded Hill provide his automobile declaration page. Hill had a long practice of providing only his insurance card, and was never once questioned. (ALJD, p. 18:31-39) The ALJ noted that Respondent was unable to profess a non-discriminatory reason for requesting Hill produce his automobile insurance declaration page.

Response to Exceptions Eight through 11: Unilateral Change to Administrative Hearing Transcript

The ALJ correctly found that Respondent violated Section 8(a)(5) and (3) when it unilaterally instituted a new requirement that employees sign administrative hearing transcripts, and then terminated employee Clover English when he refused to sign a transcript.

About March 2012, Respondent unilaterally implemented a requirement that employees sign an administrative hearing transcript affirming: "Refusal to acknowledge the veracity or to correct the statement in writing is equivalent to refusal to cooperate with the administrative investigation." (ALJD, p. 28:30-48) In addition to the signature requirement, Respondent also prepared a document which reads as follows: "I acknowledge that refusal to sign the administrative investigation minutes rise to the level of insubordination…The act of insubordination is considered to be impeding the administrative investigation and is a Class III infraction punishable by disciplinary policy 6049 # 10." (ALJD, p. 29:28-36) Respondent did not give the Union prior notice or the opportunity to bargain before implementing these changes and before discharging employee Clover English for failing to follow the unilaterally implemented work rule. (ALJD, p.31:50)

English refused to sign the transcript because he did not believe it was complete or accurate. (ALJD, p. 29:14-20) Thus, human resources manager Newsome ordered English to leave the facility and stated that if English chose not to sign the transcript, he was prohibited from returning to work. (ALJD, p. 30:15-18) Newsome confiscated English's keys and badge, an act the ALJ determined was taken because English refused to sign the transcript. (ALJD, p.30:fn.25) Respondent admitted it had knowledge that English had left messages with Respondent in which English stated he believed he had been terminated. (ALJD, p. 31:17-19) This contradicts Respondent's claim that it had not fired him.

The ALJ correctly determined that Respondent's implementation of this new rule was a unilateral change. The ALJ duly considered Respondent's contract arguments. He analyzed Respondent's management right's clause, which allowed the employer to implement "reasonable" rules. However, he correctly noted that the management's right clause is limited by Section 20 of the CBA which requires Respondent to notify the Union at least 30 days before implementing any such rules. It is uncontroverted that Respondent failed to do. (ALJD, p. 31:5-20)

Once the union did become aware of the new requirement, it demanded to bargain. Respondent refused. (ALJD, p. 31:29-32) This is a classic *fait accompli* and a violation of Section 8(a)(5). Respondent argues that because the union failed to file a grievance, the Union agreed to the change. (R. Br. at 9) This simply is not the law. The Board has held that when an employer fails to provide sufficient notice of a mandatory subject of bargain and instead presents the Union with a *fait accompli*, the Board will not find a waiver of bargaining rights. Pontiac Osteopathic Hospital, 336 NLRB 1021, 1023-1024 (2001); UAW-Daimler Chrysler National Training Center, 341 NLRB 431, 433-434 (2004).

Respondent next argues that the signature requirement is not a "material, substantial, and significant" change to the terms and conditions of employment. (R. Br. at 11) The ALJ correctly relied on NLRB v. Katz, 369 U.S. 736 (1962) and its progeny in rejecting Respondent's assertions. (ALJD, p. 32: 37-54)

Respondent cites Pan Am Grain Co., 343 NRLB 218, 331 (2004) and Goren Printing, 280 NLRB 1120 (1986) in further support of its claim that the Board has held signature requirements not to be substantial changes. However, the signature requirements in those cases did not impose discipline and were routine paperwork in the course of business. In Pan Am Grain Co., employees were required to sign overtime schedules; in Goren Printing, employees were required to sign leave slips. Both of those forms of paperwork are that of routine nature and are also filled out by employees themselves. Here, English was required to sign a transcript he did not type and did not believe was accurate. And, an administrative hearing is not a routine part of employment. This was the first administrative hearing English had attended. The situations are not comparable.

Respondent's last contention – that the signing requirement is not a new policy, but merely an extension of past practice – is equally unsupported and unpersuasive. There is no record evidence of a past practice akin to the requirements newly implemented by Respondent. Indeed, in the past, employees have refused to sign performance evaluations and disciplinary actions without being threatened that this could lead to a finding of a Class III infraction and thus to discipline, including discharge. (ALJD, p. 29:28-36) It is well-settled, as found by the ALJ, that new work rules that threaten discipline are mandatory subjects of bargaining. (ALJD, p. 33:27-32)

An employer acts at its own peril when it implements a unilateral change and an employee is discharged because of that rule. Flambeau Airmold Corp., 334 NLRB 165 (2001), Great Western Produce, 299 NLRB 1004, 1005 (1990). Thus, the ALJ correctly concluded, based on settled law, that Respondent unlawfully discharged English for violating a rule that was unlawfully implemented. (ALJD, p. 34, 36-37) See also, McCullough, 306 NLRB 345,353 (1992).

Response to Exception 12: Quorum

Citing Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281) and NLRB v. New Vista Nursing & Rehabilitation, __ F.3d __, 2013 WL 2099742 (3d Cir. May 16, 2013), *petition for reh'g filed*, Nos. 11-3440, 12-1027, 12-1936 (July 1, 2013), Respondent challenges the authority of the ALJ to issue a decision, the Regional Director to issue the complaint, and the Board's transfer Order of May 21, 2013. Respondent is incorrect on all fronts.

Regardless of the Issue of the Board's Composition, the Acting General Counsel and the Regional Director Have Independent Authority To Act

Regardless of the issue of the Board's composition, the Acting General Counsel has independent authority to issue and prosecute complaints. Bloomingdale's, Inc., 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013) ("[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel.") (citing 29 U.S.C. § 153(d); NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 127-28 (1987); NLRB v. FLRA, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, "[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any 'power delegated' by the Board, but rather directly

from the language of the NLRA." *Id*. Accordingly, contrary to Respondent, both the Acting General Counsel's authority to issue and prosecute the complaint, and, in turn, the Regional Director's authority to do so, are unaffected by any issue concerning the composition of the Board.[1]

The Board's Delegated Authority Remains Valid

Similarly, the loss of Board quorum does not affect the Board's longstanding delegation of authority to ALJs and the Executive Secretary. ALJs have possessed the authority to hold hearings on the Board's behalf since 1936, and the Executive Secretary has handled ministerial tasks, such as the automatic transfer order at issue here, since 1941. *See* General Rules and Regulations, 1 Fed. Reg. 207, 209 (Apr. 18, 1936) (designating trial examiners (now called ALJs) as agents responsible for hearings); Secs. 102.34-35, Board's Rules and Regulations (designating ALJs as agents responsible for hearings); 6 NLRB Annual Report 7 (1941) (creating the executive secretary's office); 7 NLRB Annual Report 9 (1942) (describing the executive secretary's responsibilities); Sec. 102.45, Board's Rules and Regulations ("Upon the filing of the [administrative law judge's] decision, the Board shall enter an order transferring the case to the Board . . . ."). Moreover, the Board has consistently rejected arguments that its agents and delegees cannot act when the Board loses a quorum. *See e.g.*, NACCO Material Handling Group, Inc., 359 NLRB No. 139, slip op. at 1 n.1 (June 21, 2013); Bloomingdale's, 359 NLRB No. 113, slip op. at 1; Stahl Specialty Co., 2013 WL 1228014 (Mar. 26, 2013). Accord New Process Steel, LP v. NLRB, 130 S.Ct. 2635, 2643 n.4 (2010) (stating that the Court's "conclusion that the delegee group ceases to exist once there are no longer three Board members

[1] The General Counsel has delegated the authority to the Regional Directors for issuing complaints. *See* United Elec. Contractors Ass'n v. Ordman, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff'd*. 366 F.3d 776 (2d Cir. 1966).

to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel.") Indeed, since New Process, three Courts of Appeal have held that valid prior delegations of Board authority survive a loss of Board quorum. *See* Frankl v. HTH Corp., 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1821 (2012); Overstreet v. El Paso Disposal, LP, 625 F.3d 844, 853 (5th Cir. 2010); Osthus v. Whitesell Corp., 639 F.3d 841, 844 (8th Cir. 2011).

Dated at Cleveland, Ohio, this 30th day of July 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the following parties were served a copy of the aforementioned brief electronically by e-mail on this 30th day of July, 2013:

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