

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

**UNITED STATES POSTAL SERVICE**

**and**

**Cases 28-CA-068385  
28-CA-075708  
28-CA-077161  
28-CA-077164  
28-CA-078376**

**NATIONAL ASSOCIATION OF LETTER  
CARRIERS, SUNSHINE BRANCH 504,  
affiliated with NATIONAL ASSOCIATION  
OF LETTER CARRIERS, AFL-CIO**

**GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF CROSS EXCEPTIONS**

David T. Garza  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 28  
421 Gold Avenue, Suite 310  
PO Box 567  
Albuquerque, NM 87103  
Phone: (505) 248 – 5130  
Fax: (505) 248 - 5134  
Email: david.garza@nlrb.gov

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In his decision dated September 11, 2013 [JD (SF)-45-13] (ALJD), Administrative Law Judge John J. McCarrick (ALJ) properly found that the United States Postal Service (Respondent) violated Section 8(a)(5) of the Act by unilaterally changing its practice of providing its employees with a representative of their choosing in fact-finding investigative interviews without notice to or bargaining with the National Association of Letter Carriers, Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL-CIO (Union). The ALJ further concluded that Respondent violated Section 8(a)(1) of the Act by: (1) denying employee John Trujillo's request for union representation during a discussion he reasonably believed might result in discipline; (2) threatening its employees with a fact finding investigation because they engaged in Union activities; (3) threatening its employees with unspecified reprisals because they said they would file a charge with the National Labor Relations Board; (4) threatening its employees that it would be futile for them to request a Union representative of their choosing to represent them in an investigatory interview; (5) threatening its employees with

discipline for failing to obey instructions because they invoked their *Weingarten* rights; and (6) threatening its employees by refusing to inform them of the nature of investigatory interviews that they would reasonably believe could result in discipline.<sup>1</sup>

The Acting General Counsel (General Counsel) respectfully submits, however, that the ALJ erred by failing to find that Respondent also violated Section 8(a)(3) and (4) of the Act by cancelling Trujillo's previously approved leave request. Accordingly, pursuant to Section 102.46 of the Board's Rules and Regulations, the General Counsel files this Brief in Support of Cross Exceptions to the ALJD. As set forth in the General Counsel's Cross Exceptions, filed separately, the General Counsel excepts to the ALJ's failure to find that Respondent violated Section 8(a)(3) and (4) of the Act when it cancelled Trujillo's leave.

## **I      FACTS**

On February 23, Trujillo completed a PS Form 3971 that requested 24 hours of leave from March 1 to March 4. (GC 26; Tr. 102-105) Trujillo mistakenly marked the date on the leave request as being as February 24 when he turned the request into his immediate supervisor Rick Oyer (Oyer). (GC 26, Tr. 104) An unidentified supervisor signed and approved the leave request on February 23. (Tr. 104) Trujillo's leave request was later signed and approved by Oyer on February 25. (GC 26; Tr. 103)

On March 1, Trujillo was on assignment for the Joint Alternative Route Adjustment Procedure (JARAP) working on route adjustments at the Main Office Carrier Annex. (Tr. 105-107) In performing the JARAP work, Trujillo was working with his management counterpart,

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<sup>1</sup> United States Postal Service will be referred to as "Respondent." The National Association of Letter Carriers, Sunshine Branch 504, National Association of Letter Carriers, AFL-CIO, will be referred to as the "Union." Transcript citations will be designated as (Tr.), with the appropriate page reference. The General Counsel's and Respondent's trial Exhibits will be referred to as (GC), respectively with the appropriate exhibit number.

All dates herein are 2012, unless otherwise noted.

Supervisor Mel Sanchez. (Tr. 107) While working together in the JARAP office, Trujillo told Sanchez that he was going to take his leave on March 2 and 3. (Tr. 108) Sanchez asked Trujillo if he had an approved leave slip and Trujillo said he did. (Tr. 108-109) Sanchez then asked Trujillo for a copy of his leave slip. (Tr. 108-109) At that time, Trujillo told Sanchez that he was invoking his *Weingarten* rights and wanted Union President David Pratt to represent him. (Tr. 108-109) Sanchez told Trujillo that giving him a copy of the leave slip was not going to lead to discipline and Trujillo told him to put it in writing which Sanchez did. (Tr. 109) At that time, Trujillo showed Sanchez the leave slip that had been approved. (Tr.109) Sanchez told Trujillo, “give it to me, I want it.” (Tr. 109) Trujillo told Sanchez he would show it to him but not give it to him. (Tr. 109-110)

Sanchez left the JARAP room and a short time later Manager Lacy came into the room and asked Trujillo if he had scheduled leave for Friday and Saturday. (Tr. 110-111) Trujillo told her that he did. (Tr. 111) Trujillo told Manager Lacy that he was invoking his *Weingarten* rights and wanted David Pratt to represent him. (Tr. 111) Lacy said in agitated fashion “Are you kidding?” to which Trujillo said “no, I am not”. (Tr. 111)

Immediately after Trujillo invoked his *Weingarten* rights for representation, Lacy became irate and told Trujillo that his leave was revoked and told him to return to his duty station. (Tr. 111) During his career as a city carrier, Trujillo has filed hundreds of Form 3971s with various leave requests. (Tr. 101) Prior to March 1, Trujillo had never experienced having his approved leave revoked by Respondent or revoked in the manner it was. (Tr. 101-102)

In addition to his Union activities as Chief Shop Steward and Formal Step A Designee, Trujillo was very active in filing unfair labor practice charges against Respondent protesting conduct that violated the National Labor Relations Act. (Tr. 99-100) Trujillo has filed quite a

few charges during the 15 years he has served as Formal Step A Designee. (Tr. 99-100) His charge-filing activity has been significant and he has filed as many as 6 charges against Respondent during the year prior to his leave being revoked. (GCX 19-35)

## **II THE ALJ ERRED IN FAILING TO FIND THAT RESPONDENT UNLAWFULLY DISCRIMINATED AGAINST TRUJILLO**

In his decision, the ALJ dismissed alleged Section 8(a)(3) and (4) allegations regarding the revocation of Trujillo's leave based on his finding there was no evidence that Respondent took adverse employment action against Trujillo. (ALJD at p. 15; 38-40) In dismissing the allegation concerning which the General Counsel is taking exception, the ALJ overlooked evidence that established the adverse action element. First and foremost, the ALJ found there was no dispute that Trujillo was an active Union member and officer and this was well known to Respondent and that Respondent was also aware that Trujillo had filed numerous charges against Respondent with the Board. (ALJD at 15: 29-31) The ALJ also found that the evidence established that Respondent had demonstrated animus towards Trujillo's protected activity by threatening him with reprisals for filing charges and for threatening to cancel his leave. (ALJD at 15: 32-33) To this end, the ALJ properly found the General Counsel met its initial *Wright Line* burden regarding these prima facie elements.

The General Counsel respectfully submits, however, that the ALJ erred in dismissing the Section 8(a)(3) and (4) allegations based on his finding there was no evidence that Respondent took any adverse employment action against Trujillo. It is not disputed that the record reflects Trujillo took the requested vacation leave after clarifying with his immediate supervisor and Lacy later in the day on March 1 that he could take the leave. Although Trujillo took the leave, there was a notable period of time between when his leave was revoked by Lacy and when he was later told he could take the leave. It was during this time period that Respondent subjected

Trujillo to consternation and unease that he would not have suffered had he not engaged in protected activity. This included Trujillo having to consider altering his leave plans and enduring the stress of having to make other arrangements. Such circumstances establishes an adverse action element and, taken with the record evidence credited by the ALJ, establishes that Respondent violated Section 8(a)(3) and (4) with its action regarding Trujillo's leave.

### **III. CONCLUSION**

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's erroneous ruling as set forth above, and find that Respondent committed additional violations of Sections 8(a)(3) and (4) as discussed above.

Dated at Albuquerque, New Mexico, this 25<sup>th</sup> day of October 2013.

*/s/ David T. Garza* \_\_\_\_\_

David T. Garza  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 28  
421 Gold Avenue, Suite 310; PO Box 567  
Albuquerque, NM 87103  
Phone: (505) 248 – 5130  
Fax: (505) 248 - 5134  
Email: david.garza@nlrb.gov

## CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS EXCEPTION and GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in UNITED STATES POSTAL SERVICE, Cases 28-CA-068385, 28-CA-075708, 28-CA-077161, 28-CA-077164, and 28-CA-078376, was served by E-Gov, E-Filing, and E-Mail on this 25<sup>th</sup> day of October 2013, on the following:

***Via E-Gov, E-Filing:***

Gary W. Shinnars, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

***Via E-Mail:***

Roderick D. Eves, Deputy Managing Counsel  
United States Postal Service  
1720 Market Street, Room 2400  
St. Louis, MO 63155-9948  
*Email: Roderick.d.eves@usps.gov*

National Association of Letter Carriers,  
Sunshine Branch 504  
124 Monroe Street NE  
Albuquerque, NM 87108  
*E-mail: jessejames504@outlook.com*

*/s/ David T. Garza*

David T. Garza  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 28  
421 Gold Avenue, Suite 310  
PO Box 567  
Albuquerque, NM 87103  
Phone: (505) 248 – 5130  
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