

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS
OF AMERICA (SPFPA) AND ITS
AMALGAMATED LOCAL 444,

Respondent

and

Case 05-CB-099029

CORDARRYL NELSON, AN INDIVIDUAL

Charging Party

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING
MEMORANDUM**

**Katrina H. Woodcock
Counsel for the General Counsel**

I. STATEMENT OF THE CASE

This proceeding involves one charge filed by Cordarryl Nelson, an individual.¹ The Charge in Case 05-CB-099029 was filed on February 25, 2013. (GC 1-A). Based upon the foregoing Charge, a Complaint and Notice of Hearing issued on May 10, 2013. (GC 1-C). Respondent filed an Answer to this Complaint that was received in the Region on May 22, 2013. (GC 1-E). The hearing in this proceeding occurred on July 29, 2013, before Administrative Law Judge Michael A. Rosas (ALJ). On September 24, 2013, the ALJ issued his decision (ALJD), in which he found that Respondent, by reporting Nelson's protected concerted activity to Respondent's client, NASA, and divulging Nelson's confidential tape recording of his conversation with the Respondent's client, attempted to cause and caused the Employer to discipline and discharge Nelson in violation of Section 8(b)(2) and (b)(1)(A) of the Act.

On November 5, 2013, Respondent filed Exceptions² to the Administrative Law Judge's Decision and Memorandum of Law in Support. Counsel for the General Counsel files this Answering Brief in response to Respondent's Exceptions and in support of the ALJD.

¹ All dates are 2012 unless otherwise indicated. Hereafter, the National Labor Relations Board will be referred to as the "Board" and the National Labor Relations Act as the "Act". The National Aeronautics and Space Administration will be referred to as "NASA"; Security Support Services, Inc. will be referred to as "Respondent," "Employer" or "S3"; International Union, Security, Police and Fire Professionals of America (SPFPA) and its Amalgamated Local 444 will be referred to as "Respondent" or "the Union". With respect to the record developed in the case, the transcript will be designated as "Tr."; the General Counsel's exhibits as "GC"; Joint exhibits as "JT", Respondent's exhibits as "R", and Respondent's Exceptions as "REX", respectively. References to the Administrative Law Judge Decision will be cited as "ALJD" followed by the appropriate page designation and line number(s).

² Respondent was required under the NLRB's Rules and Regulations Sec 102.46(b)(1) to "set forth specifically the questions of procedure, fact, law or policy to which exception is taken..." Here, the first three Exceptions (Counsel for the General Counsel has enumerated Respondent's Exceptions in the order listed) lack any specificity and fail to comply with the requirement of the above-cited section. Thus, based on 102.46(b)(2), the first three Exceptions should be deemed waived and the Exceptions should be disregarded.

II. ISSUES PRESENTED

By its exceptions, Respondent seeks to have the Board disregard the record evidence, stipulated facts, and the well-reasoned credibility determinations of the ALJ concerning Respondent's unlawful conduct which is a violation of Section 8(b)(1)(A) and derivatively, 8(b)(2). Respondent seeks to have the Board overturn the credibility determinations of the ALJ, as well as disregard his well-supported findings of fact and conclusions of law. Respondent's exceptions are without merit and should be denied. The issues raised by Respondent's Exceptions and Memorandum of Law in Support include the following:

- 1) Whether the ALJ ignores or misapplies the record evidence that establishes that the Respondent did not violate the Act by its actions.
- 2) Whether the ALJ's Decision and Order raises substantial questions of law or policy because of the absence of or departure from Board precedent.
- 3) Whether the ALJ incorrectly concluded that the General Counsel met its burden of proving that Respondent violated the Act.
- 4) Whether the ALJ incorrectly determined that Captain Rager informed Charging Party on November 13 that Michael Brunson had reported Charging Party's comments of November 10.
- 5) Whether the ALJ erred in his conclusion that Joe Costanza provided credible testimony with respect to some of the key details of his November 14 conversation with Michael Brunson.
- 6) Whether the ALJ incorrectly concluded that Paul Raudenbush was notified by Michael Brunson or other representatives of Respondent of the existence of the subject recording.
- 7) Whether the ALJ clearly ignored the fact that Charging Party informed other officers who were not representatives for Respondent of the subject recording, and that Charging Party sent a copy of the recording to the Employer prior to learning that a copy had already been provided to NASA.
- 8) Whether the ALJ wrongly concluded that Michael Brunson was not ordered by his superior to turn over a copy of the subject recording.

- 9) Whether the ALJ incorrectly found that Michael Brunson reported Charging Party's conduct to his superiors with the intent to cause the Employer to discriminate against Charging Party for engaging in protected concerted activities.
- 10) Whether the ALJ incorrectly concluded that the Respondent failed to put forth sufficient evidence that Shop Steward Michael Brunson would have taken the same actions regardless of Charging Party's opinion of the union.
- 11) Whether the ALJ failed to recognize how security employees are held to different standards than other non-9(b)(3) employees.
- 12) Whether the ALJ ignored analogous, albeit not directly on-point, Board precedent that is instructive with respect to the duty of employees to report wrongdoing committed by fellow employees.

III. THE ALJ PROPERLY CREDITED THE TESTIMONY OF JESSE RAGER AND JOE COSTANZA, AND PROPERLY DISCREDITED THE TESTIMONY OF PAUL RAUDENBUSH AND MICHAEL BRUNSON REGARDING DETAILS OF CONVERSATIONS AND EVENTS SURROUNDING NELSON'S COMMENTS AND TERMINATION.

In Exceptions Nos. 4, 5, 6, 7 and 8, Respondent challenges the credibility determinations of the ALJ. In support of its exceptions, Respondent makes several different arguments, all of which require the application of the same legal standard. Respondent can only prevail on its numerous, duplicative, and unsupported Exceptions only if the Board is willing to ignore its long established policy of not overruling the credibility resolutions of an administrative law judge, absent overwhelming evidence. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. 1951). Respondent's numerous arguments are not supported by the record and provide no basis for reversing the findings of the ALJ.

In rendering his Decision and Recommendation, the ALJ carefully addressed the credibility of each witness and, where appropriate, addressed any issues that affected his credibility resolutions. Respondent's attempt to pick and choose the testimony of each witness to be credited to fit its own self-serving agenda is indicative of the lack of merit that Respondent's exceptions hold.

For example, in Exception No. 4, Respondent's arguments that the ALJ's credibility resolution should be overturned with respect to the finding that Captain Rager informed Nelson on November 13th that it was Michael Brunson who had reported Nelson's comments is without merit and not supported by the record and the ALJ properly credited Rager's testimony (ALJD p.4, fn.13). Respondent's position that Brunson could not have notified Captain Rager until the morning of November 14th is simply unsubstantiated. The credited testimony on this matter shows that when Nelson arrived at work on the evening of November 13, Captain Rager informed him that NASA Chief of Security Raudenbush wanted to speak to Nelson because Brunson had reported him to Raudenbush (Tr. 57, 93). If, as the Respondent claims, Brunson did not inform Rager or Raudenbush until November 14, there is no possible way for Raudenbush, on the 13th, to request to speak to Nelson about Brunson's report. If Raudenbush was not aware of Nelson's reported comments until the 14th, there would be no reason to request to speak to him on the 13th.

With respect to Exception No. 5, Respondent's arguments that the ALJ erroneously credited the testimony of Joe Costanza regarding the key details of his November 14th conversation with Brunson are without merit and unsupported by the record. The ALJ specifically found that Brunson's testimony was wholly impeached based on numerous inconsistencies between his testimony, incident report and Board affidavit (ALJD p. 5 fn. 15). In

contrast, the ALJ specifically found Costanza, a third party witness with no dog in the fight, to be especially credible regarding the events and conversations he had with Brunson on November 14. (ALJ p. 5 fn. 15; JT. 4). The ALJ properly found that Brunson was the one who initiated the conversation, the time and location of the conversation, and that Brunson had reported that the conversation was “concerning” and further that Brunson failed to report to Costanza that Nelson was off-duty and un-armed at the time. (Tr. 194-197)

In Exception No. 6, Respondent’s arguments that the ALJ erroneously concluded that Paul Raudenbush was notified by Brunson or other representatives of Respondent regarding the existence of a recording Nelson had of his conversation with Raudenbush is equally without merit. In addition to the ALJ’s finding that Brunson was not a credible witness, the ALJ found that Raudenbush’s testimony was equally untrustworthy (ALJD p. 7, fn 23). Further, it is a stipulated fact that Brunson forwarded the recording Nelson had sent him the prior evening to Raudenbush (JE1, Stipulation 9, JE8). This is one of many extensive stipulations entered into by the Respondent prior to the Hearing. Accordingly this exception is clearly without merit and shows how glaring lacking of merit the Respondent’s exceptions are.

In Exception No. 7, Respondent’s argues that the ALJ ignored the fact that Nelson sent a copy of the recording to the Employer prior to learning that Brunson had forwarded it. This factual matter is not disputed and wholly irrelevant to the conclusions the ALJ made that Brunson did in fact forward the recording to Raudenbush (ALJD p.10, Lines 16-17). As again part of the extensive stipulated facts in this matter, and found by the ALJ, Brunson himself did provide the recording to the Employer on November 21. (JT. 8) This variation, as well as the countless others pointed out by Respondent are not substantive and do not undermine the credibility resolutions of the ALJ.

In Exception No. 8, Respondent argues that the ALJ wrongly concluded that Brunson was not ordered by his superior to turn over a copy of the subject recording which Nelson had made during his conversation with Raudenbush on November 14. This exception relies directly on the testimony of both Brunson and Raudenbush, which as described above, the ALJ clearly and correctly found inherently not credible. (ALJD p. 7, fn. 23). In his credibility findings, the ALJ appropriately relied on Brunson's tentative and evasive testimony regarding sending the recording to Raudenbush, as well as Raudenbush's less than credible testimony as to his role in Nelson's termination (ALJD p.8, fn. 23; fn. 32; Tr. 226-227). Further, the ALJ found Raudenbush's memory spotty as to how he learned about the recording, deducing that Raudenbush was attempting to insulate Brunson as his source of information (ALJD p.7, fn.23). Raudenbush's testimony about directing Brunson to email him the recording prior to receiving Brunson's email of the recording is illogical. The objective evidence, including the stipulated facts and joint exhibits of the emails, clearly establishes that Raudenbush did not direct Brunson to provide him with the November 21 email and recording before Brunson sent it to Raudenbush on his own avail (AJD p. 6-7, lines 37-38 and 1-2) . Brunson did not receive the recording from Nelson until November 20 at 8:19 p.m. at the earliest. (JT 1 at Stipulation 8, JT 7(c)). Brunson testified that he doesn't have a home computer so he did not even see or open the email from Nelson until he arrived for his 6:00a.m. shift on November 21. (Tr. 176). By 6:02 am. on November 21, Brunson forwarded the email of the recording to Raudenbush (JT 1 at Stipulation 9, JT 8). Brunson testified that he had no conversations with anyone prior to forwarding the recording to Raudenbush. (Tr. 180). Brunson then contradicted his testimony by testifying that a day or so before Brunson sent Raudenbush the recording, Raudenbush asked him for it. (Tr. 180-181). However, as discussed above, Brunson only received the recording less than 10 hours

before he forwarded the email to Raudenbush and he spoke to no one during the intervening period of time. (Tr. 175-177; 228-229). Raudenbush and Brunson's inconsistent, illogical, and unconvincing testimony with respect to the recording was properly discredited. The ALJ relied on the objective evidence of the timing and dates of the emails as well as the stipulated facts and properly concluded the more plausible explanation of the recording -- that within hours of receiving Nelson's confidential email and recording, Brunson forwarded Nelson's email to Raudenbush without any direction from Raudenbush. (ALJD p. 7, fn23).

Thus, it is clear that the ALJ's credibility findings are well-supported by the record and there is insufficient basis for reversing such findings. Accordingly, Respondent's Exceptions Nos. 4, 5, 6, 7 and 8 must be dismissed.

IV. THE ALJ PROPERLY APPLIED THE RECORD EVIDENCE IN FINDING THE GENERAL COUNSEL MET ITS BURDEN THAT RESPONDENT VIOLATED THE ACT AND THAT BRUNSON REPORTED NELSON'S CONDUCT TO HIS SUPERIORS WITH THE INTENT TO CAUSE THE EMPLOYER TO DISCRIMINATE AGAINST NELSON

In Exceptions No. 3 and 9, Respondent contends that the General Counsel did not meet its burden of proving that Respondent violated the Act and that the ALJ incorrectly found that Brunson reported Nelson's conduct to his superiors with the intent of having the Employer discriminate against Nelson.

First, in regard to Exception 3 and as noted in footnote 2 above, Exception 3 does not state with specificity the portion(s) of the ALJD to which Respondent objects, and fails to meet the requirements of 102.46(b)(1). Accordingly, it should be disregarded.

As the Board held *Ironworkers Local 340 (Consumers Energy Co.)*, 347 NLRB 578, 579 (2006),

To establish a prima facie case under *Wright Line*, the General Counsel must establish that [the employee's] . . . protected concerted activity was a substantial or motivating factor in the Respondent's adverse employment actions. . . . If the General Counsel makes the required initial showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of [the employee's] protected activity. *Id.*

First, the ALJ correctly found by a preponderance of the evidence that Nelson's dissident union activity was a motivating factor in Respondent's instigation of his discipline and discharge. Nelson's open and vocal dissident union activity in supporting a rival union was indisputably known to the Respondent. (ALJD p. 9, lines 37-40; Tr. 23-46, 120-126, 132-134, 149-151, 166-167, 245-246). The evidence clearly supports the finding that Brunson was motivated by his interests in defending the Union's status as the bargaining unit's employee's labor representative. Respondent's discriminatory motive in reporting Nelson's profanity was clearly established by the fact that Brunson voluntarily reported Nelson to Costanza who was the client and not Nelson's employer (ALJD p.10, lines 1-10; Tr. 194-199, 207-208; JT. 4). Notwithstanding the fact that Brunson admitted that Nelson's conduct was not threatening (Tr. 155), he still voluntarily provided an exaggerated version of events, and equally failed to include the fact that Nelson was off duty and not armed at the time, intentionally leading Costanza to erroneously believe that Nelson was armed and on duty at the time the comments were made (Tr. 197).

Further, Respondent knew that the recording that Nelson provided to the Union was confidential (JT 1 Stipulation 8, JT 7(b)), yet Brunson forwarded Nelson's email and recording to Raudenbush shortly after receiving it from Nelson, reasonably foreseeing that Nelson would face discipline and/or discharge for such comments.

Respondent's Exception No. 9 stating that the ALJ incorrectly concluded that the Respondent failed to put forth sufficient evidence that Brunson would have taken the same actions regardless of Nelson's opinion of the union is also wholly without merit. As the ALJ

correctly found, once General Counsel met its burden of establishing a prima facie case, the burden then shifted to Respondent to prove it would have taken the same action regardless of Nelson's dissident union activities. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The ALJ correctly found that the Union failed to meet its burden. The record evidence shows that Brunson did not consider Nelson to have engaged in misconduct (Tr. 155), nor was he directed to turn over the tape recording Nelson had provided to him in confidence³ (JT. 1 Stipulation 8, JT (7(b))). However, the ALJ found most persuasive the fact that the Union provided no explanation why Brunson would sidestep his employer, essentially keeping it in the dark about alleged misconduct by a coworker, and report the November 10 incident and divulge the November 14 tape recording directly to the client. (ALJD p. 10, line 40). The Respondent has still failed to provide any such evidence that would support its contention. As such, the ALJ findings are correct and should remain undisturbed. Respondent's multiple attempts to introduce implausible and vague assertions for the purpose of undermining the ALJ's reasoning should not be entertained.

V. THE ALJ CORRECTLY APPLIED APPLICABLE BOARD LAW IN FINDING THAT RESPONDENT VIOLATED THE ACT BY INDUCING THE EMPLOYER TO DISCRIMINATE AGAINST NELSON

In Exceptions Nos. 1, 2, 11, and 12, and brief in support of exceptions, Respondent asserts that the ALJ erred in finding that Respondent committed the violation of Section 8(b)(1)(A) and 8(b)(2) because his legal conclusions were not supported by the law or the ALJ misapplied Board law. As stated earlier in footnote 2, Respondent did not satisfy the requirements of 102.46(b)(1) in framing it's Exceptions in Nos. 1 and 2, and under 102.46(b)(2), these two Exceptions should be deemed waived.

³ As noted by the ALJ in footnote 22, "Jones conceded that any evidence provided by a unit member to the Union in furtherance of a grievance should be kept confidential." (JT. 7(c); Tr. 282).

In Exception No. 11, Respondent contends that the ALJ misapplied the law with regard to union employees, specifically security guards, acting in their individual capacity versus that of their official capacity. Respondent argues that the ALJ incorrectly found that Brunson was acting in his official union capacity when he reported Nelson's comments. This is wholly without merit and unsubstantiated by the record. The Respondent simply asserts that case law permits the finding of individual action status without providing any evidence, facts or other support for its conclusory statement. (REX p. 12) Respondent also asserts that Brunson's unique duty as a security officer requires a special duty towards the Employer. In both instances, Respondent ignores the legal findings cited by the ALJ that the holding of elected office is persuasive and substantial evidence of a finding of agency. See *Electrical Workers IBEW Local 453 (National Electrical)*, 258 NLRB 1427, 1428 (1981); *Penn Yan Express*, 274 NLRB 449 (1985). What Respondent also ignores, however, is that holding of office is persuasive and substantial absent *compelling contrary evidence* (emphasis added). *Mine Workers Local 1058 (Beth Energy)*, 299 NLRB 389, 389-390 (1990); *Plumbers, Local Union No. 83*, 238 NLRB 499 (1978). Respondent has provided no evidence, compelling or otherwise, other than the fact that Brunson is a security guard, to support its position that Brunson was acting individually. Absent any evidence to the contrary, the ALJ properly found that Brunson's status and title conferred agency status on him and thus was acting in an official union capacity when he reported Nelson's comments.

In these exceptions, Respondent further claims that the ALJ departed from Board precedent by misapplying *United Paperworkers International Union, Local 1048*, 323 NLRB 1042, 1044 (1997) (union violated the Act when its treasurer reported critical comments of dissident member to management and exaggerated the level of outrage amongst his workers).

Respondent attempts to distinguish this case as not being on point, however, this is an incorrect application of the law. As in *United Paperworkers*, Brunson, a union steward who had a known, ongoing conflict with Nelson, reported an exaggerated version of Nelson's comments to the Employer, knowing that reporting such alleged conduct could and would result in Nelson being disciplined. Respondent's attempt to distinguish this case on the basis that Brunson is a security guard and was reporting what he witnessed "to the best of his ability" has no basis in the law or in the record.

It is plainly apparent the ALJ correctly and accurately followed Board law. His well reasoned and accurate legal analysis should not be overturned based on Respondent's confusing, vague and conclusory depictions of the law, and therefore these exceptions must be dismissed.

VIII. CONCLUSION

For the reasons set forth above, it is urged that all of Respondent's Exceptions to the Decision of the Administrative Law Judge be denied in their entirety and the ALJ decision be affirmed.

Dated at Washington, District of Columbia, this 5th day of December 2013.

Respectfully submitted,



Katrina H. Woodcock
Counsel for the General Counsel
National Labor Relations Board, Region 5
1099 14th Street, N.W. Suite 6300

CERTIFICATE OF SERVICE

I hereby certify that the COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING MEMORANDUM in Case 05-CB-099029 was served via E-Gov, E- Filing and electronic mail, on this 5th day of December, 2013, on the following:

Via E-Gov, E-Filing:

Office of the Executive Secretary

109914th Street N.W.
Washington, D.C. 20570

Via Electronic Mail:

Michael J. Akins
GREGORY, MOORE, JEAKLE &
BROOKS, P.C.
65 Cadillac Square, Suite 3727
Detroit, MI 48226
mike@unionlaw.net

Cordarryl Nelson
6004 Surry Square Lane, Apt. 204
District Heights, MD 20747
cordarrylericnelson@yahoo.com



Katrina H. Woodcock
Counsel for the General Counsel
National Labor Relations Board, Region 5
1099 14th Street, N.W., Suite 6300
Washington, D.C. 20570
202-273-2962
Katrina.Woodcock@nlrb.gov