

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

UNITED STATES POSTAL SERVICE,

Respondent

and

Case: 13-CA-097568
13-CA-097606
13-CA-098060

NATIONAL ASSOCIATION OF
LETTER CARRIERS, BRANCH 11

Charging Party

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

Respectfully submitted:



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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this Answering Brief in response to Respondent's Exceptions to the Decision of Administrative Law Judge Ira Sandron, dated November 13, 2013.¹

I. INTRODUCTION

The ALJ found, based on overwhelming evidence, that Respondent violated Section 8(a)(1) and (3) of the Act by threatening, suspending and terminating Darion Williams because of his efforts to carry out his responsibilities as a new union steward. The ALJ also correctly found that the Respondent further violated Section 8(a)(1) of the Act by threatening employees and announcing more stringent enforcement of rules and policies because the employees had elected a new union steward. His decision was logical, took all relevant facts into account and applied correct Board law. His decision should, therefore, be sustained and the Respondent's Exceptions should be dismissed.

II. GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S FACTUAL AND LEGAL ASSERTIONS.

Respondent excepts to some of the findings of the ALJ, and has filed a brief in support of those exceptions. Respondent's exceptions do not present any new arguments or facts that were not previously considered by the ALJ. The ALJ's decision explains in detail the facts and reasoning supporting his decision that the Respondent violated the Act. Nothing contained

¹ Hereinafter the Administrative Law Judge will be referred to as the "Judge" or "ALJ"; the National Labor Relations Board hereinafter is the "Board"; the National Labor Relations Act hereinafter is the "Act"; United States Postal Service, hereinafter is "Respondent"; Darion Williams hereinafter is "Williams"; citations to the Judge's decision will be referred to as "ALJD__"; citations to the transcript are designated as "Tr. __" the General Counsel's Exhibits are hereinafter referred to as "GC__"; Respondent's Exhibits are hereinafter referred to as "R__". Joint Exhibits are hereinafter referred to as "JT __."

within the Respondent's exceptions or brief in support thereof detracts from his factual findings, conclusions or legal analysis.

Respondent makes two central arguments that it expands on in its brief in support. First, Respondent claims that the ALJ erred in finding Williams' actions were protected on January 25 and 29, 2013, which the Respondent calls "persistent insubordination." Second, Respondent claims the ALJ erred in not finding that Respondent's reactions to Williams' activities on January 25, and 29, 2013, were not reasonable under the circumstances. Respondent's strains the facts and logic itself to argue that the ALJ was wrong in his conclusions. Each of Respondent's arguments will be addressed separately below.

1. Respondent applies the wrong legal standard to Williams' activities on January 25, 2013.

In its supporting brief, Respondent claims that the ALJ should have found Williams' actions on January 25, 2013, unprotected because supposedly, although Williams' initial purpose was to process a grievance, Brewer never allowed the protected activity to actually occur when she refused their request. Respondent makes the bizarre argument that because Brewer refused the newly elected steward the ability to file his grievance, any communications after that refusal were unprotected and therefore justified Brewer's threat to call the police. Respondent's argument ignores the facts of what occurred on January 25, 2013, and the proper legal standard for this event.

As the ALJ correctly found, Brewer attempted to deceive newly elected union steward Williams on January 25, 2013. ALJD pg. 14. As the record shows, when Williams asked to file a grievance on January 25, 2013, Brewer told him that he could not because he was on vacation and not on the clock. ALJD pg. 7. Tr. 260. Then in a sort of catch twenty-two, when Williams

asked to get an extension in order to file the grievance, Brewer told him that in order to get an extension he had to file a grievance first. Tr. 260. Regardless of this fact, Respondent ignores Brewer's conduct and instead focuses on Williams' subsequent behavior which it claims justifies Brewer's interference with his protected activities which was, in addition to her lie, her threat to call the police on Williams and Rayborn.

Even assuming everything that Respondent points to is true, that Williams and Rayborn did not leave immediately and instead argued with Brewer over whether they were properly on Respondent's property in order to file a grievance, this still does not render Brewer's threat to call the police legal. As the ALJ correctly found, the proper legal standard for Brewer's statement is the Board's well-settled test for interference, restraint, and coercion under Section 8(a)(1) of the Act. The standard is an objective one and does not turn on the employer's motive or on whether the coercion succeeded or failed. *Atlas Refinery Inc.*, 354 NLRB 1056 (2010). The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *Id.* (citing *American Freightways, Co.*, 124 NLRB 146, 147 (1959)). Conduct such as threats to call the police for engaging in protected activity violate Section 8(a)(1) of the Act. See *W.D. Manor Mechanical Contractors, Inc.*, 357 NLRB No. 128 (2011). Respondent focuses misleadingly on when in the conversation Williams' union activities took place. However, as the ALJ recognized, it does not matter when in the conversation Williams asked to file a grievance. What matters instead is that Brewer threatened to call the police in the same conversation. Her conduct, given all the

circumstances of the record evidence, clearly interfered with Williams' free exercise of his Section 7 rights.² The ALJ correctly applied this standard and his findings should be upheld.

2. Respondent applies the wrong legal standard to Williams' activities on January 29, 2013

Respondent again selectively picks testimony in order to force the conclusion that Williams' behavior on January 29, 2013, was insubordinate and therefore not protected. Respondent points out several comments that Williams made to Brewer which as the ALJD found were "not necessarily exemplary," but did not amount to "true insubordination." ALJD pg. 13. Even though the ALJ made it clear he did not find that Williams' behavior was insubordination, Respondent claims that the ALJ incorrectly concluded that Williams' insubordination was not so intertwined with discussion of grievances with Brewer that his conduct was protected. Strangely, Respondent goes even further and claims that Williams was not trying to discuss grievances at all on January 29, 2013. Respondent cites *United States Postal Service*, 350 NLRB 441 (2007) in support of its claim.

Once again, Respondent is applying the wrong legal standard. In *United States Postal Service*, supra, a supervisor issued a warning letter to a union steward for working over a 60 hour work week limit rule after the supervisor purposely assigned work to the steward that would take him over the limit. The Board correctly applied the *Wright Line* framework in that case. *Supra* at 444 (citing 251 NLRB 1083(1980)) However, as the ALJ found in the instant case, the correct legal framework for these circumstances is set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979).³ The reason the *Wright Line* framework is not appropriate in the instant case is because

² The ALJ made special note of the fact that Brewer's treatment of Williams was inconsistent with management's past treatment of off-duty stewards and of stewards' requests for extensions of time. ALJD pg. 14.

³ The four-fact test in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), is used because there is an assumed causal connection between the protected activity of the employee and the discipline.

union steward Williams' protected activity occurred at approximately the same time as Brewer's illegal removal of Williams by the police, and his suspension and eventual termination. The Board in *United States Postal Service*, supra, used the *Wright Line* framework because, unlike Darion Williams, the steward did not engage in protected activities at the time of the event he was disciplined for. Williams, contrary to what the Respondent claims, was clearly engaged in the filing of grievances on January 29, 2013. Whether Williams' so-called insubordination was intertwined with his protected activities is, again, not the issue. Accordingly, Respondent's second argument fails as a matter of law.

3. Respondent's reaction to Williams on January 25, 2013, was not reasonable given the circumstances.⁴

Respondent argues that based on the circumstances on January 25, 2013, Brewer's reaction of threatening to call the police, was reasonable. Respondent once again selectively picks out testimony from the record in an attempt to show that Williams' actions were so severe and insubordinate on January 25, 2013, that Brewer had no alternative but to threaten the two men with removal by the police. Respondent claims that Williams was, in fact, a demeaning, deceitful, and threatening individual who challenged "the little woman" when she gave them an order to leave.

Respondent's ridiculous characterizations of Brewer and Williams were addressed by the ALJ in his decision. 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 shows that those resolutions are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188

⁴ As pointed out before, Respondent is not applying the correct legal standard to the facts. The issue is not whether Brewer's reaction was reasonable. Instead, *Atlantic Steel Co.*, 245 NLRB 814 (1979), examines: (1) the place of the discussion; (2) the subject matter; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's ULP's.

F.2d 362 (3d Cir. 1951). The ALJ correctly concluded that Brewer was not credible on many key matters. Specifically, the ALJ found that Brewer's demeanor showed that she excessively dramatized the events of January 25 and 29, 2013, and exaggerated Williams' so-called threatening behavior. ALJD pg. 3. The ALJ also found that Brewer had a strong personality and that she was not easily intimidated. ALJD pg. 3.

On the other hand, the ALJ found Williams and assistant steward Rayborn believable and not aggressive on January 25, 2013. ALJD pg. 3. Williams and Rayborn's depiction of Brewer was confirmed by Respondent's own witness Yoldana Finch who was in the vicinity of the conversation. As the ALJ explained, Finch stated that Brewer's voice was louder than Williams' whom she could not hear. Tr. 180. Additionally, the ALJ credited former union steward Steven Harris' testimony that the past practice had allowed grievance filing when off duty. ALJD pg. 7. Because of Brewer's contradictory and inconsistent testimony, the ALJ credited Williams and Rayborn over Brewer and found Brewer's reaction to be not just unreasonable but in violation of the Act.

4. Respondent's actions on January 29 and February 13, 2013, were also unlawful and unreasonable under the circumstances.

Respondent argues that Brewer issued the correct level of discipline to Williams resulting from his actions on January 29, 2013. Respondent points out how Williams had a history of progressive discipline for failure to follow his supervisor's instructions. Based on this fact, and that Williams was supposedly uncooperative during his investigatory interview on January 31, 2013, Respondent argues that Brewer issued the correct level of discipline to him.

Whether Williams received the correct level of discipline under the collective bargaining agreement is completely irrelevant. See *Atlantic Steel Co.*, supra. None of William's disciplines

prior to January 29, 2013, were challenged by the Counsel for the General Counsel. What the Counsel for the General Counsel did allege as unlawful, and the ALJ agreed, was Williams' discipline which was his removal and subsequent termination resulting from the events on January 29, 2013.

II. CONCLUSION

Based on the foregoing, Respondent's Exceptions to the Decision of the Administrative Law Judge are all without merit and should be rejected by the Board. Therefore, Counsel for General Counsel respectfully requests that Respondent's Exceptions be overruled in their entirety.

DATED at Chicago, Illinois, this 20th day of December, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge have been served this 20th day of December, 2013, in the manner indicated, upon the following parties of record.

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