

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

UNITED STATES POSTAL SERVICE,)	
)	
Respondent,)	
)	
and)	Case 19-CA-092096
)	
AMERICAN POSTAL WORKERS UNION,)	
AFL-CIO, PORTLAND, OREGON AREA)	
LOCAL 128)	
)	
Charging Party)	

RESPONDENT’S ANSWERING BRIEF TO EXCEPTIONS

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent United States Postal Service files this Answering Brief in response to Counsel for the General Counsel’s Exceptions to the Decision of Administrative Law Judge Eleanor Laws, dated January 22, 2014.¹

I. INTRODUCTION

The ALJ found, based on evidence and credibility determinations, that Respondent did not violate Section 8(a)(1) and (3) of the Act by issuing the letter of warning (“LOW”) on September 26, 2011, to Walton because Walton was not engaged in protected activity at the time. The ALJ also correctly found, based on her assessment of Babb’s credibility and relevant case law, that Respondent was not liable for the initial TRO obtained by Babb against Walton. Based on this reasoning the Judge also held that attorney’s fees for the union were not appropriate in

¹ Hereinafter the Administrative Law Judge will be referred to as the “Judge” or “ALJ” the National Labor Relations Board as the “Board”, the National Labor Relations Act as the “Act”; the United States Postal Service as “USPS” or “Respondent”; Steward Walton as “Walton”; USPS supervisor Gina Babb as “Babb”; citations to the Judge’s decision will be referred to as “ALJD__”; citations to the transcript as “Tr.__”; the Joint Exhibits are referred to as “JT__”; the General Counsel’s exhibits are referred to as “GC__”; and Respondent’s exhibits are referred to as R__.”

this matter. The Judge's decision was logical, took all relevant facts into account and applied correct case law. Her decision should therefore be sustained and the General Counsel's Exceptions should be dismissed.

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

The General Counsel excepts to the ALJ's decision and has filed a voluminous brief in support of those exceptions. However, the General Counsel's brief conveniently ignores the fact that most of the Judge's decision is based on her credibility determinations. Furthermore, the ALJ's decision explains in detail the facts and reasoning supporting her decision that in relevant part Respondent did not violate the Act. Nothing within the General Counsel's exceptions or supporting brief thereof detracts from the Judge's credibility determinations, factual findings, conclusions or legal analysis.

The General Counsel makes two central arguments that it expands on in its brief in support. First, the General Counsel argues that Walton's campaign of harassment and intimidation was akin to an "isolated outburst" or "moment of animal exuberance" and was therefore protected activity within the realm of her activities as a union steward. Second, the General Counsel claims that the USPS was liable for the TRO that Babb obtained against Walton when Babb enforced the TRO while acting with apparent authority as an agent for the USPS; and, more importantly, that the TRO did not have a reasonable basis and was retaliatory. Each of Respondent's arguments will be addressed separately below.

1. The Judge Correctly Determined that Respondent did not violate the Act by issuing the letter of warning ("LOW") on September 26, 2011, to Walton because Walton was not engaged in protected activity at the time.

The General Counsel's brief asserts, incorrectly, that Walton was at all times engaged in protected activity from the first aggressive encounter on August 8 through her repeated and unauthorized attempts to contact Babb after being told not to by Babb's manager Jeff White.

Further, the General Counsel's brief conveniently glosses over the fact that the Judge's finding was in large part based on her credibility assessment of Walton's testimony. The Judge's well-reasoned decision contained the following credibility determinations:

Walton's testimony, particularly when discussing her interactions with Babb, came across as overly self-serving and orchestrated to downplay the more aggressive and flippant side of her personality. (ALJD 12)

Babb's version of events is also more credible when considering witness testimony from both union members and supervisors regarding Walton's tendency to scream and yell, use disrespectful language, become physically aggressive, and loudly assert her right to do and say whatever she wants. (ALJD 12)

The record establishes that Walton is someone who, when challenged, reacts impulsively and does not take things quietly. Either version of this measured response upon being called a "fucking bitch" strains credibility. Given that I have credited Babb's description of events, the General Counsel's argument that Walton was provoked by Babb fails. (ALJD 13)

I do not consider the August 9 meeting in isolation, however, but rather as the beginning of a connected and disturbing pattern of conduct Walton directed at Babb. (ALJD 13).

Walton's testimony that her continued attempts to contact Babb were to request steward time pursuant to Mullin's request has been squarely discredited by Mullin's own disinterested, credible, and corroborated testimony that he never requested a steward. (ALJD 14).

The multiple profane and taunting phone calls to Babb over the course of 45 minutes and the disingenuous attempts to have Babb come out of her work area to grant steward time that was never requested clearly caused Babb to panic, as shown by her email to Anderson. (GC Exh. 4.) To me, these actions are strong evidence that Walton was acting outside the boundaries of genuine steward activity, and was pursuing her own unprotected agenda. (ALJD 14).

In sum, the Judge held that

Walton lost the Act's protection by acting in a persistently insubordinate, obstinate, and disruptive manner designed to harass Babb. In coming to this conclusion, I have made certain credibility determinations, both general and specific. In general, I found Babb and White were more credible than Walton, based both on demeanor and the plausibility of their respective versions of events. (ALJD 12).

Finally, based in large part on these credibility findings, the Judge held that she "considered all of the evidence and carefully evaluated the content and **credibility of witness**

testimony and, applying the Act and the Board’s interpretive case law to the evidence, find Walton lost the Act’s protection.” (ALJD 15, emphasis added).

Since the Judge’s holding that Walton was not engaged in protected activity was based in large part on her credibility findings, the Board should not overturn the Judge’s 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 convinces us that they are incorrect.” *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

2. The Judge also Applied the Correct Legal Analysis that Walton was not Engaged in Protected Activity.

The Judge also correctly applied the *Atlantic Steel* analysis in holding that Walton’s campaign of harassment did not present an “outburst” or a “moment of animal exuberance.” Rather, the Judge found that Walton engaged in a “connected and disturbing pattern of conduct. . . directed at Babb.” (ALJD 13).

In assessing whether the employee has lost the protection of the Act, the Board balances four factors: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way, provoked by an employer's conduct. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

Factor 4 directly relates to the Judge’s finding crediting Babb’s version of events in relation to the initial August 8 meeting, rather than Walton’s “self-serving” testimony. (ALJD 12). Because of the Judge’s credibility finding in this regard, she rightfully held that Walton’s conduct that day and subsequently was not in any way provoked by the employer’s conduct.

“I do not find the *Atlantic Steel* analysis applicable here, because this case does not present an “outburst” as is contemplated in two of the four evaluative factors. Nor does it involve a “moment of animal exuberance” as in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941), but rather a course conduct over time.” (ALJD 13, fn 11)

The General Counsel improperly attempts to focus attention on Walton's conduct as isolated incidents worthy of protection. As the saying goes, "that dog won't hunt." The General Counsel's dismissal of the Judge's reliance on *Calmos Combining Co.*, 184 NLRB 914 (1970), ignores the Judge's credibility findings and completely misconstrues the facts and applicable law. The General Counsel's focus on "adherence to protocol" (GC's Brief in Support of Exceptions p. 26) rather than Walton's overall behavior tortures the facts beyond recognition. The simple fact, as found by the Judge, is that Walton was engaged in a campaign of harassment of Babb that was only "tangentially related" to any legitimate grievance activity. The General Counsel attempts to gloss over this fact by focusing on Walton's actions in isolation, rather than as part of Walton's "connected and disturbing pattern of conduct." Therefore, *Calmos Combining* is directly on point and supports the Judge's holding that Walton was not engaged in protected activity.

The General Counsel also mischaracterizes *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989), as distinguishable. Actually, the Board ruled in favor of the employer on very similar terms in *Carolina Freight*, holding that the charging party's misbehavior, taken in isolation might be protected, but his "conduct. . . did not stand alone." *Carolina Freight, supra* at 1083. Moreover, the Board used a similar analysis to that employed by the Judge in the instant matter to hold that *Atlantic Steel* did not apply. *Carolina Freight, supra* at 1084.

Similarly, in *Marico Enterprises*, 283 NLRB 726 (1987) the Board used the same *Atlantic Steel* analysis as the instant matter to hold that the charging party's conduct was not provoked by the employer. *Marico Enterprises, supra* at 732. Moreover, the Board held that the charging party's refusal to follow his supervisor's instructions rendered his termination legitimate. Consequently, these cases support the Judge's reasoning that *Atlantic Steel* does not apply and that Walton was not engaged in protected conduct while engaged in her campaign of harassment against Babb.

Furthermore, Walton's on-going misconduct falls squarely under the ambit of *United States Postal Service and New Haven CT Area Local, APWU*, 268 NLRB 274 (1983) (employee's continued shouting and personal insults after being told to quiet down were unprotected); and *New Process Gear Div. of Chrysler Corp.*, 249 NLRB 1102 (1980) (employee's continued intransigence in shouting and using abusive language after being ordered to cease was unprotected and not part of the res geste of grievance discussion.)

3. The Judge Correctly Ruled that the TPSO had a Reasonable Basis and was not Retaliatory.

The General Counsel incorrectly asserts that the Judge ruled correctly that Respondent was responsible for the TPSO acquired by Babb. However, a closer reading of the Judge's decision reveals a different conclusion. The Judge found that the USPS was without knowledge of Babb's actions in obtaining the TPSO. It was only **after** Walton was served with the stalking order on October 13, and Babb enforced it against her at the Main Office, that liability attached to the Respondent. (ALJD 15-16).

The General Counsel must perforce ignore the Judge's credibility findings and holding that Babb's motive for seeking the TPSO was not retaliatory, or the General Counsel's reliance on *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) must fail. "Based on her testimony, I find Babb's sole purpose in taking these actions was to further her own interests. Specifically, I am convinced it was an act of desperation concerned with trying to alleviate her own personal fears." (ALJD 15)

Furthermore, the General Counsel's argument is purely speculative that the Clackamas County court would have dismissed the TPSO had the court reached the merits of the case. The General Counsel's argument cites Oregon law as support for this position this it should not be "construed to permit the issuance of a court's stalking protective order for conduct that is authorized or protected by the labor laws of. . .the United States." O.R.S. § 163.755(1)(a)." In

making this argument the General Counsel dismisses the Judge's determination that Walton's campaign of harassment was not protected activity as "clear error." The Judge, understandably, reached a different conclusion. "As I have found Walton's conduct was unprotected, this argument fails." (ALJD 17). "The conduct she [Babb] cited to support the petition falls outside the Act's protection. Moreover, there is nothing in the petition itself that requests Walton abstain from most of the behaviors the court ultimately enjoined." (ALJD 17). To call the Judge's reasoning "inexplicable" hardly addresses the central fact and the Judge's credibility determinations that Walton's "connected and disturbing pattern of conduct" was **not** legitimate union activity.

The Judge understood the distinction between Walton's harassment and the fact that the TPSO barred both unprotected and protected activity. "It is clear that the stalking order enjoined both Walton's unprotected activity of harassing Babb as well as her protected activities attendant to her roles with the Union." (ALJD 18). Thus the Judge held that the ultimate effect of the TPSO was to restrict activity that was "arguably protected." (ALJD 17 - citing *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978)). The General Counsel ignores this distinction of "arguably protected" activity. However, the Judge understood this distinction and, citing *Sears Roebuck*, held that "where the conduct at issue is "arguably protected" the state court is not deprived of jurisdiction." (ALJD 17).

4. Because the TPSO was Reasonable, and Because the General Counsel Presented no Proof of Damages, the General Counsel's Claim for Attorney's Fees Must Fail.

As stated previously, the Judge "found that the [TPSO] lawsuit was not unlawful at its inception." (ALJD 19). Therefore, the Judge held that "an award of legal fees and expenses is not necessary to discourage the Respondent from permitting its supervisors to maintain preempted lawsuits enjoining conduct protected by the Act." (ALJD 19). Furthermore, as argued *supra*, the activity enjoined by the TPSO was "arguably protected" and the state court

action was therefore reasonable and not preempted.

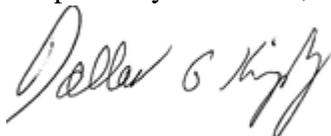
Furthermore, the General Counsel presented no evidence as to the amount of legal fees the union was allegedly owed. Therefore, Respondent was unable to review billing documents or cross examine the union's attorney as to what his customary billing rates were or whether the alleged fees were excessive. "A Board order must be supported by evidence that there are violations to be remedied." *Marriott Corp.*, 313 NLRB 896 (1994). Based on the foregoing, the General Counsel's demand for fees should be denied.

III. CONCLUSION

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

DATED this 5th day of February, 2014.

Respectfully submitted,

A handwritten signature in cursive script, reading "Dallas G. Kingsbury", enclosed in a rectangular box.

Dallas G. Kingsbury
Attorney for United States Postal Service

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Respondent's Answering Brief to the General Counsel's Exceptions to the Decision of the Administrative Law Judge** were sent this 5th day of February, 2014, as follows:

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