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11 Respondent/Union

12 UNITED STATES OF AMERICA
13 NATIONAL LABOR RELATIONS BOARD
14 REGION 28

15 LABORERS' INTERNATIONAL UNION OF
16 NORTH AMERICA LOCAL 872,

17 Respondent/Union,

18 and

19 STEPHANIE SHELBY, an individual,

20 Charging Party.

No. 28-CB-065507

**REPLY BRIEF TO OPPOSITION TO
EXCEPTIONS**

21 **I. INTRODUCTION**

22 **A. EXCEPTIONS OF THE ACTING GENERAL COUNSEL SERVE TO
23 EMPHASIZE THAT THE UNION COMMITTED NO VIOLATION OF THE ACT
24 WHEN IT TEMPORARILY EXCLUDED MS. SHELBY FROM ITS HALL
25 BECAUSE OF HER UNCONTROLLED OUTBURST AND THE LAS VEGAS
26 POLICE REQUESTED THAT MS SHELBY BE REQUIRED TO HAVE A
27 POLICE ESCORT**

28 As the Brief of the Acting General Counsel concedes, Ms. Shelby was asked to leave the Union's office after she called Ms. Lucero a "bitch." From that abusive statement, events escalated because Ms. Shelby lost control and engaged in unprotected activity disruptive of the Union's operation of its hiring hall. As the Brief of the Acting General Counsel concedes, the requirement for a police escort was caused by the Las Vegas Police requiring it as a condition of removing Ms. Shelby from the premises after her continued outburst. Ms. Shelby has not sought to have the police escort removed. The Union did not breach its duty of fair representation in

1 taking action to protect its office and hiring hall from this misconduct. Furthermore, Ms.
2 Shelby's ability to work has suffered no interference.

3 II. FACTS

4 1. The Administrative Law Judge found that the Union had the right to at least
5 temporarily remove Ms. Shelby from its premises:

6 In this case, everyone agrees that Ms. Shelby's activities leading up
7 to her profanity-laced outburst on October 4 were protected
8 activities. (TR. 113, 139-41, 332; R Br. 7.) I find that under the
9 circumstances of this case, once Ms. Shelby directed her first
10 profanity at Ms. Lucero and was simply asked to leave the hiring
11 hall premises, her protected activity crossed the line and became
12 unprotected. Moreover, there was no protected activity once Ms.
13 Shelby continued to direct additional profanities at Ms. Lucero and
14 Mr. Taylor. The matter escalated not because of Ms. Lucero's
15 actions but because of Ms. Shelby's loss of temper and her inability
16 to control her actions leading to her continued string of epithets
17 directed at Respondent's agents when Mr. Taylor finally asked her
18 to calm down and she refused until the police finally arrived.

19 Additionally, the Administrative Law Judge found that given the circumstances of Ms. Shelby's
20 "outburst" she was not privileged to act belligerently towards Ms. Lucero:

21 While cursing in general may have been common at the hiring hall,
22 it is apparent that profanities directed at Respondent's agents never
23 occurred before Ms. Shelby's October 4 outburst. The distinction
24 between general cursing at work and swearing toward someone is
25 that one can act belligerently, i.e., irate, eager to fight, and out of
26 control but when the profanity becomes directed at a target, one
27 crosses the line from just blowing off steam to becoming a safety
28 concern. I find that a union member occasionally blowing off
steam was a common occurrence at the hiring hall but directing
profanities toward a dispatcher target had not occurred before Ms.
Shelby's outburst on October 4 caused concern and nervousness to
Ms. Lucero.

In summary, then, given all the facts which the Administrative Law Judge found, Ms.
Shelby engaged in an emotional outburst which lost the protection of the Act.

Finally, the Administrative Law Judge noted, and Ms. Shelby agreed, that her conduct was
inappropriate:

In contrast, Ms. Lucero credibly opined that no one has previously
directed their profanities at her as dispatcher as Ms. Shelby did on
October 4. Even Ms. Shelby admits that it is not right to direct
profanities at union agents and she would not want similar
treatment at work. (Tr. 227-28.)

1 The Union had a right to ask Ms. Shelby to leave the hall. When she was initially asked to leave
2 by Ms. Lucero and then Mr. Stephen it was only a temporary request. Nothing prevented her
3 from walking away and coming back later when she was calm. It was her refusal to leave and
4 subsequent outburst that escalated the situation.

5 2. Ms. Lucero is not an elected officer of Local 872. She is an office clerical
6 employee. Whatever arguments or strong language may occur between members of the Union or
7 between members and their elected officers may have protection under Landrum-Griffin, 29 U.S.
8 C. section 411(a)(1), but disrespect towards an office employee hired to maintain the dispatching
9 records and system is inappropriate and unprotected. The Acting General Counsel ignores this
10 context to the outburst by Ms. Shelby.

11 3. Imposition of the police escort was the result of a police process, not the specific
12 request of Respondent. Counsel for Acting General Counsel concedes in his Brief that “the police
13 escort requirement was an unplanned consequence of the incident” (See page 19.) Nothing
14 in the record suggests, and nothing found by the Administrative Law Judge holds, that the Union
15 requested any permanent restriction. Rather, this was a result of the police asking Mr. Taylor to
16 read the no trespass card to Ms. Shelby. See General Counsel’s Exhibit 5. Thus, the police escort
17 was triggered by the Police, not the Respondent.

18 4. Ms. Shelby has not made a request that the police escort requirement be removed.
19 Even assuming at some point the requirement for a police escort was no longer necessary, the
20 question then is who should ask that it be removed or modified? Plainly, Ms. Shelby has not
21 asked the Union to have that request be removed. In fact, she has visited the Union’s hall on
22 several occasions since the October 4 incident and has attended meetings without a police escort.
23 Once imposed, if Ms. Shelby thought the restriction should be removed, she had the right to ask
24 that it be done. However, she has refused to do so. If the Acting General Counsel thinks Ms.
25 Shelby was privileged to call Ms. Lucero a “bitch” twice, Ms. Shelby can ask Respondent to
26 rescind the escort restriction. If the Acting General Counsel thinks her outburst with Mr.
27 Stephens of repeated expletives is protected, again she can ask the Respondent directly to modify
28 the restriction.

1 The record does reflect that Counsel for the Respondent attempted to inquire at the
2 hearing about letters or complaints that were sent by Ms. Shelby after the October 4 incident. The
3 Administrative Law Judge sustained an objection by the Counsel for the Acting General Counsel
4 to any such inquiry. Tr. 216. Thus the General Counsel thought it in appropriate to demonstrate
5 any actions after October 4 in which Ms. Shelby sought to have the restriction removed or to have
6 Respondent resolve the problem to prove that she even wanted the escort removed.

7 All of Ms. Shelby's efforts with respect to her skills dispute occurred before the October 4
8 incident. Tr. 217. Ms. Shelby had every opportunity to object to any restriction imposed upon
9 her after October 4, but failed to so do. She has communicated with the Union since the October
10 4 incident but there is no evidence offered that she has sought to have the one remaining
11 restriction modified or removed.¹ In fact, Ms. Shelby has not been willing to communicate
12 directly with the Union to remove the one last remaining restriction arising out of her October 4
13 outburst.

14 The record furthermore demonstrates, as conceded by the Acting General Counsel, that
15 there has been no restriction placed whatsoever on Ms. Shelby in any other regard. She has
16 visited the hall. She has used the hiring system. She has worked consistently. She has gone to
17 Union meetings. There is simply no evidence that Ms. Shelby sought to either remove the
18 restriction regarding a police escort or even wanted the police escort restriction removed.

19 5. There is no evidence that Ms. Shelby has come to the Union's office for any
20 purpose concerning either administration of any collective bargaining agreement or her right to
21 use the hiring hall, or any matter concerning the Union's exclusive representation of Ms. Shelby.
22 It is undisputed that Ms. Shelby has come to the hall several times and without a police escort and
23 has attended Union meetings. There is no evidence, however, as to whether any function for
24 which she has visited the Union's office is encompassed by the Union's exclusive representation
25 of Ms. Shelby either as a worker or an applicant seeking work. Indeed, as found by the

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27 ¹ Acting General Counsel's theory is that the violation occurred when Ms. Lucero asked her to
28 leave and thus his theory was that subsequent events were not relevant. The ALJ has rejected
this finding that the Respondent was privileged to ask her to leave at least at the time of the
initial outburst.

1 Administrative Law Judge, Ms. Shelby has worked consistently since the October 4 incident and
2 has had no need to use the hiring hall for any purpose, nor is there is any evidence that Ms.
3 Shelby has needed to access the Union's hall for filing grievances or anything else that might
4 trigger the Union's obligation to represent her or as the exclusive representation of Ms. Shelby.

5 There is a confusion here as to the functions of a union. The Union may have a hiring hall
6 in its office, something we concede Local 872 does maintain, but the Union has many other
7 functions it serves with respect to its members. Thus, there was no evidence presented by the
8 Counsel for the Acting General Counsel that any other functions had anything to do with the
9 Union's exclusive representation other than the hiring hall.

10 6. There is no discussion in the Administrative Law Judge's decision regarding the
11 impact of Ms. Shelby's outburst on other members. It should be plain that a Union cannot
12 tolerate the kind of outburst Ms. Shelby engaged in directed at both Ms. Lucero and Mr. Taylor.
13 If members or others engage in this kind of belligerent activity there would be chaos in the
14 Union's hall. The same is true of any employer's premise. Condoning Ms. Shelby, as argued by
15 Counsel for the Acting General Counsel, to engage in this profane outburst against first Ms.
16 Lucero and then Mr. Taylor would be to encourage and approve this kind of activity within the
17 Union's hall. Plainly, that kind of conduct would undermine the Union's ability to represent all
18 of its members. This would prevent the Union from being able to protect its members and others
19 using its premises from being subject to this kind of inappropriate behavior when using the
20 Union's offices.

21 In summary, then, Ms. Shelby's conduct was inappropriate and the Union's request she
22 initially leave was proper. It was proper to call the police when Ms. Shelby escalated the
23 situation. It was proper to have her removed by the police when the outburst and profanity
24 continued. It was proper to acquiesce in the police escort requirement which was generated by
25 the police. Ms. Shelby has conceded that her conduct was inappropriate:

26 Q: BY MS. SENCER: Ms. Shelby, do you believe it's right to
27 be called a bitch at work?

28 A: No.

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Q: Is it right to be called a mother fucker at work?

A: No.

Q: Is that how you want to be treated at work?

A: No.

Q: Now, you've been in to the Union a number of times since the trespass notice has been in place, correct?

A: Yes.

Q: Okay, And you've been able to conduct your business with the Union, correct?

A: Yes.

Q: And, in fact you've been called out at least twice since then, correct?

A: Yes.

Q: Okay. One of which is the employment that you're still currently in, which has been over two months now, correct?

A: Yes.

Q: Okay. Did you call in in November 2011 for your dispatch? Excuse me, for your out-of-work roll call?

A: Yes, uh-huh.

Q: And this hasn't affected your, the issue of October 4, 2011 did not affect your spot when you called in November, 2011 did it?

A: No.

Q: Have you been denied any opportunity to update your skills?

A: No

Tr. 227:16-228:19.

III. ARGUMENT

A. THE DUTY OF FAIR REPRESENTATION STANDARD APPLIES TO THE OPERATION OF THE HIRING HALL

Counsel for the Acting General Counsel seeks to impose a heightened standard towards a Union in operating a hiring hall. He argues that two Circuits have adopted such a standard and that the Board should now adopt a similar standard.

1 First, there has been no effect upon Ms. Shelby’s work or efforts to seek work. The
2 impact on her at most has been an inconvenience which has not affected her employment at all.
3 Moreover, as noted above, the escort requirement is an inconvenience which she has never sought
4 to modify or remove. This is plainly not a case where the Board should adopt such a standard.
5 To the contrary, this plainly illustrates the Union’s need to have the kind of flexibility associated
6 with the duty of fair representation to deal with members like Ms. Shelby who engage in these
7 kinds of outbursts which singly or, if occurring more often, would destroy the ability of the Union
8 to operate its hall or any hiring hall arrangement.

9 In any case, the Counsel for the Acting General Counsel has deliberately ignored the
10 Board’s recent pronouncements with respect to application of the duty of fair representation
11 standard to the administration of union security. *United Autoworkers Local 376*, 356 NLRB No.
12 164 (2011) and *International Association of Machinists Local 2777*, 355 NLRB No. 177 (2010).
13 Since the Board has now held that the duty of fair representation standard governs the
14 administration of union security which does directly impact upon workers’ jobs, there is no
15 logical basis to extend it to the operation of a hiring hall. Counsel for the Acting General
16 Counsel’s failure to even cite these two important relevant cases (cases which have already been
17 cited in this case), shows a clear lack of respect for the Board and its precedent.

18 **B. THERE IS NO VIOLATION OF SECTION 8(B)(1)(A)**

19 As we argued in our Exceptions, there is no violation of Section 8(b)(1)(A). As noted in
20 our Exceptions, the Board has limited the application of Section 8(b)(1)(A) to “union tactics
21 against violence, intimidation and reprisals or threats thereof.” *NLRB v. Teamsters Local 639*,
22 262 U.S. 274, 290 (1960). The Brief in Support of the Acting General Counsel’s Exceptions does
23 not explain why Section 8(b)(1)(A) applies here where there is at best an inconvenience to Ms.
24 Shelby who worked continuously since the October 4 incident without resort to being present at
25 the hiring hall. It is only a speculative future inconvenience with respect to the hiring hall that is
26 involved in this case. This does not rise to the level of a violation of Section 8(b)(1)(A).

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1 There is no evidence that Ms. Shelby’s conduct was concerted. Acting General Counsel’s
2 exceptions fail to explain why Ms. Shelby’s argument over her skill sheet (and non one else’s)
3 amounts to concerted activity.

4 **C. THERE IS NO VIOLATION OF SECTION 8(B)(2)**

5 The Exceptions of the Acting General Counsel correctly point out that the Administrative
6 Law Judge seems to have not been clear in his written decision. At one point the ALJ suggests
7 that there was a violation of Section 8(b)(2) (see ALJ Decision, p. 16:6-8). The ALJ, however,
8 clearly rejected such a finding:

9 I further find that Respondent did not violate Section 8(b)(2) of the
10 Act as alleged in the Complaint and that that portion of the
11 Complaint is dismissed. See ALJD, p. 19:14-16. See also,
12 conclusion of Law No. 2.

13 Section 8(b)(2), governs the Union’s interference with someone’s job or employment. Here, as
14 we repeatedly stressed, and as found by the Administrative Law Judge, Ms. Shelby’s employment
15 has suffered no interference. She has worked since shortly after the October 4 incident without
16 resort to the hiring hall or any interference with her work.

17 Section 8(b)(2) was intended to deal with any effort by the Union to cause someone to
18 either lose his or her job, or prevent the person from obtaining employment. This section does
19 not deal with the very indirect impact which this police escort restriction has with respect to Ms.
20 Shelby’s use of the hiring hall. As noted, for example, Ms. Shelby obtained her employment by
21 the “second track” because she was on the out of work list and could call in. There is nothing in
22 the record that suggests that the Union has foreclosed her from being on the out of work list or
23 intends to do so under any circumstances in this case.

24 The Union plainly has a right to impose restrictions on its members to insist that they not
25 be abusive towards office employees or others in the hiring hall. That serves the Union’s
26 legitimate function in preserving work opportunities for all applicants and members. It preserves
27 the integrity of the hiring hall. Ms. Shelby’s outburst interfered with that and more effectively
28 restricted the ability of other members to seek work because of concerns about coming to the hall
and being exposed to these kinds of outbursts.

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed
3 in the County of Alameda, State of California, in the office of a member of the bar of this Court,
4 at whose direction the service was made. I am over the age of eighteen years and not a party to
5 the within action.

6 On July 12, 2012, I served the following documents in the manner described below:

7
8 **REPLY BRIEF TO OPPOSITION TO EXCEPTIONS**

9 On the following part(ies) in this action:

- 10 (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy
- 11 through Weinberg, Roger & Rosenfeld’s electronic mail system from
- 12 kshaw@unioncounsel.net to the email addresses set forth below.
- 13 (BY E-Gov SYSTEM) I electronically served the above-described document on the
- 14 following parties by electronically filing the foregoing with the NLRB on July 12, 2012.

14 Executive Secretary
15 National Labor Relations Board
16 1099 14th Street N.W.
17 WASHINGTON, D.C. 20570

Stephanie Shelby
609 Bursting Sun Avenue
North Las Vegas, NV 89032-8239

18 VIA E-GOV, E-FILING

Shelby5454@gmail.com

VIA EMAIL

19 Pablo Godoy
20 Larry Smith
21 NLRB, Region 28
22 600 Las Vegas Boulevard South, Suite 400
23 Las Vegas, NV 89101

Pablo.Godoy@nrlb.gov
Larry.Smith@nrlb.gov

24 VIA EMAIL

25 I declare under penalty of perjury under the laws of the United States of America that the
26 foregoing is true and correct. Executed on July 12, 2012, at Alameda, California.

27 /s/Katrina Shaw
28 Katrina Shaw