UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE

and Case 19-CA-092096

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PORTLAND, OREGON AREA, LOCAL 128

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

This case primarily involves three interactions between two very difficult people with a troubled history, employee/Union Representative Cheryl Walton ("Walton") and supervisor Gina Babb ("Babb"), that resulted in a disciplinary warning and a court-ordered stalking order. Employee Walton serves as the Union's Director of City Stations for 25 post offices throughout the Portland Metropolitan area, meeting with Respondent's supervisors to investigate, file and process grievances. Supervisor Babb is the contractually specified representative at the first level of the grievance procedure for grievances involving clerks at Respondent's Main Office.

After a grievance meeting at the Main Office ended with screaming and cursing on August 9, 2012,[1] Respondent sought to restrict Walton's abilities to perform her representational duties, despite having determined through its own investigation that Walton's conduct was protected. Eventually, it issued Walton a letter of warning targeting these Union activities, but later expunged it. In the interim, however, Respondent, by Babb, acquired a Temporary Stalking Protective Order ("TSPO") enjoining Walton's Union activities.

The case was heard by Administrative Law Judge Eleanor Laws (the "Judge") on August 27, 2013. The alleged violations of the Act before the Judge were that Respondent violated §§ 8(a)(1) and (3) of the Act by issuing Walton the warning and procuring the TSPO. The General Counsel also sought reimbursement to the Union of legal fees incurred in representing Walton against the TSPO. The Judge issued her decision ("ALJD") on December 4, 2013. Although she found that Respondent violated

[1] Hereinafter, all dates are in 2012 unless otherwise noted.
[2] References to the Judge's decision appear as (ALJD_:_). The first number refers to the pages; the

the Act by acquiring the TSPO because it enjoined Walton's protected Union activities, she determined that the conduct for which the TSPO was sought was not protected. As such, she found that Respondent did not violate the Act in issuing Walton the warning, and that Respondent need not reimburse the Union for the legal fees it incurred in defending Walton.

By the attendant exceptions, the General Counsel posits that the Judge's determinations on all but the finding regarding acquiring the TSPO are erroneous. Specifically, the Judge erred in finding Walton's conduct lost the protection of the Act, the TSPO was reasonably based, was not retaliatory, and sought a legal objective, and that legal fees should be denied.

II. STATEMENT OF THE FACTS

A. Background[2]

Respondent provides postal services for the United States and operates various facilities through the United States, including a facility at 715 NW Hoyt Street in Portland, Oregon ("Main Office"). (ALJD 1:39-40; Tr. 39:16-17, 76:21-24; GCX 1(c),1(g)). Shawneen Betha is the Postmaster for Respondent's Portland facilities, 5 of which are managed by Jeff White, Manager of Customer Service (Midway, Central, Main Office Finance, Airport Mail Facility and Collections). (ALJD 2:12-13; Tr. 18-20, 21:4-11, 57:1-3). Babb, who reports to Manager White, is a Supervisor of Customer Service at Respondent's Main Office Finance unit. (ALJD 3:10; Tr. 57:25-58:1, 76:21-

[2] References to the Judge's decision appear as (ALJD_:_). The first number refers to the pages; the second to the lines. References to the transcript appear as (Tr _:_). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GCX_); References to Respondent Exhibits appear as (RX_); and references to Joint Exhibits appear as JTX_).

22, 90:4). White is not the immediate supervisor of any Union represented clerk at the Main Office. (ALJD 2:20-21; Tr. 32:23-25).

The Union has a National collective bargaining agreement with Respondent effective from 2010 through 2015. (ALJD 2:35-36; JTX 1). The collective bargaining agreement contains a grievance procedure directing that the first step in the procedure is a discussion with the aggrieved employee's immediate supervisor. (ALJD 2:37-39; Tr. 20:10-14; JTX 1, p. 87).

Walton has worked for the Postal Service since 2005, and serves as the Lead Sales Service Associate responsible for opening, closing, and running the unit at Respondent's Midway facility. (ALJD 2:15-16; Tr. 15:2-8). Her regular work hours are from 10 a.m. to 7 p.m., and her immediate supervisor is Debbie Roots (ALJD 2:16-17; Tr. 15:9-11, 29:18-19). Walton has also served as the Union's Director of City Stations since 2007 or 2008. (ALJD 2:23-24; Tr. 16:24-17:1). In her role as Director of City Stations, Walton is responsible for monitoring Respondent's 25 Portland City Stations, filing grievances, adjusting grievances, investigating grievances and issues, and setting up grievance meetings. (ALJD 2:26-28; Tr. 17:2-5, 18:16-22). She reports to Brian Dunsmore, Union President, and Joe Cogan, Union Vice President. (ALJD 2:24-25; Tr. 17:10-16).

Walton interacts with Babb only in her capacity as the Union's Director of City Stations. (Tr. 20:20-23) However, as Walton's unrefuted testimony established, Babb would usually refuse to meet for step 1 grievance meetings. (ALJD 3:14-15; Tr. 20:3-9, 22:2-4).

B. August 9 Grievance Meeting

On August 9, Walton met with Babb alone in the supervisor's lounge at the main office to discuss eight grievances. (ALJD 3:17-18; Tr. 21:15-21, 21:25-22:1; GCX 2; JTX 6, p. 10). The supervisor's lounge contains two doors; one leads to a bathroom, and the other, which was open during the grievance meeting, leads out of the room. (Tr. 21:22-24, 135:21-23). After discussing the first few grievances, they turned to one which involved an accusation that Babb had been performing work that was supposed to be performed by Lead Sales Service Associate Marilyn Telfor.[3] (ALJD 3:18-19, 3:27-28; Tr. 15:4-5, 16:16-20, 22:5-8, 22:13-14, 23:21-24, 78-15-18; GCX 2).

Babb began fidgeting in her chair and stated, "I don't believe this." (ALJD 3:28-29; Tr. 24:1-2). When Walton tried to discuss the case, Babb interjected, saying Walton didn't have any documentation, and that she wasn't saying anything that pertained to the grievance. (Tr. 24:2-5). Walton disputed Babb's characterization and told Babb that she (Walton) was, in fact, discussing that which pertained to the grievance. (Tr. 24:5-6). Babb became frustrated, started swaying in her chair, and told Walton that the grievance was denied. (Tr. 24:6-7; GCX 2). When asked for a reason why the grievance was denied, Babb replied, "because I said so." (Tr. 24:7-8; GCX 2). Walton's notes reflect some additional conversation between them about the grievance, with Walton confirming that Babb had denied the grievance, saying because "I said so." (GCX 2). At that point, Babb leaned over the table, and said to Walton, "Cheryl, you're a fucking bitch." (ALJD 3:33-34; Tr. 24:9-15; GCX 2).

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[3] The claim that Babb was performing bargaining unit work was also included in an e-mail message Babb sent to the court in support of her TSPO. (JTX 6, p. 8). Walton, after this meeting, began investigating the claim that Babb was performing bargaining unit work by sitting in the lobby in the Main Office and observing the work being performed. (Tr. 103:8-10)

Although there was sharp disagreement as to the events following the discussion of the first few grievances, the Judge credited Babb's version of events.[4] (ALJD 12:17). Specifically, the Judge found that Walton, while discussing a grievance during the meeting involving the denial of leave for employee Smith, told Babb that she was being an ass after Babb explained her response to the grievance. (ALJD 5:7, 19-20). Later, in response to further comments from Babb, Walton became angry and proceeded to "pepper her language with profanity." (ALJD 5:20-22). Babb got up, told Walton the meeting was over, and walked toward the door. (ALJD 5:22). As Babb passed by where Walton was sitting, Walton stood up, tipped back her chair, stepped toward Babb while shaking her finger at her, and said, "I can say anything I want. I can swear if I want. I can do anything I want."[5] (ALJD 5:22-25). The Judge concluded that, as a result of her upbringing and beliefs, Babb does not swear and finds it highly offensive when others do. (ALJD 13:5-7).

However, during cross examination, Babb did not deny discussing with Walton the grievance relating to the allegation that she was performing bargaining unit work. (ALJD 3:27-31; Tr. 130:4-8; GCX 2). Babb also never specifically denied calling Walton

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[4] According to Walton, the fourth grievance discussed was one involving the denial of employee Smith's leave, and the fifth grievance was the one involving the accusation that Babb performed bargaining unit work. (Tr. 22:10-15, 23:20-24). According to Walton, it was during the discussion of the 5th grievance that the meeting broke down. (Tr. 24:22-25). Though the Judge credited Babb's version of events, Babb did not deny discussing a grievance involving her performing bargaining unit work. However, she did not provide any testimony about that discussion, and thus the order of grievances discussed reflects the Judge's finding that the meeting broke down while discussing the Smith grievance.

[5] In discrediting Walton's testimony, the Judge found that, had "Walton sat quietly in her chair the entire time as she stated (upon prompting after she initially said she was standing) it is extremely unlikely Babb would have reacted in the way she did." (ALJD 12:21-23) The Judge miscited the record. The actual testimony was as follows:

A: So I did not move. I stood right there.
Q: When you say - -
A: I wasn't standing, I was actually sitting.

(Tr. 25:20-23).

"a fucking bitch," or that she had grabbed Walton's arm in the past and called her a smart ass on the way out the door at a prior meeting. (Tr. 52:23-53:5, 127:19-23).

According to the Judge's credited version, Babb then sought assistance in removing Walton from the facility from Supervisor Duncan Santoro, who was located about 100 feet away from the supervisor's lounge. (ALJD 5:29-31; JTX 6, p. 10). Santoro did not testify. Babb then saw that Walton was trying to gain entrance to the Main Office finance area, and told Walton that she was not allowed in the unit. (ALJD 5:31-32) Babb instructed employee Dayna Jones, who was going to let Walton into the secured door, not to do so. (ALJD 5:32-33; JTX 6, p. 10). Walton then left the area with Babb and Santoro following her, and after walking through a swinging door, shut it directly in front of Santoro.[6] (ALJD 5:33-35; JTX 6, p.10).

Walton then left the facility and went to the Union hall. There, she spoke with Union President Dunsmore and documented what happened between her and Babb. (ALJD 4:11; Tr. 26:20-21, 27-11-24; GCX 2). At this same time, Babb, who testified to being upset and shaking, called White and told him she was "making the call" (*i.e.*, reporting she felt threatened). (ALJD 6:13-16). After White arrived at the Main Office, Babb and White spoke with Mike Norbom, Acting Human Resources Manager, who then went down to the workroom floor to interview potential witnesses. (ALJD 6:16-19). To the extent Respondent interviewed witnesses, none were presented at hearing. Babb then dictated her statement to Trish Adams, Acting Manager of Customer Service. (ALJD 6:19-20; Tr. 92:4-10).

[6] The Judge's recitation of Babb's testimony to include an accusation that Walton "slammed [the swinging door] on Santoro is not supported by the record. (ALJD 5:34-35) Instead, what the record reflects is that Walton grabbed the swinging door and shut it in front of him. (Tr. 89:17-18; JTX 6, p. 10).

Thereafter, a threat assessment team, which included Babb, met and determined that Walton was in a protected status during the events on August 9. The team further concluded that Walton and Babb should have a cooling off period and would not meet for a while. (ALJD 6:24-26).

C. Jeff White Restricts Walton's Steward Time

On August 17, White gave Walton an official discussion, telling her she was not allowed to work on grievances outside of her regular work hours, and that she was to clock in at the Midway Post Office each morning, and then request steward time. (ALJD 6:30-32; Tr. 29:13-20). After her meeting with White, Walton was told that her immediate supervisor was no longer able to grant her requests, and that White would have to approve them instead. (ALJD 6:32; Tr. 30:14-23). At the time she was given the instruction from White, Walton had been requesting steward time on a weekly basis from her immediate supervisor, and then reporting to the postal location in which she had duties to perform. (ALJD 6:33-34; Tr. 30:6-13). Following these instructions, Walton filed multiple successful grievances after her requests for steward time were denied by White. (ALJD 10:1-7; Tr. 31:18-20; GCX 7).

D. Walton's Attempts to Contact Supervisor Babb

On September 8, on her day off, Walton attempted to schedule step 1 grievance meetings with Babb, the aggrieved employee's immediate supervisor. (ALJD 6:43; Tr. 33:16-21, 105:25-106:1; JTX 6, p. 1). Step 1 of the grievance procedure involves a meeting between the employee and his or her immediate supervisor. (ALJD 2:38-40; JTX 1, p. 87). Unlike at the second step, the first step of the procedure does not permit Respondent to appoint a designee. (JTX 1, p. 88). Despite this, according to the

credited evidence, when Walton called Babb at 12:30 p.m., Babb told her that Jeff White is the step 1 designee and she should contact him. (ALJD 13:24-25; JTX 6, p.1).

Consistent with her testimony that this was the first time she had heard such an instruction, Walton responded by asking if Babb was saying she didn't meet for step 1 meetings anymore. (JTX 6, p. 1). Babb responded that Walton should have been told by White or Harry Neal (Labor Relations Manager), that White was the step 1 designee. Babb then hung up the phone. (Tr. 32:10-14; JTX 6, p. 1, JTX 16). Walton called back, and said, "there's no fucking instruction that tells me...," followed by Babb hanging up the phone again. (Tr. 47:16-21; JTX 6, p.1).

According to Babb, Walton then repeatedly called her, using profanity, including calling Babb a "fucking idiot," and telling Babb she had better come out and see Walton. (ALJD 7:13-14; JTX 6, p.1-2). Walton then appeared at the Main Office, and requested, via employee Bob Mullin, to speak with Babb. (ALJD 7:14-15). Babb asserts that Walton also called the office phone again, and that she did not answer the phone. (JTX 6, p. 1). Thereafter, Babb claims that Walton began pounding on the back door, "layed" on the buzzer and yelled, "Gina do you want to come out here and talk to me?" (JTX 6, p.1).

Walton then called again, and told Babb she needed to speak with employee Bob Mullin. (JTX 6, p. 1). Babb hung up the phone, and when Walton called back, she said, "So are you going to deny him a steward." (JTX 6, p. 1). Babb asked employee Mullin if he had requested a steward; while he denied requesting a steward, he did tell Babb he wanted to talk to Walton about when the Union picket was.[7] (ALJD 7:16-17, 25-27;

[7] The picket is not related to any of the events involved in this case.

Tr. 172:2-5; JTX 6, p. 1). Babb admitted during cross examination that her permission was required in order for employee Mullin to speak with Walton. (Tr. 132:16-133:1).

Walton's last call to Babb on September 8 was to Babb's personal cell phone, a number management had distributed throughout the city. (ALJD 7:18-20; Tr. 50:4-9; GCX 4; JTX 6, p. 2). Babb asserted that Walton laughed and said, "well, since you gave your personal cell phone out to the city, I thought I'd use it." (ALJD 7:18-20). Babb told Walton not to call her personal cell phone and hung up. (ALJD 7:20; JTX 6, p. 2).

E. Respondent Informs Babb that Action is Being Taken and then Meets with Walton on September 10 to Deny Her Access to the Main Office and Steward Time, Forbid Contact with Babb, and Inform Her He Has Assumed Babb's Contractual Grievance Role

Later in the day of September 8, Babb sent an email message to District Manager Kim Anderson, seeking assistance from him with respect to her dealings with Walton. (ALJD 7:30-8:2; GCX 4). Anderson took Babb's concerns seriously, responding two days later to explain that Respondent was taking action, and that he would be setting up a meeting that day to discuss plans for handling the matter. (ALJD 8:4-6; GCX 4). Anderson did not communicate to Babb that Respondent would not help her or that nothing could be done. (Tr. 139:5-12; GCX 4).

White, who was copied on Babb's correspondence with Anderson, met with Walton on September 10. (JTX 2). Despite not being any clerk's direct supervisor, he told her he would be meeting with her on grievances for the Main Office. (ALJD 7:30-8:2; GCX 4). Further, White told Walton that she was not to have any contact with Babb in any manner, and that she could not enter the Main Office without first getting permission from him, or from Anthony-Spina Denson, a manager against whom Walton

had outstanding EEO claims. (ALJD 8:10-12; Tr. 35:16-20, 36:7-37:5, 147:1-2). Additionally, White also told Walton she was not permitted to meet for step 1 grievances or schedule step 1 grievance meetings unless she was on the clock. (ALJD 8:13-15; Tr. 37:7-10).

F. Walton Observes Babb Performing Bargaining Unit Work

On the morning of September 11, when Walton appeared outside of the Main Office prior to her shift, she observed Babb performing bargaining unit work. (ALJD 8:18-19; Tr. 39:8-40:1; JTX 6, p. 6). She remained outside the Main Office for approximately 10 minutes and, consistent with White's instructions, did not enter the facility. (Tr. 35:18-20, 40:2-3; JTX 6, pp. 5-6). According to Babb, when she saw Walton waiting, she thought Walton was looking at her and laughing, so she "freaked out" and ran into Supervisor Justin Lowe's office, crying and shaking. (ALJD 8:22-23). Walton denied laughing at Babb, which was confirmed by Respondent's security report stating only that Walton "walked back and forth in front of the window stopping to peer into the window and then walking back and forth again." (Tr. 51:9-13; JTX 6, p.6).

G. Respondent Disciplines Walton for Engaging in Union Activity

By letter dated September 27, Manager White issued Walton a letter of warning ("LOW") referencing Walton's meeting with Babb, Walton's investigations of Babb performing bargaining unit work, the events of September 8th, and Walton's conduct on September 11. (ALJD 8:29-30; Tr. 21:2-11, 40:16-21, 42:16-18; JTX 2, 16). The LOW alleged that Walton violated several sections of the ELM (Respondent's rules and regulations). (JTX 2; Tr. 119:17-19). Although the letter also stated that Walton was uncooperative when questioned in interviews, her unrebutted testimony established that

she answered the questions asked of her to the best of her abilities. (ALJD 8:38-39; Tr. 40:7-15). White did not testify about what Walton allegedly did that caused him to write that she was uncooperative, and couldn't even testify as to the month in which the interview was held. (Tr. 146:10-15).

Walton filed a grievance and, after being denied by local management at the first and second steps, the LOW was expunged at the third step of the grievance procedure. (ALJD 8:42; Tr. 145:25-146:9; GCX 3; JTX 16). In an e-mail message dated January 14, 2013, Respondent's Regional management criticized the denial of the grievance at the second step, opining that the LOW was severely lacking in establishing the charge of "misconduct." (JTX 16). In the same e-mail chain, Jim Davey, Respondent's Western Area Labor Relations, admitted that he "[could not] totally disagree" with the Union's assertion that the [LOW] was connected to protected activity and that, from his review of Respondent's case file, Walton's "behavior really did not rise to the level of a threat or some type of violence" as alleged in the LOW. (JTX 16).

H. Respondent Obtains and Attempts to Enforce a TSPO Against Walton

On October 9, Babb filed a petition for a TSPO against Walton in Clackamas County Circuit Court. (ALJD 9:1-2; JTX 5). Despite the fact that the Oregon law under which the TSPO was sought specifically prohibits seeking such relief for conduct protected by labor law, Babb's petition was granted the next day. (ALJD 9:4, 17:13-17; JTX 3, 5, 10). Rather than being based on a reasonable ruling on the facts of the case, the decision of the Court in granting the petition was made *ex parte*, based solely on the petition and documents submitted by Babb, without considering any input from Walton. (JTX 3-6). In fact, Walton's first opportunity to appear before the court was 20 days

after the petition was granted, on October 30. (JTX 4). Even then, the stated purpose of such appearance was limited to allowing Walton to object to the TSPO and to request a hearing. (JTX 4). Prior to the TSPO being served on Walton, Babb notified Respondent that she had filed the petition, and had instructed employees to contact her if they saw Walton in the Main Office. (ALJD 9:28-31, 35-36; Tr. 115:1-2, 137:21-138:1).

The TSPO ordered, *inter alia*, that Walton cease having and avoid all future contact with Babb. (JTX 3, pp. 2-3). This effectively restricted her from not only entering the Main Office to meet with bargaining unit members and investigate their grievances, but also entering other offices where Babb might be, such as Respondent's Central and Oak Grove facilities. (ALJD 9:8-26; Tr. 55:8-56, 56:16-21; JTX 3). The TSPO also interfered with Walton's ability to process grievances implicating Babb, as well as her ability to request information from Respondent.[8] (Tr. 56:24-57:8, 57:23-58:10, 148:1-7; JTX 3). The consequences of violating the TSPO included criminal liability, as well as termination of employment. (Tr. 58:14-24; JTX 4).

When Walton visited the Main Office as a customer on October 13 to mail a personal item, Kathy Cooper, supervisor/Address Management Technician, came out of the back office, informing someone on her cell phone that she (Walton) was in the office. (ALJD 9:33-35; Tr. 44:13-18, 24-45:1, 157:17-18). Thereafter, Babb called the police to enforce the TSPO against Walton, identifying herself as a Postal Service supervisor. (Tr. 138:7-11). Walton was served with the TSPO later that day while she was at the Union hall. (ALJD 9:35-36; Tr. 41:18-42:5; JTX 3-5).

[8] The General Counsel requested in its brief to the Judge that the transcript be corrected to reflect Walton's testimony that the TSPO would interfere with Walton communicating with Jeff White about a step 1 grievance if that "implicated" (rather than "implemented," as the transcript reads) Gina Babb working in the clerk craft. (Tr. 57:24). The Judge erred in failing to rule on this ministerial request.

Two days later, on October 15, Walton was approached by two police officers while at Respondent's Midway facility, who stated they were there to arrest her for having violated the TSPO by visiting the Main Office on October 13. (ALJD 9:41-42; Tr. 42:19-43:13). When the officers learned that Walton hadn't been served with the TSPO until the evening of October 13, after the visit to the Post Office, they did not arrest her. (ALJD 9:43-44).

I. Court Proceedings

On October 30, pursuant to an Order from the court served upon Walton in conjunction with the TSPO, Walton appeared in court with Adam Arms, an attorney the Union hired to represent Walton against the TSPO. (ALJD 10:9-10; JTX 4). Arms attempted to have the TSPO dismissed, but the court advised him to put his motion to dismiss in writing.[9] (JTX 12, p. 1). Thereafter, on January 31, 2013, Arms filed the written motion to dismiss the TSPO, as well as a motion to reset the hearing. (ALJD 10:10-11; JTX 9, 10).

Babb filed a response to Arms' filings opposing the dismissal of the TSPO. (ALJD 10:12; JTX 11). In support of her opposition, Babb submitted a declaration explaining why she believed the TSPO should not be dismissed. (JTX 12). That declaration appended a statement from Manager White in support. (JTX 12). The court granted Arms' motion for a continuance, but did not rule on his motion to dismiss. (JTX 9, p. 3).

Babb, who admitted that she wanted her pound of flesh and wanted to go to court, testified that after realizing that the petition was causing so many other issues, in

[9] The Judge's assertion in her findings of fact that the State court judge denied Arms' motion to dismiss the TSPO is neither accurate nor supported by the record. (ALJD 10:12-13).

the way of grievances and NLRB charges, she wanted everything to be settled. (Tr. 119:12-16). Thereafter, the parties ultimately reached a settlement, and the TSPO was settled on March 22, 2013. (ALJD 10:17-18; JTX 14, 15). Respondent's Labor Relations Specialist, Kim Kelly, whose presence Babb had requested, proposed a global settlement of the TSPO as well as the instant Unfair Labor Practice charge during settlement discussions. (ALJD 10:13-17; Tr. 72:2-5, 73:1-5; GCX 5).

J. Walton's Interactions with Others

The Judge credited the testimony of Respondent's four witnesses, who claimed to have had contentious interactions with Walton at various points during a 7 year span. (Tr. 180:10-11, 184:25). Supervisor/Address Management Technician Kathy Cooper testified that she's had several interactions with Walton that she would consider confrontational or adversarial, and that the most recent one was after the TSPO was filed, in December 2012. (ALJD 10:22-30; Tr. 159:3-9; JTX 5). Cooper testified that in the incident in December, she requested not to have to work with Walton because of "things that happened in the past," but that she was told she needed to work with her and follow direct orders. (Tr. 159:21-25). While working together, Cooper claims Walton yelled at her while she (Cooper) was assisting a customer. (Tr. 160:3-5). According to Cooper, Walton always used profanity, and that Walton even yelled at her while she was on the phone with Postmaster Shawneen Betha. (Tr. 160:6-13, 161:18-19).

Cooper recounted other incidents in the context of Walton meeting with management for step 1 grievance meetings. (ALJD 10:32-38; Tr. 163:13-14, 20-22, 165:15-18). Cooper testified that when she dealt with Walton on step 1 grievances a

couple of years prior to the date of the hearing, Walton continually screamed, yelled and cursed. (Tr. 163:20-22, 164:10-11). She also testified that following one meeting, Walton followed her and started screaming and yelling, leading some people from labor relations to come down because they were concerned. (ALJD 10:35-37; Tr. 164:5-9). Prior to that, Cooper recalled attending step 1 meetings together with Babb where, after being asked not to curse, Walton responded with profanity. (Tr. 164:15-25).

Oak Grove supervisor Julie Pimentel, testified that there was an incident in September or October, where she threatened to call the police on Walton after she refused to leave the Oak Grove facility. (ALJD 10:43-11:9; Tr. 189:13, 190:4, 190:20-191:4). She also recalled Walton allegedly yelling at her on the phone when she did not give Walton an answer regarding a grievance right on the spot. (ALJD 11:21-22). Pimentel did not testify as to when this phone call allegedly occurred. Supervisor Lyudmila Basarab recalled an incident that occurred "some time" in 2013 (again, after the TSPO was acquired), when Walton allegedly started screaming and cursing after being denied the opportunity to speak with a new clerk. (ALJD 11:15-19). Even were such vague testimony properly credible, regardless of when it allegedly occurred, there is no record evidence that Walton ever received a warning or discipline for this conduct or for any of the conduct recounted by Respondent's witnesses.

Most telling, however, is the testimony of Respondent's witness, window clerk Bob Mullin. Mr. Mullin, who was also credited by the Judge, had similarly heard Walton yell and curse at some undefined time when Walton was handling a Union matter with Respondent. (ALJD 10: 40-41; Tr. 173:16-22). However, consistent with Walton's

testimony, Mullin specifically testified that Walton was *not* shouting on September 8, as alleged by Babb. (Tr. 34:20-22, 173:11).

III. ARGUMENT

A. Respondent Violated §§ 8(a)(1) and (3) by Issuing Cheryl Walton a Letter of Warning in Retaliation for Engaging in Union Activities

Despite correctly recognizing that an employer violates the Act by disciplining a union steward for "processing grievances, policing the collective-bargaining agreement, or for engaging in other activities as a union steward,[10]" the Judge incorrectly found that Respondent did not violate §§ 8(a)(1) and (3) of the Act by issuing the LOW to Walton on September 26. Her error was based on the faulty conclusion that Walton's conduct lost the protection of the Act, a conclusion not supported by the law or the record evidence.

1. Walton's Conduct Did Not Lose Protection Under the Act

The Judge found that *Atlantic Steel*[11] was not applicable because Walton's conduct, as outlined in the LOW was not an "isolated outburst" or "moment of animal exuberance" in the course of performing her responsibilities as a Union representative. (ALJD 13, fn. 11). Rather, the Judge found that Walton lost the Act's protection by acting in a "persistently insubordinate, obstinate, and disruptive manner designed to harass Babb." (ALJD 12:2-3). This is clear error.

First, it is well established that "union stewards filing and processing grievances on behalf of other employees enjoy the protection of the Act, even if, while doing so, they exceed the bounds of contract language, unless the excess is extraordinary,

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[10] *Pacific Coast Utilities Services*, 238 NLRB 599, 606 (1978), *enfd.*, 638 F.2d 73 (9th Cir. 1980), citing *General Motors Corp., Inland Div.*, 233 NLRB 47 (1977); *Schiavone Constr. Co.*, 229 NLRB 515 (1977); *Chrysler Corp.*, 228 NLRB 486 (1977); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976).
[11] 245 NLRB 814 (1979).

obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure." *Roadmaster Corp.*, 288 NLRB 1195, 1197 (1988), *citing Goodyear Tire & Rubber Co.,* 271 NLRB 343, 345 (1984); *Union Fork & Hoe Co.,* 241 NLRB 907, 908 (1979); *NLRB v Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). *See also Southwestern Bell Tel. Co.*, 260 NLRB 237 (1982) (tempers of all parties flare and comments and accusations are made which would not be acceptable on the plant floor during the administration and resolution of grievances). Thus, for an employee to forfeit the protection of the Act while processing a grievance, "the employee's behavior must be so violent, or of such an obnoxious character, as to render him wholly unfit for further service." *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028, 1034 (1976).

Second, to the extent the Judge relied upon Babb's reaction to Walton's conduct in determining that Walton lost the protection of the Act, such reliance is improper.[12] An employer's subjective perception is not dispositive. Rather, the question is an objective one; *i.e.*, whether the alleged misconduct is so serious that it deprives employees of the protection the Act normally gives for engaging in concerted activity. *Kiewit Power Constructors Co.*, 355 NLRB 708 (2010), citing *Shell Oil Co.*, 226 NLRB 1193, 1196 (1976), *enfd.,* 561 F.2d 1196 (5th Cir. 1977).

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 (1979). *See also Piper Realty*, 313 NLRB 1289, 1290 (1994) (although employees are permitted some leeway for impulsive

[12] (ALJD 12:6-8,18-23;17:1-2)

behavior when engaged in concerted activity, this leeway is balanced against an employer's right to maintain order and respect). None of Walton's conduct was sufficiently egregious to lose the protection of the Act.

Specifically, with respect to the August 9 meeting, crediting Babb's testimony, Walton and Babb were in the supervisor's lounge for the purpose of discussing grievances, and Walton did not call Babb an ass or "pepper her language with profanity" until the grievance she was pursuing was denied without a reason other than I said so. Even assuming, *arguendo*, that Walton screamed at Babb and approached her while shaking her finger, given that the alleged conduct occurred in a supervisor's lounge, during a grievance meeting off the work floor and in response to Babb's provocation, Walton would not have lost the protection of the Act. *See Stanford Hotel*, 344 NLRB 558, 559 (2005) (employee calling manager a "f-ing son of a bitch" while angrily pointing finger at him during private meeting discussing eligibility to join union held protected). Here, even if Walton's alleged "outburst" weighed in favor of losing protection under the Act, the remaining factors (the location of the discussion, the subject matter, and the fact that her conduct was provoked by Babb) do not. *See Felix Industries, Inc.*, 339 NLRB 195, 195-197 (2003) (while employee's "obscene," "personally-denigrating" and "insubordinate" outburst weighed in favor of losing protection, it did not outweigh remaining 3 factors favoring protection). Further, the evidence established that it was not uncommon for Walton to curse while at work, and no evidence was provided by Respondent to establish that she was disciplined for it,[13] or that it was opprobrious

[13] The discipline of an employee violates Section 8(a)(3) of the Act when there is evidence that the employer has seized upon union activity to justify changing its previous tolerant policy toward the employee. *Gravure Packaging, Inc.*, 321 NLRB 1296 (1996).

enough to ever cause her to lose the protection of the Act vis-à-vis her representational duties.

As for Walton's interactions with Babb on September 8 over the phone and in the main office lobby, they were for the purposes of scheduling step 1 grievance meetings, and requesting permission to talk with Clerk Mullin. Walton's "outburst" was made solely in response to Babb telling her that, contrary to the language in the parties' collective bargaining agreement, Manager White was the step 1 designee and Babb's repeatedly hanging up without giving Walton the opportunity for discussion or clarification. Walton's "outburst" consisted of nothing more than her questioning the instruction and beginning to argue with Babb, stating "there was no fucking instruction" before Babb hung up the phone on her. While perhaps undesirable from Babb's standpoint, the Board has held that a "certain amount of salty language and defiance" must be tolerated during such confrontations. *Severance Tool Indus., Inc.*, 301 NLRB 1166, 1170 (1991) *citing*, *NLRB v. Chelsea Laboratories*, 825 F.2d 680, 683 (2d Cir. 1987); *Syn-Tech Windows Systems*, 294 NLRB 791 (1989).

Here, the first step of the grievance procedure does not permit Respondent to designate a representative to meet with the Union, but instead directs that the employee's immediate supervisor be involved. (JTX 1, p. 88). Walton was not notified by White of any agreement with the Union that permitted a change to the grievance procedure, and Respondent made no such claim at hearing. (Tr. 33:9-12). Though perhaps a little overzealous, Walton's conduct of trying to get in touch with Babb to schedule a grievance meeting was consistent with her interpretation of the collective bargaining agreement. Further, Walton's repeated phone calls to Babb were

necessitated by Babb hanging up the phone before Walton could finish what she was saying or ask questions. (Tr. 47:16-21, 51:3-5; JTX 6, pp. 1-2). Thus, Walton's repeated calls cannot be relied upon to support a finding that she lost the Act's protection as an employee has considerably greater leeway for misconduct if found to be provoked by the employer. *Romar Refuse Removal, Inc.*, 314 NLRB 658, 671 (1994). That was exactly what happened here.

Further, given Babb's undisputed history of refusing to meet for Step 1 meetings, it was not unreasonable that Walton would question Babb's refusal to meet. (Tr. 20:7-9). In addition, even if, as the Judge found, Walton called Babb a "fucking idiot," the conclusion that Walton did not lose the protection of the Act would not be altered.[14]

Finally, even assuming Walton yelled through the door, "layed" on the buzzer and knocked on the door, as alleged by Babb, the evidence established that Babb was behind locked doors and, upon hearing the buzzer, ignored it. It strains credulity to believe Walton ringing the buzzer a second time, (or even a third time) or even knocking repeatedly on the door, could somehow constitute serious misconduct or conduct sufficiently egregious for her to lose the protection of the Act. Compare *In re Sodexho Mariott Svcs.*, 335 NLRB 538, 549 (2001) (employee banging and kicking office door and uttering profanity did not lose protection of the Act).

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[14] *See Wal-Mart Stores, Inc.*, 341 NLRB 796, 807 (2004), *citing Burle Indus.*, 300 NLRB 498, 504 (1990) (calling supervisor a "fucking asshole"), *enfd.*, 932 F.2d 958 (3d Cir. 1991); *Postal Service*, 241 NLRB 389, 390 (1979) (referring to supervisors as "a-holes"); *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964) (supervisor believed employee called him a "horse's ass"), *enfd.*, 351 F.2d 584 (7th Cir. 1965); *Crown Central Petroleum Corp. v. NLRB*, 430 F. 2d 724 (5th Cir. 1970) (implying supervisor was "a damned liar"); *Norton Concrete Co.*, 249 NLRB 1270, 1277-1278 (1980) (threat to supervisor to "return and whip the ass of that bald-headed mother-fucker" if he did not like what the employee was doing; held protected); *NLRB v. Cement Transport Co.*, 490 F. 2d 1024, 1030 (6th Cir. 1974) (referring to president of company as a 'son-of-a-bitch'); *Alcoa, Inc.*, 352 NLRB 1222 (2008) (employee referred to supervisor as "egotistical f—er"); *Tampa Tribune*, 351 NLRB 1324, 1324-1325 (2007) (calling supervisor a "stupid f—ing moron").

Third, the cases the Judge relies upon, *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989), and *Marico Enterprises*, 283 NLRB 726 (1987), are factually distinguishable and do not support the conclusion that Walton lost the protection of the Act.

In *Carolina Freight Carriers Corp.,* alleged discriminatee Ward was a casual employee characterized as a "chronic complainer" who had been repeatedly warned about his attitude by the employer. Despite his attitude, the employer was going to hire him on as a regular employer, but decided to cease employing him altogether after an incident in which Ward, in pursuing what he believed was a contract right, loudly refused an order to clock out. Adopting the decision of the administrative law judge, the Board found the employer did not violate the Act because his employment history as a whole was sufficient to support the decision, even though Ward's refusal to clock out was not so extreme as to lose the protection of the Act.

Walton, unlike Ward, is a long term employee entrusted with the opening, closing, and running of the unit at Respondent's Midway facility. Further, despite Respondent's witnesses' testimony that Walton yells and curses in carrying out her Union duties, which are not free from contention to begin with by their very nature, Respondent failed to present any evidence of Walton being warned about or disciplined for such behavior in the past. In fact, after the August 9 meeting between Babb and Walton, Respondent chose not to issue any discipline, determining instead that Walton was in protected status. Furthermore, after the September 26 LOW was issued, Respondent expunged it from her record, having determined that Walton's conduct did

not violate Respondent's own rules in light of the "bad blood" between Babb and Walton.

Moreover, unlike in *Carolina Freight Carriers Corp.,* management arguably condoned Walton's behavior, given the complete absence of warnings Walton received. Such condonation is supported by management's directive to those who complained about Walton's behavior, such as clerk Cooper, to work with Walton nonetheless. Respondent's own condonation and assessment that Walton's conduct was protected in light of the two women's long-standing difficult Union-management relationship, renders the Judge's finding legally untenable. *See United Parcel Service,*340 NLRB 776 (2003) (noting that what are fighting words in some workplaces may be everyday banter in another, and in finding discriminatory discharge, noted that profane and derogatory statements were common in the work place, and there was no evidence of other discipline for the same conduct).

In *Marico Enterprises,* when alleged discriminatee Pauyo, a Haitian immigrant, confronted his supervisor in the presence of approximately 45 co-workers about the employer checking green cards and Immigration agents appearing at the plant right after the employer learned of the union's petition, the conversation became heated. Pauyo yelled at his supervisor, his arms flailing, and made gestures toward his supervisor with his hips. After being asked to leave several times, the employer discharged him. Applying *Atlantic Steel*, the judge determined that Pauyo's outburst was extreme, not provoked by the employer, and on the plant floor in the presence of a large number of employees.

Here, none of the interactions relied upon by Respondent in issuing its LOW and TSPO involve reliable evidence that Walton repeatedly refused an instruction and none involved an unprovoked outburst. With respect to the interactions between Walton and other employees and supervisors recounted in the Judge's findings, there is no evidence that Respondent relied upon them in issuing the LOW to Walton. There is also no evidence that any of these interactions formed the basis for the TSPO. Moreover, as the majority of the interactions recounted in the Judge's findings arguably occurred after the TSPO was acquired, it would be unreasonable to rely on such conduct to find support for Respondent's actions in this case.

2. The Judge Was Mistaken as to the Timing of Walton Being Limited by Respondent as to Her Union-Related Activities; September 10 Is the Correct Date

Critical to the Judge's finding that Walton was insubordinate is her conclusion that, at some point prior to September 8, Manager White instructed Walton that he was the Step 1 designee and that Walton was not to schedule grievance meetings when she was off the clock. The Judge found that Walton disregarded these instructions. Contrary to this finding, the evidence supports Walton's contentions that she was not given the instructions regarding the Step 1 designee until September 8, and that the direction not to schedule grievance meetings while off the clock was given on September 10. As such, Walton was not insubordinate.

The Judge also found that Walton had been told prior to September 8 that, according to the collective bargaining agreement, she had to get permission from the supervisors at both her home office and the office she was visiting prior to using

steward time for grievance handling. However, as Walton was off the clock on September 8, and remained in an area open to the public, such finding is irrelevant.

In determining that Walton was instructed that White would be Respondent's Step 1 designee for the Main Office, the Judge relied on White's court-filed statement in support of Babb's TSPO, as well as his testimony at the unfair labor practice hearing. In his court statement, White averred that, to the best of his recollection, he instructed Walton to bring all Step 1 grievances to him on or about August 11, 201[2]; however, he also explained that Respondent's threat assessment team met on September 14 and determined Babb should not meet with Walton for a temporary period. (JTX 12, p. 6). Those two statements are not consistent. Moreover, White had similar problems with inconsistency at the ULP hearing. He testified that he informed Walton not to have any contact with Babb whatsoever the day before Walton peered in the window of the Main Office (September 10), while placing the instruction to Walton to deal with him as the Step 1 designee temporally as occurring after the threat assessment team meeting. (Tr. 147:1-8, 21-23; JTX 6, pp.5-6). He does not identify specifically when, and his testimony is inconsistent both by itself and with the record evidence.

Walton, on the other hand, testified that she did not learn of this change until September 8 when Babb told her, and the statements attributed to her regarding questioning the instruction, which were credited by the Judge, support her timeline. (JTX 6, p. 1) In addition, Walton is the only one who can be credited as to the September 10 timing of her receipt of White's instructions that she could not enter the Main Office without permission from him or Anthony Spina-Denson, and revocation of her permission to schedule grievance meetings when she was off the clock. (ALJD

7:30-8:2, 8:13-15; Tr. 35:16-20, 36:7-37:10, 147:1-2). There is no other record evidence contradicting this testimony. Since Walton complied with the instructions from Manager White once they were given, as everyone acknowledged, she could not have been insubordinate in appearing at the Main Office on September 8 before the instructions were given.

Finally, the Judge's finding that Walton was insubordinate based on her mere presence at the Main Office on September 8 without prior permission is not supported by the record. As Babb herself acknowledged, Walton did not need permission to be in the lobby of the Main Office, as the lobby is a public area. (Tr. 100:11- 23). Clearly, if the collective bargaining agreement prevented Walton from entering any of Respondent's facilities, including on her day off, the instruction from Manager White not to enter the Main Office would have been superfluous.

3. Even if White Instructed Walton Prior to September 8 that He Was the Step 1 Designee, Walton's Conduct Was Protected

Even ignoring the inconsistencies in White's version of the timing and assuming he instructed Walton prior to September 8 that he was the Step 1 designee, Walton's actions were protected because she was acting consistently with the terms of the parties' collective bargaining agreement. The actions of a shop steward (or for that matter any employee) who honestly and reasonably seeks to enforce the terms of a collective-bargaining agreement constitute protected, concerted activity within the meaning of § 7 of the Act. *See NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

Similarly, efforts to utilize contractual grievance procedures are also protected, as such actions are extensions of the concerted activity giving rise to the contract itself. *AMF Voit, Inc.*, 223 NLRB 363, 367 (1976). Since Walton's only possible failure to

comply with management's instruction was her attempt to perform her duties under the grievance procedure in the parties' contract, the Judge's conclusion that Walton lost the protection of the Act cannot stand.

4. The Judge's Conclusion that Walton Intended to Harass Babb Is Incorrect

In addition to finding that Walton was insubordinate, the Judge also reached the erroneous conclusion that Walton's purpose was to harass Babb. (ALJD 14:14-16). The Judge based her conclusion on: Walton continually trying to contact Babb; and Walton's alleged fabrication of Mullin's request for steward time. First, as discussed above, the multiple attempts to contact Babb were for the purpose of scheduling step 1 grievance meetings and requesting to speak with an employee, and were motivated in part by Babb's conduct in repeatedly hanging up the phone. Second, the assessment that Walton fabricated employee Mullin's request for steward time is erroneous.

Specifically, although employee Mullin denied that he requested a steward, he did testify that he wanted to ask Walton a question. It was her responsibility as Director of City Stations to answer members' questions.

The unrefuted evidence established that Babb was refusing to meet with Walton on grievances, and that Walton needed permission from Babb to speak with Mullin. Walton followed the proper protocol as to both, including requesting permission to speak to Mullin through his supervisor, Babb. Babb admitted that such permission was required. Such adherence to protocol on admitted Union activity is crucial and distinguishes it greatly from *Calmos Combining Co.*, 184 NLRB 914 (1970), relied upon by the Judge. That case involved a steward whose screaming, yelling and

insubordination after a grievance meeting was found to be only tangentially related to his union activities.

B. The Judge Applied a Faulty Analysis of the TSPO Under *Bill Johnson's Restaurants* and *BE & K Construction (BE & K II)*

1. The TSPO Did Not Have a Reasonable Basis and Was Retaliatory

While correctly concluding that Respondent was responsible for the TSPO acquired by Babb, and that the TSPO was pre-empted by the Act, the Judge nevertheless incorrectly found that the TSPO had a reasonable basis simply because the TSPO petition was granted. (ALJD 16:34-35). She also found that Babb's motivations in seeking it were genuine and not retaliatory. (ALJD 16:35-36). The Judge is mistaken.

In *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731 (1983), the Supreme Court held that the Board had authority to enjoin a retaliatory lawsuit if it lacked a reasonable basis in fact or law. Further, it held that, if the lawsuit resulted in a judgment adverse to the plaintiff, the plaintiff withdrew the lawsuit, or the lawsuit was otherwise shown to be without merit, the Board could find a violation if the lawsuit was filed with a retaliatory motive. *Id.* at 747-49. Later, in *BE & K Construction Co. v. NLRB*, 536 U.S. 516, (2002), the Court, in reconsidering this standard, concluded that an unsuccessful, but "genuine" and "reasonably based" lawsuit implicated constitutional considerations under the First Amendment's Petition Clause. *Id.* at 530-32. Thus, the Court held that the Board could not rely solely on the fact that the lawsuit was ultimately unsuccessful, but must determine whether the lawsuit was reasonably based, regardless of its outcome on the merits. *Id.* at 535-37.

Contrary to the Judge's finding, the mere fact that the request for a TSPO was granted the day after it was filed does not, without more, establish that it had a reasonable basis. Specifically, the Board in *BE & K Construction (BE & K II),* 351 NLRB 451 (2007), held that "a lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits'." 351 NLRB at 457 (2007), quoting *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993). Here, the Clackamas County judge never reached the merits of the TSPO. As set forth below, if it had, the TSPO would have been dismissed.

Further, the Judge's finding that the lawsuit was not retaliatory is in error. The Board held in *Allied Mechanical Svcs.*, 357 NLRB No. 101, slip op. at 10-11 (2011), that retaliatory motive may be inferred from, among other things, the facts that: the lawsuit was filed in response to protected activity; the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected activity; and the lawsuit obviously lacked merit. As explained further below, there is sufficient evidence to support a finding of retaliatory motive, as the TSPO was filed directly in response to Walton's Union activity, Babb bore animus toward Walton, and the lawsuit lacked merit.

a. The TSPO Was Foreclosed as a Matter of Law

The Oregon law under which the TSPO was sought specifically states it is not to 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). While the Judge correctly found that the TSPO was unlawful because it enjoined Walton's activities attendant to her roles with the Union (i.e., conduct authorized or protected by the labor laws of the United States), she inexplicably concluded that Oregon law would not have required the dismissal of the TSPO because

of her finding that Walton's conduct was unprotected. (ALJD 17:17, 18:6-12). This is clear error. Even assuming Walton's conduct lost the protection of the Act, such a lawsuit could not ever be reasonably based in law under the standard set forth in *BE&K Construction (BE & KII)*[15], 351 NLRB 451 (2007).

b. The TSPO Was Retaliatory

The evidence supports an inference of retaliatory motive. Specifically, all of the evidence submitted by Babb in support of the TSPO reflected interactions between she and Walton while Walton acted in her role as the Union's Director of City Stations. Thus, the petition was filed in response to protected activity. As for animus, Babb, in discussing the TSPO, explicitly admitted on the record to wanting her "pound of flesh." She and Walton had a troubled history, and rather than allow Respondent's District Manager Anderson to address the matter, as he said he would, Babb, went out of her way to pursue the TSPO. Further, Respondent's restrictions on Walton's Union time, including the denials ultimately remedied by grievances, support a finding of animus toward Walton's Union activity. Moreover, the lawsuit, as it was foreclosed by law, "obviously" lacked merit.

2. The TSPO Had an Illegal Objective and Was Preempted

Alternatively, even if it could be successfully argued that the lawsuit was not objectively baseless and/or not retaliatory, Respondent's TSPO still violates the Act as it constitutes a suit beyond a state court's jurisdiction because of federal preemption and

[15] *See also, Ray Angelini, Inc.*, 351 NLRB 206, 208-209 (2007) (Board stated it would be "guided by the Court's discussion in *Bill Johnson's*, of the reasonable-basis inquiry in the context of ongoing suits" and found a lawsuit to lack a reasonable basis would be warranted "if the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous...").

because it had an objective that is illegal under federal law. *Bill Johnson's*, 461 U.S. at 737, n.5.

a. The Judge's Finding that the TSPO Did Not Have an Illegal Object Is Legally Flawed

While the Judge correctly reached the conclusion that the TSPO was preempted, and that it enjoined conduct that was protected under § 7, she concluded that Babb did not have an "illegal objective" when she filed the petition. The Judge is mistaken.

By its TSPO, Respondent sought to prohibit Walton from having any contact with Babb, as well as those Union members she was appointed to represent. Walton was the representative duly designated by the Union for Respondent's Main Office. There is no evidence, persuasive or otherwise, that Walton's presence at Respondent's Main Office would have created ill-will or made good faith bargaining impossible.[16] Further, barring Walton from the Main Office, and effectively any office where Babb might work would be contrary to the Act, a federal law; thus, a proscribed object. *Neilmed Products, Inc.*, 358 NLRB No. 8 (2012) (employer violated the Act by denying business agent access to its facility).

Even if Babb did not intend for the full extent of the consequences resulting from the TSPO she petitioned for and the restrictions that were put into effect the day after she filed the petition, neither she, nor any representative of Respondent, took action to limit the restrictions. Rather, Babb took action to ensure the TSPO remained in effect by insisting that the court not grant Arms' motion to dismiss it with the assistance of Manager White. Babb also sought to enforce the restriction when she called the police after Walton visited the Main Office on her day off even though she was not at work.

[16] *See Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980); *Long Island Jewish Med. Ctr.*, 296 NLRB 51, 71 (1989).

Under Board law, a state lawsuit has an "illegal objective" coming within the exception to *Bill Johnson's,* 461 U.S. 731 (1983), if it is aimed at achieving a result incompatible with the objectives of the Act. Such is the case here.

b. The TSPO Violated Federal Law

Under *Bill Johnson's*, it is the Board that has the authority to determine if a lawsuit brought under state law is preempted by the Act. *J.A. Croson*, 359 NLRB No. 2, slip op at 8 (2012). If it is, and if it otherwise violates the Act, the Board may hold that the filing and maintenance of the lawsuit is an unfair labor practice without regard to whether it is objectively baseless. *Id.* Notably, the Board and reviewing courts have consistently held that preempted lawsuits enjoy no special protection under *Bill Johnson's*. *J.A. Croson Co.*, 359 NLRB No. 2, slip op. at 7 (2012), *citing Bakery Workers Local 6 (Stroehmann Bakeries)*, 320 NLRB 133, 139 (1995); *Teamsters Local 776 (Rite Aid),* 305 NLRB 832, 834 (1991), *enfd.,* 973 F.2d 230 (3rd Cir. 1992), *cert. denied,* 507 U.S. 959 (1993). Thus, if a suit is preempted, it violates § 8(a)(1) if it tends to interfere with, restrain or coerce employees in the exercise of their § 7 rights. *Webco Indus.*, 337 NLRB 361, 363 (2001).

In the instant matter, the TSPO was pre-empted because it targeted activity protected by § 7 of the Act, and lacked a reasonable basis because the statute under which it was sought excluded issuance over conduct protected by Federal labor law. As such, it could never have a reasonable basis. Further, the lawsuit was retaliatory as it was filed in direct response to protected activity, and it sought an illegal objective of interfering with and restraining rights protected by § 7 of the Act, as discussed above. Thus, it violates the Act.

3. Respondent Must Reimburse the Union for the Fees Incurred By Its Defense of Walton in the Matter of the TSPO

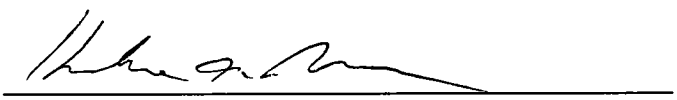
The Union hired attorney Arms to defend its Director of City Stations and steward Walton, against Respondent's unlawful TSPO. In this capacity, Arms appeared in court, filed various documents with the court, attended a settlement meeting and negotiated a settlement of the TSPO. In cases involving the maintenance of an unlawful lawsuit, the Board has, with court approval, exercised its remedial discretion to require the respondent to reimburse opposing parties for the legal fees and expenses incurred in defending themselves. *J.A. Croson Co.*, 359 NLRB No. 2, *citing Can-Am Plumbing*, 335 NLRB 1217 (2001) (awarding legal fees and expenses in addition to ordering respondent to take affirmative steps to dismiss ongoing preempted lawsuit); *Geske & Sons, Inc.*, 317 NLRB 28, 30, 58-59 (1995), *enfd.,* 103 F.3d 1366 (7th Cir. 1997), *cert. denied,* 522 U.S. 808 (1997); *Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 403 (1993), *enfd. in pert. part,* 68 F.3d 490 (D.C. Cir. 1995). *See also Milum Textile Services Co.,* 357 NLRB No. 169 (2011) (awarding reimbursement to union for filing and maintenance of unlawful TRO); *Allied Mechanical Svcs., Inc.,* 357 NLRB No. 101 (2011) (reimbursement to union for all legal fees incurred defending baseless lawsuit). As the TSPO was unlawful for the reasons discussed above, Respondent must reimburse the Union for the costs it incurred defending Walton, and the Judge erred in failing to order this remedy.

IV. CONCLUSION

For all of the above reasons, the General Counsel respectfully requests that the Board grant the General Counsel's exceptions to the Decision of the Administrative Law Judge.

Dated at Portland, Oregon, this 22nd day of January, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Exceptions and Brief In Support of Exceptions to the Decision of the Administrative Law Judge was served on the 22nd day of January, 2014, on the following parties:

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