

**International Union, Security, Police and Fire Professionals of America (SPFPA), and its Amalgamated Local 444 and Cordarryl Nelson.** Case 05–CB–099029

February 28, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON  
AND SCHIFFER

On September 24, 2013, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions with supporting argument. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We agree with the judge's conclusion that Union Steward Brunson acted as the Respondent's agent under the facts presented. In addition to the reasons given by the judge, we rely on the record evidence establishing that Brunson's authority, as a shop steward, included acting for the Respondent in investigating and presenting grievances, representing employees in disciplinary meetings with management, resolving workplace disputes without the Respondent's president's approval, and that the Respondent's president considered Brunson to be the president's liaison with the Employer and had instructed employees to refer workplace issues to Brunson. See, e.g., *Carpenters Local 296 (Acrom Construction)*, 305 NLRB 822, 822 fn. 1 (1991) (finding agency where steward's duties included authority to resolve workplace problems); see generally *Teamsters Local 886 (Lee Way Motor Freight)*, 229 NLRB 832 (1977), enf. mem. 586 F.2d 835 (3d Cir. 1978) (discussing application of common law of agency to union stewards).

The Respondent argues that Brunson was obliged to report fellow employees' misconduct because of his heightened duty as a security guard. The existence of any such duty is of little significance here, as the record shows that an agent of the Union made a belated, misleading and incomplete report about a coworker's nonthreatening conduct (which the Employer itself observed but did not act upon) directly to the Employer's client in the context of evidence that the Union's agent was motivated by the coworker's efforts to remove and replace the Union as the bargaining representative. As to Respondent's challenges to certain of the ALJ's factual findings, we find that, even assuming that the ALJ erroneously found the challenged facts, any such errors would not affect our decision.

<sup>3</sup> We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and to delete the requirement that the Respondent, which has never employed Cordarryl Nelson, file an earnings report for him with the Social Security Administration.

ORDER

The National Labor Relations Board orders that the Respondent, International Union, Security, Police and Fire Professionals of America (SPFPA) Local 444, Detroit, Michigan and Rahway, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Attempting to cause or causing the discipline and/or discharge of any employee because of his or her dissident union activity and/or other protected concerted activities.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Cordarryl Nelson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(b) Compensate Cordarryl Nelson for any adverse income tax consequences of receiving make-whole relief in one lump sum.

(c) Within 14 days from the date of this Order, ask Security Support Services, LLC and NASA to remove from their files any reference to the unlawful discipline and discharge of Cordarryl Nelson, and, within 3 days thereafter, notify the employee in writing that this has been done and that the discipline and discharge will not be used against him in any way.

(d) Within 14 days from the date of this Order, notify Security Support Services, LLC and NASA that it has no objection to the reemployment of Cordarryl Nelson and seek his reinstatement with Security Support Services, LLC and NASA.

(e) Within 14 days after service by the Region, mail copies of the attached notice marked "Appendix,"<sup>4</sup> at its own expense, to all employees in the bargaining unit who were employed by Security Support Services, LLC at NASA Headquarters, Washington, D.C., at any time since November 10, 2012. Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be mailed to the last known address of each of the employees.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 14 days after service by the Region, deliver to the Regional Director for Region 5 signed copies of the notice in sufficient number for posting by Security Support Services, LLC at its NASA Headquarters, Washington, D.C. jobsite, if it wishes, in all places where notices to employees are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT attempt to cause or cause your discipline and/or discharge for engaging in dissident union activity and/or other protected concerted activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL make Cordarryl Nelson whole for any loss of earnings and other benefits resulting from his discipline and discharge, less any net interim earnings, plus interest.

WE WILL compensate Cordarryl Nelson for any adverse tax consequences of receiving make-whole relief in one lump sum.

WE WILL, within 14 days from the date of the Board's Order, ask Security Support Services, LLC and NASA to remove from their files any reference to the unlawful discipline and discharge of Cordarryl Nelson, and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline and discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, notify Security Support Services, LLC and NASA that we have no objection to the reemployment of

Cordarryl Nelson and WE WILL seek his reinstatement with the Security Support Services, LLC and NASA.

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

*Neelam Kundra, Esq.*, for the General Counsel.

*Michael J. Akins, Esq. (Gregory, Moore & Brooks, P.C.)*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, District of Columbia, on July 29, 2013. Cordarryl Nelson (Nelson), the charging party, filed the charge on February 25, 2013, and the General Counsel issued the complaint on May 10, 2013. The complaint alleges that the International Union, Security, Police and Fire Professionals of America (SPFPA) Local 444 (the Union) violated Sec. 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) in November 2012<sup>1</sup> by causing Security Support Services, LLC (the Company) to terminate Nelson's employment because of his dissident union activities. The Union denies the allegations, including the assertion that a coworker responsible for the violation was acting in his capacity as a union steward, and contends that Nelson failed to exhaust his internal union remedies prior to filing a charge with the Board.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Union, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Company, a Nevada limited liability company, with an office and place of business in Washington, D.C., has been engaged in the business of providing security guard services to various private and governmental buildings in Washington, D.C., where it annually performs services valued in excess of \$50,000 in states other than Nevada and the District of Columbia. The Union admits, and I find, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Parties*

On May 1, the Company<sup>2</sup> assumed the NASA contract from the prior employer, Sectek, Inc. and adopted the predecessor's collective-bargaining agreement (CBA) with the Union pursuant to an adoption agreement, which included a number of

<sup>1</sup> All dates are in 2012 unless otherwise indicated.

<sup>2</sup> The Company is a partnership between Quality Investigations, Inc. and Coastal International Security, Inc. Coastal is a wholly-owned subsidiary of Akal Security, Inc. (Jt. Stip., par. 1.)

enumerated changes.<sup>3</sup> As the issues in the case revolve around alleged employee misconduct, the pertinent CBA provision is article 12.3:

If the contracting agency, or other government agency, directs that a specific employee be removed from the contract or otherwise disciplined, any such action directed may be undertaken by the Company and shall not be subject to the grievance or arbitration procedures of Article 13 of this Agreement. In the event that the contracting agency or other government agency expressly directs the removal or discipline of a contract employee, the Company agrees to cooperate with the Union by providing it with available information concerning the incident within five (5) calendar days of such direction by the contracting agency or other governmental agency. It is expressly understood that such government action does not create an obligation on the Company to relocate or reassign employee to any other contract.<sup>4</sup>

Similarly, the Company's Employee Handbook states that "[a]n employee is subject to immediate discharge if [the Company] is directed by the government to remove an employee from a government contract or for" any one of several listed offenses, including "[e]ngaging in harassment of any sort or discrimination toward the client, other employees or visitors."<sup>5</sup> Moreover, employees "[s]hall report all unusual activities, no matter how small, to a supervisor" and "[s]hall fully cooperate in any Company or client initiated investigation."<sup>6</sup> Additional rules require employees to "[r]efrain from activity that would adversely affect the reputation of [the Company] or our customers . . . [r]eport serious violations of prescribed rules, regulations and violations of law to appropriate management officials . . . [r]efuse, unnecessarily delay, or fail to carry out a proper order of a supervisor or other appropriate officials" . . . [e]ngage in any activity that adversely affects the confidence of the public and the integrity of [the Company] and its clients."<sup>7</sup>

The Union operates pursuant to a Constitution and By-Laws,<sup>8</sup> They state, in article VI, Section 13 that the Union is authorized to act as a member's exclusive agent in addressing problems with the employer:

The [Union] to which a member belongs are by him/her irrevocably designated, authorized, and empowered . . . exclusively to act as his/her agent to represent and bind him/her in the presentation, prosecution, adjustment and settlement of all grievances, complaints or disputes of any kind or character against the employer, as fully and to all intents and purposes as he/she might or could do if personally present.<sup>9</sup>

The Constitution and By-Laws also provides relief for members alleging harm by another member in violation of its provisions. Article XXI states, in pertinent part:

Section 1. A charge by a member or members in good standing that a member or members have violated the Constitution and By-Laws of a Local Union, or engaged in conduct unbecoming a member of the Union, must be specifically set forth in writing and signed by the member or members making such charges. The charges must state the exact nature of the alleged offense or offenses and, if possible, the period of time during which the offense or offenses allegedly took place. . . . Conduct unbecoming a Union member may include disaffiliation or decertification proceedings or the instigation thereof.

Section 2. Charges must be submitted to the Recording Secretary of the Local Union within sixty (60) days of the time the complainant becomes aware of the alleged offense . . . .

Section 3. Upon charges being submitted, it is mandatory that a trial be held, unless the charges are withdrawn by the accuser or unless dismissed by the Executive Board of the Local Union because found to be deficient in form or content or not timely filed under Section 2 of this Article. . . .

Section 9. An officer of a Unit of a Local Union, if charged with being derelict in performing his/her duties as a Unit Officer, shall be tried by a Trial Committee selected by the members of the Union in accordance with the provision of this Article, provided, however, that the only penalty that can be meted out to such officer shall be the loss of office in the Unit. The decision of the Trial Committee must be approved by a two-thirds (2/3) vote of such unit members present at the meeting, provided however, if the two-thirds (2/3) vote of such unit membership should desire a penalty other than that specified above, the matter shall be referred to the Local Union in accordance with the trial procedure outlined in this Article.<sup>10</sup>

During the period from September 1 through December 21, Michael Brunson was a security guard and union steward at the NASA headquarters facility. His duties included: (1) representing employees in disciplinary interviews; (2) investigating and presenting grievances; (3) transmitting such information and messages to and from the Union; and (4) bringing grievances to the Company's attention.<sup>11</sup>

Nelson, the charging party, was a security guard at the same facility. During the period of September through November, Nelson played a prominent role campaigning on behalf of a rival organization seeking to replace the Union as labor representative for company employees. He also engaged in numerous discussions with Brunson in which he criticized the Union and advocated for the rival union. Nelson was particularly disturbed about NASA's role in the termination of a coworker. On at least one prior occasion, Brunson warned Nelson that such criticism could get him in trouble if his remarks were reported to management.<sup>12</sup>

<sup>3</sup> Jt. Exh. 2-3.

<sup>4</sup> Jt. Exh. 2 at 14.

<sup>5</sup> GC Exh. 4 at 15-16

<sup>6</sup> R. Exh. 1.

<sup>7</sup> R. Exh. 2.

<sup>8</sup> The Constitution and Bylaws are one document. (Jt. Exh. 19.)

<sup>9</sup> Id. at 5.

<sup>10</sup> Id. at 37, 39.

<sup>11</sup> Jt. Exh. 2, art. 3.1(B).

<sup>12</sup> Nelson's roles in deauthorization and/or decertification of the Union and his frequent discussions with Brunson in which he criticized Brunson, the Union and NASA officials, and expressed support for another labor organization, are not disputed. Given the circumstances,

On November 10, Nelson completed his shift and was off-duty when he engaged in another conversation with Brunson. During the conversation, Nelson criticized the Union for permitting NASA to mistreat the Company's security guards and NASA headquarters security chief Paul Raudenbush to use video surveillance to monitor them. Brunson asserted that Nelson's efforts to decertify the Union would cost employees a raise. He also disagreed with Nelson's assessment about NASA security officials, insisting they served the interests of the Company's security guards. Referring to Raudenbush, his deputy, Joseph Costanza, and branch chief Jolene Meidinger, Nelson replied, "fuck Joe, fuck Jolene, and fuck Paul, they're going to respect us" and that he "did not give a fuck" about them. Brunson warned Nelson that such comments could get back to them and the conversation ended shortly thereafter. The conversation was loud enough to be heard by several other security guards stationed nearby, including Captain Jesse Rager and officers Charles Stevenson and Sean Lafferty. There was no shouting, yelling or arguing.<sup>13</sup>

On November 13, Nelson reported to work and was immediately told by Rager that Brunson reported his November 10 remarks to Raudenbush and that the latter wanted to speak with him. At the end of his shift early the following morning, Nelson went to speak with Raudenbush. Prior to entering the meeting, Nelson activated his cellular telephone's voice recorder.

Raudenbush did virtually all of the talking during the meeting. Without mentioning specific instances, he told Nelson to stop complaining and lowering morale. Raudenbush added that he was entitled to monitor the Company's security guards through surveillance cameras and asked if Nelson was recording their conversation. Nelson denied that he was recording the conversation, but Raudenbush made him remove his sweater to make sure. Raudenbush concluded the meeting by informing Nelson that he should just do his job. He added that he would not seek to have Nelson disciplined or removed from the NASA worksite.<sup>14</sup>

Unbeknownst to Raudenbush, that same morning, on November 14, Brunson kept the issue alive by expressing his concern to Costanza as to what Nelson said on November 10. Brunson told Costanza that Nelson yelled loudly, inappropriately and "in a fashion that was concerning." Brunson did not mention, however, that Nelson was off-duty and unarmed when he made the remarks.<sup>15</sup>

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Brunson clearly considered Nelson to be hostile to the Union. (Tr. 23-46, 120-126, 132-134, 149-151, 166-167, 245-246.)

<sup>13</sup> Brunson confirmed testimony by Nelson that they were neither yelling nor arguing on November 10, and the discussion was typical of several that they had in the past and was not worth reporting to management. (Tr. 49-56, 151-156.) Rager, whom I found credible, testified that they were speaking loudly, but he did not hear cursing or threatening statements. (Tr. 244-247.) In addition, the incident reports filed by Rager, Brunson, and Stevenson on November 15 confirm the absence of yelling and arguing, and the nonthreatening nature of the conversation. (GC Exh. 4 at 10-12.)

<sup>14</sup> It is evident from the testimony of Nelson and Raudenbush that the latter was not yet aware that Nelson had taken his name in vein on November 10. (Tr. 62, 221-222.)

<sup>15</sup> Brunson testified that he provided details to Costanza after the latter asked Brunson if he had heard what happened to Nelson. However,

On November 15, Costanza followed-up on Brunson's information by an email sent to Company management, including Rager, Project Manager Douglas Nelson and Vice President Nate White, requesting immediate suspension of Nelson's access to the facility, pending investigation of the November 10 incident. It stated in pertinent part:

I was informed of a very serious matter yesterday and after a bit of thought I am requesting the immediate suspension of access pending further investigation. Officer Brunson informed me yesterday that Officer Cordaryl Nelson was heard using expletives and shouting in the West lobby area while on shift Saturday November 10, 2012. Furthermore, officer Nelson yelled out F \_\_\_, F \_\_\_ and F \_\_\_ Jolene,<sup>16</sup> they need to respect me? The very nature of this type of behavior is threatening and cannot be allowed on an armed contract. Officer Nelson is hereby barred from the facility until which time statements are obtained from all parties that were on shift and from Officer Brunson. Please collect the statements and provide them to the CCS review. If this investigation is inconclusive access will be reinstated for this individual. Obviously a great deal of professionalism is required during this type of investigation so please ensure statements are collected in private and that information collected is not shared with personnel without a need to know. Thanks very much and have a great day.<sup>17</sup>

Later that afternoon, Raudenbush, sent an email to Rager informing him that Nelson was barred from NASA headquarters until the investigation into his behavior was completed:

It is now my understanding that you were informed by the 53 HR, Barbara Gonzalez, that Officer Nelson spoke to her and claimed that his attorney instructed him that he should come to work tonight. As Chief of Security at NASA HQ, I have barred him from the NASA Headquarters building until the investigation into his disruptive and threatening behavior is completed. It does not matter what any attorney advises him as I am the final authority on who has access to NASA Headquarters. If he comes to HQ tonight you are to contact FPS and have him removed from the building. You shall call me if FPS is needed and I will speak to them.<sup>18</sup>

The Company notified Nelson later that day that it was directed by NASA headquarters to remove him from the contract until further notice due to alleged misconduct at that facility. Nelson was informed that due to the removal, he was being placed on unpaid leave status and the project manager or hu-

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Brunson's credibility was impeached based on numerous inconsistencies between his testimony, incident report and Board affidavit. (Tr. 156-157, 169-170; GC Exh. 4 at 10.) Costanza, on the other hand, provided credible testimony that Brunson initiated the conversation and provided an exaggerated description of Nelson's conduct on November 10. (Tr. 194-199, 207-208; Jt. Exh. 4.)

<sup>16</sup> Blank lines were contained in the original.

<sup>17</sup> Jt. Exh. 4.

<sup>18</sup> Jt. Exh. 5.

man resources department would be in contact with him with the final determination into the matter.<sup>19</sup>

On November 16, Nelson emailed Union President Willie Jones and the International Union's Executive Director, Joseph McCray, to request union representation in a case against the United States and the Company for violating the Whistleblower Protection Act and False Claims Act.<sup>20</sup>

On November 20, Nelson sent a followup email to Jones requesting the Union assist him in a case against NASA and the Company. Jones replied by email less than an hour later and informed Nelson that he tried to contact the human resources department to get Nelson's writeup but had not received a response. Jones informed Nelson that he would file a grievance on Nelson's behalf the following day. In the email, Jones copied McCray, Brunson, and the International Union's secretary.<sup>21</sup>

Later that night, Nelson responded to Jones' email and copied McCray and Brunson. In his email, Nelson informed Jones, McCray, and Brunson that he had a "very confidential recording" that he wanted to share with them and forwarded the recording that he made of his November 14 conversation with Raudenbush. He also provided the applicable statutory provision as "DC [Title] 23 chapter 5 subpart 3 wiretapping law."<sup>22</sup>

Prior to starting his shift at 6 a.m. the following morning, Brunson informed Raudenbush about the tape recording. Raudenbush directed Brunson to send it to him. As soon as he started his shift and was able to access a computer, Brunson forwarded Nelson's email and tape recording.<sup>23</sup> Shortly thereafter, Brunson sent an email to Nelson informing him that he would file a grievance on Nelson's behalf that day. Brunson copied Jones and McCray on the email.<sup>24</sup> A few minutes later, Jones sent an email to Nelson requesting that he provide a statement of what happened during his meeting with Raudenbush. Nelson agreed to provide a copy of the statement as an email attachment.<sup>25</sup>

On November 23, Nelson sent an email to Jones, Brunson,

and McCray describing his version of what occurred during the meeting with Raudenbush. In the email, Nelson stated that Rager, while informing him that Raudenbush wanted to speak with him, implied that Brunson told Raudenbush about the recording. On November 26, Brunson replied to Nelson's email denying that he ever spoke to anyone about Nelson.<sup>26</sup>

Meanwhile, on November 23, Jones drafted a grievance on Nelson's behalf and gave it to Brunson to file at Step 2 of the grievance procedure:

The Union disagrees with [the Company's] decision to remove Mr. Cordarryl Nelson from NASA contract pending an investigation. Contract Provision Violated:

Art. 12 Discharge and Discipline  
Art. 12.1Just Cause  
Art. 12.3Government Action

Relief Requested: The Union request that [the Company] reinstate Mr. Nelson immediately and make him whole in every way possible. Also the Union request that all documents used by the company in making its decision to suspend Mr. Nelson be forwarded to the Union office and a second step grievance hearing be arranged in accordance with the CBA.<sup>27</sup>

On November 26, Jones sent an email to Douglas Nelson, attaching the grievance filed on behalf of the charging party and requesting it be processed at the second step of the CBA.<sup>28</sup>

On December 4, White notified Jones that NASA barred Nelson from the contract worksite.<sup>29</sup> On December 7, Jones sent Douglas Nelson an email formally withdrawing the charging party's grievance because the Company was following government instructions to remove him from the worksite. The email is incorrectly dated November 7, but was actually sent on December 7:

Please allow this email to serve as an official notification by the Union in reference to grievance #112312-A that was filed on behalf of Mr. Cordarryl Nelson on November 23, 2012.

Based on, Article (12) Sec. 12.3-Government Action of the CBA which states "If the contracting agency, or government agency, direct that a specific employee be remove from the contract or otherwise disciplined, any such action directed may be undertaken by the company and shall not be subject to the grievance and arbitration procedures.

Therefore, the Union has no choice but to formally withdraw Mr. Nelson grievance because the company was only following the government instructions to remove him from the work-site. If you have any questions, please do not hesitate to contact me.<sup>30</sup>

On December 20, the Company notified Nelson that he was removed from the contract site and terminated because it "lost confidence in [his] ability to properly carry out [his] duties as an Armed Security Officer and comply with all policies and

<sup>19</sup> Nelson refused to sign the document. (Jt. Exh. 6.)

<sup>20</sup> Jt. Exh. 7(a).

<sup>21</sup> Jt. Exh. 7(b).

<sup>22</sup> Jones conceded that any evidence provided by a unit member to the Union in the furtherance of a grievance should be kept confidential. (Jt. Exh. 7(c); Tr. 282.)

<sup>23</sup> Brunson was tentative and evasive in conceding that he sent the tape recording to Raudenbush the following day. (Tr. 162-164; Jt. Exh. 8.) In subsequent testimony, Brunson said that he spoke to no one the following morning, except for Raudenbush, who found out about the tape recording from someone and directed Brunson to send it to him as soon as possible. (Tr. 175-177.) That testimony is contradicted by Raudenbush, who testified that he first learned about the recording from Brunson or another officer that morning as he arrived at the facility. (Tr. 228-229.) Considering Raudenbush's less than credible testimony as to his role in Nelson's termination, see fn. 32, *infra*, I find that his spotty memory as to how he learned about the recording was an attempt to insulate Brunson as his source of information. In any event, Nelson's confidential email was sent to three union officials, including Brunson, so there is no doubt that one of them told Raudenbush about the tape recording.

<sup>24</sup> Jt. Exh. 9.

<sup>25</sup> Jt. Exh. 10(a).

<sup>26</sup> Jt. Exh. 10(b).

<sup>27</sup> Jt. Exh. 11.

<sup>28</sup> Jt. Exh. 12.

<sup>29</sup> Jt. Exh. 13.

<sup>30</sup> Jt. Exh. 14.

procedures.” The internal Company documentation containing the justification for the termination stated that the client, NASA, requested the removal based on “unprofessional conduct and behavior; false and misleading statements; failure to follow directives; loss of confidence.”<sup>31</sup> This documentation, by implication, referred to Nelson’s November 10 discussion with Brunson and Nelson’s November 13 tape recording of his conversation with Raudenbush.<sup>32</sup>

Later that day and the next day, Nelson emailed union and Company representatives urging them to submit a joint petition to NASA explaining that there was no just cause to bar Nelson from the worksite and asking NASA to lift the disciplinary requirement.<sup>33</sup>

On December 21, Nelson emailed Company manager Nate White requesting to know the status of the Company’s investigation. Later that day, White informed Nelson that the Company sent the final results of the investigation to his home address via FedEx delivery.<sup>34</sup>

#### Legal Analysis

The General Counsel alleges that the Union violated Section 8(b)(1)(A) and (2) of the Act by causing the Company to terminate discipline and terminate Nelson because of his dissident union activities. The Union concedes that Nelson openly and actively opposed it, and sought to replace it as the company employees’ labor representative. However, the Union insists that its representative was not the cause of Nelson’s discipline and termination because the latter’s misconduct was also reported to the client by other employees.

Section 8(b) states, in pertinent part, that “[i]t shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . [or]; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of [section 8(a)(3)]. . . Accordingly, a union breaches its duty of fair representation when its conduct toward a unit employee is arbitrary, discriminatory or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Carpenters Local 626*, 310 NLRB 500 (1993); *Miranda Fuel Co.*, 140 NLRB 181, 184–185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). Opposition to union officers or policies are protected Section 7 activities. *Sheet Metal Workers Local 16 (Parker Sheet Metal)*, 275 NLRB 867 (1985).

A derivative violation of Section 8(b)(1)(A) also arises where an 8(b)(2) violation has been proven. The reason is that

<sup>31</sup> Jt. Exh. 15–16.

<sup>32</sup> Raudenbush testified that he never recommended that Nelson be disciplined for recording their conversation, even though he suspected it at the time, because he lacked proof (Tr. 226–227.) In subsequent testimony, however, Raudenbush conceded that, after receiving proof of the tape recording, he told the Company’s project manager that Nelson lied about recording their conversation and he would not tolerate a dishonest guard in his facility. (Tr. 230.) Moreover, the Company’s December 18 justification for termination confirms that Raudenbush directed that Nelson be barred from the facility for “false and misleading statements,” an obvious reference to the proof provided by Brunson.

<sup>33</sup> Jt. Exh. 17.

<sup>34</sup> Jt. Exh. 18.

the union’s causation of an employee’s discharge necessarily constitutes restraint and coercion of the worker’s exercise of his Section 7 rights. *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004); *Postal Workers*, 350 NLRB 219, 222 (2007). The 8(b)(2) portion of the claim is analyzed under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981). See *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997). As the Board articulated in *Ironworkers Local 340 (Consumers Energy Co.)*, 347 NLRB 578, 579 (2006):

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

A preponderance of the evidence established that Nelson was actively involved as a dissident union member and Brunson, his union steward, and Jones, the union president, were well aware of his advocacy on behalf of a rival labor organization and his criticism of the client’s security managers. Nelson engaged in several prior discussions with them over his support for the rival union and criticism of NASA officials. During those conversations, Brunson evidenced animus by expressing his disappointment and criticism of Nelson for supporting a rival. He also defended NASA officials and warned Nelson to refrain from such criticism because his comments could get back to them.

Brunson’s voluntary report to Costanza, a NASA official, about Nelson’s behavior in the NASA headquarters lobby on November 10 smacked of discriminatory motivation. See *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Brunson conceded at trial that Nelson’s behavior on November 10 was not threatening, concerning or worth reporting to supervisors, much less the client. Brunson and Nelson were employed by the Company, not NASA, yet he bypassed his supervisors and managers and chose to report the encounter to Costanza, the client’s representative, a few days later. Aside from accurately reciting Nelson’s profanity toward NASA security supervisors, he provided an exaggerated description of Nelson as shouting and threatening. Brunson also neglected to share that Nelson was off-duty and unarmed at the time, leading Costanza to assume, incorrectly, that Nelson was on-duty and armed. By his actions, Brunson knew that Nelson would be removed from the worksite and suffer adverse employment action. He said as much when he warned Nelson of the consequences for criticizing NASA security officials regarding unit employees’ terms and conditions of employment. See *Paperworkers Local 1048*, 323 NLRB 1042, 1044 (1997) (union violated the Act when its treasurer reported critical comments of dissident member to management and exaggerated the level of outrage amongst his workers).

Similarly, Brunson’s forwarded Nelson’s tape recording of his conversation with Raudenbush soon after receiving it, even though Nelson gave it to Brunson in confidence. While it is

conceivable that the Union might have provided the recording to Raudenbush at a later date in support of a reinstatement effort, there was no union action on Nelson's behalf at that point; nor was there any evidence that NASA or company officials were aware of the tape recording and directed Brunson to turn it over. The only plausible inference was that Brunson delivered the tape recording to Raudenbush in order to bolster the case for barring Nelson from the worksite and ensuring his termination.

Under the circumstances, Brunson's voluntary disclosures to the client on November 10 and 14 were calculated to generate disciplinary action against Nelson. By doing so, the Union breached its fiduciary responsibility to represent the interests of Nelson, a bargaining unit employee. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1170 (2006), *enfd.* 315 Fed. Appx. 318 (2d Cir. 2009). Moreover, the element of causation necessary to establish a prima case violation of Section 8(b)(2) is met by the aforementioned disclosures. See *Town & Country Supermarkets*, 340 NLRB at 1411; *Paperworkers Local 1048*, 323 NLRB at 1044.

The General Counsel having established a prima facie case, the burden of persuasion shifted to the Union to prove that Brunson would have reported Nelson's conduct to Raudenbush even in the absence of Nelson's dissident union activities. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The Union failed to meet its burden. First, the credible evidence reveals that Brunson did not, in fact, consider Nelson to have engaged in misconduct; nor was he directed to produce the tape recording by anyone.<sup>35</sup> Secondly, there is no evidence of a Company or NASA rule or policy requiring company employees to report to NASA profanity by off-duty coworkers or divulge tape recordings provided by coworkers. Thirdly, and more importantly, the Union provided no explanation why Brunson would sidestep his employer, essentially keeping it in the dark about alleged misconduct by a coworker, and report the November 10 incident and divulge the November 14 tape recording directly to the client.

The Union's alternative defense is that Brunson was, at most, acting in his individual capacity and not as a union steward when he forwarded damaging information about Nelson to NASA officials. The Board regularly finds elected or appointed union officials to be agents of that organization. See *Electrical Workers IBEW Local 453 (National Electrical)*, 258 NLRB 1427, 1428 (1981); *Penn Yan Express*, 274 NLRB 449 (1985). Although the holding of elective office does not mandate a finding of agency per se, it is persuasive and substantial evidence that will be decisive in the absence of compelling contrary evidence. *Mine Workers Local 1058 (Beth Energy)*, 299 NLRB 389, 389-390 (1990); *Plumbers, Local 83*, 238 NLRB 499 (1978). I find no compelling contrary evidence here.

The evidence establishes that Brunson was motivated by his

<sup>35</sup> *San Diego Carpenters (Hopeman Bros.)*, 272 NLRB 584 (1984), relied upon by the Union, is inapplicable. In that case, like many others, the Board held that a union commits an unfair labor practice when it fines a member for reporting a work rule infraction by a coworker to an employer when that member is required by the employer to make such a report. In this instance, Brunson faced no such dilemma.

interests in defending the Union's status as unit employees' labor representative at NASA headquarters, not in his individual capacity. Brunson voluntarily reported details of his November 10 conversation with Nelson and divulged his tape recording to NASA officials in order to precipitate adverse employment action. Contrary to what Brunson reported to Costanza, his testimony and other credible evidence did not reveal any violation by Nelson of Company or NASA rules or policies; and, without being asked or directed by anyone, Brunson voluntarily sent Raudenbush a copy of Nelson's tape recording. In neither instance was Brunson's employment status imperiled if he refrained from passing on information concerning Nelson.

Finally, although not briefed by the parties, the Union asserted as an affirmative defense Nelson's failure to exhaust internal union remedies prior to filing an unfair labor practice charge. The Board has long held that, in appropriate cases, it should defer consideration of certain cases alleging violations of the Act under the rationale of *Collyer Insulated Wire, A Gulf & Western Systems Co.*, 192 NLRB 837 (1971). The most common situation is where a contractual arbitration provision is found to both reflect the intentions of the parties and provide an appropriate forum for resolution of the dispute.

Deferral is not appropriate, however, in cases where the interests of the aggrieved employee are in apparent conflict with the interests of the parties to the contract. *Electrical Workers Local 675 (S & M Electric Co.)*, 223 NLRB 1499 (1976). Accordingly, the Board does not apply deferral to duty of fair representation charges or complaints. See, e.g., *Electrical Workers IBEW Local 581*, 287 NLRB 940, 948 fn. 25 (1987); *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 907 (1985); *Musicians Local 47*, 255 NLRB 386, 390-391 (1981); *Pipe Fitters Local 392*, 252 NLRB 417 fn. 1 (1980).

In this case, Nelson could have filed charges against Brunson seeking to have him expelled from the Union and/or fined pursuant to the union constitution and bylaws. Such an avenue, under the circumstances, would have been futile and insufficient. Had Nelson resorted to the Union's procedures, he would have likely encountered a slow and hostile path forward, given his stated objective of deathorizing or decertifying the Union as unit employees' labor representative. In any event, having Brunson disciplined and/or fined by the Union would not have provided an effective remedy, since it would not have resulted in Nelson's reinstatement by the Company. Under the circumstances, deferral to the Union's processes would be inappropriate.

Based on the foregoing, the Union attempted to cause or caused Nelson's discipline and termination by reporting his protected concerted activity to the Company's client on November 14 and divulging Nelson's confidential tape recording to the client on November 21 in violation of Section 8(b)(2). *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042 (1997), *enfd.* 865 F.2d 251 (3d Cir. 1998). The Union's conduct also constitutes a derivative violation of Section 8(b)(1)(A).

#### CONCLUSIONS OF LAW

1. The Respondent, International Union, Security, Police and Fire Professionals of America (SPFPA) Local 444 (the Union),

is a labor organization within the meaning of Section 2(5) of the Act.

2. Michael Brunson was at all material times an agent of the Union.

3. By reporting Nelson's protected concerted activity to the Company's client on November 14, 2012, and divulging Nelson's confidential tape recording of his conversation with the Company's client on November 21, 2012, the Union attempted to cause and caused the Company to discipline and discharge Nelson in violation of Section 8(b)(2) and (b)(1)(A) of the Act.

4. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Union has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Union shall make Nelson whole for any loss of earnings and benefits suffered as a result of his discipline and discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Union shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Union shall also compensate Nelson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

Additionally, the Union will be required to request that the Company, Security Support Services, LLC, remove all records of Nelson's termination and suspension from his personnel file.

[Recommended Order omitted from publication.]