

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Chicago, Illinois 60604



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AGENCY PETITION FOR REVIEW
CASE OPENING COVER LETTER

February 24, 2015

No. 15-1354	STAFFING NETWORK HOLDINGS, LLC, Petitioner v. NATIONAL LABOR RELATIONS BOARD, Respondent
Originating Case Information:	
Agency Case No: 13-CA-105031 National Labor Relations Board	

A petition for review of an order of the National Labor Relations Board has been filed this day in this court in the above entitled cause, and a copy of said petition is herewith served upon you.

To: National Labor Relations Board

SHORT RECORD
15-1354
Filed 2/24/2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STAFFING NETWORK)
HOLDINGS, LLC.)
)
Petitioner)
)
v.)
)
NATIONAL LABOR RELATIONS)
BOARD,)
)
Respondent.)

PETITION FOR REVIEW

STAFFING NETWORK HOLDINGS, LLC., by its counsel, pursuant to 29 U.S.C. § 160 and Fed. R. App. Pro. 15(a), hereby petitions this Court for review of the Order of the National Labor Relations Board in the matter of Staffing Network Holdings, LLC, 362 N.L.R.B. No. 12, NLRB Case 13-CA-105031, entered on February 4, 2015 (copy attached).

Dated February 24, 2015

Respectfully submitted,

STAFFING NETWORK HOLDINGS,
LLC

By /s/Amanda Sonneborn
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**CERTIFICATE OF SERVICE
OF PETITION FOR REVIEW**

Pursuant to Federal Rule of Appellate Procedure Rule 15(c)(1), the undersigned attorney certifies that a copy of the attached Petition for Review filed was served by first class mail, with postage prepaid, this 24th day of February, 2015, on the individuals whose names appear below:

Deputy Associate General Counsel
Appellate Court Branch
National Labor Relations Board
1099 14th St. N.W.
Washington D.C. 20570-0001

Honorable Peter Sung Ohr
Acting Regional Director
National Labor Relations Board,
Region 13
209 South LaSalle Street
Suite 900
Chicago, IL 60604-5208

Griselda Barrera
c/o Christopher J. Williams and
Alvar Ayala
Workers' Law Office, PC
401 S. LaSalle St., Suite 1400
Chicago, IL 60605

Sylvia Taylor
National Labor Relations Board,
Region 13
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/s/Kerry M. Mohan

Kerry M. Mohan

NOTICE This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Staffing Network Holdings, LLC and Griselda Barrera. Case 13–CA–105031

February 4, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

On July 17, 2014, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply 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,¹ and conclusions and to adopt the recommended Order as modified below.²

¹ 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by terminating Griselda Barrera, we agree with the judge that under *Atlantic Steel Co.*, 245 NLRB 814 (1979), Barrera did not engage in any conduct that would cause her to lose the protection of the Act.

Contrary to the judge and our colleague, we find that the fourth factor of the *Atlantic Steel* test, whether the outburst was provoked by an unfair labor practice, weighs in favor of protection. Specifically, we find that the Respondent's unlawful threats of termination (rather than the discharge of Barrera's coworker, relied on by the judge) motivated Barrera to briefly refuse to leave work when asked to do so and state that she had done nothing wrong. See *Goya Foods, Inc.*, 356 NLRB No. 73 (2011). We further find, however, that even assuming this factor weighed against protection, a finding of a violation is still warranted, because the other three *Atlantic Steel* factors weigh in favor of protection, as the judge found. We also agree with the judge that an analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), is not appropriate in this case, but even assuming *Wright Line* applied, a finding of a violation would be warranted for the reasons set forth in the judge's decision.

In adopting the judge's finding that the Respondent's statement that Barrera could not return to work conveyed that she was discharged, we do not rely on *Action Carting Environmental Services*, 354 NLRB 732 (2009), cited by the judge. Instead, we rely on *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846–847 (2001).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Staffing Network Holdings, LLC, Itasca, Illinois, its officers, agents, successors, and assigns, shall take the actions set in the Order as modified.

1. Substitute the following for paragraph 2(g).

“(g) Within 14 days after service by the Region, post at its facilities in Itasca, Illinois, and its ReaderLink facility in Romeoville, Illinois, copies of the attached notice marked ‘Appendix.’²¹ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including

In affirming the judge's recommended tax compensation and Social Security Administration reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We affirm the judge's decision not to order a Spanish-language notice posting, but do not rely on *First Student, Inc.*, 359 NLRB No. 12 (2012), cited by the judge.

In finding that Andy Vega unlawfully threatened Barrera, Member Johnson does not rely on Vega's asking Barrera whether she was fine, but only on the threat that followed. See his concurrence in *Greater Omaha Packing Co.*, 360 NLRB No. 62, slip op. at 2 fn. 6 (2014) (emphasizing the need to afford employers the opportunity to exchange views with employees on terms and conditions of employment).

In finding the unlawful discharge, Member Johnson notes that the judge did not clarify what purported misconduct of Barrera's was the subject of her *Atlantic Steel* analysis. The judge did not credit Supervisor Andy Vega's testimony that Barrera was rude and refused his instruction to go back to work. His colleagues point to Barrera's later refusal to go home when directed, but that occurred after Vega told her to go, and the Respondent does not contend that it took adverse action against her because of it.

As for the *Atlantic Steel* analysis itself, Member Johnson agrees that the first two factors weigh strongly in favor of protection. As for Barrera's refusal to leave when directed (and assuming that the judge was looking at that), Member Johnson disagrees with the analysis in *Goya Foods* insofar as it puts too much importance on the brevity of insubordination to an employer's directive (particularly a directive for the employee to leave). More decisive is the employer's reaction to the potential insubordination. Here, Vega told Barrera to go home, she refused and said she had done nothing wrong, and Vega angrily said, “Let's see if you're not leaving.” After the others defended Barrera, however, Vega did not insist that she leave. He simply walked off. It could have reasonably appeared that he was dropping the matter. When Monica Amaya then came to repeat the instruction, Barrera readily complied. Based on this and the fact that Barrera's refusal was not particularly disrespectful or disruptive, Member Johnson finds that this factor weighs only weakly toward a loss of protection. Finally, contrary to his colleagues, he does not disturb the judge's finding that the fourth (provocation) factor properly relates to the discharge of employee “Juan” and does not weigh in favor of protection. All told, however, he agrees that none of Barrera's conduct cost her the Act's protection.

² We shall modify the judge's recommended Order in accordance with our decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010), and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 2012.’

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 4, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
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 discharge or otherwise discriminate against you for engaging in protected, concerted activities protected under Section 7 of the Act.

WE WILL NOT threaten you with discharge for engaging in protected, concerted activity.

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

WE WILL, within 14 days from the date of this Order, offer Griselda Barrera full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Griselda Barrera whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Griselda Barrera for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Griselda Barrera, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

STAFFING NETWORK HOLDINGS, LLC

The Board’s decision can be found at www.nlr.gov/case/13-CA-105031 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



STAFFING NETWORK HOLDINGS, LLC

Sylvia Taylor, Esq., for the General Counsel.
Amanda Sonneborn, Esq., Kerry Mohan, Esq., and Giselle Donado, Esq., for the Respondent.
Christopher Williams, Esq. and Alvar Ayala, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Chicago, Illinois, on February 12 and 13, 2014. Griselda Barrera, an individual, filed the charge on May 13, 2013, and a first amended charge on September 16, 2013, and the General Counsel issued the complaint on October 29, 2013.¹ (GC Exhs. 1(a), (c), (e).) The complaint alleges that Staffing Network Holdings, LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening to terminate employees because they engaged in protected concerted activity, and by terminating Charging Party Griselda Barrera, an employee of Respondent, because she engaged in protected concerted activity. (GC Exh. 1(e).) Respondent timely filed an answer and amended answer to the complaint denying the alleged violations of the Act and asserting eight affirmative defenses. (GC Exhs. 1(g) and (k).) The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,² including my own observation of the demeanor of the witnesses,³ and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Staffing Network Holdings, LLC, a limited liability corporation, provides long-term and temporary assignment of technical, professional, and light industrial services to a variety of employers from its facility in Itasca, Illinois, where it annually performs services valued in excess of \$50,000 in

¹ Abbreviations used in this decision are as follows: "Tr" for transcript; "R Exh." for Respondent's Exhibit; "GC Exh" for General Counsel's Exhibit; "R. Br." for Respondent's Brief, and "GC Br." for the General Counsel's Brief. The Charging Party did not file a brief.

² On March 31, 2014, after the General Counsel and Respondent moved to correct the transcript, I issued an Order Correcting Transcript. The Order to Correct Transcript is in the record as ALJ Exh. 2. Pursuant to this Order, the transcript is corrected as follows: Tr. 86, L. 18. substitute "By Ms. Taylor" for "By Ms. Sonneborn"; Tr. 97, L. 21. substitute "breaks" for "brakes"; Tr. 103, L. 19: substitute "Ms. Sonneborn" for "Ms. Taylor"; Tr. 126, L. 24: substitute "Ms. Sonneborn" for "Ms. Taylor"; Tr. 128, L. 8: substitute "Ms. Sonneborn" for "Ms. Taylor"; Tr. 146, L. 3: substitute "hire" for "higher"; Tr. 221, L. 18: substitute "Ryan" for "Brian"; Tr. 222, L. 1: substitute "Ryan" for "Brian"; Tr. 258, LL. 8-10: substitute "pinche joto, maricon, te voy a partir tu madre, and eres un puto" for "[Spanish word], [Spanish word], [Spanish word]."

³ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

States other than the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Overview of Respondent's Operations and Management Structure*

Respondent operates a staffing agency. Some of its locations are freestanding (branch locations) and others are within the premises of another employer (embedded locations). One such embedded location is at a facility called ReaderLink in Romeoville, Illinois. The General Counsel does not allege that Respondent and ReaderLink are joint employers or a single employer under the Act. Respondent provides 80 employees who work as pickers and stockers, an onsite manager, and a staffing assistant to ReaderLink. The pickers work side by side on a production line with radio headsets, placing books into boxes and sending them down the line. Stockers, who work near the pickers, ensure that the pickers are provided with a sufficient supply of books to pick.

Respondent's clients may wish to terminate or remove one of Respondent's employees from its employ. Respondent uses the acronym DNR (do not return) to describe such situations. Thus, when an employee is told not to return to a client-employer's premises, Respondent describes this situation by stating that the employee has been "DNR'd."

In November and December 2012, Andy Vega was Respondent's onsite supervisor at ReaderLink. Esther Rodriguez is Respondent's operations manager for ReaderLink and other accounts; in the fall of 2012 she visited ReaderLink about two or three times per week. Cecilia Zuniga is Respondent's human resources manager. Respondent admits, and I find, that Vega, Rodriguez, and Zuniga are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exhs. 1(g) and (k).)

At the time of the events giving rise to this case, Monica Amaya was Respondent's staffing assistant at ReaderLink; she reported to Vega. (Tr. 217-218.) Her duties included assisting Vega with payroll and administrative duties. *Id.* I find that Amaya is an agent of Respondent. Agency may involve express or apparent authority. The Board applies common-law principles of agency in determining whether an employee is acting with apparent authority on behalf of an employer when that employee makes a particular statement or takes a particular action. *Pan-Oston Co.*, 336 NLRB 305 (2001), citing *Cooper Industries*, 328 NLRB 145 (1999). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the act in question. *Pan-Oston Co.*, 336 NLRB at 306, citing *Southern Bag Corp.*, 315 NLRB 725 (1994). Agency status can be established when an employee is held out as a conduit for transmitting information to employees. *D&F Industries*, 339 NLRB 618, 619 (2003); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998). As set forth more fully below, Amaya relayed various messages from Vega to Barrera, including the messages sending Barrera home and

advising her not to return to work. I find that in so doing Amaya is an agent of Respondent within the meaning of Section 2(13) of the Act.

B. Griselda Barrera's Employment with Respondent

Griselda Barrera was employed by Respondent from about 2004 until she was discharged by Respondent on November 15, 2012.⁴ (Tr. 13.) Barrera's only assignment while employed by Respondent was at ReaderLink, where she worked as a picker. (Tr. 14.) Her supervisor was Andy Vega. (Tr. 15–16.) Prior to her termination, Barrera had never been disciplined for insubordination or other issues related to her work performance.⁵

C. The Events of November 15

On November 15, 2012,⁶ the pickers and stockers at ReaderLink were trying to fulfill a large book order. (Tr. 17, 71.) Vega testified that he was asked to speak to the stockers by Mari Perez, a supervisor employed by ReaderLink, because the stockers were not working quickly enough. (Tr. 241.) Accordingly, Vega spoke with two stockers that morning.⁷

One of the stockers, a man identified only as Juan, stated that he would not work faster for \$8.25 [an hour]. (Tr. 243.) Vega testified that he was shocked and taken aback by this response and that Perez told Vega to send Juan home. (Id.) Vega testified that he told Juan he couldn't accommodate him elsewhere, said he was sorry, and shook Juan's hand. (Tr. 245.) Juan allegedly replied, "OK, that's fine. I'll go home."⁸ (Tr. 243.)

The decision to send Juan home caused an immediate reaction by the pickers. Shortly after seeing Juan leave, the pickers spoke to Vega. Barrera and others, including Olga Gutierrez, told Vega that the line wasn't moving because the stocker (Juan) was new and couldn't keep up with the work. (Tr. 19, 72.) Vega replied that Juan was being sent home because of his attitude and because he couldn't keep up with the work. (Tr. 18–19, 72.) Barrera, Gutierrez, and others told Vega that this wasn't fair. (Tr. 19, 73.) Vega replied that it wasn't the pickers' matter to deal with and that they should get back to work.

⁴ I find Respondent's claim that it did not discharge Charging Party Barrera to be without merit for reasons discussed in greater detail herein.

⁵ I decline to discredit Barrera's testimony based upon the contradiction between her testimony at Tr. 37 and R. Exh. 1. Barrera testified that she had never been disciplined, but when confronted with a disciplinary action form she admitted receiving it. (Id.) However, Barrera did not believe that this form represented "discipline" because it was not related to her work. (Id.) Instead, Barrera was written up for punching in more than 10 minutes before her shift started (R. Exh. 1.) I do not find this contradiction material and, therefore, I decline to discredit Barrera as a witness.

⁶ All dates are in 2012, unless otherwise indicated.

⁷ Neither of the two stockers, nor Perez, was called as witnesses at the trial.

⁸ This rather illogical testimony, along with other examples cited below, form the basis for my discrediting of Vega as a witness. It defies credulity that Vega replied to Juan in this manner. Vega's testimony that he told Juan he "couldn't accommodate him," shook Juan's hand, and said he was sorry stands in stark contrast to Vega's testimony that he was shocked and taken aback by Juan's statement that he would not work faster

(Id.) Vega further stated that he could send the pickers home for their attitude. (Tr. 19.) Vega then left the area.

A short time later Vega, appearing angry, returned to the pickers' work area and asked Barrera if everything was fine. (Tr. 20–21, 74.) Vega told Barrera that if she had an issue, he could send her home. (Tr. 21.) Barrera asked Vega if he was threatening her and stated that she could send a letter to the Department of Human Rights. (Tr. 21, 31.) Vega then told Barrera to take her things and go home. (Tr. 21, 74.) Barrera refused, stating that she had done nothing wrong. (Id.) Vega then became angrier, pointed at Barrera, and stated, "Let's see if you're not leaving." (Tr. 21.) Gutierrez and others came to Barrera's defense, stating she had done nothing wrong. (Tr. 75.) Although Vega appeared angry and raised his voice during this exchange, Barrera did not raise her voice in response. (Tr. 21–22, 74.) Vega again left the area.⁹

Vega returned to the office and asked Amaya to send Barrera home. (Tr. 219.) Amaya then went to the pickers' work area. (Tr. 23, 75, 219.) Amaya told Barrera to please take her things and leave because if she did not, Vega would call security and have her escorted out. (Tr. 23, 75–76, 219.) Other workers came over and spoke to Amaya supporting Barrera. (Tr. 24, 76, 227–228.) The other workers told Amaya that Vega had been rude. (Id.) Amaya stated that there had been a lot of complaints about Vega, but that there was nothing she could do.¹⁰ (Tr. 25.) Barrera and Amaya left the work area and Barrera turned in her radio. (Tr. 219.) Amaya then escorted Barrera to the cafeteria, where she waited for her ride home.¹¹

Barrera was initially told by Amaya to go home for the day. I credit the testimony of Amaya and Gutierrez, and Barrera's affidavit testimony in making this finding. Events that transpired later that day, however, lead me to the conclusion that Barrera was discharged. Barrera and Amaya agree that Barrera sent a text message to Amaya on the evening of November 15 and asked if she [Barrera] could come back to work the next

⁹ I do not credit Vega's version of his exchange with Barrera. Vega testified that Barrera angrily referred to him as a secretary and a nobody, and threatened to call immigration and report him. (Tr. 248.) His testimony was contradicted by that of Barrera, Gutierrez, and Amaya. Barrera denied that she told Vega that he was nothing more than a secretary, that he was a nobody, or that she [Barrera] was going to call immigration and have him deported. (Tr. 44.) Gutierrez did not mention any such comments in her testimony. Amaya testified that she could not remember whether Vega mentioned any such comments to her. (Tr. 230–231.) More importantly, Vega's testimony that Barrera made these statements to him is contradicted by R. Exhs. 8 and 10, which were prepared by Vega and Amaya shortly after the events in question. These contradictions, as well as others detailed elsewhere in this decision, have led me to the conclusion that Vega's testimony was not credible.

¹⁰ When questioned about this on cross-examination, Amaya did not specifically deny making this statement. Instead, she testified that she remembered the workers making complaints about Vega, but could not remember if she agreed with them. (Tr. 227–228.) Therefore, I credit the testimony of Barrera on this point.

¹¹ I credit the testimony of Barrera that she asked Amaya to wait in the cafeteria. (Tr. 39.) Barrera testified that she gets a ride to work and had to wait for her ride. (Id.) Barrera had no reason to fabricate this point. To the extent that this testimony contradicts that of Amaya (Tr. 219), I credit Barrera.