

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

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE, AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AMALGAMATED
LOCAL UNION NO. 509, AFL-CIO
(FIAT CHRYSLER AUTOMOBILES GROUP)**

and

Case 28-CB-144872

JOE MOORE, an Individual

**BRIEF IN SUPPORT OF
GENERAL COUNSEL'S EXCEPTIONS**

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I. INTRODUCTION

In his decision in the above captioned case, the Administrative Law Judge (the ALJ) erred by failing to find that Mike Watson (Watson) was an agent of Respondent, and that Respondent, through Watson, reported an argument between he and Joe Moore (Moore) with the intent to have Moore suspended and terminated, and by this conduct attempted to cause and caused Respondent Fiat Chrysler Automobiles Group (the Employer) to suspend and discharge Moore. (ALJD 6:30-31; 7:26-28)¹

On October 29, 2014,² Moore confronted Watson about carbon monoxide monitoring in test vehicles following his carbon monoxide exposure on October 2, and after he attempted

¹ ALJD__:_ refers to page followed by line or lines of the ALJ's decision in JD(NY)-39-15 (September 8, 2015); GCX__ refers to General Counsel exhibit followed by exhibit number; Tr. _:___ refers to transcript page followed by line number(s), unless the Transcript cite covers multiple pages, of the unfair labor practice hearing held on July 28, 2015.

² All dates are in 2014, unless otherwise noted.

to obtain carbon monoxide testing in vehicles to minimize further risks of carbon monoxide exposure. Although the ALJ found that Watson was the Respondent's representative for health and safety issues since 2008 and represented Respondent's interests as to health and safety issues, the ALJ found that Watson was not Respondent's agent for reporting the October 29 conversation to the Employer which was initiated because of, and was focused on, a potentially lethal and contractual health and safety concern. Health and safety language is present and emphasized in the collective-bargaining agreement and other agreements which Respondent maintains with the Employer, but the ALJ nevertheless found that Moore was not engaged in union activity, notwithstanding that the October 29 conversation was between Moore and Respondent's health and safety representative for the purpose of addressing carbon monoxide exposure. The conversation between Moore and Watson was the sole reason that Moore was terminated, and no supervisors were present during the conversation. As explained below, the Board should find that Watson was Respondent's agent for the purposes of reporting the October 29 conversation to the Employer, and that Respondent violated the Act by reporting the conversation with the attempt to cause, and causing, the Employer to discriminate against Moore.

II. FACTS

A. The Employer's and Respondent's Operations and Relevant Agents

The Employer operates a car endurance facility in Yucca, Arizona, and is an employer engaged in commerce within the meaning of the Act. (ALJD at 1) The Employer tests vehicles at its facility, including current production vehicles, current vehicles modified with potential future components, and prototype vehicles. (ALJD 2:26-29) The testing includes

endurance testing and high speed testing up to 150 miles per hour. (ALJD 2:27-30)
Scott Campbell (Campbell) is the Employer's Human Resources Employee Relations
Generalist and Health and Safety Co-Chair. (ALJD 3:37; Tr. 26:15-24; 59:19)

Respondent is the exclusive collective-bargaining representative for employees at the
Employer's facility, including drivers, driver/mechanics, mechanics, technicians, and
stockroom employees. (ALJD at 1; 2:24-26) Watson held the position of Respondent's
health and safety representative since 2008, and represented the interests of the Respondent's
unit at the Proving Grounds on health and safety matters. (ALJD 2:9-14) Chris Moreland
(Moreland) is Respondent's unit chairman. (ALJD 3:26-27) Roberto Martinez (Martinez) is
a steward for Respondent. (ALJD 3:28)

B. Respondent's Contractual Health and Safety Agreements with the Employer

Respondent and the Employer have collective-bargaining agreements at the national
and local levels. (GCX 2, 3) Each agreement contains health and safety language, including
language addressing vehicle fumes and odors, and provides a means to address issues with the
Local Joint Health and Safety Co-Chairs. (Tr. 25:4-11; Tr. 27:22-24; GCX 2 at 11; GCX 3 at
199-213) It is undisputed that health and safety is the highest concern to the Union and the
Employer and is a contractual issue between them. (Tr. 28:17-20; 31:2-4)³

C. Moore's Attempts to Address his Carbon Monoxide Poisoning

Moore worked as an endurance driver since 1999, was an excellent employee, and
held positions with the Respondent in 2005, 2008, and 2011. (ALJD 2:29-32) On October 2,

³ "WHEREAS, no subject is of greater concern to the Company and the Union than the physical well-being of employees in Chrysler's facilities, and in our recent negotiations no subject received or deserved a higher priority than promoting safe and healthful working conditions in the facilities." (Tr. 28:7-20; GCX 3 at 199)

Moore became so ill with a headache and stomachache while driving a test vehicle that he left work early and vomited several times on the way home.⁴ (ALJD 2:32-41) Before leaving for the day, Moore stated that his illness may be due to carbon monoxide and suggested that a carbon monoxide monitor be placed in the vehicle. (ALJD 2:34-39) A meter was placed in the vehicle during a test on the next shift, and a carbon monoxide spike was noted by driver Vern Vanotti (Vanotti) during the second half of the test. (ALJD 2:44 to 3:3) Vanotti informed Watson and Moore that all the alarms went off when he drove the car, which prompted Watson to order the car to be shut down. (ALJD 3:20-23) Watson also instructed a supervisor that the car was not to be driven without a carbon monoxide meter, and told an engineer to inspect the car. (ALJD 3:20-23) A loose bolt, which could cause a small leak, was tightened and repaired. (ALJD 3:23-24) When Moore reported to work on October 3, he asked his supervisor whether there was anything wrong with the vehicle, but his supervisor was unaware of any problems at that time. (ALJD 3:24-26) Shortly thereafter, Moore requested a meeting with Moreland and Martinez about the possible carbon monoxide exposure. (ALJD 3:26-29) Moore also requested a meeting with the Employer regarding possible exposure, and the meeting was held on October 8. (Tr. 93:20-25) In late October, Watson informed Moore of the exhaust leak found by the engineer, and that the vehicle had been shut down so that the fresh-air mode would remain on full time. (ALJD 3:30-33)

D. Moore's October 29 Conversation with Watson

On October 29, Moore had a brief confrontation with Watson regarding Moore's carbon monoxide exposure. (ALJD 1) Although testimony regarding the conversation

⁴ Headache, nausea, tiredness, and fatigue are all signs of carbon monoxide poisoning. (Tr. 38:2-6)

differed, the ALJ credited Moore's version of events, though he found both Watson's and Moore's testimony to be exaggerated. (ALJD 6:33-35) Both Watson and Moore testified that the conversation started when Moore asked about carbon monoxide, and they both exchanged profanity, including saying f*** you to each other. (ALJD 3:35-48 to 4:3-12) However, as noted by the ALJ, it was Moore that walked away from the conversation after Watson cursed at Moore. (ALJD 6:35-36) Moore walked back toward Watson and cursed at Watson. (ALJD 6:36) Watson then pushed his chest out and said "do it." (ALJD 6:37-38) Moore asked what was meant by that, but then walked away a second time. (ALJD 6:38) The conversation involved only Watson and Moore, with no supervisors or managers present. (Tr. 56:6-17) Afterward, Watson reported the conversation to Campbell, claiming that he had an altercation with Moore which got very heated, that he was concerned, and he wanted to prevent the occurrence of any similar incident. (ALJD 2:1-2; 4:18-24; 6:41-42) Watson informed Campbell that the conversation started with a discussion of carbon monoxide, but made no recommendation as to discipline, although he knew of the Employer's zero tolerance policy towards harassment and violence. (ALJD 2:1-2; 4:23-29) The Employer conducted a brief investigation, suspended, and then discharged Moore. (ALJD 2:2-3; 4:30; GCX 13, 14)

As part of its investigation, the Employer collected witness statements from three employees in the area, none of which corroborated Watson's version that Moore was yelling at him. (ALJD 5:25) The Employer took statements from employees Randall Dulin, Sarah Newman (Newman), and Stephen Redman. Each employee was in the south parking lot where Watson and Moore were on October 29, but did not see or hear anything unusual. (Tr. 100-101; GCX 10, 11, 12, 13) Specifically, there was no corroboration that Moore

screamed at Watson; Newman saw Watson and Moore talking, but did not hear them, even though they were about 35 feet away. (Tr. 103:11-15; GCX 11) By letter dated November 12, the Employer terminated Moore based on his conversation with Watson. (Tr. 104:1-9; GCX 14) The Employer skipped all levels of progressive discipline, taking Moore from no prior discipline to termination.⁵ (ALJD 2:30; Tr. 104:16-19; 136:2-5; GCX 15(a)-(w)) Watson received no discipline, although Campbell was aware that he said f*** you to Moore. (ALJD 4:26; 5:27-28)

E. Watson Knew that Discipline Could Result from Reporting the October 29 Carbon Monoxide Discussion to the Employer

The ALJ found that Watson did not ask the Employer to discipline Moore, although he found that Watson knew of the Employer's "zero-tolerance policy toward violence and harassment, and he must have known that either he, Moore, or both, would be disciplined as a result of his reporting the incident[.]" (ALJD 7:8-11) The ALJ further found that Watson's report to the Employer on October 29 had no connection to Section 8(a)(3) of the Act or dissident or antiunion activities by Moore. (ALJD 7:26-28) Instead, the ALJ found that Watson reported the conversation because he was angry with Moore after the October 29 confrontation, and that the report had nothing to do with union activity and, therefore, recommended dismissal of the complaint. (ALJD 7:16-18, 26-28) The ALJ ignored Watson's testimony that some of his health and safety discussions have been confrontational, with yelling and cursing and that Watson is not unaccustomed to cursing, as he and

⁵ Progressive discipline includes verbal warning, written warning, one day disciplinary layoff, three day disciplinary layoff, five day disciplinary layoff, ten day disciplinary layoff, 30 day disciplinary layoff, and then discharge. (Tr. 92:8-25)

supervisors have cursed at each other as part of their discussions. (Tr. 41:3-6; 45:7-20; 46:19-23)

The ALJ found that Watson was not an agent of Respondent for the purposes of reporting the October 29 conversation, reasoning that there was no evidence that Watson was authorized to act for the Union on the subjects of discipline of employees, or that the Employer would reasonably believe that Respondent authorized Watson to complain about Moore's actions. (ALJD 5:48-50; 6:21-31) Notwithstanding his finding that "Moore and Watson had a brief confrontation over a health and safety issue that Moore experienced on October 2," (ALJD 1 bottom), the ALJ found that it was "unrelated to any union activity[.]" (ALJD 2:1)

Other employees have received differing discipline for confrontations, including confrontations with Watson. Michelle Demarsh had a disagreement with Watson in early 2014, where she told him to leave her the f*** alone and stay out of her f***ing business, and that she would consider it harassment if he continued, to which Watson responded that "he could go anywhere he wanted to." (ALJD 5:30-34) Demarsh was not disciplined. (ALJD 5:34) Richard Charlesworth was suspended for 30 days for harassing and tailgating temporary employees. (ALJD 5:36-39; GCX 16(a)) Robert Fry was suspended for 30 days after loudly arguing with a female employee, pushing chairs out of the way, and had to be physically restrained as he approached her, telling her to "[l]isten here, little girl." (ALJD 5:39-40; GCX 17(a))

III. ANALYSIS

A. The ALJ Erred by Failing to Find that Watson was an Agent of Respondent for Reporting the October 29 Conversation with Moore. [Exception No. 1]

As found by the ALJ, Moore's October 29 conversation with Watson was brief, and centered on Moore's attempts to prevent future carbon monoxide exposure. Watson, as the designated health and safety representative, was the person with whom Moore needed to discuss the carbon monoxide exposure, and, as the Respondent's health and safety representative, it was within his duties to determine what actions to take regarding a health and safety concern raised by an employee. Watson was the Union representative to whom Moore needed to bring his health and safety concerns if there was to be any resolution under the agreements that Respondent maintained with the Employer. Moore had unsuccessfully tried to address his concerns on several occasions, including meeting with the Union and the Employer. Watson was the sole avenue for Moore to attempt to resolve his concerns. As the unit's health and safety representative since 2008, Watson was not entitled to report his disagreement with Moore simply because Moore was dissatisfied with the progress made on carbon monoxide monitoring, or that Watson was angry because an employee did not like the lack of resolution to a health and safety concern. This is especially true here, where the ALJ found that Watson was the person who initially cursed at Moore, but then ran to the Employer to tattle on Moore and report him for possible discipline.

Watson, who had prior confrontations in health and safety discussions, including yelling and cursing, was clearly Respondent's agent for health and safety discussions, including knowing that differences of opinion have existed on health and safety matters, and the appropriate actions to take when there is a disagreement on a health and safety issue.

Watson acted in his role as Respondent's health and safety representative when he reacted against Moore by cursing at him during the conversation, but could not let it go in order to focus on representing Moore's carbon monoxide concerns. Instead, he intentionally sought to affect Moore's employment by reporting the conversation to eliminate any future incidents – by eliminating an employee critical of Watson's performance as the Union's health and safety representative. In his role as health and safety representative reacting to a health and safety concern, and by reporting the conversation notwithstanding the known discipline which could result, Watson acted as Respondent's agent. Further, the Employer fully relied upon Watson's assertions such that it skipped all levels of progressive discipline in favor of termination.

The Board should find that Watson was Respondent's agent for the October 29 carbon monoxide discussion with Moore. Further, the Board should find that Watson, as the designated health and safety representative for such a conversation, acted with Respondent's authority when he decided to report this health and safety discussion to the Employer with the clear understanding that discipline could result. Watson was Respondent's agent for addressing health and concerns with the Employer, including taking appropriate actions to address health and safety concerns. Unfortunately for Moore, Watson chose to address this health and safety concern by taking action to eliminate Moore's employment, as opposed to addressing Moore's concern.

B. The ALJ Erred by Failing to Find that Respondent Violated the Act when Watson Reported the October 29 Conversation to the Employer with the Intent to Cause Moore to be Disciplined, and Attempted to Cause, and Caused, the Employer to Suspend and Discharge Moore. [Exception No. 2]

The ALJ correctly found that Watson knew that discipline could result because he reported the conversation to the Employer. However, the ALJ not only parses too finely the October 29 discussion between Watson and Moore, but fails altogether to address the Union activity integrated within the conversation. Notwithstanding the contractual health and safety language between the Respondent and the Employer, the ALJ nonetheless found no union activity in Moore's October 29 conversation with Watson. It is unfathomable how there is no Union activity in a discussion regarding a contractual and potentially lethal health and safety concern between an employee and the Union's designated health and safety representative, a subject both Respondent and the Employer have contractually declared "of no...greater concern." The ALJ provides no explanation why the conversation does not involve any union activity, or whether Moore retained the protection of the Act during this conversation. The ALJ simply concluded that Watson reported the conversation because he was angry with Moore, and that the report had nothing to do with union activity. Under the ALJ's finding, a union could cause an employee to be disciplined and avoid liability simply because union agents are upset with an individual's reaction - even if it involves union activity. The ALJ's holding is even more befuddling considering his finding that Watson was the aggressor and cursed first at Moore before reporting the conversation to the Employer. Most importantly, the ALJ's findings are inconsistent with established Board law.

In evaluating alleged violations of Section 8(b)(2), the Board has "primarily applied either a duty-of-fair-representation framework or the framework established in *Wright Line*." *Good Samaritan Medical Ctr.*, 361 NLRB No. 145, slip op. at 2 (2014). A union violates the

Act when it applies indirect pressure to discipline, and no direct demand needs to be made to find a violation. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1043 (1997) (citing *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499 (1993) (“direct evidence of an express demand by the Union is not necessary where the evidence supports a reasonable inference of a union request.”); *Quality Mechanical*, 307 NLRB 64, 66 (1992). It is sufficient that a union knows that an employer issues discipline for alleged violations of the conduct reported. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB at 1044; *Quality Mechanical*, 307 NLRB at 66. Similarly, it is adequate that the union reasonably knew that the employee would be disciplined. *Good Samaritan Medical Ctr.*, 361 NLRB No. 145, slip op. at 3.

Respondent violated the Act under the duty-of-fair-representation framework and the framework of *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under either scenario, the Union applied indirect pressure to the Employer, notwithstanding any direct or express request for discipline. As found by the ALJ, Watson knew that Moore could be disciplined as a result of Watson’s report of the October 29 conversation. Respondent thereby satisfied any requirement that the Union applied indirect pressure to cause Moore’s discipline. *Good Samaritan Medical Ctr.*, 361 NLRB No. 145, slip op. at 3; *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB at 1044; *Quality Mechanical*, 307 NLRB at 66.

1. Respondent Violated the Act under the Duty-of-Fair-Representation Standard.

“[W]hen a labor organization ‘causes the discharge of an employee, there is a rebuttable presumption that [the labor organization] acted unlawfully because by such conduct [it] demonstrates its power to affect the employees’ livelihood in so dramatic a way as to

encourage union membership among the employees.” *Good Samaritan Medical Ctr.*, 361 NLRB No. 145, slip op. at 3. A union can rebut this presumption by showing that it acted pursuant to a valid union-security clause or that its actions were necessary to the “effective performance of its function of representing its constituency.” *Id.*, slip op. at 2 fn. 8.

Watson’s report was based on a one-time conversation between Moore and his Union Health and Safety Representative about a contractual safety issue that could affect the membership. Watson’s actions were the exact opposite of performing the Union’s functions in representing its constituency. Instead of addressing the potentially lethal risk to the membership, Watson went to the Employer to report the conversation. Notwithstanding the undisputed fact that the conversation involved a contractual health and safety discussion between Moore and his Union Health and Safety representative, the Employer relied upon Watson’s statement to terminate Moore. Watson’s report of the conversation was in no way connected to a union security clause or to the necessary and effective performance of the Union’s functions in representing its constituency. Accordingly, the Board should find that Respondent violated the Act under the duty-of-fair-representation standard when it attempted to cause the discharge of Moore based on the one-time contractual health and safety conversation between Moore and his appropriate Union representative.

2. Respondent Violated the Act under the *Wright Line* Standard.

It is clear that Moore was engaged in a discussion with his Union health and safety representative on October 29 about a contractual health and safety issue, that the Employer knew that the carbon monoxide testing was the subject of the discussion, and that Moore was terminated solely for the October 29 conversation. Accordingly, the evidence established that Moore was engaged in Union activity, the Employer was aware, and the activity was a motivating factor in the Employer’s decision to terminate him. Neither the Respondent nor

the Employer demonstrated that Moore would have been terminated in the absence of the carbon monoxide discussion with Watson. Further, Moore was treated disparately when he was terminated in comparison to Charlesworth and Fry who were suspended for more egregious and corroborated conduct. Accordingly, the Board should find that the Respondent violated the Act under the *Wright Line* standard when it attempted to cause, and did cause Moore's discharge because he engaged in a protected Union discussion with his health and safety representative about a Union health and safety issue.

Further, Moore did not lose the Act's protection during his October 29 conversation with Watson. *Longshoremen Local 333*, 267 NLRB 1320, 1320, 1324 (1983) (union violated Section 8(b)(1)(A) and 8(b)(2) and the administrative law judge erred in invoking *Atlantic Steel*⁶ to evaluate a confrontation between a member and the union's delegate, notwithstanding the judge's characterization of the confrontation as an "insubordinate attack on a union official who was enforcing the Union's rotation procedure" and was "rebellious conduct" when the member ignored the delegate's instructions). In *Longshoremen*, the judge found that the member's conduct was "intended to belittle a union official in the performance of his duties and to undercut that authority" and "jeopardized the Union's ability to perform one of its most important obligations under its labor contract – to provide a stable labor force when and where needed." *Id.* at 1324. However, the Board stated "[i]t is well established that an employee has a statutory right to voice dissatisfaction with a union's conduct and its policies, regardless of their propriety, without suffering reprisal by being deprived of work for so doing." *Id.* at 1320. The Board reasoned that the situation involved the employee's protected right to question the union's authority. *Id.* "That [the individual] resorted to strong

⁶ *Atlantic Steel Co.*, 245 NLRB 814 (1979)

language which is not unusual [in the area], albeit not in conformity with Emily Post standards of etiquette customary in more genteel surroundings, cannot justify the Union's reprisal[.]” Id. Accordingly, Respondent cannot avoid liability by relying on *Atlantic Steel's* standards to remove the Act's protection.

The cases cited by the ALJ are distinguishable and inapplicable. In *Operative Plasterers & Cement Masons, Local No. 299*, 257 NLRB 1386, 1393-1395 (1981), the union did not violate Section 8(b)(2) when it denied the charging party A-list journeyman status; the union had good faith doubts as to his qualifications based on objective considerations such as his marginal and exaggerated background and substandard performance evaluations. The union did not completely remove him from further referrals, but maintained him on the B list for referrals even though the charging party disappeared for a substantial period of time. Id. at 1393. The amount of work he received was further diminished by the numerous out-of-work journeymen and because contractors generally selected referrals by name. Id. at 1393. Similarly, in *Acklin Stamping Co.*, 355 NLRB 824, 827 (2010), no violation was found where the union sought an employee's discharge based on the union's good faith belief that he was unqualified to perform journeyman-level electrical work and thereby jeopardized the safety of his coworkers. These cases address a union's good faith doubt as to the qualifications of an individual to obtain and maintain employment, which is clearly not at issue here.

The Board should find that Moore was engaged in Union activity during his October 29 conversation with Watson about the carbon monoxide testing, that Moore did not lose the Act's protection during the conversation, and that Respondent, by Watson, violated the Act when it attempted to cause, and caused, the Employer to discriminate against Moore because he engaged in Union activity, in violation of Section 8(b)(1)(A) and 8(b)(2).

IV. CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board find that Watson was an agent of Respondent, and that Respondent violated the Act when Watson reported the October 29 conversation to the Employer with the intent to have Moore suspended and terminated, and by this conduct attempted to cause, and caused, the Employer to suspend and discharge Moore, and affirm the remaining findings of the ALJ.

Dated at Las Vegas, Nevada, this 13th day of October 2015.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF IN SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS in INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION NO. 509, AFL-CIO, Case 28-CB-144872, was served by E-Gov, E-Filing, and E-Mail, on this 13th day of October 2015, on the following:

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