

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

AMALGAMATED TRANSIT UNION, LOCAL 689

and

Case 5-CA-141077

TAMAR C. SIMMONS, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND  
SUPPORTING ARGUMENT

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## **I. STATEMENT OF THE CASE**

This proceeding involves a charge filed by Tamar Simmons, an individual. The Charge in Case 05-CA-141077 was filed on November 17, 2014,<sup>1</sup> and Complaint and Notice of Hearing issued on March 24, 2015. (GC 1-A; GC 1-E). Respondent filed an Answer to this Complaint that was received in the Region on April 7, 2015. (GC 1-G). The hearing in this proceeding occurred on July 9, 2015, before Administrative Law Judge Arthur J. Amchan (ALJ). On August 25, 2015, the ALJ issued his decision (ALJD),<sup>2</sup> in which he found that Respondent, by Jackie Jeter, coercively instructed Simmons not to talk to fellow employees about their break times and implicitly threatened to discharge her for causing Local 2 to file a grievance on her behalf, in violation of section 8(a)(1) of the Act. He further found that Respondent issued two disciplinary warnings to Simmons and gave her a very unfavorable performance appraisal in violation of section 8(a)(3) and (1) of the Act. (ALJD, pg. 5, lines 30-63).

On September 21, 2015, Respondent filed Exceptions to the Administrative Law Judge's Decision and Memorandum of Law in Support. Counsel for the General Counsel files this Answering Brief in response to Respondent's Exceptions and in support of the ALJD.

## **II. RESPONDENT'S EXCEPTIONS**

By its exceptions, Respondent seeks to have the Board disregard the record evidence, and the well-reasoned credibility determinations of the ALJ concerning Respondent's unlawful conduct. Respondent enumerated two exceptions, as restated below:

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<sup>1</sup> Hereafter the National Labor Relations Board will be referred to as the "Board" and the National Labor Relations Act as the "Act". Amalgamated Transit Union Local 689 will be referred to as "Respondent" or "ATU" and the Office and Professional Employees International Union, Local 2 shall be referred to as "Local 2." With respect to the record developed in the case, the transcript will be designated as "Tr."; the General Counsel's exhibits as "GC-", and Respondent's exhibits as "R-".

<sup>2</sup> The Administrative Law Judge's decision will be referenced as "ALJD" followed by the page and line number.

- 1) There is no evidence that the work evaluation was discriminatory.
- 2) The retaliatory discharge allegation had been removed from the charge prior to the hearing. Any reference to the discharge is inappropriate and must be removed from the award.

### III. PROCEDURAL DEFICIENCIES

At the outset, it must be noted that Respondent's Exceptions do not properly conform to Board requirements. Respondent was required under the Board's Rules and Regulations Sec. 102.46(b)(1) to "set forth specifically the questions of procedure, fact, law or policy to which exception is taken. " Here, the exceptions lack specificity and fail to comply with the requirement of the above-cited section and only generally assert conclusory statements. Specifically, Respondent did not follow Sec. 102.46(b)(1)(ii) by failing to identify the part of the ALJD to which objection is made. Respondent did not at any point in its exceptions or supporting argument identify the page or line numbers to which it excepted.<sup>3</sup> Further, Respondent did not follow Sec. 102.46(b)(1)(iii) by failing to designate by precise citation of page the portions of the record on which it relied in making its objections. Thus, based on 102.46(b)(2), the exceptions should be deemed waived and may be disregarded. In the alternative, the Board should overrule the exceptions and affirm the ALJ and adopt his Conclusions of Law and Order, for the reasons set forth below.

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<sup>3</sup> It is acknowledged that Respondent quoted portions of the ALJD, which it identified incorrectly as the "Order," but it failed to identify the location of the quotations. Respondent's brief, pg. 1, 2 and 3.

**IV. THE ALJ PROPERLY FOUND SUFFICIENT EVIDENCE TO ESTABLISH THAT THE EXTREMELY POOR WORK EVALUATION WAS ISSUED DISCRIMINATORILY IN RETALIATION FOR SIMMONS' GRIEVANCE FILING ACTIVITY.**

In Exception 1, Respondent alleges that there is no evidence to establish the extremely poor evaluation was discriminatory. In support of Exception 1, Respondent asserts that the evidence regarding the poor performance review establishes that it was not due to retaliation, but rather, it was the reassignment of duties among the clericals that led to the performance reviews. Respondent further argues that all the employees received evaluations at the same time, and therefore issuing an evaluation to Simmons was not retaliatory. Lastly, Respondent argues that the record lacks evidence that Simmons was good at the tasks in which she was rated poorly. All of these arguments fail and the ALJ properly found that the extremely poor evaluation was issued in retaliation for Simmons' grievance filing activity.

In *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1<sup>st</sup> Cir. 1981), the Board set forth its causation test for cases alleging violations of the Act turning on Employer motivation. First, the General Counsel must make a prima facie showing of sufficient evidence to support an inference that protected conduct was a motivating factor in the Employer's decision. Once this is established, the burden shifts to the Employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. An Employer cannot simply present a legitimate reason for its actions but must persuade by the preponderance of the evidence, that the same action would have taken place even in the absence of protected conduct. *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8<sup>th</sup> Cir. 1990). Since an employer rarely admits that it discharged (or disciplined) an employee for engaging in protected concerted activities, the Board may rely on circumstantial evidence in

determining the employer's actual motive. *NLRB v. Electronic Data Systems, Inc.*, 985 F.2d 801; 142 LRRM 2825 (5<sup>th</sup> Cir. 1993).

Here, the ALJ correctly found by a preponderance of the evidence that Jeter issued Simmons her extremely poor evaluation in retaliation for her grievance filing activity. First, there is simply no connection between the fact that Simmons' tasks were reassigned in order for her to focus on the phones and her unfavorable evaluation. This reassignment of tasks is relevant in as far as it precipitated Simmons' to request that a grievance be filed on her behalf. The ALJ properly found that this protected activity is what motivated Jeter to discriminate against Simmons by issuing the evaluation. (ALJD p.4, lines 30-37). The ALJ properly found Jeter's unlawful motivation through his finding that Jeter made unlawful coercive statements to Simmons, impliedly threatening Simmons with discharge because of her grievance filing activity, as well as issuing two discriminatory disciplines. (ALJD p. 5, lines 30-34). Notably, Respondent has not excepted to these findings and they cannot be disregarded as evidence of Jeter's unlawful motivation.

Respondent's assertion that because other employees received evaluations at the same time as Simmons it somehow proves that Simmons' evaluation was not discriminatory is not supported by the record. The ALJ acknowledged that other employees were issued evaluations at the same time as Simmons, but he specifically found that, "this has no bearing on the outcome of this case." (ALJD p. 3, fn. 4). The ALJ relied on evidence introduced at the hearing in finding that the bad evaluation was motivated by Simmons' protected activities, including that Simmons had not been issued an evaluation since 2010, and she alone received the worst rating, a "1", in 20 of the 29 categories enumerated in the evaluation. (ALJD pg. 3, lines 29-34; Tr. 26, 30-31, 92-93; GC-7). He also properly found that "there is absolutely no evidence that her job

performance was inadequate between 2010 and 2014,” as to warrant such unsatisfactory ratings, which establishes that Respondent was motivated to issue the poor evaluation by Simmons’ protected activities. (ALJD, pg. 4, line 35).

Respondent further asserts in its argument in support of Exception 1 that Simmons deserved her poor rating because Jeter testified that Simmons was not good at her job. Contrary to Respondent’s argument in this regard, the ALJ found, “[i]n the absence of any documentation, I decline to credit Jeter’s self-serving testimony regarding Simmons’ job performance.” (ALJD, pg. 4, fn. 6).<sup>4</sup> 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 the Board that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d. 1951). Here, the ALJ discredited Jeter’s testimony as to Simmons’ job performance in the absence of any documentation, and correctly found that Simmons’ job performance did not warrant the extremely low ratings. *Supra*. The record supports this credibility determination by more than a preponderance of the evidence. (see Tr. 69-70 and 93-94; GC-10, pg. 5, lines 17-19 and pg. 14, lines 18-19).

Finally, Respondent argues that the evaluations were announced on September 8, prior to Simmons’ grievance, and as a result, Simmons’ evaluation could not be motivated by retaliation. This argument fails to take into account all that happened between the 8<sup>th</sup> and the 16<sup>th</sup>, and to which Respondent did not except. The ALJ found that Local 2 filed a grievance on September 11, and Jeter was aware on that day that a grievance was forthcoming. (ALJD pg. 3, lines 7-10). On September 12, a step one meeting was held and Jeter asked Simmons why she filed a grievance, and then shortly thereafter that same day, “Jeter interrogated Simmons as to when she took her break.” When Simmons then went to discuss this issue with her shop steward, Jeter

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<sup>4</sup> The ALJ specifically chose to credit Simmons over Jeter. (ALJD pg. 1, fn.1).

angrily “told Simmons not to talk to Sanders about the break and complained that every time Jeter addressed Simmons, Simmons filed a grievance.” *Id.* at lines 18-21. Jeter then told Simmons that if she was unhappy she should quit. *Supra.* Jeter followed up on that exchange by issuing Simmons a warning letter on the same day, and sending an email complaining about Simmons’ upkeep of the bulletin board the next day. *Id.* at lines 23-27. The evaluation is dated September 16, after she filed her grievance on the 11<sup>th</sup>, and the timing, in conjunction with the unlawful statements and the unlawful discipline, is compelling evidence of Jeter’s unlawful motive in rating Simmons so poorly.<sup>5</sup>

**V. THE ALJ PROPERLY ORDERED RESPONDENT TO CEASE AND DESIST FROM DISCHARGING, DISCIPLINING OR OTHERWISE DISCRIMINATING AGAINST EMPLOYEES FOR EMPLOYEES FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY, INCLUDING HAVING GRIEVANCES FILED.**

In Exception 2, Respondent argues that any reference to “discharge” in the Order is not proper, as Simmons’ discharge was not before the ALJ. This argument is misplaced. The ALJ properly included the word “discharge” in his Order because Respondent, through Jeter, implicitly threatened Simmons with discharge for filing a grievance. (ALJD pg. 6, lines 12-13). The Order requires Respondent to cease and desist from “discharging or otherwise discriminating against employees for engaging in protected concerted activity, including having grievances filed.” (ALJD p. 6, lines 14-16). This broad Order is necessary and relevant because Jeter impliedly threatened Simmons with discharge by telling Simmons that she should quit if she were unhappy. ALJD, pg. 4, lines 1-5; Tr. 106). As noted by the ALJ, such a response to an employee’s protected concerted activity is a violation of 8(a)(1) and that “[s]uch statements in this context are an implied threat that the employee may be discharged for such activity in the

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<sup>5</sup> The record fully supports the ALJ’s findings in this regard. See Tr. 10-12, 14-15; 16-17; 18-19; 23, and 106; GC 2-6.



**CERTIFICATE OF SERVICE**

I hereby certify that COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND SUPPORTING ARGUMENT in case 05-CA-141077 was served via E-Gov, E-filing and electronic mail, on this 14<sup>th</sup> day of October, 2015, on the following:

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