

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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:
BRANCH 4779, NATIONAL ASSOCIATION OF :
LETTER CARRIERS (NALC), AFL-CIO (UNITED :
STATES POSTAL SERVICE), :
:
 Respondent, :
:
 and :
:
VALERIE JUNE WINIESDORFFER, : Case No. 07-CB-155726
an Individual, :
:
 Charging Party, :
:
 and :
:
ELIZABETH BOSSICK, : Case No. 07-CB-156115
an Individual, :
:
 Charging Party. :
:
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**ANSWERING BRIEF OF RESPONDENT BRANCH 4779 OF THE NATIONAL
ASSOCIATION OF LETTER CARRIERS, AFL-CIO**

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Respondent Branch 4779 of the National Association of Letter Carriers, AFL-CIO (“Respondent”) submits this answering brief in response to the April 20, 2016 exceptions and brief of the General Counsel.

PRELIMINARY STATEMENT

The case involves two separate communications. The first was protected speech by a union official mocking management. A local union president sent a text message to a group of three friends, who were also co-workers, that contained a caricature meant to represent a management official, with a fictional statement from the official saying he was going to “come after” a particular named employee. The text was one in a series of mocking texts that the president and his friends shared among themselves, that had the same caricatured representation of the management official and similarly outrageous make-believe anti-union or anti-employee remarks supposedly coming from the official’s mouth. The president had no intention that anyone outside this small circle of friends would ever read his text, and no reason to believe that anyone would.

The second communication occurred when one of the three co-workers – who was not, and was never alleged to be, a union agent – made an independent decision to forward the text message to the employee named in it. By ripping the message out of its context, as a joke among friends understood to be mocking management, the co-worker triggered a charge by the employee that she had been threatened by the union.

In a thoughtful and carefully crafted decision, Administrative Law Judge (“ALJ”) John T. Giannopoulos rejected the General Counsel’s claim that the union threatened the employee. In reaching this decision, the judge correctly decided to hear all the relevant evidence, rejecting the General Counsel’s urging that he put on blinders and ignore the context that gave rise to the text

message. The ALJ also correctly concluded that the second communication could not be attributed to the union, which had no intention that the charging parties ever see the message. For these reasons, as explained below, the Board should adopt the ALJ's order dismissing the complaint.

FACTS

The Branch

The Branch, a local affiliate of the National Association of Letter Carriers, AFL-CIO ("NALC"), represents city letter carriers employed by the United States Postal Service ("USPS") at its Allen Park, Michigan facility. ALJ's Decision ("Dec.") at 2; Hearing Transcript ("Tr.") at 49-50. Robert Willbanks has worked as a letter carrier at Allen Park for 25 years and has served as the Branch's president for ten years. Dec. 2; Tr. 48-49.

The Charging Parties

Charging Parties Elizabeth Bossick and Valerie Winiesdorffer worked as letter carriers at Allen Park. Dec. 2, 5; Tr. 16, 25. On occasion, Bossick works as a "204(b)" temporary supervisor. *See* Tr. 16. She worked as a 204(b) supervisor almost the entire summer of 2015. *See* Dec. 2; Tr. 16.

Alan Wilson

Alan Wilson, another letter carrier at the Allen Park facility, also occasionally worked as a 204(b) temporary supervisor. *See* Dec. 2; Tr. 21. Wilson and Branch president Willbanks have known each other for years and are friends. *See* Dec. 2, 3; Tr. 51. They text each other pretty much daily, usually joking about things. *See* Dec. 3; Tr. 52.

Wilson was not, and was never alleged by the General Counsel to be, an agent of the Branch. *See* Tr. 93; *see also* General Counsel Exhibit ("GC Ex.") 1(m), at Consolidated Complaint ¶5 (listing alleged Branch agents and not including Wilson).

Joke Texts Between Willbanks and His Friends Ridiculing the Postmaster

Willbanks and Wilson were also friends with letter carriers Kris Shaw and Mark Tocco, who have also worked for many years at the Allen Park facility. *See* Dec. 3; Tr. 52, 85-86. Willbanks, Wilson, Shaw and Tocco had a practice of sharing group texts with each other. *See* Dec. 3; Tr. 53. The four friends had an “inside joke,” Tr. 84, where they would share texts among themselves that bore a caricatured picture of “Paul Bearer.” Dec. 3; Tr. 54. Paul Bearer was the stage name of William Moody, a well-known pro-wrestling manager. *See* Dec. 3 n.3; Tr. 54. The four friends understood the caricature of Paul Bearer, which Willbanks described as “kind of [] slimy,” Tr. 56, to represent their boss, Mark Taurence, the postmaster of the Allen Park facility. *See* Dec. 3; Tr. 55-56. The words in these texts were understood to be fictional statements – typically, outrageous anti-union or anti-employee remarks – by Taurence. Dec. 3; Tr. 55-56. The four friends did not share these “inside joke” texts, which were for their own amusement, with anyone else outside of their small circle.

One example of such a text was the April 18, 2015 text sent by Wilson to Willbanks and Shaw, featuring the caricature of Paul Bearer to represent Postmaster Taurence. *See* Respondent Exhibit (“R. Ex.”) 4; Tr. 61-62; Dec. 3. The words in the text, which Willbanks understood to be a fictional statement by Taurence, read: “Terry. Have Shaw pivot tomorrow no matter what the mail volume is.” R. Ex. 4. Willbanks understood this as a joke about how unreasonably demanding the postmaster was of the employees, giving the make-believe instruction to supervisor Terri Mettles to have Kris Shaw carry more mail (pivot, in letter carrier jargon) and still do it within eight hours, no matter the amount of mail volume. *See* Tr. 62; Dec. 3.

Another text from April 23, 2015, bearing the same caricature, was sent by Willbanks to Wilson, Tocco and Shaw. *See* Tr. 57; R. Ex. 2; Dec. 4. This one, also sent in jest,

had Taurence making the fictional statement “I bet Shaw was done by 3. I got something for him next inspection. Plantar Fasciitis or not!” R. Ex. 2. Willbanks meant this as another joke about how unreasonably demanding Taurence was of the employees, with Taurence making the fictional statement that he would add more work to Shaw’s mail route at the next route inspection, despite Shaw’s foot ailment (Plantar Fasciitis). *See* Tr. 58-59, 90; Dec. 4. Willbanks did not show the text to anyone other than the three recipients and, as far as he knew, none of the recipients showed it to anyone else. Tr. 59. It was just a joke between them, aimed at the postmaster.

Another text from Shaw dated May 29, 2015 featured the same Paul Bearer caricature over the words “[t]hese GPS scanners will finally prove what thieving scumbags you carriers are.” R. Ex. 3. Willbanks understood this text to be a joke, with Taurence making the fictional anti-employee statement about how the use of GPS scanners, which the facility had recently received, would reveal that the letter carriers were fooling around and not working as hard as they should be. *See* Tr. 60-61, 90-91; Dec. at 4. Willbanks did not send or show the text to anyone else. *See* Tr. 61. He understood it to be a joke among friends.

Finally, on June 9, 2015, Willbanks wrote and sent another text to his three friends, also bearing the Paul Bearer caricature, and having Taurence make the fictional anti-union statement “I’ve devised a plot to circumvent the [Overtime Desired List]. Let people change their schedule to say Monday. No exchange. Just an extra body on Monday ... I would have got away with it. If it wasn’t for that meddling union.” R. Ex. 1; Tr. 53-56, 86-87. Willbanks did not show or send the text to anyone other than Shaw, Tocco and Wilson. *See* Tr. 56.

To Willbanks' knowledge, Wilson had never shown any of these group joke texts to anyone else. *See* Tr. 74.

The City Carrier Assistant Grievance

A contractual memorandum between NALC and USPS allowed management at a postal facility on occasion to “borrow” a City Carrier Assistant (“CCA”) from another facility. *See* Tr. 77-78; Dec. 3. However, management at Allen Park was borrowing one every day. *See* Tr. 77-78; Dec. 3. Letter carriers at the facility came to Willbanks to complain about it, because this daily use of a CCA deprived them of overtime opportunities. *See* Tr. 78-79; Dec. 3. In response, Willbanks filed a grievance against management over its daily use of the CCA. *See* Tr. 77, 79; Dec. 3. As a result of the grievance, Taurence decided to take Bossick, Wilson and another letter carrier off of their 204(b) temporary supervisor details and put them back on their letter carrier routes, effective Monday, June 15, 2015. *See* Tr. 18-19, 79; Dec. 3. Bossick and Wilson were both put back on their routes on June 15. *See* Tr. 21. Bossick testified that she was not happy about the CCA grievance because being a 204(b) had allowed her and the two others to learn the job of supervising and gave them an opportunity to advance in their field. *See* Tr. 19; Dec. 2. The ALJ found that Wilson, too, was upset with the Branch and Willbanks over the outcome of the CCA grievance. *See* Dec. 6.

Bossick's June 12, 2015 Conversation with Willbanks

On June 12, three days earlier, Bossick had a conversation with Willbanks at the postal facility. *See* Tr. 17. During the conversation, she asked Willbanks how she could “get out of the Union.” Tr. 20. Willbanks explained to Bossick that to quit the union she would need to find out the date she had joined, and that she could find that out by looking at the Postal Record and calling a certain telephone number. *See* Tr. 20. Willbanks said nothing to dissuade her from quitting and gave no indication that he cared that she was considering quitting.

Jim Long's Workers Compensation Complaint

Jim Long, another letter carrier at the Allen Park facility, *see* Tr. 65, began his employment at USPS very close to the date that Bossick began hers. *See* Tr. 70. Long had been a good employee and Postmaster Taurence thought well of him, *see* Tr. 65, 70, until he got hurt, *see* Tr. 68. After his injury, Long was having trouble getting his workers compensation claim approved. *See* Tr. 68-69. On June 13, 2015, Willbanks, who had a practice of helping employees with their workers compensation claims, *see* Tr. 69, sent a text message to Branch officer Danny Szkarlat, Tr. 70, saying "Tell Jim Long. Ask to see me on Monday. Maybe I can help get his case approved." R. Ex. 6. That Monday was June 15, 2015.

Willbanks' June 15, 2015 Joke Text to His Friends

On June 15, 2015, the same day he was to help Long with his workers compensation claim, Willbanks wrote and sent a text to his friends Tocco, Shaw and Wilson with the Paul Bearer caricature above the words, "Beth, you are one major illness or injury. From being in my dog-house. You see how petty I am. I will come after you too." GC Ex. 4; Tr. 29; Dec. 4. Willbanks explained that the words, which he made up, were supposed to be a fictional statement from Taurence to Bossick, with the point being that just as Taurence had turned on Long after his injury, he would do the same to Bossick "too" were she to become injured or ill. *See* Tr. 70, 72-73. The text contained no threat of physical harm or a refusal to provide union representation.

Tocco testified that he understood the June 15 text to be "a picture of Paul Bearer representing Postmaster Taurence with a false quote attributed to Mark Taurence." Tr. 91. His interpretation of the text was that now that Bossick was back to carrying mail, "she's going to get treated like a carrier, not a supervisor," and "if she should have to use sick leave, that he would come after her." Tr. 91.

Willbanks had no expectation that his friends who received the text would do anything with it. *See* Tr. 73-74. He did not send it to Bossick and had no expectation that she would ever see it. *See* Tr. 74. Willbanks' June 15 text was part of an ongoing exchange of joke texts between friends. Indeed, less than an hour later, Shaw shared with the group another joke text, also with a caricature and fictional statement. *See* R. Ex. 7; Tr. 75.

Wilson's Communications with Bossick and Bossick's with Winiesdorffer

On June 15, just before receiving Willbanks' text, Wilson had sent a text to Bossick telling her that he had met the new 204(b) supervisor that Taurence had borrowed from another postal facility. *See* GC Ex. 3; Tr. 22; Dec. 5. Then, unbeknownst to Willbanks, Wilson forwarded Willbanks' June 15 text to Bossick, telling her that it was a text "from Willi." GC Ex. 3; Tr. 22; Dec. 5. Lacking any context to understand Willbanks' text, Bossick did not know who the caricature in the text was supposed to be. *See* Tr. 23; Dec. 5. Bossick then forwarded the text to another co-worker, charging party Winiesdorffer. *See* Tr. 25; Dec. 5. Winiesdorffer had previously filed a series of internal union charges accusing Willbanks of misconduct and corruption, most of which were thrown out, *see* Tr. 46-47, and she admitted at the hearing that she wanted to see Willbanks "gone." Tr. 47. Winiesdorffer told Bossick that Willbanks' text was a threat. *See* Tr. 26. In July 2015, Winiesdorffer and Bossick filed unfair labor practice charges against the Branch based on the text. *See* GC Ex. 1(a), 1(e).

The Complaint and the ALJ's Decision

On October 26, 2015, the General Counsel issued a complaint charging the Branch with violating Section 8(a)(1)(B) of the Act. *See* GC Ex. 1(m). The complaint alleged, in relevant part, that "Respondent, by its agent Robert Willbanks, via text message, threatened employees with physical harm and/or refusal to represent them, because they requested to resign

from Respondent, and or because they opposed grievances raised by Respondent.” *Id.* at Consolidated Complaint ¶7.

After a hearing, Judge Giannopoulos, on March 2, 2016, issued a decision and order dismissing the complaint in its entirety. The ALJ determined that “the objective facts do not support a finding that the Union unlawfully threatened Bossick with physical harm or threatened to refuse to represent her, as alleged in the Complaint.” Dec. at 6. In reaching this conclusion, he emphasized that Willbanks did not send the text to Bossick, but sent it only to his friends, who understood it to be a fictional message from Postmaster Taurence, and that it was Wilson, who was not a Union agent, who forwarded it in a separate communication to Bossick. *See id.*

On April 20, 2016, the General Counsel filed exceptions to the ALJ’s decision. As explained below, the exceptions are meritless.

ARGUMENT: THE GENERAL COUNSEL’S EXCEPTIONS ARE MERITLESS

I. THE ALJ CORRECTLY DETERMINED THAT THE BRANCH DID NOT VIOLATE THE ACT

The General Counsel argues first that the ALJ erred in not finding the Branch to have violated the Act. *See* General Counsel Brief (“GC Br.”) at 14-16. In fact, the ALJ correctly dismissed the complaint.

In determining whether a respondent has violated Section 8(b)(1)(A), the Board looks at whether “the alleged offender engaged in conduct which tends to restrain or coerce employees in the rights guaranteed them in the Act.” *United Steelworkers of Am., Local 1397*, 240 N.L.R.B. 848, 849 (1979); *accord United Mine Workers of Am.*, 275 N.L.R.B. 444, 447 (1985); *Highway, City & Freight Drivers*, 250 N.L.R.B. 1127, 1130 (1980). Making this determination in the case of an alleged threat “require[s] an assessment of all the circumstances

in which the statement was made.” *Int’l Bhd. of Elec. Workers, Local 6*, 318 N.L.R.B. 109, 109 (1995), *enf’d*, 139 F.3d 906 (9th Cir. 1998); *see also Am. Postal Workers Union*, 328 N.L.R.B. 281, 282 (1999) (statement should be examined “‘in context’”) (citation omitted); *Local 9431, Communications Workers of Am.*, 304 N.L.R.B. 446, 446 (1991) (allegation must be evaluated “‘in the context’” of the relevant facts).

Here, the only conduct in which Branch president Willbanks engaged was the sending of the June 15 text to his friends Wilson, Tocco and Shaw. That conduct did not tend to restrain or coerce employees in the rights guaranteed them by the Act. An assessment of the circumstances makes clear that Willbanks sent the text to this small circle of his friends as a joke, only the latest in a series of similar texts shared among them bearing a caricature understood to represent the postmaster and words understood to be fictional statements by the postmaster. Even though the June 15 text referred to “Beth” and said “I will come after you,” the context shows that it cannot reasonably be interpreted as a threat by the Branch against Bossick. *See, e.g., Int’l Bhd. of Elec. Workers*, 318 N.L.R.B. at 109 (finding union did not threaten employee, because, under consideration of “all the circumstances,” the union’s statement “you will be killed” could not be taken literally). Seen in the context of the prior texts between the friends mocking the postmaster with faux statements attributed to him, the June 15 text can only reasonably be understood as a criticism of management, showing how “petty” the postmaster was, and how ready the postmaster would be to “come after” Bossick “too” were she to suffer an illness or injury, just as Long had lost management’s favor following his injury. Indeed, far from being unlawful, the June 15 text constituted employee speech criticizing the employer within the protection of Section 7 of the Act.

Moreover, the context shows that Willbanks had no intention, and no expectation, that his text would be read by anyone outside of the small circle of friends to whom he sent it and who understood its meaning. *See* Tr. 73-74. It is undisputed that he did not send it to Bossick, Winiesdorffer or to anyone else other than Wilson, Tocco and Shaw. *See* Tr. 29. Because Willbanks had no intention or reasonable expectation that Bossick, Winiesdorffer or any other employee outside of his small circle of friends would ever see the text, the Branch lacked “the intent necessary for an unfair labor practice.” *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963). In any event, there is certainly no evidence, as General Counsel alleged in the complaint, *see* GC Ex. 1(m) at Consolidated Complaint ¶7, that the Branch intentionally threatened employees with physical harm or with a refusal to represent them.

Bossick only received the text as a result of independent action taken by Wilson. *See* GC Ex. 3; Tr. 22; Dec. 3. Because Wilson was not – and was not even alleged to be – an agent of the Branch, *see* Tr. 93; GC Ex. 1(m), at Consolidated Complaint ¶5, the Branch cannot be liable for his conduct. *SSC Corp.*, 317 N.L.R.B. 542, 547 (1995) (employer not liable for threats made by individuals in absence of proof that they were the employer’s agents); *cf. Serv. Employees Local 87*, 291 N.L.R.B. 82, 82-83 (1988) (cited at GC Br. at 16) (finding violation by respondent union when evidence showed that picketers were the union’s agents). The General Counsel cites *Teamsters Local No. 886*, 354 N.L.R.B. 370 (2009) (cited at GC Br. at 5), a case in which a union steward had apparent authority to speak for the union, but General Counsel nowhere in his complaint or in his brief alleges or contends that Wilson had actual or apparent authority to speak for the Branch.

While Wilson did not alter the June 15 message, he did forward it to Bossick stripped of its context as a joke putting words in the mouth of the postmaster. The Branch

cannot be liable for the impact of a statement it made when a third-party disseminates it shorn of its original context. *See Manorcare of Kingston PA, LLC*, 360 N.L.R.B. No. 93 (2014), at *2 (statements about punching people in the face and damaging their cars not objectionable threats when originally made in jest, and only later repeated by third-party employees “stripped of their original context”). Bossick’s subjective (and incorrect) belief that she had been threatened cannot be grounds for holding the Branch liable. *See Masonic Homes of California*, 258 N.L.R.B. 41, 41 n.4 (1981) (whether statements are coercive “is not determined by the subjective state of mind of the hearer”).

The General Counsel’s reliance on *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984) (cited at GC Br. 6) is misplaced. There, the court agreed with the Board that an employer had unlawfully given employees the impression that their union activities were under surveillance when a manager stood near an employee while she was speaking on the telephone, apparently monitoring what she was saying, and then told her that the company’s president had told him to monitor her calls with or about the union. *See* 724 F.2d at 541. The court reached this conclusion even though the employee’s testimony created some ambiguity, with her testifying both that the manager seemed to be joking around and that he had seemed “very serious in what he was saying.” *Id.* at 549. Here, by contrast, the evidence about the circumstances of the case leaves absolutely no ambiguity about the message that Willbanks sent to his three friends: the words in the text saying “I will come after you” were indisputably intended as a fictional statement out of the mouth of the Paul Bearer caricature, who was understood to represent the postmaster. In addition, unlike in *Homemaker*, where the employer’s agent engaged in the coercive activity by appearing to monitor the employee’s call and telling the employee he was monitoring her call, here the Branch engaged in no coercive conduct

towards any employee, having never sent the June 15 text to Bossick or Winiesdorffer or to anyone else outside the small circle of Willbanks' friends who understood its context. Other cases on which the General Counsel relies are similarly distinguishable, since in those cases, unlike here, it was the respondent, through its agents, that communicated the purportedly threatening statement. *See Graphic Communications Conf.*, 359 N.L.R.B. No. 22 (2012) (cited at GC Br. at 4) (union president in telephone call with employee threatened to remove her from class action suit if she did not stop complaining); *Branch 3126, Nat'l Ass'n of Letter Carriers*, 330 N.L.R.B. 587, 587-88 (2000) (cited at GC Br. at 4) (union steward, as agent of union, said, in presence of employee, that nonmember should not be assigned overtime), *enf'd*, 281 F.3d 235 (D.C. Cir. 2002).

To try to show that the June 15 text was a retaliatory threat, the General Counsel points out that Bossick received it following the June 12 conversation with Willbanks in which she asked how to quit the union. *See* GC Br. 15. But Willbanks did not send the June 15 text to Bossick in the wake of that conversation. He *never* sent it to her. It was Wilson who sent it to her. Moreover, there is no reason to believe that Willbanks writing the text had anything to do with Bossick's request about how to quit the union. The text itself makes no reference to her request. *See* GC Ex. 4-5. Nor is there any evidence that Willbanks ever said anything to Bossick or anyone else about her request. The evidence of the June 12 conversation shows without dispute that Willbanks simply and in a matter-of-fact and helpful fashion gave Bossick information in response to her request. *See* Tr. 20. There is no evidence that he even cared whether she quit the union.

Willbanks did initially assume, before Bossick told him otherwise, that she was "mad" about management removing her from her 204(b) position as a result of the CCA

grievance. *See* Tr. 20. However, that does not mean that *he* was mad at *her*, or had any animus at all toward her. Moreover, while the General Counsel contends that Willbanks “taunted” or “made fun of” Bossick, GC Br. 6, 15, 16, the ALJ made no such finding. Nor does the General Counsel cite anything in the record to support that contention. *See id.*

The evidence demonstrates why Willbanks wrote the text on June 15, and it had nothing to do with Bossick’s June 12 request for information about how to quit the union. On June 15, Willbanks was to meet with Long, an injured employee who was no longer in management’s favor, about Long’s workers compensation claim. *See* R. Ex. 6. As Willbanks explained, he wrote the text “in relation to Jim Long.” Tr. 72. Now that management had taken Bossick off her 204(b) duties and she was back on her route, if she became injured or ill like Long had, the postmaster, given his supposed pettiness, might “come after” her “too.” GC Ex. 4. The use of the word “too” confirms that it was someone else’s situation – namely, Long’s – that triggered the timing of Willbanks’ writing the text.

The General Counsel asserts that after Willbanks learned that Bossick had received the June 15 text message, “he made no attempt to explain to her what it meant or to diminish its impact.” GC Br. 12 (citing *Passavant Mem. Area Hosp.*, 237 N.L.R.B. 138 (1978)). But the Branch cannot be held liable because Willbanks did not explain to Bossick what the text meant after she had received it. *Passavant* holds that “under certain circumstances an employer may relieve himself of liability for *unlawful conduct* by repudiating the conduct.” 237 N.L.R.B. at 138 (emphasis added). Here, for the reasons explained above, the Branch committed no unlawful conduct, so it had nothing to repudiate. It certainly had no *duty* to repudiate anything.

In any event, the union did essentially what General Counsel contends it should have: as Bossick testified, after she received the text, NALC, through its National Business

Agent Pat Carroll, explained to Bossick that the text was not meant for her to see, that it was “schoolyard play,” and that Willbanks was sorry. *See* Tr. 32-34. This explanation from Carroll made no difference to Bossick, who pursued her unfair labor practice charge anyway. Because the explanation Bossick received from NALC made no difference to her, the General Counsel should not be heard to argue that the Branch should be held liable because Willbanks did not provide her a similar explanation.

In sum, the evidence supports the ALJ’s determination that the Branch did not commit an unfair labor practice.

II. THE ALJ APPLIED THE CORRECT LEGAL STANDARD

The General Counsel next argues that the ALJ applied the incorrect legal standard in deciding the case. *See* GC Br. 10-14. In fact, the ALJ applied the correct standard. The ALJ explained that an “objective” standard governs whether a statement by a union in a Section 8(b)(1)(A) case can reasonably be interpreted as a threat. *See* Dec. 5. This is exactly the same “objective” standard that the General Counsel cites in his brief. *See* GC Br. 4.

The General Counsel takes issue with the ALJ’s use of representation cases to support his decision, pointing out that the standard the Board uses in deciding whether a threat constitutes grounds for setting aside an election is inapplicable to unfair labor practice cases. *See* GC Br. 10-12. While the standard for setting aside an election is inapplicable here, it does not follow that discrete principles set forth in representation cases have no relevance in unfair labor practice cases. For example, the judge cited *Manorcare*, 360 N.L.R.B. No. 93, for the proposition that context matters, and thus that the objective meaning of the text written by Willbanks – as mocking the postmaster and putting fictional words in his mouth – did not change when Wilson forwarded it without context to Bossick. *See* Dec. 6. While *Manorcare* is a representation case, the principle that context matters, and that the Board should assess the

circumstances, is not unique to representation cases, but has equal applicability to unfair labor practice cases like this one. *See Int'l Bhd. of Elec. Workers*, 318 N.L.R.B. at 109 (holding in unfair labor practice charge case that statement should be examined in context); *Local 9431*, 304 N.L.R.B. at 446 (same). The ALJ also relied on the representation case *Mastec N. Am., Inc.*, 356 N.L.R.B. No. 110 (2011), but only as support for the proposition that a union cannot be held responsible for the statements of individuals who are not its agents. *See* Dec. 6. This same principle applies in unfair labor practice cases, as illustrated by *SSC Corp.*, 317 N.L.R.B. at 547, an unfair labor practice case which the ALJ cited for the same point. *See* Dec. 6. Finally, the ALJ cited a representation case, *G.H. Hess, Inc.*, 82 N.L.R.B. 463, 463 n.3 (1949), for the proposition that a statement's legality does not turn on the subjective understanding of the recipient, but he also cited two unfair labor practice cases, *Donaldson Bros. Ready Mix, Inc.*, 341 N.L.R.B. 958, 963 (2004), and *Masonic Homes*, 258 N.L.R.B. at 41 n.4, for the same proposition. *See* Dec. 7.

In sum, the judge applied the correct legal standards in making his decision.

III. THE ALJ CORRECTLY CONSIDERED EVIDENCE OF THE CIRCUMSTANCES

The General Counsel next argues that the ALJ erred by considering evidence that gave “any context” to the June 15 communication, including Willbanks’ testimony that the text was meant to mock management and that it was intended to be seen only by the small circle of friends to whom he had previously shared similar joke texts and who understood its meaning. *See* GC Br. 7. The General Counsel contends that the ALJ should have put on blinders, only allowing him to see the text through Bossick’s eyes. *See id.* at 5.

The General Counsel’s position runs directly contrary to Board law, which not only allows an ALJ to consider context, *see Am. Postal Workers Union*, 328 N.L.R.B. at 282;

Local 9431, 304 N.L.R.B. at 446, but requires assessment of “all the circumstances in which the statement was made.” *Int’l Bhd. of Elec. Workers*, 318 N.L.R.B. at 109 (emphasis added) (considering full context and concluding that union did not threaten employee with statement that employee would “be killed”). It is only possible to determine whether the Branch engaged in unlawful threatening conduct by understanding the full context, including the fact that the fictional words in the June 15 text were attributable to the postmaster and that Willbanks only intended and expected it to be seen by his friends who understood that.

Considering context is not inconsistent with the Board’s objective standard, as the General Counsel seems to suggest. *See* GC Br. at 4. For example, it is an objective (and undisputed) fact that no agent of the Branch sent the text to Bossick or Winiesdorffer. That is critical context showing that the Branch did not engage in coercive conduct in violation of Section 8(a)(1)(B).

Ironically, the General Counsel is not entirely opposed to the ALJ considering context; he repeatedly urges consideration of the timing of the June 15 text and Willbanks’ June 12 conversation with Bossick. *See, e.g.*, GC Br. at 5. What the General Counsel really wants here is selective use of context, with the Board considering those facts that the General Counsel believes supports his case while ignoring those facts that do not.

Because the ALJ did not err by considering the evidence of context, his decision should stand.

IV. THE ALJ’S FACTUAL FINDINGS WERE NOT ERRONEOUS

Next, the General Counsel challenges the ALJ’s fact-finding, *see* GC Br. at 9, including the fact that Wilson sent Bossick the June 15 text without Willbanks’ knowledge. *See* Dec. 6. On this point, the General Counsel faces a particularly high hurdle. Willbanks testified in no uncertain terms that he had no intention or expectation that Bossick or Winiesdorffer would

ever see the June 15 text. *See* Tr. 74. The ALJ credited this testimony, finding that Wilson sent Bossick the text “unbeknownst to Willbanks.” Dec. 5. It is the Board’s established policy not to overrule an ALJ’s credibility determinations unless a preponderance of evidence shows that the ALJ was incorrect. *See Int’l Ass’n of Machinists & Aerospace Workers*, 363 N.L.R.B. No. 165, at *1 n.3 (2016) (citing *Standard Dry Wall Prods.*, 91 N.L.R.B. 544 (1950)). Here, there is no evidence, let alone a preponderance of evidence, to challenge the ALJ’s fact-finding on this point.

The General Counsel points to the *absence* of testimony by Wilson and speculates that perhaps, if Wilson had testified, he might have said that Willbanks told him to send Bossick the text. *See* GC Br. at 10. Such speculation carries no weight. If the General Counsel wanted Wilson to testify, it could have subpoenaed him to testify.

The General Counsel, however, tries to flip things on their head, arguing that Wilson’s absence should have caused the ALJ to draw an adverse inference against the Branch. *See* GC Br. 9. This argument is meritless. While the Board has held that an adverse inference “may” be drawn from a witness’ absence in certain circumstances, *Int’l Automated Machs.*, 285 N.L.R.B. 1122, 1123 (1987) (cited at GC Br. at 9), the judge retains broad discretion whether to draw the inference. *See Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998); *see also, Alliance Mechanical, Inc.*, 356 N.L.R.B. No. 126, at *13 (2011) (ALJ exercising discretion not to draw an adverse inference); *Local Jt. Exec. Bd. of Las Vegas, Culinary Workers, Local 226*, 2014 WL 1766823, at n.5 (Case No. 28-CB-107960) (May 2, 2014) (same). Here, the ALJ acted well within his discretion in not drawing an adverse inference against the Branch. First, Wilson was not an agent of the Branch. *See* Tr. 93; *cf. Int’l Automated Machs.*, 285 N.L.R.B. at 1123 (drawing adverse inference against employer that failed to call a member of

management). Moreover, drawing an adverse inference against a party is unwarranted when there is insufficient evidence that the witness was favorably disposed to that party. *See Alliance Mechanical*, 356 N.L.R.B. No. 126, at *13; *Local 226*, 2014 WL 1766823, at n.5. Here, although Wilson was friends with Willbanks, who was one of his co-workers, the records contains no evidence that Wilson was favorably inclined to the Branch. Indeed, because he lost his 204(b) position as a result of management's reaction to the Branch's CCA grievance, it was reasonable for the ALJ to find, as he did, that Wilson "was also upset with Willbanks and the Union over the outcome of the CCA grievance." Dec. 6. Thus, there is no basis to conclude that Wilson was favorably disposed to the Branch.

In addition, if the General Counsel wanted the ALJ to draw an adverse inference, he should have asked the ALJ to draw one. Having made no such request either at the hearing or in its post-hearing brief, the General Counsel should not be heard to complain that the ALJ did not draw the adverse inference. Finally, even if the ALJ had drawn an adverse inference against the Branch, it does not follow that he would or should have found that Willbanks knew Wilson would forward the text to Bossick. "No inference can stand against concrete evidence," *Alliance Mechanical*, 356 N.L.R.B. No. 126, at 13, and Willbanks' testimony provided concrete evidence that he did not expect Wilson to send the text to anyone.

The General Counsel next argues that Bossick attempted to testify about a telephone conversation she had with Wilson, which, the General Counsel claims, "might have shed light on the reason why Wilson sent Bossick the text," but, the General Counsel further asserts, the ALJ "refused" to allow the testimony. *See GC Br. 9*. This misconstrues the record. The ALJ did not refuse to allow Bossick to testify about her conversation with Wilson. When counsel for the General Counsel asked Bossick about the conversation, the Branch's counsel

asserted a relevance objection. *See* Tr. 26. Rather than rule on the objection, the ALJ asked counsel for the General Counsel about the relevance of the conversation. *See id.* Counsel for the General Counsel responded “[w]e can leave it out,” Tr. 26-27, and proceeded to move on to other questions. The General Counsel thus voluntarily abandoned the inquiry about Bossick’s conversation with Wilson.

But even if the ALJ had ruled excluding Bossick’s testimony about her conversation with Wilson, the General Counsel should have preserved his objection to the ruling by making a proffer about what Bossick would have said about the conversation if she had been allowed to testify. Bossick was the General Counsel’s witness, and also one of the charging parties, so the General Counsel knew or should have known what she would have said about her conversation with Wilson. Having failed to make a proffer of what Bossick would have said, the General Counsel should not be heard now to offer speculation about what she might have said. *See Canterbury Villa of Waterford, Inc.*, 282 N.L.R.B. 462, 462 (1986) (rejecting contention that judge erred by excluding certain evidence when party failed to make a proffer regarding the evidence).

V. THE ALJ DID NOT ERR IN TAKING JUDICIAL NOTICE OF “PAUL BEARER” AND, EVEN IF HE DID, THE ERROR WAS HARMLESS

Finally, the General Counsel argues that the judge erred by taking judicial notice that the caricature in the texts that Willbanks and his three friends used to represent the postmaster was “Paul Bearer.” *See* GC Br. at 8. Even if the ALJ erred by taking judicial notice that the caricature was a picture of “Paul Bearer,” the error was completely harmless. It made no difference *who* was depicted in the texts. The picture could have been of anybody or nobody. The only relevant (and undisputed) fact was that Willbanks and his friends used the caricature to represent Postmaster Taurence, and that the words in the texts were fictional words put into

Taurence's mouth to ridicule how anti-union and anti-employee he was, and were not words representing the intentions of the Branch.

In any event, it was not error for the ALJ to take judicial notice that the caricature was of Paul Bearer. Paul Bearer may not have been famous beyond the world of pro-wrestling, as the General Counsel contends. *See* GC Br. at 8. But a fact being generally known is just one possible basis for judicial notice. A tribunal may also take judicial notice under Federal Rule of Evidence 201(b) when the fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." F.R.E. 201(b)(2). The ALJ cited a *New York Times* obituary of Moody, *see* Dec. 3 n.5, which referenced his "Paul Bearer" stage name and persona, http://www.nytimes.com/2013/03/12/arts/television/william-moody-58-pro-wrestlings-paul-bearer-dies.html?_r=0. No reason exists to question the accuracy of the *Times* article and the General Counsel does not question it. Thus, the ALJ properly took judicial notice of "Paul Bearer."

CONCLUSION

For the foregoing reasons, the Board should reject the General Counsel's exceptions and adopt the ALJ's decision dismissing the complaint.

Dated: April 29, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Answering Brief of Respondent Branch 4779 of the National Association of Letter Carriers, AFL-CIO to be served this 29th day of April 2016 by email and by first-class mail, postage prepaid, upon:

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