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Branch 4779, National Association of Letter Carriers, (NALC), AFL–CIO (United States Postal Service) and Valerie June Winiesdorffer

Branch 4779, National Association of Letter Carriers, (NALC), AFL–CIO (United States Postal Service) and Elizabeth Bossick. Cases 07–CB–155726 and 07–CB–156115

July 21, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

On March 2, 2016, Administrative Law Judge John T. Giannopoulos issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a reply brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel 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 adopting the judge’s dismissal of the allegation that the Respondent violated Sec. 8(b)(1)(A) of the Act, we rely on his finding that the Union president’s text was not objectively threatening in the original context. Even if employees Winiesdorffer and Bossick reasonably could have found the forwarded text message to be threatening, there is no evidence that Wilson, the employee who forwarded the message, was an agent of the Respondent. Accordingly, Wilson’s conduct is not attributable to the Respondent.

In addition, we do not rely on the judge’s speculation about why Wilson forwarded that text message to Bossick.

Member McFerran, in agreeing to dismiss the 8(b)(1)(A) allegation, relies only on the General Counsel’s failure to prove that employee Wilson was an agent of the Respondent.

Dated, Washington, D.C. July 21, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Donna M. Nixon, Esq., for the General Counsel.
Rebecca A. Hayes, Esq. and *Peter D. DeChaira, Esq. (Cohen Weiss & Simon, LLP)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. Branch 4779, National Association of Letter Carriers (NALC), AFL–CIO (Respondent or Union) is accused of violating Section 8(b)(1)(A) of the National Labor Relations Act (Act)¹ by threatening employees with physical harm and/or threatening to refuse to represent employees because they requested to resign from the Union or opposed grievances raised by the Union. This case was tried in Detroit, Michigan, on January 6, 2016, pursuant to an October 26, 2015, consolidated complaint (Complaint) issued by the Regional Director for Region 7 on behalf of the General Counsel.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Union, I make the following findings of fact and conclusions of law.²

JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is a labor organization within the meaning of Section 2(5) of the Act, and that the Board has jurisdiction over the United States Postal Service (USPS) pursuant to Section 1209 of the Postal Reorganization Act.

¹ Sec. 8(b)(1)(A) of the Act, 29 U.S.C. §158(b)(1)(A), states, in part, that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Sec. 7, i.e., the right to self-organization, to form, join, or assist labor organizations and to engage in other concerted activities for mutual aid or protection and to refrain from any or all such activities.

² There is little dispute regarding the facts of this case. However, when necessary, credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor was primarily considered in making credibility resolutions. I also considered the inherent probability of the testimony and whether such testimony was in conflict with credited testimony or documentary evidence. Testimony contrary to my findings has been discredited.

Facts

A. Background

The Union represents letter carriers working out of the Allan Park, Michigan post office (Tr. 49–50). Mark Taurence is the Postmaster in Allan Park (Tr. 25, 55). For the past 10 years, Robert Willbanks has been the Union president; he has also worked as a letter carrier in Allan Park for 25 years (Tr. 49–50). The Charging Party Valerie June Winiesdorffer (Winiesdorffer), has worked as a letter carrier in Allan Park for 28 years (Tr. 40). Winiesdorffer has an admitted dislike for Willbanks’s reign as union president and over the years has filed various internal union charges against him; she testified that she would like to see him “gone” (Tr. 46–47).

The charging party Elizabeth Bossick has worked as a letter carrier in Allan Park since 2013 (Tr. 16). During the summer of 2015,³ Bossick worked a significant part of the time as an acting supervisor—known in Postal Service jargon as a “204(b).” (Tr. 16.) Bossick estimated that she spent “almost the whole summer” of 2015 working as an acting supervisor. (Tr. 16) Alan Wilson, another letter carrier in Allan Park and a friend of Willbanks, worked alongside Bossick as a 204(b) during part of 2015⁴ (Tr. 18, 21, 51).

Bossick enjoyed working as an acting supervisor, as it gave her the opportunity to learn how to supervise others and provided a chance for future advancement within the post office (Tr. 19). Bossick had a good relationship with Postmaster Taurence, and she was also close friends with Winiesdorffer (Tr. 25–27).

At some point, the Allan Park post office started using City Carrier Assistants (CCA’s) from Taylor, Michigan on a daily basis to assist with delivering the mail. Some Union members were upset at this practice, as it was reducing their ability to get overtime, and they were demanding the Union take action. Accordingly, the Union filed a grievance over the use of CCA’s, arguing that the contract only allowed their use occasionally—but that Postmaster Taurence was using CCA’s on a daily basis (Tr. 77–79).

As a result of the grievance, Bossick and Wilson were relieved of their 204(b) duties for a period of time and were put back on their routes as letter carriers (Tr. 79). Postmaster Taurence met with both, informing them that starting Monday, June 15, they would return to their letter carrier routes because of the grievance filed by the Union over the use of CCA’s (Tr. 18–19).

B. Text messages between Willbanks and his friends

Willbanks and Wilson were close friends, having known each other for 21 years (Tr. 51). They spoke and texted regularly and generally liked to laugh and joke with each other (Tr. 51–52). The two were also long-time friends with Kris Shaw and Mark Tocco, who also worked as letter carriers in Allan Park (Tr. 52). The four friends would talk or text daily, sending

³ All dates are in 2015.

⁴ A third letter carrier was also working as a 204(b) during the summer of 2015; however, he was on a detail at another facility in June 2015. (Tr. 18.)

group text-messages amongst themselves, many times joking with each other (Tr. 52; R. Exh. 1–7). Shaw was often the butt of their jokes—however, they also joked about other coworkers (Tr. 59, 75; 92, R. Exh. 2, 7).

At some point, the four friends started using a photograph of professional wrestling manager “Paul Bearer” in their text-messages, as a caricature representing Postmaster Taurence⁵ (Tr. 54–55, 88; R. Exh. 1–5). This was an “inside joke” amongst the four friends. (Tr. 84) Whenever they sent a text message with the photo of Paul Bearer, the words in the text message represented the imaginary words being spoken by Postmaster Taurence, (Tr. 55–58, 89) much like a cartoon character’s words appear in a speech bubble.⁶

These texts, using Bearer as a caricature for Taurence, generally painted the Postmaster in a bad light—as a boss who would pile on work for no reason or who thought that employees were lazy. Thus, in one April 2015 group text message, under the picture of Paul Bearer, Wilson wrote to his friends “Terry. Have Shaw pivot tomorrow no matter what the mail volume is.” (R. Exh. 4.) Willbanks explained this text as a fictional instruction from Postmaster Taurence, to their front line supervisor named Terry, to have Shaw carry a heavier load of mail (“pivot”) on his route—but still complete the route in 8 hours. (Tr. 62).

In another April 2015 group text message under the photograph of Paul Bearer, Willbanks texted the group saying “I bet Shaw was done by 3. I got something for him next inspection. Plantar Fasciitis or not!” (R. Exh. 2.) Both Willbanks and Tocco testified this text was meant to tease Shaw, who regularly complained his feet hurt due to plantar fasciitis, that Postmaster Taurence would give him extra mail to complete on his route after the next inspection (Tr. 58, 90).

In a May 2015 group text message under the picture of Paul Bearer, Kris Shaw wrote “These GPS scanners will finally prove what thieving scumbags you carriers are.” (R. Exh. 3.) Again, both Willbanks and Tocco explained that this text was a joke—this time referencing the use of GPS scanners to follow the letter carriers throughout the day and the Postmaster’s perceived belief that the letter carriers were fooling around instead of working (Tr. 60–61, 90–91).

It is in this context that Willbanks sent a group text message

⁵ Paul Bearer (a play on pallbearer) was the stage name used by William Moody who died in 2013. Wrestling Manager Bearer wore a black suit and cake-white face makeup. He had died-black hair, moustache, and eyebrows, and carried around an urn of cremated ashes from which he would conjure up supernatural powers for his primary client—the 6’10” wrestler known as the Undertaker. See <http://www.nytimes.com/2013/03/12/arts/television/william-moody-58-pro-wrestlings-paul-bearer-dies.html> (last accessed on February 29, 2016). Pursuant to Fed. R. Evid. 201 I take judicial notice of this fictional persona. *United States v. Saccoccia*, 58 F.3d 754, 776, n. 16 (1st Cir. 1995) (court takes judicial notice that fictional character Juan Valdez is a prominent persona in coffee advertisements, “[c]lad in a serape and sombrero and accompanied by his faithful donkey, Valdez regularly appears in supermarkets and private kitchens to remind consumers of the virtues of Columbian coffee”).

⁶ Bearer wasn’t the only caricature they used. The group used a picture of a child actor to represent one of their coworkers who frequently used sick leave and was often in trouble at work (Tr. 92; R. 7).

on June 15 referencing Bossick that is the subject matter of the threat allegations in the Complaint.

C. June 15 text message referencing Bossick

On Friday June 12, Bossick was working as a 204(b) and was the closing supervisor for the office. Along with his regular mail route, that day Willbanks had been assigned some extra mail to deliver—servicing Bossick’s usual route. After Willbanks finished for the day, he ran into Bossick in the back area of the post office. He told Bossick that a customer had asked about her, and that he told the customer Bossick would return to her route on Monday. Bossick told Willbanks that she missed her customers and was happy to go back to her route. She then asked Willbanks how she could get out of the Union. Willbanks gave her information on withdrawing from the Union and then told her that she should be mad at Postmaster Taurence, and not him, about being relieved of her duties as a 204(b). Bossick told Willbanks that she was not mad at anybody but just wanted to get out of the Union. In fact, Bossick was unhappy about the grievance outcome—and was displeased that she was being temporarily relieved of her duties as an acting supervisor (Tr. 17–20; 50–51).

Around mid-day on Monday June 15, the first day Bossick and Wilson were back on their routes, Willbanks sent a group text message to his three friends (Wilson, Shaw, and Tocco) under the picture of Paul Bearer saying: “Beth, you are one major illness or injury. From being in my dog-house. [sic] You see how petty I am. I will come after you too.”⁷ (GC 4). Employee Mark Tocco credibly testified that when he received the text, he interpreted it to mean that, because Bossick was no longer a supervisor and was now back to carrying mail, Postmaster Taurence was going to treat her like an ordinary letter carrier and would “come after her” if she tried to use sick leave (Tr. 91).

Just before receiving Willbanks’s June 15 text, Wilson had texted Bossick saying “I met the new 204B before I left. Lol [Laugh out loud].”⁸ (GC 3.) Then, unbeknownst to Willbanks, Wilson forwarded to Bossick a screenshot of Willbanks’s text saying “I am forwarding a text from Willi he [sic] just sent me.” The screenshot contains the photograph of Paul Bearer with the words of the text underneath. (GC 3.)

At the time she received Wilson’s text, Bossick did not know who the individual was in the photograph (Tr. 38). Later that day, Bossick learned from her husband that it was a picture of wrestling manager Paul Bearer (Tr. 29, 38).

After receiving the text, Bossick called Winiesdorffer who was home on her day off (Tr. 25). Bossick told Winiesdorffer that she would not believe the text she just received from Wilson. (Tr. 25) After a brief discussion, Bossick hung up and forwarded the text to Winiesdorffer⁹ (Tr. 25–26). After reading

the text, Winiesdorffer immediately called Bossick, telling her “this is a threat; you need to take it to the Postmaster.” (Tr. 26.) The next day Bossick showed Postmaster Taurence the text (Tr. 30). She also contacted Pat Carroll, business agent for the national union, and forwarded the text to him (Tr. 32–33). Later, Carroll telephoned Bossick telling her that he had spoken to Willbanks about the text message. Carroll explained that the text was not meant for Bossick to see, that Willbanks was sorry and should not have acted that way, and that the text was “schoolyard play.” (Tr. 34–35.) Bossick was dissatisfied with Carroll’s explanation. So too, it appears, was Winiesdorffer, who filed the original charge in this matter July 8, 2015. (GC 1(a).) Bossick filed her charge over the text message on July 16, 2015. (GC 1(e).)

Analysis

The test used to establish whether a union representative’s statement violates Section 8(b)(1)(A) of the Act is objective—whether the statement can reasonably be interpreted by employees as a threat based upon engaging in protected concerted activity. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1066 (2007), enfd. 577 F.3d 467 (2nd Cir. 2009) (objective standard used to analyze an 8(b)(1)(A) threat). What the union agent subjectively intended by the comment and the subjective state of mind of any employee who heard or read the statement is not determinative. *United Steel Workers of America Local 1397, AFL–CIO (United Steel Corp.)*, 240 NLRB 848, 849 (1979). Moreover, the statement itself cannot be viewed in a vacuum, but must be viewed in “context in order to determine if under all the circumstances it would have a tendency to restrain and coerce employees within the meaning of Section 8(b)(1)(A).” *American Postal Workers Union, AFL–CIO*, 328 NLRB 281, 282 (1999) (examining the context of the conversation, the Board found a violation where union representatives twice asked an employee, who sought assistance with filing a grievance, whether she was a union member); *See also, International Brotherhood of Electrical Workers, Local 6 (S.F. Elec. Contractors), AFL–CIO*, 318 NLRB 109, 109 (1995), enfd. mem., 139 F.3d 906 (9th Cir. 1998) (assessing “all the circumstances in which the statement [was] made,” comment from a hiring hall dispatcher to an applicant that “you will be killed” if the applicant’s unfair labor practice charge led to “class action” litigation was a metaphorical prediction of a resounding defeat for a possible class action court case, and not a threat of adverse consequences, physical or otherwise, particularly where there were no overt moves by the dispatcher that would be consistent with an actual threat to kill the applicant).

Here, the June 15 text message cannot be divorced from the context by which it was sent from Willbanks to his friends and then forwarded from Wilson to Bossick. Under the circumstances surrounding Bossick’s receipt of the message, 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.

Significantly, Willbanks did not send the text message to Bossick; he sent it to his three friends who knew the words in the text message referenced a hypothetical statement by Postmaster Taurence. Willbanks was predicting to his friends that,

⁷ It is undisputed that “Beth” refers to Bossick.

⁸ Bossick explained that Postmaster Taurence had borrowed an employee from another office to be the new acting supervisor since herself and Wilson had returned to their routes (Tr. 22). Apparently this unknown individual is the person Wilson is referring to in his text message.

⁹ Like Bossick, Winiesdorffer had never previously seen a photograph of wrestling manager Paul Bearer (Tr. 43).

since Bossick was no longer an acting supervisor, Postmaster Taurence would treat her like any other employee and would target her for reprisals if she became injured or sick.

Thereafter, it was Wilson, without Willbanks's knowledge, who forwarded a screen-shot of the message to Bossick. Although Wilson did not testify at trial, it appears from the context in which the message was forwarded that Wilson was also upset with Willbanks and the Union over the outcome of the CCA grievance. He was trying to paint Willbanks in a bad light—implying to Bossick that the words in the text message were Willbanks' and not the hypothetical words of Postmaster Taurence. However, Wilson knew otherwise.¹⁰

The objective meaning of the text message cannot change simply because a screen-shot of the message was forwarded by Wilson to Bossick without explanation. Cf. *ManorCare of Kingston PA, LLC*, 360 NLRB No. 93 slip op. at 1 (2014). Moreover, even if the meaning of the text message did change when it was forwarded by Wilson, it becomes the equivalent of Wilson telling Bossick that Union President Willbanks is going to target her. However, Wilson is neither an agent nor a representative of the Union; thus, Wilson's words cannot be attributed to Respondent. *Price Brothers Co.*, 211 NLRB 822, 822–823 (1974) (union not responsible for statement made by an individual who initiated a false rumor that the union had voted to kill a worker expressing antiunion views as there was no evidence that the threat was attributable to the union); *Mastec North America, Inc.*, 356 NLRB 809, 809 (2011) (statements made by individual employees were not attributable to the union as they had neither actual nor apparent authority to speak on behalf of the union); *SSC Corp.*, 317 NLRB 542, 546 (1995)

¹⁰ The General Counsel's citation (Br. 8) to *NLRB v. Homemaker Shops* 724 F.2d 535, 549–550 (6th Cir. 1984), does not warrant a different finding. In *Homemaker Shops*, the court noted that the "mere existence of friendly relations between a supervisor and an employee does not preclude a finding" of a violation. *Id.* at 550. Here, because Wilson, Tocco, and Shaw knew the words in the text message referenced conjectural words from Postmaster Taurence—there is no threat in violation of 8(b)(1)(A). For the same reason, the General Counsel's citation (Br. 8) to *Masters, Mates & Pilots (Marine Transport)*, 301 NLRB 526, 532 (1991), is unavailing.

(no violation where unidentified men threatened prounion employee with bodily harm and property damage if he testified at Board hearing where the evidence did not show the individuals making the threat were agents of the employer). The fact that Bossick or Winiesdorffer misinterpreted the original text and subjectively believed the Union was threatening Bossick in the text message is not controlling; the subjective state of mind of the hearer/reader is irrelevant. See e.g., *G. H. Hess, Inc.*, 82 NLRB 463 fn. 3 (1949); *Masonic Homes of California*, 258 NLRB 41, 41 fn. 4 (1981); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004). As such, considering all the circumstances, including the context in which the text message was originally sent by Willbanks and ultimately received by Bossick, there is no violation.

Accordingly, I find that Respondent did not violate Section 8(b)(1)(A) as alleged, and I recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. The United States Postal Service is an employer subject to the Board's jurisdiction under Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 101 et. seq.

2. Branch 4779, National Association of Letter Carriers (NALC), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act as alleged in the Complaint.

On these findings of fact, conclusions of law, and based upon the entire record, I issue the following recommended¹¹

ORDER

The complaint is dismissed in its entirety.
Dated, Washington, D.C. March 2, 2016

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.