JD(NY)-18-17
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

COMMUNICATION WORKERS OF
AMERICA, AFL-CIO, LOCAL 1101

and Case No. 2-CB-176719

SIDRA EPPS

Eric Brooks, Esq., of
New York, New York,
for the General Counsel.

Bruce J. Cooper, Esq., and Andrew Midgen, Esq. (Pitta, LLP), of New York, New York,
for the Respondent.

DECISION

Statement of the Case

Mindy E, Landow, Administrative Law Judge. Based upon charges filed by Sidra Epps, an amended complaint and notice of hearing (complaint) issued on May 3, 2017, alleging that the the Communication Workers of America, Local 1101 (Respondent or the Union) attempted to cause Verizon Communications, Inc. (Verizon or the Employer) to discriminate against Epps by requesting that the Employer transfer her, in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act. Respondent filed an answer to the complaint denying the material charges therein. This matter was heard before me in New York, New York, on May 31, 2017.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the theGeneral Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

It is admitted and I find that, at all material times, Verizon, a New York corporation, having an office and place of business at 140 West Street, New York, New York, has been engaged in providing telecommunication services. Annually, in the course and conduct of its business operations, Verizon dervies goss revenues in excess of $100,000 and receives at its New York facilities goods valued in exess of $5000 directly from suppliers located outside of the State of New York. Accordingly, I find that Verizon is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is admitted, and I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Background

The Communication Workers of America, AFL–CIO (the International) has been the collective-bargaining representative of various employees for many years. Respondent is the local affiliate of the International and is responsible for representing bargaining unit employees in Manhattan and the Bronx, New York. A 2012 collective-bargaining agreement between the Employer and the International expired in August 2015.

The Charging Party, Sidra Epps, had been a member of the bargaining unit represented by the Union since 1996. She was a member of the Union until May 2016.[1] At all material times she has been employed at the Employer's facility located at 615 West 47th Street in Manhattan, New York, as a construction coordinator.

On April 13, the International commenced a strike involving nearly 40,000 employees of the Employer in eastern states from Maine to Virginia. The union agents primarily involved in this proceeding are Chief Steward Frank Calisi, Business Agent Peter Torres, and David Noble, a chief steward who works from an Employer facility located at Randall Avenue in the Bronx.

Epps Resigns from the Union

Epps, along with other striking employees was assigned to picket duty but, as she testified, found the work to be too oneronus for her given various health conditions.[2] As a result, the Union determined that the level of her strike activity was not sufficient to warrant her receipt of strike benefit funds.

On May 13, Epps sent a letter to the Union, dated May 12, as follows:

> I am resigning from the Union during the strike due to unfair practices. I will be crossing the picket line on Monday, May 16, 2016.

On May 14, Epps wrote again to the Union and the International stating that she was resigning from any membership obligation; that she would remain a bargaining unit employee with full right to representation by Respondent; that she objected to paying dues for nonrepresentational activities; and that she wanted Respondent to cease dues deductions when no collective-bargaining agreement was in effect.

On May 16, Epps crossed the picket line and returned to work. She worked during the remainder of the strike and thereafter. The record reflects that she was the only employee in her work location to have crossed the picket line during the strike, which ended as of June 1, when the employees returned to work.[3] During the 7-week strike, employees endured significant losses of wages. The record reflects that the Union (and the International) viewed the strike as a

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[1] All dates are in 2016 unless otherwise indicated.

[2] The record reflects that Epps had a history of absenteeism and had been placed on the Employer's Absence Control Plan (ACP) for such difficulties. This will be discussed in further detail below.

[3] On May 29, representatives of the Employer and the International executed a document entitled "2016 Common Issues Memorandum of Understanding."

successful one. Of the approximately 3000 Verixon employees its Manahttan and Bronx locations, only a handful did cross the picket line during the strike. Such employees are commonly referred to as "scabs." Respondent made a point of identifying such employees to their coworkers.

Respondent's Alleged Unlawful Conduct

As noted above, the complaint alleges that the Respondent unlawfully attempted to have Epps transferred as a result of her decision to refrain from strike activities, conduct which is protected by the Act. Epps was unable to provide direct evidence of Respondent's attempts to have her transferred; rather the General Counsel relies primarily upon the testimony of Verizon Control Manager Gerard "Roddy" Harrington.

Harrington's testimony

Harrington has worked for Verizon for 36 yers and has held his current job title for 20. He is Epps' direct supervisor.

On June 1, the day the Verizon employees ended the strike and reported to work, Harrington parked in the garage and was walking toward the elevator. Business Agent Torres, who was waiting with a group of returning employees, saw him and waved him over. They met in the middle of garage with no one in the immediate vicinity.

As Harrington testified, after he congratulated Torres on the successful outcome of the strike, Torres said he wanted to speak about Epps. Harrington said that she was going to step 4 due to her absences, and according to Harrington Torres stated that he did not "give a shit" about step 4 and that he "wanted the fucking bitch out of the building."[4] Harrington responded that he could not do that unless Epps feared for her safety or wanted to be moved and that Torres would have to speak with his (Harrington's) supervisor, [area manager] Rick John.

Approximately 1 week later, Chief Steward Calesi came to Harrington's office and, as Harrington testified, stated that "we want the fucking bitch moved." Calisi did not mention Epps by name, but as Harrington testified, there were five women who worked under his supervision, and Epps was the only one who had crossed the picket line. Harrington told Calisi that he would have to speak with John about any removal, and Calisi left his office.

Approximatley 2 weeks later, Harrington received a telephone call from Dave Noble who, as Harrington testified, said that, "we heard you have a scab up there. We want the bitch moved." Again, Harrington referred Noble to John and the two went on to discuss other topics.

Finally, several days after the Labor Day holiday, Torres called Harrington and mentioned that the NLRB might want to speak with him. Harrington said that it was probably about the request he had made to have Epps moved. As Harrington recounts, Torres characterized Epps as a scab and said that "[we] want all the scabs moved."

Harrington stated that he had never previously heard any union official call an employee

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[4] At this time, Epps' request for leave under the Family Leave and Medical Act had been denied due to insufficient documentation; thus, she would have been subjected to a 10-day suspension pursuant to the Employer's attendance policy. Epps' request for leave was later granted and she was not put on step 4.

a bitch or request a transfer. Moreover, Epps had never requested a transfer and stated that she had no interest in being moved.

Harrington further testified that, of the Verizon metro area offices, his is the most flexible in terms of work hours. Epps, for example, has flexible hours to accommodate childcare needs.

Harrington stated that he did not know whether any of the union officials had contacted John to request Epps' transfer.

Torres' testimony

Torres is a Field Technician Splicer for Vrizon who has worked here for 21 years. He is currently a business agent for the Union had had previously served as steward and chief steward. In these capacities, he would represent employees in both formal and informal grievance settings.

The last time Torres represented Epps was about 6 years ago, when the Employer wanted to suspend her for poor work performance, tardiness or a combination of the two. Although the employer sought a 30-day suspension, it appears from the record that Epps was suspended for 3 days at this time.

During the strike, employees were entitled to certain strike benefits. If an employee was assigned to picket duty, they would receive payment for that time. For employees who could not participate in more active strike duties for religious or physical reasons, they were asked to perform clerical duties at the union office. Torres stated that he learned from Calisi that Epps failed to perform strike duties, as assigned. As a result, the Local withheld Epps' strike pay and Calisi called Torres to inform him that he had had an argument with Epps about withholding her strike pay. Epps called Torres and advised him that she had no money to get to the garage and that she could not go to the Local offices on 26th street because of her asthma, as it was too close to "Ground Zero."[5]

With regard to his conversation with Harrington, Torres stated that Harrington told him that Epps woud be suspended. He additionally stated that the company would transfer 'scabs" after the strike, so Harrington should wait to see if the company would do the same to Epps.

Torres testified that he told Mike Baxter, the vice-president of the Local, that Epps would be suspended and his resonse was, "good, fuck her." Torres further testified that he called on several occasions to see if Epps had been suspended yet.

Torres denied that he ever requested Epps' transfer or that he told Harrington that "we want the fucking bitch moved."

The Union posted a notice on their website to let membership know that Epps was a "scab." He also mentioned Epps by name at a union rally on June 1, with about 70–80 people in attendance. As Torres testified:

> We said that we would go after the scabs, and find them and make them members in bad standing, but we also explained that if they signed out of the Union we wouldn't be

[5] Torres further testified that Harrington expressed anger toward him about comments made about Harrington's mother during the strike.

> able to do that. I then gave them very specific instructions that when they went into the building at the start of their tour, if Ms. Epps is walking down the hallway, do not address her, do not say anything to her, do not leave notes on her desk, do not write anything in the bathroom. Just act like she's not here, because she's not worth getting yourself in trouble after we made it past a seven-week strike.

The record relveals that the Local followed provisions set forth in its consititution and by-laws for bringing charges against Epps, but these were later dropped.

Michael Baxter's testimony

Baxter is a field technician for Verizon and has worked there for over 20 years. He is also a vice-president of Local 1101. He was at the 47th Street location when the employees returned to work after the strike.

Baxter testified that Harrington had motioned for Torres to approach him. Torres later reported back that he'd been told that Epps would be suspended for 10 days. Baxter replied, "good, fuck her."

Frank Calisi's testimony

Calisi is the Chief Steward from Local 101, and has geen a field technician at Verizon for 19 years. In the recent past he served as a representive at a step one grievance for Epps relating to her absences from work. Harrington was there to adjust the grievance on behalf of the Employer.

Calisi testified that during the strike Epps did not report on site for the time to which she was assigned and he had several discussions or text messages with her. On one of these occasions, Epps was informed that her check for strike duty was being withheld because she failed to meet the International's requirements.

Calisi denied that he never told Harrington that he wanted "that fucking bitch moved;" nor did he request her transfer. He further stated that he did not recall talk of "scabs" being moved at a meeting after the strike or that any such individuals were named on a website or a union bulletin board.

David Noble's testimony

Noble is a field technician at Verizon's Bronx location, where he is also a chief steward. He has worked there for 29 years. He used to work with Harrington at the Bronx location and played basketball recreationally, but they have not been in touch in recent years.

In early-June (that is, after the strike ended), a tech working out of the Bronx location told Noble that a "scab" was answering the phone line in the RCMAC department, which is not based in the Bronx, and Noble called Harrington to confirm. Although her name was not disclosed during their discussion, it appears undisputed that the "scab" in question was Epps. According to Noble, Harrington stated that having someone performing struck work was not a problem. Noble reported that there was one employee performing stuck work in his facility and was wondering what the atmosphere was as compared to that in his garage. He admitted on cross-examination that there had been no problem at his facility. Harrington also allegedly stated that the worker in question would not be there for long as she was having absence and lateness difficulties. Noble denies telling Harrington that he wanted "that bitch" to be moved.

Respondent's Position Letter

Entered into evidence as General Counsel's Exhibit No. 12, this statement of position submitted on behalf of the Union during the course of the investigation refers to three key matters under consideration here:

> We understand that Torres, trying to keep the Company from suspending the CP [Epps] so she wouldn't lose any days and wages, asked the manager whether Verizon would transfer her instead of suspending her for ten (10) days. [6]
>
> Frank Calisi, Chief Steward, expressly denies that he had a conversation with a supervisor at the Employer's 47th Street facility in which he requested Verizon transfer the CP out of the 47th Street location.
>
> Dave Noble, a Chief Steward, explicitly denies that he called a supervisor at the 47th Street facility and requested that the employer transfer the CP out of the 47th Street location. . . He also says that . . .to the best of his knowledge [he] does not know any of the supervisors working there.[7]

Analysis and Conclusions

The Board has found that the involuntary transfer of an employee to encourage or discourage protected conduct is violative of the Act. *CSC Holdings, LLC and Cablevision Systems New York City Corp*., 365 NLRB No. 68 (2017); see also *Earthgrains Co.*, 351 NLRB 733, 738 (2007). As has been found, the violative nature of such an involuntary transfer is independent of whether an adverse change in employment terms and conditions results or may result to an employee.

Union efforts to cause an employer to discriminate against an employee for protected conduct is violative of Section 8(b)(2) and 8(b)(1)(A) of the Act, as it seeks to cause an employer to discriminate against an employee in violation of Section 8(a)(3). *Caravan Knight Facilities Management, Inc.*, 362 NLRB No. 196 (2015). It is beyond question that Epps' decision to refrain from engaging in the Union's strike is conduct which is protected by Section 7. Moreover, there is no evidence that she failed to follow legal and Union requirements that predicated her taking action in furtherance of such conduct.

Here, the General Counsel had advanced certain arguments regarding prospective adverse consequences to Epps of such a transfer, which the Respondent disputes. I find, however, that the General Counsel's arguments in this regard are speculative, and based upon the precedent noted above, I do not rely upon them.

Rather, the primary dispute at issue here can be resolved primarily by assessing witness credibility. A credibility determination may rest on various factors, including "the context of the

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[6] This is at odds with Torres' sworn testimony whereby he was asked by counsel for Respondent whether he had ever asked Harrington or any other supervisor to move or transfer Epps, and Torres denied doing so.

[7] This assertion is contradicted by the testimony of both Harrington and Noble, as noted above.

witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group, Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

It is often difficult to reconcile all of the different recollections of witnesses. In evaluating the various versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities their testimony in light of other events; corroboration or the lack of it and consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. See, e.g. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited. Further, I note that where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis as discussed herein.

Respondent has argued that I should discredit Harrington's testimony because it was colored by Verizon's frustrations in the immediate aftermath of the Union's successful strike and personal offense to comments made to him by Union Agent Torres on the picket line. [8] Notwithstanding the foregoing, I found Harrington's demeanor to be worthy of credit. His testimony was specific, including the approximate dates, times and surrounding circumstances of each conversation. He agreed to facts that might be viewed as undermining the strength of his account of events. Generally, his lack of equivocation regarding the relevant events was convincing.

To the contrary, in my view, particularly damaging to the Respondent's defense are the circumstanes regarding the telephone call from Noble to Harrington. Noble's testimony is at odds with Harrington's in that he claims to have initited the phone call because he was curious about the "atmosphere" a scab could create in Harrington's department. However, on his cross-examination, Noble admitted that the presence of the employee who had crossed the picket line in his own location had not caused apparent difficulties with other employees. Moreover, it is not credible that Noble would have called Harrington, who worked in a location remote from his own, to inquire about problems that might have been caused by someone who crossed the picket line, well after the strike was over. There is no evidence that Noble had any jurisdiction over the facility where Epps is employed or to explain any non-discrminatory reason why he would have taken it upon himself to inject himself into any potential dispute in any other Verizon location. Rather, the evidence on whole supports the conclusion that Noble joined his fellow union agents and sought to encourage Harrington to transfer Epps from the facility where she was employed to punish her for crossing the picket line and otherwise not supporting the Union's strike activities.

Further supporting my finding that the Union's agents' testimony was not truthful in relevant part are the significant discrepancies between the position letter submitted to the Region on behalf of the Union and their testimony on the stand. The relevant portions of the position letter are set forth above. It is well-settled that position papers submitted by respondent

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[8] As has been noted above, Torres or others may have made certain offensive comments regarding Harrington's mother during the strike. Harrington testified that he was aware of such comments and ignored them.

employers in connection with investigations of charges are admissible into evidence and can be used as admissions against respondents. *Evergreen America*, supra, 348 NLRB at 182–188 (2006); *Raley's*, 348 NLRB 382, 501–502 (2006); *United Scrap Metal*, 344 NLRB 467, 468 (2005); *Tarmac America*, 342 NLRB 1049 (2006).

As an initial matter, Torres' sworn testimony is at odds with the assertion contained in the position letter as he specifically denied requesting that Epps be transferred rather than suspended. Further, the position letter cites Noble's denials that he was unaware of who the supervisors were at the 47th street facility. This is contrary to the record in that it was shown that Noble and Harrignton were old acquaintances and had previously worked and socialized together. In my view, these inconsistencies are not insignificant and undercut the credibility of the Respondent's witnesses on issues under consideration here.

Accordingly, I find that the preponderance of the credible evidence supports a finding that, by requesting that Epps be transferred from her work current work location because of her protected conduct, Respondent violated Section 8(b)(2) and 8(b)(1)(A) of the Act.

Conclusions of Law

1. By requesting that the Employer transfer Sidra Epps from her current location at 47th Street in New York, New York, because of her refusal to participate in a strike, the Respondent, by its agents, has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (b)(2) and 8(b)(1)A) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Communication Workers of America, AFL–CIO. Local 1101, its officers agents, and representatives shall

1. Cease and desist from requesting a transfer of any employee who refuses to participate in a strike called by the Respondent Union.

2. In any like or related manner restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

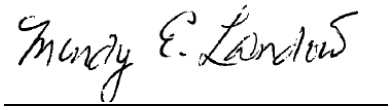
3. Within 14 days after service by the Region, post at its Union office in New York, New

[9] 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.

York copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2016.

4. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 21, 2017



Mindy E. Landow
Administrative Law Judge

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT request that your employer transfer you to another work facility because you refuse to engage in a strke or for your other protected concerted activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

COMMUNICATION WORKERS OF
AMERICA, AFL-CIO, LOCAL 1101
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CB-176719 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0344.