

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

GREYHOUND LINES, INC.

and

Case 08-CA-181769

LOUIS LITTLE, AN INDIVIDUAL

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Sec. 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions to the Administrative Law Judge Thomas Randazzo's Decision.¹

I. INTRODUCTION

On July 21, 2017, Administrative Law Judge (ALJ) Thomas Randazzo issued a Decision, finding that Respondent violated Section 8(a)(1) and (3) when it discharged Louis Little for engaging in union and protected concerted activities; maintained unlawful overbroad rules "Hostility," "Personal Conduct/Courtesy" and "Company Information," rules, and enforced the "Hostility," "Personal Conduct/Courtesy" rules as a basis to discharge Little.

Little, a twenty-nine year employee and Chief Union Steward at the Respondent's Cleveland, Ohio facility was discharged after he engaged in a brief, heated meeting with Respondent's Customer Service Manager Jon Heben. The meeting was conducted in an effort to resolve driver Danielle Young's complaints about Heben.

Little's efforts to reach a quick resolution with Heben were met with denial, yelling, and finger-pointing. The initial discussion began in a vestibule and spilled out onto the platform at Respondent's facility, where Heben persistently pursued Little and Young as they walked away from the conflict. The entire incident, both inside the vestibule and on the platform, lasted approximately three or four minutes, refuting Respondent's claim that Little's actions impeded Respondent's productivity.

¹ In this Brief, the ALJ's Decision in JD-59-17 will be identified with "ALJD" page and line; references to the official transcript of this proceeding will be referred to as TR.__; Counsel for the General Counsel's Exhibits will be referred to as GC Exh.,__; Respondent's Exhibits will be referred to as R. Exh.__; and Joint Exhibits will be referred to as Jt. Exh.____.

The ALJ in his decision set forth the record facts and the applicable Board law to support his credibility determinations and his legal analysis in finding that Respondent violated the Act. Notwithstanding the ALJ's comprehensive analysis of the documentary evidence and witness testimony, Respondent filed its exceptions, which are clearly not supported by the record evidence. As the ALJ fully addressed many of Respondent's Exceptions in his Decision, Counsel for the General Counsel finds it unnecessary to respond individually to each Exception raised and addressed in Respondent's brief. Counsel for the General Counsel will address certain credibility determinations, facts, and legal authority mischaracterized by Respondent in an attempt to bolster its case.

II. THE ALJ'S CREDIBILITY DETERMINATIONS ARE SUPPORTED BY THE RECORD EVIDENCE

Respondent excepts to many factual findings that turn on credibility resolutions and evidence analyzed by the ALJ in favor of the General Counsel's witnesses. The ALJ articulated that "where the testimonies of Respondent's witnesses differ from that of the General Counsel's witnesses I credit the testimonies of the General Counsel's witnesses". (ALJD p. 15, lines 33-35). The ALJ noted that "General Counsel's witnesses were sincere and honest in their demeanor, and they testified in a consistent, convincing, and straightforward manner." The ALJ specifically noted that out of all of the General Counsel's witnesses, Little was the most credible. He found Little's demeanor as being honest, noting Little readily admitted to his use of profanity in the closed vestibule and on the platform. (ALJD p. 14, lines 4-8).

The Board has found that demeanor-based credibility resolution is a basis for a finding of fact and noted that a judge is not required to lay out the underlying basis for making such a determination. *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004). Even so, the ALJ

provided detailed reasons why the General Counsel's witnesses were more credible than Respondent's witnesses.

The ALJ noted that the testimony of Young and Little corroborated key points in the record. (ALJD p. 14, lines 3-5) Moreover, he concluded that Young's written account of the incident and her verbal statement to Area Manager Jimmie Lytle immediately following the incident also corroborated Little's testimony.² Young's contemporaneous accounts specifically identified Heben as the aggressor in the vestibule, and noted that Heben provoked the confrontation on the platform after the discussion ended in the vestibule. Crediting Young and Little, the ALJ noted that Respondent's witnesses Heben and Lytle were evasive, and guarded, and that their testimony was implausible and inconsistent with the record evidence.

For example, Respondent's Exceptions erroneously claim that Heben's testimony concerning the platform incident is supported by the surveillance video. (R. Exh. 3) In his Decision, the ALJ concluded that the frame in the video in which Heben claims shows that Little punched him shows "no discernible body movement" by Heben to support that Little punched him. The ALJ noted that if Little, weighing in at about 345 pounds, had closed-fist punched Heben, the video frame would show some reaction by Heben. (ALJD p. 16, lines 29-38) Heben did not react in the video. Instead, the video shows that rather than turning away from Little after the alleged punch, Heben took several steps toward Little, and Little turned and walked away from Heben. (R. Exh. 3; ALJD p. 16, lines 45, p. 17, lines 1-5). When asked at the hearing "Why did you follow him? (Tr. 579) Heben responded, "I don't know." (Tr. 579). The ALJ found Heben's response to be incredible and implausible. (ALJD p. 17, lines 6-9).

² The ALJ found Lytle's failure to recall that Young both in her written and verbal statement informed him that Little did not strike Heben incredible. (ALJD p. 14, lines 15-18)

Based on his detailed analysis of Heben's testimony and the partial video footage of the platform incident, the ALJ correctly determined that the evidence refuted Respondent's claims that Little struck Heben. (ALJD p. 18, lines 28-30; R. Exh. 3).

Notably, there is no evidence that Little was screaming profanities at Heben on the platform. The video has no audio. There was no evidence introduced by Respondent to show that any customers complained verbally or in writing that Little was "screaming" profanities at Heben on the platform. To wit, the Employer collected three employee statements and not one of those statements mentioned that Little was screaming profanities. (ALJD, p. 40, lines 41-44; G.C. Exhs. 14, 15; R. Exh. 9).

The ALJ also provided a detailed analysis of Heben's testimony regarding the photograph that purportedly shows Heben's stomach after Little allegedly struck him. In his Decision, the ALJ concluded that the photograph was implausible and not worthy of belief, in light of Heben's evasive and inconsistent testimony regarding the details of the photograph, the three-and-a-half hour delay in taking a photograph, and Heben's failure to have the police photograph him following the incident. (ALJD, p. 17, lines 27-44; p. 18, lines 1-46).

The ALJ found Lytle's testimony equally unavailing, giving numerous examples of Lytle's evasive and inconsistent testimony, including Lytle's claim that he could not recall whether Little had ever been disciplined or suspended; his reluctant admission that the Respondent's video did not show Heben striking Little; and his denial that he permitted Heben to participate and disrupt Little's investigatory interview regarding the incident, particularly where Lytle's own notes from the interview clearly show Heben's presence. (Tr. 97; G.C. Exh. 30; ALJD, p. 14, lines 11-41, p. 15, lines 1-4).

Notwithstanding Respondent's attempt to muddy the water, the ALJ's credibility resolutions are overwhelmingly supported by the record evidence and, according to established Board precedent, should not be overruled unless the clear preponderance of the relevant evidence convinces the Board that the ALJ's resolutions were incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F. 2d 362 (3d Cir. 1951).

III. ALJ RANDAZZO CORRECTLY DETERMINED THAT LITTLE WAS ENGAGED IN PROTECTED CONCERTED AND UNION ACTIVITY WHEN THE EMPLOYER DISCHARGED HIM

The ALJ followed established Board precedent in finding that Little was engaged in union and other concerted activities when he attempted to discuss Heben's inappropriate treatment of driver Young. Respondent argues that Little did not act in his capacity as a union steward or engage in protected concerted activity because the vestibule and platform discussion was not a pre-grievance or grievance meeting. Respondent has no legal support for its contention that union and concerted activities are limited to pre-grievance or pending grievance conduct. Crediting Young and Little's testimony regarding the reason for the discussion, the ALJ correctly applied Board law and found that employee complaints about supervisors' treatment of employees is related to working conditions and constitutes protected concerted activity. *Calvin D. Johnson Nursing Home*, 261 NLRB 289 *fn.* 2 (1982) *enfd.* 753 F.2d 1078 (7th Cir. 1985) (ALJD, p. 21, lines 24-28).

IV. ALJ RANDAZZO CORRECTLY APPLIED THE ATLANTIC STEEL FACTORS AND DETERMINED THAT RESPONDENT VIOLATED THE ACT WHEN IT TERMINATED LITTLE

Despite the overwhelming record evidence, the ALJ's supported credibility determinations, and extant Board law, Respondent continues to assert that Little forfeited the Act's protection as a result of his conduct during the exchange with Heben.

In his Decision, the ALJ carefully analyzed whether Little's conduct lost the Act's protection pursuant to the four factors set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979): (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's conduct; and (4) whether the conduct was provoked by the employer's unfair labor practice to determine Little's conduct did not lose the protection of the Act.

The ALJ concluded that while Little's actions may have been disrespectful and discourteous, his use of profane language and pointing his finger at Heben were insufficient to remove his conduct from the protection of the Act. (ALJD, p. 22, lines 45-47).

Crediting Little and Young in his analysis of the first factor, the ALJ determined that the initial meeting between them occurred in the expressway vestibule that connects the dock to the terminal. (ALJD, p. 23, lines 5-7; Tr. 171). The vestibule doors leading to the dock and terminal were closed and no passengers or employees were present or within earshot of the conversation. (ALJD, p. 23, lines 10-13; Tr. 171, 274). There is no surveillance video footage of the vestibule conversation.

The ALJ, again crediting the testimony of Little and Young, determined that Little and Young ended the discussion and walked toward the platform. Heben began to walk away from them toward the terminal. (ALJD, p. 23, lines 19-21; Tr. 175, 277; G.C. Exh. 12). Although there is no surveillance video footage that captures Little and Young leaving the vestibule and arriving on the platform, the ALJ credited Little and Young's account that Heben changed direction and then pursued them to the platform. (ALJD, p. 23, lines 20-23); (Tr. 176).

Respondent's surveillance video footage captures the second part of the meeting, establishing that it only lasted 30 seconds. (ALJD, p. 23, lines 23-25; Respondent Exh. 3). There

is no evidence that any passengers saw or overheard the confrontation. The video shows no visible passengers, and the bus windows and doors were closed. (ALJD, p. 23, lines 23-26).

Based on these facts, record evidence and the ALJ's credibility determinations in favor of the General Counsel's witnesses, the ALJ correctly determined that the first *Atlantic Steel* factor weighs in favor of protection under the Act. (ALJD, p. 23, lines 4-5).

The ALJ also correctly determined that the second factor, the "subject matter of the discussion," weighs in favor of protection under the Act. (ALJD, p. 24, line 13). Heben admits that Little initiated the conversation for the purpose of discussing Heben's treatment of Young. (Tr. 539). Little testified that Heben became defensive and aggressive when Little explained that he wanted to talk to him about how he spoke to Young. (Tr. 172). Heben denied any wrongdoing and ordered Young to leave. (Tr. 275). As he directed her to leave, Heben began to yell and point his finger toward Young. (Tr. 275). Little told Heben that his yelling and finger-pointing was the reason that he (Little) had requested to speak with him. (Tr. 172). Rather than address the issue, Heben ignored Little and interrogated Young about why she had not boarded her bus earlier. (Tr. 173).³ Heben continued his finger-pointing tirade and gestures toward Young and Little.

Little freely admitted to swearing and making statements about "the damn bus in the system" and "Greyhound's fucking fault there was no bus available," and finally telling Heben "fuck you" after Heben closed in on Little and pointed his finger in his face. (Tr. 175-176).

Little continued to protest Heben's well-known, aggressive behavior towards employees, evidenced by his speech, attitude and inappropriate gestures. (ALJD, p. 24, lines 22-25; Tr. 259, 260, 347, 357, 407, 408, 409, 414, 415). The conversation escalated when Heben followed

³ Young explained that there was no bus available when she arrived and she had to wait until the mechanic fixed the bus.

Young and Little to the platform, as he yelled at Young to get on the bus, and threatened to remove Little from service for using profanity in the vestibule. (Tr. 176).

Little, who was admittedly frustrated, pointed his finger at Heben and said that he could say “whatever the fuck I want to say.” (Tr. 273-274). Little told Heben that he had a right to point his finger in his face similar to Heben’s actions toward him in the vestibule. (Tr. 177).

The ALJ correctly determined that the subject matter of the conversations in the vestibule and on the dock was protected. Little’s initial inquiry was into Heben’s supervisory conduct toward Young and the resulting exchange was an outgrowth of that protected inquiry. (ALJD p. 24, lines 20-25).

The ALJ correctly determined the third factor, nature of the outburst, weighs in favor of protection under the Act. In its Exceptions, Respondent claims that Little lost the protection of the Act because he repeatedly shouted “fuck you” in the vestibule and aggressively swung his arms over Heben resulting in a “blow” while on the platform.⁴ The ALJ discredited Heben’s testimony that Little spewed profanities at him in the vestibule. Heben testified that after Little accused him of harassing Young, an accusation Heben denied, Little went “ballistic on him” stating “fuck Greyhound” and that it was Greyhound’s “fucking responsibility to have a fucking bus for the driver.” (Tr. 541). Heben’s testimony was directly contradicted by Young and Little with respect to what Little said and why Little responded the way he did. The ALJ determined that Young and Little were more credible and that Heben’s testimony that Little spewed profanities was not plausible or believable. (ALJD, p. 15, lines 32-33).

In addressing Little’s use of profanity during the vestibule and platform confrontation, the ALJ found that there was an established practice of using similar profane language at the

⁴ As noted earlier, the ALJ concluded that Little did not strike Heben. (ALJD p. 18, lines 28-30; R. Exh. 3)

Respondent's facility by employees, management and union officials toward each other and customers. (ALJD, p. 25, lines 18-32).

In its Exceptions, Respondent erroneously argues that Counsel for the General Counsel's evidence on this issue is stale. This is not the case. While the record contains evidence of pervasive profanity dating back fifteen years, the record also contains evidence that profanity is presently regularly and routinely used at Respondent's facility.

Current employee Clarissy Rankin testified that current employees regularly use curse words at work. (Tr. 135-136). Rankin testified that Reports Clerk Renee Ramsey regularly curses and that Rankin overheard Ramsey say "ass, shit, damn, fuck, and fuck Greyhound." (Tr. 137-138) Little testified that up until the time that he was terminated, employees, including Ramsey, even used profanity toward passengers. (Tr. 208). Little's uncontroverted testimony noted that under the Respondent's new boarding procedures, passengers are loaded based on their boarding number. Ramsey assists in this process. During the boarding procedures Ramsey regularly told passengers "you should fucking pay attention" and "you should fucking listen." (Tr. 209-210).

Union Regional Vice-President Herman Green testified that he regularly uses profanity in meetings that he has with management. (Tr. 371-372). On June 24, 2016, he used profanity, such as "ass" or "asshole" when describing Heben in a conference call with Area Manager Lytle. (Tr. 372). As noted by the ALJ, the record is replete with examples of profanity used at the Respondent's facility. Thus, Little's conduct and actions were not outside the range of conduct accepted at the employer's facility.⁵ This is particularly true, as the record is devoid of evidence that any employee has been disciplined for using profanity.⁶ (ALJD, p. 25, lines 26-27).

⁵ Green testified that Lytle and Heben gestured with their fingers and hands during grievance meetings. (Tr. 368 – 371)

⁶ See *Plaza Auto Center, Inc.*, 355 NLRB 493, 494-497 (2010) (Board held that an employee engaged in protected activity did not lose protection of the Act despite calling the owner a "fucking mother fucker," a "fucking crook,"

In his Decision, the ALJ noted that the facts in this case are similar to *Postal Service*, 364 NLRB No. 62 (July 29, 2016) involving protected conduct by a union steward. In that case, the Board analyzed the “nature of the outburst” factor and noted that it has “repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity.” *Id.* slip op. at 3; quoting *Hawaii Tribune-Herald*, 356 NLRB 661, 680 (2011), *enfd.* 677 F.3d 1241 (D.C. Cir. 2012). In *Postal Service*, the Board found that the employee was not threatening, but “merely loud, profane, disrespectful, and obnoxious which apparently was not unusual for that employee’s past behavior or beyond the conduct the employer had previously tolerated. *Id.* slip op. at 4; (ALJD, p. 27, lines 1-13).

The ALJ correctly determined that the fourth *Atlantic Steel* factor, whether the outburst was provoked by the Respondent, also weighs in favor of protection under the Act. In its Exceptions, Respondent claims that this factor is inapplicable to this case because Little’s conduct was unprovoked. Respondent’s position was considered and rejected by the ALJ in his credibility determinations. The ALJ, crediting Young’s testimony corroborated by her contemporaneous written statement, concluded that the heated exchange should have ended when Little and Young exited the vestibule and attempted to end the conversation.

Heben escalated the matter when he pursued them to the dock to tell Little that he would remove him from the facility if he did not stop cursing. Little was upset and in a spontaneous outburst told Heben that he could say “whatever the fuck he wanted to say” and pointed his finger in Heben’s face in a manner similar to which Heben had done to Little in the vestibule.

and an asshole” in a single and brief outburst of profanity, the Board noting that profane language was acceptable and the employee did not threaten to physically harm anyone. See also *Pier Sixty, LLC*, 362 NLRB No. 59, slip op. at 2-3 (2015) (Board held that where the use of profane language is “a daily occurrence in [the] Respondent’s workplace, and [it] did not engender any disciplinary response,” such a factor weighed in favor of retaining the Act’s protection.)

The ALJ concluded that there is sufficient provocation under an *Atlantic Steel* analysis when the Employer makes certain statements or gestures to an employee while engaged in protected activity. (ALJD ,p. 29, lines 27-43). See *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *Postal Service*, supra, slip op. at 3.

V. THE ALJ CORRECTLY DETERMINED THAT LITTLE WAS TERMINATED PURSUANT TO VIOLATING THE EMPLOYER’S OVERLY BROAD HOSTILITY AND PERSONAL CONDUCT RULE.

In its Exceptions, Respondent contends that Little was not terminated exclusively based on the “Hostility” and “Personal Conduct/Courtesy” rules. Rather, Respondent argues that Little was terminated because of gross insubordination⁷ and disruption of Greyhound’s operations. In its Exceptions, the Respondent claims that an employer may avoid liability in a case where discipline was issued pursuant to an unlawful rule if it can establish that the employee’s conduct actually interfered with its operations.

In his Decision, the ALJ determined there was insufficient evidence to establish that Little’s confrontation with Heben interfered with his work, the work of Respondent’s employees, or with Respondent’s operations. (ALJD p. 39, lines 13–15, 43-44). Heben admitted that the confrontation in the vestibule lasted one to two minutes. (Tr. 543). Likewise, the date and time stamp on the surveillance video footage clearly shows that the platform incident only lasted about thirty seconds. (R. Exh. 3).

While Respondent claims that Little interfered with Respondent’s operations, the record evidence shows that any delay in the departure of Young’s bus was attributable to Respondent’s failure to have a bus ready for Young when she arrived to work. (Tr. 263-267). Moreover, despite Respondent’s later-formed justifications, the termination letter did not state that Little

⁷ The ALJ correctly determined that Little’s actions were not true insubordination and his response to Heben’s provocation was protected under the Act. (ALJD p. 28, lines 4-6). See *Goya Foods, Inc.*, 356 NLRB 476, 479 (2011), quoting *Severance Tool Industries*, 301 NLRB 1166, 1170 (1990), enfd. mem. 953 F.2d 1384 (6th Cir. 1992).

was being terminated because he interfered with the Employer's operations. (Jt. Exh. 3).⁸ Respondent's contemporaneous termination notice identified violations of Rule 2-1 Hostility; 2-3 Personal Conduct; and insubordination as the basis for Little's termination. (Jt. Exh. 3). The clear implication from the termination form and Heben's testimony is that Little challenged Heben and was disrespectful in violation of the overly broad Hostility and Personal Conduct rules. (Jt. Exh. 3; Tr. 546-547).

Lytle, the decision maker in Little's termination, testified that the violation of those rules was the sole basis for Little's termination. (Tr. 81, 83). Similarly, Lytle admitted that the Respondent's responses to Little's grievances concerning his termination state that Little was discharged for violating those rules. (Tr. 81, 83). Respondent's assertion that Little was terminated for interfering with its operations is not supported by the record and the admissions of its own witnesses. This claim is merely an after-the-fact attempt to justify its unfair labor practice and was never contemplated by Respondent prior to the hearing in this matter. Respondent failed to state in Little's termination notice that he was terminated for interfering with its operations; Respondent's witnesses testified that the only reason for the termination was violation of its overbroad and unlawful rules; Respondent never raised interference as a defense during the processing of Little's discharge grievance, and it never raised it as an affirmative defense in its Answer. (Jt. Exh. 3; G.C. Exhs. 1(g), 4).

CONCLUSION

For the reasons set forth above and in the Administrative Law Judge's Decision, it is urged that Respondent's Exceptions be denied in their entirety. It is further requested that the

⁸ See *Gerry's I.G.A.*, 238 NLB 1141, 1151 (1978) enfd. 602 F.2d 1021 (1st Cir. 1979) (Board held that "It is impossible, of course for the employer...to establish [that the employee was discharged based on interference with production] when interference with work is not the reason given in the discharge letter...").

Board affirm the ALJ's findings of fact, conclusions of law and recommended Remedy and Order regarding this matter.⁹

Dated at Cleveland, Ohio, this 7th day of December 2017.

Respectfully submitted,

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⁹ Respondent filed Exceptions to the Proposed Order relevant to the rules, including the enforcement of the rules in discharging Little. The ALJ's Remedy and Order complies with Board Orders for similar violations and warrant no discussion.

PROOF OF SERVICE

A copy of the foregoing Answering Brief to Respondent’s Exceptions was electronically filed through the NLRB website on December 7, 2017 with the following:

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Copies of the foregoing were sent on December 7, 2017 by electronic mail to the following:

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