

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the matter of

CENTRAL KY BRANCH 361, NATIONAL
ASSOCIATION OF LETTER CARRIERS,
AFL-CIO (NALC)
(UNITED STATES POSTAL SERVICE)

Respondent

and

Case 09-CB-202214

LESLIE DENISE WELLS, AN INDIVIDUAL

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE
ADMINISTRATIVE LAW JUDGE

1. OVERVIEW:

This matter is before Administrative Law Judge Andrew S. Gollin, upon General Counsel's Complaint and Notice of Hearing which issued on November 21, 2017,^{1/} on a charge filed by Leslie Denise Wells, hereinafter called Wells. The complaint alleges that since about March 2017, Respondent failed to file and process a grievance concerning the Employer working Wells beyond her medical restrictions. The complaint further alleges that since about May 27, Respondent failed to file and process a grievance concerning the Employer removing Wells from her 4-hour shift. As such, Respondent is alleged to have violated Section 8(b)(1)(A) of the Act, by its failure and refusal to represent Wells. The administrative hearing on the complaint allegations was held on March 28 and 29, 2018 in Cincinnati, Ohio.

^{1/} All dates cited herein are in 2017 unless otherwise noted.

II. ISSUES:

- a. Whether Respondent committed a representational breach within the meaning of Section 8(b)(1)(A) of the Act by its failure to file and process a grievance for Wells from about March 2 through May 27 concerning her being forced to work beyond her medical restrictions.
- b. Whether Respondent committed a representational breach within the meaning of Section 8(b)(1)(A) of the Act by its failure to file and process a grievance concerning Wells being removed from her 4-hour shift.

III. FACTS:

A. Background Information:

The National Association of Letter Carriers (“NALC”) is the exclusive collective-bargaining representative of employees of the Employer in the Letter Carrier craft, as described in Article 1, Union Recognition, of the collective-bargaining agreement between the Employer and Respondent (the “National Agreement”).^{2/} (Jt. Exs. 1, 2; Tr. 10) At the hearing, the parties stipulated that the NALC delegated to Respondent (Union) certain collective-bargaining duties with respect to employees in the Letter Carrier craft who were stationed in and around Lexington, Kentucky. Negotiating local agreements and filing, processing and settling grievances through Step A of the grievance process are among Respondent’s delegated duties.

Wells has been a United States Postal Service employee for approximately 2-½ years and has worked as a city letter carrier at all times material herein. She has also been a union member during that time period. (Tr. 114, 115) The Union is responsible for representing United States Postal Service employees in Lexington, Kentucky at the following locations: Brentwood, Beaumont, Bluegrass, Garden Side and Liberty Road. (Tr. 518, 519) There is one steward at the Liberty, Brentwood and Garden Side facilities, three stewards at the Bluegrass facility and two

^{2/} References to the transcript will be designated as (Tr. ----); references to General Counsel’s Exhibits will be designated as (G.C. Ex.---); references to Joint Exhibits will be designated as (Jt. Ex. ---); and references to Respondent’s Exhibits will be designated as (Resp. Ex.----).

stewards at the Beaumont facility. Mark Whitcomb was the steward at the Garden Side facility at which Wells worked since February. In fact, her work station is about 4 feet away from Whitcomb. (Tr. 116, 117) She interacts on regular basis with Whitcomb at work and does so before clocking in or on the work floor around the sacks of mail that come in the morning. (Tr. 117)

Before transferring to Garden Side, Wells worked at the Employer's Liberty Road and Brentwood facilities. James "Jim" Carl, Amanda Boblitt and 204B Supervisor Michael "Mike" Genncio are Garden Side's station managers. (Tr. 119) After being transferred to the Garden Side facility, Wells was assigned an 11-mile walking route. (Tr. 119) After starting that route, Wells started experiencing increased pain in her left ankle. This is the same ankle which she injured while working at the Employer's Brentwood facility in 2015. (Tr. 119, 120) Due to the excruciating ankle pain, Wells made an appointment to see a physician and did so on February 27. (Tr. 119, 120) On February 24, Wells informed Carl that she had re-injured her ankle and was experiencing excruciating pain. She asked to be considered for other positions, including office or managerial duties. (Tr. 120) Carl responded that she was doing a good job on the route she was currently assigned and informed her that the waiting period for a management position was up to 2 years. (Tr. 120) Wells' physician subsequently issued her medical restrictions, which reduced the number of hours she could work from an 8-hour shift to a 4-hour shift. (Tr. 120, 121; G.C. Ex. 2)

B. Wells' Reduced Work Schedule And Matters Pertaining Thereto:

Wells' submitted her medical restrictions to Boblitt on March 1. (Tr. 122, 123; G.C. Ex. 2) After reviewing her restrictions, Boblitt told Wells that no light-duty work was available, but approved a work schedule for Wells which reduced her shift from 8 hours to 4 hours a day. This was an oral agreement. (Tr. 124) When Wells returned to the work floor, she saw Steward

Whitcomb and advised him of her medical restrictions and the forgoing reduced work schedule which Boblitt approved. (G.C. Ex. 2; Tr. 124, 135, 260, 261, 299-300) Wells gave Whitcomb a copy of the medical work restrictions that she submitted to Boblitt. (G.C. Ex. 2; Tr. 124) ^{3/} On March 1, Wells completed the delivery of the mail she was assigned within the reduced 4-hour schedule. (Tr. 124, 125, 130)

On a typical day when Wells reports to work, she and other carriers usually congregate around the time clock by the DPS - where mail scheduled for delivery is kept. (Tr. 130-131, 139, 140) When the carriers clock in, the Employer's managers normally go to the work floor to announce the volume of mail, carriers who would have to carry additional routes or pivot to complete other routes due to call-ins, absences or other reasons. (Tr. 131) The number of carriers that work in a given day, the hours worked, the carrier's start times, end times, movements of vehicles are documented in clock rings. (G.C. Ex. 3; Tr. 131, 132) In addition, the Employer prepares and posts weekly and monthly color-coded work schedules for carriers, which identifies the days each carrier is scheduled off. (G.C. Ex. 4; Tr. 135, 136, 138) In 2017, Wells' off days were color coded in red. (G.C. Ex. 4; Tr. 136, 138)

When Wells arrived to work on the morning of March 2, Boblitt pointed her to large piles of mail which she had been assigned to deliver along with the portion she was to distribute to other carriers who complete (pivot) delivery of mail on the remaining 4-hours left on her original 8-hours route. (Tr. 140, 141) Boblitt also assigns the number of minutes it should take carriers to complete delivery of each bundle of mail. (Tr. 140, 141) Because Wells was new at the Garden Side location, she asked a carrier who covers her route on her off days to assist in casing

^{3/} G.C. Ex. 2 has 4 pages. The last page was electronically signed by the physician on March 15. Wells explained that she gave Boblitt and Whitcomb a 3-page document on March 1. Wells also explained that she later printed off another set of documents from her health records and it was a 4-page document which contained her physician's electronic signature on the fourth page. (Tr. 128, 129)

or sorting the mail among the carriers who would cover (pivot) the remainder of her route. (Tr. 140, 141) Some of the carriers would receive mail that Boblitt designated should be delivered in 30 or 45 minutes. (Tr. 141) Wells asked the carrier who was assisting her in sorting out the mail if each bundle would be delivered in the amount of minutes allocated by Boblitt and he informed her that each of the bundles would go over 10 to 15 minutes. (Tr. 141, 142) While Wells was casing her mail, Boblitt stopped by her work area and Wells told Boblitt that the carriers are going to be upset with her for giving them mail that says 30 minutes, but would take at least 45 minutes to deliver. (Tr. 142) Boblitt responded that she should just fake it until she makes it because the carriers do not know how much mail they are carrying. (Tr. 142, 143)

After casing her mail on the morning of March 2, Wells commenced delivery on her route, carrying first class and ADVOS or junk mail. (Tr. 143) Early that day, Wells sent a text message to Boblitt advising her that she would go over her reduced schedule. In response thereto, Boblitt asked her to bring the junk mail back but complete the delivery of the first class mail. (Tr. 143, 144, 146; G.C. Ex. 5) However, Wells still worked past her reduced 4-hour schedule on March 2. (Tr. 144)

March 3 was Whitcomb's regularly scheduled off day. (G.C. Ex. 4; Tr. 144) Wells worked on March 4, but was unable to complete her mail delivery within the reduced hour schedule. (Tr. 140-141, 150) Upon realizing she would not be able to complete mail delivery within the allotted 4 hours, Wells contacted Boblitt and was directed to complete the mail delivery. (Tr. 150, 151) When Wells saw Whitcomb on the morning of March 6, upon their arrival, she told him that Boblitt had forced her to work past her reduced schedule and in

violation of her restrictions on March 2. Wells states that when she asked Whitcomb to file a grievance on her behalf, he responded okay. Wells further asserts that Whitcomb commented that he and Carl had already been talking about finding her something at the Employer's Mandino location to cover the remaining 4 hours that was not covered by her medical restrictions. (Tr. 144, 145)

Wells worked during the second week in March, beginning from Monday, March 6, through Friday, March 10, but was off on March 7. (G.C. Exs. 3, 4; Tr. 154, 155) After Wells' initial conversation with Whitcomb, Boblitt came to the work floor and told Wells to make sure she delivered all of her assigned mail. In so doing, she prohibited Wells from bringing any mail back to the station. (Tr. 152, 153) Upon hearing this, Wells understood Boblitt's instruction to mean she was not to call back and was required to work past her reduced 4 hours. (Tr. 153, 154) Wells' whose work station is approximately 4 feet away from Whitcomb, asserts that she walked over to his work area and again informed him that she was being forced to work past her reduced 4-hour schedule. Again, she asked Whitcomb to file a grievance on her behalf. (Tr. 153, 154) Whitcomb, according to Wells' candid testimony, said he would file a grievance on Wells behalf. (Tr. 153-154) He did not, contrary to Respondent's claim, instruct her to fill out a grievance request form. Nor did he, according to Wells, give her any reason to believe at such time that her grievance and/or concerns about her work schedule lacked merit.

On March 7, Wells called Respondent's Business Representative David Mudd and complained about the fact that she was being worked past her reduced 4-hours shift. (G.C. Ex. 6, p. 2; Tr. 155) Mudd, according to Wells, promised to contact Respondent's Local Union Branch 361 to find out what was going on. (Tr. 155, 156) Besides Mudd, Wells also contacted Linda Dunn, a steward at the Brentwood station, to complain that she was being worked past her

reduced 4-hour schedule. She avers that she told Dunn that she had asked Whitcomb to file a grievance on her behalf, but that he had not done so. (G.C. Ex. 6, p. 2; Tr. 156) Dunn directed Wells to stay on Whitcomb and make sure he filed a grievance on her behalf. (Tr. 157)

Wells worked on Monday, March 13 through Saturday, March 18 and was off on March 16. (G.C. Exs. 3, 4; Tr. 157) March 18 was the only day that week on which she was able to complete the delivery of mail within her reduced schedule. (Tr. 157, 158) On each instance when she realized that she was going to go over her reduced 4 hours, she either telephoned or sent text messages to Boblitt and asked what she should do with the remaining mail. Boblitt, according to Wells, instructed her to complete the mail delivery. (Tr. 159; 160) On the morning of March 14, before Wells left the Garden Side facility, Boblitt came to the work floor and instructed her to complete the delivery of all mail assigned to her and not bring any mail back to the station. (G.C. Ex. 3; Tr. 158)

Wells could not recall the exact dates, between Monday, March 13 through Friday, March 17, but she avers that when she saw Whitcomb, she told him she was being assigned a large volume of mail which was forcing her to violate her medical restrictions and work beyond her 4-hour schedule. (Tr. 160, 161) When she requested that a grievance be filed, Whitcomb reiterated that he was trying to work something out with Carl which would possibly allow her to work at Mandino. (Tr. 161) As before, Wells asserts that when she said she needed a grievance filed on her behalf, Whitcomb said okay. (Tr. 161)

When Whitcomb failed to follow through on his promise to file a grievance on her behalf, Wells contacted Respondent's Vice-President David Blackburn on March 15, and said she was being forced to work past her restrictions. She asserts that when she asked him to file a grievance on her behalf, he said he would do so. (G.C. Ex. 6, p. 4; Tr. 162, 285) That same day,

Wells avers that she contacted Mudd again and reiterated that she was being forced to work beyond her reduced work schedule. (G.C. Ex. 6, p. 4; Tr. 163) She maintains that she also told Mudd that she had apprised Blackburn of the situation and requested that he file a grievance on her behalf. (Tr. 163) Mudd, according to Wells, led her to believe that he would contact Local Union Branch 361 for purposes of addressing her concerns. (Tr. 163)

In addition to contacting Blackburn and Mudd, Wells called Dunn on March 15 and expressed her frustration with Respondent's failure to seriously address her concerns about her work schedule. (G.C. Ex. 6, p. 4; Tr. 163, 164) In response thereto, according to Wells, Dunn exclaimed, "you still don't have a grievance filed?," to which she replied "no." (Tr. 164) Dunn then encouraged Wells to contact Mudd if she had not already done so. (Tr. 164)

Wells worked during the week of March 20 through March 23, and was off from work on March 24 through March 25. (G.C. Exs. 3, 4; Tr. 164-165) She completed mail delivery within the reduced 4-hour schedule on Thursday, March 23. (Tr. 165) However, due to the volume of mail assigned to her, she was unable to complete her route within the allotted time frame on March 20 through March 22. (G.C. Exs. 3, 4; Tr. 166, 169) In view of that situation, Wells contacted Boblitt on each occasion to ask what she should do with the mail. In response thereto, Boblitt instructed her to complete delivery of all mail. (G.C. Exs. 3, 4, 5; Tr. 166, 169) When Wells apprised Whitcomb of the matter on March 23, and asked that a grievance be filed on her behalf, he, as on earlier occasions, said he would file one, but failed to do so. (Tr. 169)

On the following week, Wells completed her mail delivery on March 28 within her reduced 4-hour schedule, but was unable to do so on March 27 and March 29 through March 31, given the large volume of mail she was assigned. (G.C. Exs. 3, 4; Tr. 170, 171, 172) On those days when Wells was unable to complete mail delivery within the reduced 4-hour schedule, she

contacted Boblitt and was instructed to complete all mail delivery. (G.C. Ex. 5; Tr. 172) When she advised Whitcomb of the matter, she, again, asked that a grievance be filed. (Tr. 172, 173) Whitcomb, according to Wells, promised to file a grievance. (Tr. 173, 174)

Between March 27 and April 1, Wells contacted Dunn and complained about the fact that Whitcomb had not filed a grievance following multiple requests that he do so. (G.C. Ex. 6, pp. 5, 6, 7; Tr. 174) Dunn advised Wells to continue asking Whitcomb to file a grievance on her behalf. (Tr. 174) In addition to calling Dunn, Wells contacted Mudd and complained about the fact that Whitcomb had not yet filed a grievance after she had repeatedly requested that he do so. (G.C. Ex. 6, p. 7; Tr. 174)

On the week beginning with Tuesday, April 4 and ending with Saturday, April 8, April 4 was the only day in which Wells completed delivery of her mail within the reduced 4-hour schedule. (G.C. Exs. 3, 4; Tr. 176, 185) On the mornings of April 5 and 6, before Wells commenced her mail delivery, Boblitt instructed her to complete her route and not return to the facility with any mail. (G.C. Ex. 3; Tr. 181) After being forced to work beyond her reduced 4-hour schedule, Wells states that she told Whitcomb that she was still being forced to work beyond her 4-hour schedule and insisted that a grievance be filed on her behalf. (G.C. Exs. 3, 4; Tr. 182, 183) Consistent with his prior responses, Whitcomb promised to file a grievance, but never did. (Tr. 183)

At some point in time when Wells complained about Whitcomb's failure to file a grievance, (G.C. Ex. 6, p. 10; Tr. 183, 184) Dunn encouraged her to apprise Respondent's Acting Assistant Vice-President/Union Steward Denise Preston of the matter. (Tr. 183, 184) Dunn explained that Preston could put pressure on Whitcomb to file a grievance since she is very close

to Blackburn and Respondent's President Kenneth Beecraft. (Tr. 183, 184, 185, 186) In any event, Wells contacted Preston on May 25, and informed her that Whitcomb had not filed a grievance on her behalf after she had repeatedly asked him to do so. (G.C. Ex. 6, p. 22; Tr. 186) She further states that she told Preston at such time that she had advised Blackburn of Whitcomb's inaction in her regard. (Tr. 186, 187)

April 11 was Wells' off day during the week of April 10. (G.C. Ex. 4; Tr. 189) However, on the preceding day, towards the end of her 4-hour shift, Wells states that Boblitt ordered her to complete her route when she said she would not be able to finish it within the allotted time. (G.C. Ex. 6, p. 10; Tr. 190)

Given the volume of mail she was assigned from April 12 through April 15, Wells was unable to complete delivery of her mail within a 4-hour time period. (Tr. 189, 190) On the mornings following each day she was forced to work beyond her 4-hour schedule, Wells states that she advised Whitcomb of the situation and asked that a grievance be filed. (Tr. 191) She states that after she told Whitcomb that she was tired of requesting that a grievance be filed, he promised to file a grievance. (Tr. 191)

Wells contacted Dunn again during the week of April 10 (G.C. Ex. 6, p. 10; Tr. 191) and told her that Whitcomb still had not filed a grievance concerning her work schedule. Dunn advised her to stay on Whitcomb until he filed a grievance. (Tr. 191)

During the week of April 17, Wells was off on April 19 but worked the other scheduled days. (G.C. Exs. 3, 4; Tr. 192) She completed delivery of her mail within the 4-hour schedule on April 18, but worked beyond her 4-hour schedule on the other days and did so after Boblitt prohibited her from returning to the station with any mail. (G.C. Exs. 3, 4; Tr. 192, 193, 194, 195, 197, 198, 199, 265, 266) Wells avers that she called Mudd on April 17 and stated that she

had been forced to work past her restrictions for over a month and that she had repeatedly asked Respondent to file a grievance on her behalf, but none was filed. (G.C. Exs. 6, p. 12; Tr. 195, 196) Wells further states that she told Mudd that she had contacted Blackburn and that a grievance had not been filed even after she complained about Whitcomb's inaction concerning her work schedule. Mudd, who did not testify, told Wells that he had addressed her situation with Local Branch 361, but did not offer any commentary about what was discussed. Mudd did not say anything that would lead her to believe that her grievance lacked merit. (Tr. 196)

Wells worked the week of April 24, but was off on April 27 and April 29. (G.C. Exs. 3, 4; Tr. 200) Although she completed delivery of mail within the allotted 4-hour schedule on April 28, she was unable to do so on April 24 through April 26. (Tr. 201) As was the case on previous occasions, Boblitt directed Wells to complete her route. (G.C. Ex. 6, p. 14; Tr. 201) When Wells raised this matter with Dunn on April 24, Dunn again encouraged her to stay on Whitcomb and demand that a grievance be filed. (G.C. Ex. 6, p. 14; Tr. 202) Wells asserts that when she saw Whitcomb on April 26 she, again, asked that a grievance be filed on her behalf, and he said he would do so. (Tr. 201, 202) However, it was not filed and Whitcomb offered no explanation for his inaction. (Tr. 202)

During the week of May 1, and at the outset of the workday, Boblitt instructed Wells to complete her route and not return to the facility with any mail. (G.C. Ex. 3; Tr. 202, 203, 204, 205, 206, 207, 265, 266) In response to this situation, Wells contacted Mudd and complained about the fact that she was still being forced to work beyond her reduced work schedule without a grievance being filed in protest of the matter. (G.C. Ex. 6, p. 16; Tr. 206) Per Wells' un rebutted testimony, Mudd said he was going to address the matter with the local union. (Tr.

206-207) In addition to contacting Mudd, Wells vented her frustration about the matter with Dunn. (G.C. Ex. 6, p. 16; Tr. 207, 208) Wells completed her mail delivery within the allotted time on May 8 and May 13, but was unable to do so for the remainder of that week. (G.C. Ex. 3, G.C. Ex. 6, p. 17; Tr. 208, 209) In some instances, Boblitt directed Wells to return the remaining mail to the facility and on the other occasions she ordered Wells to complete delivery of the mail and not bring any of it back. (Tr. 208) When she saw Whitcomb that week and stated that she was still being forced to work beyond her reduced work schedule, he, per Wells' straightforward testimony, said he would file a grievance upon being requested to do so. (Tr. 208, 209) When Wells updated Dunn on her situation, Dunn said she could not believe the matter has gone on that long and that Whitcomb had not filed a grievance. (Tr. 209)

On the week of May 15, Wells was unable to complete her mail delivery on May 18 within her reduced schedule. (G.C. Ex. 3, G.C. Ex. 6, p. 19; Tr. 210) In response thereto, Wells states that she contacted Boblitt and was told to return the mail. (G.C. Ex. 6, p. 19; Tr. 210) Following Boblitt's directive, Wells asserts that she called Blackburn on May 18 and complained about the fact that she was still being forced to work beyond her reduced work schedule and that a grievance had not been filed on her behalf. (G.C. Ex. 6, p. 19; Tr. 211) It is during that conversation that Wells testified that she told Blackburn that she had made Mudd aware of the situation. (Tr. 211) Per Wells' credible testimony, Blackburn said he would file a grievance for her after she requested that he do so. ^{4/} (G.C. Ex. 6, pp. 19, 20; Tr. 211)

^{4/} Although denying that Wells complained to him in April or May, Blackburn evasively testified that he could not recall Wells asking him to file a grievance on her behalf concerning her work schedule. (Tr. 394, 396, 417, 419, 420) Above all, he did not specifically deny Wells' representation that he agreed to file a grievance for her. Since he had filed grievances for her while she was working at the Liberty Road facility, and given his current union position, it is not surprising that Wells would have sought his assistance in getting a grievance filed in response to her work schedule. (Tr. 391, 392)

Realizing that Respondent had not kept any of its promises, Wells called Respondent's Washington D.C. Director of City Letter Carriers Chris Jackson on May 19. (G.C. Ex. 6, p. 20; Tr. 212, 288) Per her un rebutted testimony, Wells told Jackson that she had been forced for some time to work beyond her reduced work schedule and that the Union had not filed a grievance in response to her repeated requests. (Tr. 212) Jackson said he would contact Respondent's Local Branch 361 and see why she was being worked past her reduced hours. (Tr. 212, 213) Upon talking to Dunn on May 19, Dunn agreed with Wells that it was ridiculous that almost 3 months had passed without a grievance being filed. ^{5/} (G.C. Ex. 6, p. 20; Tr. 213, 214)

During the week of May 22, Wells was off on May 23, but worked the other scheduled days. (G.C. Exs. 3, 4; Tr. 214, 215) Due to the volume of mail, she was unable to complete delivery of mail within her reduced 4-hour schedule. (Tr. 215) She asserts that when she talked to Blackburn on May 22, she reiterated that she was still being forced to violate her medical restrictions and that Whitcomb still had not filed a grievance although he had promised to do so. (G.C. Ex. 6, p. 21; Tr. 216, 217) In any event, Wells testified that Blackburn promised to file a grievance on her behalf, but failed to do so. (G.C. Ex. 6, p. 21; Tr. 216, 217)

After Wells was unable to complete her route on May 26 within her 4-hour schedule, she contacted Blackburn several times that day and repeated that she was still being forced to violate

^{5/} Respondent dismissed Dunn's union agency status by contending that she was not a union steward at any time material herein. (Tr. 470, 516) However, the evidence does not clearly establish that employees were ever definitively told that Dunn's status had changed. (Tr. 541) Contrary to Respondent's claim, the evidence discloses that Dunn attended Regional union meetings beginning about April and did so in her capacity as alternate union steward. (Tr. 44, 81, 83, 85) Additionally, the evidence reveals that Dunn was compensated for her service as steward for the period from January through March. (Tr. 48, 49) In fact, she continues to serve as alternate steward at the Brentwood facility. (Tr. 44)

Dunn testified that she submitted a written statement to Beecraft concerning matters surrounding Wells' efforts at getting Respondent to file a grievance in protest of her being forced to work beyond her reduced 4-hour schedule. Dunn did not keep a copy of that statement. Although Counsel for the General Counsel subpoenaed that document, Respondent did not produce it, thereby creating an inference that if produced, such would reinforce Dunn's testimony that Respondent clearly did not act in Wells' best interest. (Tr. 65, 66, 67, 68, 69, 79)

her medical restrictions and had been forced to do so since March 2. (G.C. Ex. 5, p. 7; Tr. 217, 218, 219) She stated that Whitcomb had failed to file a grievance and urged Blackburn to file one. Again, Blackburn, per Wells' straightforward testimony, said he would file a grievance on her behalf. (G.C. Ex. 6, p. 22; Tr. 216, 217)

When Wells saw the volume of mail she was assigned on May 27, she immediately realized that it would take her more than 4-hours to complete her route. (Tr. 220) At that point, Wells testified that she called Blackburn again and advised him of her predicament. (Tr. 220) Blackburn then asked if Whitcomb was there and she replied, yes, at that point, Blackburn instructed Wells to have Whitcomb contact him. (G.C. Ex. 6, p. 22; Tr. 220, 221) In response thereto, Wells avers that she approached Whitcomb at his work station and told him that Blackburn wanted him to call. (Tr. 221) After doing so, Wells returned to her work area and called Blackburn to inform him that she had given Whitcomb the message. After working for a period of time, Wells contacted the Employer's 204B Supervisor Mike Genncio, and said she was going to be working past her reduced 4-hour schedule. (G.C. Ex. 6, p. 22; Tr. 222) Genncio sent a text message to Wells, directing her to finish her mail. (G.C. Ex. 5, p. 8) Wells responded to Genncio's text message by asking him if he wanted her to work past her restrictions. Genncio responded that she should continue working and that he would get back with her in about 30 minutes. (G.C. Ex. 5, p. 8; Tr. 222) Genncio later called Wells and instructed her to bring back the remaining mail. (G.C. Ex. 5, p. 23; Tr. 223)

Upon Wells' return to the station on May 27, Genncio informed her that Carl said she needed to unload her truck, turn in her keys and stated that she would not be scheduled until further notice. (Tr. 223) Wells asked what she did wrong and why she was asked to turn in her

key and leave the building, but no response was forthcoming. (Tr. 223, 224) At that point, Wells asked Gennacio to ask Carl why she was being removed from the work schedule. (Tr. 224) Gennacio called someone, whom Wells assumed was Carl, when the telephone conversation ended, Gennacio told Wells that Carl said she was not to return to work until she submitted paperwork which would be mailed to her. (Tr. 224, 225)

While Gennacio and Carl were conversing, Wells called Blackburn and advised him of her situation. (G.C. Ex. 6, p. 23; Tr. 224) Blackburn said he knew that was going to happen and commented that her information was not on the correct form. (Tr. 224, 225, 226) When Wells questioned Carl's decision to abruptly remove her from the work schedule, Blackburn said he can do that because he is a supervisor. (Tr. 226) At this point, Wells asserts that she told Blackburn that she had been asking for a grievance to be filed, but one had not been filed. (Tr. 226) As on previous occasions, Wells avers that Blackburn stated that he was going to file a grievance with respect to her being forced to work beyond her 4-hour reduced schedule, but he never filed one. (Tr. 226) Nor did he ever say that one was not filed because her concerns lacked merit.

Wells also called Whitcomb on May 27 and updated him on her situation. (G.C. Ex. 6, p. 23; Tr. 226, 227) She states that when she said she had been asking him for months to file a grievance, he offered no explanation as to why he had not done so, but simply replied that he would file a grievance on her behalf. (G.C. Ex. 6, p. 23; Tr. 226, 227)

IV. CREDIBILITY RESOLUTIONS:

Counsel for the General Counsel asserts that the record evidence presented at the hearing convincingly supports the premise that Respondent violated Section 8(b)(1)(A) of the Act. Counsel for the General Counsel respectfully submits that such a finding is warranted by the

blatant inconsistencies that are inherent in Respondent's defenses as reflected by the record. Respondent's witnesses offered contradictory testimonies for its positions and they were often vague, combative and evasive. Moreover, Respondent's witnesses testified without significant recollection about material facts being litigated. On the other hand, General Counsel's witnesses were credible, truthful, consistent and straightforward. Such factors should be considered when evaluating the credibility of witnesses at hearing. See, *International Brotherhood of Electrical Workers, (I-T-E Electrical Products)*, 271 NLRB 885, 888 (1984) (where the Board affirmed an administrative law judge who credited the testimony of a witness who testified with conviction and apparent honesty and discredited the other witness who appeared somewhat uncertain in his testimony and failed to specifically deny critical aspects of the testimony.) Board law also recognizes that the testimony of a current employee, in this case, a current steward of the Respondent, is reliable because it is given at a considerable risk of economic reprisal, including the loss of a stewardship position. See, *ADF, Inc.*, 355 NLRB 81, (2010), citing *Shop Rite Supermarket*, 231 NLRB 5000, 505 (1977). Dunn is a current steward of Respondent. She appeared at the hearing pursuant to NLRB subpoena (Tr. 43-45) Dunn's recollections supports Wells' account of the events and she testified adversely to Respondent's interest.

Whitecomb's testimony should not be credited because it was contradictory and evasive and he failed to specifically deny critical aspects of Wells' testimony. When asked on cross-examination if there was a need to request union steward time to file a grievance where the request is made by a carrier whose work station is adjacent to his, Whitecomb replied no. (Tr. 378) Interestingly, Whitcomb became somewhat combative when he was asked if a formal grievance request needed to be made by a carrier who approached him at the start of the shift and

requested that a grievance be filed. (Tr. 378, 379) Notwithstanding Whitcomb's earlier response, he defensively replied that union time should be done on the clock. (Tr. 278, 279, 382)

In explaining why a grievance was not filed with respect to matters surrounding Wells' reduced 4-hour work schedule, Whitcomb, contrary to Wells' candid testimony, maintained that Wells did not request that one be filed. (Tr. 373) In fact, he asserted that the only time Wells requested that a grievance be filed was in July. (Resp. Ex. 11; Tr. 379) Wells, however, denied that she made a grievance request in July. Despite that fact, Whitcomb apparently filed the light-duty grievance on Wells' behalf and did so absent Wells' request.

Contrary to Dunn's credible testimony, Whitcomb denied having a conversation with Dunn in which she admonished him to file a grievance for Wells. (Tr. 381) In a similar vein, Blackburn testified that he did not recall Dunn telling him that someone needed to get Whitcomb to file a grievance for Wells regarding her being forced to work beyond her reduced 4-hour work schedule. (Tr. 418)

Becraft's description of Whitcomb as a worthless steward perhaps best reinforces the magnitude of his failure to represent Wells for the period of time set forth in the complaint. (Tr. 515) However, Whitcomb is not the only culprit here. Beecraft, for example, testified that Wells did not adhere to the proper procedure in filing a grievance and explained that she did not have a meritorious grievance in any event. Even if this were true, Beecraft, along with his colleagues, never communicated with Wells about the merits of the work scheduling concerns she raised with Respondent for the period beginning in March. Rather, Respondent strung Wells along by repeatedly telling her that a grievance would be filed when, in fact, it was never filed. In short, it is evident that Respondent's excuses for its failure to act on Wells' behalf are nothing

more than a lame attempt to mask the arbitrary and capricious manner in which it mishandled her concerns about how she was being forced to work beyond her reduced 4-hour shift.

V. **ARGUMENT:**

A. Respondent failed to file and process grievances for Wells in protest of her being worked beyond her agreed-upon reduced 4-hour work schedule and being abruptly removed from that schedule.

In the landmark case of *Vaca v. Sipes*, 386 U.S. 171 (1966), the Supreme Court determined that a union owes a duty of fair representation to all employees it represents and does not run afoul of the Act unless it acts in an arbitrary or discriminatory manner or in bad faith. A union “may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner.” *Id.* at 191. Although a union is granted a wide range of reasonableness in serving the represented employees, such reasonableness is subject to complete good faith and honesty of purpose when exercising this discretion. *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953).

A union may also abandon a grievance short of arbitration as long as the decision is not perfunctory or motivated by ill will or other invidious considerations. *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979) and *Service Employees Union 3036 (Linden Maintenance)*, 280 NLRB 995 (1986).

In addition, when determining whether a union violates Section 8(b)(1)(A), no evidence of an unlawful motive or unlawful intent is required. As such, perfunctory or careless grievance handling constitutes arbitrary conduct, not mere negligence, and is violative of the Act.

The Board will find that a union’s conduct is deliberate and arbitrary when the union fails to provide a logical explanation for its conduct or if the asserted explanation could not have been the real reason for the union’s conduct. *SEIU Local 3036, (Linden Maintenance Corp.)*, 280

NLRB 995, 996 (1986). The Board in *Teamsters, Local 315 (Rhodes & Jamieson)*, 217 NLRB 616 (1975) explained:

If a duty to avoid arbitrary conduct, as part of an affirmative, fiduciary responsibility, means anything, it must mean at least there be a reason for the action taken. Sometimes a reason will be apparent, sometimes not. When it is not, the circumstances may be such that we will have no choice but to deem the conduct arbitrary if the union does not tell us what it is.

In the instant case, Respondent breached its duty of fair representation in that it did not advance any compelling reason for its failure to file a grievance on Wells' behalf after repeatedly leading her to believe that it would do so. The evidence disclosed that on March 1, Wells gave Boblitt a work restrictions letter from her physician which required her to work no more than 4 hours in an 8-hour shift. (G.C. Ex. 2; Tr. 124) After accepting the work restrictions, and after advising Wells that no light-duty work was available, Boblitt and Wells agreed upon a reduced work schedule which would honor her medical restrictions by limiting her to a 4-hour work day. (Jt. Ex. 1, 2; Tr. 24, 125, 260, 261, 299-300) Despite the restrictions, and beginning on March 2, the Employer started forcing Wells to work past her approved reduced 4-hour schedule.

From about March 2 until Wells was removed from the work schedule about May 27, Wells told Whitcomb and other union officials that she was being forced to violate the terms of her reduced work schedule and requested that a grievance be filed with respect thereto. Respondent repeatedly promised to file a grievance, but did not do so. (Tr. 153, 154, 157, 160) Nor did it provide Wells with an explanation as to why it was not honoring her request. This pattern of behavior on Respondent's part continued over a period of approximately 3-months, and ultimately resulted in Wells being removed from the work schedule. Although maintaining that Wells should have made a formal grievance request while on the clock, Respondent offered no explanation as to why it did not communicate that fact to Wells.

Respondent would have us believe that Wells never requested that a grievance be filed with respect to her being forced to extend her work day beyond 4-hours. That claim, however, is implausible when you consider the overwhelming credible evidence that Wells reached out to Dunn and others when her pressing work-related concerns were being ignored by Whitcomb and other union officials. (G.C. Ex. 6; Tr. 60, 72, 96, 162, 163, 174, 183, 285) Even Dunn acknowledges that Respondent was at fault in not filing a grievance for Wells after she explained her situation and asked that a grievance be filed. (Tr. 110) Interestingly, when Respondent's counsel asked Blackburn if Wells had requested that a grievance be filed on her behalf, he testified that he did not recall such a request being made. (Resp. Ex. 3; Tr. 393, 394) Not only was the request made, but it was made repeatedly over a 3-month period. (Tr. 145, 154, 161, 169, 187, 202, 213)

Under established Board law, a union is deemed to have engaged in something more than mere negligence when it abandons an employee's grievance and offers no explanation for its inaction. *Service Employees Local 3036*, 280 NLRB 995 (1986). Similarly, a union is considered to have a perfunctory manner when it fails to properly represent an employee in its investigation of a discharge. *Service Employees Local 579, (Convacare of Decatur)*, 229 NLRBG 692 (1977). Respondent's inaction following its commitment to file a grievance on Wells' behalf undoubtedly constituted something more than mere negligence. *Service Employees Local 3036*, supra. Thus, consistent with the holding in that case, Respondent's willful failure to honor Wells' grievance request after indicating that it would do so, was perfunctory and thereby violative of Section 8(b)(1)(A) of the Act.

In defense of the complaint allegations, Respondent cites *Johnson v. United States Postal Service*, 756 F.2d 1461 (1985), *Local 3217, Communication Workers of America, (Southern Bell*

Telephone), 243 NLRB 85 (1979) and *Musicians Local 148-462 (Atlanta Symphony)*, 333 NLRB 1108, 1116 (2001), for the proposition that its failure to file a grievance for Wells was justified in view of its assessment that Wells' grievance was not meritorious. This argument, however, fails because it conveniently disregards Respondent's failure to provide Wells with an honest assessment of the merits of her work-related concerns and the lack of evidence showing that Respondent even conducted such an assessment.

The Board in *American Postal Workers Union (United States Postal Service)*, 328 NLRB 281 (1999) held that a union violates Section 8(b)(1)(A) of the Act when it misleads an employee about the status of his or her grievance. Thus, a union commits a representational breach when it willfully misinforms an employee about the status of his or her grievance or willfully keeps an employee uninformed. Clearly, Respondent misinformed Wells about the status of her grievance and did so over an extended period of time when it offered assurances that it would file a grievance after purportedly determining that it lacked merit. Hence, only one conclusion can be logically drawn from the totality of circumstances and that is that Respondent's arbitrary and capricious conduct toward Wells constituted a Section 8(b)(1)(A) violation.

C. Respondent's subsequent filing of a grievance for Wells concerning her July 1 request for light-duty does not excuse its prior unlawful conduct.

Respondent is expected to argue that it is exonerated by the fact that it grieved the Employer's denial of Wells' July 1 light-duty request. (Resp. Ex. 12, Tr. 491, 492, 496). Such argument is unavailing and does not excuse Respondent's failure to act lawfully with respect to a prior grievance over the preceding 3 months. Even if the light-duty grievance is ultimately resolved in Wells' favor, it is unrelated to, and does not remedy, the Employer's failure to honor her reduced work schedule from March 1 through May 27, or its subsequent removal of Wells from work. It has nothing to do with the Employer's repeated violations of the reduced schedule

that it initially granted beginning on March 1 (Tr. 124, 302). Indeed, contrary to Respondent's claim (Tr. 302), Wells was not on any official light-duty from March 1 to May 27. According to Wells, Boblitt told her that the Employer did not have light-duty work when she submitted her medical restrictions to Boblitt on March 1. (Tr. 124) Thus, the grievance over the July 1 denial does not "reach back" to this conduct.

D. Wells' alleged inactions did not absolve Respondent of its duty under the Act to fairly represent Wells.

Respondent is also expected to argue that Wells' failure to timely submit additional documentation to the Employer pursuant to a May 18 request, somehow bolsters its defense. (Rep. Ex. 5) However, this defense is undoubtedly unavailing. In any event, such failure on Wells' part occurred more than 2 months after she first asked the Union to file a grievance over the Employer's failure to honor her reduced-work schedule. Furthermore, Respondent's witness Carl testified that he advised Wells not to worry about the May 29 deadline for submission of the documents. (Tr. 332)

Finally, Respondent is also expected to argue that Wells could have filed her own grievances under the National Agreement. Respondent did not cite the contractual provision on which it based this assertion, however, it appears that Article 15 of the National Agreement permits an employee to informally discuss his or her grievance with the employee's immediate supervisor as an "Informal Step A." (Jt. Exs. 1, 2) The Union's post-hoc reliance on this provision would be disingenuous given the complete absence of evidence that either Whitcomb or Blackburn ever told or asked her to file her own grievance. To the contrary, they kept assuring her that they would file a grievance on her behalf. Indeed, the Union did not present record evidence showing that Wells, or employees generally, ever actually filed their own

grievances pursuant to this provision. Rather, Wells has always relied on Respondent's officials to initiate such action, which is also permitted by the contract. (Tr. 56, 392)

VI. CONCLUSIONS:

The overwhelming evidence establishes that Respondent violated Section 8(b)(1)(A) of the Act by failing to file and process a grievance for Wells from March 1 through May 27 concerning her being forced to work beyond her medical restrictions. Respondent also violated Section 8(b)(1)(A) of the Act on May 27, by failing to file and process a grievance concerning the Employer removing Wells from her 4-hour shift. In short, Respondent further violated Section 8(b)(1)(A) by misleading Wells about the status of her medical restrictions grievance and by being somewhat complicit in the situation which resulted in Wells being removed from her 4-hour shifts.

VII. REMEDIES:

As a consequence of Respondent's conduct, the General Counsel requests that the Recommended Order include a remedy under *Iron Workers, Local 377 (California Ironworkers Employers Council)*, 326 NLRB 395 (1998) which requires Respondent to ask the United States Postal Service to accept and process Wells' grievances in good faith and due diligence, including permitting Wells to have counsel or another representative of her own choosing present during the grievance-arbitration proceedings. If it is no longer possible for Respondent to pursue the grievances through the grievance-arbitration procedure, and if the General Counsel shows in a later compliance proceeding that timely pursued grievances would have been successful, the General Counsel requests that Respondent be ordered to make Wells whole for any loss of earnings and other benefits, together with interest, suffered as a result of Wells being forced to

work past her medical restrictions and removed from the four (4) hours schedule, from May 27, 2017 through August 2017.

As an additional remedy, the General Counsel seeks an Order requiring that the notice be posted at Respondent's NALC Branch 361, 1101 Red Mile Road, Lexington, Kentucky 40504 and Respondent's monthly newsletter. In addition, if Respondent maintains bulletin boards at the following facilities of the Employer where the alleged unfair labor practices occurred, 1025 Majestic Drive, Lexington, Kentucky 40513, 3101 Richmond Road, Suite 303, Lexington, Kentucky 40509, 3525 Lansdowne Drive, Lexington, Kentucky 40517, 2441 Creative Drive, Suite 100, Lexington, Kentucky 40505, and 1729 Alexander Drive, Lexington, Kentucky 40504, Respondent shall also post Notices on each such bulletin board and do so during the posting period. The General Counsel requests all other relief as may be just and proper to remedy Respondent's unfair labor practices.

VIII. PROPOSED NOTICE:

Counsel for the General Counsel urges the Administrative Law Judge to consider the following Notice to Employees as part of the remedy in this case. (See Attachment A)

Dated at Cincinnati, Ohio this 30th day of April, 2018.

Respectfully submitted,

Julius U. Emetu II
Julius U. Emetu, II
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CERTIFICATE OF SERVICE

April 30, 2018

I, hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by mailing true copies thereof by electronic mail and/or regular mail today to the following at the addresses listed below.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

CENTRAL KY BRANCH 361, NATIONAL
ASSOCIATION OF LETTER CARRIERS
AFL-CIO (NALC)
(UNITED STATES POSTAL SERVICE)

Respondent

and

Case 09-CB-202214

DENISE LESLIE WELLS

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE
ADMINISTRATIVE LAW JUDGE

PROPOSED FINDINGS OF FACT;

- The Complaint and Notice of Hearing issued on November 21, 2017, on a charge filed by Leslie Denise Wells, the Charging Party.
- The complaint alleges that since about March 2017, Respondent has failed to file and process a grievance concerning the Employer working Leslie Denise Wells beyond her medical restrictions. The Complaint also alleges that since about May 27, 2017, Respondent has failed to file and process a grievance concerning the Employer removing Leslie Denise Wells from her 4-hour shift.
- The Complaint alleges that Respondent violated Section 8(b)(1)(A) of the Act, by refusing and failing to fairly represent Leslie Denise Wells.

- The National Association of Letter Carriers (“NALC”) is the exclusive collective-bargaining representative of employees of the Employer in the Letter Carrier craft, as described in Article 1, Union Recognition, of the collective-bargaining agreement between the Employer and the Respondent (the “National Agreement”). (Jt Ex 1, 2, Tr. 10) At the hearing the parties stipulated that the NALC delegated to the Respondent certain collective bargaining duties with respect to Employees in the Letter Carrier craft who were stationed in and around Lexington, Kentucky, including but not limited to the negotiation of certain local agreements where permitted by the National Agreement, the filing, processing and settlement of grievances through Step A of the grievance process set forth in the National Agreement.
- Linda Dunn possesses apparent authority and is a 2(13) agent of Respondent.
- Since March 2, 2017 through May 27, 2017, Respondent has failed to file and process a grievance concerning the Employer working Leslie Denise Wells beyond her medical restrictions.
- Since May 27, 2017, Respondent has failed to file and process a grievance concerning the Employer removing Leslie Denise Wells from her 4-hours shift.
- From about March 2, 2017 through May 27, 2017, Respondent misled Leslie Denise Wells about the status of her medical restrictions grievance and her removal from the 4-hours shift and thereby committed a representational breach within the meaning of Section 8(b)(1)(A) of the Act.

PROPOSED CONCLUSIONS OF LAW:

Respondent violated Section 8(b)(1)(A) of the Act:

- by failing to file and process a grievance for Leslie Denise Wells from March 2, 2017 through May 27, 2017 concerning her being forced to work beyond her medical restrictions;
- by failing to process file and process a grievance concerning the Employer removing Leslie Denise Wells from her 4-hours shift;
- by misleading Leslie Denise Wells about the status of her medical restrictions grievance and by allowing her to be removed from her 4-hours shift.

Respectfully submitted,


Julius U. Emetu, II

Counsel for the General Counsel
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3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer 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 do anything to prevent you from exercising the above rights.

WE WILL NOT breach our duty of fair representation to you by failing to file and process a grievance for you after promising to do so and by handling your grievance in an arbitrary or perfunctory manner.

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

WE WILL promptly request United States Postal Service (Employer) to consider Leslie Denise Wells' grievances concerning her being worked beyond her restrictions and removing her from her 4-hours shift and, if it agrees to do so, process the grievance with due diligence in accordance with our collective-bargaining agreement with the Employer.

WE WILL permit Leslie Denise Wells to be represented by her own counsel at any grievance proceeding, including arbitration or other resolution proceeding, and **WE WILL** pay the reasonable legal fees of such counsel.

WE WILL, in the event that it is not possible to pursue the grievances, and if it is shown in a compliance proceeding that timely pursued grievances would have been successful, make Leslie Denise Wells whole for any damages suffered as a consequence of our failure to process her grievances in good faith, plus interest.

**NATIONAL ASSOCIATION OF LETTER
CARRIERS, LOCAL 361**

(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. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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 or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Telephone: (513)684-3686
Hours of Operation: 8:00 a.m. to 4:30 p.m.

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.