

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

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:
NATIONAL ASSOCIATION OF LETTER :
CARRIERS BRANCH 361, AFFILIATED WITH :
NATIONAL ASSOCIATION OF LETTER : Case No. 09-CB-202214
CARRIERS, AFL-CIO, CLC (UNITED STATES :
POSTAL SERVICE), :
Respondent, :
and :
LESLIE DENISE WELLS, AN INDIVIDUAL, :
Charging Party. :
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POST-HEARING BRIEF OF RESPONDENT BRANCH 361 OF THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

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Respondent Branch 361 (“Branch”) of the National Association of Letter Carriers, AFL-CIO (“NALC”) submits this post-hearing brief in opposition to the above-captioned unfair labor practice charge.

PRELIMINARY STATEMENT

The General Counsel alleges that the Branch breached its duty of fair representation to the Charging Party, Leslie Denise Wells, by failing to file grievances she claims she asked the Branch to file in the period March to May of 2017. The General Counsel first contends that the Branch should have filed a grievance on Wells’ behalf based on her claim that the United States Postal Service (“USPS” or “Postal Service”), forced her to walk or stand more than four hours per day, which the General Counsel claims violated work restrictions she had received from a physician. The General Counsel also claims that the Branch should have grieved the Postal Service’s removal of Wells from her shift on May 27, 2017, after Wells was unable to deliver the mail she was assigned to deliver within the four-hour period afforded by her medical restrictions.

The General Counsel’s claims are meritless for three reasons. First, the General Counsel’s theory presumes, with respect to the grievance alleging a violation of Wells’ medical restrictions, that Wells did request such a grievance, but the hearing evidence showed that she did not. Wells’ testimony that she asked for that grievance was inconsistent, largely speculative based on her reading of documents during her testimony, and contradicted by the documentary evidence. The testimony of Branch officials that Wells never requested such a grievance, by contrast, was credible and corroborated by the documentary evidence.

Second, the General Counsel’s claims for both the medical restrictions grievance and the removal grievance are premised on the unsupported notion that the duty of fair representation required the Branch to file these grievances simply because Wells may have

requested them, even though there is no basis for such grievances under the collective bargaining agreements between NALC and the USPS, and the evidence at hearing showed that Wells did not actually work beyond her medical restrictions except for one occasion, the day before she was removed.

Moreover, the hearing evidence established that the Branch fulfilled its duty to Wells by assisting her immediately upon learning of her removal from the four-hour shift. Shortly thereafter, the Branch told Wells that she needed to obtain an approved light duty assignment pursuant to the collective bargaining agreement in order to return to work. This advice was based on the Branch's reasonable interpretation (indeed, the only reasonable interpretation) of the collective bargaining agreement. When the USPS subsequently denied Wells' request for light duty, the Branch — of its own accord — filed a grievance contesting that denial, which it settled because the documentation Wells submitted in support of her request did not meet the Postal Service's criteria under the collective bargaining agreement. Finally, in August of 2017, when the USPS denied Wells' second request for light duty, the Branch contacted the USPS and attempted to resolve the situation, but reasonably determined not to file a grievance because Wells' had, again, failed to submit appropriate medical documentation. The hearing evidence thus showed that the Branch acted reasonably in response to the facts it was aware of regarding Wells' situation, and there was no breach of its duty of fair representation. The complaint should be dismissed.

FACTS

A. NALC and USPS

NALC is the collective bargaining representative under the National Labor Relations Act (the "Act") of a nationwide bargaining unit of city letter carriers employed by the United States Postal Service. *See* Joint Exhibit ("JE") 3, at ¶1. During the time period relevant

to this case, USPS and NALC were party to a collective bargaining agreement (“National Agreement”) governing the terms and conditions of employment of city letter carriers. *See Id.*; JE 1, JE 3, at ¶2.

The Branch acted as NALC’s agent with respect to the administration of the “Informal A” and “Formal A” steps of the grievance procedures for NALC-represented letter carriers in Central Kentucky and specifically, as relevant here, Lexington, Kentucky. *See* JE 3, at ¶1; JE 1, at R-00073-R-00085. In accordance with this delegation by the National Union, the Branch negotiated a “local” memorandum of understanding dated December 12, 2014 (“MOU”). *See* JE 2, at 1. In addition to the National Agreement and MOU, NALC and the USPS adhere to a Joint Contract Administration Manual (“JCAM”) which explains the National Agreement and how NALC and the USPS have interpreted it over the course of their collective bargaining relations. *See* Respondent’s Exhibit (“RE”) 13; March 28, 2018, Hearing Transcript (“3/28 Tr.”) at 472:3-474:9. Finally, the Postal Service promulgates an Employee Relations Manual (“ELM”), which is incorporated into the National Agreement via Article 19 of the National Agreement. JE 1, at R-00096-97; RE-15; 3/28 Tr. at 501:19-504:7.

B. Reduced Work-Schedule Provisions of the, National Agreement, MOU, JCAM, and ELM

Article 13 of the National Agreement sets forth NALC-USPS’s agreement regarding carriers who are unable to work a full day due to medical issues. *See* JE 1, at R-00058. Under that Article, a letter carrier may obtain a reduced work schedule on either a temporary or permanent basis. *See id.*; RE 13¹, at R-00524; 3/28 Tr. at 484:11-12. For temporary assignments, Article 13 provides that a carrier who is “recuperating from a serious injury or

¹ The Joint Contract Administration Manual (“JCAM”) is a binding document on both NALC and the Postal Service. 3/28 Tr. at 487:14-21.

illness and temporarily unable to perform the assigned duties may voluntarily submit a written request to the installation head for temporary assignment to a light duty or other assignment.” See JE 1 at R-00058-59; *see also* RE 13, at R-00524-26; 3/28 Tr. at 484:15-23. To obtain a *permanent* light duty assignment, a carrier must either have five years of service or demonstrate that the injury occurred in the course of performance of the carrier’s duties, which requires the United States Department of Labor’s Office of Worker’s Compensation Programs (“OWCP”) to approve the carrier’s worker’s compensation claim. RE 13, at R-00524-25; JE 1, at R-00058-59; 3/28 Tr. at 484:25-487:21; 498:6-500:11.

Article 30 of the National Agreement specifically permits the Branch and the USPS at the local level to enter into agreements regarding provisions for light duty assignments. See JE 1, at R-00642; RE 13, at R-00644; March 27, 2018, Hearing Transcript (“3/27 Tr.”) at 323:15-22; 3/28 Tr. at 489:7-11. Accordingly, the MOU provides that “[I]ight duty assignments shall be considered on a case by case basis and all requests for light duty shall be submitted in writing to the Postmaster (or designee) accompanied by acceptable medical documentation.” JE 2, at R-00301. The ELM, in turn, governs what documentation is deemed acceptable, *see* RE 15, at R-00805-06, 3/27 Tr. at 331:23-332:2; 3/28 Tr. at 501:19-22, and section 513.364 of the ELM gives management discretion in making that determination, and, as relevant here, authorizes management to demand that medical documentation for individuals who are on leave for extended periods of time (including those who work reduced schedules and are thus considered on sick leave for the times they would be working but for the reduced schedule) every 30 days. See RE 15, at R-00805 (ELM Section 513.363); 3/28 Tr. at 505:9-20.²

² There is another form of restricted duty known as “limited duty” which is not provided for in the National Agreement but is governed by federal regulations; limited duty is described at

C. Wells' Evolving Medical Restrictions and Light Duty Assignment

In late February 2017, Wells transferred to the Gardenside facility in Lexington, Kentucky, because she had bid on a particular route, number 421. 3/27 Tr. at 252:23-253:3. Upon her arrival, she had a conversation with the Postal Service's Finance Manager, James Carl, wherein Wells and Carl had a cordial discussion about their respective expectations for Wells' career at Gardenside. 3/27 Tr. at 317:11-318:3; 336:5-9. Though Wells made no mention of any medical issues during this conversation, only a few days later, she presented management with a document listing certain medical restrictions dated February 27, 2017. See 3/27 Tr. at 318:4-14. These restrictions apparently arose because she had broken her left ankle in 2016, and though she had been cleared to return to work without restrictions after that initial injury, she began experiencing pain in her ankle again in early 2017. 3/27 Tr. at 119:20-120:2. The medical restrictions Wells presented to management in early March 2017 stated "please restrict standing and walking to 4 hours per shift[.]" General Counsel Exhibit ("GC") 2 at 3. Wells testified that she understood this document to mean that she could only stand for two hours, and walk for two hours, because that is what her physician had told her. See 3/27 Tr. at 254:7-255:5. The USPS honored Wells' medical restrictions, and assigned Wells a four-hour light duty assignment, which required only four hours of combined standing and walking. See 3/27 Tr. at 319:4-17. The USPS assigned her this reduced workday even though she had not submitted the appropriate documentation to support the light duty assignment, because Carl believed it was better to be "safer than sorry" to "reduce the chance of issues such as this one." 3/27 Tr. at 341:11-342:2.

In accordance with management's decision to honor Wells' medical restrictions, the Postal Service assigned Wells, each day in March, April, and May, a volume of mail that it

section 540 of the ELM, and requires an approved OWCP claim. RE 15, at R-00940; RE 13, at R-00524.

felt she could deliver in four hours. 3/27 Tr. at 320:9-20. The Postal Service determines the amount of mail that a particular carrier delivering a particular route can carry in a normal eight-hour day, which eight hours includes sorting the mail, loading it into a mail truck, driving to the beginning of the route, two ten-minute breaks, and driving the mail truck back to the postal facility at the end of the carrier's shift. 3/27 Tr. at 264:23-265:22; 306:1-4; 356:20-358:13. The determination as to how long it will take to carry a particular volume of mail is specific to each carrier. 3/27 Tr. at 320:9-20. In Wells' case, her medical restrictions meant that she could not deliver all of the mail on route 421, and would thus have to "hand off" some of the mail for businesses and residences on her route for other carriers to complete. 3/27 Tr. at 256:7-257:18; 370:7-372:8.

Thus, every work day Wells would clock in to the postal facility at 8:00 A.M., her normal start time. 3/27 Tr. at 300:1-3. She would receive a certain volume of mail, and she and USPS Supervisor Amanda Boblitt would determine how much of that mail Wells could deliver, and how much would have to be handed off, and Wells would ultimately decide how much would be handed off. 3/27 Tr. at 256:7-257:18; 350:6-352:2. Wells' handoff of mail meant that other carriers would work overtime to deliver mail on Wells' route after completing the deliveries on their routes. *Id.*; *see also id.* at 369:2-20. It was typical for Wells to hand off mail that other carriers knew would take more time to deliver than Wells had indicated. 3/27 Tr. at 256:16-257:18; 372:5-7. Supervisor Boblitt instructed Wells and the other carriers to "fake it until you make it" - *i.e.* that other carriers should carry more of Wells' mail than the Postal Service estimated was necessary to hand off to keep Wells' assignment within her medical restrictions. 3/27 Tr. at 256:16-257:18; 372:5-7. Wells would then sort, or "case," her mail, during which time she could sit down (3/27 Tr. at 255:22-256:6; 330:15-19; JE 1 at R-00130-

131) take the mail to her truck, load it in the truck, and then drive to the beginning of the route. 3/27 Tr. at 265:2-17; 303:19-304:16. It took her fifteen minutes to drive to the beginning of the route. 3/27 Tr. at 265:4-7. Wells would then walk her route, and deliver the mail; she was entitled to one ten-minute break during her four-hour shift. 3/27 Tr. at 265:18-22. After she was done delivering the mail (or if it started getting close to the end time for her four-hour shift), she would return to her truck, drive back to the postal facility, return the undelivered mail, and clock out. 3/27 Tr. at 139:25-140:6; 261:5-21; 265:11-14; 376:1-14.

The Postal Service tracks when carriers clock in, when they leave the facility, when they return to the facility, and when they return. *See* GC 3. These time records are known as “clock rings,” and Wells’ clock rings for the March-May 2017 period were introduced into evidence. GC 3; 3/27 Tr. at 132:8-15. Wells’ clock rings indicate, with the codes “MV” and “7210-00” when the carrier leaves the facility, and the code “MV” and “7220-00” when the carrier returns to the facility. 3/27 Tr. at 328:2-21. The time between these two codes is known as “street” time and includes the time Wells drove to her route in addition to the time she walked the route delivering the mail.³ *Id.* The clock rings also indicate, in the upper middle portion of the entry for a particular day, the total time between when Wells clocked in at the beginning of her shift and when she clocked out at the end of her shift, *i.e.* the entire time Wells was on the clock. 3/27 Tr. at 327:1-330:6. On General Counsel Exhibit 3, these entries are circled for all of the days where Wells’ total time on the clock exceeded four hours. With one exception, May 26, 2017 (GC 3, at R-01178), every single day reflected on Wells’ clock rings indicates that she was on the street for less than four hours.

³ The various times are indicated in hundredths of an hour, such that a notation of 9.50 corresponds to 9:30 A.M. *See* 3/27 Tr. at 329:2-9.

The Postal Service allowed Wells to work her light duty assignment for over two months, but Wells was not able to meet the Postal Service's expectations as to the volume of amount of mail she could deliver in four hours, even though she was handing off more mail than the Postal Service estimated was necessary to comply with her restrictions. *See* 3/27 Tr. at 331:16-24. On several occasions, Wells contacted Boblitt and said to her that she would not be able to deliver all her assigned mail within four hours, and on each occasion (until May 25, 2017) Boblitt instructed Wells to bring the mail back. GC 5 at 1 (March 2, Wells says she cannot finish two streets by 12 p.m. with all the "advos" and Boblitt tells her to bring the "advos" back); 3/27 Tr. at 144:18 (Wells: "Amanda told me to bring back the ADVOS"); GC 5 at 4 (March 15, Wells tells Boblitt she will not be finished by 1 p.m., Boblitt responds to "bring back" the mail); at 6 (May 25, Wells tells Boblitt she still has an hour and a half of mail to deliver at 11:44 a.m. and Boblitt instructs her to "Bring it back"). On May 26, 2017, Wells texted Boblitt as to the status of her progress but never indicated she would have to violate her restrictions if she finished her assignment. GC 5, at 7.

Thus, to get a better understanding of the nature of Wells' medical restrictions, on May 18, the USPS requested updated medical documentation within eleven days. RE 5; 3/27 Tr. at 330:24-332:8. Wells did not respond within eleven days, but in late June 2017, after she was removed from her position (discussed further below), she submitted three OWCP forms, RE 6-8. Two of the forms were dated June 6, 2017, and the third was dated June 26, 2017. *See* RE 6-8; 3/27 Tr. at 274:14-276:24; 278:24-279:3. The forms dated June 6, 2017 both indicated that Wells could walk for two hours and stand for two hours, but required rest after two hours. *See* RE 7, RE 8. On July 19, 2017, Wells submitted yet another set of updated medical forms; these

forms indicated that she was able to walk or stand for four to six hours, that it would be best to drive rather than carry, and also that her condition was permanent. *See* RE 14.

D. The USPS Removes Wells from Her Light Duty Assignment, Wells Requests Light Duty at the Branch's Instruction, and the Branch Grieves USPS's Denial

On May 27, 2017, after repeated occasions where Wells had indicated that the volume of mail assigned to her was more than she could deliver within her restrictions, and had failed to provide the updated medical information requested on May 18, the USPS removed Wells from the light duty assignment. *See* 3/27 Tr. at 321:17-322:6. Carl explained that he determined to remove Wells from duty because she had not submitted acceptable medical documentation, and attempting to accommodate her ever-decreasing ability to do the job had resulted in additional expenses for the Postal Service, namely payment of overtime for other carriers. 3/27 Tr. at 321-322:17-6. After her removal, Branch representatives informed Wells that to return to work she would need either an approved OWCP claim (to be entitled to limited duty) or for the Postal Service to approve a request light duty assignment. *See* 3/27 Tr. 297:20-25. Since Wells had no OWCP claim (though the NALC continued to assist her appeal of OWCP's denial), on June 1, 2017, she applied for a light duty assignment. *See* RE 9. Pursuant to the MOU, the USPS considered the request and denied Wells a light duty assignment on June 13, 2017, citing (i) her medical restrictions of two hours standing, followed by two hours walking, with a break in between; (ii) her demonstrated performance; and (iii) the availability of productive work. *See* RE 10.

After the USPS denied Wells' light duty request, the Branch, on its own initiative, filed a grievance on Wells' behalf. *See* RE 11; 3/27 Tr. 374:6-10. The Branch and the USPS resolved the grievance without overturning the USPS's denial of Wells' light duty request because the Branch agreed with the USPS's position that there was no productive work available

under the parties' MOU to accommodate the light duty request. *See* RE 11, 3/27 Tr. 325:10-326:9; 375:14-376:14.

On June 26, 2017, Wells submitted a second light duty request along with new medical restrictions. *See* RE 6. While her request was under consideration by the USPS, Wells submitted an additional set of medical restrictions, dated July 19, 2017. *See* RE 14. On August 7, 2017, the USPS denied Wells' second request for a light duty assignment, in part, because the documentation indicated that Wells' restrictions were permanent. *See* RE 12. The Branch reviewed the denial and the accompanying medical documentation, and made a determination that filing a grievance would have been meritless because Wells' medical restrictions indicated that they were permanent, and Wells had neither five years of service nor an approved OWCP claim (and thus could not demonstrate the injury occurred on the job), at least one of which is required for a permanent reassignment under the National Agreement. 3/28 Tr. at 495:19-500:23; R 13, at R-00524-25; JE 1, at R-00058-59.

E. Wells' Communications With the Branch

Both prior to and during the events that give rise to this case, Wells communicated with Branch officials regarding her concerns with the USPS via text message. *See* RE 3, RE 4. In 2016, Wells regularly communicated with Branch President Kenneth Becraft regarding several issues, including a request that the Branch file a grievance on her behalf. *See* RE 4, at R-01193-01221. On May 18, 2017, (the same day that Wells received the Postal Service's request for updated medical information) she contacted Branch Vice President David Blackburn and said she "had a question to ask." *See* RE 3, at R-01225. On May 26, 2017, Wells contacted Blackburn again, and informed him that she was "still out still have an hour." RE 3, at R-1225. In response, Blackburn spoke to Carl and inquired whether the USPS was

working Wells beyond her restrictions. 3/27 Tr. at 395:6-24. Carl informed him that they were not. *Id.*⁴

On May 27, 2017, Wells contacted Blackburn by phone and told him she had more mail than she could deliver, and Blackburn told her to clearly ask management if she was being directed to violate her restrictions. *Id.* at 396:13-397:1. Wells texted the supervisor on duty at that time, Michael Genncio, and asked him “Ok so you want me to go against my restrictions.” GC 5, at 8 (hearing transcripts note name as “Michael Genncio, but Wells’ texts state “Micheal Geavne).

After Wells was removed from her shift, her communications with the Branch’s officials do not reflect any inquiry about any grievances over her having been required to violate her restrictions, but she asked about her request for light duty, the Postal Service’s denial of that request, and the Branch’s grievance of that denial. 3/28 Tr. at 507:21-508:19; RE 4, at R-01222, RE 3, at R-01226 (June 6 Wells’ asking about “[a]ny news on light duty”); R-01229 (Wells stating “[I] also need to give you my request for light duty and restriction”); R-01232 (stating that “Jim told Mark months ago he was looking for me light duty”). Wells’ communication with the Branch’s officials concerning her requests for light duty extended until the USPS denied her second request for light duty. RE 3, at R-01237.

F. The Branch’s Attempts to Get Wells Back to Work

After Wells was removed, the Branch advised her to submit a light duty request. 3/27 Tr. at 297:20-25; 398:1-14. As explained above, the only mechanism for a carrier to obtain

⁴ On May 25, 2017, Wells also contacted Branch Steward Denise Preston (“Preston”) to ask if the USPS could remove her from her shift if she did not have appropriate medical documentation. 3/27 Tr. at 428:6-24; 432:1-12. Preston relayed this information to Becraft and said that during Preston and Wells’ conversation, Wells said that she had been asking Branch Steward Mark Whitcomb to file a Restrictions Grievance and he had not done so. GC 7, at 1.

a modified work schedule is to either obtain OWCP approval of an injury-on-duty claim or receive management's approval of a request for light duty. Wells did not request light duty until June 1, 2017. *See* RE 9.⁵ And while that request was pending, Wells submitted additional documentation showing that she could only stand for two hours, take a break, and sit for two hours. RE 7, RE 8. The USPS denied Wells' light duty request by letter dated June 13, 2017, RE 10, and the Branch filed a grievance on Wells' behalf, which it settled with the Postal Service. RE 11; 3/27 Tr. at 325:7-326:9; 375:16-376:14. Whitcomb, who had been a mail carrier for several years and was familiar with the routes at Gardenside, and Wells' route in particular, agreed that there was no productive work for Wells under the two hours standing, two hours walking medical restrictions. 3/27 Tr. at 375:16-376:14.

After the denial, Wells submitted a second light duty request, accompanied by medical documentation. *See* 3/27 Tr. 407:6-8; RE 6. But Wells submitted medical documentation that indicated that she was able to do even less work than the four hours on her feet that this condition was permanent. RE 14. Once the USPS denied Wells' second request for light duty, the Branch, specifically Becraft, evaluated the merits of a possible grievance and discussed the issue with the USPS. 3/28 Tr. at 495:19-500:23. The Branch determined that Wells' second light duty request did not meet the National Agreements' requirements of five years of service or an injury on duty (demonstrated by an approved OWCP claim) for permanent light duty and decided not to pursue a grievance over USPS's denial of that request. *Id.*; RE 13, at R-00524-25; JE 1, at R-00058-59.

⁵ The General Counsel's repeated contention that the Branch's conduct after March 27, 2017 is not relevant to the charge is meritless. Wells did not file for light duty until June 1, and the Branch believed that this was the appropriate procedure for obtaining a reduced work schedule. Thus, the Branch's conduct after March 27, 2017 rebuts directly the General Counsel's claim that the Branch breached its duty to Wells by not filing the Removal Grievance.

ARGUMENT

A union breaches its duty of fair representation, and violates Section 8(b)(1)(A) of the Act, only if it engages in conduct that is arbitrary, discriminatory, or in bad faith. *See Amalgamated Transit Union Local No. 1498*, 360 NLRB No. 96 (2014); *Delphi/Delco East Local 651*, 331 NLRB 479, 480 (2000). Here, although the Complaint makes a general assertion that the Branch acted arbitrarily and discriminatorily, *see* GC 1(c) at ¶7(d), the General Counsel presented no evidence demonstrating that the Branch had animus or bias towards Wells.⁶ Accordingly, the General Counsel's case rests entirely on proving that the Branch acted in an arbitrary fashion towards Wells in failing to file both of her alleged requested grievances. *See* 3/27 Tr. at 19:24-20:12.

Under the Act, any substantive examination of a union's conduct must be "highly deferential." *In re Local 307, Nat'l Postal Mail Handlers Union*, 339 NLRB 93 (2003) (quoting *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991)). Thus, a union's conduct only is considered arbitrary when it falls "so far outside 'a wide range of reasonableness' as to be irrational." *Amalgamated Transit Union*, 360 NLRB No. 96 (quoting *Air Line Pilots Ass'n*, 499 U.S. at 67). A union's failure to process an employee's grievance does not violate Section 8(b)(1)(A) so long as the union acted pursuant to a "reasonable interpretation of the collective-bargaining agreement and/or a good-faith evaluation regarding the merits of the complaint." *Delphi/Delco*, 331 NLRB at 480. In evaluating the union's conduct, it is not the Board's role to interpret the contract and determine whether the union's interpretation was correct; instead, the

⁶ Any allegations of animus or discriminatory treatment are unsupported by the record. Becraft testified, without contradiction, that he successfully advocated for the USPS to employ Wells beyond her probationary period in 2016, and it is undisputed that the Branch filed Wells' grievance concerning the denial of her first light duty request on its own initiative. 3/28 Tr. at 478:15-479:7; 3/27 Tr. at 374:6-10.

Board's role is to determine whether the union was acting in a reasonable, non-arbitrary manner. *See id.*; *General Motors Corp.*, 297 NLRB 31, 32 (1989).

The gravamen of the General Counsel's Complaint here is that the Branch was perfunctory in failing to file two grievances on Wells' behalf: (i) a grievance challenging the Postal Service's purported insistence that Wells' perform work that violated her medical restrictions (the "Restrictions Grievance") and (ii) a grievance challenging the Postal Service's decision to remove Wells from her four-hour shift and place her Wells in unpaid status on May 27, 2017 (the "Removal Grievance"). As shown below, neither allegation has merit.

A. The Branch Did Not Breach the Duty of Fair Representation By Failing to File the Restrictions Grievance.

The hearing evidence shows that the Branch did not violate the act by failing to process the Restrictions Grievance for two reasons. First, Wells never asked a Branch official to file the Restrictions Grievance, and the Branch did not have independent knowledge that the Postal Service was causing Wells to violate her restrictions (because it was not). The Branch cannot be responsible for failing to pursue a grievance it was not aware of. Second, the Restrictions Grievance would have had no merit, because, under the facts demonstrated at the hearing, there is nothing in the National Agreement, MOU, JCAM, or ELM that would have required the Postal Service to honor Wells' restrictions

1. *The Branch Had No Knowledge of the Purported Violation of Wells' Medical Restrictions until May 25, 2017.*
 - (a) Wells' Testimony that She Asked the Branch to Pursue a Restrictions Grievance Is Not Credible.

The General Counsel's case that the Branch was aware that Wells believed the Postal Service was forcing her to work more hours than her medical restrictions would permit

was based almost entirely on Wells' self-serving testimony.⁷ In assessing credibility, a factfinder may rely on "a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, corroboration, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations." *Brasfield & Gorrie, LLC & United Bhd. of Carpenters & Joiners of Am. (Ubc)*, 2017 WL 6311233 (Dec. 8, 2017). Wells' account of events was not credible in several respects. First, Wells could not even clearly explain the nature of her medical restrictions. The February 27, 2017 medical document she relied upon states "[p]lease restrict standing and walking to 4 hours per shift[.]" GC 2, at 3. On direct examination, Wells stated adamantly that this language meant that she could only stand for two hours and walk for two hours, though that distinction appears nowhere in the document. 3/27 Tr. 254:7-10; GC 2. On cross-examination, however, Wells conceded that these restrictions were her "interpretation" of the document and that the restrictions did not specify that she could only perform each activity for two hours. *See* 3/27 Tr. 120:20-25; 254:7-255:13.

Moreover, Wells was inconsistent as to whether her restrictions precluded her only from standing or working more than four hours, or if working more than four hours, whether standing, walking, or sitting, would violate her restrictions. She initially conceded that she could work more than four hours so long as she was not required to stand or walk for more hours (and, of course, it would make no sense for medical restrictions arising from a broken ankle to restrict Wells ability to do seated work). *Id.* at 255:10-11 ("I can do anything else after

⁷ To the extent the General Counsel relies on Linda Dunn's testimony to rebut the testimony of the Branch's officials and support Wells' testimony, Dunn's testimony was not credible and should be disregarded. Dunn was not a Branch Steward between March-May 2017, and she could not even consistently recall whether her conversations with Wells about a Restrictions Grievance took place in 2016 or 2017. *See* 3/28 Tr. at 470:2-15; *Compare* 3/27 Tr. at 63:18-64:18 with 3/27 Tr. 93:18-95:24; 98:22-99-6.

that [four hours of standing/walking], as long as it wasn't walking or standing.”). When it became clear that GC 3, Wells' clock rings, did not actually show that she was on her feet the entirety of the time she was at work, however, Wells became evasive and reversed her prior testimony about her restrictions, and testified that she could only work four hours a day in total, even if a portion of that time was seated. *Id.* 259:16-19 (Q: That's less than four hours [walking or standing], isn't it? A: My recollection [of my restrictions] is four hours total a day). Thus, Wells' inability to testify consistently and clearly about what her medical restrictions allowed and what they prohibited undermines her credibility. *See SSA Pacific, Inc.*, 366 NLRB No. 51 (2018) (inconsistent testimony diminished credibility); *Sunrise Health Care Corp.*, 334 NLRB 903, 907 (2001) (equivocation diminished credibility).

Regarding her requests that the Branch file a grievance, Wells testified in essence that every day where she was required to violate her medical restrictions, she told Whitcomb the next day to file a grievance. Yet she could not recall a single instance from memory where she asked a representative of the Branch to file a grievance on her behalf. Instead, Wells relied entirely on GC 3, her time records, to testify that if she worked longer than four hours any particular day then she must have asked Whitcomb or Blackburn to file a grievance over that incident. 3/27 Tr. at 160:4-14; 180:18-182:13. Similarly, she testified that she had called management to report that she had more mail than she could carry within her restrictions, but the sole basis for that contention was that she reviewed her phone records and every instance where she had called Amanda Boblitt, Wells assumed that she had been worked past her restrictions. *See* 3/27 Tr. at 266:3-267:8. Wells had no independent recall of any of the instances where she claimed she was worked beyond her restrictions, and her testimony was no more than

speculation based on reading her clock rings and phone records. 3/27 Tr. at 160:4-14; 180:18-182:11.

(b) The Documentary Evidence Contradicts Wells' Testimony.

In addition to Wells' general lack of credibility, her specific testimony that she asked either Branch Steward Mark Whitcomb or Branch Vice President David Blackburn to file a Restrictions Grievance is not consistent with the documentary evidence.⁸ The text messages between Wells and Blackburn and Wells and Becraft establish that Wells knew very well how to communicate with Branch officials about her disputes with management, but there is not a single text from her to Blackburn about a Restrictions Grievance. *See generally* RE 3, RE 4. Wells texted Becraft (RE 4) the prior year about her worker's compensation claim arising from her initial ankle injury and resultant leave in February-July 2016, *see* RE 4, at R-00193-1205, a uniform voucher in July 2016, *id.* at R-1205, and an ongoing dispute with a supervisor in August through October 2016. *Id.* at R-01206-01219. Indeed, during her 2016 dispute with her supervisor, Wells specifically told Becraft on August 30, 2016 that she "want[ed] a discrimination grievance[] against Lori [the supervisor]," *id.* at R-01211 and then on September 12, 2016 asked about the status of that grievance. *Id.* at R-01213. Yet there is no text from her

⁸ Wells' overall credibility is undermined further by her failure to comply with the narrow document requests in the Branch's subpoena, which requested all communications, including text messages, Wells had with Branch officials from January to August of 2017. RE 1, at 6. Wells admitted that she searched for documentation, including text messages relevant to the case (and indeed provided text messages between herself and management, GC 5), but failed to produce text messages that existed between herself and Branch President Kenneth Becraft or Blackburn, 3/27 Tr. 241:6-252:22; RE 3, RE 4). Since, as described above, none of these text messages make any mention of a Restrictions Grievance, it is obvious that Wells produced only documents that she felt supported her case and this undermines her credibility. *See Boothwyn Fire Co. No. 1 & Aaron Kisela*, 363 NLRB No. 191 n. 6 (May 16, 2016) (refusing to credit testimony in part because of failure to produce relevant documentation in response to subpoena); *FPC Holdings, Inc.*, 314 NLRB 1169, 1174 (1994) (inferring that documents not produced in response to subpoena "contain material corroborative" of opponent's witnesses).

to Becraft requesting the Branch pursue a Restrictions Grievance or complaining that one had not been filed.

While Wells clearly knew how to contact Becraft and Blackburn via text, including to request grievances on her behalf, and to ask about the status of grievances, and despite her insistence that she was telling virtually everyone she could think of — including national NALC officials David Mudd (who was assisting her with the OWCP process), *see* 3/27 Tr. at 163:12-20, and Christopher Jackson in Washington, DC, *id.* at 288:6-10, about her desire for a Restrictions Grievance, the record contains no text messages from Wells to anyone where Wells requested a Restrictions Grievance or complained that Whitcomb had not filed one. Indeed, Wells' text messages with all the Branch's representatives concern updates regarding her request for light duty *after* the USPS removed her from the light duty assignment. *See* R-3, R-4, at R-01222;⁹ *see also* 3/27 Tr. at 287:3-18. This utter lack of documentary support for Wells' contention that she consistently and repeatedly contacted Whitcomb and Blackburn and asked that the Branch file a Restrictions Grievance undermines her credibility (and, indeed, the General Counsel's own GC 5 corroborates Blackburn's testimony about the May 27 telephone conversation between Wells and Blackburn, where Blackburn said he told Wells to clearly ask management if she was being directed to violate her restrictions) and common sense. Wells was not a credible witness and her testimony should be discounted.

The documentary evidence further demonstrates that the reason Wells did not escalate her purported request for a Restrictions Grievance to Blackburn or Becraft was because she never asked Whitcomb to process one since it was not until May 25 that management

⁹ Respondent's Exhibit 4 was not admitted to establish the truth of the matters asserted in the text messages contained therein, and the Branch does not rely on them for that purpose. Rather, Respondent's Exhibit 4 was admitted, and is relied upon here, only to show that such text messages existed for the purposes of assessing Wells' credibility.

actually directed Wells work in excess of her restrictions. First, all of Wells' time records demonstrate that, except for May 26, 2017, she was not out on her route for longer than four hours. And Wells concedes that she was permitted to sit while in the postal facility and that she indeed did so. 3/27 Tr. at 255:18-256:6.

Further, all of Wells' text messages with Boblitt prior to May 26 show that, after Wells submitted her restrictions, if she had more mail than she thought she could carry within her restrictions, Boblitt told her to bring the mail back in. GC 5, at 1 (March 2, Wells says she cannot finish two streets by 12 p.m. with all the "advos" and Boblitt tells her to bring the "advos" back), 4 (March 15 Wells tells Boblitt she will not be finished by 1 p.m., Boblitt responds to "bring back" the mail) 6 (May 25 Wells tells Boblitt she still has an hour and a half of mail to deliver at 11:44 a.m. Boblitt instructs her to "Bring it back"). On May 25, despite Boblitt's instruction to return the mail, Wells apparently then "lost track of time," and was out on the street longer than her restrictions permitted, and on this occasion alone, Boblitt told her to finish the route after Wells said that she was "really trying to do this route." GC 5, at 6-7. After that incident, Wells for the first time called Branch Steward Preston and told Preston that she was being worked beyond her restrictions "every day." *See* GC 7, at 1 (Preston texting Becraft on May 26 that Wells called her "last night" and said she was being worked past her restrictions almost every day).¹⁰

¹⁰ The General Counsel will presumably argue that Becraft's text message to Preston stating that Whitcomb was "worthless as a steward" shows that Whitcomb failed to file the grievances Wells claims she requested. Becraft, who has a no-nonsense and brusque demeanor, however, credibly testified that he was venting after he returned from medical leave and found that Whitcomb had failed to handle a matter relating to the Branch's property that Becraft had assigned him and had allowed two other carriers, one of whom was Dunn, to insert themselves into Branch business. 3/28 Tr. at 515:11-516:16.

(c) All the Evidence, Excluding Wells' Testimony, Demonstrates that She Never Requested a Restrictions Grievance.

All of the Branch's representatives testified that Wells never asked them to file a grievance between March and May 2017 because the USPS had worked Wells beyond her medical restrictions or removed her from her light duty assignment. *See* 3/27 Tr. at 373:4-11; 394:16-19; 396:9-11.407:23-25; 417:15-24; 429:22-430:22; 3/28 Tr. at 507:21-508:19. Crucially, the documentary evidence introduced by the General Counsel supports David Blackburn's testimony and undermines Wells'. Wells testified that on May 27, she called Blackburn and said that she wanted him to file a grievance because she had been directed to work past her restrictions, and Blackburn said that he would do so. 3/27 Tr. at 219:1-220:8. Blackburn, however testified that during this call, he directed Wells to ask management "Are you directing me to break my restrictions." *Id.* at 396:13-397:1. Blackburn's testimony is corroborated by the General Counsel's own Exhibit 5 at page 8, where Wells texted supervisor Michael Gennacio "Ok so you want me to go against my restrictions." This also undermines Wells' credibility, because while she testified that during this conversation she told Blackburn that she wanted the Branch to file a grievance because she was being forced to work in violation of her medical restrictions, Blackburn denied that she said that, and testified that in fact he told her to ask management almost precisely what she asked in her text message. 3/27 Tr. at 219:5-20. Moreover, Carl credibly testified that he never instructed USPS management to require Wells to work past her restrictions. 3/27 Tr. at 320:23-321:1. Thus, Wells' testimony is unsupported by both testimony and the documentary evidence and her statements that she asked the Branch to file a Restrictions Grievance should not be credited.

The evidence in the record thus shows what actually happened with Wells, USPS management, and the Branch regarding her workload and medical restrictions. May 25 was the

first day that Wells was actually told to continue to carry the mail after telling management it might violate her restrictions. This suggested to Wells that her inability to carry mail productively within her restrictions had become a serious issue with management, so in an effort to protect herself Wells concocted a narrative that in fact she had consistently been required to work past her restrictions consistent occurrence, and that she had repeatedly requested that the Branch grieve it and been ignored. This is the only account of these events that makes sense of (i) management's consistent instructions to Wells to return mail rather than violate her restrictions prior to May 25; (ii) the time records that show Wells was only on the street more than four hours on one occasion; GC 3, at R-01178; and (iii) the complete absence of any documents showing that Wells asked Blackburn or Becraft that she wanted the Branch to file a Restrictions Grievance, even though Wells was in frequent text communication with the Branch's representatives and had communicated with Becraft about grievances in the past. The Branch never processed or considered processing a Restrictions Grievance because Wells never asked for one. She never asked for one because until late May she was never required to stand or walk more than four hours. The Branch is not obliged to file a grievance over a dispute it does not know about, and the Complaint's allegation arising from the Branch's failure to process such a grievance, GC 1(c), at ¶7(a), should be dismissed.

2. *The Branch Had No Duty to File the Restrictions Grievance Because the Grievance Would Have Lacked Merit.*

Even assuming that Wells in fact requested that the Branch file the Restrictions Grievance (which she did not), there is no basis to conclude that the Branch's failure to do so was perfunctory. Here, the General Counsel has completely failed to carry its burden of showing that a Restrictions Grievance would have had merit, and it well-established that the Act does not require a union to process a meritless grievance. *See York v. Am. Tel. & Tel. Co.*, 95 F.3d 948,

956 (10th Cir. 1996) (“[I]f a union could be compelled to take official action on every grievance, irrespective of merit, the union would quickly deplete its resources and credibility; and the arbitration machinery would eventually become overburdened.”); *Cruz v. Local Union No. 3 of Int’l Bhd. of Elec. Workers*, 34 F.3d 1148, 1153–54 (2d Cir. 1994) (“[T]he duty of fair representation is not breached where the union fails to process a meritless grievance[.]”); *Johnson v. U.S. Postal Serv.*, 756 F.2d 1461, 1466 (9th Cir. 1985). Under Article 13 of the National Agreement, Wells was entitled to work a four-hour workday only if she had an approved OWCP claim or approved light duty assignment, the latter of which required her to submit acceptable medical documentation that showed she could do productive work within her medical limitations. *See* RE 13, at R-00523; JE 1, at R-00058; 3/27 Tr. at 341:11-25. 3/28 Tr. at 484:15-486:3. Carl, the USPS manager, testified that in early March 2017, Wells was on light duty as “accommodated by the Postal Service,” 3/27 Tr. at 341:12-16, and had not submitted the appropriate medical documentation to support a proper light duty request. *Id.* There is nothing in the National Agreement, JCAM, MOU, or ELM that requires the Postal Service to assign a carrier a less than full day’s work when the carrier has not provided timely medical documentation to support a light duty request. Thus, even if Wells’ testimony that she asked for grievances to be filed when the USPS worked her beyond her restrictions or when the Postal Service revoked her light duty assignment was credible, those grievances would have lacked merit. Neither a breach of the USPS’s discretionary and voluntary accommodation of Wells’ restrictions, nor a rescission of that accommodation, violated the National Agreement, and the General Counsel presented no testimony or documentary evidence to the contrary.

Moreover, even if the National Agreement arguably prohibited the USPS from changing its discretionary accommodation of her work restrictions, even absent Wells’

submission of appropriate documentation, any grievances also would have lacked merit because the evidence does not establish that Wells worked beyond her medical restrictions against her will. Relying solely on GC 3, Wells testified that any date on GC 3 that showed more than 4.00 hours represented a day the USPS required her to work beyond her medical restrictions. *See* Tr. 3/27 at 159:19-160:14. Yet, this statement is contradicted by Wells' own testimony and that of other witnesses. It is undisputed that the only time that Wells spent outside the USPS facility delivering mail were the time periods between the codes "7210" and "7220" on GC 3. 3/27 Tr. at 258:9-259:15; 328:2-329:22. Wells spent the remainder of her work time at the USPS facility, which Wells testified "[a]t times" included sitting down while casing her mail. *See* 3/27 Tr. at 255:18-256:3; *see also* 258:5-15; 328:2-7. In fact, Wells testified that the USPS never informed her that she could not sit while "casing" the mail during her time at the USPS facility. *See id.*, at 255:18-256:6. Thus, while GC 3 represents time that Wells generally worked — *i.e.* the time between when she clocked in at the beginning of her shift and when she clocked out at the end of it — it does not establish that she was standing or walking the entirety of that time, or that any portion of that time was work in excess of her medical restrictions. Without any documentary evidence or credible testimony to support a Restrictions Grievance, the Branch did not act unreasonably in not filing a grievance on Wells' behalf.¹¹

¹¹ Even the General Counsel's documentary evidence demonstrates that the only two times the USPS required Wells to complete her route after having been informed that Wells believed doing so would violate her restrictions, was in late May 2017, and includes the day that the USPS removed Wells from her light duty assignment. *See* GC 5. Otherwise, the USPS invariably instructed Wells to return the mail after she said she had more than she could deliver within her restrictions. *See* 3/27 Tr. at 167:3-4; 222:12-17; GC 5 at 1, 4, 6.

B. The Branch Was Not Perfunctory in Not Grieving the Postal Service's Removal of Wells from her Four Hour Shift.

The same legal standard described above applies to the General Counsel's claim that the Branch violated the Act by not filing a Removal Grievance on Wells' behalf when the USPS removed her from her light duty assignment on May 27, 2017. The General Counsel must show that the Branch acted "so far outside 'a wide range of reasonableness' as to be irrational," *Amalgamated Transit Union*, 360 NLRB No. 96, when the USPS removed Wells from her work shift.

The General Counsel did not meet its burden. Here, after the Postal Service removed Wells from her light duty position on May 27, 2017, the Branch acted reasonably as it attempted to assist Wells in following the appropriate procedure to return to work. As shown above, under the National Agreement, a letter carrier may obtain a reduced work schedule with an approved OWCP claim or an approved light duty assignment. Since Wells did not have an approved OWCP claim, the Branch informed Wells that she was required to obtain a light duty assignment and submit acceptable medical documentation, which she had not done despite the USPS having sent her a written request to do so. *See* 3/27 Tr. at 297:20-25; 302:18-22; RE 5; RE 3, a R-01226. Without acceptable and timely medical documentation, Wells was not entitled to a light duty position, and the Branch could not file a meritorious grievance arguing that the Postal Service had breached the National Agreement in removing her from it. The mere fact that Wells had worked a four-hour shift for two months did not entitle her to keep working that shift indefinitely, as the General Counsel apparently believes, and there is nothing in the National Agreement or anywhere else to suggest otherwise.

In any event, the Branch acted reasonably in responding to Wells' removal from her shift by pursuing the only route provided by the National Agreement to get Wells back to

work — it advised her to submit a light duty request. 3/27 Tr. at 297:20-25; 398:1-14. Wells, however, did not request light duty until June 1, 2017. *See* RE 9.¹² Once the USPS denied Wells' light duty request, the Branch filed a grievance on Wells' behalf, which it settled with the Postal Service. RE 11, 3/27 Tr. at 375:8-376:14. The Branch was reasonable in resolving the light duty request denial because the medical documentation that Wells submitted in connection with that request indicated that Wells could only stand for two hours, take a break, and then walk for two hours. RE 7; RE 8; RE 10. Whitcomb, who had been a mail carrier for several years and was familiar with the routes at Gardenside, and Wells' route in particular, agreed that there was no productive work for Wells under those restrictions. 3/27 Tr. at 375:8-376:14.

The Branch's duty was to behave reasonably in addressing a dispute between a member and the Postal Service, not to pursue the resolution strategy that the General Counsel thinks would have been most appropriate. The Branch's decision not to file a grievance contesting Wells' placement on leave without pay was not a violation of the Act, because such a grievance would have lacked merit under the language of the National Agreement. The Branch reasonably interpreted the National Agreement as not permitting the Branch to contest the removal and instead requiring an application for a light duty assignment supported by acceptable medical documentation. *See Delphi/Delco*, 331 NLRB. at 480; *Diversified Contract Servs.*, 292 NLRB 603, 606 (1989).

Moreover, even after it resolved the grievance, the Branch continued to assist Wells with her situation, though it was hampered by her inability or unwillingness to cooperate.

¹² The General Counsel's repeated contention that the Branch's conduct after March 27, 2017 is not relevant to the charge is meritless. Wells did not file for light duty until June 1, and the Branch believed that this was the appropriate procedure for obtaining a reduced work schedule. Thus, the Branch's conduct after March 27, 2017 rebuts directly the General Counsel's claim that the Branch breached its duty to Wells by failing the Removal Grievance.

Wells submitted a second light duty request and the Branch corresponded with Wells concerning the request, despite her inability to obtain the appropriate documentation. *See* 3/27 Tr. 407:6-8; RE 3, at R-0123, R-01234-1237. Wells, however, submitted medical documentation that indicated that she was able to do even *less* work than the four hours on her feet, and even worse, that this condition was permanent. *See* RE 14. Once the USPS denied Wells' second request for light duty, the Branch evaluated the merits of a possible grievance and discussed the issue with the USPS. 3/28 Tr. at 495:19-500:23. The Branch thus reasonably determined that Wells' second light duty request did not meet the National Agreements' requirements of five years of service or an injury on duty (demonstrated by an approved OWCP claim) and decided not to grieve it. RE 13, at R-00524-25; JE 1, at R-00058-59; 3/28 Tr. at 484:25-487:21; 498:6-500:11. Thus, the Branch's actions were not perfunctory when the USPS removed Wells from her shift on May 27, 2017, and thereafter. The General Counsel's claim based on the Branch's failure to file a Removal Grievance is meritless.

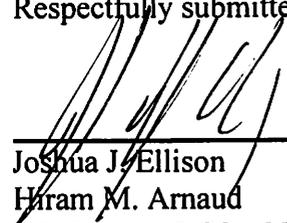
The General Counsel failed to show that the Branch acted arbitrarily, discriminatory, in bad faith in not processing either the Restrictions Grievance or a Removal Grievance. The Complaint should accordingly be dismissed.

CONCLUSION

For the foregoing reasons, the complaint is without merit and should be dismissed.

Dated: New York, New York
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Respectfully submitted,



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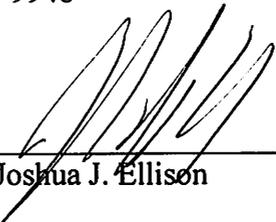
I hereby certify that I caused a copy of the foregoing brief to be served this 30th day of April 2018 by first-class mail, postage prepaid, upon:

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