

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

AIM AEROSPACE SUMNER, INC.

and

**Cases 19-CA-203455
19-CA-203586**

**INTERNATIONAL ASSOCIATION OF
MACHINISTS, DISTRICT 751**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S CROSS-EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel (“General Counsel”) submits this Answering Brief to the Cross-Exceptions filed by AIM Aerospace Sumner, Inc. (“Respondent”), to the May 16, 2018, decision of Administrative Law Judge Eleanor Laws (“ALJ”) in the above-captioned cases¹ [JD(SF)-12-18] (“ALJD” or “Decision”).

I. OVERVIEW

Respondent, by its lack of cross-exceptions to the overwhelming majority of the ALJ’s factual findings, concedes many facts which serve as the underpinning to this case. This includes facts addressed in General Counsel’s Cross-Exceptions and Brief in Support of Cross-Exceptions filed on June 27, 2018, and the facts underlying the violations found by the ALJ, including Respondent’s promotion of and granting of a wage increase to Lori-Ann Downs-Haynes (“Downs-Haynes”) as a reward for her circulation of the decertification petition that Respondent ultimately relied upon to withdraw recognition from the Union.

As discussed in detail below, those factual findings and legal conclusions by the ALJ were appropriate, proper, and fully supported by the record evidence and established precedent. Accordingly, the Board should reject Respondent’s Cross-Exceptions in their entirety and sustain the attendant portions of the ALJ’s decision and recommended order.

¹ Respondent’s Brief in Support of its Cross-Exceptions will be referred to as (R. Br.), with citations to specific page numbers. References to the ALJD will be designated as (ALJD __:__), including appropriate page and line citations. References to the official transcript will be designated as (Tr. __:__), including appropriate page and line citations. References to the General Counsel’s, Respondent’s, and Charging Party’s exhibits will be referred to as (GC Exh), (R Exh), and (CP Exh), respectively.

II. THE ALJ'S FINDINGS THAT ARE DISPUTED BY RESPONDENT SHOULD BE AFFIRMED

A. Respondent Does Not Contest the Underlying Facts as to Downs-Haynes' Promotion and Wage Increase

Respondent, by its lack of cross-exceptions to most of the ALJ's factual findings, admits to knowledge of Downs-Haynes' decertification activity and its support thereof. The ALJ correctly found, and Respondent does not contest, that Downs-Haynes informed Human Resources Director Deborah Ruffcorn ("Ruffcorn") that she wanted to get rid of the Union in mid-June 2017² (ALJD 15:13-15). It is also uncontested that on June 28, Downs-Haynes began collecting signatures for the decertification petition upon which Respondent based its withdrawal of recognition (ALJD 5:26-32).

In fact, Respondent does not dispute the ALJ's correct findings that Downs-Haynes went to a scheduled meeting with human resources on June 30, where she voiced numerous questions concerning decertification (ALJD 5:39-6:8). Significantly, Respondent concedes by its lack of cross-exceptions that the ALJ appropriately found that Downs-Haynes went to human resources on July 5 with further comments about decertification, and that Ruffcorn provided Downs-Haynes with the National Right to Work website address (ALJD 6:20-26).

With regard to the receiving clerk position at issue, Respondent concedes that the ALJ correctly found that Respondent had a regular practice of posting positions both internally and externally (ALJD 10:32-33). On May 21, Respondent posted the opening for the receiving clerk position both internally and externally, and then received 24 external applications and two internal applications – Laura Hobbick ("Hobbick") and Downs-Haynes (ALJD 10:36-11:17). The ALJ correctly found, and Respondent admits

² All dates are 2017 unless otherwise noted.

through its lack of cross-exceptions, that Downs-Haynes applied for the receiving clerk position electronically on June 4, and via paper application on June 6. The ALJ found, and Respondent admits, that it offered an outside applicant the position on June 6 or 12 due to his experience as a logistics technician with warehouse responsibilities (ALJD 11:28-30). The outside applicant took the position, but abandoned the job on June 26 after two weeks (ALJD 11:30).

The ALJ also found, and Respondent does not contest, that Respondent reposted the receiving position both internally and externally on June 29, despite Ruffcorn's testimony at hearing that Respondent did not post externally because of the initial "bad response" (ALJD 11:35-36). It is uncontested that 20 external candidates applied to the reposting, along with the same two internal candidates – Hobbick and Downs-Haynes (ALJD 11:38-12:17). Then, contrary to its own policies (R Exh 25), and as both the ALJ found and Respondent admits, Respondent decided to consider only internal candidates (ALJD 12:21-22).

This decision was made despite the fact that Hobbick had no experience and Downs-Haynes had only minimal shipping and receiving experience when compared to the extensive experience of the external applicants (ALJD 11:23; 12:29-31; Tr. 456:2-11, 456:18-25, 457:1-10; GC Exhs 15-16). In fact, as the ALJ properly found, and Respondent concedes by its lack of cross-exceptions, Respondent inflated Downs-Haynes' this minimum prior relevant experience by granting Downs-Haynes:

1.5 years of credit for filling-in in the shipping and receiving department at AIM, even though she had only filled-in once[,...] a year of credit for 7 months of work as a warehouse associate, a year of credit for 6 months of work as a customer care specialist, and 2 years of credit for a little less than 2 years of work in customer service (ALJD 12:27-31).

On July 6, the day after Respondent admittedly provided Downs-Haynes with the website for National Right to Work, Respondent interviewed Downs-Haynes for the receiving position (ALJD 6:24, 12:23). In the interview paperwork, Respondent noted that Downs-Haynes was “devoted, willing, [and] reliable” (Tr. 439:14-18; R Exh 22). The ALJ found and Respondent concedes that it granted her the position on July 11 (ALJD 12:33).

Along with the promotion, Respondent awarded Downs-Haynes a long-awaited wage increase of 40 cents per hour (ALJD 12:38-39). The ALJ found, and Respondent does not contest, that Ruffcorn testified that the pay increase was due to her “experience” (ALJD 12:39-40; Tr. 441), while a supervisor told Downs-Haynes that it was due to the fact that “the job required more responsibility” (ALJD 12:40-41; CP Exh 1).

B. The ALJ Properly Found that Respondent Unlawfully Promoted Downs-Haynes with its Attendant Wage Increase as a Reward for Her Circulation of the Decertification Petition

The ALJ appropriately determined that, based on the uncontested facts, Respondent’s promotion of Downs-Haynes to the receiving clerk position and the accompanying wage increase violated §§ 8(a)(1) and (3) of the Act as a reward for her decertification activity. As discussed below, the arguments raised in Respondent’s Cross-Exceptions are misplaced and do not warrant reversal of these ALJ findings.

As a preliminary matter, contrary to Respondent’s assertions, the ALJ appropriately applied *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), to find that Respondent’s promotion of Downs-Haynes violated the Act. The Board has found that an employer violates the Act where

it provides better terms or conditions of employment to employees “in order to reward and encourage anti-union activity.” *Miramar Hotel Corp.*, 336 NLRB 1203, 1203 (2001) (employer violated the Act by giving pay raises to employees in reward for their role in decertification efforts). See also *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 606 (1999) (citing *General Clay Products Corp.*, 306 NLRB 1046, 1052-53 (1992)). Whether the improved terms and conditions of employment constitute a violation of the Act are addressed within a *Wright Line* framework. *Miramar Hotel Corp.*, 336 NLRB at 1211. See also *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 6 (2015) (“[t]he only difference between this case and a conventional *Wright Line* case is that here, the acts of discrimination said to have been motivated by the Respondent’s wish to rid itself of an unwanted union presence were not acts of discrimination against pro-union workers, but acts for the benefit of anti-union workers who signed a decertification petition”).

As noted above, the ALJ found and Respondent admits that Downs-Haynes engaged in extensive anti-union activity, that it was well aware of such activity, and that it awarded her the position of receiving clerk.³ Although Respondent contends that its actions were lawfully motivated and that any other action on its part would constitute discrimination *against* Downs-Haynes due to her anti-union activity, the ALJ appropriately determined that the timing of the promotion in relation to the anti-union activity, the departure from past practice, and evidence of a pretextual explanation all favored finding that Respondent had an unlawful motive and violated §§ 8(a)(1) and (3)

³ To the extent that Respondent argues that an adverse action, as opposed to a favorable promotion, is necessary to find that it violated the Act, such argument is clearly unsupported by Board law. See, e.g., *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 6 (2015) (increase in hours for employees who signed decertification petition violated §§ 8(a)(1) and (3)).

of the Act. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981). See also *Bethlehem Temple Learning Ctr.*, 330 NLRB 1177, 1178 (2000) (timing); *JAMCO*, 294 NLRB 896, 905 (departure from past practice).

With regard to timing, the ALJ properly found, in light of the uncontested facts of this case, that the “timing of events is highly suspicious” (ALJD 19:10). Respondent does not contest the ALJ’s findings that it did not interview Downs-Haynes for the receiving position at the time of her initial application or before she began her decertification activities. Nor does Respondent contest the finding that it only interviewed her after meeting extensively with Downs-Haynes regarding decertification and providing her with the Right to Work website. Instead, Respondent again argues, as it did before the ALJ, that the timing is consistent with “seeking to fill the position as quickly [and] reasonably as possible,” without “repeat[ing] a process that has been unsuccessful” (R. Br. 12-13).

Here, the ALJ accurately concluded that Respondent did not even interview either internal candidate in response to the initial posting in early June, even though it had both applications in its possession prior to offering the job to the external candidate (ALJD 19:15-16). The ALJ, in her discretion, specifically did “not credit Ruffcorn’s explanation that Downs-Haynes’ application was not brought to her attention until [...] after she had already offered the position” to the external candidate (ALJD 19:16-19). Since the record evidence demonstrates that the ALJ’s findings are well-founded, the Board should leave these credibility determinations untouched. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951) (Board’s established

policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence dictates they are incorrect).

The record is simply devoid of any other plausible explanation, beyond reward for anti-union activity, that would prompt Respondent to go from actively avoiding its only internal candidates even for an interview, to electing to solely interview and hire those same internal candidates a little less than a month later, especially in light of the experience of the external candidates. Accordingly, the ALJ appropriately found that the timing of Respondent's promotion of Downs-Haynes supported finding an unlawful motive in the awarding of the receiving clerk position.

With regard to departure from past practice, as noted above, the ALJ found, and Respondent does not deny, that it had a practice of considering external and internal candidates for positions (ALJD 10:32-33; CP Exh 3). Respondent's contentions before the Board merely constitute an attempt to reframe those already raised and properly rejected by the ALJ. In its Cross-Exceptions, Respondent focuses its argument on the fact that it reasonably and lawfully determined it would only pursue an internal candidate for the reposted receiving position, since it had already hired an external candidate who quit shortly after being hired. Respondent argues that, as a result of this purportedly lawful act, the only discrimination could be that of employees versus non-employees.

The ALJ appropriately rejected these and other similar arguments raised by Respondent, and nothing raised in Respondent's Cross-Exceptions warrants a different conclusion. In fact, as the ALJ properly noted, Respondent's decision to reject the entire "the entire pool of external applicants [as] unworthy of consideration" due to "one bad apple" constituted a "red flag" under the circumstances, especially due to its stark

contrast to Respondent's uncontested policy of giving internal and external candidates equal consideration (ALJD 19:35-39). Further, the ALJ accurately highlighted that Respondent's departure from policy was even more suspect given the volume of responses from external applicants to both the first and second postings (ALJD 19:31-32, 39-40), many of whom had significantly greater experience than the internal candidates Respondent ultimately chose to consider exclusively for the receiving clerk position. In sum, Respondent's illogical deviation from past practice supports a finding of unlawful motivation in promoting Downs-Haynes.

With regard to pretext, the ALJ correctly concluded, based on the uncontested record evidence discussed above, that "the consideration only of two internal candidates following the internal and external re-posting was a pretext to award the position to Downs-Haynes" (ALJD 20:12-14). Although Respondent excepts to this finding, its arguments neither warrant reversing the ALJ nor make sense in the context of Board law. For example, Respondent ponders in its brief how "awarding a clearly open position to an employee who engaged in anti-union activity" could constitute discrimination or discourage union activity, when "no one who engaged in pro-union activity was disfavored" (R. Br. 7). Clearly, Respondent need not punish pro-union employees in order to unlawfully reward anti-union employees for decertification activity. Taken at face value, Respondent's actions towards Downs-Haynes sent a clear message to its employees: here is your reward for helping us get rid of the Union, thank you.

Further supporting a finding of unlawful pretext is the fact that Respondent cannot even present a consistent message regarding why it granted Downs-Haynes the largest possible wage increase, something its own human resources director admitted was “rare” (Tr. 441:17-22). The ALJ appropriately highlighted Respondent’s conflicting rationales for the pay raise as one of the “too many irregularities” surrounding the circumstances (ALJD 20:4-9).

Simply put, Respondent’s actions make no sense if it was genuinely trying to fill a position with the best qualified candidate. However, they do make sense if Respondent promoted Downs-Haynes as a *quid pro quo* for her decertification activity. Even if Cole and Downs-Haynes did create the petition and begin the process of collecting signatures solely on their own, Ruffcorn clearly constructed a hiring process that guaranteed the job to Downs-Haynes as an implicit incentive and reward for this activity.

III. CONCLUSION

Based on the foregoing, it is respectfully submitted that the Board should deny Respondent’s Cross-Exceptions and affirm that Respondent violated §§ 8(a)(1) and (3) of the Act by promoting Downs-Haynes and granting her a wage increase.

DATED at Seattle, Washington, this 11th day of July, 2018.

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of Counsel for the General Counsel's Answering Brief to Respondent's Cross- Exceptions to Administrative Law Judge's Decision was served on the 11th day of July, 2018, on the following parties:

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