

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

**IMERYS CARBONATES USA, INC.**

**and**

**Case 10-CA-232952**

**ROBERT JOSEPH BLANTON, an Individual**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION, AFL-  
CIO**

**and**

**Cases 10-CB-232953  
10-CB-240168**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION, LOCAL 254-06,  
AFL-CIO**

**and**

**ROBERT JOSEPH BLANTON, an Individual**

**USW INTERNATIONAL AND USW LOCAL 254-06  
POST HEARING BRIEF**

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The USW and USW Local 254-06 (hereinafter Local 254) respectfully submit the following post hearing brief in response to the General Counsel's claims that the USW and Local 254 violated Sections 8(b)(1)(A) and 8(b)(2) of the Act in connection with the Employer's termination of the Charging Party Robert Blanton's employment. The USW and Local 254 deny that its agents threatened Mr. Blanton or any other employee, that they physically assaulted him, caused the Employer to terminate his employment and/or breached their duty of fair representation.

**I. Introduction and Summary of Facts:**

The General Counsel's case rests largely on the testimony of Mr. Blanton: an unreliable witness who exaggerates and traffics in conspiracy theories. The most dramatic conspiracy theory was that Local 254's President Darryl Ford, in exchange for hundreds of thousands of dollars, allowed the Employer to implement a bi-weekly pay period. Tr. 314:5-24; 315:3-11. Blanton called the USW headquarters to register his dissatisfaction with Ford and the Employer's proposed plan to change the pay period. When Alex Perkins (the USW staff representative filling in for Mr. Kelly Smith) reached out to Mr. Blanton to address his complaints about the Local Union, Blanton offered to split with Perkins the money he fancied he'd make from blowing the whistle on Mr. Ford and the Employer. *Id.*

Hoping to get to the bottom of Blanton's speculation about a kick-back scheme, Perkins contacted Ford to understand the bi-weekly pay period issue. Ford explained the situation and what he had done to stop the Employer from unilaterally implementing a bi-weekly pay period, actions which Perkins found to be reasonable. Not knowing Blanton's volatile nature, Perkins arranged a three way call so that Ford could explain to Blanton the status of the biweekly pay

issue and hopefully rectify the impression that “anybody was in bed with anybody.” Tr. 316:6-21.

Less than three minutes into the call, Blanton “went off.” Tr. 317. Blanton called Ford a “motherfucking liar” and that he didn’t believe “shit” Ford was saying. *Id.* In racially tinged language, Blanton told Ford that he wasn’t going to come up here in “\$200 tennis shoes” and “fool us boys up here in the hills.” *Id.* Blanton also accused Ford of “being in bed with the Company” and getting “paid thousands of dollars.” *Id.* Blanton made these accusations without an iota of evidence and then hung up. *Id.*

On Tuesday December 4, 2018 Joe Young held a meeting with the Local Union membership to discuss the status of the bi-weekly pay period issue. Tr. 250. Mr. Blanton did not show up at the meeting, so Young stopped by his work area (i.e. the loader) on the morning of December 6 to explain the status of the biweekly pay period issue and after hearing that Blanton was telling other co-workers that they could go on strike when the Company implemented the bi-weekly pay period. Tr. 205, 216, 250-51.<sup>1</sup> Young explained to other co-workers that a no-strike clause prevented them from going on strike over the biweekly pay period issue and he wanted to communicate the same message to Blanton. Tr. 251.

Consistent with his character and demeanor, Blanton did want to hear anything Young had to say. Blanton came down from his work station and before Young could explain the status of the biweekly pay issue and that the Union would not strike over the issue, Blanton started cursing and yelling at Young. Tr. 215. He tells Young that he didn’t want to hear anything from

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<sup>1</sup> Blanton testified during direct that the morning of December 6 he was talking to employees in the lab and telling them that the company couldn’t implement the bi-weekly pay period, that the union would file charges, that there was a six-month strike benefit fund and that they could go on strike. Tr. 41. On cross examination, he denies that he told employees they could go on strike. Tr. 113. This is just one of many contradictions.

his “flat lazy ass.” Tr. 215. Young however persisted in explaining the situation without cussing at Blanton because he wanted Blanton to understand they could not strike over the biweekly pay issue. Tr. 215, 217, 234.

Rather than end the conversation and climb back up to his work station on the loader, Blanton started towards the breakroom. Tr. 218. Young followed Blanton because he wanted Blanton to hear him out and understand what was going on with the grievance process. Tr. 218-219. Blanton claims that Young somehow “chest bumped” him while walking behind him and even though Blanton was walking at a fast pace. Tr. 220. Young denies that he “chest bumped” Blanton and the sheer physics of this alleged “chest bump” defies common sense. Tr. 253-54. Contrary to Blanton’s unreliable testimony, Young did not threaten Blanton to kick his ass or to physically harm him. Tr. 253. Nor did Young tell Blanton that he should quit because the Union wasn’t going to help him. Tr. 251. Everyone that witnessed their interaction testified that Young never threatened Blanton and that he was trying to calmly talk to him. To believe Blanton’s version of events, one would have to discredited Young, Ruel Johnson, Doug Harper and Jeremiah Jerrit.

All the witnesses agree that when Blanton and Young were in the breakroom, Blanton continued cursing at Young and shoved him in the chest. Tr. 267-68, 301-302, 427. Blanton violated the cardinal rule: don’t put your hands on another co-worker during an argument. Doug Harper was so alarmed by Blanton’s behavior that he contacted management to report the incident. Tr. 268-269

After Blanton shoved Young, he walked out of the breakroom. Tr. 221-222. Young stayed behind for a few seconds and then left the breakroom. *Id.* (UEX 4: Shannon Smith reported that Blanton said Young did not follow him out of the breakroom) When Young

reached the mule, Blanton was at the Raymond Mill office and he continued cursing at Young. Tr. 235. Young got into the buggy (as referred to as the mule) and Ruel Johnson drove him across the creek to the crusher. Tr. 223, 236.<sup>2</sup>

Later that morning, Sonny Pierce visited Young at the crusher and asked him if Blanton had laid hands on him. Tr. 200. In an effort to minimize what Blanton had done, Young said that Blanton had given him a “schoolyard” push and that it was no big deal to him. Tr. 223. Young was clearly not seeking to get Blanton in trouble. Significantly and undisputedly, Young did not report the incident to management and he did not ask anyone to report it. Tr. 223-224. He was simply answering questions as an employee that his supervisor asked him.

The Employer conducted an investigation into the incident and interviewed several witnesses whose statements were recorded in a memorandum prepared by Mr. Shannon Smith. UX 4. When the Employer told Blanton that he was being discharged for putting his hands on Young, Blanton left the plant and parked his car on the other side of road. Tr. 275. This conduct unnerved some of the employees. *Id.*

On December 13, 2018, Mr. Ford filed a grievance concerning the Employer’s termination of Mr. Blanton. Tr. 141, UEX 3. The grievance was then taken over by Kelly Smith. Tr. 390, 405. Incidentally, Mr. Smith had been on medical leave and his first day back was December 7, 2018, the day after Blanton’s termination. Tr. 402, 404. During his medical leave, it is undisputed that Smith had no contact or interaction with Mr. Blanton. Tr. 442.

As stated with more detail below, Mr. Smith set up a third step grievance meeting and requested information from the Employer which included evidence involving comparators. Tr. 411-412. Mr. Blanton was informed of the third step meeting, he attended the meeting and was

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<sup>2</sup> Ruel Johnson contradicts Blanton’s testimony that when he and Young returned from the break room, they circled around the mule while arguing. Tr. 235-36.

allowed to present his side of the story. Tr. 405. Mr. Smith also interviewed all the witnesses the Employer had interviewed and he discussed with them the statements that the Employer had recorded in a report/memo. Tr. 416-418. Mr. Smith also interviewed Tylor Waters, the employee that Mr. Blanton had identified as supporting his version events. Tr. 422-23. According to Mr. Smith, Waters did not state that he saw Young “chest bump” Blanton. Tr. 422-23. This was consistent with what Waters told Alex Perkins who was the first person to interview Waters after Blanton’s termination. Tr. 337-338.

After reviewing the facts presented, speaking to the witnesses the Employer interviewed and considering Blanton’s hothead temperament and recent hire date, Mr. Smith made the decision not to arbitrate the Blanton termination grievance. Tr. 431-432. Mr. Ford and Mr. Young had no involvement in this decision. Tr. 256, 390. Mr. Smith did not believe that the Union could prevail at arbitration so he informed Blanton that the grievance would not be arbitrated. GCX 4. Prior to receiving the January 26, 2018 letter regarding the disposition of the termination grievance, Blanton had contact with the USW regarding the status of the termination grievance. Tr. 75.

## **II. Legal Analysis.**

The General Counsel failed to prove by a preponderance of the evidence (1) that the USW and/or Local 254 caused Mr. Blanton’s termination since it’s undisputed that, among other things, neither the USW nor Local 254 reported the incident between Blanton and Young to management; (2) that the USW and/or Local 254 breached the duty of fair representation by not arbitrating the Blanton termination grievance and (3) that the USW and/or Local 254 violated the Act by threatening Mr. Blanton and/or physically assaulting him. Mr. Blanton’s version of events simply lack credibility and are almost entirely uncorroborated. The mere fact that Mr.

Blanton was fond of yelling and cursing at his co-workers and at Joe Young doesn't mean the USW and/or Local 254 harbored animus towards his alleged protected activity. Nor does the fact that Mr. Young calmly but persistently sought to correct Blanton's erroneous and frankly far-fetched ideas about Local 254's handling of the bi-weekly pay period issue support the charge that the USW and/or Local 254 are responsible for Blanton's outbursts and more importantly his violation of the Employer's policy prohibiting employee's from laying hands on a co-worker. There is no question Blanton put his hands on Young and that in doing so was deemed the aggressor.

Before addressing the evidence and allegations leveled in the Complaint against the USW and Local 254, the USW seeks dismissal of all allegations on the grounds that it was not named in charge filed prior to expiration of the 10(b) limitations period.

**A. All Complaint allegations against the USW International are untimely and must be dismissed.**

As Respondent USW International has argued in its Motion to Dismiss submitted at the hearing, all charges filed against it are untimely and must be dismissed. It is undisputed that NLRB Charge No. 10-CB-232953, filed December 18, 2018; NLRB Charge 10-CB-240168, filed April 24, 2019; and NLRB Charge No. 10-CB-232953 [First Amended], filed June 5, 2019 name USW Local 254-06 as the sole Charged Party. On August 30, 2019, Second Amended Charge No. 10-CB-232953 was filed. The Second Amendment added the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO ("the USW International") as a party, and made no other amendments. On September 6, 2019, Second Amended Charge No. 10-CB-240168 was filed. The Second Amendment added the USW International as a party, and made no other amendments.

All charges against the USW International were filed more than six months after the conduct alleged in the Complaint, and must therefore be dismissed. The Complaint alleges that on December 6, 2018, the International Union, through Local 254-06 steward Joseph Young “threatened employees with physical violence;” “physically battered employees;” and made other threats to employees. Compl. ¶ 7(a); (b) (c). Additionally, the Complaint alleges that on December 6, 2018, the International Union “informed” Employer Imerys Carbonates that Charging Party “had engaged in a physical altercation” and that by this conduct the International Union “attempted to cause and caused” Employer Imerys to discharge Charging Party Robert Blanton. Compl. ¶ 8(a); (b). The charges against the International were filed on August 30 and September 6, 2019, more than six months after December 6, 2018, and must therefore be dismissed as time-barred by Section 10(b) of the Act.

The Complaint additionally alleges that on December 7, 2018; the International Union, through Local 254-06 Union President Darryl Ford, threatened employees with job loss. Compl. ¶ 9. The charges in this matter were filed against the International Union more than six months after December 7, 2018, the date of the alleged conduct. The charges against the International were filed on August 30 and September 6, 2019, more than six months after December 7, 2018, and must therefore be dismissed as time-barred by Section 10(b) of the Act.

Further, the Complaint alleges that since “about” January 26, 2019, the International Union has “failed to process to arbitration a grievance concerning the Charging Party.” Compl. ¶ 10. On January 26 or 27, 2019, International Union Staff Representative Kelly Smith sent the Charging Party a letter dated January 26 notifying Charging Party Robert Blanton that the International Union had made the decision not to arbitrate the grievance filed challenging his termination. Blanton received this notification “shortly” or “a couple days” after the January 26

mailing date. G.C. Ex. 4; Tr. 131:6-21. The charges against the International were filed on August 30 and September 6, 2019, more than six months after January 26, 2019 and more than six months after Blanton received the letter “a couple days” later, and must therefore be dismissed as time-barred by Section 10(b) of the Act.

It is axiomatic that a party must be named in a charge to properly be bound by an Order by an Administrative Law Judge. The Act and black letter Board law hold that a complaint may not issue based upon conduct occurring more than six months before the filing and service of the charge. 29 U.S.C. §160(b); *St. Barnabas Medical Center*, 343 NLRB 1126 (2004). In this case, the Charging party clearly and unequivocally knew on or about January 29, 2019 when he received Kelly Smith’s letter that the International Union was not proceeding to arbitration on his grievance. *See Linden Maintenance Corp.*, 280 NLRB 995, 996 (1986) (indicating that the 10(b) period began to run on a duty of fair representation claim when an employee was clearly informed that his grievance would be abandoned). Yet, he waited until September 6, 2019 to amend his charge in case 10-CB-240168 to add the International Union as respondent, more than six months after he received notice that his grievance would not be arbitrated. Accordingly, the charge in case 10-CB-240168 is clearly time-barred and must be dismissed.<sup>3</sup>

In addition, the complaint makes clear that the Charging party knew of alleged conduct that forms the basis of the complaint allegations in paragraphs 7 and 8 no later than December 6 and 7, 2018. The Charging Party was well aware of the distinction between the Local and the International Union, having spoken with representatives of both entities who clearly identified themselves in December of 2018. Rather than file a timely charge, the Charging party waited

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<sup>3</sup> The standard in *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988) permitting amendment of complaints to add closely related allegations has never been applied to the addition of a party, only to the addition of alleged violations of the Act against the same party.

more than eight months until August 29, 2019 to add the International Union as party. Thus, the allegations in paragraphs 7 and 8 against the International Union must be dismissed as time-barred.

The Board applies a limited exception to the rule that a party must be named where “one member of an alter ego or single employer is served with a timely charge and complaint.” *U-Haul Co.*, 2005 WL 2574009 (ALJD, Sept. 30, 2005) (citing *Horizons Hotel Corp.*, 322 NLRB 214, 216 (1996); *II Progresso Italo Americano Publishing*, 299 NLRB 270, 273 fn. 4 (1990)). Such service is found to be “service on all members of the alter ego or single employer.”<sup>4</sup> *Id.* (holding service on one entity to comprise proper service on another where they are “a single integrated enterprise, single employer and joint venturers”). The Board will find related entities to be “alter egos” where they share “substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership” and show an “absence of any arm's-length relationship between the entities also suggests the existence of alter ego status.” *Horizons Hotel Corp.*, 322 NLRB 214, 216 (1996).<sup>5</sup>

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<sup>4</sup> An analogy may be made to the law under Title VII of the Civil Rights Act, where courts hold that dismissal of a Title VII complaint against a defendant is proper where the defendant is not named in an EEOC charge alleging a Title VII violation. *See, e.g., Knafel v. Pepsi-Cola Bottlers of Akron*, 899 F.2d 1473, 1480–81 (6th Cir. 1990) (“The rule in this circuit is that a party must be named in the EEOC charge before that party may be sued under Title VII unless there is a clear identity of interest between the unnamed party and a party named in the EEOC charge.”)(citations omitted). “It is well settled that a party not named in an EEOC charge may not be sued under Title VII unless there is a clear identity of interest between it and a party named in the EEOC charge or it has unfairly prevented the filing of an EEOC charge.” *Jones v. Truck Drivers* 748 F.2d 1083, 1086 (dismissing suit against union where only employer had been named in EEOC charge); *Knafel*, 899 F.2d 1473, 1480–81 (“a ‘clear identity of interest’ implies that the named and unnamed parties are virtual alter egos.”).

<sup>5</sup> The burden of showing an alter ego relationship is on the party seeking to assert it. The General Counsel in this case did not even attempt to make such a showing.

This exception does not apply to the International and the Local in this case. The Board has held, consistent with the Supreme Court's ruling in *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979), that there is a "legal distinction" between Local and International Unions, and that there is no derivative legal duty between these entities. *Caravan Knight Facilities Mgmt.*, 362 NLRB 1802, 1817 (2015) (dismissing International union from case alleging violations of 8(b)(1) and 8(b)(2) where International did not play a role in alleged unlawful conduct). In *Carbon Fuel*, the Supreme Court stated that Section 301 of the Labor Management Relations Act is "Congress' clear statement of the limits of an international union's legal responsibility for the acts of one of its local unions." *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 217-18 (1979). *See also Shimman v. Frank*, 625 F.2d 80, 97 (4th Cir. 1980 (The "International Union is a separate body from [its] local[s].")

There is simply no question that as a matter of fact and of law the USW International is a separate legal entity from Local 254-06. The two entities are not alter egos, are not a single employer, and do not have any agency relationship to each other unless one is created through conduct. The International is bound by its Constitution, which is adopted by a body of the International, applies to the International, and creates a "chartering" relationship between the International and USW Locals. U. Ex. 18; Tr. 494:20-499:3. The Local is governed by its by-laws. U. Ex. 19; Tr. 499:24-502:4. The International and the Local file separate annual LM reports with the federal government, as required of all labor organizations. U. Ex. 20; U. Ex. 8; Tr. 358:1-25; 503:9-504:21. The International is governed by its Executive Board, and the Local has its own elected officers. The two entities have entirely separate assets, and the International has no access to or authority over the finances of the Local, which are solely in the control of the Local's officers and financial committee. Tr. 504:23-505:17; 508:7-509:10.

Because the charges against the USW International were filed out of time under Section 10(b) of the Act, and service on Local 254-06 does not constitute timely service on the International, a separate legal entity, all allegations against the International must be dismissed. Most notably, the evidence has shown that the decision not to advance the grievance challenging termination to an arbitration hearing was made solely by the USW International through its agent International Staff Representative Kelly Smith. Local 254-06 did not direct, advise, or participate in this decision. Tr. 390:8-23; 432:2-433:14. G.C. Ex. 4. Therefore, the allegations in the Complaint that the Respondents violated the duty of fair representation by failing to arbitrate Mr. Blanton's grievance must be dismissed in their entirety. Compl. ¶ 10.

**B. The undisputed evidence establishes that the USW and/or Local 254 did not violate Section 8(b)(2) and thus these allegations should be dismissed.**

“In determining whether a union has violated Section 8(b)(2), the Board has applied both the analytical framework set forth in *Wright Line* and the duty-of-fair-representation framework.” *Caravan Knight Facilities Mgmt.*, 362 NLRB No. 196 (Aug. 27, 2015). In applying the duty of fair representation standard, the Board has held that “whenever a labor organization causes the discharge of an employee, there is a rebuttable presumption that it acted unlawfully,” and the Union may rebut this presumption by showing that “its actions were done in good faith, based on rational considerations, and were linked in some way to its need effectively to represent its constituency as a whole.” *Caravan Knight Facilities Mgmt.*, 362 NLRB No. 196. Under *Wright Line*, the union may rebut a prima facie case of discrimination by “establishing that it would have taken the same action even in the absence of [an employee’s] protected union activity.” *Caravan Knight Facilities Mgmt.*, 362 NLRB No. 196.

The Board applies the 8(b)(2) inquiry, however, only “[w]here a union is found to have caused an employer to take adverse action against an employee.” *SSA Pacific*, 366 NLRB No. 51

(Apr. 3, 2018). If the Union did not cause the Charging Party's termination, the Union has not violated 8(b)(2). This is because this Section of the Act aims to "separate membership obligations owed by employees to their bargaining representatives from the employment rights of those employees." 366 NLRB No. 51 (citing *IBEW Local 1547 (Rogers Electric)*, 245 NLRB 716, 717-718 (1979)). The prohibition on union causation of employee discipline, therefore, creates a "wall between organizational rights and job opportunities." *Id.*

It follows that where no conduct attributable to a union or a union agent has a causal relationship with the Employer's disciplinary actions, there is no liability under this Section of the Act. "To establish a violation of Section 8(b)(2), there must be some evidence of union conduct; it is not sufficient that an employer's conduct might please the union." *Caravan Knight Facilities Mgmt.*, 362 NLRB 1802, 1804 (2015) (citing *Wenner Ford Tractor Rentals, Inc.*, 315 NLRB 964, 965 (1994)). Where there is no evidence that the Union requested that the Employer take an adverse employment action, and there is no "reasonable inference" that can be drawn showing that the Union made such a request, causation has not been established. *See Int'l Union of Operating Engineers*, 337 NLRB 544, 545 (2002); *Toledo World Terminals*, 289 NLRB 670, 673 (1988) (where union "made no request" to remove employees from hire list, Board find that it is not "reasonable to infer" that the union "participated in their removal" from evidence of the union's "hostility" to employees' union political activity.)

In this case, the General Counsel's Complaint alleges in Paragraph 8(a) that the Union "informed Respondent Employer that the Charging Party, an employee of Respondent Employer, had engaged in a physical altercation with Joseph Young in which the Charging Party acted as the aggressor," and that "[b]y the conduct described above in paragraph 8(a), Respondent Union attempted to cause and caused Respondent Employer to discharge the Charging Party." The

General Counsel's case with respect to a violation of Section 8(b)(2) therefore rests on proving that the Union or some Union agent informed the Employer of Blanton's conduct, and that this act caused Blanton's termination. The evidence at the hearing failed entirely to establish that the Union made a report or otherwise informed the Employer of Blanton's conduct.

The evidence at the hearing showed that the Employer terminated Robert Blanton because its investigation determined that he had violated a work rule that mandated discharge for his conduct. Tr. 450:23-451:5. The uncontroverted evidence shows that no agent of the Local or International Union requested that Blanton be discharged or disciplined. The Employer representative who made the decision to terminate Blanton, Shannon Smith, testified that no person speaking on behalf of the Union informed him of the incident. Tr. 445:1-6.

The General Counsel failed to introduce any evidence, direct or circumstantial, of such a request. *See Avon Roofing & Sheet Metal Co.*, 312 NLRB 499 (1993) ("An 8(b)(2) violation can be established by direct evidence that the union sought to have the employer discriminate, or by sufficient circumstantial evidence to support a reasonable inference that the union requested that the employer discriminate"). Nor did the General Counsel show that the Union effectively caused the termination by making a report of employee conduct that it was aware would lead to termination. *See, e.g., Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997).

The evidence shows that employee Doug Harper, who witnessed Blanton yelling, cursing, and pushing Young, reported Blanton's conduct to management. Tr. 224:1-13; 268:10-270:8. Harper explained that no Union agent asked him to report the incident. Tr. 270:9-16. In fact, no one asked him to report the incident; he did so on his own initiative. Tr. 270:9-23.

Harper testified that he was motivated to report the incident by a concern for safety and the “alarming” nature of Blanton’s behavior. Tr. 270:12-16.

Harper was not a union agent. He held no position with the Local or International Union. Tr. 224:1-15. Moreover, Harper did not report the incident out of any particular interest in the subject matter of the conversation between Young and Blanton. He did not make the report in order to further the interests of the Union in any way. Tr. 270:12-16.

Joseph (“Joe”) Young, the unit chair for the Imerys Whitestone unit of USW Amalgamated Local 254, testified that he was pushed twice by Robert Blanton while Blanton was loudly cursing and yelling at him. Tr. 220:17-221:5. Young’s uncontradicted testimony shows that he did not report Blanton’s conduct, did not ask anyone to report it, and did not notify any official of the Local or International Union about the conversation or about Blanton’s actions. Tr. 223:21-25; 256:5-21. After the incident, Young reported to his work station and went directly to work. Tr. 223:1-4.

While at his work station, Young was approached by his direct supervisor, Sonny Pierce. Pierce asked Young whether Blanton had touched him. Young answered truthfully in the affirmative, and added that it was only a “schoolyard push” and “no big deal.” He told Pierce that the interaction was about “Union business.” Tr. 223:5-24. Later in the morning, Sonny Pierce returned and instructed Young to report to the Employer’s office. On the porch of the office, Employer representative Shannon Smith asked Young about the incident. Tr. 225:20-226:12. These brief interactions are the sum total of the information Young gave to the Employer about the incident.

Young was not acting as a Union agent when he responded to questions from the Employer. The Board recognizes that “a union is not responsible for every act of a shop steward,

simply by virtue of his position. If he acts only as an individual rather than within the authority the union has conferred, the union is absolved.” *Caravan Knight Facilities Mgmt.*, 362 NLRB 1802, 1804 (2015) (citing *NLRB v. Teamsters Local 815*, 290 F.2d 99, 104 (2d Cir. 1961)). In both interactions, Young was an employee witness participating in the Employer’s investigation at the Employer’s behest. Both interactions were initiated by Employer representatives, and not by Young. Pierce’s questions to Young were in the nature of a Company investigation following a report of workplace violence. Shannon Smith testified that he had sent Pierce to “gather up everybody that witnessed anything.” Tr. 446:2-8. Pierce spoke to Young because he was a witness, not because he was a Union representative. Young responded in his capacity as an employee instructed to comply with an employer investigation, and not in his capacity as a steward or unit chair of Local 254-06.<sup>6</sup> Nor was Young acting at the direction of any Union agent in responding to the Employer inquiries.<sup>7</sup> Young did not speak with any Local or International official between the time of Blanton’s outbursts and the questioning by Pierce. Tr. 223:1-4.

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<sup>6</sup> Young told Pierce that he and Blanton had been discussing “union business.” This reference to the subject matter of the interaction is insufficient to show that Young was acting as a Union agent when he answered his supervisor’s questions. In fact, Young testified mentioned the nature of the discussion not to invoke his status or role as a Local steward, but to deflect Pierce’s inquiry. Young’s referenced “union business” in an attempt to show Pierce that the Company did not need to be involved and that no action needed to be taken. This was consistent with Young’s approach to the conversation, which was to downplay Blanton’s push, characterizing it as a “schoolyard push” and as “no big deal.” Tr. 223:6-15.

<sup>7</sup> To the extent that Young was acting as a Union agent when answering questions from Pierce and Smith, Young was an agent of Local 254-06, and not of the USW International. The conversations in question took place on December 6, 2018. Young testified that he holds no position with the USW International, and that on December 6, 2018 he had not spoken to International Staff Representative Alex Perkins, International Staff Representative Kelly Smith, or any other representative of the International regarding the payroll period change, the grievance concerning the change, or Mr. Blanton’s comments to other employees that they could strike over the issue. Tr. 258:3-259:10.

Young testified that he felt compelled to answer Pierce's inquiry because Pierce was his direct supervisor. Tr. 224:17-21. Young's role in the Local did not require him to refuse to cooperate with a workplace investigation, nor would his position have shielded him from the possibility of employer discipline if he had refused to comply with the employer's requirement that he answer these questions. *See Caravan Knight Facilities Mgmt.*, 362 NLRB 1802, 1804 (steward who gave witness statement to employer regarding threat of violence that resulted in employee's discharge "was not acting as the Union's agent when she submitted her witness statement").

Nevertheless, regardless of Young's role at the time he answered questions from Pierce and Smith, those interactions did not cause Blanton's discharge and therefore did not violate Section 8(b)(2). An employee witness statement given by an employee who holds a union position does not, without more, constitute causation of discipline such that it gives rise to a "rebuttable presumption" that the union acted unlawfully. *Caravan Knight*, 362 NLRB at 1805. In *Caravan Knight*, the Board specifically held that a witness statement by a union steward had caused the employee's discharge only where a steward had (jointly with the Local's President) "reported [the Charging Party's] threat" and "[the steward] submitted a witness statement supporting that report," and the President and the steward "knew full well that doing so would in all likelihood result in [the Charging Party's] discharge." 362 NLRB 1802, 1805 (2015). Here, Young's answers to Pierce's questions were not in support of a report made by Young or any Union agent. Nor did Young know that by answering truthfully that Blanton had pushed him, the Employer could find that Blanton had violated its zero-tolerance workplace violence policy. In *Caravan Knight*, the evidence showed that the Union agents making the report of a threat had previously been directly involved in a similar situation which led to an employee's discharge. *Id.*

By contrast, Young was not aware of the Employer's specific rule on fighting in the workplace and the penalty assigned to being the aggressor in a fight. Tr. 223:15-21.

The General Counsel's case that Young "informed" the Employer of Blanton's conduct also fails on the theory that Young withheld key information, causing the Employer to determine, allegedly incorrectly, that Blanton was the aggressor in the interaction. Young answered Pierce's direct questions about Blanton's conduct and did not volunteer a chronological accounting of the interaction. Young was not asked to describe the sequence of events in the interaction or his and Blanton's positions relative to each other while walking. Young was under no obligation to offer a schematic of the events—he was obliged only to answer the questions presented to him truthfully.

Any alleged omission in Young's accounting of the facts to Pierce was not material to the results of the Employer's investigation of the incident. The Employer's determination to discharge Blanton was a product of its investigation, which consisted of multiple witness statements. The fact that Young walked behind Blanton and persisted in trying to speak calmly to him while Blanton raged was not material to Blanton's termination. The Employer was aware of Young and Blanton's relative positions while walking, and did not find this information to be exculpatory. The Employer based its determination on Blanton's conduct, which it found to violate its workplace violence policy. Tr. 450:23-452:11.

The Employer's investigation focused on the initiation of physical contact, and found Blanton to be the initiator in that respect. U. Ex. 4; Tr. 450:23-452:11. Therefore, Young's telling of the facts to Pierce did not cause Blanton's termination. The Employer's finding that despite Blanton's claims to the contrary, the witness statements showed that Blanton was the

only person to engage in physical aggression is not dependent on any alleged omission by Young.

**C. The GC Counsel’s evidence does not establish that the USW and/or Local 254 breached the duty of fair representation when the USW failed to process to arbitration a grievance concerning Blanton’s termination of employment. (GCX 1 Consolidated Complaint ¶¶ 10-12)**

In paragraphs 10 through 12 of the Complaint, the General Counsel alleges that the USW and Local 254 failed to arbitrate the grievance concerning Blanton’s termination “for reasons that are arbitrary, discriminatory or in bad faith” and thus “breached the fiduciary duty they owed to Mr. Blanton and the unit.” Specifically, the General Counsel’s complaint alleges that the decision not to arbitrate Blanton’s discharge was because Blanton “had criticized and attempted to decertify the Respondent Union.” (Complaint ¶ 11) The General Counsel has not proven that Blanton’s criticism of Local 254 and any alleged mention of “decertification” motivated the decision not to arbitrate Blanton’s discharge grievance.

**1. Section 8(b)(1)(A)’s Duty of Fair Representation Standard**

The basic proposition as set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967) is that a union must represent all unit employees fairly, that it must administer the contract's grievance-arbitration provision fairly and in good faith, and that it violates that duty when its conduct toward a unit member is arbitrary, discriminatory or in bad faith. Unions are afforded a "wide range of reasonableness" in serving the unit that it represents, *Ford Motor Co. v. Huffman* 345 U.S. 330, 338 (1953), and they have discretion in determining whether grievances merit being processed. Mere negligence, poor judgment, or ineptitude on the part of the union is insufficient to establish a violation of its obligation to represent all unit employees fairly. *Local Union No. 195, Plumbers (Stone & Webster)*, 240 NLRB 504, 508 (1979). A union's actions are considered arbitrary only if the union has acted "so far outside 'a wide range of reasonableness' as to be

irrational." *H&M International Transportation, Inc.* 363 NLRB No. 139, 2016 NLRB LEXIS 165, \* 165-171 (2016)(quoting *Air Line Pilots Assn., International v. O'Neill*, 499 U.S. 65, 66, (1991) which quoted *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

As the Board noted in *Central Ky Branch 361 (NALC)*, 367 NLRB No. 19 (2018), 2018 NLRB LEXIS 462 at \* 31-32 (Oct. 16, 2018) the Supreme Court in *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 66, 78, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991), held that because a Union's actions are "arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational[,] any subsequent examination of a union's performance, therefore, must be highly deferential . . . Thus, a union has a broad range of discretion in carrying out its representational duties, including grievance handling, and an individual does not have an absolute right to have a grievance filed or have it processed through arbitration.”

In *Glass Bottle Blowers, Local 106 (Owens-Illinois)*, [240 NLRB 324 \(1979\)](#), the Board stated:

Where, as here, a union undertakes to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merit of the grievance but rather on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations." *See also Local 3036 Taxi Drivers Union (Linden Maintenance)*, [280 NLRB 995, 996 \(1986\)](#).

With respect to the issue of “perfunctory” disposition of a grievance, a union is not required to carry out an investigation of the same scope and rigor as one that the Region might carry out or to follow any particular procedures in processing an employee's grievance. *See Pacific Maritime Assn.*, [321 NLRB 822, 823 \(1996\)](#); *Asbestos Workers Local 17*, [264 NLRB 735, 735-736 \(1982\)](#); *Local Union No. 195, Plumbers*, [240 NLRB 504, 504 fn. 3 \(1979\)](#) It has

been held that a union has not breached its duty of fair representation, notwithstanding the fact that certain aspects of its conduct such as the quality of their investigation, could be subject to criticism. *Douglas Aircraft Co., a component of McDonnell Douglas Corp.*, 307 NLRB 536, 557 (1992) (union did not violate Act, although it failed to speak to some witnesses and failed to speak to charging parties before withdrawing grievance). The following cases stand for the general propositions that (1) mere negligence or mismanagement of a grievance is insufficient to find a breach of the duty of fair representation or to infer ill will or discriminatory motive and (2) that union representatives are not held to the same standards as lawyers or NLRB agents investigating a charge:

- *Laborers Local 1191 (S. J. Groves & Sons)*, 292 NLRB 1022, 1024 (1989)(although union made only a "casual" request that charging party be reinstated, and erroneously directed charging party to mail grievance to the union rather than employer, which caused grievance to be time barred, no violation found as the union's conduct was found to be mere negligence, and not arbitrary or perfunctory conduct);
- *Diversified Contract Services*, [292 NLRB 603, 605-606 \(1989\)](#) (Board reverses ALJ, and concludes that although union failed to discuss company's position with charging party before meeting with company, failed to inform her of meetings, and did not conduct a full scale investigation, these factors did not amount to perfunctory representation, but mere mismanagement which is not arbitrary);
- *Local 64 Bartenders (HLJ Management Group)*, 278 NLRB 773 (1986) (no violation found, although union at grievance meeting failed to address an issue raised by charging party, and agreed at meeting with employer's position that dismissal was for cause. The Board in footnote points out that union representative's duties in prearbitral stages, are not the same as duty owed by an attorney to a client or the duty of a union to be an advocate once in arbitration);
- *Rainey Security Agency*, 274 NLRB 269, 270 (1985) (the Board reverses ALJ's finding of perfunctory representation. The Board concludes that conduct relied on by ALJ, such as delay in appointing steward, failure to maintain reasonable contact with employees and to keep them informed, constituted ineptitude or mismanagement, but not arbitrary or perfunctory representation);

- *Local 17 Asbestos Workers (Catalytic, Inc.)*, 264 NLRB 735, 736 (1982) (no violation found, although union representative agreed with employer's position without any protest);
- *Local 3217, Communications Workers (Southern Bell Telephone)*, 243 NLRB 85, 86-87 (1979) (no violation, although charging party was never interviewed by union representatives and was never told the status of her grievance);
- *Local Union No 195 (Stone & Webster)*, supra (no violation found, although ALJ found that union did not conduct an efficient investigation, and accepted employer's position);
- *Local 355 Teamsters (Monarch Institutional Foods)*, 229 NLRB 1319, 1320-1321 (1977) (The Board reverses ALJ who found violation on grounds that union had ignored a viable provision in contract in processing grievance. The Board concludes that "duty of fair representation does not require that every possible option be exercised or that grievant's case be advocated in a perfect manner.").

Thus, based on the foregoing, it becomes apparent that arbitrary or perfunctory representation is not established merely because a union might have conducted a more thorough investigation, or failed to raise particular arguments in support of a grievance. As the Board has observed, "the issue here is not whether the [union] discharged its obligations with maximum skill and adeptness, but whether, in undertaking its efforts, it dealt fairly. The duty of fair representation does not require that every possible option be exercised or that a grievant's case be advocated in a perfect manner." *Monarch Food*, [229 NLRB at 1321](#); *Local 327 Teamsters (Kroger Co.)*, [233 NLRB 1213, 1217 \(1977\)](#) (although union official did not seize upon possible inconsistencies in witnesses' testimony, "the duty of fair representation in representing employees in grievances does not require that each case be handled with the expertise of a trial lawyer").

2. **The General Counsel has not established that the USW and Local 254 violated Section 8(b)(1)(A) in the processing and handling of the grievance concerning Charging Party's termination of employment.**

The 8(b)(1)(A) duty of fair representation theory set forth in the Complaint focuses on the allegation that the USW and Local 254 failed to arbitrate the grievance because Blanton criticized the USW and Local 254 and attempted to decertify the Union. The record evidence does not support this theory of the case.

**(a) Procedural background concerning the Blanton termination grievance.**

The Company terminated Mr. Blanton's employment on December 6, 2018 because he admitted to pushing Mr. Young in the breakroom. Tr. 12. It is undisputed that on December 13, 2018, Local 254 filed a grievance regarding Mr. Blanton's termination. (UEX 4) The grievance was processed to the third step and turned over to the USW staff representative Kelly Smith. Tr. 390, 405. Mr. Smith scheduled and attended a third step grievance meeting on January 10, 2019. Tr. 405. Kelly Smith (a USW staff representative) made the decision not to arbitrate the termination grievance concerning Mr. Blanton. Tr. 390. The Local Union did not make this decision because once the grievance is in the third step of the grievance process, the USW staff representative takes over. *Id.*

**(b) Local 254 did not make the decision regarding arbitration.**

There is no evidence or claim that Local 254 controlled (let alone influenced) Mr. Smith's decision not to arbitrate the Blanton termination grievance. Nor is there evidence that Local 254's officers recommended such outcome. Mr. Kelly Smith's decision not to arbitrate the discharge grievance concerning the Charging Party cannot be imputed to Local 254. *See, Hi Way Paving Co.*, 297 NLRB 835, 840 (1990) (finding that a Trial Board's imposition of a fine did not violate 8(b)(1)(A) because there was no showing that the Local Union officer responsible for filing charges against Charging Party controlled the Trial Board). Because the only allegation in the complaint regarding the processing of Blanton's grievance concerns the decision not arbitrate

and that decision was made by the USW staff representative Kelly Smith, Local 254 cannot be found liable for breaching its duty of fair representation with respect to the processing and handling of Blanton's termination grievance.

(c) **Kelly Smith's decision not to arbitrate the Charging Party's termination grievance was not discriminatory or made in bad faith.**

The General Counsel failed to introduce evidence establishing that Mr. Smith made the decision not to arbitrate the grievance regarding Charging Party's termination because Blanton criticized Local 254's officers or allegedly sought to decertify the Union. First, it is undisputed that during contract negotiations and the subsequent dispute over pay roll periods, Mr. Smith was on a medical leave. Tr. 402, 404. During his medical leave, Mr. Alex Perkins filled in for Mr. Smith. Tr. 310, 404. Mr. Smith had **no contact or interaction** with Mr. Blanton during his leave (i.e. prior to Blanton's termination). Tr. 442. Mr. Smith's first day back from leave was the day after the Employer terminated Blanton's employment. Tr. 442. The lack of interaction between Blanton and Smith undercuts the General Counsel's allegation that the USW (acting through Mr. Smith) failed to process the Blanton termination grievance to arbitration for discriminatory or bad faith reasons.

Second, Mr. Blanton's criticisms were directed at the Local Union officers and not staff representatives Mr. Perkins and/or Mr. Smith. Indeed, Mr. Blanton testified that "if all the people that I dealt with treated me the way Alex Perkins did, we probably wouldn't be sitting here." Tr. 103. There is no evidence that Mr. Smith discriminated against Blanton because Blanton criticized Darryl Ford and Joe Young. As Perkins testified, it's not uncommon that staff representatives respond to calls from union members criticizing their local union or wanting to get out of the union. Tr. 311-312. Moreover, the mere fact that a charging party criticizes and is hostile towards some of his Union representatives does not support the inference that all Union

representatives (or even the ones the charging party doesn't like) harbored animus towards the charging party's protected activity and acted on such animus. *See Nat'l Ass'n of Letter Carriers*, 333 NLRB 343, 351 (2001) ("ill will" and "animosity" between grievant and Union, and unlawfully coercive statements by Union representative "that the Union might not represent members" did not necessarily show that grievance was handled in a discriminatory fashion where other evidence explains why the grievance was handled in a certain manner). Indeed, even if Blanton's testimony is credited that Young told him he should quit because the Union wouldn't help him because there is no evidence that Mr. Smith (as the decision maker) was aware the Young had made this statement.

Moreover, the evidence does not support the General Counsel's allegation that Blanton sought to "decertify" the Union. Mr. Blanton called the USW's Pittsburgh PA offices seeking "membership withdrawal cards." Tr. 37. He said he wanted to quit the Union and also complained about the bi-week pay issue. Tr. 311-312. When Alex Perkins called him back, Blanton complained about the bi-weekly pay issue and accused Ford of taking a kick back from the Employer. Tr. 313-14. In fact, after speaking with Perkins and "confirming" in his mind the existence of a kick-back scheme involving Ford and the Employer, Blanton offered to help increase union membership. (UEX 5)

There is little evidence (other than Blanton's uncorroborated testimony) that he sought to "decertify" the Union. Indeed, Joe Young never heard Blanton say anything about decertifying the union and really wasn't sure what that meant. Tr. 220. Asking for a "withdrawal card" to quit the Union is not the same as attempting to decertify a union. Nor is there any evidence that Blanton had this conversation with Mr. Kelly Smith or that Smith was aware that Blanton had sought to withdraw from the Union.

Third, as noted above, neither Mr. Ford nor Mr. Young were involved in the decision not to arbitrate the termination grievance concerning Mr. Blanton. Tr. 256, 390. The General Counsel cannot dispute that Kelly Smith made the decision not to arbitrate the Blanton termination grievance and there is no evidence that Ford or Young controlled or effectively recommended the decision not to arbitrate the grievance.<sup>8</sup> Indeed, Ford himself was on medical leave when the staff representative made the decision not to arbitrate and didn't know which staff representative actually made the decision. Tr. 390.

Fourth, the General Counsel failed to produce any evidence of comparators to support an inference of discriminatory motive. There is no evidence that Mr. Smith or the USW has arbitrated a case at Imerys where an employee is accused of physically assaulting or threatening a co-worker with bodily injury.

Mr. Smith testified that his decision not to arbitrate was based on the witness interviews that he conducted and his own investigation into the dispute. Tr. 431-432. Mr. Smith also consulted with in-house counsel prior to making the decision not to arbitrate the Blanton termination grievance. (UEX 15) There is no evidence that he consulted with Joe Young or Darryl Ford regarding this decision.

Perhaps most importantly, Smith testified that he requested information from the Company regarding the basis of the discharge and any comparators prior to the January 10, 2019 third step grievance meeting. Tr. 409-411; UEX 13. Mr. Smith sent this request for information to "make sure that Mr. Blanton was being treated fairly" and that there was "no disparate treatment" or "discrimination or anything like that." Tr. 411-12. Mr. Smith's expressed and

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<sup>8</sup> Mr. Ford testified that after he filed the Blanton termination grievance, he turned it over to Mr. Smith. (Tr. 384) This is typical in termination cases because such grievances are expedited.

unrebutted intent to treat Blanton fairly is precisely what the Board DFR standard requires. *Monarch Food*, [229 NLRB at 1321](#).

Because the General Counsel failed to establish that Mr. Smith was “motivated by ill will or other invidious considerations” and the decision was based on Smith’s own review of the facts, the General Counsel has failed to prove that the failure to arbitrate Blanton’s grievance was discriminatory or in bad faith. There is no substantial basis for attributing any of Blanton’s interactions with Local 254 officers to Mr. Smith and inferring from such interactions that Smith’s independent decision not to arbitrate was improperly motivated.

- (d) Smith’s processing of the Blanton termination grievance was not perfunctory under Board law and thus no inference can be drawn that Smith’s decision was improperly motivated; indeed the evidence establishes that Smith would have made the decision not to arbitrate based on the facts and testimony he had before him at the time.**

The General Counsel’s complaint does not allege that the USW breached the duty of fair representation because the Union’s handling of the grievance was “perfunctory.” The General Counsel’s theory is solely predicated on the allegation that the USW and Local 254 failed to process the Blanton termination grievance because Blanton criticized Local 254 and attempted to decertify the Union. To the extent the General Counsel intends on arguing that the handling of the grievance gives rise to an inference of a discriminatory or bad faith motive, the record evidence supports the opposite conclusion. Mr. Smith’s handling of the Blanton termination grievance and his decision not to arbitrate cannot reasonably be characterized as “perfunctory” under extant Board law. Moreover, based on the facts and the testimony he had obtained, Mr.

Smith would have made the same decision not to arbitrate notwithstanding any statements attributed to Mr. Young or Mr. Ford.<sup>9</sup>

First, as noted above Smith requested information from the Company regarding the basis of the discharge and any comparators prior to the January 10, 2019 third step grievance meeting. Tr. 409-411; UEX 13. Mr. Smith sent this request for information to “make sure that Mr. Blanton was being treated fairly” and that there was “no disparate treatment” or “discrimination or anything like that.” Tr. 411-12.

Second, Mr. Smith attended the third step meeting and spoke to Mr. Blanton prior to that meeting. Tr. 405. During the third step meeting Mr. Blanton was allowed to present any evidence in support of his position. Tr. 129. Mr. Smith also advocated on behalf of Mr. Blanton during the third step meeting by “pressing” the Employer’s representative on its findings and requested that the Company reinstate Blanton with back pay and benefits. Tr. 73, 426, 428 UEX 14. The advocacy on behalf of Mr. Blanton and the opportunity for Blanton to explain his version of events is more than sufficient to satisfy the duty of fair representation at this step of grievance process even if the USW did not obtain the outcome it sought. *See, Amalgamated*

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<sup>9</sup> The Board treats an allegation of discriminatory failure to process a grievance as requiring the General Counsel to prove by a preponderance of the evidence that the decision maker failed to process a grievance because of animus towards the charging party’s protected activities. *See, National Assn of Letter Carriers*, 2018 NLRB LEXIS 405 at \* 62 (ALJ Decision J. Locke, Sept. 24 2018). However, if the General Counsel contends that *Wright Line* applies to this case, then the outcome is still the same. Regardless of Blanton’s disagreements with what he perceived to be the Union’s positions, the Union would not have arbitrated this grievance, because of the lack of evidence contradicting the Employer’s witnesses, and the Company’s clear policy against workplace violence. Under *Wright Line*, employers are entitled to terminate employees for valid reasons, even where there is additionally a discriminatory motive for the termination. *N.L.R.B. v. Starbucks Corp.*, 679 F.3d 70, 82 (2d Cir. 2012) (employee’s “documented performance deficiencies” provided “a sufficient and independent reason to fire him” even where termination was “substantially motivated” by employee’s union activity). If the Union’s conduct is being analyzed under the same standard, the Union’s reasonable conclusion that the grievance would be unsuccessful is sufficient reason not to pursue the grievance.

*Clothing & Textile Workers Local Union 148T*, 259 NLRB 1120 (1982)(no breach when the Union advocated for the charging party during grievance meeting and sought reinstatement of charging party)

After the third step meeting but before making the decision not to arbitrate, Mr. Smith spoke individually to the witnesses the Employer had interviewed about the incident. Tr. 419. Mr. Smith showed or read to each employee interviewed by the Employer (i.e. Ruel Johnson, Doug Harper and Jeremiah Jerrit), the statements they had given and that the Employer had recorded. Tr. 416-418, 421, UEX 4. Each employee interviewed confirmed the accuracy of the statements the Employer had provided to Mr. Smith. *Id.* The following are excerpts drawn for Union **Exhibit 4** of the information Mr. Smith had before him prior to deciding whether to arbitrate the grievance:

Mr. Johnson stated that he observed employee Robert Blanton yelling and cursing at Joe young while Joe Young was calming trying to talk with Robert as they were walking towards the break room. Mr. Johnson stated that Mr. Blanton was acting very agitated and aggressive towards Mr. Young. Mr. Young was trying to calming talk with Mr. Blanton but Mr. Blanton continued to yell, curse and point aggressively at Mr. Young. He did not see either man contact the other in any way.

Mr. Harper stated that he observed employee Robert Blanton yelling and cursing at Joe young while Joe Young was trying to talk with Mr. Blanton as they were inside the breakroom. Mr. Johnson stated that Mr. Blanton was acting very agitated and aggressive towards Mr. Young. Mr. Young was trying to calming talk with Mr. Blanton but Mr. Blanton aggressively came toward Mr. Young cussing him loudly and shoved Mr. Young in the chest. At this point, Mr. Young left the break room and returned to his work location. Mr. Blanton left the break room as well. I asked him if Mr. Young retaliated in any way and he said he did not.

Mr. Jarrett stated he witnessed Mr. Blanton and Mr. Young speaking loudly to one another as they walked to the break room. Mr. Jarrett entered the break room and witnessed the continued heated discussion between Mr. Blanton and Mr. Young. Mr. Jarrett stated at one point, Mr. Blanton did push Mr. Young in the chest. I asked him if Mr. Young retaliated in any way and he said he did not.

So Mr. Smith had three statements from three neutral employees stating that (1) Blanton started yelling and cursing at Young; (2) Young was not cursing or yelling back; (3) Young was not seen pushing or retaliating against Blanton and (4) Blanton shoved Young (i.e. he put his hands on another co-worker). UEX 4 and Tr. 427. Mr. Smith was also aware that the Employer's policy prohibited the conduct the witnesses testified Blanton had engaged in and subjected him to immediate termination. Tr. 426.

Mr. Smith also interviewed Mr. Blanton about his version of events and Mr. Young. (Tr. 423 (Blanton interview) and 429 (Young interview)).<sup>10</sup> With the exception of Blanton's claim that Young "chest bumped" him, both Blanton and Young confirmed what the witnesses had stated occurred. What is undisputed (indeed Blanton admitted as much) Blanton cursed Young out and shoved Young in the chest in the breakroom. Young denied that he had any physical contact with Blanton. Tr. 254.

Mr. Smith interviewed Tylor Waters because Blanton had identified him as a witness to the incident Tr. 422-23. Mr. Smith called Waters and told him "basically the same thing he told everyone else" that he was doing an investigation on Blanton's grievance. Tr. 422. Waters told Smith that he was on top of a silo building looking down and that he saw Young and Blanton but that he "couldn't hear anything they were saying" and that's all he witnessed. Tr. 422. Waters did not tell Smith that he witnessed Blanton or Young coming into contact with each other. Tr. 422-423.

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<sup>10</sup> When asked whether Joe Young told Mr. Smith that he had followed Blanton back to the breakroom, Mr. Smith said he did not recall Young telling him that he had followed Blanton through parking lot to the breakroom. Tr. 441:8-20. However, Smith knew that the interaction started at the loader because he spoke to Ruel Johnson and that they ended up in the breakroom. (UEX 4) Of course, the fact remains that two (2) witnesses Mr. Smith interviewed confirmed that Blanton shoved Young in the chest.

Smith's account of what Waters told him in early January 2019 is the same account Waters gave to Alex Perkins on December 7, 2018. Alex Perkins was the first person to speak to Mr. Waters the day after the incident. Tr. 337-338. After speaking to Waters, Perkins called Ford, told him what Waters had stated, gave him Waters phone number and asked him to get a statement from Waters. Tr. 340. According to Perkins testimony, Waters told him the following:

Q. Okay. Did he tell you who the witness was?

A. Yes. A young man by the name of Tyler.

Q. Did he provide you with a phone number?

A. Yes. He did.

Q. Okay. And what did you do when you received that phone number?

A. He gave me that phone number the day that he was terminated.

Q. Yeah.

A. I -- I didn't call Tyler until the following day --

Q. Okay.

A. -- that -- that Friday. I called Tyler on that Friday, and I asked Tyler, I said -- I told him, I said, well, I'm Alex Perkins, you know, the staff representative representing the Local while Kelly was out. I told him that Mr. Blanton had called me and told me that he had witnessed, you know, the -- the whole thing. And I asked him, you know, if -- if he, in fact, saw Mr. Young chest-bumping Mr. Blanton. And he told me he didn't see him chest-bumping him. He told me that he saw them -- he said he was up on top of -- he said he was up on top of the -- the silo or the tower, or whatever it is, he was up on top of it and he could see them down there. And he saw them headed towards the break room. He says, I saw them headed towards the break room. And then he says that, you know, Joe was bigger than Robert. He says, so Joe was behind Robert. So they got to a point where he couldn't see Robert because Joe was walking behind him headed towards the break room. And I said, so you didn't see him chest-bumping Mr. Blanton? He said, and I didn't see him chest-bumping. (Tr. 337-338)

That same day Perkins interviewed Waters, he debriefed Mr. Smith about the Locals he was servicing in Smith's absence and the outstanding issues. Tr. 338. Perkins's testimony

corroborates what Kelly Smith heard from Waters. It's also the most credible account because it makes common sense. Waters was on top of a silo seventy (70) feet up in the air and looking down as Young and Blanton were walking away towards the breakroom. He saw Young walking behind Blanton and given the height differential he could not see Blanton. If he can't see Blanton then there's no way for him to have witnessed an alleged "chest bump" from his vantage point (i.e. behind Young).

More importantly, Waters could not have seen Young "chest bump" Blanton on the way back from the breakroom because Young did not immediately follow Blanton out of the breakroom. After Blanton shoved Young in the breakroom and Young pulled back, Blanton stormed out of the breakroom and Young waited several seconds before leaving the breakroom. Tr. 221. Young did not follow Blanton out the breakroom door and had no further interaction with Blanton as he walked back to the mule. Tr. 221-22. Indeed, Blanton told Shannon Smith when he interviewed him on December 6, 2018 that after he shoved the Young in the chest he turned and left the breakroom and **"Mr. Young did not follow him."** (UEX 4) So if Young didn't follow Blanton out of the breakroom, Waters could not have seen him "chest bump" Blanton on the way back to the Raymond Mill where the mule was parked.<sup>11</sup>

When both Smith and Perkins interviewed Waters, he stated that he really didn't hear anything or see any physical contact. Mr. Johnson testified that he didn't see any contact between Young and Blanton when Young first approached him at the loader and as they walked towards the breakroom. Mr. Jerrit testified that as he saw Young and Blanton approach the breakroom he didn't see any contact between them either. The only third party statements confirming a physical assault involved Blanton shoving Young in the breakroom. Accordingly,

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<sup>11</sup> Mr. Harper testified that Waters had a reputation as a "habitual liar" and that he "just kept making stuff up." (Tr. 283)

the fact that Waters testified that he witnessed Young chest bump Blanton as they returned from does not mean the USW breached its duty of fair representation when Smith decided not to arbitrate the Blanton termination grievance.

The only testimony available to Mr. Smith that Young “chest bumped” Blanton came from Mr. Blanton himself. Mr. Smith did not think this testimony was sufficient to overcome the testimony of Mr. Harper, Mr. Jerrit and Mr. Johnson. Moreover, Mr. Young denied that he made any physical contact with Blanton. Mr. Smith considered Blanton’s work history and demeanor in deciding whether the USW could prevail at arbitration. Tr. 432-433.

An arbitrator would have to credit Blanton’s account over the testimony of Doug Harper, Jeremiah Jerrit, Ruel Johnson and Joe Young. Mr. Smith believed that Blanton’s admitted “hot headed” attitude and his angry outbursts towards co-workers (outbursts which on the day in question so worried Mr. Harper that he reported the incident) would undermine his credibility. Tr. 432; UEX 4 (Harper’s concern about Blanton’s aggression). This hot-headed attitude and behavior was confirmed by Doug Harper when he testified that he reported the incident in the breakroom to management because he “was concerned about safety -- what could happen. I mean, they tell you if you see something, say something. And I didn't -- they had got to the point it was, you know, it was kind of alarming to me that it got that bad.” Tr. 270. Harper had known that Blanton had a “bad temper or an anger problem” but the morning in question “was the worst he had ever seen.” Tr. 271.

In fact, after Blanton was escorted off the premises on December 6, he parked his car outside the gate and up the hill. Tr. 275. Blanton’s actions alarmed Harper and other employees. Tr. 275. At some point, the Company called the police because employees were feeling

uncomfortable with Blanton parking his car outside the gate. Tr. 275. An arbitrator would likely view such behavior as threatening and certainly out of the ordinary.

In addition to Blanton's anger problem, Mr. Smith factored in Blanton's short length of service. Mr. Smith reasonably believed based on his experience that Blanton's four and half months of service would cut against the USW's case at arbitration. Tr. 433. In his experience, arbitrators consider an employee's length of service when deciding whether to overturn a Company's disciplinary action. *Id.*<sup>12</sup> Couple with other complaints about his behavior (i.e. breaking a door and slamming his hard hat), it was not irrational for Mr. Smith to conclude that Blanton's lack of service with the company would ultimately result in a denial of the grievance.

Thus, based on the employee testimony obtained during the USW's investigation that supported the Company's discipline, the lack of evidence corroborating Blanton's version of events, Blanton's admission that he put his hands on Young, the evidence of Blanton's self-admitted anger problem, the evidence of other outbursts of anger leading to property damage, Blanton's post-termination conduct that some employees found threatening and his short length of service, Mr. Smith rationally decided that the grievance lacked sufficient merit for the USW to prevail at arbitration. This decision was not based on Blanton's criticism of Local 254 or the Union and his alleged attempt to decertify the Union. The fact that the General Counsel believes the USW should have arbitrated the Blanton termination grievance because of conflicting testimony about Blanton and Young's interaction is not enough to overcome the substantial deference Board law requires that an Administrative Law Judge afford to the Union's decision on how to process and resolve a grievance.

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<sup>12</sup> Length of service is a factor in deciding whether to uphold a discharge of an employee. *See*, Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> ed. Editor in Chief Alan Miles Robin, p. 988-989 (noting that long service with the company, particularly if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration).

**D. The General Counsel failed to establish by a preponderance of the evidence that the USW and/or Local 254 threatened Mr. Blanton and/or Mr. Waters as alleged in paragraphs 7 and 9 of the Complaint, respectively and that the USW and/or Local 254 physically assaulted Mr. Blanton as alleged in paragraphs 7 and 8 of the Complaint.**

In paragraph 7 of the consolidated complaint, the General Counsel alleges that the Union violated the Act when Local 254 shop steward, Joseph Young, allegedly threatened employees with physical violence by (1) stating that he would kick an employee's ass on the way to the breakroom and on the way to the Raymond Mill because employees criticized and were interested in decertifying the Union; (2) told employees that the Union would not assist them because they criticized and were interested in decertifying the Union; and (3) physically battered "employees" by "repeated chest bumps." (Consolidated Complaint, p. 4, ¶¶7(a)-(c). As the Union shows below the credible evidence does not support these allegations.

Counsel for the General Counsel principally relies on two witnesses to support these allegations. Neither witness, however, provided credible testimony in light of the testimony of other witnesses who refuted these claims. First, the charging party contends that Local 254 steward Young initiated the altercation on December 6, 2018. He claims that Young chest bumped him during their conversation on that day as they were walking towards the break room and threatened to kick his ass. Tr. 45:19-20, 23-24. Young denied making physical contact with Blanton or chest bumping him as they walked to the break room or making these alleged threats. Tr. 217:23-25; Tr. 218:15-20; Tr. 225:18-19; Tr. 251:2-13. Counsel for the General Counsel attempted to use Tyler Waters to corroborate the "chest bumping" allegation but Waters could not do so. As outlined below, Waters was standing on top of a silo about seventy feet off the ground and did not have a clear view of the area where the altercation took place. Given where Waters was standing and his obstructed view, his version of the events cannot be credited. No other witness corroborated Blanton's chest bump version of events and no witness corroborated

his allegations that Young threatened to “kick his ass.” In addition, Waters made the untenable claim he could hear the conversation between Young and Blanton as they crossed the area between the silos and the break room even though he was seventy feet in the air above them and working in a noisy industrial environment. Tr. 212:21-24.

Ruel Johnson was giving Young a ride in the “mule” (an all-terrain type vehicle) that morning to Young’s work station when that they stopped where Blanton was working at the scales so Young could talk to him about the ongoing pay period dispute that Blanton had been complaining about and was the subject of a grievance. Tr. 232:17-25. Johnson, who was sitting on the mule, was approximately 20-30 feet from where Young and Blanton were standing when Blanton came down off the scales. Johnson, who was much closer than Waters, watched Young and Blanton walk towards the break room, testified that he did not see Young put his hands on Blanton or chest bump him. Tr. 238:1-4. When Blanton and Young returned from the break room, Young got in the mule and Blanton climbed back up on the scales and continued to curse Young. Tr. 240:22-25. According to at least three witnesses, Ruel Johnson, Marion “Doug” Harper and Jeremiah Jerrit, at no time did Young exhibit any aggressive behavior or make abusive comments towards Blanton. Tr. 234:16-22; Tr. 267:11-14, 20-25; Tr. 268: 3-8; Tr. 269: 14-23; Tr. 302:2-9; Union Ex. 4.

On the other hand, at least two witnesses, Harper and Jerritt, witnessed Blanton acting aggressively and cursing at Young when Blanton and Young entered the break room that morning. Tr. 267:11-16; Tr. 302:1-4. According to Harper, Young never raised his voice in the break room and was trying to ask Blanton what he did not like about the contract. Tr. 267:20-25; Tr. 268:1-8. Then at one point, Blanton shoved Young and told him to leave him (Blanton) “the F alone.” Tr. 268:6-8; Tr. 302:12-22. Harper described Blanton’s conduct as “alarming” and

that while it was known that Blanton had anger problems, this event was “probably the worst” that he seen from Blanton. Tr. 270:12-16; Tr. 271:3-7. Jerrit who was also in the break room on December 6, 2018 testified that he was looking out the door of the break room that morning when he saw Blanton and Young walking towards it. Tr. 300:22-25. He was looking directly at them and did not see Young make contact with or chest bump Blanton. Tr. 301:1-7. Jerrit testified that he watched Blanton and Young enter the break room and that Young did not bump Blanton as they came through the door. Tr. 301:22-24. Jerritt did not hear Young make any threats towards or curse Blanton after they entered the break room. Tr. 302:3-9. According to Jerrit, Young was trying to explain to Blanton what was going on but Blanton was cursing Young and then he shoved him. Tr. 302:10-22. By all accounts other than Mr. Blanton’s, Young was calm and simply trying to discuss with Blanton the payroll and contract issues that had led to Blanton being so upset.

The only witness produced by the General Counsel to attempt to corroborate Blanton’s version of events was Tylor Waters who at the time he claims to have seen and heard the altercation between Blanton and Young was at the top of the silos, approximately 70 feet in the air with an obstructed view of the area where Blanton and Young were walking to. Tr. 161:1-2; Tr. 163:10-19; Tr. 169:4-5. From the top of silo 1 where Waters was standing, you cannot see the break room because it is completely obscured from view. Tr. 161:24-25; Tr. 162:1-5. The view of the break room is also obscured from the top of silo 3. Tr. 162:6-9. The only silo from which you can see the break room is silo 4, which Waters did not go to that morning. Tr. 162:14-15. At the top of the silo, you cannot hear very much. Tr. 163:20-21. Despite the being floors above the ground and with an obstructed view, Waters claims he saw Young chest bump or touch Blanton as they made their way back from the break room. Tr. 169:16-23; Tr. 170:1-5.

Waters testified that he did not witness Young chest bumping Blanton when they walked towards the break room or when they left the break room. Tr. 170:8-13; Tr. 172:4-18. The only time Waters contends he saw Blanton and Young was small area somewhere right in the middle of the parking lot, which was the only area he could see from his location on top of the silo 1. Tr. 172:19-22; Tr. 176:8-12. Waters testimony is simply not credible. He was at least 70 feet in above the ground looking at what was an obscured view in a noisy, industrial environment. Despite these physical and locational difficulties, Waters claims he could see a chest bump from Young and hear Blanton cursing. On the other hand, Ruel Johnson who was on the ground 20-30 feet from Young and Blanton and facing the break room did not see any chest bumping or physical contact. Waters and Blanton's testimony is further undermined by Blanton's statement to Shannon Smith taken when Smith was investigating the incident. According to Blanton's statement, after he shoved Young, "he [Blanton] turned and left the break room and Mr. Young did not follow him." Union Ex. 4. This statement given to Smith shortly after the incident when he was investigating the matter and was not refuted by Mr. Blanton. If Young did not follow Blanton out of the break room, it is unlikely that he chest bumped him on his way back to the where Johnson was parked with the mule. Further undermining Waters' testimony is that he told USW representative Alex Perkins that he did not see young chest bump or touch Blanton when Perkins called him the next day to find out what he knew about the incident. Given Blanton's own statement shortly after the incident that Young did not follow him out of the break room and Waters inconsistent recollection of the events and obscured view from a location on top of the silos, his testimony on this point is simply not believable.

In paragraph 9 on the consolidated complaint and notice of hearing, the General Counsel alleges that the "Union" by Local Union President Daryl Ford violated the Act when Ford

allegedly “threatened employees with possible job loss during a phone call if they provided Respondent Employer with a witness statement” regarding the Robert Blanton incident that led to his termination. This allegation is not supported by the testimony of the General Counsel’s own witness on the issue nor the credible evidence in the record.

Waters, the only other witness called by the General Counsel in an attempt to support his allegation, only saw part of the incident between Blanton and Young from his work area on top of the silo. Tr. 147:14-25. Later that day, Waters told fill-in Local Union steward, Josh Morrow, what he claims he saw. Tr. 151:20-25. Later that day, apparently after the charging party was terminated, Waters received a text from the charging party asking him to speak to USW field representative, Alex Perkins about the incident. Waters spoke to Perkins and told him what he saw. Waters told Perkins that he did see any physical contact between Blanton and Young. Tr. 153:2-12; Tr.340:13-18. A few days later, Waters spoke to Local Union President, Daryl Ford who had called Waters on the phone at home after he had gotten off his shift. Tr. 153:15-21. Ford asked Waters if he would be willing to give a statement and Waters said that he would. Tr. 153:23-24. Waters told Ford what he saw from on top of the silo. Tr. 154:1-11. According to Waters, after he told Ford what he saw, Ford allegedly told him “that if my [Waters] stories didn’t really line up with anybody else, I could be seen as lying. And that I could get fired.” Tr. 154:17-19. Waters testified that he thought Ford was threatening his job, so he said goodbye and hung up the phone. Tr. 154:22-23. This is the only testimony that the General Counsel relied on to support his allegation that Daryl Ford threatened an employee with job loss if he gave a statement to the employer. The testimony of Mr. Waters simply does not support the allegation made by the General Counsel. Indeed, as Waters later testified on cross-examination, Mr. Ford told him that he should be truthful in whatever statement he had to give on the matter and that if

lied to the company he could be disciplined.. Tr. 189:16-23. Waters admitted that in this conversation, Ford reminded him of the company rule that falsification of company documents could lead to discipline. Tr:191:2-4. Critically, Waters made his statement and did not change it despite this alleged threat by Ford. Tr. 191:5-10.

Ford testified that he told Waters that he needed him to be truthful in his statement because if he was not, he could be subject to discipline. Tr. 386:23-25. Ford explained that he gave Waters the same advice that he has given to hundreds of witnesses over his 15-20 years as a Local Union representative, that they needed to be truthful because if they were caught not being so, they could face discipline. Tr. 387:1-6, 12-19. This was Ford's normal practice to tell employees that when giving witness statements they must be truthful or they could be subject to discipline. Tr. 389:10-13. Ford never threatened Waters with job loss if he gave a statement to the respondent employer or told him he would lose his job if he did so. Tr. 389:1-7. The credible evidence simply does not support the General Counsel's allegation that Ford threatened Waters with the loss of his job if he gave a statement to the employer.

Under current Board law, the test for whether a statement is coercive and in violation of the Act is "whether the remark had a reasonable tendency to restrain or coerce an employee from vindicating a protected right." *UPIU Local 710*, 308 NLRB 95, 99 (1992). Vague or nebulous statements will not suffice to support a violation of the Act. See *United Steelworkers of America, Local Union 5550*, 223 NLRB 854, 855 (1976). The statement by Ford, that Waters should be sure to tell the truth or that he could be subject to discipline because of the company rule regarding falsification of documents is far too vague and nebulous to conclude that it restrained or coerced Waters from "vindicating a protected right." There is no evidence that Ford's statement was a veiled threat or that he had any ability to cause the employer to fire

Waters. Indeed, the reason that Ford gave Waters that warning was to make sure that Waters told the truth, so he **would not** be subject to discipline. This is the same advice that Ford has given to hundreds of employees during the course of his time as a Local Union official. Waters subjective belief that Ford was “threatening” his job is simply not evidence that Ford’s statement tended to restrain or coerce Waters in violation of the Act.

### **III. Conclusion.**

The USW and Local 254 request that all allegations be dismissed for lack of sufficient proof. The USW also requests that all allegations against it be dismissed because the Charging Party failed to file a timely charge. At the end of day, the evidence clearly shows that Mr. Blanton is solely responsible for his misconduct and his termination. He allowed his temperament to cloud his judgment and refused to act in a reasonable manner.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify on February 14 2020, I electronically filed a true and correct copy of the foregoing Post Hearing Brief through the NLRB's website and electronic mail:

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