

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

**NEXSTAR BROADCASTING, INC. d/b/a
KOIN-TV**

and

Case 19-CA-232897

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS, THE
BROADCASTING AND CABLE TELEVISION
WORKERS SECTOR OF THE COMMUNICATIONS
WORKERS OF AMERICA, LOCAL 51, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE
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 Exceptions and Brief in Support (“exceptions”) filed by Nexstar Broadcasting, Inc. d/b/a KOIN-TV (“Respondent”), to the June 3, 2020, decision of Administrative Law Judge Christine E. Dibble (“ALJ”) in the above-captioned cases [JD(DC)-26-20] (“ALJD” or “Decision”).¹

I. OVERVIEW

All twenty-seven of Respondent’s Exceptions are neither supported by the record evidence nor factually accurate statements of the ALJ’s findings of fact and law. As discussed in detail below, the ALJ’s factual findings and legal conclusions were appropriate, proper, and fully supported by both record evidence and established precedent. Accordingly, the Board should reject Respondent’s Exceptions in their entirety and sustain the ALJ’s decision and recommended order.

II. THE ALJ’S FINDINGS WERE PROPER AND SHOULD BE AFFIRMED

The ALJ appropriately determined that, based on the record evidence, Respondent violated §§ 8(a)(1) and (3) of the Act when it issued bargaining unit employee Ellen Hansen (“Hansen”) a written warning and that Respondent violated §§ 8(a)(1) and (5) of the Act when it failed to provide National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO (“Union”), with requested

¹ Respondent’s Brief in Support of its Exceptions will be referred to as (R. Br.), with citations to specific page numbers. Respondent’s Exceptions will be referred to as (R. Ex.), with citations to specific pages 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.

information related to the identity of a witness in Respondent's disciplinary investigation of Hansen. As discussed below, the arguments raised in Respondent's exceptions are misplaced and do not warrant reversal of these ALJ findings.

A. Respondent Improperly Seeks to Have the Board Second-Guess the ALJ's Credibility Determinations by Claiming Her Actual Factual Findings Are Somehow Improper

Respondent's Exceptions 1 through 8 argue that the ALJ's credibility determinations are self-contradicting findings or are not based on the overall record. These arguments are based on neither record evidence nor otherwise proper grounds. Apart from providing no evidence in support of this argument, Respondent misstates and misapplies the ALJ's actual findings.

First, in exceptions 1 and 3, Respondent excepts to the ALJ's credibility determination regarding Moore's testimony on the grounds that it is self-contradicting. (R. Br. 13 – 17). These exceptions are ill-founded, based on Respondent's own misunderstanding or misstatement of the ALJ's findings of fact. What Respondent fails to comprehend or acknowledge is that, while there are at least four separate credibility determinations that the ALJ makes regarding Moore's testimony,² she only found one of them credible: that Respondent did not tell new hires about the Union until they got to the worksite.³

Given the ALJ's intentional distinction between the separate statements and their particular credibility (ALJD 5:1-9, 7:31-8:21), it is clear that Respondent mistakenly

² They are: (1) Moore's testimony regarding "secret meetings;" (2) Moore's testimony regarding Respondent not telling new hires about the Union until they got there; (3) Moore's testimony regarding Hansen asking when he was going to sign documents to join the Union; and (4) Moore's testimony regarding Hansen calling Supervisor Rick Brown ("Brown") a "piece of shit" and "rat/rat fuck." (ALJD 5:1-9, 7:31-8:2).

³ The ALJ specifically does not credit his testimony about 1, 3, and 4 above in footnote 2. (ALJD 5:1-9, 7:31-8:21).

conflates Moore's testimony regarding the "secret meetings" and his testimony about Respondent not telling new hires about the Union. Thus, contrary to Respondent's assertion, none of the ALJ's findings of fact are "self-contradicting."

Second, Respondent's claim in Exceptions 4-8 that the ALJ's factual determinations regarding witness testimony are not supported by the overall evidence is similarly misplaced; they are credibility based, supported by the evidence, and entitled to deference.

In these Exceptions, without any support, Respondent argues that the ALJ should have credited Moore over Hansen. However, Respondent fails to raise any relevant factor that the ALJ did not consider or resolution that the ALJ did not explain. (R Br. 15). In fact, the ALJ's decision to credit part of Moore's testimony where it is supported by other record evidence and credibility factors and to not credit other parts when it is not supported or inapposite to what the ALJ determined to be more substantial record evidence demonstrates the exact opposite that Respondent claims -- that the ALJ parsed through each piece of evidence and fairly analyzed it when making her findings of fact. That Respondent wishes her determinations were other than those found does not change the fact that the ALJ made proper findings regarding Moore's testimony based on the weight of the evidence, any corroborating evidence or lack thereof, and the credibility of the witnesses. (ALJD 5:1-9, 7:31-8:21).

Respondent also attempts to attack the ALJ's decision to credit Hansen, period. In so asserting, Respondent incorrectly states that Hansen "dodged and equivocated when pressed" during the hearing regarding the allegation that she called Brown names as support for its argument. The ALJ appropriately found that, based on Hansen's

demeanor and other record evidence, that Hansen was more credible than Moore, not only as to the facts found but also Hansen's history of behavior and demeanor. (ALJD 11:11-21). The ALJ also properly weighed the record evidence regarding Hansen and Moore's testimony regarding the alleged "secret meeting" accusation and pressure to sign Union documents. (ALJD 5:1-9, 7:31-8:21). Again, Respondent has offered no evidence that the ALJ's credibility determinations are unreasonable or unexplained, requiring the Board's reversal.⁴

It is the Board's established policy not to overrule an administrative law judge's credibility resolution unless the clear preponderance of the all relevant evidence dictates they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951). Indeed, as even Respondent correctly notes in its brief, "decisions regarding witness credibility and demeanor 'are entitled to great deference, as long as relevant factors are considered and the resolutions are explained.'" *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337 (D.C. Cir. 2003), citing *Breakfast Prods., Inc. v. NLRB*, 901 F.2d 1130, 1130 (D.C. Cir.1990) (unpublished disposition) (quoting *NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987)). Indeed, an administrative law judge's credibility determination enjoys almost "overwhelming deference," absent an egregious error on the part of the administrative law judge. *Sasol N. Am. Inc. v. N.L.R.B.*, 275 F.3d 1106, 1112 (D.C. Cir. 2002). *See also, Circus Circus Casinos, Inc. v. NLRB*, 954 F.3d. 279, (2020). Since, as discussed above, the ALJ's credibility determinations as to Moore and Hansen

⁴ Confoundingly, Respondent also excepts, in Exception 8, to what it calls a finding of fact by the ALJ regarding Nevin's testimony, which appear to actually be direct quotes from Nevin. (R. Ex. 5). Respondent has provided no explanation for this exception or argument for why any determination the ALJ made regarding Nevin's testimony was improper. As such, Counsel for the General Counsel will not specifically respond to this exception other than to note that, yet again, Respondent has failed to provide any proper basis for overturning the ALJ's findings of fact.

are supported by the overall evidence in the record, as she has clearly delineated, the Board should leave her credibility determinations untouched. *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362. *See also Stanford Hosp. & Clinics v. NLRB*, 325 F.3d at 337 (review of an administrative law judge's credibility determination is done with a "highly deferential standard").

Third, Respondent argues in Exceptions 2 and 9 that the ALJ's decision to not credit anonymous "witness testimony" was erroneous. Respondent also incorrectly claims that the ALJ used this "erroneous" decision to credit Hansen over Moore in determining whether Hansen called Brown names during Hansen and Moore's discussion, using a creatively cropped quote to attempt to cobble the two together. (R. Br. 17).

The anonymous employee witness Respondent seeks to have found credible over Hansen is one who was not identified or produced, could not have been questioned by either the Union and General Counsel (not to mention Respondent itself), could not have her alleged summary or statement verified or tested for inconsistencies, could not have her credibility assessed by the ALJ, could not provide more than hearsay evidence (had she testified), and would have provided no statements that had probative value because, as she had admitted to Respondent, she didn't hear any specifics of the conversation. (ALJD 5:42- 6:5). The ALJ not only properly denied crediting Respondent's "proffer" of such anonymous testimony, but she also relied and cited to appropriate caselaw in her decision to not credit these statements. (ALJD 5:42-6:5). Respondent has failed to produce any caselaw supporting its argument that the ALJ's evidentiary decision was not proper.

Fourth, Respondent's attempted argument that the ALJ used this determination about the non-appearing witness to find Hansen more credible than Moore is just blatantly wrong. The ALJ simply did not take into account the witness's proposed testimony at all, much less in determining whether to credit Hansen or Moore regarding the use of derogatory language. The reason for this is simple: because the witness admittedly (by Respondent's own representation) did not hear any specifics of the conversation, the testimony was not probative.⁵ (ALJD 8:1-21). Respondent has failed to provide any reason why the ALJ's decision to not credit statements made by an anonymous witness was improper, Respondent's Exceptions 2 and 9 should be denied.

In sum, Respondent's exceptions 1-9 to the ALJ's factual finding are all without factual or legal foundation. The ALJ's findings, including those based on credibility, are based on her observations, the record evidence, and appropriate legal precedent. As such, they are entitled to great deference and should be upheld.

B. The ALJ Properly Found Respondent Violated §§ 8(a)(1) and (3) of the Act Under the Appropriate Precedent

The ALJ appropriately determined that, based on the record evidence, Respondent's issuance of a written warning to Hansen was a violation of §§ 8(a)(1) and (3) of the Act under existing law. As discussed below and in line with the Exceptions discussed above, Respondent's arguments in its Exceptions are misguided and the ALJD should be affirmed.

⁵ Respondent's quotation in its brief omits the first part of the paragraph in which the ALJ succinctly lays out all of the reasons she finds Hansen more credible in her denial that she called Brown derogatory names. (ALJD 8:1-21).

1. Respondent Violated §§ 8(a)(1) and (3) of the Act Under *Burnup & Sims*

The ALJ found that, under *NLRB v. Burnup & Sims* (“*Burnup & Sims*”), 379 U.S. 21 (1964), Respondent violated of §§ 8(a)(1) and (3) of the Act. In its Exceptions 10-14, Respondent generally objects to the ALJ’s application of *Burnup & Sims*, as it patently ignores the ALJ’s thorough analysis altogether. (R. Br. 19-23). Respondent claims no flaws or oversights by the ALJ and instead merely attempts to argue anew what the ALJ already rejected in making her findings and engaging in her analysis.

In short, Respondent reframes that already rejected by misstating the facts and misrepresenting what the ALJ determined in order to argue its case. For example, Respondent’s Exception 11 seriously misstates the ALJ’s factual determinations, claiming that the ALJ concluded that Hansen accused Moore of having secret meetings and using derogatory language; the ALJ very clearly concluded that Hansen had done neither. (R. Ex. 7; ALJD 7:31-33).

The gist of Respondent’s *Burnup & Sims* already rejected objections boil down to its argument that Hansen engaged in serious misconduct by using two derogatory terms to describe Brown in conversation with Moore. (R. Ex. 6-8). Like the above example, this argument patently ignores the ALJ’s sound factual findings that Hansen did not, in fact, use derogatory terms to describe Brown. As explained above, the ALJ’s factual findings on this issue are supported by the record evidence as well as credibility determinations and must therefore be affirmed. *Mobil Exploration and Producing U.S., Inc. v. N.L.R.B.*, 200 F.3d 230, 237 (5th Cir. 1999).

Respondent further ignores the ALJ’s finding that, even assuming *arguendo* that Hansen had made the derogatory statements, the statements do not qualify as “serious

misconduct” under *Burnup & Sims*. (ALJD 11:30-38). As the ALJ properly determined, the Board has consistently held that the use of profanities itself is insufficient to remove conduct from protection of the Act. See, e.g., *Winston-Salem Journal*, 341 NLRB 124, 126 (2004) (an employee cursing at a supervisor and “angrily pointing his finger at him was not so inflammatory as to lose the protection of the Act”); *NC-DHS, LLP, d/b/a Desert Springs Hosp. Med. Ctr. & Theresa Van Leer*, 363 NLRB No. 185 (an employees’ use of expletives to describe a manager during a conversation with a coworker was not sufficiently egregious to remove it from the Act’s protection). Thus, not only is there is no evidence that supports Respondent’s assertion that Hansen sought to intimidate or threaten Moore in her conversation (ALJD 16:30-32), but the caselaw that Respondent cites to in support of its argument that “hostile and profane language and threats are not protected even if under the guise of union activity” would not support such a finding. (R. Br. 21-22). See, e.g., *Mobil Exploration and Producing U.S., Inc. v. NLRB*, 200 F.3d at 242-43 (Board’s determination that an employee’s use of profanity to other coworkers regarding management was *not* serious misconduct upheld).

In sum, the ALJ properly determined, based on the overall record, that no serious misconduct occurred. As discussed above, Respondent has presented no evidence that the ALJ did not consider in making her factual findings regarding this alleged misconduct.⁶ The ALJ appropriately relied on these factual findings in her legal analysis under *Burnup & Sims*, all of which are based on the uncontested record and appropriate legal precedent.

⁶ As the basis for its exceptions, Respondent repeatedly claims that the evidence at hearing “shows that Hansen engaged in serious misconduct”, but Respondent has offered no evidence or testimony in support of this assertion other than Moore’s testimony, which was not credited by the ALJ. (R. Ex. 6-8).

2. Respondent Violated §§ 8(a)(1) and (3) of the Act Under *Wright Line*

The ALJ found that Respondent violated of §§ 8(a)(1) and (3) of the Act under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Respondent excepts to the ALJ's decision on several unfounded grounds.

First, Respondent excepts to the ALJ's determination that a *Wright Line* analysis was not appropriate because Respondent's motivation was not at issue. Respondent is simply wrong. As the ALJ pointed out, the undisputed record evidence establishes that Hansen was engaged in "quintessential protected union activity" when she had a conversation with Moore, and that the plain language of the written warning itself clearly shows that it was issued because of this Union conversation. (ALJD 12:5-16). Other record evidence of anti-Union animus as a motivating factor include that the policies Respondent cites to in issuing Hansen the written warning do not align with Respondent's discipline and that Respondent failed to explain the shifting reasons for its investigation into Hansen.⁷ (JX 2, RX 3).

Second, the ALJ found, based on the record evidence, that the General Counsel had met its initial burden under *Wright Line*. Respondent objects to this finding on the basis that it claims its sole motivation for disciplining Hansen was the "serious misconduct" that Hansen supposedly engaged in. (R. Br. 25-28). This "serious misconduct" was Hansen's conversation with Moore. (R. Br. 25). As discussed above, this was quintessential protected Union activity that resulted in animus-based discipline.

⁷ Respondent claimed that it was only concerned about Hansen's conversation with Moore but then, in the course of its investigation, questioned other employees about whether Hansen had ever talked to them about the Union. (TR 111:9-13).

Respondent has not cited to any record evidence or caselaw that support its assertion that the General Counsel has not met its initial burden, as the ALJ properly determined.

Respondent, instead of moving forward to meet its shifted burden, attempts to use flawed, circular logic harkening back to the General Counsel's initial burden: "the General Counsel failed to sustain its' [sic] burden under any test to establish that Section 7 activity was the motivating factor for the issuance of the written warning to Hansen..." (R. Ex. 10). Respondent simply fails, or perhaps refuses, to recognize the ALJ's finding of law that the General Counsel has, in fact, met its burden. (ALJD 12:5-16). As the ALJ properly found, Respondent failed to meet its burden because it failed to put on any evidence that the written warning was not a deviation from past practice. (ALJD 12:18-27).

Respondent does, however, argue merely that there is "no evidence of disparate treatment or proof that the written warning to Hansen deviated from past disciplinary actions at KOIN." (R. Br. 27). It does so without any evidence and without full comprehension of its burden. Indeed, Hansen testified that she has heard other employees make disparaging comments about managers and other employees on multiple occasions, but is not aware of any employees being disciplined for such comments. (TR. 41:20-42:5). It was Respondent's burden to prove that it would have taken the same action, even in the absence of the protected activity, for example, by showing consistent discipline of other employees who engaged in similar conduct. *General Motors*, 369 NLRB No. 127 (July 21, 2020). By instead merely pointing to a lack of evidence of comparators, Respondent has utterly failed to meet it, and the ALJ's determination based on the record evidence must stand.

3. Respondent Violated §§ 8(a)(1) and (3) of the Act Under *Atlantic Steel*

Respondent's exceptions 18 and 19 take issue with the ALJ's analysis under *Atlantic Steel*. (R. Ex. 10-11). Respondent correctly points out that, since the ALJ's decision, the Board issued its decision in *General Motors*, 369 NLRB No. 127 (July 21, 2020), which changed the standard from *Atlantic Steel*, 245 NLRB 814 (1979), to *Wright Line* in cases involving alleged offensive or abusive conduct in the course of otherwise protected activity. At the time of the decision, however, *Atlantic Steel* was the appropriate test and, as discussed above, the ALJ correctly applied *Wright Line* to find that there was a violation of the Act. However, in light of the fact that *Wright Line* has already been addressed herein and the Board has applied *General Motors* retroactively, General Counsel's response to these Exceptions will be limited to addressing the Respondent's factual inaccuracies.

First, Respondent claims, without any support in its brief, that the ALJ erroneously applied a "subjective analysis" to determine whether Hansen's conduct disrupted Respondent's operation. (R. Ex. 10). Nowhere in the ALJ's decision does it indicate that the ALJ applied a subjective analysis, nor does Respondent point to any evidence that the ALJ's decision was not objective. The careful analyses in the ALJ's decision demonstrate that ALJ's conclusions were appropriately based on the objective record evidence. (ALJD 13:9-36). Respondent then claims that Hansen's alleged language was so egregious as to lose the protection of the Act. Again, this claim ignores the ALJ's factual conclusion that Hansen was credibly found NOT to have used the alleged language. (ALDJ 7:31-8:21,10:12-21). Furthermore, as discussed above and in the

ALJ's decision, Respondent failed to meet its *Wright Line* burden that it would have taken the same action regardless of Hansen's union activity – stating it did does not make it so.

To round out its arguments, Respondent objects to the ALJ's conclusion of law that Respondent violated §§ 8(a)(1) and (3) of the Act under *Burnup & Sims*, *Wright Line*, and *Atlantic Steel*. While Respondent has baselessly excepted to all of the ALJ's factual and legal determinations, Respondent has failed to cite to record evidence or precedent in support of its bald assertions. In sum, Respondent's exceptions to the ALJ's finding that Respondent violated §§ 8(a)(1) and (3) of the Act by issuing a written warning to Hansen are all without factual or legal foundation.

C. The ALJ Properly Found Respondent Violated §§ 8(a)(1) and (5) of the Act

In light of her decision that Respondent violated the Act by issuing Hansen discipline, the ALJ stated that a ruling on the merits of the information request was unnecessary. (ALJD 13:42-43). While it was alleged as a separate violation, the ALJ is correct in that the rescission of Hansen's discipline, as required after a finding of merit, would render the information unnecessary. Despite this, the ALJ thoroughly and properly analyzed the allegation, finding that, based on the record evidence, Respondent's failure to provide the Union with requested information was a violation of §§ 8(a)(1) and (5) of the Act. As discussed below, the arguments raised in Respondent's exceptions are misguided and do not warrant reversal.

Relying almost entirely upon *Michigan Bell Telephone Co.*, Respondent contends that its claim of confidentiality outweighs the Union's need for the information. 367 NLRB No. 74 (2019) (employer did not violate the Act by withholding the identity of an informant who told the employer about a potential walk-out because the union did not need the

name of the informant to help it determine if the employer's actions were consistent with the CBA). It does not and Respondent's reliance is misplaced. As the ALJ explains in detail in her decision, this case is easily and significantly distinguishable from the situation at hand: there is no evidence here of *Union* animosity toward the witness and the witness's identity has a direct correlation to the Union's ability to conduct an independent investigation into Hansen's discipline. (ALJD 17:10-25).

As the ALJ further noted, as the party asserting confidentiality, Respondent bears the burden of proof. (ALJD 16:5-24). However, Respondent failed to produce any evidence that disclosure of the witness's name could reasonably be expected to lead to harassment or retaliation, or any other appropriate grounds for asserting confidentiality. In fact, the ALJ properly relied on record evidence and caselaw in determining that Respondent had provided insufficient justification for keeping the identity of the witness confidential under the circumstances. (ALJD 16:26-17:25).

Going further in her analysis, the ALJ found that, even assuming Respondent had sustained its confidentiality defense (which it did not), it was still obligated to engaged in accommodative bargaining with the Union. (ALJD 17:27-32). This was also its affirmative burden to prove, which it again failed to do. (ALJD 17:30-32).

Rather, without providing any evidence, Respondent contends that no accommodation was possible or required because it provided a summary of the witness' testimony at the hearing. (R. Br. 33). Contrary to Respondent's assertions, providing a summary of what the witness allegedly said at the hearing – more than a *year* after the initial information request – falls far short of meeting its burden to engaged in accommodative bargaining with the Union. (ALJD 1, 8:25).

Yet again, Respondent's exceptions to the ALJ's finding that Respondent violated §§ 8(a)(1) and (5) of the Act by failing to provide requested information are all without factual or legal foundation. The ALJ's conclusions of law are appropriately based on the record evidence and relevant caselaw and should therefore be upheld.

III. CONCLUSION

Based on the foregoing, it is respectfully submitted that the Board should deny Respondent's Exceptions in their entirety and affirm Administrative Law Judge Dibble's decision that Respondent violated §§ 8(a)(1) and (3) of the Act when it issued Hansen a written warning and that Respondent violated §§ 8(a)(1) and (5) of the Act by failing to provide the Charging Party with information requested regarding a witness's identity.

DATED at Portland, Oregon, this 12th day of August, 2020.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was served on the 12th day of August, 2020, on the following parties:

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