

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

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

Respondent- Employer

v.

Case 19-CA-232897

NATIONAL ASSOCIATION OF  
BROADCAST EMPLOYEES AND  
TECHNICIANS –  
COMMUNICATION WORKERS OF  
AMERICA, AFL-CIO LOCAL 51

Charging Party -Union

**REPLY BRIEF OF RESPONDENT**

Nexstar Broadcasting, Inc. d/b/a KOIN-TV ("KOIN", "Respondent" or "Company") hereby submits its Reply Brief in Further Support of Exceptions from the Decision by the Administrative Law Judge, and in Reply to the Brief filed by the Counsel for the General Counsel("CGC")on August 12, 2020:

**I. REPLY IN FURTHER SUPPORT OF EXCEPTIONS 1-8:** Exceptions 1 through 8 relate to the credibility determinations arrived at by the ALJ. They all involve one conversation between two individuals: 1) former KOIN employee Moore and 2) employee Hansen, who received the written warning which is the subject of this Complaint. The warning given to Hansen grew out of a complaint made by Moore, who reported to his supervisor Rick Brown that he was made to feel very uncomfortable by Hansen when she confronted him in the newsroom on the evening of Friday, May 18, 2019. Determining what was said in that conversation is clearly critical to determining whether a violation of the Act occurred. The

ALJ erred in performing this task. The Board has, of course, held that while credibility determinations by ALJs are entitled to deference, they can be overturned in appropriate circumstances. *International Longshoremen's Association, Local 28 (Ceres Gulf, Inc.)* 366 NLRB No.20 (2018); see *Circus Circus Casinos, Inc. v. NLRB*, 954 F.3d. 279, (2020). The ALJ made several erroneous, and improperly justified, credibility determination regarding this short conversation. Our initial Brief carefully examined these critical credibility determinations and called for their rejection by this Board. The CGC in its' Answering Brief dismissed our carefully drawn arguments as "wishes" that the ALJ's findings were "other than those found"----in other words----'wishful thinking'. However, as discussed below, the CGC's Answering Brief offered not one word in support of the ALJ's most critical finding which was that Hansen did not call their common supervisor Brown a "piece of shit" and a "rat fuck".

This is not surprising, as there really is little to support the ALJ's finding that this vulgar and derogatory statement was not made. As we argued in our Initial Brief, it is preposterous to suggest, much less conclude, that Moore invented out of 'whole cloth' the vile and profane words that he clearly and unequivocally asserted were used by Hansen to attack their common supervisor Brown. Moore testified that Hansen made the following statements to him during their short conversation:

**She called him a piece of shit and a rat, rat fuck. And this was right in the open.....I was very uncomfortable at this point. And after she was accusing me of having secret meetings with Rick about badmouthing the Union, .....(Emphasis added) TR 84: 8-25**

As we also argued in our Initial Brief, the ALJ mentioned this aspect of Moore's testimony by stating that "Moore also insists that Hansen continued the conversation by bad mouthing Brown and calling him a "piece of shit" and "rat fuck., but then baselessly discrediting Moore for the following **three weak reasons**: 1) Moore was hoping to transfer to the Portland

facility, 2) Moore ‘acknowledged that over his career he has had that contentious conversations with coworkers but, except for Hansen, he did not “report all of those conversations.” and 3) KOIN General Manager Nevin admitted that for the past 1½ to 2 years of observing Hansen in contract negotiations, his impression of her was that of a notetaker and while in bargaining sessions Biggs-Adams would sometimes use profanity and derogatory terms to refer to management but Hansen never used that type of language. (ALJD 8: 12-15). As we noted in our Initial Brief before analyzing them in order, each of these points fail, when fully and properly analyzed, to support crediting Hansen’s testimony over that of Moore. Again, we emphasize that the General Counsel’s Answering Brief fails to address any of these points. Before we turn to these points raised by the ALJ we point to an obvious and more significant point critical to a proper evaluation of their respective credibility. This is not a simple ‘he said/she said’ situation. Moore testified unequivocally that Hansen called Brown a “rat fuck and a piece of shit’ while Hansen dodged and equivocated when pressed during the hearing to deny using these vulgar and disrespectful slurs directed towards Rick Brown, a supervisor that Hansen shared with Moore. In response to questioning by the ALJ herself, Hansen stated:

**Yeah. You know, I really doubt that I would have said that. I don't remember saying that and try not to use stuff like that in these kind of conversations with employees. Initially, I try to be professional about it and so I can say that's the best of my recollection that I didn't say that and it doesn't sound like that's something I would say but I mean, I don't think I did, no. I don't recall. TR: 44:15-25, 45: 1-3)(Emphasis added)**

In her decision the ALJ does not acknowledge this incredible discrepancy between Hansen and Moore. Instead she drew upon the three points noted above, which we will now turn to. Given the critical importance of this particular credibility determination we will once again review this evidence even though our contentions were not challenged by the CGC.

As to the **first point**, while it is true that Moore acknowledged that he hoped to transfer back to Portland from another station, it is, of course, also true that Hansen had every incentive to deny that she called Rick Brown a ‘piece of shit’ and a ‘rat fuck’ as she hoped to escape the discipline that had been imposed upon her. As we mentioned in our Initial Brief, the ALJ’s **second reason** for crediting Hansen over Moore as to the use of these vulgar slurs is that Moore ‘acknowledged that over his career he has had that contentious conversations with coworkers but, except for Hansen, he did not “report all of those conversations.’ (ALJD 8:9-11). We challenged this odd point by noting that there was no foundation laid as to what these “contentious conversations” consisted of. And, of course, we do not have any evidence that in these previous ‘contentious conversations’ that Moore had in his career, that a fellow worker called a supervisor or manager a ‘piece of shit’ or a ‘rat fuck’. As with the other points relied on by the ALJ, CGC did not mention this contention in its’ Brief. As we stated in the Initial Brief, without any foundation as to the nature of these ‘contentious conversations’ this is a meaningless point. As noted in our Initial Brief , and again not refuted by the CGC in its’ Brief, the ALJ’s **third reason** for discrediting Moore’s highly credible testimony that Hansen used these vulgar and derogatory slurs is just as unjustified as the others. The ALJ noted that Nevin testified that Hansen did not swear or use vulgar words in negotiations. We argued and were not challenged in doing so by the CGC, that this does not in any way establish that she would not use such words in a conversation occurring ‘behind the scenes’ or ‘in the clenches’. Common experience points to the opposite conclusion. Many employees are inclined to swear or use obscene language towards supervisors when they are not present, but not so inclined when they are.

For all of the reasons noted above we believe that Moore’s testimony regarding the use of the vulgar and derogatory terms of ‘rat fuck’ and ‘piece of shit’ toward Brown should be

credited over Hansen's incredibly weak and equivocating testimony that she did not remember if she said these words or not. Additionally, it is clear as we noted in our Initial Brief, that the ALJ issued contradictory conclusions as to whether Moore was to be believed on another aspect of the short conversation. As we discussed in our Initial Brief, the ALJ apparently credited Moore's statement that Hansen accused him of having a "secret meeting with Brown. (ALJD 5:1-11) and found otherwise in another passage of her decision. (ALJD 7:31-33). The CGC in its' Brief attempted to rescue the ALJ from this apparent contradiction by parsing the determinations into four(4) neat items that the ALJ herself did not utilize. The Board should reject this attempt. And even if it does conclude that the ALJ did not contradict herself, we submit that the first conclusion is correct in that it is clear from Moore's testimony that Hansen accused Moore of having a secret meeting with Rick Brown. This conclusion is supported by the additional reason that it is preposterous to suggest that Moore invented the Hansen's harsh 'accusation' of him out of 'whole cloth'.

The final credibility point that the ALJ addressed in the Decision was to discredit the testimony of the 'anonymous witness' and then use this to credit Hansen over Moore on the critical issue of the use of the vulgar and derogatory terms directed at Brown. (ALJD 8:17-21) It is evident that this discrediting of the anonymous witness is not really a 'credibility determination' at all, but actually a substantive and evidentiary ruling. Employee X was not a witness, as that would have identified the witness. So, the proper analysis is whether the statement attributed to the witness adds any weight to Moore's version of the conversation between him and Hansen. In that regard, it should be allowed to do so. This evidence should certainly have been weighed by the ALJ in assessing the respective credibility of Moore versus Hansen. Instead the ALJ ignored it, rejecting it as hearsay despite the fact that there was no hearsay objection made at the hearing. (ALJD 8:17-21, 6:3-5)

**II. REPLY BRIEF IN SUPPORT OF EXCEPTIONS 9-19:** The CGC alleges that KOIN violated section 8(a)(1) and (a)(3) in connection with the disciplinary warning given to Hansen. GC Exhibit 1(c), para. 6 . The ALJ examined and then applied three separate analytical frameworks to determine whether or not the Act was violated in this regard: *Burnup*, *infra*, *Wright Line*, *infra* and *Atlantic Steel*, *infra*. CGC asserted that KOIN did not meet its’ burden under these tests. CGC acknowledged the Board’s landmark decision in *General Motors*, 369 NLRB No.127, (2020) wherein it was decided to apply the *Wright Line* analysis instead of the *Atlantic Steel* approach in deciding cases such as this one. CGC acknowledged *General Motors*’ retroactive application but went on to analyze the case under the *Atlantic Steel* approach anyways. At this juncture, we believe that the case should be analyzed under the *Burnup* and *Wright Line* tests. After doing so for the reasons elaborated on in our Initial Brief we believe it is clear that KOIN did not violate the Act in issuing Hansen a written warning. Of course, central to that conclusion is the proper factual finding, discussed at length above, that Hansen engaged in foul and highly offensive conduct during her conversation with Moore, properly drawing discipline for its’ use.

Under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), to determine whether a Section 8(a)(1) or 8(a) (3) violation occurred in this sort of context. “At all times, the burden of proving discrimination is that of the [NLRB] General Counsel.” *NLRB v. Plastic Applicators, Inc.*, 369 F.2d 495, 498 (5th Cir. 1966). The employer bears the **initial burden to show that it had a good-faith belief that the employee was engaged in misconduct.** *Burnup & Sims*, 379 U.S. at 23 n.3. The burden then shifts to the CGC, who must prove that the employee was engaged in a protected activity, the employer knew it was protected, the employer's actions were based on alleged misconduct occurring in the

course of the protected activity, and **the employee was not guilty of misconduct.** *Id.* at 23. After a careful review of the record, we submit that the only reasonable inference that can be drawn from the evidence is that KOIN plainly possessed an honest, good-faith belief that Hansen violated KOIN's important company policies on business conduct and anti-harassment through her contemptuous vulgar and offensive comments directed towards Moore and his supervisor. Moore credibly testified that Hansen accused him of having "secret" meetings with a person she described as a "piece of shit" and either a "rat" or a "rat fuck". (TR. 84-86) While Hansen maintained that she did not use those words, or when pressed by the ALJ that **'she did not recall whether she did or not'....."I really doubt that I would have said that"** (TR.44:15-25; 50:11- 21)(see argument at p.3, supra), we believe that the CGC failed to prove that Hansen "was not guilty of misconduct", as it should be found that she did, in fact, use these words.

Under *Wright Line*, a similar analysis is used. CGC must initially show that the employee's Section 7 activity was a motivating factor in the employer's decision to discharge or discipline the employee. The elements required to support this initial showing are union or other protected concerted activity, knowledge of that activity, and animus on the part of the employer. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the employee's protected conduct. *Wright Line*, 251 NLRB at 1089. Under *Wright Line*, the critical inquiry is what motivated the Employer to issue the disciplinary warning. Here there can be little doubt. Hansen's vulgar, derogatory, and harassing conduct on May 18, 2019 justifiably led to a written warning. As noted above, it was brought to the attention of KOIN management that Hansen was involved in an inappropriate and harassing

conversation with co-worker Ben Moore that took place on that date. KOIN, pursuant to its' Anti-Harassment Policy, carefully investigated the circumstances to determine what had occurred and whether Hansen had violated company policy during this incident. Based on the findings during its' investigation KOIN management concluded that violations of company policies did occur, specifically violations of the Business Conduct Policy and the Anti-harassment policy. It was Hansen's offensive and vulgar conduct and not union activity, was the "motivating factor" for KOIN's decision to give her a written warning.

A number of factors have been employed by the Board and the courts to decide the motivating factor for the discipline imposed. One court set out some of the factors to use in assessing motive: "the failure to investigate the conduct alleged as the basis for discipline, disparate treatment of the disciplined employee or discipline that deviates from the employer's past disciplinary practice, the implausibility of the employer's explanation of its action, inconsistencies between the employer's proffered reason for the discipline and other actions of that employer, and the seriousness of the alleged violation. *Id.*(citing *Valmont*, 244 F.3d at 456). "Mere suspicions of unlawful motivation are insufficient to establish violations of the NLRA." *Asarco, Inc. v. NLRB* 86 F.3d at 1401, 1408 (internal quotations omitted). Timing is often looked to as to the relationship between the adverse employment action and union activity. *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 565 (5th Cir. 2003).

Here, all of those factors and considerations point in KOIN's favor. There can be no doubt that KOIN conducted a careful and methodical investigation of the Hansen/Moore incident. There is absolutely no evidence of disparate treatment or proof that the written warning given to Hansen deviated from past disciplinary actions

at KOIN. There is no implausibility as to KOIN's asserted reason for the discipline. There are no inconsistencies between KOIN's proffered reason for the discipline and other actions of KOIN. The violation of KOIN policy was serious, at least warranting a written warning. Finally, there is absolutely no suspicious 'timing' involved here. It is undisputed that Hansen's involvement with the union is longstanding spanning many years and several 'very tough' negotiations, with absolutely no evidence that she had been disciplined before or after the ugly and profane actions that she engaged in on May 18, 2019. TR. 22-25 *Electrolux Home Products* 368 NLRB No. 34 (2019).

**III. BRIEF IN SUPPORT OF EXCEPTIONS 20-25:** The ALJ and CGC both attempted to distinguish the *Michigan Bell* holding by asserting that there was no credible evidence of witness intimidation, coercion or other threats to the witness' safety, without acknowledging the credible evidence that Moore reported, and proof established, that Hansen had engaged in harassing, accusatory and abusive conduct and the undisputed facts that witness X had asked to remain anonymous and that the employee handbook assured her such anonymity if possible, and the additional undisputed fact that she works closely with Hansen. The ALJ also sought to distinguish *Michigan Bell* by claiming that the identity of the witness or witnesses involved was entitled to a greater degree of confidentiality in *Michigan Bell* than it would be in this case; despite the fact that in *Michigan Bell* there was no showing that the individual who was the informant to management about the planned job action requested confidentiality or had been threatened or intimidated. The Board in *Michigan Bell*, while protecting the identity of the witness, also concluded that the union should be provided a 'summary' of what the informant provided to the Company as to the possibility of another job action. In the instant case, the Union only sought the identity of the witness not asking for a

summary of the statement, or the statement itself, because they had already been furnished one. Moreover, the Company also provided a summary of what the witness said at the hearing, (R.Exh.#3) which was admitted without hearsay objection and should be credited as to its weight. (see supra at p.17-18). The final point that the ALJ raised as to support this violation is that the Company should have offered to accommodate the denial by offering an alternative. Given that a summary had been provided, there would be nothing left to offer as an accommodation without yielding the identity of the individual who wished not to be 'outed'. Applying the decision in Michigan Bell, the Board should protect the confidentiality of the witness' identity from disclosure to the Union and find that KOIN did not violate the act by refusing to give up that individual's identity.

### III. CONCLUSION

The Exceptions to the Administrative Law Judge's should be granted and an Order dismissing the Complaint in its' entirety should be entered.

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

*Charles W. Pautsch*

By: Charles W. Pautsch, Esq.  
Associate Counsel  
Nexstar Media Group, Inc.  
545 E. John Carpenter Freeway  
Suite 700  
Irving, TX 75062  
972-373-8800  
[cpautsch@nexstar.tv](mailto:cpautsch@nexstar.tv)

Dated: August 26, 2020

### AFFIDAVIT OF SERVICE

I hereby certify that I served the foregoing REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION on Anne Yen counsel for the Charging Party Union by e-mailing a copy of same in to [ayen@unioncounsel.net](mailto:ayen@unioncounsel.net), to Sarah Ingebritsen, Counsel for the General Counsel at [Sarah.Ingebritsen@nlrb.gov](mailto:Sarah.Ingebritsen@nlrb.gov). and Ronald Hooks, the Regional Director of Region 19, at [Ronald.hooks@nlrb.gov](mailto:Ronald.hooks@nlrb.gov) on 8/22/20.

*Charles W. Pautsch*

Charles W. Pautsch