

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

UNITED STATES POSTAL SERVICE

And

Case 10-CA-223776

CONNIE RENEE SANCHEZ, an Individual

BRIEF OF COUNSEL FOR THE GENERAL COUNSEL

To the Honorable Michael Rosas, Administrative Law Judge

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I. INTRODUCTION

The preponderance of the record evidence proves that the United States Postal Service (herein “Respondent”) violated Section 8(a)(1) and (3) of the National Labor Relations Act (herein the “Act”) by unlawfully removing Charging Party Connie Sanchez from the schedule in retaliation for her union activities. Respondent further violated Section 8(a)(1) of the Act by making multiple statements of futility regarding the grievance filing process to employees Sanchez, Luz Steiner, and Tina Peacock.

Counsel for the General Counsel will begin by setting forth relevant background facts with specific focus on the events of March through June of 2018.¹ Counsel will then proceed to a discussion of credibility issues. Lastly, Counsel will address each of the complaint allegations with separate sections of this brief.

Counsel for the General Counsel argues that the Administrative Law Judge should credit the record evidence showing that Respondent violated the Act, find the violations alleged in the complaint, and order Respondent to remedy its unlawful conduct.

II. FACTS

A. Respondent’s Business Operations

Respondent operates a post office facility in Ludowici, Georgia. There are approximately ten (10) employees at this facility. The employees at this facility are clerks, rural carriers, and rural carrier associates. The rural carriers and rural carrier associates deliver and pick up mail from residences and businesses in Ludowici and the surrounding area. (Tr. 28). The rural carriers and

¹ All dates herein will be 2018 unless noted otherwise.

rural carrier associates are represented for purposes of collective-bargaining by the National Rural Letter Carriers Association (herein “Union”). (Tr. 106).

Typically, there is one supervisor that oversees the employees at the Ludowici facility. From May through July 2018, Veronica White was the Postmaster at the Ludowici facility. During 2017 and until May 2018, Ernest Warden was the Postmaster at the Ludowici facility. These individuals are supervisors and agents as defined by Section 2(11) and Section 2(13) of the Act. Respondent admits that Veronica White is a supervisor and agent as defined by Section 2(11) and Section 2(13) of the Act. (GC Ex. 1(m)).

Outside the Ludowici facility, there are several supervisors and agents of Respondent involved in this case. Lasandra Crawford is a Labor Relations Specialist for Respondent. Claudette Ballard works in the Injury Comp Office as a Health and Resource Manager for Respondent. Michael Chestnut is a Rural Delivery Specialist. The above individuals are supervisors and agents as defined by Section 2(11) and Section 2(13) of the Act.

B. Charging Party Connie Sanchez

Sanchez began working for Respondent in January 2017 as a rural carrier associate. (Tr. 26, 28). Sanchez transferred to the Ludowici facility around October 2017. (Tr. 32). Prior to working at the Ludowici facility, Sanchez worked for Respondent in North Augusta, South Carolina. (Tr. 32). Sanchez worked without any disciplinary incidents from the start of her time with Respondent until May 2018. (Tr. 32).

Around April 29, 2017, while working in North Augusta, Sanchez suffered an on-the-job injury to her respiratory tract. (Tr. 32-33). As a result of this injury, Sanchez developed a chronic condition and remains sensitive to heat and dust. In May 2017, Sanchez filed a claim for workers’

compensation with the Department of Labor. Despite this chronic medical condition, Sanchez worked from October 2017 until March 2018 without any serious issues as a rural carrier associate in Ludowici. (Tr. 34).

C. Sanchez's March 2018 Injury and April 2018 Reasonable Accommodation

On March 17, Sanchez became overheated and went to the emergency room as a result of her medical condition. (Tr. 35). Sanchez saw Dr. Moody who told her that she would need to miss work and rest until March 26. (Tr. 35; GC Ex. 2). On March 26, Sanchez provided Postmaster Ernest Warden with a medical document signed by Dr. Moody that stated she could return to work on March 26 and that she should avoid dusty, humid, and extremely hot environments. (Tr. 36; GC Ex. 2). Warden informed Sanchez that the language in this note needed to be clarified. He specifically asked her to get the phrase "extreme heat" clarified. (Tr. 37). Dr. Moody then wrote Sanchez an additional note that provided further information. (Tr. 38). The note defined excessive heat as 10 degrees higher than the average temperature for that climate. (GC Ex. 3). The note also stated that Sanchez should wear a mask to avoid exposure to dust and mold. (GC Ex. 3). Sanchez provided this note to Warden on March 26. (Tr. 38).

Sanchez did not hear anything from Warden for about two weeks and decided to file a grievance over the issue on April 6. (Tr. 40; GC Ex. 4). On April 6, she also provided Warden with a written letter wherein she requested a reasonable accommodation based on the medical restrictions of avoiding extreme heat, humidity, and dusty environments. (GC. Ex. 5).

After Sanchez provided this medical documentation to Warden on March 26, Warden informed Sanchez that he would need to consult with his supervisor and the occupational health nurse before Sanchez could return to work. (Tr. 38). On April 11, after receiving the reasonable accommodation request letter and related grievance, Warden sent an email to Labor Relations

Specialist LaSandra Crawford and Michael Jakob (Manager HRM, Gulf Atlantic District) and informed them both that Sanchez made a request for reasonable accommodations. (GC Ex. 30, pg. 1). Jakob responded by asking what Sanchez “wants as an accommodation.” (GC Ex. 30, pg. 3). Warden responded by stating that Sanchez wanted a mask for dust and “to take a cool down brake (sic) if needed.” (GC Ex. 30, pg. 3). Warden also wrote “I see not (sic) problems.” (GC Ex. 30, pg. 3). Jacob responded and informed Warden that he was going to check with the DRAC (District Reasonable Accommodation Committee) Chairman to see if Warden “needed to do anything else than say ok.” (GC Ex. 30, pg. 3). Crawford informed Warden that she “sent it to OHNA (occupational health nurse administrator) for verification.” (GC Ex. 30, pg. 1).

That same day, April 11, Warden contacted Sanchez and told her that she could come back to work the next day, April 12. (Tr. 43). On April 12, Warden signed a request for light duty form for Sanchez’s respiratory illness. (Tr. 44; GC. Ex. 6). Crawford testified that through this form Warden “was allowing her to work, and he knew she had a restriction, and he utilized that light duty form.” (Tr. 371). Postmaster Warden signed off on the section of the form that stated that Sanchez could be accommodated in Ludowici for light duty exceeding thirty (30) days. (GC. Ex. 6). The request stated that the anticipated duration of the light duty request was from April 12, 2018 through April 12, 2019. (GC Ex. 6).

D. Postmaster White’s May 2018 Removal of Sanchez from Schedule

Sanchez worked with these restrictions without incident until Veronica White took over as Postmaster around April 30, 2018. (Tr. 255). Sanchez first met White on April 27. Sanchez witnessed Warden tell White that Sanchez had medical accommodations. (Tr. 47). Coworker Luz Steiner also witnessed this conversation and confirmed that Warden told White that Sanchez had

medical restrictions and an accommodation. (Tr. 147). White denied knowing about Sanchez's medical accommodation at that time. (Tr. 308-309).

On the morning of May 4, after Sanchez reviewed her paycheck, Sanchez attempted to speak with White about an issue with pay period nine. (Tr. 50; GC Ex. 7). White told Sanchez that she did not have time to discuss the issue. (Tr. 50). Employee Tina Peacock witnessed this interaction and corroborated Sanchez. (Tr. 115). Sanchez then spoke with her Union representative over the phone and filled out a grievance form about the pay issue. (Tr. 51). Sanchez then attempted to file the grievance with White. White responded that she was not going to discuss the pay issue and was not going to sign the grievance form. (Tr. 51, 115). White instructed Sanchez to prepare for work and get on the road. (Tr. 51). White admitted that she told Sanchez multiple times that she did not have time for her grievances. (Tr. 321).

On May 7, White sent an email to Health Resource Manager Claudette Ballard to see if Sanchez had an active Department of Labor, Office of Workers' Compensation Program (OWCP) case or had any limitations. (R. Ex. 26, pg. 5). Ballard did not respond to the inquiry about Sanchez's restrictions. (R. Ex. 26, pg. 6). On May 8, Ballard informed White that Sanchez had filed a claim "stating that she inhaled some type of chemical," but that claim was denied. (R. Ex. 26, pg. 6). Ballard informed White that Sanchez needed to use personal leave or leave without pay if she was going to a doctor's appointment. (R. Ex. 26, pg. 6). However, White also provided contradictory testimony that on May 11 she was not aware that Sanchez had an OWCP claim that was denied. (Tr. 335). White testified that she did not find out about the OWCP claim until she did an investigation later. (Tr. 335).

On May 10, Sanchez felt as though she was over-heating and took two breaks. (Tr. 52). That evening, Sanchez returned to the Ludowici office after White had left for the day. (Tr. 52).

On the morning of May 11, White confronted Sanchez about taking too long on her route. (Tr. 52). Sanchez attempted to explain that she had a medical restriction and that her previous Postmaster Ernest Warden had granted her an accommodation based on her medical issues. (Tr. 52-53). White told Sanchez that as far as she was concerned Sanchez did not have accommodations because Sanchez's workers' compensation case was denied. (Tr. 53). White claims that she asked Sanchez for documentation of her medical restrictions and Sanchez refused to provide those documents. (Tr. 313). White told Sanchez that if Sanchez could not get back by 6:00 pm then she was not allowed to take a break. (Tr. 53). White denied making this statement. (Tr. 314). However, White admitted that she told Sanchez that if she exceeded a thirty-minute break then that was a contract violation. (Tr. 314). She also admitted telling Sanchez that if she took more than thirty-minutes then Sanchez was not working proficiently. (Tr. 314).

Also, prior to heading out on her route that morning on May 11, Sanchez attempted to file the pay period nine grievance for a second time with White. (Tr. 53; GC. Ex. 7). White again refused to sign the grievance form. (Tr. 53). When Sanchez tried to file the grievance, White also put her hand in Sanchez's face and stated "get out of my face. I do not have time for this." (Tr. 54). Sanchez then contacted a Union representative and let them know that she wanted to file a grievance over the issue. (Tr. 55). There is no evidence in the record that any other employees attempted to file grievances during White's first two weeks as Postmaster in Ludowici.

Tina Peacock witnessed this interaction. Peacock corroborated that White again refused to accept Sanchez's grievance and told Sanchez to get out of her face. (Tr. 116). Peacock also remembered that when Sanchez was outside talking on the phone to the Union representative, White followed Sanchez outside and told Sanchez to get off the phone. (Tr. 117). Peacock was outside with Sanchez at the time and witnessed White tell Sanchez "that she needed to hang up the

phone, that the Union wasn't going to help her anyways.” (Tr. 117). White did not deny this statement directly.

Later during her shift on May 11, Sanchez took a lengthy break because she felt again that she was overheating. (Tr. 57-58). She attempted to contact White to let her know that she needed to take a break, but White did not answer her calls. (Tr. 57).

Following May 11, Sanchez called out from work on May 12 and May 14 because she was still physically recovering from her May 11 shift. (Tr. 58). Sanchez then went to Florida for her daughter’s graduation on May 15. (Tr. 58). Warden previously approved two leave requests for Sanchez’s trip on April 13. (Tr. 45; GC. Ex. 8; R. Ex. 2). Sanchez was in Florida from May 15 through May 19. (Tr. 58). White denied seeing the leave slip for May 16 through 19 and testified that she had only seen the approved leave for May 26 through May 30. (Tr. 326, 327). The two leave slips are for different events. Warden approved leave for Sanchez’s daughter’s graduation in Florida for May 16 through May 19. (GC. Ex. 8). He also approved Sanchez’s leave request for May 26 through May 30 for an out of town academy party. (R. Ex. 2).

On May 15, Sanchez left for her daughter’s graduation in Florida. (Tr. 59). That same day, White sent Peacock to deliver a certified letter to Sanchez requiring her to be present for an investigatory interview on May 17, 2018. (Tr. 117; GC Exs. 9, 28, 29). Before delivering the letter, Peacock informed White that Sanchez was not going to be home because Sanchez was out of town for her daughter’s graduation. (Tr. 117). Peacock also told White that Sanchez had an approved leave slip from former Postmaster Warden. (Tr. 117). White told Peacock that if Sanchez was not home, she (Peacock) should sign for receipt of the certified letter. (Tr. 117). Peacock did as she was ordered and delivered, signed, and dated a certified mail receipt for a letter that Sanchez was not home to receive. (Tr. 118; GC. Ex. 28). For further confirmation that this letter was delivered,

White also required Peacock to fill out a routing slip documenting that the letter was delivered. (Tr. 119; GC. 29). This was the only time in Peacock's lengthy career as a carrier that she was required to fill out a form of this kind. (Tr. 119).

Sanchez missed the May 17 investigatory interview because she was on approved leave for her daughter's graduation. (Tr. 60). Sanchez returned from Florida early in the morning of May 20. (Tr. 60). When Sanchez returned from Florida, she reviewed the letter that required her to attend an investigatory interview. (Tr. 60; GC Ex. 9).

On May 21, when Sanchez came in to work her first shift following her approved leave, she encountered an employee from another location preparing for Sanchez's route. (Tr. 62). When White arrived that morning, she informed Sanchez that she needed to go home and that her services were not needed. (Tr. 62). Sanchez asked for an explanation as to why she was being sent home and White told her that she would get something in the mail. (Tr. 62, 150). Sanchez also asked when she should return and for her schedule. (Tr. 62). White only told Sanchez that she would get something in the mail. (Tr. 62). When Sanchez continued to ask for an explanation, White threatened to call the police if Sanchez did not leave the building. (Tr. 62). Peacock and Steiner witnessed this interaction, including White's threat to call the police. (Tr. 120, 150). Sanchez then left her workplace without receiving an explanation as to why she was being expelled and removed from the schedule. (Tr. 63). Sanchez was not told why she was removed from the schedule until June 12. (Tr. 80).

Following her expulsion from the office on May 21, Sanchez had a meeting with White and Union representative Kathleen Brunson on May 25. (Tr. 79). Sanchez expected White to explain the removal and the investigational interview during this meeting, but that did not happen. (Tr. 79). White stated that she did not know what they were there to discuss. (Tr. 79). Sanchez and

Brunson filed three grievances during that meeting. (Tr. 79). These grievances concerned Sanchez's removal from the schedule, the pay period issue that Sanchez previously brought to White's attention, and her reasonable accommodation. (GC Ex. 10-12).

Sanchez continued to file and attempt to file grievances with White even after she was removed from the schedule. (GC. Ex. 15, 16, 18). As noted by former Union steward Peacock, Sanchez filed more grievances than any other employee during White's brief tenure as Postmaster in Ludowici. (Tr. 127).

E. Respondent's Justification for Sanchez's Removal

Respondent did not tell Sanchez why she was removed from the schedule until June 12. This was 22 days after White threatened to call the police if Sanchez did not leave the Ludowici Post Office. During those 22 days, White attempted to justify Sanchez's removal for two separate reasons unrelated to her medical restrictions.

Initially, White sought to terminate Sanchez because Sanchez missed the investigatory meeting on May 17. (GC Ex. 32, pg. 1-3). Prior to Sanchez returning from Florida, White completed and sent a disciplinary action request form to the Senior Labor Relations Specialist on May 18. (GC Ex. 32, pg. 1-3). White requested the "removal" of Sanchez because Sanchez "failed to report for an investigatory interview." (GC Ex. 32, pg. 1). White included the letter she sent to Sanchez on May 15 and two forms of verification that the letter was delivered. (GC Ex. 32, pg. 2, 4-9). The request for removal was reviewed and concurred with by Shalitha T. Orr, Manager, Post Office Operations for the Regional Post Office in Jacksonville, Florida. (GC Ex. 32, pg. 3).

Respondent did not formally inform Sanchez that it took this disciplinary action. As noted above, White simply told Sanchez that she needed to leave the facility and that she would get something in the mail.

After making this formal request for removal, White had at least one email communication with Labor Relations Specialist Melissa A. Stack on May 30. (GC Ex. 32, pg. 12). In this email, White provides at least three different reasons why Sanchez is deserving of discipline. She notes that, 1) Sanchez took too long on her route on a few different dates, 2) this required other carriers to assist Sanchez, “which is grossly unfair,” and 3) that Sanchez’s “attendance is atrocious.” (GC Ex. 32, pg. 12). Again, Sanchez did not receive any discipline from Respondent during the weeks following this email during which time she remained off the schedule without explanation.

On June 12², after over three weeks without work, Sanchez was called in for a meeting with Union representative Robin Moody, White, Respondent Occupational Health Nurse Anne Kachowsky, and Labor Relations Specialist Lasandra Crawford. (Tr. 80-81). During this meeting, management informed Sanchez that she needed to get further clarification regarding her medical restrictions. (Tr. 81). Respondent claims that during this meeting, it informed Sanchez that it could not accommodate her medical restrictions based on the documentation she had provided. (Tr. 387).

During the investigation of the underlying charges in this case, Respondent provided a position statement that summarized its approach to removing Sanchez from the schedule. (GC. Ex. 33). It reads in relevant part:

² There is no documentation from this meeting. Sanchez confirmed that this meeting took place on June 12 with two grievances that she filed on that date. (GC. Ex. 15, 16, Tr. 75). Sanchez stated that she filed these grievances after they had their meeting on June 12. (Tr. 75). Crawford mentions the phone call with Sanchez taking place on June 7, but this appears to be incorrect because it conflicts with Sanchez’s testimony and documents and is not corroborated by any documentation. (Tr. 387-88).

Ms. Sanchez was indefinitely removed from the work schedule due to her pending removal from the Post Office, at that particular time, for her failure to report for an investigatory interview on May 17, 2018, concerning her unsatisfactory performance and, thereafter, because Management was unable to accommodate the extreme nature of her medical work restrictions, in her capacity as a Rural Letter Carrier. In particular, Ms. Sanchez is unable to work in excessive heat or cold temperatures. Management's proposed removal action against Ms. Sanchez was not ultimately issued to her and she (Sanchez) is currently out of work on OWCP (Office of Worker's Compensation Programs), specifically due to the nature of her medical restrictions and Management's inability to accommodate those restrictions. In that regard, the Department of Labor has sole discretion concerning the administration of her OWCP/FECA claim, including, but not limited to, compensation payments. (GC. Ex. 33).

Sanchez was informed by a letter that her OWCP claim was accepted on July 25. (GC. Ex.

19). The OWCP acceptance letter was sent more than two months after Respondent removed Sanchez from the schedule.

F. Postmaster White's Statements to Employees Regarding Grievances

In addition to removing Sanchez from the schedule without explanation and then for varying explanations, Respondent, through White also made several comments that discouraged employees from filing grievances. She made these statements to Sanchez, Tina Peacock, and Luz Steiner.

Peacock is a 21-year veteran of the Postal Service and has worked at the Ludowici post office for the entirety of that time as a rural carrier. (Tr. 105). She currently is employed as a rural carrier. (Tr. 105). Peacock was also a steward with the Union from 2011 until June 2018. (Tr. 106). As a steward, Peacock filed grievances on behalf of other mail carriers and attempted to settle grievances with management at the lowest possible level. (Tr. 106). Luz Steiner is a rural carrier who has worked out of the Ludowici post office since 2014. (Tr. 147).

On June 6, Peacock and Steiner attempted to file grievances regarding the measurement of their routes. (Tr. 124, 155). Peacock testified that when they spoke with White about the

grievances, White told them that “she wasn't going to sign it, and she told [them] if [they] wanted to file it, [they] could, but the post office was going to side with her.” (Tr. 125). Steiner testified that when they attempted to file these grievances with White, White told them that they were wasting their time, and that White would be believed over them. (Tr. 155).

On June 26, Sanchez went to the Ludowici post office hoping to speak with White about possibly working inside the post office. (Tr. 84). Sanchez asked White if it was possible that she could work inside the office as a clerk, and White informed Sanchez that there were no clerk positions available. (Tr. 84). Sanchez then attempted to file a grievance with White seeking to work inside as a clerk. (Tr. 77, 84; GC Ex. 18). White refused to accept the grievance and asked Sanchez who helped her fill out the grievance. (Tr. 77, 84). Sanchez told White that she filled the grievance form out herself. (Tr. 77, 84). White then told Sanchez that Union representative Kathleen Brunson should not tell her how to fill out the grievances. (Tr. 77, 84). White then stated that she did not know why Sanchez was wasting her time filing grievances because the Postal Service was always going to be on White's side. (Tr. 77, 85).

Steiner also testified that she witnessed an encounter between Sanchez and White around the end of June 2018. (Tr. 160). Steiner witnessed Sanchez attempt to file a grievance and White told Sanchez that she was wasting her time. (Tr. 161).

White made a blanket denial to these statements. (Tr. 322). She denied telling employees that they were wasting time. (Tr. 322). She also denied telling them that the Postal Service would believe her over them. (Tr. 322). White did not address the specific instances as stated by Sanchez, Steiner, and Peacock.

G. Grievance Filing Process

There are a number of instances throughout the transcript where Respondent counsel objected to the inclusion of grievances that did not include Veronica White's signature. Respondent counsel stated that it would accept certain grievances being admitted into the record as indications that these were forms filled out by Sanchez, but not actually filed or given to a supervisor. (Tr. 77-78, 94). However, Sanchez, Peacock, and Steiner all articulated in their testimonies that the first step of the grievance filing process from their experience was to take the grievance form directly to the Postmaster prior to attempting to file it through the Union. (Tr. 41, 107, 153).

All three employees stated that this was their practice, but Peacock went into the most detail. (Tr. 107). Peacock explained that in her seven years as Union steward, it was her experience that when attempting to file a grievance the Postmaster would initial and date the grievance and then either speak with her about the issue at that time or set a time to speak about it later. (Tr. 107). Peacock stated that White refused to sign approximately eleven (11) grievances that she attempted to file with White. (Tr. 108). Peacock also testified that when she attempted to file the grievances, White would sometimes respond by ignoring Peacock or by telling Peacock to get out of her face. (Tr. 108). Peacock also testified that during her seven years as a steward, no other Postmaster had refused to accept a grievance that she attempted to file. (Tr. 110).

H. Sanchez's Post-Removal Attempts to Return to Work

As seen from the June 26 grievance, Sanchez wanted to, and attempted to, return to work immediately. (Tr. 75; GC Ex. 18). At that time, she sought work inside the post office as a clerk. (Tr. 75). She testified that during the period between the end of White's tenure as Postmaster (August 2018) and the beginning of Shaun Smith's time as the Ludowici Postmaster (October

2019) there were about thirteen acting officers in charge of the Ludowici post office. (Tr. 93). Sanchez stated that she met with every new supervisor and informed them that she wanted to work and was willing to work inside as a clerk. (Tr. 92, 93). Shaun Smith verified that Sanchez came up and attempted to start working within a couple days of his starting in Ludowici. (Tr. 608-609). She also continued to file grievances with the intent of returning to work. (GC Ex. 21). Sanchez stated that at least two other rural carriers or rural carrier assistants were allowed to work as clerks during the time that she was out. (Tr. 76, 84). She was never called in for a clerk position in the office, not once given a job inside as a clerk in 18 months. (Tr. 93). Respondent never rebutted that other rural carriers were given clerk work during that period of time.

III. CREDIBILITY

At hearing, Counsel for the General Counsel called three employee witnesses on direct examination, all of whom testified in a consistent and detailed manner. To the extent that credibility determinations are necessary in this case, those determinations should weigh in favor of the non-supervisory witnesses called during the General Counsel's case in chief.

The Board has consistently held that testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). The Board has also held that the testimony of current employees is entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209, fn. 1 (2006); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). All of the General Counsel

witnesses are current employees who testified against their own interests as employees and are therefore highly credible.

Additionally, the credibility of Counsel for the General Counsel's witnesses should be enhanced in the case at hand because the witnesses all gave testimony while Respondent's Postmaster White sat in the hearing room as a representative of Respondent. (Tr. 346). All three witnesses testified directly about actions that White had taken and/or things that White had said, thus creating an enhanced risk of reprisal.

It is anticipated that Respondent will attack the credibility of Sanchez and Peacock. In regard to Peacock, it is likely that Respondent will note that certain statements she made on the stand were not included in her affidavit during the investigation. Respondent argued during the hearing that this contradiction should undercut Ms. Peacock's credibility as a witness. However, it should also be noted that during the intense cross examination Ms. Peacock endured, she also testified that she provided her affidavit over the phone while at work (driving a car, delivering mail). (Tr. 135). She testified she was not asked in detail about these events and that she did "not give in detail, anything." (Tr. 135). The weight of short affidavits, provided over the phone while driving, should be minimal.

It is also probable that Respondent will note that Sanchez wrote extensively to various sources about her removal from the schedule. Sanchez did not always allege anti-union retaliation in her letters. (R. Exs. 7, 8, 9). However, Sanchez's familiarity with her Section 7 rights is not necessary for a finding that she was in fact retaliated against because she engaged in protected activity. Sanchez also did specify at other times that her Union activity was one of White's motivating factors when White decided to remove Sanchez from the schedule without cause. (R.

Ex. 23). Most importantly, Sanchez consistently told the same set of facts while questioned on the stand and during the investigation.

All the witnesses Respondent called to testify were current supervisors or agents of Respondent. Much of the testimony of these witnesses was elicited with leading questions during direct examination. Thus, the testimony of Respondent's witnesses should be afforded less weight than the testimony of Counsel for the General Counsel's witnesses and discredited where appropriate. *T.M.I.*, 306 NLRB 499 (1992); *H.C. Thomson*, 230 NLRB 808 (1977). To the extent that Respondent's witnesses failed to deny or contradict the testimony of Counsel for the General Counsel's witnesses, the testimony of Counsel for the General Counsel's witnesses should be credited as uncontradicted. See *Mark Lines, Inc.*, 255 NLRB 1435 (1981) (finding a violation of Section 8(a)(1) where General Counsel's evidence offered through witness of 'less than impressive credibility' was not rebutted and therefore confirmed by uncontradicted proof).

Finally, although not addressed in Federal Rule of Evidence 611, the Administrative Law Judge should draw an adverse inference from Respondent's failure to call former Postmaster Ernest Warden, a material witness reasonably assumed to be favorably disposed toward Respondent. A trier of fact may draw the "strongest possible adverse inference" against a party that fails to present a material witness presumed to be favorable to it, sometimes called the "missing witness rule." *Flexsteel Industries, Inc.*, 316 NLRB 745, 758 (1995); *Douglas Aircraft Company*, 308 NLRB 1217, 1217 fn. 1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). Warden played a crucial role as the previous Postmaster. He oversaw Sanchez's work for approximately seven months prior to accommodating her medical restrictions in April 2018.

IV. ALLEGATIONS AND ARGUMENTS

A. Respondent Made Unlawful Statements of Futility to Employees [Complaint ¶5]

The Board has found violations of Section 8(a)(1) where an employer “conveyed the impression that the contractual grievance procedure was futile.” *Prudential Insurance Co. of America*, 317 NLRB 357 (1995) (supervisor unlawfully informed employee that filing grievances would “lead to a bad situation” and “it didn't matter what happened during the grievance procedure”). See also, *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB 1225, 1230 (2014) (an employee was told, “Go file a grievance. You'll get nowhere”) and *Cadillac of Naperville, Inc.*, 368 NLRB No. 320, slip op. at 1 (2019) (supervisor informed employees that he did not “give a shit about grievances. Grieve all you want. It doesn't matter. They can't do shit”).

In this case, Sanchez, Steiner, and Peacock all testified that White told them on at least two different occasions that filing grievances was a waste of time. White made this statement to Steiner and Peacock on June 6, and made this statement to Sanchez on June 26. Additionally, during those same conversations on June 6 and June 26, White further emphasized that Respondent management was going to side with her and believe her instead of the employee-grievants. She made these comments to Sanchez, Steiner, and Peacock while they were attempting to give her grievances forms, which she refused to accept and refused to sign.

White also told Sanchez when Sanchez tried to call the Union on May 11 that “she needed to hang up the phone, that the Union wasn't going to help her anyways.” (Tr. 117). White clearly informed these employees that filing grievances with her was going to be futile and attempted to discourage these employees from filing grievances.

Based on extant case law, Respondent violated Section 8(a)(1) of the Act by making coercive statements to these employees on at least three separate occasions during the months of May and June 2018.

B. Respondent Unlawfully Removed Connie Sanchez from the Schedule on May 21, 2018 [Complaint ¶6]

In determining whether an adverse employment action is attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 108 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* framework requires proof that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. 251 NLRB at 108. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *General Motors*, 369 NLRB No. 127, slip op at 15. (2020); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 67 (2d Cir. 2009). If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011).

i. Union Activity and Knowledge

In this case, Sanchez engaged in open and vociferous union activity by attempting to file grievances on multiple occasions prior to her indefinite removal from the schedule. Sanchez's attempts to file grievances on May 4 and May 11 are corroborated by Peacock and Steiner. There is no evidence in the record that any other employees attempted to file grievances during White's first two weeks as Postmaster in Ludowici. Sanchez continued to attempt to file grievances and filed grievances during the month of May prior to being informed that Respondent could not accommodate her medical restrictions. As noted by former Union steward Peacock, Sanchez filed

more grievances than any other employee while White was the Postmaster in Ludowici. Respondent knew that Sanchez was engaged in such activity because Sanchez spoke directly to Postmaster White about her grievances.

ii. Animus

In *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019), the Board held that “to meet the General Counsel’s initial burden [under *Wright Line*], the evidence of animus must support finding that a causal relationship exists between the employee’s protected activity and the employer’s adverse action against the employee.” The Board explained:

[W]e emphasize that we do not hold today that the General Counsel must produce *direct* evidence of animus against an alleged discriminatee’s union or other protected activity to satisfy his initial burden under *Wright Line* . . . We continue to adhere to the Board’s longstanding principle that proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole

The Board also recently held that Section 8(a)(1) violations occurring close in time to an adverse action against an employee are “particularly relevant” as far as showing unlawful motivation. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 9 (2018). See also *St. Mary Medical Center*, 339 NLRB 381, 381 (2003) (“Animus can be inferred from the 8(a)(1) violations....”). Animus can also be inferred from the relatively close timing between an employee’s protected concerted activity and his discipline. *Corn Brothers, Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus).

In this case, Respondent, through White, removed Sanchez from the schedule and prevented her from working immediately after Sanchez attempted to file grievances. On May 11, when Sanchez attempted to file a grievance, White told Sanchez to get out of her face. Moments later, when Sanchez went to call the Union, White told Sanchez that the Union could not do

anything for her. A mere three days later, White started the disciplinary process that led to Sanchez's removal. Specifically, White drafted and issued a letter requiring Sanchez to attend an investigational interview on May 17. There is no evidence that any employees other than Sanchez attempted to file grievances during White's first two weeks in Ludowici.

The letter requesting Sanchez to attend an investigational meeting may appear innocuous, but the intent behind the letter was retaliatory and unlawful. White knew (both from the leave request document and from Peacock's verbal communications) that Sanchez was out of town on May 15 when White sent the letter. White required Peacock to sign two separate forms verifying the delivery of the investigational letter. When Sanchez then missed the investigational meeting on May 17 (because she was out of town on a pre-approved leave), White filled out a request for removal form. The request for removal was based on Sanchez missing the investigative interview. It makes no reference to Sanchez's medical restrictions. As supporting evidence that Sanchez missed an investigative interview, White provided the certifications that she required Peacock to sign. White then removed Sanchez from the schedule and informed Sanchez that her services were no longer needed. When Sanchez asked why she was being removed, White told her that she would get something in the mail, and that if she did not leave the premises, White would call the police.

Furthermore, the Board has held that an employer's hostility to unionization and antiunion comments, while themselves lawful, may nevertheless be considered as background evidence of animus toward employees' union activities. *Tim Foley Plumbing Service*, 337 NLRB 328, 329 (2001). In the weeks after Sanchez's removal (but prior to Sanchez being informed that Respondent could not accommodate her medical restrictions), White continued to express her displeasure with employees who filed grievances. She refused to sign and accept grievances that Peacock attempted to file on behalf of other employees. White also repeatedly told Peacock to get

out of her face when Peacock attempted to file grievances. White discouraged Peacock and Steiner from filing a grievance by informing them that they were wasting their time and that the Postal Service was going to side with her. White also made similar statements to Sanchez when Sanchez attempted to file a grievance on June 26.³

Additionally, shifting defenses give rise to an inference of discriminatory intent and that the proffered explanation for the discrimination is pretextual. See e.g., *Sound One Corp.*, 317 NLRB 854, 858 (1995). Where a defense is shifting and inconsistent, this is strong support for a finding that no legitimate reason existed for an employer's adverse action. *Electric Group, Inc.*, 327 NLRB 504, 505 (1999), citing *Frances House, Inc.*, 322 NLRB 516, 523 (1996).

Approximately nine days after removing Sanchez from the schedule and telling her that the police would be called if she did not go home, White again attempted to justify Sanchez's removal in an email to a labor specialist. This email does not mention Sanchez missing an investigative interview. The email does mention a number of ways in which Sanchez was allegedly failing to perform her job duties. Notably, neither the email nor the removal request include a single reference to Sanchez's health or safety.

Finally, on June 12, twenty-two days after Sanchez was sent home without explanation, Respondent informed Sanchez that it could not accommodate her medical restrictions. During their testimony, White and Lasandra Crawford both explained that this was the only consideration made when deciding to remove her from the schedule. Both Crawford and White testified that Sanchez was removed solely out of concerns for her safety. (Tr. 317-321, 397).

³ In mid-June, White also denied leave that Peacock requested for July 5-6. This adverse action was fully handled by the Union through the parties' grievance process and were not alleged as violations of the Act in this complaint. (Tr. 111-114).

However, this explanation was demonstrably false. As noted above, White attempted to remove Sanchez first for the fabricated reason of failure to attend an investigative interview and then secondly based on Sanchez's performance and attendance. Furthermore, this justification is directly at odds with the position taken by Respondent during the initial investigation of these allegations. (GC. Ex. 33). In its initial position statement, Respondent admitted that, "Ms. Sanchez was indefinitely removed from the work schedule due to her pending removal from the Post Office, at that particular time, for her failure to report for an investigatory interview on May 17, 2018, concerning her unsatisfactory performance" (GC. Ex. 33). This explanation is clearly supported by White's request for removal and May 30 email found in General Counsel Exhibit 32. During the hearing, Respondent providing a shifting defense by focusing solely on Sanchez's medical issues.

In sum, Respondent, through White: 1) removed Sanchez from the schedule immediately after Sanchez attempted to file her second grievance; 2) made unlawful and generally hostile comments to multiple employees (including Sanchez) regarding their grievance filing activities; and 3) provided a shifting defense to justify its decision to remove Sanchez from the schedule. Based on the evidence described above, the Administrative Law Judge should find that Respondent harbored animus towards Sanchez's protected Union activity. The Administrative Law Judge should further find a causal relationship between Sanchez's protected activity and Respondent's decision to remove her from the schedule on May 21.

iii. Respondent's Wright Line Defense Burden

Once the General Counsel satisfies the initial burden under *Wright Line*, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct." *East End Bus Lines, Inc.*, 366 NLRB No. 180

(2018), slip op. at 1; *Allstate Power Vac.*, 357 NLRB 344, 346 (2011)(quoting *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). To establish this affirmative defense, “An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), quoting *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

Respondent’s defense burden under *Wright Line* is not to identify legitimate grounds for which it *could* impose discipline, but to persuade that it *would* have disciplined the employee even absent his or her protected activity. E.g., *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

Additionally, in *EF International Language Schools*, 363 NLRB No. 20, slip op. at 1 (2015), the Board affirmed an Administrative Law Judge decision holding that:

A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Thus, if the evidence establishes that the reasons given for the Respondent’s action are pretextual, the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). *EF International Language Schools*, above, slip op. at 13 (2015).

As demonstrated in the animus section above, Respondent offered a variety of pretextual justifications for Sanchez’s removal. The following section explores in depth how her removal allegedly for disciplinary reasons and medical reasons were both pretextual.

Respondent’s defense of possible disciplinary action was clearly pretextual. At the time of her removal, Sanchez had no disciplinary history. This means that White, who oversaw Sanchez’s work on approximately six total shifts between April 30 and May 11, decided to terminate Sanchez

because she missed an investigatory interview while she was in another state on approved leave. Respondent's other claim that Sanchez deserved to be terminated because she was frequently late to return to the office is also undercut by the limited time that White was Sanchez's supervisor. White supervised Sanchez for less than two weeks. During that incredibly short amount of time, Sanchez was only late to return from delivery four times. (GC. Ex. 32, pg. 12). Respondent emphasized through multiple witnesses during the hearing that Sanchez's late return times were unacceptable, but it provided no evidence that it ever issued her formal discipline. Obviously, Respondent did not have proper cause to terminate Sanchez and that is why it shifted its focus to her medical restrictions as an alleged justification for keeping her off the work schedule.

Respondent's decision to no longer accommodate Sanchez (which it made 22 days after removing her from the schedule ostensibly because she missed an investigative interview) was also pretextual and arbitrary. Respondent provided extensive evidence to argue that it could have taken disciplinary action had it chosen to, but that what it actually did was remove Sanchez from the schedule because it could not accommodate her medical restriction. However, her medical restrictions (avoid extreme heat, humidity, dust, and fumes) have not changed since her injury in April 2017. Remarkably, Respondent was able to accommodate her from October 2017 until May 2018 while Ernest Warden was her supervisor and until she attempted to file grievances with White. Respondent is also now able to accommodate her and has done so since November 2019 with Shaun Smith as the Postmaster in Ludowici.

Respondent can offer no satisfying explanation as to why it could not accommodate Sanchez during and immediately after White's tenure as Postmaster in Ludowici. On April 12, 2018 Respondent decided that Sanchez had provided sufficient medical documentation regarding her injury and restrictions and that it could accommodate her. Respondent allowed her to return to

work based on the information it had at that time. Then, exactly two months later, and following her removal for a fabricated reason, Respondent informed Sanchez that it could not accommodate her medical restrictions.

Respondent offered a variety of explanations as to why it decided that it could no longer accommodate Sanchez after June 12, 2018. Most clearly, Respondent, through Lasandra Crawford, explained that the second medical note prevented Sanchez from working in temperatures that were 10 degrees above average. Crawford explained that Respondent interpreted this note (without guidance from a medical professional) to mean that Sanchez could not work in temperatures above 85 degrees. (Tr. 402). Based on this new, arbitrary interpretation of the March 23 note, Crawford and others decided that Respondent could not accommodate Sanchez.

Incredibly, Crawford participated in the process to accommodate Sanchez based on the same medical documentation just two months prior when Warden sought the accommodation. In April, Crawford did not object to the lack of clarification, Sanchez's letter, or the terms of the accommodation (frequent breaks and mask use).⁴ It was not until three weeks after Sanchez was removed from the schedule based on pretextual and fabricated discipline that Crawford (and presumably others) decided that Sanchez's medical documents were insufficient and that Respondent could not accommodate her medical restrictions.⁵

Certainly, Sanchez's OWCP claim and her contacts with Claudette Ballard had nothing to do with Respondent's decision to no longer provide Sanchez with a reasonable accommodation.

⁴ Breaks and mask use were first listed in the letter that Sanchez wrote, but as Sanchez testified, she wrote this letter based on information provided by her Doctor at the time. These restrictions are confirmed in later medical documentation. For example, R. Ex. 30 pg. 50 has a handwritten note from the physician explaining that Sanchez needs frequent breaks and must wear a mask to prevent asthma flare ups. This note is dated January 14, 2019.

⁵ Crawford testified that Warden requested further documentation from Sanchez and that Sanchez failed to provide it. This is hearsay and it is not corroborated by any additional evidence. Respondent failed to present Warden as a witness and provided no explanation for his absence even though he was the central figure in Sanchez initially receiving a reasonable accommodation in April 2018.

Her OWCP claim is handled by the Department of Labor. It had been denied at the time of her removal, and it was not approved until July 25, 2018. It logically could not have contributed to the decision to remove her from the schedule on May 21. Ballard did not request medical documentation from Sanchez at any point between March 23 and July 25. Any issue with Sanchez providing medical documentation as part of an OWCP claim that was accepted after July 25, 2018 is not relevant to Respondent's decision to remove Sanchez from the schedule on May 21.

Furthermore, and as noted above, Sanchez's medical restrictions have not changed since her on-the-job injury in 2017. This is evident even in the documents and process that eventually brought her back to work. Respondent's Exhibit 30 at page 48, a letter signed Dr. CD Sudduth dated May 21, 2019, stated that Sanchez could return to work if she had no exposure to heat, humidity, toxic fumes, smoke, or volatile chemicals. (This is notably less articulate than the return to work form Sanchez provided Respondent on March 26, 2018.) Ballard requested a second opinion from the OWCP claims examiner after receiving the letter from Sudduth. (R. Ex. 30, pg. 43). Sanchez then got a second opinion that stated that Sanchez could return to work if she was "allowed to take reasonable frequent breaks." (R. Ex. 31, pg. 51). Ballard then requested what was essentially a third opinion from a Dr. Morales "in order to provide suitable work within the above employee's restrictions." (R. Ex. 31, pg. 51). Morales wrote a "statement clarification" wherein he stated that to his knowledge "there is no available scientific data to support a recommendation for length of exposure to these temperatures." He goes on to note that based on Sanchez's remarks, "she has been able to fulfill her work duties when taking three ten-minute breaks during her work shift ..." and "based on [Sanchez's] remarks, she is allowed to work her eight hour shift with three ten-minute breaks." (R. Ex. 32, pg. 53). In summary, Respondent relied on Sanchez's own description of her physical limitations in November 2019 when it decided to return her to work.

From the evidence presented, it is clear that the continued removal of Sanchez for medical reasons was arbitrary and pretextual.

In the alternative, should it be found that Respondent acted without unlawful motive when it decided that it could not accommodate Sanchez on June 12, 2018, General Counsel emphasizes that this decision was made 22 days after Sanchez was sent home because she failed to attend an investigative meeting. While the evidence surrounding Sanchez's medical documentation is convoluted and complex, the evidence of her initial removal is more than clear. Respondent removed her allegedly because she missed an investigative interview when she was out on approved leave. The evidence shows that Respondent took this action in retaliation for Sanchez's Union activity. The removing supervisor took this action even though she knew that the letter was not delivered to Sanchez and that Sanchez was out of town. The removal itself was demonstrably pretextual, which is why Respondent had to search for a more legitimate reason to keep Sanchez off the schedule (i.e. unable to accommodate her medical restrictions)⁶.

Even if Respondent did not provide multiple pretextual defenses, it still would not meet its defense burden under *Wright Line*. Respondent did not provide documentation of a single example of comparable discipline (or of any discipline) for missing a disciplinary meeting or being late returning on a route. Respondent had five supervisory witnesses testify. Only one of these witnesses provided evidence of an employee terminated for possibly similar reasons, but did so without any specific information. (Tr. 596). Former Acting Rural Delivery Supervisor Michael Chestnut said that at some point during his career with Respondent he was "a part of a removal process." When asked if it was for the same conduct, Chestnut stated "for unsatisfactory

⁶ The question of Sanchez's backpay in light of her medical restrictions and OWCP claim would be more appropriately handled during a backpay specification hearing. (Board's Rules and Regulations Sec. 101.16).

performance.” (Tr. 596). That is the only attempt Respondent made to show that Sanchez would have been removed for cause had she not engaged in protected activity. Respondent provided no documentation of this termination or any others. It did not provide the name of this employee, the date of the termination, the employee’s previous disciplinary history or any other useful evidence. This information does not satisfy Respondent’s burden to show that it would have taken the same actions absent Sanchez’s union activity.⁷

Incredibly, despite providing multiple supervisors to speak about the legitimacy of discipline taken against Sanchez, Respondent, through Crawford and White, denied that it ever took disciplinary action against Sanchez. Respondent argued in depth that it could have removed Sanchez. Unfortunately, providing a possible legitimate reason for her removal is not the standard under extant case law. Respondent must show that it would have removed her absent her protected activity by a preponderance of the evidence. In this case, Respondent is greatly lacking evidence that it would have taken the same action. In fact, it denied that it even took this action. The hypothetical scenario provided on multiple occasions during Respondent’s direct examinations of what a supervisor could have done is irrelevant to both the facts and underlying legal theory of this case.

Based on the foregoing, the evidence is clear that Respondent fails to carry its burden of proving that it would have removed Sanchez from the work schedule absent her protected activity.

⁷ There is no question that Respondent provided an extraordinary amount of evidence attempting to validate the measurement of Sanchez’s route, Sanchez’s slower than average times during the first two weeks of May 2018, and the significance of those times. However, this information would only establish that Sanchez took longer than the designated time to deliver her mail on a handful of days in early May 2018. The Employer provided no concrete evidence that it had ever removed an employee from the schedule without explanation for being late to return to the office or for missing an investigative interview. The record is full of hypothetical scenarios showing that it could have terminated her for being late, but the Employer did not provide documentary evidence of a single instance where any disciplinary actions were taken against any employee for being late. The Respondent provided no evidence that it had ever indefinitely removed an employee from the schedule as the first disciplinary measure for being late to return from a route or for missing an investigative interview.

Under the *Wright Line* analysis recently articulated by the Board, Respondent violated Section 8(a)(1) and (3) of the Act when it removed Sanchez from the schedule on May 21, 2018.

C. Statements of Futility Should Not be Considered Untimely Filed

The original charge in this case did not include allegations of unlawful statements of futility as a violation of Section 8(a)(1) of the Act. However, the Charging Party amended this allegation into the charge on July 16, 2019. (GC Ex. 1(i)). The amended allegations of statements of futility were untimely based on the statute of limitations articulated in Section 10(b) of the Act. However, the Board has held on many occasions that untimely filed allegations can be considered when the allegations are “closely related” to other timely-filed allegations.

In determining if untimely allegations are sufficiently “closely related,” the Board, under the *Redd-I* test, considers: (1) whether they involve the same legal theory as the timely allegations, (2) whether they arise from the same factual situation or sequence of events as those in the timely charge, and (3) whether the respondent would raise the same or similar defenses to the otherwise untimely allegation and the allegations in the timely-filed charge. *Carney Hospital*, 350 NLRB 627, 628 (2007) (citing *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988)).

In this case, the first *Redd-I* prong is met because the statements of futility regard the filing of grievances are central to the allegation of a Section 8(a)(3) unlawful removal. White made the statements of futility regarding grievances filed in response to the alleged retaliatory action of removing Sanchez from the schedule, and informed Sanchez that filing a grievance was a waste of time just a few days prior to removing her from the schedule. The statements demonstrate anti-union animus that is central to the legal theory underlying the Section 8(a)(3) allegations. Additionally, White made similar unlawful statements to Steiner and Peacock after Sanchez was removed, but before she was informed that she would remain off the schedule because Respondent

could not accommodate her medical restrictions. This is further evidence of anti-union animus, again, an essential element of the legal theory supporting the allegation of an unlawful removal in violation of Section 8(a)(3) of the Act.

Prong two is also satisfied in this case because the un-alleged statements of futility are completely intertwined factually. As stated above, White made unlawful statements regarding the grievances, and then, as the only supervisor at the Ludowici post office, made the decision to remove Sanchez from the schedule. White also informed Sanchez that filing grievances that contested her removal from the schedule were futile. In sum, White was the only actor and was speaking about grievances that are central to the timely allegation of unlawful removal made in the charge.

The Board stated in *Carney Hospital* that the third prong is not mandatory. (“Prong three, as indicated by its language (‘may’, not ‘must’), is not a mandatory aspect of the *Redd-I* test.” *Id.* at fn. 8.) However, in this case, Respondent’s defense is almost certainly the same to both allegations. During her testimony, White denied making the statements and stated that she had processed hundreds of grievances during her tenure as a Postmaster. She also stated that she processed grievances while working as a supervisor in Ludowici. This defense arguably goes to the heart of both allegations because it would negate both the statements themselves and the element of animus necessary to establish a retaliatory violation under *Wright Line*.

However, even finding that prong three of the *Redd-I* test was not met, the Board has held more than once that the third prong is not determinative. In *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014), the Board held that unlawful 8(a)(1) statements were sufficiently related based only on prongs one and two of the *Redd-I* test. The facts in that case are very similar to the facts in the case at hand. In *Alternative Energy*, there was an untimely filed allegation of an

8(a)(1) statement that did not directly relate to the timely filed unlawful termination allegations.

In that case, the Board held that:

...[T]he events are part of the same chronology and involved the same people. Finally, we acknowledge that the third *Redd-I* factor does not appear to be satisfied because the alleged unlawful statement and discharge would not necessarily prompt the same or similar defenses. Nevertheless, we find that this third factor is outweighed by the others, particularly given the evidence that the alleged unlawful threat and discharge allegations are part of the same sequence of events involving the same actors. *Alternative Energy Applications, Inc.*, 361 NLRB at 1203.

Therefore, because the allegations are absolutely intertwined in terms of actors, timing, and legal analysis, the allegations of unlawful statements of futility are sufficiently related and should not be barred by Section 10(b) of the Act.

V. CONCLUSION

Counsel for the General Counsel respectfully urges that the Administrative Law Judge credit the testimony of Counsel for the General Counsel's witnesses and find that Respondent violated the Act as alleged in the complaint. Counsel for the General Counsel seeks an Order requiring Respondent to cease its unlawful conduct and remedy the harm that it caused to its employees. The General Counsel also seeks all other relief deemed appropriate to remedy Respondent's violations of the Act.

Respectfully submitted,

/s/Kurt Brandner_____

Kurt Brandner
Counsel for the General Counsel
National Labor Relations Board, Region 10

/s/Laura Evins_____

Laura Evins
Counsel for the General Counsel
National Labor Relations Board, Region 10

Dated this 28th day of August 2020.

APPENDIX I – PROPOSED CONCLUSION OF LAW

1. Respondent, United States Postal Service, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By making statements of futility to employees regarding grievance filing activities Respondent violated Section 8(a)(1) of the Act.
3. By removing Connie Sanchez from the schedule in retaliation for her protected activities and union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

APPENDIX II – PROPOSED ORDER

Respondent, United States Postal Service, its officers, agents, successors, and assigns shall:

1. Cease and desist from
 - (a) Discharging and/or removing employees from the schedule in retaliation for their protected activities and/or union activities.
 - (b) Informing employees that filing grievances is a waste of time.
 - (c) Informing employees that they will not win grievances when they attempt to file grievances.
 - (d) In any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act
 - (a) Make whole Connie Sanchez for any loss of earnings and other benefits plus interest from the date of discharge to the date of reinstatement.
 - (b) Within 14 days after service by the Region, post at its Ludowici, Georgia facility copies of the attached notice marked “Appendix III.” Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 21, 2018.
 - (c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

APPENDIX III – (Proposed) NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL NOT tell you that filing a grievance is a waste of time.

WE WILL NOT tell you that you will not be able to win a grievance.

WE WILL NOT fire you or indefinitely remove you from the schedule because of your union membership or support.

WE WILL pay Connie Sanchez for the wages and other benefits she lost because we removed her from the schedule.