

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

ALSTATE MAINTENANCE, LLC

and

Case No. 29-CA-252004

VERNON HARRIS, an individual

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ

and

Case No. 29-CB-252635

VERNON HARRIS, an individual

POST-HEARING BRIEF

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I. STATEMENT OF THE CASE

This case is before Administrative Law Judge Benjamin Green upon allegations by Vernon Harris (“Harris” or “Charging Party”), Charging Party, against Employer-Respondent Alstate Maintenance, LLC (“Alstate” or “Employer”) and Union-Respondent SEIU Local 32BJ (“Local 32BJ” or “Union”). The General Counsel alleges that the Union obtained improper financial assistance from Alstate because Alstate discharged Harris, a baggage lead who allegedly was a statutory supervisor, for failing to pay Union dues or agency fees. The Complaint alleges no other theory of Union or Employer misconduct. (Tr. 235-236).

Based on this termination, General Counsel alleges that Respondent Alstate rendered unlawful assistance and support to a labor organization in violation of Section 8(a)(1) and (2) of the National Labor Relations Act and that Respondent Local 32BJ violated Section 8(b)(1)(A) of the Act for receiving such assistance.

The only factual issue in this case is whether the Charging Party constituted a supervisor as per the definition in Section 2(11) of the Act. The General Counsel has failed to meet its burden of establishing supervisory status. Moreover, General Counsel’s legal theory is without any merit or support in Board law. Through negotiations, the Union and Employer agreed to include lead employees in the bargaining unit. Thus, Harris was a member of the bargaining unit and the Union treated him as such. Further, the Employer did not provide, and the Union did not receive financial assistance because, *inter alia*, Harris never paid any union dues. Even if Harris had not been part of the bargaining unit and was a statutory supervisor, it would be lawful for the Employer to discharge Harris for failure to pay dues, since it is not alleged that the discharge coerced statutory employees.

II. STATEMENT OF FACTS

A. Harris's Employment with Alstate Maintenance, LLC

Charging Party Vernon Harris was employed by Alstate Maintenance, LLC at JFK Airport Terminal 1 from December 2008 until October 2019. (Tr. at 22:1). Harris was first employed as a baggage handler, and in 2014, began acting as a lead agent for Alstate. (Tr. at 22:1-23:9).

B. The Role of Lead Agents

Lead agents support the work of baggage handlers or workers in their relevant department and facilitate orders from supervisors. (Tr. 257:14-16). Lead agents provide general oversight role to ensure baggage handlers are working efficiently, distributed between airline counters, and taking their scheduled breaks. (Tr. 36-37).

There are approximately seventeen lead agents in Terminal 1, all of whom are included in the Local 32BJ-represented bargaining unit. (Tr. 278:16-24). Supervisors are paid \$1.40 more per hour than lead agents. (Tr. 257:13). All leads are presumed statutory employees since none are alleged to be supervisors except Harris.

Lead agents do not participate in hiring decisions, and do not have the authority to transfer employees between terminals within the airport or between jobs. (Tr. 259:18-23). Lead agents do not have the authority to layoff, recall, or promote employees, or handle employment-related grievances for employees. (Tr. 260-261). Leads cannot suspend or issue discipline to employees, written or otherwise. (Tr. 265:18-23; 266:4-5). Leads also do not decide whether overtime should be assigned or mandated. (Tr. 263:12-18). Neither Local 32BJ nor Alstate consider lead agents to be supervisors. (Tr. 354:8-14; 257:19).

C. Harris Violated the Union Security Clause

Local 32BJ became the exclusive representative for the bargaining unit, inclusive of lead agents, after an election in 2015. (Joint Exh. 2). The CBA between Local 32BJ and Alstate took effect on January 1, 2017. (Joint Exh. 2).

Prior to Local 32BJ, another union, Local 660, had represented the bargaining unit. (Tr. 166:23-24). Harris had been a shop steward for Local 660 and was therefore familiar with the idea of collective bargaining agreements. (Tr. 166:23-24). Harris remained a shop steward for Local 660 even after he changed positions from baggage handler to lead agent. (Tr. 104:10-12).

Lead agents at JFK Terminal 1 are part of the bargaining unit represented by Local 32BJ. (Tr. 354:11-13). As a lead agent, Harris was subject to the union security clause contained in the CBA. (Joint Exh. 2, at 3-4). Harris, however, did not pay dues to the Union at any point. (Joint Exh. 3; Joint Exh. 4). Accordingly, the Union requested Alstate terminate Harris for failure to pay union dues in accordance with the CBA and, on October 3, 2019, Alstate facilitated the same. (Tr. 276:1-15; Joint Exh. 5). This termination occurred more than six months from the date of the Union's original letter to Harris informing him of his rights and responsibilities. (Joint Exh. 3). The sole reason Alstate terminated Harris was for his failure to comply with the union security clause. (Tr. 276:18).

In 2019, Local 32BJ received \$103,614,698.00 in dues and agency fee payments. (Joint Exh. 11). The Union reported 124,624 full-time members, 35,194 part-time members, 157 agency fee payers, and 136 retirees, for a total of 160,111 individuals. (Joint Exh. 11).

D. Harris' Testimony is Unreliable and Should Not Be Credited

Harris's testimony should not be credited as it was evasive, not supported by documentary evidence, and disputed by consistent testimony from multiple witnesses. Notably, Harris failed to provide a straightforward answer when asked simple questions concerning whether layoffs are

determined by seniority (Tr. 136), the baggage bid (Tr. 138-139), and the extent of his duties during the hours of 3:00 a.m. to 7:00 a.m. (Tr. 142). When questioned about his claim that he had not understood Local 32BJ's letter regarding agency fee payment, Harris could not answer what parts of the letter had been misunderstood or confusing, even when presented with the document itself. (Tr. 177-179).

When describing his understanding of agency fee payment, Harris could not even specify in what year he had first spoken with Union Representative Todd Jennings. (Tr. 207-208). Indeed, Harris's timeline was so vague he could not explain when he first learned that agency fee payment was an option. (Tr. 207-208).

Harris's testimony about conversations regarding union dues was contradicted on numerous occasions. First, Harris claimed he had asked Jennings about agency fee payment. (Tr. 209:9-15). Jennings denied this claim. (Tr. 351-352). Harris also claimed that Jennings promised to deliver paperwork related to Beck objection. (Tr. 168:18-24). Jennings also denied this and testified that the topic of Harris becoming a Beck objector never came up in any of their conversations. (Tr. 351-352).

Harris also claimed that Vladimir Clairjeune never delivered a letter explaining agency fee rights to him. (Tr. 114:1-3). Harris's testimony is intentionally misleading, since Clairjeune attempted to hand him the letter while explaining its contents, yet Harris refused to take it. (Tr. 323:12-21). Contrary to Harris's claim of non-delivery, Clairjeune credibly testified about speaking to Harris that day, including where the interaction occurred and the fact that Jennings was also present in the room. (Tr. 323-324). Clairjeune testified that Harris refused to take the letter, "swatted the documents away" and responded verbally when Clairjeune explained that termination would be a consequence of dues nonpayment. (Tr. 323:23-25). Clairjeune's testimony

is supported by the simultaneous documentation of this interaction, which he signed and dated immediately after conversing with Harris. (Joint Exh. 4).

Harris also stated that he asked Ivan Johnson about agency fee payments. (Tr. 189:20-22). Yet Johnson testified that he had never spoken to Harris about paying dues. (Tr. 335:8-10). Johnson further testified that prior to Harris's termination, he and Harris had only spoken to each other in a personal capacity. (Tr. 339-341).

Finally, Harris claimed to have told General Manager Vincent Gilmore about wanting to be an agency fee payer. (Tr. 189:23-25). Gilmore refuted this, recalling that he spoke to Harris three times, but that Harris did not request agency fee information at any point. (Tr. 275:15-18).

Based on these numerous direct contradictions by four (4) witnesses coupled with documentary support and the absence of any witnesses or documents supporting his claims, Harris's testimony should be deemed unreliable and not credible.

III. ARGUMENT

A. Respondents Did Not Violate the Act Because Harris was Not a Statutory Supervisor.

Alstate lead agents do not exercise any indicia of supervisory authority under the Act; thus, Harris was not a statutory supervisor. The Act specifies that supervisory authority requires the ability to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action." NLRA Sec. 2(11); 29 USC § 152. As the party asserting supervisory status, the burden of proof is on the General Counsel. See Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003). Any lack of evidence is construed against the party asserting supervisory status. Id. at 1048. The General Counsel failed to present any evidence that Harris could hire, transfer, suspend, lay off, promote, discharge, reward employees, or adjust grievances

The General Counsel also failed to demonstrate that Harris exercised independent judgment in his duties as a lead agent. In order for an individual to have supervisory status, the exercise of the indicators of supervisory authority “is not of a merely routine or clerical nature but requires the use of independent judgment.” NLRA Sec. 2(11); 29 USC § 152. This requirement separates “true supervisors vested with ‘genuine management prerogatives,’ and employees such as ‘straw bosses, lead men, and set-up men’ who are protected by the Act even though they perform ‘minor supervisory duties.’” Oakwood Healthcare, 348 NLRB 686, 687 (2006) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974)). Judgment is not independent if it is dictated or controlled by instructions from company policy, verbal instructions from a higher authority, or the provisions of a CBA. Oakwood, 348 NLRB at 692.

Additionally, an individual being in charge for a period of time does not itself establish supervisory authority; the individual still must demonstrate that actions taken during that time involved independent judgment. Dean & Deluca, 338 NLRB at 1047 (2003). For example, evidence that an individual oversaw a group of employees, made schedules, and closed the store multiple nights per week was insufficient to establish the exercise of independent judgment. Id. at 1048.

Harris claimed that, when no supervisors were on shift between the hours of 3:00 a.m. to 7:00 a.m. on Saturdays and Sundays, he acted with supervisory authority vis-a-vis his duties to oversee other employees. (Tr. 92-93). No documentation supports Harris’s claim supervisory authority. The only description of lead duties that the General Counsel entered into evidence is the Employee Handbook. (GC Exh. 6). The handbook states that “employees must follow Rules and Regulations and Job Assignment given by Management/Leads.” (GC Exh. 6). There is nothing in the handbook that states that leads have authority other than relaying orders and decisions from management personnel. Thus, neither the length of time that Harris was on duty as a lead nor the

written duties of a lead agent support the General Counsel's claim that he was a statutory supervisor.

I. Assignment

The distribution of baggage handlers between airline counters and offering employees overtime hours does not involve the use of independent judgment and does not meet the Board's definition of "assign" for supervisory purposes.

(a) Distributing employees to airline counters does not constitute assignment.

Assignment is designating the place, time, or work of an employee. Oakwood, 348 NLRB at 688. "Assignments based on the expressed preferences of the employees involved, or on their availability, without regard to individualized assessments of the [employee's] skills in relation to the needs ... are routine and do not require independent judgment." Springfield Terrace LTD, 355 NLRB 937, 943 (2010) (citing Children's Farm Home, 324 NLRB 61, 64 (1997)). Responsibility for ensuring that all duties in a workplace are covered is also not sufficient to constitute assignment. See UPS Ground Freight, Inc., 365 NLRB No. 113, at *7 (July 27, 2017).

Harris had the limited ability to ask employees to cover different airline counters if there was a need for baggage handlers. (Tr. 133:6-7). If airline personnel requested counter staff, Harris would comply with the request; again, his function was following direct orders from the client. (Tr. 219:17-24). This distribution of baggage handlers for coverage purposes was not based on independent judgment of an individual's skill. Rather, the only quality Harris cited as a consideration for an employee's distribution to different counters was efficiency. (Tr. 79:12-14). Notably, Harris never explained which employees were more efficient, what he meant by efficiency or what he did with employees lacking efficiency. The work performed at the various airline counters was virtually identical, with superficial differences in requirements for labeling bags. (Tr. 78-79).

Harris also testified that he could distribute employees to the CTX/oversize baggage area. (Tr. 80:4-6). Again, this distribution was based on an employee's efficiency and punctuality — basic workplace criteria that did not change from assignment to assignment and does not require independent judgment on Harris' part. Finally, Harris discussed assigning baggage handlers to the CBRA area of the terminal. (Tr. 85:6). He claimed the CBRA assignment required special training, and that he could select which workers received that training. (Tr. 85:13-18). The "training", however, consists of nothing more than learning how to scan the bags coming in and out of the CBRA room and is taught by TSA agents assigned to the area or baggage handlers with more experience. (Tr. 378-379). Harris later admitted that the selection of workers for CBRA was discussed with a supervisor, who made the ultimate decision. (Tr. 186-187). Again, Harris's only criteria for this decision-making was an employee's punctuality and ability to follow orders. (Tr. 85:22-24). Harris's testimony on this point, like the other assignment-related testimony, does not demonstrate independent judgment, as the qualities considered for distribution were the same across positions.

(b) Distributing overtime hours on a volunteer basis is not assignment.

Harris did not exercise supervisory authority in distributing overtime hours. Seeking volunteers to fill shift vacancies, without authority to compel an employee to come to work, also does not constitute supervisory status. Springfield Terrace LTD, 355 NLRB at 942 (citing Golden Crest Healthcare Center, 348 NLRB 727, 729 (2006)).

Harris did not independently and unilaterally distribute overtime opportunities. Rather, such opportunities were only distributed after discussion with a supervisor, and Harris merely to asked employees whether they would be willing to stay or come in early for extra hours. (Tr. 147:18-25). Thus, the distribution of overtime was the result of a direct request from a supervisor — not independent judgment or discretion based on an analysis of operational needs. (Tr. 96:19-

23). Essentially, Harris merely asked for volunteers to fill the overtime hours needed. Harris could not mandate overtime. (Tr. 263:14-16). Again, Harris pointed to a singular trait when distributing these hours – the reliability of the employee to show up to the shift, which did not involve an assessment of their skills. (Tr. 89:3-9).

Based on the foregoing, Harris did not assign employees using independent judgment and his limited duties do not establish Section 2(11) supervisory status.

2. *Discipline other employees*

Harris did not have the authority to issue or effectively recommend discipline for other employees. Issuing discipline for purposes of establishing supervisory status under the Act means the authority to institute a disciplinary process with the employee. DirecTV U.S. DirecTV Holdings LLC, 357 NLRB 1747, 1747 (2011). Effectively recommending discipline “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” Id. at 1748-49 (quoting Children's Farm Home, 324 NLRB 61, 61 (1997)).

Harris claimed to have disciplined employees for failing to follow company procedure. (Tr. 95:8). He pointed to a total of seven (7) incidents which allegedly involved disciplinary action against the following employees: Drummond, Chambers, Solomon, Harris, Edwards, Starks, and Chotai. (Tr. 54-76). None of these examples show Harris exercising supervisory authority, even if Harris’s version of events is credited.

Although Harris believed he had written eight (8) to nine (9) of these reports during his years as a lead, the General Counsel only offered two (2) into evidence. (GC Ex. 4; GC Ex. 5). In regard to first incident report, Harris recalled being unable to find an employee named Drummond, and supervisor Wilfred Chance ordered him to write an incident report. (Tr. 56-57; 60:6-10; GC Exh. 4). The second incident report pertained to an employee (Chambers), who failed to follow

instructions, clocked in at the wrong time, and was disrespectful. (Tr. 61:5-16). Once again, Harris did not issue the discipline himself; rather, he submitted the incident report to Supervisor Chance who admittedly “took over the matter.” (Tr. 61:19-25; GC Exh. 5). Both the testimony and documentary evidence demonstrate that the authority to issue discipline rests with Alstate’s supervisors – not Harris as a lead agent. Harris merely had a reportorial role and relayed information to supervisors as necessary.

Harris cited an additional three (3) incidents in which he verbally reported an employee’s conduct to a supervisor. (Tr. 63). The first, regarding an employee named Solomon, again was a mere report that left any disciplinary action to the supervisor. (Tr. 64). Similar testimony was given regarding employees Rahim Harris (Tr. 66-67) and Eon Edwards. (Tr. 71-72). None of those incidents involved Harris taking disciplinary action himself or even recommending specific discipline. Even more compelling, on cross-examination, Harris admitted that any warnings he gave to employees were not part of the Employer’s disciplinary system, and that he had never documented verbal warnings on an Alstate disciplinary form. (Tr. 154:14-16). The extent of Harris’s involvement in employee discipline was reporting employee misconduct to a supervisor. The actual imposition of discipline was left to the discretion of Alstate’s supervisors – *not* Harris. (Tr. 61:20-25; GC Exh. 4; GC Exh. 5).

Harris also claimed that part of his disciplinary authority was the ability to send employees home from a shift. (Tr. 101:10-15). He cited sending one employee, Brad Starks, home from a morning shift due to poor hygiene. (Tr. 100-101). Alstate management previously notified Harris of Starks’s hygiene issue, including a prior order from a manager for Harris to provide Starks with a clean outfit. (Tr. 100:6-13). When Starks returned to the workplace two weeks later in a similar state, Harris told him to go home and report to work in proper attire. (Tr. 100:13-16). There is no documentation in evidence of this event, and Harris stated that there was no written incident report.

(Tr. 150:22-24). Additionally, even if this event did occur in the way that Harris described, Harris admitted that manager Vincent Ordosio had instructed him to send this particular employee home if he arrived in a state of poor hygiene. (Tr. 150:24-26). By sending Starks home, Harris was carrying out specific orders from his supervisor and thus, did not utilize any independent judgment.

Harris brought up a second example, in which he allegedly sent home an employee named Chotai. (Tr. 96-97). Harris explained away the omission of this incident from his affidavit by claiming not to have remembered this incident at the time he gave his affidavit. (Tr. 430-431). Harris recalled that Chotai had failed to complete a task assigned by a manager, and that he subsequently sent Chotai home for this failure. (Tr. 98:4-11). He then reported this action to a supervisor. (Tr. 98-99). Harris's vague testimony contained very few details. Again, no documentation or supporting testimony was provided regarding this incident. Given the omission from the affidavit, the lack of corroboration and the vague testimony, Harris's testimony should not be credited. Even if it were, his testimony does not demonstrate his use of independent judgment.

Harris then changed his testimony to state that he could recommend discipline, rather than issue it. (Tr. 154:24). Two examples were given to support this claim: the incident with Rahim Harris, and an employee whose name could not be recalled. (Tr. 155-157). With Rahim Harris, Harris reported an incident to General Manager Vincent Gilmore and suggested Gilmore issue discipline. (Tr. 155-156). Harris admitted that he merely suggested no the need for some type of discipline. The type of discipline, however, was left to the manager's discretion and judgment. (Tr. 156:1-6). In the second incident, Harris reported the behavior of a disrespectful employee to Gilmore, and Gilmore indicated that he would independently investigate the incident. (Tr. 383:19-21). This independent investigation negates the claim of effective recommendation, even if Harris suggested a disciplinary action that was ultimately followed by a supervisor. Thus, not only did

Harris not independently issue discipline, he did not even effectively recommend discipline to Alstate's supervisors.

3. *Responsibly direct other employees*

To establish the responsible direction of other employees, the employer must have "delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary." Oakwood, 348 NLRB at 691. Additionally, there must be "a prospect of adverse consequences for the putative supervisor if he/she does not take these steps."

Id.

Harris was responsible for reminding employees of company policies and rules, as well as distributing employees based on the request or order of higher authorities within the terminal. (GC Exh. 6). Neither of these duties constitute responsible direction of work under the Act. First, Alstate does not discipline lead agents for the failure of baggage handlers to adequately perform the duties of their position. Accordingly, lead agents suffer no adverse consequences. (Tr. 263:4-5). Harris cited two (2) examples where he was allegedly disciplined for other employees' performance. (Tr. 74-75). First, employees who were supposed to be reporting for a shift in the tower were late. (Tr. 74:15-21). Harris claimed he was warned for this incident, but there was no documented discipline issued. (Tr. 75:2-4). Second, Harris failed to transfer two employees to another terminal because he did not find the correct documentation. (Tr. 75-76). Again, no disciplinary documents were provided to support this story, despite Harris's claim that they were in his personnel file, which was produced to the Region upon request. (Tr. 76:20-25). Thus, an inference should be made since it was not introduced, that it did not exist. Even assuming, *arguendo*, Harris was reprimanded for this incident, it did not constitute official discipline within Alstate's system and was based on Harris's failure to follow a direct order to transfer employees to another location, not for the employees' behavior. (Tr. 76:5-17). Additionally, Harris's

unwillingness to act without proper documentation from above further demonstrates his reliance on orders from management to carry out basic functions as a lead. (Tr. 76:1-4). Harris does not meet either of the elements for responsibly directing other employees, and the General Counsel has failed to meet its burden for demonstrating that Harris had this supervisory authority.

B. Respondents did not violate the Act because even if Harris was a supervisor, he was a member of the bargaining unit.

Harris could be found to be a statutory supervisor and be a member of the bargaining unit, in which case there is still no violation of the Act. Statutory supervisors may be included in a unit upon mutual agreement of the parties. See, e.g., McClatchy Newspapers Inc., 307 NLRB 773, 778 (1992). The Board stated that “parties are free however to define their own lawful bargaining units by voluntary agreement. Thus, statutory supervisors may be included in a bargaining unit by mutual agreement.” Id. This same principle has been reiterated in more recent Board decisions. See, e.g., Dixie Elec. Mbrshp. Corp., 358 NLRB 1089 (2012) (“The Board has held that, where parties to a collective-bargaining relationship have voluntarily agreed to include supervisors in a bargaining unit, it will order the application of the terms of the collective-bargaining agreement to such supervisors.” Id. at 1091.)

Both Local 32BJ and Alstate consider lead agents to be part of the bargaining unit and have acted accordingly. Local 32BJ representative Todd Jennings approached Harris about whether he would be interested in serving as a steward for Local 32BJ, an offer that would not have been made to an employee who was not part of the bargaining unit. (Tr. 354:5-10). Based on the foregoing, Harris was subject to the union security clause set forth in the negotiated collective bargaining agreement and, thus there was no violation of the Act.

The General Counsel argues that the unit description in the CBA excludes statutory supervisors, and that Harris was excluded from the unit regardless of how the Union and Employer treated him. The General Counsel’s position has no basis in Board law or fact. The Union provided

Harris with all the benefits and services of a member. The Employer applied the CBA to Harris. Harris did not assert that he was a supervisor when he filed his initial charge. (Joint Exh. 8(a); 8(b)). It was only when the Regional Director dismissed Harris's charges that the supervisory claim arose. (See Joint Exh. 9; GC Exh. 1(A), 1(C)). The claim that Harris was outside the unit based on the General Counsel's determination after his discharge is the height of formalism, having more in common with medieval scholasticism than Board law.

Critically, the General Counsel has not shown how its determination that Harris was a supervisor provided an unwarranted financial benefit to the Union. As the Union considered Harris to be part of the bargaining unit, Local 32BJ expended the same or more funds representing Harris as it did the hundreds of other workers who are indisputably in the unit. Even if Harris had paid the requested dues, there would have been no windfall or improper financial gain by the Union. All parties involved treated Harris as any other bargaining unit member, and therefore his discharge did not violate the Act.

C. Respondents did not violate the Act because, even if Harris were found to be a supervisor, the Employer could still discharge him lawfully.

Even if Harris were a statutory supervisor and not part of the bargaining unit, there would still be no violation of the Act. Supervisors are excluded from protection of the Act. NLRA Sec. 14; 29 USC § 164. As an individual without protection, "the discharge of a supervisor violates the Act only where it interferes with the exercise of employees' Section 7 rights." Pontiac Osteopathic Hosp., 284 NLRB 442, 442 (June 23, 1987); see also Parker-Robb Chevrolet, 262 NLRB 402, 402 (June 23, 1982).

If Harris were found to be a supervisor, his discharge would only violate the Act in narrow circumstances. See id. The General Counsel did not allege or produce credible evidence that Harris's discharge constituted one of those circumstances. (Tr. 237). In furtherance of an alleged coercive impact on bargaining unit members, the General Counsel attempted to elicit testimony

from Ivan Johnson, baggage handler at JFL Terminal 1. When asked on cross examination whether he and fellow employees discussed Mr. Harris's termination for failure to pay union dues, Mr. Johnson vehemently denied doing so and instead testified that he only spoke to Mr. Harris directly. (Tr. 341:7-11 "I had no discussion with the workers. I called Mr. Harris."). This evidence is insufficient and, despite the General Counsel's direct statement to the contrary, does not establish that Mr. Harris's termination was coercive to other members of the bargaining unit and thus, violative of the Act. In fact, ALJ Green noted that the Complaint was completely devoid of such an allegation. (Tr. 347:4-8). Accordingly, the General Counsel's only theory is that the Union received improper financial assistance from the Employer.

The well-established case law concerning improper assistance require a showing that the financial assistance is so great as to corrupt the relationship between the Union and the Employer. See, e.g., Wells Enters., 2016 NLRB LEXIS 897 (December 22, 2016) (finding 8(a)(2) violation when the Union's sole income was commission on vending machines maintained on Employer premises); Utrad Corp., 185 NLRB 434, 441 (1970), *enfd.* 454 F.2d 520 (7th Cir. 1971) (finding violation where the Employer had a history of antiunion bias, provided all of the Association's financial support, and paid Association officers for time spent conferring with managers and conducting elections); Post Publ'g Co., 136 NLRB 272, 273 (March 15, 1962) (finding violation where the Employer furnished "virtually all of the financial support necessary" to carry out the Union's functions). As demonstrated in the aforementioned case law, the financial support was money paid directly by the Employer to the Union, and there was no collection of member dues to support the Union. The Unions in these cases were entirely dependent on the revenue that Employer provided, allowing for Employer control of Union formation and operation.

In contrast to these cases, the only money in question in this case is a single member's dues and does not involve any funding from the Employer. A far cry from the complete financial support

that the Unions took advantage of in the Board cases discussed herein, Harris's individual dues—had he even paid them—would be miniscule compared to Local 32BJ's dues income. The Union receives over \$100,000,000 in dues annually; the Union requested \$810 from Harris. (Joint Exh. 3). Harris's contribution would have amounted to .0008% of the Union's yearly dues income, a negligible amount that would not have a noticeable impact on the Union's finances and would not impact its relationship with the Employer. (Joint Exh. 11). The facts of this case are so different as to have the Board precedent regarding improper financial assistance be wholly inapplicable.

Finally, the General Counsel asserts the Union received assistance through Alstate's discharge of Harris. (GC Exh. 1(E)). Yet this discharge foreclosed any possibility of the Union receiving any financial support from Harris. Not only did the Employer not provide any financial support itself, Harris never paid the dues that other bargaining unit members continue to pay, and the discharge itself provided no financial support to the Union. As such, there was no violation of the Act.

IV. CONCLUSION

The General Counsel's complaint alleges only that the Employer provided improper financial assistance to the Union by discharging Vernon Harris. The General Counsel failed to meet its burden of proving that Harris was a statutory supervisor. Harris followed the orders of his superiors; he did not possess any of the Act's enumerated supervisory authorities and did not exercise independent judgment in his actions.

Additionally, even if Harris were found to be a statutory supervisor, he was still a member of the bargaining unit and subject to the CBA's union security clause. Furthermore, even if Harris were a supervisor and not in the bargaining unit, the Employer has the right to discharge him without violation of the Act.

Finally, the General Counsel's allegation that the Union received improper financial assistance through the discharge of Harris for nonpayment of dues lacks a scintilla of factual support. The facts in this case are vastly different from cases in which the Board has found improper financial assistance, where the Unions in question were completely dependent on money from Employers rather than member dues. The General Counsel's case does not have precedent in Board law, and the General Counsel has failed to establish any basis for its allegation. Additionally, Harris's discharge foreclosed the possibility of a dues payment, thereby ending any potential dues or agency fee payments the Union would have received through Harris's employment. The General Counsel's theory is that this action constituted improper financial assistance, when in fact, the discharge *prevented* improper assistance.

In any of these scenarios, the General Counsel has failed to demonstrate a violation of the Act by either the Employer or the Union, and the complaint should be dismissed.

Dated: October 9, 2020
New York, NY

SEIU LOCAL 32BJ



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