

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

**MICHIGAN BELL TELEPHONE
COMPANY and AT&T SERVICES, INC.,**

and

**LOCAL 4034, COMMUNICATIONS
WORKERS OF AMERICA (CWA),
AFL-CIO,**

**CASE: 07-CA-161545; 07-CA-165384;
07-CA-166130; 07-CA-170664;
07-CA-176618; 07-CA-177201;
07-CA-182490; 07-CA-184669;
07-CA-190631**

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF
EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons asserted in its Exceptions and Brief in Support thereof filed by Respondents Michigan Bell Telephone Company and AT&T Services, Inc. (collectively “Company” or “AT&T”) on January 8, 2020, AT&T requests that the National Labor Relations Board reverse the supplemental decision of Administrative Law Judge Sandron (“ALJ”) dated December 20, 2020. The General Counsel’s Answering Brief raises no legal or factual arguments not already comprehensively addressed in Respondent’s Brief in Support of Exceptions.¹ However, General Counsel’s Answering Brief distorts the facts of this case and relevant legal principles applied in numerous Board decisions.

In September 2015, the Company placed Brian Hooker, a full-time Customer Service Specialist, on the work schedule and required him to accurately report his work time. In protest, Hooker simply refused to perform his assigned duties, and for nearly a year undertook an unrelenting and undisputed campaign of work avoidance. Hooker received progressive discipline for this conduct and was ultimately terminated for violating established, uniformly enforced work rules. General Counsel’s Answering Brief provides no substantive defense for Hooker’s misconduct and fails to prove the Company’s decision makers harbored animus because of Hooker’s Union activity.

General Counsel instead contends this case is not about Hooker’s work performance or misconduct, but whether the Company’s initial decision to return Hooker to the work schedules violated the Act. Without legal support, the General Counsel continues to assert an invalid “fruit of the poisonous tree” theory, positing that if the Company violated the Act by returning Hooker

¹ Respondents have not taken exception to any of the ALJ’s credibility findings. Nonetheless, the General Counsel’s Answer Brief needlessly attacks the character of various witnesses. General Counsel’s arguments regarding credibility are irrelevant to Respondents’ exceptions and should therefore be disregarded.

to the load, it consequently must have violated the Act by terminating Hooker's employment, irrespective of his misconduct. General Counsel's novel legal theory is wrong. In fact, this analysis was already rejected by the Board because it "was based on an assumption that each act of disciplining Hooker following his return to the load was de facto tainted by the Respondent's animus in placing him there in the first place." (Board Decision at 5). Section 10(c) of the Act prohibits the remedies of reinstatement and back pay because Hooker undeniably was terminated for cause.

II. LEGAL ANALYSIS

A. General Counsel Failed to Prove Ted Brash Held Discriminatory Animus Towards Hooker Because of Union Activity

General Counsel's Answer Brief sets forth the false narrative that "Respondents" held discriminatory animus towards Hooker, without regard to whether the *decision makers* who disciplined him held animus towards Hooker, whether the alleged animus was because of his Union activity, or whether such animus motivated their decisions. It is undisputed that on each relevant occasion only Ted Brash decided to discipline and terminate Hooker. Evidence of alleged animus by anyone other than Brash is irrelevant to this case. See *Sociedad Española de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 463 (2004)(dismissing 8(a)(3) allegation because GC failed to prove animus by the decision maker, despite evidence of animus by others); *Shamrock Foods Company*, 366 NLRB No. 115 (2018)(dismissing Complaint because GC failed to establish decision maker was aware of protected activity and therefore could not have held animus); *Reynolds Electric*, 342 NLRB 156, 157 (2004)(decision maker cannot discriminate against employee for engaging in protected concerted activities because he was unaware of the activity); *Vae Nortrak North America Inc.*, 344 NLRB No. 12 (2005)(affirming dismissal of 8(a)(3) allegation because there was no evidence of animus by decision maker). Further, to prevail

General Counsel must prove the alleged animus is based on Union or protected activity. Generalized personal animus cannot support a Section 8(a)(3) allegation. *Bosk Paint and Sandblast Co.*, 266 NLRB 1033 (1983)(dismissing complaint and finding reference to former employee as a "troublemaker" was not based on protected activity, but rather on personal animus); *In re Tell City Chair Co.*, 257 NLRB 374 (1981)(finding decision maker's personal animus towards employee did not equate to union animus); *Pro-Tec Fire Services Ltd.*, 351 NLRB 52 (2007)(dismissing Complaint because GC failed to prove decision maker "independently bore animus at all toward [former employee] for his prior union activity").

In an attempt to demonstrate animus, General Counsel points to various events that did not involve Brash and often did not even involve Brash's organization, Technical Field Services ("TFS"). For example, General Counsel heavily relies on the fact that Hooker testified at an NLRB hearing on October 6, 2015. Brash knew nothing of the hearing or of Hooker's testimony, and had no reason to know, because it related to Internet and Entertainment Field Services ("IEFS") Market Business Unit, a separate and distinct organization with separate technicians, managers, and directors. (Mrla 2606-07; Brash 1019-20).² General Counsel also relies on an alleged dispute between Hooker and Mike Jarema – an Area Manager in IEFS – which had nothing to do with Brash or TFS. There is no evidence that Brash even knew of these events, much less evidence that he harbored animus toward Hooker because of them.

There is no evidence Brash held animus towards Hooker based on Union activity. In a wayward attempt to demonstrate animus, General Counsel refers to one of the Company's Position

² In this Reply Brief, AT&T uses the following abbreviated citations: hereinafter, "GC Brief ___" refers to the specific page of General Counsel's Answer Brief; "D ___: ___" refers to specific page and lines of the ALJ's Decision; "R ___" and "GC ___" refers to the Respondent Exhibits and General Counsel Exhibits, respectively; and "[Witness Name] ___" refers to the witness and the transcript pages of the witness's testimony introduced at the hearing before the ALJ.

Statements, drafted by counsel, submitted to Region 7 on April 6, 2016. (GC Brief at 39; GC 73). The Position Statement, filed over 6 months after Brash and Mrla informed Hooker and the Union that Hooker would return to the load, was not written by Brash or Mrla and does not support a finding of animus. (GC 73). Any reasonable reading of that Position Statement reflects the Company's acknowledgement that Region 7 would scrutinize its responses to Union RFIs, as it already had filed four of the nine charges at issue in this case. That Brash was fully aware of Hooker's RFIs and ULP charges is inconsequential.

General Counsel only identifies two comments from Brash and Mrla to show animus prior to the decision to return Hooker to the load – both comments occurred in the October 23 meeting with Letts and Beach. First, General Counsel attempts to demonstrate animus by pointing to Brash's comment that Hooker was the "one individual in Local 4034 that is difficult to deal with." (GC Brief 17, 21). This simply is not evidence of animus based on protected activity. Here, Brash merely told Letts he had no problem dealing with Local 4034, and he held no animus for Union activity. That Hooker was difficult to work with does not equate to animus based on Union activity.

General Counsel also relies on Mrla's observation (not Brash's) that Hooker took more MXUP time than other Union representatives. Contrary to the GC's assertion, Mrla wasn't "complaining" about Hooker's MXUP time, he was working with Letts by explaining why Hooker was returning to the load. Specifically, Mrla's comment was in response to Letts' questions about how Mrla knew that Hooker was the only appointed Union representative not on the workload. (Letts 144-46). Mrla showed Letts the "Schall Report," which shows all MXUU and MXUP time by TFS employees, and they discussed whether the employees listed were elected or appointed union representatives, and who was on the load, and who was not. (R 23; Mrla 2621). Mrla's good

faith discussions with Letts about returning Hooker to the load demonstrate that Mrla wanted to work with the Union and held no animus towards it.

Further, there is no evidence that Brash harbored animus towards Hooker because of his Union activity after Hooker returned to the workload. General Counsel fails to identify a single incident or comment that would show Union animus. Instead, General Counsel merely mischaracterizes discipline Hooker received, and without substantive analysis or legal support, claims that the discipline in and of itself is evidence of Union animus. Hooker received discipline and was ultimately discharged for good cause, the details of which are fully addressed in Respondents' Brief in Support of Exceptions. (Exceptions Brief 5-29). Hooker's mere belief that he was discriminated against when ordered to work on the load, even if later upheld, did not permit him to refuse to perform his job while that issues was litigated.

B. General Counsel Misconstrues Section 10(c) of the Act and Ignores the Campaign of Work Avoidance that Caused Hooker's Termination

The outset of General Counsel's Brief identifies what he considers the central issue of the case: the Company acted with discriminatory animus simply by assigning Hooker to perform his job duties. (GC Brief 1-2). This demonstrates the grossly misconstrued interpretation of "animus" throughout General Counsel's argument. Even if the Company violated the Act when it returned Hooker to the load, that does not mean it violated the Act by terminating Hooker nearly a year later for refusing to perform his job while the issue was litigated. Hooker was therefore terminated for cause, and the remedies of reinstatement and back pay are prohibited by Section 10(c).

The General Counsel's case still principally rests on an invalid "fruit of the poisonous tree" legal theory. General Counsel posits that *if* the Company violated the Act by deciding unilaterally to place Hooker on the work load in October 2015, *then* its termination of Hooker in October 2016

inherently was unlawful. Extant Board law applying Section 10(c) of the Act invalidates that theory.

Section 10(c) of the Act provides:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Because Hooker indisputably was terminated for cause, Section 10(c) prohibits reinstatement or back pay remedies. In *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), the employer unilaterally installed surveillance cameras, and then disciplined employees for misconduct detected by the hidden cameras. Although the Board found the employer violated the Act by unilaterally installing the cameras, it denied a make-whole remedy for the disciplined employees because the discipline was based on misconduct, and a make-whole remedy would be “inconsistent with the policies of the Act, and public policy generally, [and would] reward parties who engaged in unprotected conduct.” 362 NLRB at 644. General Counsel attempts to distinguish *Anheuser-Busch*, claiming the unilateral change in that case did not cause or contribute to any misconduct, but the same is true here. Returning Hooker to the workload and requiring him to perform the same duties as all similarly situated employees did not "cause or contribute" to Hooker's work avoidance and misconduct. It is indisputable that Hooker's disciplines and termination were the direct consequence of independent and intentional acts completely within his control. His incessant and unyielding campaign of misusing time and avoiding work over a 10-month period severed any causal connection to the initial decision to return him in the load.³

³ See *Grand Rapids Die Casting*, 279 NLRB 662, 667 (1986)(finding that an employee's “insubordinate refusal to obey an order to return to work ... was not privileged by the protected activity in which he was engaged at that moment”); *Mead Corp.*, 331 NLRB 509, 513 (2000)(“The usual and long-recognized rule is that employees faced with an order that they believe to be in conflict with the terms of a collective-bargaining agreement must obey now; grieve later. And part and parcel of that rule is a steward's obligation to adhere to the grievance process rather than to ‘advise employees not to comply with a legitimate directive of the Company.’”); *B.C. Lawson Drayage*, 299 NLRB 810, 810 n. 1 (1990) (finding no violation where employer discharged union steward because of his adamant, recurring

The burden is on General Counsel to prove that Hooker was terminated without cause. As former NLRB Chairman Miscimarra discussed in *Total Security Management*, "Congress placed the burden of proof on the Board's General Counsel to establish, by a preponderance of the evidence, that an alleged unlawful suspension or discharge was not 'for cause.' To this effect, the legislation expressly stated that the Board could not order reinstatement or backpay 'unless the weight of the evidence shows that the individual was not suspended or discharged for cause.'" 364 NLRB No. 106, at slip op. 35 (2016) (Miscimarra dissenting) overturned by *800 River Rd. Operating Co., LLC*, 369 NLRB No. 109 (June 23, 2020).

The ALJ and General Counsel fatally rely on the argument that Hooker's refusal to perform his job does not qualify for 10(c) protection because it does not constitute "gross misconduct." (GC Brief at 4; ALJD at 39). The 10(c) protections are not so limited. For example, in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964), the Supreme Court cited legislative history to support its position that section 10(c) was "designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." *Id.* at 217. This legislative history states Section 10(c) was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a **license to loaf, wander about the plants, refuse to work, waste time, break rules**, and engage in incivilities and other disorders and misconduct." (emphasis added). There can therefore be no doubt that the term "misconduct" was intended by Congress and the Supreme Court to include the very activity in which Hooker engaged. Accordingly, returning Hooker to the workload certainly did not give him a "license to loaf," which is exactly what he did in this case and is exactly why

defiance of management's order that he check in with the dispatcher; this was unprotected insubordination notwithstanding the steward's view that the new rule was an improper unilateral change).

Brash disciplined him. In light of Hooker's excessive and intentional work avoidance, Section 10(c) does not allow for his reinstatement or backpay.

The legislative history of Section 10(c) also was discussed at length by former NLRB Chairman Miscimarra in *Babcock and Wilcox*, 361 NLRB No. 132 (2014) (Miscimarra concurring and dissenting, in part). In *Babcock*, Miscimarra emphasized the "cause" language in Section 10(c) was a statutory mandate, and "not a minor technical amendment of the Act. Rather, the Section 10(c) language was specifically referenced by President Truman when he vetoed the LMRA, and by Senator Taft in opposition to President Truman's veto." 361 NLRB No. 132, slip op. 18. Miscimarra referred to the language of the House Bill enacted into law as the Taft-Harley Act,⁴ which demonstrated the "cause" standard would bind the Board in all suspension and discharge cases:

A third change forbids the Board to reinstate an individual unless *the weight of the evidence shows that the individual was not suspended or discharged for cause...* The Board may not "infer" an improper motive when the evidence shows cause for discipline or discharge. (emphasis in original).

Id. at 17.

General Counsel failed to prove that Hooker was terminated without cause and the Board must not infer improper motive. General Counsel's Brief provides only cursory mischaracterizations of the facts leading to Hooker's discipline and discharge, which involved 10 separate incidents in which Hooker received discipline or counseling. (GC Brief 26-42). Both the ALJ and General Counsel gloss over Hooker's misconduct and fail to consider and analyze the Company's legitimate and substantial reasons for issuing discipline and terminating Hooker's employment. The Company indisputably terminated Hooker for cause following progressive

⁴ H.R. 3020, 80th Cong. (1947)

discipline for his repeated and defiant misuse of work time over a sustained period. Hooker was terminated after repeatedly violating legitimate, uniformly enforced work rules, and nearly a year after he was returned to the work load. Because the Company terminated Hooker for cause, Section 10(c) prohibits reinstatement and back pay remedies as a matter of law.

Accordingly, and for all of the above reasons and the reasons asserted in Respondent's *Brief in Support of Exceptions*, the ALJ's findings and conclusions are without merit and must be reversed, and the Complaint dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2020, a copy of the foregoing was served via e-mail upon:

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