

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

BOULDER CITY HOSPITAL, INC.

and

Case 28-CA-22283

**GENERAL SALES DRIVERS, DELIVERY
DRIVERS AND HELPERS AND
REPRESENTING THE PUBLIC SECTOR,
TEAMSTERS UNION, LOCAL 14,
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

GENERAL COUNSEL'S ANSWERING BRIEF

**TO: Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary**

Respectfully submitted,

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A. INTRODUCTION

By its exceptions, Boulder City Hospital, Inc. (Respondent) seeks to have the Board ignore the record evidence in this case concerning the denial of work opportunities for Greg Ostrowski (Ostrowski) by Respondent and the well-reasoned conclusions and credibility determinations of Administrative Law Judge William G. Kocol (the ALJ) concerning Respondent's conduct directed at Kevin Dale Slover (Slover). Respondent would have the Board excuse the obvious violations of the Act found by the ALJ. Respondent's exceptions are without merit and should be denied.

B. RESPONDENT'S EXCEPTIONS

1. Denial of Work Opportunities to Greg Ostrowski

a. Facts

Respondent should prevail on this exception only if the Board suspends belief and ignores the record evidence in this case. As found by the ALJ, Ostrowski worked as a registered nurse in Respondent's emergency room, having started his employment with Respondent in 2003. (ALJD 2:18-20)¹ In May 2008,² Ostrowski and another emergency room registered nurse, Slover, signed authorization cards for General Sales Drivers, Delivery Drivers and Helpers and Representing the Public Sector, Teamsters Union, Local 14, affiliated with the International Brotherhood of Teamsters (the Union). Thereafter, they solicited other employees to sign authorization cards for the Union. (ALJD 2:31-35) By mid-October, Respondent's Chief Operating Officer, Thomas Maher (Maher), knew that

¹ GCX___ refers to General Counsel's Exhibit followed by exhibit number; RX___ refers to Respondent's Exhibit followed by exhibit number. (___:___) refers to transcript page followed by line or lines. ALJD ___:___ refers to page followed by line or lines of the ALJ's decision.

² All dates are in 2008, unless otherwise noted.

Ostrowski and Slover were the two employees that were “primarily promoting” the Union at Respondent. (134:4-7; 140:4-23)

On October 12, Ostrowski submitted his resignation to Respondent effective October 31, and sought to become a part-time employee working one shift of work per week. (ALJD 4:1-10) At the time of the request, Respondent did not employ part-time nurses but did employ what it termed per diem nurses. Per diem nurses worked as needed by Respondent with no guaranteed shifts or hours. Although they generally enjoyed a higher wage rate than regular full-time nurses, they did not receive any of the fringe benefits that the regular full-time nurses received. (ALJD 2:24-28)

By October 16, when Respondent re-classified Ostrowski as a per diem nurse, Maher had met with Chief Nursing Officer Debra Balido about Ostrowski’s request. (ALJD 4:12-16; 120:11-25, 121:1-25) At this meeting, Maher told Balido that he did not want Ostrowski to work as a per diem nurse because he was one of the people who spearheaded the Union. (ALJD 4:14-16) Balido passed on these instructions to Acute Care Manager Andre Pastian (Pastian) whose duties included staffing and scheduling nurses working in the emergency room. (ALJD 2:17-18; 4:16-18) Pastian, in turn, told Martha Harward (Harward)³ who was responsible monitoring the scheduling of nurses in the emergency room. (ALJD 4:18-20)

In early November, Licensed Practical Nurse Regina Archuleta was working in the emergency room when Respondent was looking to find a nurse to fill a vacancy in the schedule. When Archuleta suggested to Pastian that she call Ostrowski into work, Pastian

³ While the ALJ reflected her name as Howard, Respondent’s records shows the spelling of her last name as Harward (GCX 16-20). CGC also corrected the spelling of Harward’s name in the portion of his Brief to the ALJ included in this Answering Brief starting at page 9.

replied that she could not do so because Maher did not want Ostrowski in the building because Maher thought that Ostrowski spearheaded the Union. (ALJD 4:25-27)

In November, employees in the emergency room self-scheduled themselves for work, writing in their days of work on a calendar. (ALJD 2:23-24; 46:12-25, 47:1-9; GCX 3-6) On November 11, Pastian was looking at the December schedule when Slover asked her what she was doing. Pastian answered that Maher had informed her that Ostrowski was probably the employee behind the Union and that they needed to get him off the schedule. She then told Slover that if the Union came in, Respondent might have to close. (ALJD 4:44-47; 47:2-18; GCX 5) Thereafter, Pastian revised the December schedule, replacing Ostrowski and Mindy Small on Mondays and Tuesdays, respectively, with Elaine Troyer, the registered nurse hired by Respondent to replace Ostrowski. (ALJD 5:11-15; GCX 6)

Ostrowski worked as a per diem nurse on November 24. Respondent's Director of Human Resources, Carol Davenport, reported this event to Balido who, in turn, reminded Pastian that Maher did not want Ostrowski around "if we didn't have to use him." Pastian did not respond. Pastian recalled that Balido told her that "people were upset" about Pastian working Ostrowski that day. (ALJD 5:4-6; 89:25, 90:1-17; 123:7-25, 124:1-8) Maher testified that he may have told Balido, "[i]t's too bad we have to stoop to that level to bring him in here...." (143:8-23)

Maher testified that in mid-December, he realized that Ostrowski was claiming that he was being denied work opportunities when he began investigating the instant charge. (145:17-25, 146:1-25, 147:1-3) He took no action at that time to see that Ostrowski had work opportunities. (147:4-6) It was not until February 2009, acting on the advice of legal counsel,

that he retracted his “do not use” instruction as to Ostrowski. (147:11-18) According to Pastian, in February 2009, Balido simply told her she could start using Ostrowski. (38:1-11)

When Pastian talked with Ostrowski in late October, he did not know his availability as a per diem nurse. Pastian next checked with Ostrowski on or about February 11, 2009, at which time he told her he was available Tuesdays, Wednesdays, and Thursdays. (91:6-17)

Ostrowski did not work again at Respondent until March 2009. (GCX 12) Balido testified that she did call him for work in early January 2009, when there was a vacancy in the Emergency Room and she had “to try and scramble” by calling everyone who was “able and competent” and who also was a Registered Nurse. (118:1-25, 119:1-2) By February 2009, Respondent had removed Ostrowski’s name from the printed schedule of ED Registered Nurse per diem employees. (GCX 19)

b. Discussion

The ALJ correctly found that Respondent did not violate the Act by its removal of Ostrowski from the December schedule. Respondent replaced him and Mindy Small with Elaine Troyer who was hired to replace Ostrowski and who had completed her orientation. (77:16-25, 78:1-10) Respondent now seeks to expand this finding to claim that there was no occasion in which Respondent could have used Ostrowski from early November to March 2009.

Unanswered in Respondent’s exceptions is the lost opportunity to use Ostrowski in early November to fill a schedule vacancy when Pastian explained to Archuleta that she could not call Ostrowski because Maher did not want him in the building because he was spearheading the Union. Unanswered in Respondent’s exceptions is why it took Pastian until

February 11, 2009, to check with Ostrowski and determine his availability to work as a per diem nurse.

Unanswered in Respondent's exceptions is why Respondent was able to schedule Ostrowski for work on March 4, 10, 18 and 25 (GCX 20) and permit him to work at least two days in March (GCX 12) after Maher lifted his ban on Ostrowski's use on advice of counsel but was unable to find those work opportunities in December, January and February. It is pure speculation by Respondent to suggest that Ostrowski "probably is getting more work than he would have otherwise obtained had he never engaged in any union activity."⁴ In February 2009, Balido instructed Pastian "[t]o go ahead and use him" with no further explanation. (38:1-11) This hardly supports Respondent's claim that Respondent sought to schedule Ostrowski for more work opportunities than he otherwise would have been entitled.

Unanswered in Respondent's exceptions is Respondent's removal Ostrowski from its printed schedule for its emergency room by February 2009 (GCX 19), only to return him to the printed schedule the next month and schedule him for four days of work. (GCX 20)

Pastian's claim that she knew of no time in February when Ostrowski was denied a work opportunity because of Maher's directive, in response to a leading question by Respondent's attorney (87:8-12), is belied by Ostrowski's removal from the February schedule when he was not even listed among the pool of per diem employees available for scheduling. (GCX 19) It is difficult to provide an employee a work opportunity when the employee is no longer listed as available for work.

The evidence establishes that Respondent failed to schedule Ostrowski for work or call him into work during the period November 1 until March 2009, because of his Union

⁴ Respondent's Brief in Support of Exceptions, page 6, 2nd paragraph, lines 5-6.

activities. Applying the shifting burden analysis specified in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management*, 462 U.S. 393 (1983), CGC has established that Ostrowski was one of two employees of Respondent soliciting Union authorization cards and that Respondent knew that Ostrowski was one of the two employees “primarily promoting” the Union at Respondent. Faced with his request for part-time employment, Respondent permitted him to continue employment as a per diem employee while directing that he not be used because of his Union activities. Respondent showed its hostility to Ostrowski’s Union activities by making this directive known to employees.

Having met the *Wright Line* burden, the burden shifts to Respondent to show that it would not have scheduled Ostrowski as a per diem employee, notwithstanding his Union activities. The testimony of Archuleta establishes that there was a need for Ostrowski in early November to fill in when Pastian said she could not call Ostrowski to work because Maher did not want him in the building since he thought Ostrowski had spearheaded the Union. When Pastian used Ostrowski on November 24, Maher told Balido it was too bad the Respondent had to stoop to that level to bring Ostrowski in for work, and Balido told Pastian that people were upset. Balido’s comment was not lost on Pastian who did not schedule Ostrowski for work from December 1 until March 2009, after Balido told her to go ahead and use him. By February 2009, Respondent had removed Ostrowski’s name from its list of Per Diem Registered Nurses on the printed schedule for the Emergency Room. (GCX 19)

Pastian made Maher’s statement that she should not work Ostrowski because of his Union activities a reality by failing to call him into work in early November and by failing to schedule him to work from the end of November until March 2009. Pastian’s claim that there

were no work opportunities for him after he left through February 2009 (87:8-12), is belied by her ability to schedule him in March 2009, after Maher retracted his “do not use” ban on advice of counsel and she checked with Ostrowski to determine his availability. In addition, it is no defense that Balido called Ostrowski for work early in January 2009, since she was reaching out to any available Registered Nurse to fill a scheduled day. (118:1-25, 119:1-2)

Based on the foregoing, the Board should reject Respondent’s exception that the General Counsel has failed to establish that Ostrowski lost employment opportunities because of his Union activities.

2. Credibility of Slover’s Testimony

a. Facts

Respondent should prevail on this exception only if the Board chooses to ignore or overrule its established policy of not overruling an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent has no basis for claiming that Slover fabricated his testimony.

To assess the respective credibility of Counsel for the General Counsel’s (CGC) witnesses as compared to Respondent’s witnesses, the Board should consider CGC’s discussion in his brief to the ALJ concerning credibility:⁵

⁵ At fn. 2 of his decision, the ALJ described this discussion as “especially useful in assisting [the ALJ] in resolving issues of credibility.” (ALJD 1)

3. Credibility Favors Employee Witnesses

a. Facts

The testimony of the three employees called as witnesses for the General Counsel should be credited when in disagreement with the testimony of Respondent's witnesses. All three of these employee witnesses were employed by Respondent: Ostrowski as a per diem employee and Slover and Archuleta as full-time employees. This fact of continuing employment by Respondent may be properly weighed and considered in resolving credibility, based on the particularly reliability of such witnesses. *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), wherein the Board held:

...every reason exists for finding the testimony of these employees particularly credible since both were still in Respondent's employ at the time of the hearing and both testified in direct contradiction to certain statements of their present supervisors. The Board has long recognized that the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken. (footnote omitted)

In addition, CGC invoked the separation of witness rule, Federal Rules of Evidence 615, at the outset of the hearing.

Each of the employee witnesses called by CGC testified truthfully and in detail, without a hint of guile, deceit, or exaggeration. As an example, both Slover and Archuleta offered foundation information and precise details of conversations that they had with supervisors of Respondent. Although Archuleta and Slover testified to different conversations with Pastian, their testimony mutually corroborated each other and Pastian's admission that she was told not to use Ostrowski because of his Union activities.

Archuleta testified that Pastian told her that Maher thought that Ostrowski "spearheaded" the Union. (54:4-5) Pastian did not use this word when she testified about her

instructions from Balido or what she told Harward. (36:19-25, 37:1-12) Similarly, Balido did not use this description when she testified about her directive to Pastian, testifying “Tom [Maher] thinks that Greg is – there’s a chaos, you know, when he is working.” (117:8-17) Yet, when asked by counsel for Respondent about what Maher said about Ostrowski’s Union activities, Balido said, “Tom said ... he is one of the people that spearheads the union activity.” (116:22-25) By using the “spearheaded” description, Archuleta surely testified to the exact instructions that passed from Maher to Balido to Pastian and, finally, to her. This detail supports the Administrative Law Judge crediting the testimony of Archuleta.

Considering that the testimony of Archuleta and Slover closely follows the directive Pastian admittedly passed on to Harward and that Pastian changed the December work schedule to remove Ostrowski’s name after her conversation with Slover about that schedule, the Administrative Law Judge should credit their testimony over Pastian’s denials that she passed on this same directive to them. (81:25, 82:1-10) Ostrowski did not testify to any conversations but testified to his employment by Respondent after October 31, supported by payroll records.

In contrast, Davenport’s testimony is marked with inconsistencies which call into question her truthfulness. Thus, she initially testified that she could not remember if she met with Slover before issuing the October 1 Memo. (17:22-23) Thereafter, she insisted that she had not spoken with Slover in October. (95:7-9) When questioned by CGC about the source of the harassment, Davenport testified that she did not know if Anderson “said specifically.” (18:8-12) Only when questioned by the Administrative Law Judge did she admit that the harassment involved “being pressured by another employee to sign up for the Union,” as explained to her by Anderson. (22:3-19)

The testimony of Anderson and Orvis is also marked by inconsistencies. While Anderson testified that Orvis reported that two employees, Reynoso and Herridia, were harassed, Orvis testified that her report to Anderson involved only Reynoso. Anderson displayed a lack of consistency as well as her anti-union bias by initially describing the October 1 Memo as “dealing with allegations of criminal and/or illegal harassment.” (100:24-25, 101:1-3) When confronted on cross-examination with her description, she denied using the term criminal. (103:7-15)

Orvis initially testified that Reynoso never complained that he thought the respiratory employee soliciting him was going to be violent as she described what she was told by Reynoso and what she reported to Anderson. (109:9-17; 110:4-25, 111:1-8) At the end of her testimony, during cross-examination by CGC, Orvis denied that the respiratory employee made any sort of threat to Reynoso. She then added, for the first time, that she told Reynoso there was a “zero violence” policy in the building and that he thought the respiratory employee was going to be violent with him. (112:1-9)

While the testimony of Davenport, Anderson, and Orvis should not be credited when in conflict with Slover’s testimony and the circumstances involved in issuance of the October 1 Memo, it is possible that Davenport was investigating Slover’s conduct as he described at the same time she was receiving the complaint from Orvis as relayed by Anderson since Davenport and Slover met alone.

The Administrative Law Judge should discredit the attempt by Maher and Balido to offer an additional reason for Respondent not using Ostrowski. Maher’s testified that he told Balido not to use Ostrowski as a per diem Registered Nurse because he had spearheaded the Union and because he could not get along with physicians. While he claimed that since

arriving at Respondent in April 2007, he had observed Ostrowski not being able to get along with physicians (147:19-25, 148:1-5), Maher conceded that Respondent did not address this alleged deficiency in Ostrowski's most recent annual appraisal that Maher signed on June 11. (148:8-25, 149:1-4) Balido claimed she repeated to Pastian this same twofold reason for not using Ostrowski: his Union activities and problems with physicians. (117:6-20) Respondent never asked Pastian to repeat what Balido had told her. As she described Balido's instructions to her when questioned by CGC, Pastian made no mention of the alleged second reason, Ostrowski's inability to get along with physicians. (36:19-25, 37:1-5)

Finally, Maher displayed hostility and anti-union animus when asked if he took any action when confronted with the claim or charge that Ostrowski had lost work because of his Union activities. Maher termed the claim "ridiculous." (145:17-25, 146:1-4) Even when he discovered that Respondent had not worked Ostrowski in November and December, save for November 24, Maher was reluctant to admit that it took him until February 2009, to retract his directive and then only when Respondent's counsel told him to give Ostrowski work opportunities. (146:11-25, 147:1-18)

b. Discussion

The ALJ's credibility determinations are well-founded and supported by the record. There is no basis for the Board to overrule those determinations and to discredit Slover as urged by Respondent. Pastian's statement to Slover over not using Ostrowski pursuant to Maher's directive was made at and around the same time she was repeating the same directive to two other employees: Archuleta and Harward. Moreover, Slover offered the context in which Pastian made the remark, including the schedule they were looking at together, and the schedule posted after Pastian removed Ostrowski's name. (46:12-25, 47:1-18; GCX 5 and 6)

Respondent argues that it is not logical that Pastian would offer a false reason to Slover for the removal of Ostrowski from the December schedule.⁶ This argument ignores the fact that Pastian was making similar statements to two other employees at around the same time she was making the statement to Slover about the directive she had received not to use Ostrowski. This argument also ignores Pastian's actions surrounding the December schedules.

The record suggests that Pastian attempted to hide her removal of Ostrowski's name from the December schedule. Pastian marked three of the December calendars with sequential numbers in the upper right hand corner of the calendars. Thus, she marked the first version of the calendar as "#1." (GCX 3; 30:23-25, 31:1-8; 75:5-7) She marked the second version of the calendar as "#2." (GCX 4; 31:10-18; 76:12-16) Neither of the calendars showed Ostrowski as scheduled to work in December. (GCX 3 and 4)

As explained by CGC when questioning Pastian, the next version of the calendar CGC showed to Pastian was not among the subpoenaed documents Respondent produced at hearing. Pastian was able to identify this calendar as "a further representation of the working calendar where people were signing up to where they could work." (31:24-25, 32:1-6; GCX 5) She also agreed that it was the third in the sequence. (77:7-13) Pastian went on to identify much of the writing on the calendar, including Ostrowski's name as written on the calendar by Martha Harward. (32:7-25, 33:1-25, 34:1-3)

Pastian identified the next and last version of the December schedule as "the third copy of the – or my third copy of the December's working schedule." (34:5-9; GCX 6) As with the first two calendars, it shows "#3" in the upper right hand corner. (GCX 6) Pastian

⁶ Respondent's Brief in Support of Exceptions, page 9, 3rd paragraph, lines 4-5.

explained that she erased the names of Ostrowski and Mindy Small on the third version of the December schedule (GCX 5), inserted the name of Elaine Troyer in their places, and placed her initials “AP” following Troyer’s name. (34:13-25, 35:1-12; 77:16-20)

The three versions of the schedule Pastian marked in sequential order and presumably supplied to Respondent’s counsel in response to CGC’s subpoena never showed Ostrowski scheduled to work. The additional version of the schedule, unmarked by Pastian but identified by her, showed Ostrowski’s name on the December schedule, working five Mondays in the month. Perhaps this version was removed for copying to be supplied to CGC, copied, and then not returned to the schedule clip. (47:3-6) Perhaps Pastian simply overlooked this version as she gathered “my” copies of the schedules. A more probably explanation is that Pastian hid this schedule just as she sought to hide her unlawful statement made to Slover as they both viewed Ostrowski’s name on the schedule and her subsequent removal of Ostrowski from that schedule. Without this additional schedule that Respondent did not produce, there would be no record that Ostrowski was ever scheduled to work in December.

Even with a lawful explanation for removing Ostrowski from the five Mondays in he was scheduled to work in December, Pastian informed three of Ostrowski’s co-workers, including Slover, of Maher’s unlawful instructions not to use Ostrowski because of his Union activities. This finding is well supported by testimony and record evidence, including the December schedule that showed Ostrowski scheduled to work and that prompted the discussion between Pastian and Slover. In these circumstances, the ALJ correctly credited Slover’s testimony over that of Pastian, both as to the directive not to use Ostrowski and the threat of closure of Respondent.

As to Respondent's claim that Slover fabricated his October 1 meeting with Davenport, Respondent offers no basis to support its claim. Further, there is no evidence in the record to support Respondent's claim that Slover's testimony of his meeting with Davenport came as "a complete surprise to Respondent."⁷ As discussed above, Davenport was not a credible witness, and the ALJ correctly discredited her denial of meeting with Slover on October 1.

C. CONCLUSION

Respondent's exceptions are without merit and should be denied by the Board. The Board should affirm the ALJ's decision, save for CGC's limited exceptions that the Board should grant.

Dated at Las Vegas, Nevada, this 5th day of August 2009.

Respectfully submitted,

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⁷ Respondent's Brief in Support of Exceptions, page 10, 2nd paragraph, lines 5-6.

CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S ANSWERING BRIEF** in Case 28-CA-22283, was served via E-Gov, E-Filing, facsimile and regular mail on this 5th day of August 2009, on the following:

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