

**Ryder Services, Inc. and Andra M. Branch Sr.  
Laborers' International Union of North America,  
Local Union 572, AFL-CIO and Andra M.  
Branch Sr.** Cases 5-CA-20719 and 5-CB-6444

January 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On May 8, 1991, Administrative Law Judge Michael O. Miller issued the attached decision. Charging Party Andra M. Branch Sr. filed exceptions and a supporting brief.<sup>1</sup> The Respondent Employer and the Respondent Union each filed a brief in response to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ryder Services, Inc., Newport News, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the complaint in Case 5-CA-20719 is dismissed to the extent no violations have been found, and that the complaint in Case 5-CB-6444 is dismissed.

The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup>The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup>We agree with the judge's dismissal of the allegation that Respondent Employer terminated Charging Party Branch in violation of Sec. 8(a)(3). Regardless of the events which led up to the termination, it is clear according to the credited testimony that the Respondent's proposal to transfer Branch to a different jobsite with higher wages and benefits was not discriminatory and that the Respondent believed that Branch had accepted the transfer. In these circumstances, we find that the Respondent established that it would have terminated Branch for refusing to report to work at the transfer position even in the absence of his protected conduct.

have been found, and that the complaint in Case 5-CB-6444 is dismissed.

*James P. Lewis, Esq.*, for the General Counsel.  
*E. D. David, Esq.* and *Ralph M. Goldstein, Esq.* (*Jimese L. Pendergraft, Esq.*, on brief) (*Jones, Blechman, Woltz & Kelly, P.C.*), of Newport News, Virginia, on behalf of the Respondent Employer.

*Walter Briscoe*, Field Representative, of Williamsburg, Virginia (*Michael Barrett, Esq.* and *Laurence E. Gold, Esq.* *Connerton, Ray & Simon*), of Washington, D.C., on brief, on behalf of Respondent Union.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Newport News, Virginia, on January 15 and 16, 1991, based on charges filed by Andra M. Branch Sr., an individual, on October 2, 1989 (Case 5-CA-20719), as amended on October 26, 1989, and January 5, 1990 (Case 5-CB-6444), and complaints issued by the Regional Director of Region 5 of the National Labor Relations Board (the Board) on December 27, 1989 (Case 5-CA-20719), as amended on October 30, 1990, and May 31, 1990 (Case 5-CB-6444). The complaint in Case 5-CA-20719 alleges that Ryder Services, Inc. (the Employer or Ryder) threatened and otherwise interfered with, restrained, and coerced employees, and discriminated against the Charging Party by giving him more onerous and difficult work assignments, by issuing warnings, by transferring him to a new worksite, and by discharging him because of his union or other protected concerted activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The complaint in Case 5-CB-6444 alleges that Laborers' International Union of North America, Local Union 572, AFL-CIO (the Union) failed to process the Charging Party's grievances for reasons which were arbitrary, invidious, or in bad faith, in breach of the fiduciary duty owed to employees whom it represents, in violation of Section 8(b)(1)(A) of the Act.

The timely filed answers of both Respondents deny the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS  
PRELIMINARY CONCLUSIONS OF LAW

The Employer, a Virginia corporation, is engaged in providing janitorial and related services at military bases in the State of

State of Virginia, from its facility in Newport News, Virginia. It annually purchases and receives products, goods and materials at that location valued in excess of \$50,000 which are shipped to it directly from points located outside the State of Virginia and it annually performs janitorial and related services valued in excess of \$1 million for the United States Navy at its Norfolk Naval Hospital, Norfolk, Virginia facility. The Employer admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>1</sup>

The complaints allege, the parties admit, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Facts*

Ryder is the maintenance service contractor at the Coast Guard Station in Newport News, Virginia. It hired Andra Branch, the Charging Party, in May 1988 as a janitorial employee. Branch's work included the cleaning of floors and carpets, cleaning bathrooms and removing trash.<sup>2</sup> When he started, Branch worked a split shift, 4 hours in the morning and 4 more in the evening. In March 1989,<sup>3</sup> he gave up the evening shift, allegedly because he believed that Robert S. Holloway, the project manager and his supervisor, was "messing with [his] time." He took another job for those hours, doing janitorial work in the Virginia Beach Public School system.

Ryder's employees at the Coast Guard base are represented by the Union and are covered by a collective-bargaining agreement effective from October 1, 1988, to September 30, 1991. The field representative responsible for negotiating this contract and servicing this unit is Larry Carter. There was no official union steward; from approximately March through early July, Nora Hinton was the acting steward.

In March, Branch commenced the filing of a series of grievances. Allegations of Employer reprisal for his having done so, and of union failure to properly process those grievances, form the basis of his charges and these complaints.

In early March, Branch was out sick for 2 days. He requested, and was denied, sick leave; Holloway told him that unused sick leave from the prior year did not carry over. Branch discussed this with Carter, contending that the denial was contrary to an alleged promise by Holloway that he would be allowed to carry over unused sick leave. Carter told him that he did not have any sick leave coming.<sup>4</sup> Branch decided "to put [Holloway] to the test to see if he was going to give [me] sick leave" and filed his first grievance. On re-

ceipt of the grievance, Carter told Branch that he would discuss it with Ryder. Branch claimed to hear nothing further from Carter on this grievance. On April 18, Holloway denied the grievance, stating in essence that sick leave did not carry over for any employee (G.C. Exh. 4).

On about March 29, Branch filed a second grievance alleging "Harassment & Profanity abusive language" (by Holloway) and "Under staffed," allegedly in violation of the contract's maintenance of standards clause.<sup>5</sup> According to that grievance, Holloway had terminated one of the four employees on the morning shift and required the remaining employees to make up the work without regard for the work load. Then, when Branch told someone that their crew was a worker short, Holloway said that Branch was merely trying to make himself look good. Additionally, it asserted that Holloway had insulted Branch, stating that Branch was "on [his] high horse but [his] ass is coming down," assigned him to scrub corners" and repeatedly called him a clown when Branch replied to his orders with a loud "Yes sir!"

Branch gave this grievance to Hinton with instructions that it be delivered to Carter. As Branch recalls, he discussed this grievance with Carter in early April; Carter told him that Holloway did not get along with anyone but Carter would see what he could do. Carter had no recollection of receiving this grievance but did recall a conversation wherein he told Branch that the Union had no role in staffing.

Holloway answered this grievance on April 18, finding fault with Branch's work attitude and denying that he had used abusive language in talking with Branch. He further asserted that there was no shortage of employees because he worked with the other crew members when anyone was absent.

Branch's next grievance was filed about April 11. It alleged that Holloway had placed him on a "60 day in-house suspension" [i.e. probationary period], apparently for tardiness, had tampered with his hourly wage, and had "shown a extremely violent and sometimes abusive attitude towards [him] . . . has drummed up charges which are false . . . as a personal vendetta." He denied violating any company rules or being excessively tardy. Branch had no recollection of discussing the grievance with either Carter or the Employer. (G.C. Exh. 6.)

Holloway also replied to this latter grievance on April 18. That response, which establishes that the Union took the grievance through step one of the grievance procedure, asserts that Branch was not paid for sick leave because he had called in to the wrong department and because he had no sick leave left. Holloway denied that he had shown any violent or abusive attitude toward Branch and claimed that Branch was frequently tardy.

At the same time that he filed the last grievance, Branch also filed a grievance alleging that he had been denied overtime pay. The copy of this grievance which Branch filed with the Employer (G.C. Exh. 8) does not indicate when he had worked the overtime. He also filed it with the Wage and Hour Division of the U.S. Department of Labor; on that copy (G.C. Exh. 7), he detailed overtime allegedly worked in 10 weeks between July 1988 and January 31, 1989. Branch

<sup>1</sup> The CA complaint alleges, additionally, that the Employer's operations have a "substantial impact on the national defense of the United States. No evidence, other than the fact that its services are performed on military bases, was offered to support this assertion, which the Employer denied.

<sup>2</sup> While Branch referred to himself as a "floor technician," the collective-bargaining agreement, referred to infra, provides for only two job classifications, cleaner and crew leader. Branch was, except for a brief period of time, a cleaner.

<sup>3</sup> All dates hereinafter are 1989.

<sup>4</sup> The collective-bargaining agreement provides for 8 days of sick leave per year, with no express provision for carrying over unused leave.

<sup>5</sup> Art. XVI, sec. 1, provides that: "The Employer agrees that all conditions of employment relating to . . . general working conditions shall be maintained at not less than the highest standards in effect at the time of the execution of this Agreement . . ."

claimed that he had not previously objected to the lost overtime but did so at this juncture because of Holloway's harassment.

This grievance was submitted to Carter through Hinton and Carter discussed it with the Employer. Holloway denied the grievance on April 18, asserting that Branch had been paid overtime at the appropriate rate. Ultimately, Branch received some pay for overtime; he credits the efforts of a representative of the Department of Labor, Wage and Hour Division, not Carter, for securing this relief.

On April 14, while absent from work on claimed sick leave, Branch came in to the Employer's office to pick up his paycheck. Holloway saw Branch and terminated him, presumably for abusing sick leave.<sup>6</sup> Branch filed a grievance claiming that he had been given no warning and no reason for the termination. He also reasserted a claim to sick pay and claimed that Holloway had "lied and exaggerated" in his statements on the earlier-given warning. He gave the grievance to Hinton who passed it along to Carter. According to Branch, he was unable to reach Carter until May 1 or 2; Carter's office told him that Carter was in training and could not be reached. However, on May 1 or 2, he spoke with Carter and Carter set up a meeting with the Employer for the same day.

The meeting, held at the Naval Hospital, was attended by Branch, Carter, Holloway, and Robert Miller, Ryder's general manager.<sup>7</sup> Carter and Holloway got into a shouting match; Miller calmed them down and sent both Holloway and Branch out of the room. Carter and Miller then worked out a resolution wherein Branch would be reinstated, without backpay, to a job at the Naval Hospital. However, when Carter proposed that to Branch, describing it as a good deal, Branch rejected it. Branch insisted that he was entitled to reinstatement to his original worksite, with backpay. Carter asserted that they could not do better than this and Branch told him to take it to the next step, arbitration. Carter refused, saying that arbitration was too expensive and reiterating that Branch had been offered a "good deal." When Branch said that he was going over Carter's head, Carter told him to "go ahead."

Branch has related a confusing and not entirely probable<sup>8</sup> history of events following this meeting and leading to his reinstatement on July 3. He claimed that he spoke with an agent of the NLRB who called Ed Glenn, a higher union official, on his behalf. Glenn allegedly spoke to Branch and was either told about Branch's efforts to get help from Carter and Carter's superior, Connie Ellis, or referred him back to Carter and Ellis. According to Branch, Glenn asked him to hold up on filing a charge with the NLRB and requested that he be given a chance to see what he could do for Branch first. Subsequently, Branch claimed, Glenn would not return his calls. At some point during this, Ellis allegedly told Branch that he would direct Carter to take the matter to arbi-

tration, if necessary, and suggested that Branch get affidavits from his coworkers.

Carter, under examination by both the General Counsel and the Union, gave a similarly confusing description of the events. From his testimony, it appears that the offer of reinstatement to a job at a different jobsite arose later, in a meeting with both Ryder and Miller. Given the delay between the May 1 or 2 meeting and Branch's reinstatement, I find it likely that a third meeting, at this level, did occur. Carter also alleged that, at this time, Branch agreed to the transfer. I cannot credit this assertion given that Branch was reinstated at the Coast Guard Station. I believe that Carter, who was admittedly and demonstrably weak on his recollection of dates, confused conversations occurring before and after Branch's reinstatement.

On July 3, Branch was reinstated, with backpay, to his job at the Coast Guard station. Notwithstanding the several meetings between Carter and his employer, he credits an agent of the Wage and Hour Division, John Norris, to whom he had brought his overtime complaints, not Carter, with securing the reinstatement.

Prior to his reinstatement, Branch's Wage and Hour complaints had been investigated by Norris. In the course of that investigation, Norris told Ryder that certain of its bookkeeping and payroll practices were unwise: Holloway had been signing the workers in and out; Norris suggested that the employees should sign in and out for themselves. Additionally, Ryder had been following a practice of paying its employees for all hours worked right up to payday. In order to do this, it had been projecting the hours they would work between the day the checks were prepared and payday, adjusting their pay in the subsequent week if they worked more or less than projected. Norris suggested that the Employer should only pay for hours actually worked, holding back some pay until the next payday, rather than projecting how many hours an employee would work.

Before Branch's return, Holloway held a meeting with the employees where he explained the changes in payroll procedures. In doing so, he told them that the changes were being made because of Branch. He also told one employee that he considered Branch to be a troublemaker who would not find things easy when he came back.<sup>9</sup>

At some point, Carter had seen a Department of Transportation procurement request, dated in May 1988, which purported to amend the Coast Guard Station's janitorial service contract by raising wages pursuant to a Department of Labor Wage Determination. It stated that the wage increase was to be retroactive to October 1, 1987, and the total amount was shown as \$1,213.40 (R. Exh. 6). Immediately upon his return to work, Branch submitted a grievance claiming that the employees were entitled to this wage increase pursuant to the maintenance of standards clause in the collective-bargaining agreement (G.C. Exh. 10). When he gave it to Carter, he was told that this had already been taken care of.<sup>10</sup>

<sup>6</sup>The April 14 termination is not the subject of this CA complaint and this record contains no details with respect to it.

<sup>7</sup>Carter's testimony indicates that he met first with Holloway, at step one, before going on to this second step grievance meeting.

<sup>8</sup>In the normal course of events, NLRB field attorneys and examiners would endeavor to settle unfair labor practice charges which appeared, from an investigation, to be meritorious but would not mediate or otherwise attempt to resolve disputes between members and their unions on which no charges had been filed.

<sup>9</sup>In so finding, I credit the testimony of former employee Alphonso Johnson over Holloway's denial that such a conversation took place. Johnson was a disinterested witness whose testimony had a ring of truth to it.

<sup>10</sup>This allegation and the Union's alleged failure to process this grievance were the subjects of unfair labor practice charges filed by Branch in Cases 5-CA-21024 and 5-CB-6335. Both charges were dismissed on findings that the procurement request had been made

At the same time, Branch reiterated his contention that he was entitled to 5 days sick leave. Initially, Carter told him that he was wrong. In subsequent meetings over the next few days, Carter was able to secure the Employer's agreement to pay him for 2 days of sick leave. Branch was informed of this on July 6.

Prior to his termination, Branch had scheduled a vacation for the end of June and early July. On his return, he asked if he would be able to take his vacation. Miller, observing that Branch was returning from more than 2 months of lay-off, with pay, said (allegedly in jest) that he had just had his vacation. Carter suggested that Branch be flexible and re-schedule his vacation.<sup>11</sup>

About July 5, Branch told Holloway that he would start his vacation on July 15. Holloway refused and said that Branch would take his vacation when he (Holloway) scheduled it. On July 10, Holloway again told Branch that he could not start his vacation on July 15. Branch filed a grievance, giving it directly to Holloway, as per Carter's directions (G.C. Exh. 13). In discussing the matter with Carter, Branch was told that he should allow the Employer to schedule his vacation and was warned that he could be fired if he took his vacation on July 15. Holloway answered the grievance on July 13, stating that Branch could take his vacation after August 1, "due to work schedule." Carter did not respond to Branch's insistence that this grievance be taken to subsequent steps in the grievance procedure.

Also on about July 5, Branch filed a grievance alleging that Holloway was harassing him. It asserted that Holloway had questioned the work he had done, had given him assignments, "in a nasty way," and had criticized his work to another employee on July 3 and July 5. He asked that Holloway be "reproved for his continued harassment" (G.C. Exh. 11). The grievance was given to Hinton who forwarded it to Carter. Carter spoke with Branch about it on at least one occasion, telling Branch to thereafter submit his grievances directly to Holloway.<sup>12</sup>

On the same day, according to Branch, he filed another grievance, allegedly giving it directly to Holloway (G.C. Exh. 12). This grievance is similar to the preceding grievance, containing identical introductory language, but alleging, additionally, that they were working with an insufficiently staffed crew. Branch received no answer to this grievance.

Miller and Carter discussed Branch and his inability to get along with Holloway (or vice versa) both before and after the July 5 grievance was filed. Such discussions took place several times a week, sometimes daily. On what appears to be

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to cover an agreement between Ryder and the Union for a 10 cent-per-hour contribution to the union training fund, not increased wages, and the absence of either unlawful motivation by the Employer or arbitrary, capricious, or discriminatory grievance handling by the Union.

<sup>11</sup> The collective-bargaining agreement provides for 2 weeks of vacation after 2 full years of employment and requires: "In order to be paid for vacation when you take it, the Employee must submit a request at least thirty (30) days prior to taking that vacation."

<sup>12</sup> Carter sought to establish that he had so instructed Branch because he was on military leave during this period of time. Carter's log indicates that he was not on military leave in late June and early July (or in late July and early August, as he also suggested) and his memory as to when he might have gone on such leave is totally unreliable. It would appear that this instruction coincided with the conclusion of Hinton's service as an acting steward.

July 6, Ryder told Carter that he was going to fire Branch. Carter protested that he could not do that. The proposal that Branch be transferred to another facility where he would receive greater pay and benefits as a member of a collective bargaining unit represented by another union was resurrected, apparently by Ryder. Carter checked with his superiors and told Miller, on July 13, that this could legally be done. On that date, Miller answered (G.C. Exh. 11) stating:

We have analyzed the situation at the Coast Guard Base between Mr. Holloway and Mr. Branch. In an effort to keep Employee morale up, not only Mr. Branch but the others as well, we will move Mr. Branch to another site, where he will get a higher wage and better benefits.

Miller gave the answer to Carter for transmission to Branch.

About July 12, Branch drafted another grievance (G.C. Exh. 14) claiming that Holloway was continuing to tamper with his time (allegedly changing his sign-out time to reflect the end of his shift rather than the few minutes later that Branch claimed he had finished) and otherwise retaliating against him. On July 14, he was assigned to wash windows, at step ladder height, on the barracks building and he grieved this assignment. He contended that this was not in either his job description or the service contract (G.C. Exh. 15).<sup>13</sup> On the same day, he filed another grievance, again alleging Holloway's harassment and profanity (G.C. Exh. 16). That related to an incident wherein he had gone into Holloway's office to pursue his contentions respecting his vacation; Holloway had told him that he "ain't nothing but a fool" and told him to take his "you know what" out of the office.

Branch signed all three grievances as both the grievant and the steward, asserting that the other employees had selected him to so act. He attempted, unsuccessfully, to give them to Holloway; Holloway told Branch to have Carter come see him. Branch then left them for Carter's consideration, at the Naval Hospital.

In the ensuing weeks, Branch had several phone conversations with Carter. According to Carter, Branch agreed to the transfer in a conversation on July 21. Carter's testimony is corroborated by his log. Branch denied that he ever agreed to the transfer and claims to have told Carter that he would not accept a transfer because he was not the problem. Carter allegedly said, in response, that the Employer could transfer him to another site and claimed that he had talked the Employer out of firing Branch.<sup>14</sup> Carter reported back to Miller that "everything was a go," that Ellis had approved the transfer and Branch had accepted it.

In the course of that, or possibly an earlier conversation, Branch alleges, Carter stated that he was aware of a "griev-

<sup>13</sup> The collective-bargaining agreement, executed in October 1988, states in regard to subcontracting that "Window cleaning is not currently performed by bargaining unit employees" and may therefore be subcontracted out. In practice, unit employees were washing exterior windows on a regular, if not frequent, basis. Nothing in the contract precluded the Employer from assigning window cleaning to unit employees. Due to his usual work assignments, Branch may not have seen any of his fellow workers washing windows and he had not previously been assigned to that work.

<sup>14</sup> At Tr. 159, LL. 4 and 5, "fire" is incorrectly transcribed as "fight."

ance” Branch had “proposed” against him. Branch replied that Carter knew he was going to complain about the refusal to take his grievances to arbitration. Carter then allegedly said that he was “pissed off” at Branch for filing a charge against him while he was “busting his butt” trying to get Branch’s job back for him. Carter denied making such a statement to Branch.

Neither Carter nor Branch was a convincing witness. Their demeanor gives little assistance in resolving his dispute. The evidence, too, is ambiguous. On the one hand, it is improbable that Branch would have accepted a transfer he had earlier rejected so vehemently. On the other hand, Carter’s testimony is corroborated by his logs, which appear to be legitimate, and by Miller’s testimony.<sup>15</sup> On balance, noting the above, the absence of any contention that the Union caused Branch’s termination, and the burdens of proof, I find that General Counsel has failed to establish that Branch rejected the offer of a transfer. At the very least, I find that the Employer understood that Branch had accepted the transfer.<sup>16</sup> I also credit Carter over Branch with respect to Carter’s alleged expression of hostility toward Branch.

Branch met with Miller on July 26 and received written answers to the foregoing grievances (G.C. Exhs. 14–16). Miller denied that Branch had been assigned excessive work or that he had worked any overtime; he asserted that window washing was unit work; and he told Branch that he had looked into Branch’s contention regarding name calling and found it unsupported.

In the course of this meeting, and in an encounter later that day, Miller called Branch a troublemaker, with a big mouth, who had to dot all the i’s and cross all the “t’s.” He berated Branch, as an African-American, for causing trouble for this African-American owned and managed business. He told Branch to “stop being a fool” and to “stop all of that bull, that bull whatever that you are doing.” The grievance Branch prepared over that encounter (G.C. Exh. 17) indicates that he was also told that he was going to be transferred and would be discharged if he refused that transfer; it alleges that he believed that the transfer was in retaliation for his NLRB and wage and hour charges filed against the Employer and in violation of the collective-bargaining agreement. In neither his description of the July 26 meeting in this grievance nor his testimony upon direct examination did Branch claim that he had told Miller that he would not accept the transfer. He claimed that only on cross-examination.

Branch believed that he left this grievance for Carter at the Naval hospital; he also believed that it was answered. It bears no answer from management and no other document in this record purports to be that answer. Carter testified that

<sup>15</sup>As noted below, Carter told Miller that Branch had agreed to the transfer. It is unlikely that he would have lied to Miller unless he was attempting to cause the Employer to forcibly transfer and/or terminate Branch. No such conspiracy or Union involvement in Branch’s termination is alleged or proven here; the Union is not charged with causing Branch’s termination.

<sup>16</sup>In this regard, I credit Miller’s denial that Branch ever told him, prior to mid-August, that he would not accept the transfer. Miller was a credible witness who appeared to have clear recollections of the events which had transpired. I note that Branch prepared a grievance detailing his July 26 conversation with Miller. That recitation of the conversation does not include an explicit rejection of the transfer by Branch. Neither did his testimony on direct examination.

he received no grievance concerning Branch’s transfer and Miller testified that he never saw one. In light of the absence of any answer in this record, and noting that Carter transmitted all grievances he received to the Employer, who answered each one, I find that Branch never submitted General Counsel Exhibit 17 to the Union.

Branch had been authorized to take his 10-day vacation starting on Tuesday, August 1. On July 30, Holloway told Branch that he could begin his vacation on Monday, July 31 and asked Branch when he was scheduled to return. Branch replied, “August 15.” When he returned on that day, he was given an incident report stating that he should have returned on Monday, August 14. He was told that since he had been allowed to leave a day early, he had been expected back a day early.

On August 16, Miller gave Branch a letter transferring him to the Naval Operations base. It set forth the improved wages and benefits he would receive. Branch refused to accept the letter, rejected the transfer and insisted that he was going to return to his job at the Coast Guard station. He was told to punch out, was ordered off the base and, on August 22, was terminated. He wrote but never filed a grievance over his discharge and made only a single unsuccessful attempt to reach Carter.

## B. Analysis of the CA Charge

### 1. Section 8(a)(1)

A serious personality conflict existed between Branch and Holloway. Holloway, though deemed an effective supervisor by the Employer, had a crude or caustic manner, at least in his dealings with Branch but also with other employees. Branch was unable to accept direction from him and manifested this conflict by questioning everything Holloway did and by filing and refiled grievances.

Not unexpectedly, management was not happy with Branch. At one point or another, both Holloway and Miller referred to Branch as a “troublemaker” and otherwise spoke to or of him in derogatory terms, calling him a “fool” among other things. Before his July 3 reinstatement, Holloway had called Branch a “troublemaker” and said that it would be hard for him when he returned. Subsequently, Miller also called him a “troublemaker” and told him to stop this “bull” referring to Branch’s insistence that all “i’s” be dotted and “t’s” crossed.

In labor relations parlance, the term “troublemaker” frequently, but not always, refers to an employee who is engaging in unwanted union activity. Compare, for example, *Fern Terrace Lodge*, 297 NLRB 8 (1989), and *T & H Investments*, 291 NLRB 409 (1988), with *Amelio’s*, 301 NLRB 182 fn. 6 (1991); *American Licorice Co.*, 299 NLRB 145 (1990); *Guarantee Savings & Loan*, 274 NLRB 676 (1985); and *Orba Transshipment*, 266 NLRB 917, 932 (1983). Where it does, it may be an indicia of union animus, as in *Pennsylvania Electric Co.*, 289 NLRB 1200 (1988), and, if uttered in the context of threats of reprisal, may independently violate Section 8(a)(1), as in *Corry Contract*, 289 NLRB 396 (1988).

In this case, I believe, management’s references to Branch as a troublemaker clearly related, at least in part, to his grievance filing, a protected activity. The timing of Holloway’s use of the expression, while talking of changes

necessitated by Branch's complaints, and Miller's reference to Branch's insistence upon the dotting of all "i's" and the crossing of all "t's," leads to no other conclusion. Moreover, the reference by Holloway came in the context of an implied threat, that Branch would find things hard when he returned; that, I find, is sufficient to warrant the conclusion that the appellation, itself, was coercive.

The difficulty, in this case, is that Branch was both an uncooperative employee and a grievance filer. His activities overall, appear to be less than reasonable and the comments of his supervisors do not appear to be totally unwarranted. However, as the Board stated in *Tamara Foods*, 258 NLRB 1307, 1308 (1981), "inquiry into the objective reasonableness of employees' concerted activities is neither necessary nor proper in determining whether that activity is protected." The comments of Holloway and Miller could reasonably be interpreted, by Branch and other employees, as orders that he (or they) cease filing grievances and as threats of unspecified reprisals if the protected activity continued. Such statements violate Section 8(a)(1), warranting the issuance of a cease and desist order assuring employees of their right to file grievances.

## 2. Section 8(a)(3)

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) (approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 466, 470 (1983)), the Board set forth the following causation test to be applied in all discrimination cases turning on motivation:

First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Branch's record of grievance filing, and Respondent Employer's expressions of displeasure with respect thereto, set forth the requisite prima facie showing to support the inference of discriminatory motivation. However, I am convinced that, in this case, the balance of the evidence negates that inference.

As noted above, Branch was a nettlesome employee who manifested his uncooperative attitude by filing grievances to question every action of his supervisor. Because of his attitude, particularly his inability to accept the direction of his immediate supervisor,<sup>17</sup> the Employer proposed the solution which would have the least adverse impact on him. That solution was a transfer to another unit where he would perform similar work, with greater pay and benefits, and still enjoy

<sup>17</sup> His grievance over the assignment of window washing typifies this attitude. Contrary to General Counsel's contention, alleging this to be a discriminatory assignment to more onerous and difficult work, I find that exterior window washing, at no more than step ladder height, was work reasonably and regularly assigned to employees in the "cleaner" classification. It was no more onerous than cleaning bathrooms. It requires an extremely narrow construction of the collective-bargaining agreement to contend that it was excluded from the work of the bargaining unit.

the benefits of collective bargaining. I believe that such a solution would have been proposed whether Branch's attitude manifested itself in the filing of grievances or in other, unprotected, activities. Indeed, it is likely that he would have been discharged, rather than transferred, had his grievances not brought the Union into the picture to argue for the less severe remedy.

The transfer was worked out with, and approved by, Branch's collective-bargaining representative as a resolution of his grievances. Initially, I have found, it was accepted by Branch and the Employer was so informed. He was transferred pursuant to that decision and it was only when he refused to accept the transfer that he was terminated. I conclude that he was terminated for failing to report to work pursuant to a mutually agreed-to solution to the serious personality conflict existing between himself and Holloway, a conflict for which he was largely responsible, and not because he had filed grievances against the Employer.

Similarly, I also find the evidence insufficient to warrant a conclusion that the warning issued to Branch on August 15 was discriminatorily motivated. Branch was, at most, entitled to 10 days of paid vacation. If he thought that he was being given an extra day of paid vacation when Holloway said he could start 1 day early, he was wrong. It was not unreasonable for Holloway to have expected him to return after 10 days, and to give him mild discipline for failing to do so. There is no evidence connecting this discipline to his protected activity.

Accordingly, I shall recommend that the 8(a)(3) allegations be dismissed.

## C. The 8(b)(1)(A) Charge

The complaint charges that the Union, in breach of the duty of fair representation owed to unit employees, failed to process Branch's grievances. The Board, citing *Vaca v. Sipes*, 386 U.S. 171 (1967), has stated, with respect to that duty:

We note that the duty of fair representation requires that a grievance filed by a bargaining unit member . . . not be processed by the Union in an arbitrary, discriminatory, perfunctory, or bad faith manner.

*American Postal Workers (Postal Service)*, 277 NLRB 541, fn. 1 (1985).

Without contravening its statutory obligation,

A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority.

*Regional Import Trucking Co.*, 292 NLRB 206, 230 (1988), quoting *Griffin v. Workers*, 469 F.2d 181, 183 (4th Cir. 1972).

Under the foregoing standard, a union has broad discretion in deciding which grievances it will pursue and how it will pursue them. Within that range of discretion, a union is not required to advocate the employee's position; it may seek an amicable adjustment different than that sought by the employee or agree with the employer regarding the merits of a grievance and refuse to further process a grievance. *Hotel & Restaurant Employees Local 64 (HLJ Management)*, 278

NLRB 773 (1986). It does not breach its duty even if it acts negligently with respect to a grievance, so long as it does not simply ignore a meritorious grievance or process it perfunctorily. *Laborers Local 1191 (S.J. Groves & Sons)*, 292 NLRB 1022 (1989).

Applying the above to General Counsel's allegations, I am unable to conclude that the Union breached its duty of fair representation with respect to Branch and the grievances which he filed. The record reveals, if not activist representation on Branch's behalf, at least that the union representative considered his grievances, referred them to the Employer, met with the Employer on most of them, and resolved those which lent themselves to resolution.

In his first grievance, Branch claimed entitlement to sick leave unused in the prior year. He raised this issue again in the fifth grievance in this series. Carter disagreed with Branch's understanding and believed that Branch had no sick leave coming. Nonetheless, he pressed the issue with the Employer and Branch was awarded an additional 2 days of sick leave.

Branch's second grievance, and later ones, alleged understaffing and abusive language from Holloway. Carter disagreed with Branch's interpretation of the collective-bargaining agreement with respect to staffing; he believed that the determination of crew size was a management prerogative. Nonetheless, he presented the grievance to management for consideration at step one. Carter took more seriously Branch's allegations concerning his relationship with Holloway. These repeated allegations were the subject of repeated meetings with all levels of management; they resulted in a proposed solution, jointly arrived at by Carter and the Employer, that a serious personality conflict existed between Branch and Holloway which would be best resolved by transferring Branch to another facility.

Carter processed Branch's next grievance, alleging more harassment by Holloway, including an April 10 "in-house suspension," through the first step, resulting in an answer from Holloway which denied Branch's claims. It also processed his simultaneously filed overtime pay grievance through the first step. That grievance was also the subject of a complaint to the Department of Labor, Wage and Hour Division, and was resolved with the payment for some overtime to Branch. While Branch credits the wage and hour investigator, it is not clear what role, if any, the Union had in this resolution. At any rate, it is difficult to see how a union would breach its duty of fair representation by failing to vigorously pursue such a grievance where the employee's complaint was under active consideration by the appropriate governmental agency.

Branch's grievance over the "in-house" suspension became moot with his discharge on April 14. Carter processed his discharge grievance in meetings with all of the Employer's management and, although he refused Branch's demand that he take the issue to arbitration and suggested that Branch should accept a proffered transfer, Branch was reinstated, with full backpay. Whether Carter deserves all, some, or none of the credit for that reinstatement is irrelevant; there was clearly no obligation to pursue arbitration on a grievance which was satisfactorily adjusted.

Immediately on his reinstatement, Branch filed another series of grievances. With respect to those dealing with the alleged wage increase and his demand that he be allowed an

immediate vacation, Carter believed Branch to be wrong and so counseled him. The wage grievance, and the Union's alleged failure to process that grievance, were the subjects of unfair labor practice charges filed by Branch against both the Employer and the Union; those charges were dismissed. This alleged failure is not in issue before me. Branch allegedly asked Carter to take the vacation grievance to the second step of the grievance procedure. While he claimed to have received no response from Carter, that grievance was answered by Miller, at what would appear to be the second step.

Branch also grieved again his contentions that Holloway was harassing him and that the crew was understaffed. The latter grievance was given directly to Holloway and it appears that the Union never received it. At any rate, it is similar to earlier raised contentions, which Carter had rejected based upon his interpretation of the management-rights clause. A refusal to process this grievance, even if it had been brought to his attention, would have been within Carter's permissible range of discretion.

The harassment grievance, also a reiteration of earlier complaints, was actively pursued by Carter, resulting in a number of meetings with management. He objected when the Employer suggested discharging Branch and agreed that the conflict would best be resolved by transferring him away from Holloway's supervision, to a position where he would suffer no financial hardship. This was a reasonable and responsible solution; that it may have pleased Carter to remove this bothersome employee from under his area of authority (as General Counsel seems to speculate) does not render it a breach of Carter's duty of fair representation.

Branch's next series of grievances, alleging "wage tampering," "retaliation," assignment of work not in his job description (window washing) and "harassment and profanity" are essentially reassertions of earlier claims. He gave them to Carter and Carter brought them to management's attention. They were answered, as rejected, at the second step by Miller.

Branch's alleged July 26 meeting with Miller lead to the preparation of another grievance, contending that he was being illegally transferred and that Miller had talked roughly to him. I have found that this grievance was never filed. Even if it had been, and if Carter had refused to process it, the evidence would not establish a breach of the duty of fair representation. At this point, Carter had concluded, reasonably and legitimately, that the transfer of Branch was in everyone's best interests. This he could legally do and he would have been under no obligation to process a grievance which ran counter to that agreed-to solution.

As noted, Branch filed no grievance over his termination.

In sum, Carter may not have been a vigorous advocate for Branch's claims but he was not required to assume such a role. *HJL Management*, supra. Neither was he required to take a grievance to arbitration merely because the grievant demanded it. He accepted Branch's grievances, evaluated them, referred them to the Employer even when he disagreed with Branch's premises, represented Branch's interests when he believed there was any merit to the claim, secured some relief for Branch, prevented the Employer from discharging Branch and worked out a reasonable settlement of Branch's problems. Even if he resented Branch's complaint against him, and even if he failed to return all of Branch's phone

calls, there was no breach of his statutory duty. Accordingly, I shall recommend that the CB charge be dismissed.

#### CONCLUSIONS OF LAW

1. By calling an employee a troublemaker and threatening that employee with unspecified reprisals because of his union and other protected activities, the Employer has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Employer has not violated the Act in any other manner set forth in the complaint.

3. The Union has not violated the Act in any manner set forth in the complaint.

#### REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action, i.e., the posting of a notice to employees assuring them of their rights under the Act, designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>18</sup>

#### ORDER

The Respondent, Ryder Services, Inc., Newport News, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Calling employees troublemakers and threatening them with unspecified reprisals because of their union and other protected activities.

(b) In any like or related 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.

<sup>18</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at its facility in Newport News, Virginia, and other worksites copies of the attached notice marked "Appendix."<sup>19</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

In all other respects, the complaint in Case 5-CA-20719 is dismissed.

The complaint in Case 5-CB-6444 is dismissed in its entirety.

<sup>19</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refer to employees as troublemakers or threaten them with reprisals because they engage in union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

RYDER SERVICES, INC.