

Communications Workers of America Local Union No. 3410, (BellSouth Telecommunications, Inc.) and Kellena L. Steverson. Case 15-CB-4361

July 15, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 9, 1999, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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,¹ and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Communication Workers of America Local Union No. 3410, AFL-CIO, New Orleans, Louisiana, its officers, agents, and representatives, shall take the action set forth in the Order.

Patricia A. Adams, Esq., for the General Counsel.

John L. Quinn, Esq., for the Respondent.

Ms. Kellena L. Steverson, appearing pro se.

DECISION

STATEMENT OF THE CASE AND BACKGROUND

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on August 7, 1997,¹ by Kellena L. Steverson (Steverson). Complaint issued on November 26, and alleges that Communications Workers of America, Local Union No. 3410, AFL-CIO (Respondent or the Union) refused to process a grievance filed on Steverson's behalf concerning the staffing of a position for Customer Service Representative (CSA), be-

¹ The Respondent 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.

We note that the judge erroneously stated that witness Thelma Dunlap was an agent of the Respondent. She was an agent of a sister local union. The Respondent contends in exceptions that the judge further erred by ruling, based on his mistaken agency finding, that the General Counsel could examine Dunlap under Sec. 611(c) of the Federal Rules of Evidence. Absent any showing of prejudice to the Respondent's presentation of its case, we find no merit in the exceptions.

² For the reasons set forth in the partial dissent of Members Hurtgen and Brame in *Iron Workers Local 377 (California Iron Workers Employers Council)*, 326 NLRB No. 54 (1998), Member Hurtgen would impose full make-whole remedial liability on the Respondent in the event that the Kellena Steverson's grievance cannot be processed and the General Counsel proves in compliance that a timely pursued grievance on her behalf would have been successful.

¹ All dates are in 1997 unless otherwise specified.

cause of arbitrary, invidious, and unfair reasons, and because it handled the grievance in a perfunctory manner, in violation of Section 8(b) (1) (A) of the Act.

A hearing was held before me on this matter on January 27, 1999, in New Orleans, Louisiana. The General Counsel and the Respondent thereafter filed briefs. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

BellSouth Telecommunications, Inc. (Employer) is a corporation with an office and place of business in New Orleans, Louisiana, where it is engaged in providing telephone and communications services to the public. During the 12-month period ending October 31, 1997, the Employer derived gross revenues in excess of \$100,000, and received at its facility in New Orleans, Louisiana, directly from points outside the State of Louisiana, goods valued in excess of \$5000. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. SUMMARY OF THE EVIDENCE

A. *The Collective-Bargaining Agreement*

At all material times, Respondent has been the exclusive bargaining representative of all the Employer's employees except for supervisors and professional employees, and employees regularly performing confidential labor duties.² The Employer and the Union are parties to a collective-bargaining agreement (CBA) which provides, inter alia, for the filing of grievances by the Union concerning the filling of vacancies.³

B. *The Filing of the Grievance*

In 1975, Steverson started working in New Orleans for the Employer in various positions in the collection department. She joined the Union in 1975, and participated in union election activities. Since the 1990's she opposed current Union Vice President Freddie Green, and campaigned for the candidates running against him.

In 1996, the Employer closed the New Orleans office where Steverson was employed, and transferred her to Huntsville, Alabama. She then joined Local 3905 of the Communications Workers.

In March, Steverson learned that the Employer was testing for customer service associate (CSA) positions in New Orleans. On March 17, Steverson, and two other Huntsville employees drove to Birmingham, Alabama, to take the tests for this position. One of the employees was Vicki DeLatte, and the other was Linda McCloud. The latter was a steward for Local 3905 in Huntsville, with responsibility for the filing of grievances. The three applicants passed the tests. They then learned that the Employer had hired three employees with less seniority than theirs. The CBA provides that in the selection of employees for promotion, seniority shall govern if other necessary qualifications are substantially equal.⁴

² R. Exh. 2; G.C. Exhs. 1(e) (par. 7, 1(l), par. 7.

³ *Ibid.*, Sec. 21.06.

⁴ *Supra*, fn. 2, Sec. 12.02(c).

McCloud as union steward attempted to file grievances for the applicants, including Steverson, in Huntsville. She was informed by a union official that she should file in New Orleans. McCloud testified without contradiction that she filed the standard grievance forms for all three applicants with Respondent Local 3410. On April 23, Respondent's president, Michael J. Farenholt, sent to BellSouth Business Systems Manager Allen Lambert a letter requesting a grievance meeting on behalf of three employees including Steverson.⁵ On April 24, Farenholt sent Lambert another communication stating that the Union had discovered that another employee, Jo Kieffer, had not been selected, and that she had seniority over Steverson. Accordingly, the prior letter was revised to show Kieffer instead of Steverson.⁶

Union Vice President Green testified that the Union learned that the Employer had two more vacancies to fill, making a total of five positions. Green proposed to fill these vacancies with five union members including Vicki DeLatta, but excluding Steverson. The latter had more seniority than DeLatta. On July 18, the grievances were settled with the award of these positions to the five applicants including DeLatta, but not Steverson.

C. Removal of Kellena Steverson from the Grievance

1. Green's conversation with Thelma Dunlap in Las Vegas

Union Vice President Green testified that he removed Steverson's name from the grievance. He did so based on an asserted conversation which he had with Thelma Dunlap during a Union convention in Las Vegas. Dunlap was a "department representative" and an agent of the Union. Green purportedly told Dunlap that there were more applicants for the CSA position in New Orleans than there were positions available. Dunlap assertedly told Green that Steverson did not want to go to New Orleans because her husband had passed away and left her some money. Green did not call Steverson about the matter because he had received the information from Dunlap.

Dunlap agreed that she had a conversation with Green in Las Vegas. However, she denied that she told Green that Steverson did not want to return to New Orleans, or that she wanted her name removed from the grievance. Dunlap did not ever know at that time that there was a pending grievance. There was a conversation about "personalities," including Steverson. Dunlap testified that Green referred to her as a "bitch". Dunlap also remembered the words "ass," "fat," and "M-F." Green denied making these statements about Steverson. Respondent's president, Michael Farenholt, was present. On direct examination he denied that Green said anything derogatory about Steverson. On cross-examination he admitted that he gave a statement to the Board averring that he could not recall the details of the conversation.

2. Steverson's conversation with Green on July 17

Steverson testified that she learned that five applicants, including DeLatta, were receiving the CSA jobs in New Orleans. The grievances in fact were being settled, and the effective date was July 18. Steverson called Green on the 17th and demanded to know why her name had been taken off the grievance. Green replied that he based this on what Thelma Dunlap had told him. Steverson replied that Linda McCloud was her representative,

and that nobody could take her name off the grievance without Steverson's permission. Steverson averred that she told Green that she wanted the CSA position in New Orleans. "I would not have called him if I hadn't." Green replied that the settlement was a "done deal," and Steverson concluded on the basis of this statement that the settlement had already been executed.

Green agreed that he had a conversation with Steverson on July 17. He told her that he had taken her name off the grievance based on what Thelma Dunlap had "shared" with him. Green denied that Steverson told him that Dunlap had no right to say that Steverson no longer wanted to go back to New Orleans. He contended that Steverson did not object to the removal of her name from the grievance, and that she did not want to leave Huntsville. The union vice president testified that, if Steverson had said she wanted the New Orleans job, he could have corrected the still tentative settlement on July 17, and could have arranged to have Steverson get the position in lieu of DeLatta, because the latter had less seniority.

D. Steverson's Efforts to Correct the Settlement

Steverson immediately went to Thelma Dunlap on July 17, asked what she had told Green to make him think he wanted her name removed from the grievance, and asserted that Green told her Dunlap said Steverson's name should be removed. Dunlap replied to Steverson that this was "a lie," and that she would call Green immediately. Dunlap corroborated Steverson, and testified that she left a message with Green but did not receive a return call.

Steverson also placed a call to Linda McCloud on July 17. McCloud returned it that evening or the next day. Steverson told McCloud that she was unhappy that her name had been removed from the grievance, and that she wanted the job. McCloud had already spoken with Green on the 17th, and had learned that she was getting one of the New Orleans positions. Green also told her that Steverson's name had been taken off the grievance. After learning of Steverson's call, the same day, McCloud returned it that evening or the next day. She thereafter called Green and repeated Steverson's protest.

On July 17, Steverson called Booker Lester, Respondent's staff representative in New Orleans. He advised her to call Respondent's president, Michael Farenholt. On the same day, July 17, Steverson called Jim King, the president of Local 2905 in Huntsville. He advised her to call Local 2410 President Farenholt. According to Steverson's uncontradicted testimony, she called Farenholt but did not receive a return call. On July 30, Steverson wrote to the legal department of Communications Workers of America, and listed her complaint and efforts to correct it. She asserts therein that Respondent's staff representative Booker Lester advised her that the Company told him it was not necessary for the Union to offer Steverson a job, because she would refuse it.⁷ On August 7, Steverson filed the charge in this case.

E. Steverson's Applications for Jobs

A month after her transfer to Huntsville in August 1996, Steverson was offered a job in New Orleans as a service representative. (This is not a customer service associate position.) She declined the job because she had just moved, had just sold her house and, did not have the funds. Under the contract, she was then precluded from accepting a customer service representative job for 12 months. She had several active job bids for this

⁵ G.C. Exh. 3.

⁶ G.C. Exh. 2.

⁷ G.C. Exh. 7.

position at the time of her transfer to Huntsville, as well as a bid for the position of customer service associate, for which she was eligible. Steverson testified that she wanted to return to New Orleans because her mother was ill. She asserted a preference for the customer service associate position but contended that the Union “denied” her that “right”.

Factual and Legal Conclusion

Most of the relevant facts are undisputed. McCloud’s testimony and Union President Farenholt’s letter to BellSouth executive Lambert on April 23 establish that the Union filed and initially attempted to process a grievance on Steverson’s behalf. When BellSouth enlarged the available positions from three to five, Steverson had more seniority than Vicki DeLatte, one of the five who were chosen, and thus had a superior right to one of the positions according to the CBA. It is undisputed that Union Vice President Green removed Steverson from the grievance. It is also clear from Green’s testimony that the pending settlement was still tentative on July 17, and that Green could have returned Steverson to the grievance in place of DeLatte.

A relevant issue upon which the evidence is conflicting is the conversation between Green and Thelma Dunlap in Las Vegas. Dunlap, an admitted agent of the Union, categorically denied Green’s assertion that she told him Steverson did not want to go to New Orleans. Dunlap was a more believable witness than Green. Union President Farenholt’s corroboration of Green on direct examination was contradicted by his own pretrial affidavit, and he was an evasive witness. I credit Dunlap on this issue and reject Green’s assertion that Dunlap told him Steverson did not want to go to New Orleans. I also credit Dunlap’s testimony that Green made derogatory statements about Steverson.

There is no doubt that Steverson called Green on July 17, the day before the settlement was finalized. Green’s version of this conversation is highly unlikely. Thus, denying Steverson’s version, Green claimed that Steverson had no objection to his removal of her name from the grievance, and stated that she did not want to leave Huntsville. I credit Steverson’s testimony that she told Green she wanted the New Orleans position. Steverson was a more believable witness than Green, and her testimony about what she told Green is buttressed by her efforts to get other people to amend the grievance.

I credit the testimony of both witnesses that Green told Steverson that he removed her from the grievance because of what Dunlap allegedly told him in Las Vegas; I note that Dunlap did not make any such statement. I credit Steverson’s testimony that, when she told Green she wanted the New Orleans position, he replied that it was a “done deal”—a statement which was false, since Green admitted that he could have changed the settlement on July 17.

It is established law that “Section 8(b)(1) (A), of the Act . . . prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.” *Miranda Fuel Co.* 140 NLRB 18, 185 (1962). A union has a broad range of discretion in determining which grievances to pursue, and mere negligence is insufficient to form the basis for a violation. *King Soopers*, 222 NLRB (1976). However, once a union has undertaken to process a grievance, its abandonment because of ill will or other invidious considerations constitutes a breach of its duty of fair representation. *Bottle Blowers Local 106*, 240 NLRB 324 (1979). A

union may not discriminate against an employee in its hiring hall practices because of his internal union activities, or animus *Teamsters Local 287 (Emery Air)*, 304 NLRB 119, 123 (1991), or for other unlawful reasons, *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998).

The evidence shows that Steverson engaged in union political activities in which she opposed Vice President Green. In addition, he manifested animus towards her by removing her name from the grievance allegedly based on a statement (from Dunlap) which was never made, by falsely telling Steverson that Dunlap had made the statement, by falsely telling Steverson that the settlement was a “done deal” on July 17, by refusing to correct the still tentative settlement, and by making derogatory statements about Steverson, including profanity. I conclude on the criteria cited above that Respondent thereby violated Section 8(b) (1)(A) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Communications Workers of America, Local Union No. 3410, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

2. BellSouth Telecommunications, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent, by its failure to process the grievance of Kellena L. Steverson, breached its duty of fair representation and thereby violated Section 8(b) (1) (A) of the Act.

4. The foregoing unfair labor practice affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

In the complaint, the General Counsel seeks an order requiring Respondent to request that BellSouth Telecommunications (Employer) place Steverson in the position of customer service representative or, if the position no longer exists, to a substantially equivalent position. If the Employer refuses, the General Counsel seeks an order requiring the Respondent to process Steverson’s grievance⁸ in good faith and with due diligence, and grant to Steverson the right to have counsel or other representative at any grievance-arbitration proceeding, with reimbursement by Respondent of reasonable fees incurred by Steverson. The General Counsel also requests that Respondent be ordered to make Steverson whole for any loss of earnings and other benefits incurred as a result of the Employer’s failure to place her in the customer service position, until such time as the Employer places her in this or a substantially equivalent position.⁹

The Board has amended its prior remedy in such cases, as set out in *Rubber Workers Local 250 (Mack-Wayne Closures)*, 290 NLRB 817 (1988) (*Mack-Wayne II*). More recently, in *Iron Workers Local 377*, supra, the Board concluded that the formula set forth in *Mack-Wayne* “does not allocate evidentiary burdens appropriately among the parties and therefore runs the risk of imposing essentially punitive liability on the union and granting a windfall to the grievant/discriminatee.”¹⁰ The Board set forth its new policy as follows:

⁸ The complaint inadvertently states “Employer” instead of “Respondent,” G.C. Exh. 1(e).

⁹ *Ibid.*

¹⁰ 326 NLRB at 376.

Under the modified procedure which we adopt today, we will not provide a remedy requiring the Union to make the grievant whole for losses allegedly suffered as a consequence of a union's mishandling of a grievance unless the General Counsel (1) affirmatively pleads for this remedy in the complaint and (2) shows not only that the union breached its duty of fair representation by mishandling the grievance but also that the grievant would have prevailed in the grievance-arbitration procedure had the union not breached its duty. If the General Counsel pleads for this remedy he will not normally be required to establish the merits of the grievance in the unfair labor practice proceeding. Rather, once the General Counsel has established that the union acted unlawfully in breach of its duty of fair representation, we will normally issue an order directing the respondent union to take such affirmative steps as may be necessary, under the facts of the particular case, to pursue properly the grievance in a manner consistent with the Union's duty of fair representation. If the grievance is resolved through the contractual machinery, no further proceedings will be required. However, if the union is unable to secure a resolution of the grievance through the contractual machinery (because of time bars or other constraints rendering the process ineffectual), it will then be necessary for the Board, for the purpose of deciding whether make-whole relief is appropriate, to determine whether the grievance would have prevailed on a properly processed grievance. At that point, in the compliance stage, the burden will be on the General Counsel to establish that the grievant was meritorious.¹¹

We believe that removing the litigation of the merits on the grievance from the initial unfair labor practice proceeding will ordinarily be the preferable procedure, since it avoids creating the hazards, which we have noted above, to proper processing of the grievance through the normal contractual channels. It also lessens [sic] the burden of trial preparation for all parties and expedites the resolution of the basic underlying issue, which is whether the respondent union violated the Act by handling the grievance in bad faith or in an arbitrary or discriminatory manner.

As we have noted, however, there may be circumstances in which it would be appropriate to resolve all the issues in the unfair labor practice proceeding. Accordingly, if the General Counsel pleads in his complaint for a remedy requiring the Union to make the grievant whole for losses allegedly suffered as a consequence of the Union's mishandling of a grievance, the Respondent Union may, in its answer, give notice that it wishes to litigate the merits of the grievance in the initial unfair labor practice proceeding. If the judge decides that this is appropriate, he should seek the position of the General Counsel and Charging Party or Parties. Only if all are in agreement

¹¹ In providing for this bifurcated procedure, we are not postponing litigation of the merits of the unfair labor practice to the compliance stage. The issue that is deferred to compliance is merely the question whether the Respondent should have backpay liability for the violation found in the unfair labor practice proceeding. We note that the policy of deferring consideration of such factually complex issues that relate purely to the remedy has been approved by numerous courts as a means of avoiding unnecessary litigation in the event that no violation is found in the unfair labor practice proceeding. *Holyoke Visiting Nurses Assn. v. NLRB* 11 F.3d 302, 308 (1st Cir. 1993), and cases there cited.

will the hearing be expanded to include this issue.¹² This could be handled as a preliminary pretrial matter, so as to provide all parties adequate notice and opportunity to prepare fully for the issues to be disposed of in the proceeding.¹³

In the case at bar, the General Counsel has requested in the complaint that Respondent be required to reimburse the grievant for losses incurred because of Respondent's refusal to process the grievance. However, Respondent has not in its answer given notice that it wished to litigate the merits of the grievance in this proceeding, nor has there been agreement of all parties that "the hearing be expanded to include this issue." I therefore conclude that the issue of the remedy should be reserved to the compliance stage of the proceeding.

On the basis of my findings of fact, and the entire record, I recommend the following¹⁴

ORDER

The Respondent, Communications Workers of America, Local Union No. 3410, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing or refusing to process the grievance of Kellena L. Steverson, or any other employee, for irrelevant, invidious, or unfair reasons.

(b) In any like or related manner restraining or coercing employees in the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Promptly send to BellSouth Telecommunications, Inc. a letter revising its prior letter of April 24, 1997, so as to affirm that Kellena L. Steverson had seniority over one of the applicants selected by the Employer for the Customer Service Associate position in New Orleans, and, based on that letter, request that the Employer offer Steverson employment in such position.

(b) If the Employer refuses this request, promptly initiate and pursue in good faith and with due diligence a grievance on Steverson's behalf seeking the same relief, including arbitration or any other disputes-resolution forum established by Respondent's labor agreement with the Employer.

(c) Permit Kellena Steverson to be represented by her own counsel at any grievance or arbitration proceedings or other resolution proceedings, and pay the reasonable fee for such counsel.

(d) In the event that it is not possible for the Respondent to pursue on Kellena Steverson's behalf the grievance that she sought to file concerning the Employer's refusal to employ her,

¹² We disagree with Chairman Gould's position that this matter should be left entirely to the judge. We think that this is a matter of Board policy, and we have set forth policy reasons against litigating the merits of the grievance in the unfair labor practice proceeding. In addition, we have provided flexibility to giving the parties the option of litigating the merits of the grievance in the unfair labor practice proceeding, subject to approval by the judge. Thus we believe that we have provided a sound policy, and that we have built in adequate flexibility.

¹³ *Ibid.*, at 380.

¹⁴ In the event 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 by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

as requested, and if the General Counsel shows in compliance that a timely pursued grievance on that issue would have been successful, make Steverson whole for any increase in damages she suffered as a consequence of Respondent's refusal to process the grievance, together with interest.

(e) Within 14 days after service by the Region, post at its office and meeting halls in New Orleans, Louisiana copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms to be provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter in conspicuous places including all places where Respondent customarily places notices for its members. Responsible steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other materials

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to process the grievance of Kellena L. Steverson, or any other employee, for irrelevant, invidious, or unfair reasons.

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

WE WILL promptly send BellSouth Telecommunications, Inc. a letter stating that Kellena L. Steverson had seniority over one of the applicants selected for the customer service associate position in New Orleans and requesting that the Employer offer Steverson employment in such position.

WE WILL, in the event the Employer refuses this request, promptly initiate and pursue in good faith and with due diligence a grievance on Steverson's behalf seeking the same relief.

WE WILL permit Steverson to be represented by her counsel at any grievance of arbitration proceeding, and WE WILL pay the reasonable fee for such counsel.

In the event that we are not able to pursue on Steverson's behalf the grievance she sought to file, and if the General Counsel shows in compliance that a timely pursued grievance would have been successful, WE WILL make Steverson whole for any increase in damages she may have suffered as a consequence of our unlawful refusal to process her grievance, with interest.

COMMUNICATION WORKERS OF AMERICA LOCAL
UNION NO. 3410, AFL-CIO (BELLSOUTH TELE-
COMMUNICATIONS, INC.)

¹⁵ 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."