JD(ATL)–29–05
Destin, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

and **Case No. 15-CA-17506(P)**

BOBBY CLINE, An Individual

Kevin McClue, Esq., and Valerie Bennett, Esq.,
for the General Counsel.
***John C. Oldenburg, Esq.,* for the Respondent.**

BENCH DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Destin, Florida on June 20, 2005. Bobby Cline, an individual, filed the charge in this case on September 17, 2004 and amended it on October 4 and October 28, 2004.[1] On January 26, 2005, the complaint and notice of hearing issued alleging that the Respondent, United States Postal Service, violated Section 8(a)(1) of the Act, through its alleged supervisor Bobby Powers, on or about September 23, 2004, by threatening employees with unspecified reprisals and a lawsuit because employees had filed charges with the NLRB. The Respondent filed an answer to the complaint on February 8, 2005, denying the alleged unfair labor practices and raising certain affirmative defenses, including that the Respondent was not liable for the conduct of Powers because he was "acting in his individual capacity without the knowledge of, without any condonation or ratification by, and without any encouragement from the Respondent." The Respondent also claimed, as an affirmative defense, that any statements by Powers regarding a lawsuit could not be found unlawful under the Supreme Court's decision in *BE & K Construction Co.,* 536 U.S. 516 (2003).

After hearing the testimony of the witnesses, reviewing the documentary evidence offered by the parties, and considering the oral arguments of counsel, I rendered a bench decision in accordance with Section 102.35(a)(10) of the Board's Rules and Regulations. For the reasons stated by me on the record at the close of the hearing, I found that the Respondent violated the Act as alleged in the complaint.

I hereby certify the accuracy of the portion of the transcript, pages 140 through 157, containing my bench decision. A copy of that portion of the transcript, as corrected, is attached hereto as "Appendix A."[2]

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[1] All dates are in 2004 unless otherwise indicated.
[2] The corrections to the transcript are reflected in the attached Appendix B.

Conclusions of Law

1. Bobby L. Powers, the Respondent's supervisor of customer services at the Destin, Florida post office was, at all times material, a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

2. By threatening an employee, on or about September 23, 2004, with unspecified reprisals and a lawsuit because the employee had filed unfair labor practice charges with the National Labor Relations Board, the Respondent 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.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall further recommend that the Respondent post the attached Notice to Employees at its facilities in Destin and Miramar Beach, Florida (Appendix C).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, United States Postal Service, Destin, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with a lawsuit or other reprisals for filing unfair labor practice charges with the National Labor Relations Board.

(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.

(a) Within 14 days after service by the Region, post at its facility in Destin, Florida, including the Miramar Beach station, copies of the attached notice marked "Appendix C."[4] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and

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[3] 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.

[4] 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."

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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 2004.

(b) 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 the Respondent has taken to comply.

Dated, Washington, D.C.

_____
Michael A. Marcionese
Administrative Law Judge

1 A F T E R N O O N S E S S I O N

2 (Time Noted: 2:00 p.m.)

3 JUDGE MARCIONESE: On the record.

4 Okay. Good afternoon, everyone. I hope you all had a

5 nice break.

6 Now, at this point, I think, as we talked about

7 previously, I am going to be issuing my bench decision in

8 accordance with the Board's rules and regulations. There are

9 certain provisions that are required even in a bench decision,

10 so I will go through all of those, as well as reviewing the

11 facts, and make my findings with respect to credibility and

12 factual issues and then my conclusions of law.

13 And under the Board's procedures, what will happen after

14 today is that upon receipt of the formal transcript of these

15 proceedings from the court reporting service, I will then issue

16 a certification of the portions of the transcript that contain

17 the bench decision, as well as the -- whatever standard order of

18 recommended remedy I propose. And then that will be served on

19 all parties in writing -- that portion with -- the certified

20 portion of the transcript. And then at that point, you will all

21 have an opportunity to file any exceptions or appeals to any

22 findings or rulings that I have made in this decision.

23 (Whereupon, a bench decision was rendered, as follows:)

24

25

1 BENCH DECISION

2 JUDGE MARCIONESE: Now, the charge in this case was filed
3 by Mr. Cline, an individual, on September 17, 2004, and it was
4 amended on October 4 and again on October 28, 2004. On January
5 26, 2005, the complaint and notice of hearing issued, alleging
6 that the Respondent, the U. S. Postal Service, violated Section
7 8(a)(1) of the Act through its alleged supervisor, Bobby Powers,
8 on or about September 23, 2004 by threatening employees with
9 unspecified reprisals and a law suit because the employees had
10 filed charges with the NLRB.

11 The Respondent filed an answer to the complaint on
12 February 8, 2005, denying the alleged unfair labor practice and
13 raising certain affirmative defenses, including that the
14 Respondent was not liable for the conduct of Powers, because he
15 was -- and I'll quote from the Respondent's answer -- "Acting in
16 his individual capacity without the knowledge of, without any
17 condonation or ratification by and without any encouragement
18 from the Respondent."

19 The Respondent also claimed as an affirmative defense that
20 any statement by Powers regarding a law suit could not be found
21 unlawful under the Supreme Court's decision in BE&K Construction
22 Company, 536 U. S. 516, a 2003 decision.

23 Having now heard the testimony of the witnesses for both
24 parties and reviewed whatever documentary evidence was offered,
25 and having considered the very eloquent arguments made by

1 counsel for both parties, I am now prepared to render my
2 decision, and that's pursuant to Section 102.35(a)(10) of the
3 NLRB's rules and regulations.
4 Now, with respect to jurisdiction, the complaint alleges,
5 the Respondent admits and I find that the Respondent provides
6 postal services for the United States and operates various
7 facilities throughout the United States in the performance of
8 that function, including the facility at issue here, which is
9 located in Destin, Florida.
10 The Respondent admits and I also find that the Board does
11 have jurisdiction over the Respondent pursuant to Section 1209
12 of the Postal Reorganization Act. The Respondent also admitted
13 and I find that the American Postal Workers Union Local 5643 is
14 a labor organization within the meaning of Section 25 of the
15 Act.
16 Now, in its answer, the Respondent admitted -- and now
17 I'll go to the evidence -- that Bobby L. Powers, who the
18 Respondent has identified as a supervisor of customer services
19 in the Destin Post Office, is a supervisor of the Respondent
20 within the meaning of Section 211 of the Act and an agent of the
21 Respondent within the meaning of Section 213 of the Act, but the
22 Respondent at the same time denied responsibility for his
23 actions which are at issue in this case. I also note that while
24 there's no dispute that there was a telephone conversation
25 between Mr. Powers and Mr. Cline related to Mr. Cline's filing

1 of an unfair labor practice charge, there is a dispute regarding
2 what was actually said during that conversation, as well as the
3 legal significance of the statements that were made.
4 Now, in support of the complaint, the General Counsel
5 offered the testimony of the Charging Party himself, Mr. Cline.
6 Mr. Cline is a five-year employee of the Destin Post Office;
7 he's employed in the bargaining unit represented by the American
8 Postal Workers Union, but he does not now and has never held any
9 office in the union. And at the point when -- of the events
10 that were taking place that are at issue here, he was a rank-
11 and-file employee, although there is some testimony from Mr.
12 Powers that Mr. Cline does have a history of filing EEO and
13 unfair labor practice charges although he has no official status
14 with the union.
15 Now, today, Mr. Cline has testified that there was an
16 incident that occurred on August 25. And there's no dispute
17 that an incident did occur on that date, although there is maybe
18 some difference of opinion as to the seriousness of the
19 incident. But, basically, it involved one employee, not Mr.
20 Cline -- another employee finding a tray of letters with some
21 white powder in the tray and that this was brought to Mr.
22 Powers' attention.
23 Now, after that, there were some disagreements between Mr.
24 Powers, Mr. Cline and the other employee, Ms. Wittic, as well as
25 Mr. Jackson -- Marcus Jackson, who was the union steward,

regarding how to handle the situation. And apparently, from the testimony of all sides, it appears that that dispute did become somewhat escalated and heated, with Mr. Powers at one point telling Mr. Jackson to shut up.

I think Mr. Powers admitted saying that and also telling Mr. Jackson that he could not make a phone call when it appeared from what Mr. Cline has said that Mr. Jackson was going to make some inquiries from the union as to how handle the situation with the white powder.

Now, I don't need to make any particular findings with that incident; it's only relevant for background purposes, and I'm not going to determine whether there was any fault on either side with respect to what happened that day or how it was handled. But suffice it to say that as a result of that incident and how Mr. Cline perceived it, he exercised his right that he has under the law to file an unfair labor practice charge with the National Labor Relations Board, which alleged specifically that Mr. Powers had denied Mr. Jackson the opportunity to perform his duties as a union steward in connection with that incident.

Now, there's no dispute that upon receiving a copy of the charge, which was sent to Mr. Powers at the Miramar branch of the Destin Post Office, where he was working at the time, he telephoned Mr. Cline in order to discuss the charge with him. Now, according to Mr. Cline, Mr. Powers opened the conversation

1 after identifying himself by telling Mr. Cline that he had
2 received papers from the National Labor Relations Board, and
3 asking what it was about. And according to Mr. Cline, he told
4 Mr. Powers that it was about the August 25 incident and about
5 Mr. Powers not allowing Mr. Jackson to make inquiries on behalf
6 of Mr. Cline and the other employees.
7 At that point, according to Mr. Cline, Mr. Powers began
8 yelling and telling Mr. Cline that he was going to be sorry that
9 he had done this and, in the next breath, telling Mr. Cline that
10 he, "Had better get a good attorney, because I," meaning Mr.
11 Powers, "have a good attorney, and I'm going to sue." Now, in
12 the course of his direct and cross-examination, it was brought
13 out that the version of the testimony that Mr. Cline provided
14 today differs in one respect from a version that he reported in
15 his December 27 affidavit in which essentially he reversed the
16 order, stating in December that Mr. Powers told him -- made the
17 reference to filing a law suit before telling him that he was
18 going to be sorry.
19 But then on redirect examination, Mr. -- the General
20 Counsel pointed out that the version testified to today is
21 actually consistent with the much earlier version, which was
22 written by Mr. Cline himself on October 15 in support of the
23 amended charge that he had filed. And that statement was much
24 closer in time to the events in question here.
25 Now, Mr. Powers in his testimony acknowledges calling Mr.

1 Cline the same day that he received a copy of the unfair labor
2 practice charge and that he asked Mr. Cline why he had filed the
3 charge. Now, according to Mr. Powers, Cline told him that he
4 had filed the charge because he felt that the situation on
5 August 25 was an emergency situation and that Mr. Jackson was
6 looking out for his, Mr. Cline's, health and that of the other
7 employees and that Powers had not given Mr. Jackson union time.
8 Mr. Powers testifies that he disputed this, telling Mr.
9 Cline that Mr. Jackson had never asked for union time and that
10 union time has to be asked for and granted. At that point,
11 according to Mr. Powers, Mr. Cline disagreed with his
12 recollection of the events. And at that point, according to Mr.
13 Powers' own testimony, he raised his voice and told Mr. Cline,
14 Well, if you file these false accusations against me, you had
15 better get an attorney, because I'm getting one. And he then
16 admittedly hung up the telephone at that point in time.
17 Now, having considered the testimony, there -- really the
18 only significant difference in the two versions is whether Mr.
19 Powers made the statement that Mr. Cline would be sorry that he
20 had done this, meaning file the charge with the NLRB. Powers
21 denies saying this. And Mr. Cline -- although acknowledging
22 that there are some differences in his previous affidavits, he
23 does emphatically state that it was said in the conversation,
24 whether it was before or after the reference to a law suit.
25 Now, it appears that Mr. Cline's testimony here is

1 supported by the earlier statement made on October 15, not long
2 after the events in question, where, as best as I can tell, Mr.
3 Powers' testimony today appears to be based on his recollection
4 of a conversation that occurred nine months ago and it is quite
5 possible that at this point in time, he is recalling things
6 selectively, since there's really no contemporaneous statement
7 to compare it to to determine whether, you know, his
8 recollection at that point in time would be the same as it is
9 today.
10 I have to note that there was really nothing in Mr.
11 Cline's demeanor that would suggest to me that he made up the
12 part about Mr. Powers telling him that he would be sorry. And
13 nothing was -- certainly was pointed out in closing argument
14 that would convince me that Mr. Cline was not worthy of belief.
15 I also note that it would not be a stretch for Powers to
16 have used that sort of language or that phrase, either before or
17 after telling Mr. Cline that he had better get a lawyer because
18 Mr. Powers was going to get one, it's -- which is something that
19 he admits telling Mr. Cline. And Mr. Powers, I note, also
20 admits raising his voice, even if he did not yell, and when --
21 and making his statement in an emphatic tone.
22 Considering all of that and the demeanor, it's not hard to
23 believe that in the heat of that moment, considering that he had
24 just received the charge and -- which contained what he believed
25 to be a false accusation -- it's not hard to believe that he

1 would also have said to Mr. Cline, as Mr. Cline recalls, that he
2 was going to be sorry.
3 So based on having considered the demeanor and the
4 testimony and the probabilities of what may have occurred at
5 that point in time, I find, as Mr. Cline has testified, that
6 Powers in fact told him that he was going to be sorry he had
7 done this and that he had better get a good attorney, because
8 Powers had one and was going to sue.
9 Now, that then raises and brings me to the legal issue,
10 having found factually the based -- the allegations that the
11 General Counsel alleged. There are basically two legal issues
12 involved in this case. One is whether the Respondent, Postal
13 Service, is liable for the statements made by Mr. Powers in that
14 telephone conversation, and then, assuming that he is liable,
15 whether the statements made amount to an unfair labor practice
16 under the Act in light of the Supreme Court's decision in BE&K
17 Construction.
18 Now, starting with the agency/supervisory status issue,
19 the -- I'll start off by quoting from Section 213 of the Act,
20 which is the section dealing with agency. And under the -- and
21 in the National Labor Relations Act, it specifically states
22 that, "In determining whether any person is acting as an agent
23 of another person so as to make such other person responsible
24 for his acts, the question of whether the specific acts
25 performed were actually authorized or subsequently ratified

1 shall not be controlling."

2 Now, the Board has long held that statements and conduct

3 of individuals who meet the statutory definition of a supervisor

4 under Section 211 the Act may be imputed to the Employer, and

5 this is without regard to whether the Employer is aware of the

6 statements that have been made or has condoned or ratified the

7 statements, that, if the employee is a supervisor within the

8 meaning of the Act and is acting in his capacity as a

9 supervisor, the Respondent will be liable for the conduct.

10 And rarely has the Board taken -- made an exception and

11 found that the Employer is not responsible for actions of an

12 admitted supervisor when they involved employees who were

13 engaged in activities protected by the Act.

14 Now, Respondent, while Mr. Oldenburg has cited numerous

15 cases under other statutes dealing with agency and when are the

16 conduct of supervisors to be imputed to the Employer, has not

17 cited any particular Board case other than the U. S. Postal

18 Service case at 275 NLRB 360. And in that case, the Board did

19 find that the Respondent, Postal Service, was not liable for a

20 threat to sue that was made by a unit employee who was acting as

21 a temporary supervisor at the time.

22 And in the research that I did in preparation for today's

23 hearing, I didn't find any cases where the Board had followed or

24 relied upon that U. S. Postal Service case in order to absolve

25 an Employer of liability for either a threat like this or any

1 other threat that was made by an admitted supervisor, but I did
2 find and the General Counsel does rely upon Carborundum and
3 Consolidated Edison.
4 And Carborundum -- just for the record, the spelling is C-
5 A-R-B-O-R-U-N-D-U-M -- Resistant Materials Corporation -- and
6 that's reported at 286 NLRB 1321. And the other case is
7 Consolidated Edison Company of New York, Incorporated, and
8 that's reported at 286 NLRB 1031. In those two cases, the Board
9 specifically distinguished the U. S. Postal Service while
10 finding that the Employers in those cases were in fact
11 responsible for threats made by supervisors to file law suits.
12 Now -- and like both those cases, Con-Ed and Carborundum,
13 the threats here were not solely a threat to sue, but included
14 the more general, non-specific, You're going to be sorry. Now,
15 that -- now, of course, Respondent argues that that was -- can't
16 be read out of context with the threat to sue and that it should
17 be considered part of the threat to sue, but, basically, I'm
18 guided by the Board's law in terms of evaluating these types of
19 statements by what an objective, reasonable employee would
20 interpret.
21 And I'm not sure that an employee objectively would see,
22 "You're going to be sorry," as meaning only, "I'm going to go
23 out and hire a lawyer and sue you," and that it wouldn't have
24 any broader consequences.
25 I also note that, like Carborundum and Consolidated Edison

1 and unlike the Postal Service, the threat here was not conveyed
2 to a union official or the union as an entity, but it was,
3 rather, conveyed to a rank-and-file employee who admittedly was
4 under Mr. Powers' general supervision even if on that day in
5 question he was not working under him because Mr. Powers was
6 temporarily assigned to the Miramar branch. And it was also
7 directed at an employee for filing a charge with the National
8 Labor Relations Board over conduct by Mr. Powers in his role as
9 a supervisor.
10 The charge related to Mr. Powers' actions as a supervisor
11 on August 25, and that was what initiated the conversation and
12 initiated the charge that led up to the conversation. So
13 clearly -- with all of that in mind, regardless of whatever
14 subjective intent Mr. Powers may have had in terms of personally
15 pursuing a law suit or calling to tell Mr. Cline in his personal
16 capacity that he was thinking of filing a law suit, he was
17 clearly acting as a supervisor when he called Mr. Cline that day
18 upon receipt of the unfair labor practice charge and discussed
19 with him what the charge was all about and then followed that up
20 with the threats that I have found.
21 And, again, regardless of whatever might have been in --
22 the state of mind of Mr. Powers when he had the phone
23 conversation, the Board looks to what a reasonable employee
24 objectively could understand of the statements to have been
25 made. And I think an employee receiving a call from someone he

1 knows to be his supervisor while he's at work and being asked
2 about a charge that he had filed and what the charge was about
3 and then being followed up with a threat would perceive that
4 that individual calling him was acting for and on behalf of his
5 Employer and that it was not a personal call.
6 It's -- he, Mr. Powers, was not calling Mr. Cline to
7 discuss a personal dispute or grievance that they had between
8 them -- say, a dispute over whether money was owed or whether
9 there had been some incident that occurred out of work that they
10 were angry about. He was calling him about an issue that
11 occurred in the work place, in his capacity as a supervisor,
12 that led to the filing of an unfair labor practice charge.
13 Under those circumstances, I am not prepared to find that
14 Respondent is not liable for the statements that were made by
15 Mr. Powers.
16 Now, the next issue to be addressed is whether those
17 statements that were made are an unfair labor practice in light
18 of the Supreme Court's decision in BE&K Construction. Now,
19 despite the very eloquent and well-researched and well-reasoned
20 arguments to the contrary made by the Respondent, I am
21 constrained to adhere to existing Board law and find that the
22 threats that I have found that were made here do in fact violate
23 Section 8(a)(1) of the Act. Essentially, and again, what I have
24 found is that Mr. Powers told Mr. Cline he would be sorry he did
25 what he had done, which is file a charge, and that he had better

1 get a good attorney, because Mr. Powers had one and was going to
2 sue.
3 Those statements are almost identical to what the Board
4 has historically found unlawful. There's the Consolidated
5 Edison case and the Carborundum case and other cases cited by
6 the General Counsel, and, while they admittedly pre-date BE&K,
7 the Board did address the issue of the impact of the National
8 Labor Relations Act on the right to file a law suit, because
9 Bill Johnson's had been decided at the time those cases were.
10 And then in both Consolidated Edison and Carborundum at Footnote
11 Eight, the Board made a specific distinction between the threat
12 to file a law suit and the actual filing of a law suit.
13 The way I interpret the Board's decisions, and, also,
14 looking at BE&K, basically what I find is that whatever
15 constitutional concerns might exist for the Board to either
16 enjoin the filing of a law suit or find unlawful an Employers'
17 filing of a law suit are not implicated in the context of a
18 conversation between an employee and his supervisor.
19 The General Counsel is not alleging here and I don't need
20 to determine whether a law suit filed by Mr. Powers against Mr.
21 Cline would have been or would be unlawful; I need only
22 determine whether objectively the statements that were made to
23 the employee would reasonably tend to interfere with, restrain
24 or coerce employees in the exercise of their statutory right,
25 which includes in this case the right of employees to petition

1 the government by filing an unfair labor practice charge with
2 the Board.
3 The Board has long held that the test to determine whether
4 statements violate Section 8(a)(1) is an objective one and that
5 the motives, state of mind or subjective impressions of either
6 the speaker or the listener are irrelevant. And this goes way
7 back to American Freight Ways, 124 NLRB 146 at page 147, 1959,
8 and that's the standard the Board has adhered to for years in
9 addressing Section 8(a)(1) violations.
10 And I see no reason to depart from that standard in this
11 case here even in light of the BE&K decision, because I read
12 nothing in BE&K which overrules either Carborundum or
13 Consolidated Edison or suggests that a statement by itself --
14 and not a law suit -- would be -- could not be found to be an
15 unfair labor practice. The Court was concerned with the filing
16 of a law suit in that case, not with threats to file a law suit.
17 I also note now with respect to the other allegation, the
18 statement that, "You're going to be sorry" -- that's the type of
19 threat of unspecified reprisals that the Board has traditionally
20 found to be unlawful. One case I will site is SKD -- I think
21 it's Jonesville Division, LP, 340 NLRB, Number 11, September 10,
22 2003, where the Board reversed an ALJ and found a non-specific
23 threat to be an unfair labor practice. There the statement made
24 was that it would not be in the best interest of the individual
25 to get involved in the union.

1 And the Board in that case cites a number of other cases
2 in which similar, non-specific generalized threats have been
3 found to be unlawful by the Board. And, "You're going to be
4 sorry," made by a supervisor to one of the employees under his
5 supervision certainly would carry the implication that -- of a
6 threat, that there would be consequences to having engaged in
7 conduct that was clearly protected by the Act.
8 Now -- and I'll also -- having made my findings and
9 conclusions, I want to note that, as I think I've previously
10 said, I'm not making any findings here that -- and no -- and my
11 decision should not be read in any way as indicating that Mr.
12 Powers' right to sue Mr. Cline or anyone else is affected by
13 this decision or by the National Labor Relations Act. This
14 clearly involves only a statement that was made in a
15 conversation between him and Mr. Cline.
16 I'm also, obviously, not holding Mr. Powers personally
17 liable for any unfair labor practice here, since I think, as --
18 I'm not sure if he understands, but an unfair labor practice can
19 only be filed against an Employer. And his conduct as an agent
20 of the Employer is what is at issue, not whether he personally
21 has committed anything -- any unfair labor practices or --
22 unlawful.
23 What I am holding is that when an individual in their
24 supervisory capacity calls an employee under their supervision
25 order to inquire about an unfair labor practice charge that that

1 employee has filed and then makes threatening statements based
2 on the employee having filed an unfair labor practice charge --
3 when doing so, he is acting as an agent for the Employer, the
4 Employer is liable for the threat and that that type of a threat
5 implicates very important employee rights of access to the
6 Board, and the chilling effect of such statements on the
7 employees' willingness to challenge their supervisor's conduct
8 through the filing of unfair labor practice charges is obvious.
9 If I were to accept the Respondent's argument that the
10 Employer cannot be held liable because the supervisor was
11 talking about a personal law suit, essentially, it would
12 insulate Employers any time a supervisor who's named in an
13 unfair labor practice charge called up the employee who filed
14 the charge and made threats to that employee. And if that were
15 to happen on a regular basis, then it seems to me that
16 employees' access to the rights that are contained in the
17 statute would be severely limited.
18 And I certainly do not read the Supreme Court's decision
19 in BE&K so broadly. And I can find nothing under Board law that
20 would lead me to make that sort of a binding.
21 So, basically, based on what I've just said and the
22 evidence that I've heard and the arguments, I find, as alleged
23 in the complaint, that the Respondent did violate Section
24 8(a)(1) on September 23, 2004 when its supervisor/agent Bobby
25 Powers threatened employee Bobby Cline with unspecified

reprisals and a law suit because he had filed an unfair labor practice charge with the Board.

I will recommend that the Respondent be ordered to cease and desist from this conduct and post a notice to the employees. And the notice will be attached to the decision that will be issuing shortly upon receipt of the transcript.

And as I indicated previously, upon receipt of the transcript and after I've issued my order, all parties have a right to file exceptions to any rulings that I've made here today or any of my findings of facts or conclusions of law. And I refer you to the Statement of Standard Procedures, as well as the NLRB's rules and regulations, for the procedures to be filed -- for the filing of exceptions and briefs with the Board.

Okay. Anything further before we conclude the hearing?

MR. McCLUE: None from the General Counsel, Your Honor.

JUDGE MARCIONESE: Respondent?

MR. OLDENBURG: No, Your Honor.

JUDGE MARCIONESE: Okay. Thank you. I appreciate your efforts. It was a very expeditious hearing and very well presented. Your arguments were very well-researched and well-reasoned, and I've found them vary invaluable.

And now, I guess, Mr. Oldenburg, it will be up to you to see if -- how the Board views this and whether there's going to be any change in Board law as a result of your arguments.

If there's nothing further, then the hearing is closed.

APPENDIX B

Corrections to the Transcript

Page(s)	Line(s)	Delete	Insert
142	14	Section 25	Section 2(5)
142	20	Section 211	Section 2(11)
142	21	Section 213	Section 2(13)
148	19	Section 213	Section 2(13)
149	4	Section 211	Section 2(11)
156	20	binding	finding

APPENDIX C

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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten you with a lawsuit or other reprisals for filing unfair labor practice charges with the National Labor Relations Board.

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

UNITED STATES POSTAL SERVICE
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1515 Poydras Street, Room 610
New Orleans, Louisiana 70112-3723
Hours: 8 a.m. to 4:30 p.m.
504-589-6361.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 504-589-6389.