

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

LONG ISLAND NY AREA LOCAL,
AMERICAN POSTAL WORKERS UNION,
AFL-CIO

and

Case No. 29-CB-12398

JACKLYN RAM, An Individual

Tabitha Eva Tyle, Esq., Brooklyn, NY,
for the General Counsel.
*Daniel B. Smith, Esq. (O'Donnell, Schwartz
& Anderson, P.C.)*, Washington, D.C.,
for the Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge and a first amended charge filed in Case No. 29-CB-12398 on November 4, 2003, and January 7, 2004, respectively, by Jacklyn Ram, an Individual, a complaint was issued on January 9, 2004 against the Long Island NY Area Local, American Postal Workers Union, AFL-CIO (Respondent).¹

The complaint alleges, essentially, that the Union (a) filed three grievances² claiming that Ram engaged in misconduct in connection with her employment at the Lynbrook post office, and (b) posted a letter entitled "Class Action Grievance" on the Union bulletin board which stated that Ram engaged in misconduct in connection with her employment at the Lynbrook post office. It is alleged that the Union engaged in such conduct because Ram resigned her membership in the Respondent. The answer denied the material allegations of the complaint, and on February 25, 2004, a hearing was held before me in Brooklyn, New York.³

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

¹ The answer denied that the charges were filed and served as alleged. A review of the formal papers, including affidavits of service of the charges, establishes that the charges were properly filed and served.

² The grievance numbers are 563-016-03, 563-017-03, and 563-020-03, and are discussed below.

³ The Respondent's motion to correct pages 54 and 55 of the transcript to state that Donald Papa, and not attorney Smith, was answering the questions posed, is granted.

Findings of Fact

I. Jurisdiction

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The United States Postal Service (Employer) provides postal services for the United States and operates various facilities throughout the United States in the performance of that function, including its post office facility in Lynbrook, New York. The Board has jurisdiction over the Employer by virtue of Section 1209 of the Postal Reorganization Act. The Respondent admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act. The unit for bargaining involved herein includes clerks employed at the Lynbrook facility.

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II. Alleged Unfair Labor Practices

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A. The Facts

1. The General Counsel's Evidence

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Ram was employed by the Employer since 1998, and has worked at the Lynbrook Post Office since early 2000. She works in that facility as a part-time flexible distribution window clerk. In that position, she is not guaranteed a 40-hour week and has no set schedules, and no set days off. However, she has typically worked 36 to 40 hours in a six-day week. She learns of her schedule on the Friday before the workweek, and that schedule can change during the week. There are two other clerks at Lynbrook who are in the same classification as Ram.

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Ram joined the Respondent in September, 1998 when she became employed by the Employer. On September 3, 2003,⁴ Ram signed and mailed a form which cancelled her union dues. By doing so, she was effectively resigning her membership in the Respondent. The cancellation form was received at the Respondent's Washington D.C. headquarters on September 8, and her resignation became effective on September 22. Union dues ceased being deducted from her wages starting with her paycheck of September 26.

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On October 1, Donald Papa, a clerk at the Lynbrook facility, who is also the Respondent's shop steward and its Area Representative, requested of the Employer the following information in order to determine whether a grievance should be filed:

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1. Timekeeping records to show all clock rings for Jackie Ram for July, August and September, 2003.
2. Form #3972 and 3971's for Jackie Ram for the same period.
3. Clerk schedules for the same period.

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Form 3971 is a "Request for or Notification of Absence" form in which the employee requests time off from work for various reasons, and the supervisor approves or disapproves such request. Form 3972 is the sheet on which the Employer records the information set forth on the 3971 form. On October 9, the Employer gave the information requested to Papa.

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In September or October, 2003, Ram's name was written on two notices which had been posted for at least one year on the Respondent's bulletin board in the Lynbrook facility. Each list bore a total of five names, including Ram's. One of the lists was entitled "A.P.W.U. Scab List"

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⁴ All dates hereafter are in 2003 unless otherwise stated.

and the other stated: "Attention Union Members – Below are the employee[s] in your office who are not members of the American Postal Workers Union as of July 24, 2002. Please ask them to join the union today. Remember that any member who signs up a non-member from now until the end of the year gets \$100.00 for each new member they sign up. See your shop steward or
5 Area Representative for details."

On October 21, Papa filed grievance number 563-016-03 which, among other documents filed by the Respondent, stated that the Employer violated certain provisions of the collective-bargaining agreement and the parties' past practice by not monitoring and
10 administering the time and attendance policies and regulations in the Lynbrook Post Office fairly and equitably. The Union asserted that Ram was not required to submit leave slips for her absences and lateness as other employees were. The remedy requested was that the Employer (a) post a notice admitting to its unfair, discriminatory, and inequitable treatment of employees regarding time and attendance monitoring and administration, and the "unfair advantage" given
15 to Ram with respect to time and attendance monitoring and record keeping (b) correct and complete all of Ram's records to "reflect the accurate accounting of her attendance deficiencies" and (c) make whole all employees adversely affected thereby. The Employer denied the grievance, arguing that leave slips are submitted for all workers, and that during the period complained of, July 1, 2003 to October 1, 2003, Ram's schedule was adjusted for the hours she
20 worked, which was done for all employees.

Papa answered the denial by stating that he became aware of the "ongoing violation" when employees complained that Ram was being treated favorably, and he requested the documentation and then investigated the matter. According to Papa, the documentation
25 demonstrated that Ram was permitted to "come and go at her own leisure, for the most part" in the three month period at issue, during which time Ram was not required to complete 3971 forms. According to Papa, his investigation showed that Ram was late and/or absent on about 50 occasions during that period of time, and she also was permitted to "deviate from her scheduled reporting time on occasion and not even show up for work when she was scheduled."
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The Employer's answer stated that during the period of time in question Ram had serious medical issues, and was permitted to adjust her schedule to fit her needs. The answer noted that, as a part time flexible employee she had a flexible schedule. Finally, the Employer stated that "this only became a concern to the union when recently this employee withdrew from
35 the union."

On December 16, Papa replied, inter alia, that the Respondent's grievance is against management for its disparate treatment toward Ram, and not against Ram herself, and regardless of her union membership, she should not be treated more favorably than other
40 employees.

On October 21, Papa filed grievance number 563-017-03, which stated that the Employer permitted Ram to work outside of her scheduled start time, including clocking in prior to her reporting time, and permitted her to change her work hours on 11 occasions. As a
45 remedy, the Respondent requested that, pursuant to prior arbitration awards and other decisions, a total of 11 hours of overtime be paid to the clerks on the overtime desired list. The Employer's answer is the same as that set forth above.

On October 24, Papa posted the following notice on the Union bulletin board. The notice
50 is alleged as an unfair labor practice:

Class Action Grievance

5 Any clerk represented by the APWU may request to be a part of a class action grievance being filed for the below captioned violation(s) by asking the supervisor to see the shop steward on union time to sign the list to do so.

10 The class action grievance concerns favorable treatment of clerk Jackie Ram by management in that for a three month period that the Union has just investigated, showed that management has allowed Ms. Ram to come and go as she likes regardless of schedules and has not required that she sign and complete a Form #3971 for lateness.

15 For the 3 month period researched, Ms. Ram was late approx. 50 times or more.

20 For the 3 month period researched, Ms. Ram has improperly changed her schedule or just did not come in to work for the day scheduled over 11 times.

25 To the Union's knowledge, all other clerks, and carriers for that fact, are required and must sign and complete Form #3971 for lateness, absences, etc.

30 Other employees, who do come to work as scheduled for the most part and have much better attendance records than Ms. Ram, have records that show that they have attendance deficiencies, but Ms. Ram does not.

35 This creates unfair consideration for employee's attempts for higher-level positions, [sic] requests for transfers, possible incentive awards, possible discipline, etc.

40 I must mention that Ms. Ram is a scab as she has dropped out of the Union. She submitted the paperwork to quit the Union way before this investigation and the Union becoming aware of the violations. Ms. Ram did not inform or discuss with me or any other Union officer any problems or reasons for quitting the Union.

45 The improper schedule changes could result in monetary awards for the grievance and the appropriate employees from the clerks who sign up to be a part of this class action will receive such award.

50 Ram testified that, aside from the above Class Action Grievance, she has not seen any class action grievances posted on the bulletin boards, but she has "come across them." Papa testified that he has posted class action grievances on the Respondent's bulletin board in the past. Papa further stated that he mentioned the timing of the grievances in this notice because there was "controversy and rumors" in the facility that Ram resigned from the Respondent because Papa filed the above two grievances concerning her. Accordingly, Papa wrote this

notice, which states that Ram resigned from the Respondent before he began his investigation, in order to “dispel these rumors.”

5 On November 21, Papa filed grievance number 563-020-03 which asserted that on November 15 and 22, Ram was permitted to clock in before her scheduled reporting time, and change her work hours. The Respondent demanded that two hours of overtime be paid to the clerks on the overtime-desired list.

2. The Respondent’s Evidence

10 Papa testified that all employees, including the part-time flexible clerks, have schedules for reporting to work, which they must adhere to. In addition, they are also required to take a lunch break within six hours of their starting time. He stated that when a clerk arrives late to work, she must complete a form 3971, requesting leave for the time in which she was late. If the
15 employee is less than 30 minutes late, she may request permission to make up the time, or if that is denied, the Employer may require her to take leave, which could be paid or unpaid.

20 As set forth above, Ram’s resignation form was received by the Respondent’s Washington headquarters on September 8, and her resignation became effective on September 22. Papa stated that in late September, clerk Joe Segreto asked him to investigate apparent violations of the contract in Respondent’s permitting Ram to arrive late. Segreto also believed that the Employer did not require her to submit 3971 forms for her lateness. During their discussion, there was no mention that Ram had resigned from the Respondent.

25 Papa could not recall whether he learned of Ram’s resignation from the Respondent before or after Segreto asked him to investigate the alleged violations. John Bernovich, the Respondent’s president, testified that his office would not have received notice of Ram’s resignation until the second week in October, 2003. It was stipulated that in September or
30 October, 2003, Ram’s name was added to the posted list of nonmembers. As set forth above, on October 1, Papa made an information request of the Employer, requesting documents showing her hours of work for the preceding three months, the 3971 forms submitted by her, and the work schedules for the two other part time flexible clerks. Based upon the information received, Papa determined that the Employer engaged in “consistent violations”, specifically that there were more than 50 instances where Ram worked outside her schedule and took a lunch
35 break more than six hours after her start time. However, only one 3971 form was submitted by Ram during the period of time investigated.

40 Papa conceded that he did not request the clock readings of the two other part time flexible employees because it had been his experience that although this type of violation had been “rampant” in the past, the Employer had been “correcting the situation” by reminding the employees of their obligation to file a 3971 form when they take leave. Accordingly, in the past three years Papa found that these violations had “diminished” to a “de minimus” level. Accordingly, he no longer looked for these violations, but only took action when he found a violation when researching another issue, or if he observed a violation himself, or, as in this
45 case, when another employee brought it to his attention.

Papa then filed the three grievances set forth above. He stated that his filing of the grievances was not motivated by Ram’s non-membership in the Respondent.

50 Papa emphasized that the grievances filed here were not against Ram, but were against the Employer for permitting her to take time off without filing a request for leave. He stated that clerks complained to him that employees who are not at work on time adversely affected the

working conditions of the other unit members, by requiring that they perform the late employee's work, or where awards are based on attendance records, those employees who did not submit a lateness form would appear to have a spotless record.

5 Papa gave uncontroverted testimony that the remedies he requested in the three grievances at issue here, the Employer's posting a notice, correction of Ram's records, and make whole the employees, were standard remedies he has requested in the past for similar violations.

10 In addition, Papa, an aggressive Union representative, also believes that the Employer must comply with the literal terms of the rules governing employee conduct, and that all employees should be treated the same in the monitoring of their attendance, and that their records accurately reflect their actual attendance.⁵ In this respect, the record establishes that he filed similar grievances concerning the Employer's permitting employees to deviate from, and
15 change their schedules without submitting the proper requests. Specifically, in a grievance in 2000, Papa stated that "management in the Lynbrook Post Office has been disparate in their monitoring and enforcement of attendance and schedule requirements." That related to employees not taking their lunch break within six hours of reporting to work. In each of the grievances received in this record filed prior to the grievances at issue here, Papa named
20 employees for whom the proper forms had not been filed. Those employees included members and non-members of the Respondent. In addition, Papa did similar research in those cases as he did here, by requesting records showing the clock rings and absence form requests for the employees involved. Similarly, the remedy requested in those cases included, as here, a demand that overtime be paid to the clerks on the overtime desired list for each violation.

25 In October, 2001, Papa filed a grievance against the Employer for permitting Ram to select a vacation period and apply for fewer hours than her vacation period, thereby preventing a more senior employee from choosing those weeks. The grievance, filed when Ram was a member of the Respondent, charged the Employer with "disparate, inequitable treatment in use
30 of annual leave." The remedy was that Ram was required to use the appropriate amount of hours for the leave she requested, and its impact was to limit Ram's flexibility in selecting her vacation schedule.

35 Papa testified that in 2001 he was considering bringing a "maximization grievance" in behalf of the part time flexible clerks. Such a grievance is designed to increase the number of full time regular clerks. He requested time records of the part time flexible clerks in order to show that they were working a sufficient number of hours to justify the appointment of more full time clerks. Following his receipt of the information, in January, 2002, Papa filed a grievance relating to the Employer's failure to have employees take the proper lunch break, which resulted
40 in the conversion of one part time regular employee to full time status. The grievance included information that Ram had, on 25 occasions, not taken her lunch break within six hours of starting work. Although the two other part time flexible employees could be affected by this maximization grievance and Papa filed the grievance in behalf of all three employees, he pursued it only with respect to Ram because there were 25 instances in which she worked out
45 of schedule, whereas the other two employees had only one or two instances of improper schedule handling. Ram was a member of the Respondent when the grievance was filed. The grievance was successful, and the remedy was that 25 hours of overtime was paid to clerks on the overtime desired list.

50 ⁵ In early 2002, an arbitrator noted that more than 100 cases have been litigated on the issue of time and attendance.

In January, 2002, utilizing the information disclosed by the Respondent in its grievance, the Employer issued letters of warning to Ram and the other two part time flexible employees, charging them with failing to follow instructions by not taking their lunch hours within six hours of her start time. Papa filed a grievance, and the letters of warning were reduced to a “discussion.”

Analysis and Discussion

The complaint alleges that the Respondent filed three grievances claiming that Ram engaged in misconduct in connection with her employment, and posted the Class Action Grievance on its bulletin board because Ram resigned her membership in the Respondent in violation of Section 8(b)(1)(A) of the Act. A *Wright Line*⁶ analysis is appropriately applied in such a case. *Laborers Local 652 (Southern California Contractors’ Assn.)*, 319 NLRB 694, 699 (1995); *Sheet Metal Workers Local 104 (Brisco Sheet Metal)*, 311 NLRB 99, 105 (1993).

Pursuant to *Wright Line*, the General Counsel must prove that Ram’s resignation from the Respondent was a motivating factor in the Respondent’s filing of the grievances and its posting of the Class Action Grievance. If the General Counsel makes such a showing, the burden then shifts to the Respondent to prove that it would have filed the grievances and posted the Class Action Grievance even in the absence of her protected activities.

Ram engaged in the Section 7 right to “refrain from” joining, or remaining a member of the Respondent. *Graphic Communications Local I-M (Bang Printing)*, 337 NLRB 662, 663 (2002). A union cannot discriminate against employees for non-membership. *American Postal Workers Union, Local 735 (USPS)*, 340 NLRB No. 166, slip op. at 2 (2003). The evidence is not clear as to whether Papa actually knew that Ram had resigned from the Respondent at the time he filed the information request on October 1. Ram’s resignation form was received at the Respondent’s Washington, D.C. headquarters on September 8, and her resignation was effective on September 22. It was stipulated that Papa wrote her name on the “scab list” in “September or October,” and the Respondent’s president stated that he would have received the resignation notice in the second week in October.

Regardless of whether Papa received notice of Ram’s resignation prior to his request for information on October 1, the evidence is clear that on October 21, when Papa filed the first two grievances, he was aware of her resignation. Even assuming that I find that Papa knew of Ram’s resignation at the time he filed the information request on October 1, I find, however, that his request for information, and the subsequent grievances he filed, were set in motion by clerk Segreto.

As set forth above, Segreto brought to Papa’s attention that Ram was not working according to her scheduled hours and he believed that she had not been submitting requests for leave for the time not worked. Apparently it was not difficult for Segreto to notice these lapses in Ram’s attendance since Ram was late or absent 50 times during the three month period investigated by Papa. Accordingly, I credit Papa’s testimony that this matter was brought to his attention independently, by another clerk, and not by his own investigation into Ram’s attendance. In this connection, I credit Papa’s statement that by October 1, he had ceased looking into attendance matters because the Employer had improved its monitoring of employees in this regard.

⁶ *Wright Line*, 251 NLRB 1083 (1980).

Accordingly, I find that Papa did not himself seek to find misconduct by Ram in order to retaliate against her because of her resignation from the Respondent. The evidence is uncontroverted that employee Segreto first brought the issue of Ram's attendance to Papa's attention. Thereafter, pursuant to his obligation as a union representative, Papa properly made an information request for the relevant records, and then filed proper grievances against the Employer alleging that it had not required Ram to complete requests for leave.

It must be emphasized, as set forth in the various grievances and arbitration decisions received in the record, that the question of time and attendance, and the Employer's failure to require employees in this facility to submit form 3971, appears to be an issue that has been grieved frequently in the Lynbrook Post Office in the past. Indeed, similar grievances were filed involving members of the Respondent. Papa's actions in filing the grievances at issue here were not unusual or outside his authority as a union steward. He exercised his duty properly and, I find, without retaliatory intent, in order to ensure equal treatment among all unit members who may suffer if one employee is not required to submit requests for leave. Papa gave persuasive testimony that clerks who are not at work on time adversely affected the working conditions of the other unit members, and that where awards are based on attendance records, those employees who did not submit a lateness form would appear to have a perfect attendance record.

Counsel for the General Counsel relies on *Letter Carriers (Postal Service)*, 315 NLRB 1176 (1994). I find that case distinguishable. In that case, employee Davis informed union steward Bedard that he was considering resigning from the union. Bedard said that Davis would be a "scab" if he did so, that he had no respect for scabs, and that he would tell Davis' supervisor that Davis took his breaks when he was not supposed to. The Board found that threat violative of the Act because it was a response to Davis' stated contemplation of leaving the union, and that Davis could reasonably fear that the employer would discipline him. In contrast, here there is no connection, direct or otherwise, that Ram's resignation from the Respondent triggered Papa's filing of the grievances. Papa sought, as he had in the past, to enforce the parties' agreement, and to ensure that all unit employees were treated the same by the Employer with respect to their attendance and time-keeping responsibilities.

The complaint alleges that the posting of the Class Action Grievance, which stated that Ram engaged in misconduct in connection with her employment, violated the Act. This apparently refers to the above, where it is alleged that the Respondent brought Ram's attendance issues to the attention of the Employer. Counsel for the General Counsel also relies on the posting of the Class Action Grievance to support her argument that the Respondent was motivated in its filing of the grievances by Ram's resignation of her membership. Notwithstanding that Ram never saw such grievances posted, but conceded that she has "come across" them, the class action grievance is regularly used by the Postal Service unions. *American Postal Workers Union, Local 735 (USPS)*, 340 NLRB No. 166 (2003); *United States Postal Service*, 339 NLRB No.150, slip op. at 5 (2003). I find nothing improper in the Respondent's assertions in the Class Action Grievance that Ram had resigned from the Respondent, as such information could properly be disseminated to unit members. Similarly, the factual information contained in the Class Action Grievance, that Ram had been given favorable treatment by the Employer was included in the grievances which had been filed. The Respondent has a right under Section 8(c) to express its opinion in a noncoercive manner, which it did here. *APWU*, above, slip op. at 2. As set forth above, the class action grievance is a device frequently used by postal unions. Accordingly, I cannot infer unlawful motivation, or an independent violation, from the posting of the Class Action Grievance.

The evidence establishes that similar, although not identical grievances were filed by

Papa in the past, alleging the Employer's failure to obtain leave slips from employees who work out of schedule. It is important to note that the employees involved in such grievances were members and non-members of the Respondent. Accordingly, Papa did not file such grievances only against non-members in an effort to interfere with their Section 7 rights.

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Counsel for the General Counsel also argues that the remedy requested by the Respondent in one of the grievances establishes its unlawful motivation. The remedy demanded that the Employer post a notice admitting the unfair treatment of employees and the unfair advantage given to Ram with respect to time and attendance monitoring and record keeping, and correct Ram's records. I find that the remedy requested is consistent with an aggressive labor union's efforts to redress its grievance, and does not support a finding of unlawful motivation toward Ram.

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Finally, counsel for the General Counsel argues that Papa intended, by filing the grievances, to cause discipline to be imposed on Ram by the Employer, arguing that it was reasonably foreseeable that she would be disciplined. It is true, as set forth above, that Ram was previously disciplined by the Employer which used information supplied by the Respondent. However, a union is obligated to vigorously file grievances over violations of the contract. The fact that an employer may use the information to discipline employees involved should not act as a deterrent to a union's duty to pursue its grievance. In addition, the Respondent took immediate action in the prior case to grieve Ram's discipline, and was successful in having the discipline reduced.

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In her brief, Counsel for the General Counsel requests that I find a violation of Section 8(b)(2) in addition to the 8(b)(1)(A) violation alleged. No violation of Section 8(b)(2) has been alleged, but *Letter Carriers*, above, 315 NLRB 1176, 1177, permits such a finding if the evidence supports it. The theory of the Section 8(b)(2) violation is that the Respondent requested the Employer to correct and complete Ram's time and attendance records to show her actual hours of work. As set forth above, the remedy requested by the Respondent is entirely consistent with its properly filed grievances. If the Employer improperly permitted Ram to have unauthorized time off, a proper remedy would require the correction of her time records.

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In conclusion, with respect to the Section 8(b)(1)(A) and 8(b)(2) issues, I find that the General Counsel has not established that the Respondent's actions in filing the grievances and posting the Class Action Grievance were motivated by animus toward Ram's resignation from the Respondent. Even if a prima facie case had been established, I find that the Respondent would have filed the grievances and posted the Class Action Grievance even in the absence of her protected activity. *Wright Line*, above.

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Conclusions of Law

1. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act in any manner, as alleged in the complaint.

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2. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

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⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and
Continued

ORDER

The complaint is dismissed.

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Dated, Washington D.C.

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Steven Davis
Administrative Law Judge

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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.