United States Postal Service *and* Teresa Janice Boyd.
Case 12–CA–271025
August 15, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS WILCOX AND PROUTY

On June 7, 2022, Administrative Law Judge Ira Sandron issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent 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, and conclusions only to the extent consistent with this Decision and Order.[1]

The complaint alleges that, since about October 7, 2020, the Respondent has failed and refused to assign and schedule employee Teresa Boyd to a full-time limited duty assignment with 40 work hours per week and instead has scheduled her for 1.5 hours of work, 5 days per week.[2] Based on an evidentiary ruling, discussed in more detail below, the judge limited his consideration of the evidence related to the alleged violation to that occurring on or after October 9, 2020. Having done so, applying *Wright Line*,[3] the judge concluded that, since July 26, 2021, the Respondent has violated Section 8(a)(3) and (1) of the Act by not offering Boyd a full-time 8-hour per day, 40-hour per week work schedule due to her Section 7 activity. The judge thus ordered the Respondent to make Boyd whole for losses of earnings and other benefits she suffered as a result of the Respondent's discriminatory denial of work hours. No party excepts to the judge's finding in this regard and, in the absence of any such exceptions, we adopt that finding for the reasons stated by the judge.

As explained below, however, the General Counsel excepts to the judge's decision to limit his consideration of the evidence before him and contends that the judge should have found that the Respondent unlawfully failed to provide a full-time work schedule to Boyd since October 7, 2020, as alleged in the complaint—approximately ten months earlier than the date of the violation found by the judge. We find merit in the General Counsel's exceptions and, considering the entirety of the record evidence here, we find that the Respondent has violated Section 8(a)(3) and (1) by failing to offer Boyd a full-time work schedule since October 7, 2020. We thus order the Respondent to remedy the violation to that date.

I. FACTUAL BACKGROUND

The facts are more fully set forth in the judge's decision.[4] As relevant here, the Respondent operates postal facilities nationwide, including facilities in Tallahassee, Florida. The National Association of Letter Carriers, Branch 1172, AFL–CIO (the Union) represents city letter carriers and city carrier assistants operating out of facilities in the Tallahassee, Florida area. The Respondent has employed Teresa Boyd since August 1998, and she has been a city letter carrier for over 18 years. Boyd has held various positions with the Union, including serving as president and chief shop steward since 2018. The judge found that Boyd has filed over 200 grievances and numerous unfair labor practice charges in her capacity as a Union official.

During her employment, Boyd has sustained several work-related injuries and, at various times, has received a limited duty job offer (also known as a "2499 modified assignment") to accommodate those injuries. To create a 2499 modified assignment, management relies on a duty status report form (CA-17 form), which an injured employee can obtain from the employee's supervisor and have completed by a physician. The employee submits the completed CA-17 form to the employee's supervisor, who provides a copy to the Respondent's Occupational Health Claims Office (OHCO) and the Department of Labor (DOL). Management then conducts a search for limited duty work within the restrictions set out by the physician and determines what work is available. Based thereon, management prepares a 2499 modified assignment, which the OHCO reviews to ensure that the duties do not exceed the medical limitations.

As detailed in the judge's decision, in February 2015, Boyd suffered a neck and back/lumbar sprain injury (987 claim), and, in October 2016, she sustained a broken

[1] We have amended the judge's conclusions of law and recommended remedy consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[2] On January 25, 2022, the Regional Director for Region 12 issued an Order amending the complaint in this proceeding. For conciseness, we refer to the amended complaint as the complaint in this decision.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

[4] In this decision, we have summarized the relevant facts as found by the judge and, based on uncontroverted record evidence, have set forth additional facts related to matters the judge did not address.

middle finger, right ulnar nerve damage, and a nose contusion (949 claim). Because of those injuries and due to a physician-completed CA-17 form providing that Boyd could do no heavy lifting or driving, the Respondent assigned Boyd to an 8-hour per day desk job from May to October 2019. During that time and thereafter, Boyd submitted numerous CA-17 forms to her supervisors.[5]

In late 2019, Boyd had several conversations with HR Occupational Health Processing Specialist Linda Bedrosian, in which Boyd requested a 2499 modified assignment. As detailed in the judge's decision, on February 11, 2020, supervisor Waylon Morrison offered Boyd a 2499 modified assignment related to her 987 claim that gave her 1.5 hours per day of work casing mail. Boyd objected that it was not a suitable offer. After Morrison responded that this was all he had available, Boyd accepted this work schedule and continued to work under this 2499 modified assignment at the time of the hearing in this proceeding.

On May 29, 2020, the Union filed an unfair labor practice charge in Case 12–CA–261361 alleging that, since about April 24, 2020, the Respondent had discriminated against Boyd by not providing her with limited-duty assignments in order to discourage Union activities and membership. While this charge was pending, Boyd received a CA-17 form from her physician dated October 5, 2020, relating to her 949 claim from 2016, and the Respondent does not dispute that Boyd submitted this October 5 form to it on about October 7, 2020, as alleged in the complaint. On October 9, 2020, the Regional Director for Region 12 dismissed the charge in Case 12–CA–261361. Thereafter, Boyd submitted several additional CA-17 forms to the Respondent. Specifically, in 2021, Boyd submitted four physician-completed CA-17 forms to the Respondent: one on July 21, one on September 21, and two on October 26.

On January 25, 2022, based on charges filed by Boyd throughout 2021, the General Counsel issued the instant complaint alleging that the Respondent has failed to assign and schedule Boyd to a full-time limited duty assignment with 40 work hours per week and instead has scheduled her for 1.5 hours of work, 5 days per week. The crux of the General Counsel's theory underlying the complaint allegation is that, as of October 7, 2020, Boyd's medical documentation was sufficient to establish that Boyd could work a full-time schedule with appropriate assignments consistent with her medical restrictions but that the Respondent unlawfully failed to offer Boyd a full-time work schedule in retaliation for her protected activities.

I. JUDGE'S DECISION

At the outset of his analysis and as discussed in more detail below, the judge determined that he would not consider evidence presented by the General Counsel of events that occurred prior to October 9, 2020—the date the Regional Director for Region 12 dismissed the charge in Case 12–CA–261361, which was not a part of this proceeding. Having so limited his consideration of the record evidence, the judge turned to assessing the complaint allegation before him. As further explained in his decision, applying *Wright Line*, the judge found that the General Counsel met her initial burden of proving that the Respondent's refusal to assign Boyd a full-time limited duty work schedule was unlawfully motivated, and that the Respondent failed to meet its *Wright Line* defense burden of proving that it would have scheduled Boyd to work only 1.5 hours a day even absent her protected activity.

Based on his earlier determination that he would not consider evidence of the violation occurring prior to October 9, 2020, the judge then found that the "next question" to answer was the "the operable date to determine when the Respondent should have offered [Boyd] an 8-hour day after October 9, 2020." Considering only the evidence the judge viewed to be before him, he found July 26, 2021 to be the operative date because the applicable CA-17 forms established that, as of July 26, Boyd was medically cleared to work a full 8-hour workday with appropriate duties. The judge thus concluded that, since July 26, 2021, the Respondent has violated Section 8(a)(3) and (1) by not offering Boyd an 8-hour per day, 40-hour per week work schedule and ordered the Respondent to make Boyd whole for losses of earnings and other benefits she suffered as a result of the Respondent's discriminatory denial of work hours to her.

II. DISCUSSION

As stated above, in the absence of exceptions, we adopt the judge's finding, for the reasons he states, that, since July 26, 2021, the Respondent has violated Section 8(a)(3) and (1) by failing to provide Boyd with an 8-hour per day, 40-hour per week work schedule. Consistent with the General Counsel's arguments on exception, however, we find below that the judge erred in refusing to consider record evidence predating October 9, 2020, that had been

[5] The judge recounted Boyd's testimony that Customer Service Supervisor Waylon Morrison told her for the first time on October 29, 2019 that a recent CA-17 form dated October 19, 2019, was incorrectly filled out because it indicated she could do no tasks for over one hour and to go home because he had no work for her based on those restrictions. The judge stated that Boyd's CA-17 form related to her 987 claim. We acknowledge the General Counsel's contention that this CA-17 form, which was accepted into evidence as General Counsel Exhibit 41(a), is dated October 9, 2019, and relates to Boyd's 949 claim, not her 987 claim. We note, however, that the judge's error does not affect our disposition of this case.

submitted by the General Counsel in support of the complaint allegation in this case. Considering the entirety of the record evidence here, we find that the Respondent has actually violated Section 8(a)(3) and (1) by failing to schedule Boyd to a full-time work schedule since October 7, 2020, as alleged in the complaint.

A. Evidentiary Matter

The charge in Case 12–CA–261361, which was not a part of this proceeding, was filed on May 29, 2020, and alleged that, since about April 24, 2020, the Respondent had discriminated against Boyd by not providing her with limited-duty assignment in order to discourage Union activities and membership. The Regional Director for Region 12 dismissed the charge on October 9, 2020.[6] Based on the Regional Director's dismissal of the charge in that separate proceeding, the judge in the instant proceeding determined:

> It is only reasonable to conclude that Boyd presented the Region with all relevant documents and all evidence supporting her claim of unlawful discrimination [in connection with Case 12–CA–261361], and that the Regional Director properly considered them. Boyd did not appeal the dismissal, and I will not brush aside [the Regional Director's] decision and de novo consider events occurring prior to October 9, 2020. Accordingly, with one exception that I will describe, I will not address in detail events occurring prior to the date of the decision or consider them as background evidence of animus, even if they were within the 10(b) period.[7]

The judge here thus effectively found that the Regional Director's dismissal of the charge in Case 12–CA–261361 on October 9, 2020, precluded him from considering evidence prior to that date in assessing the complaint allegation at issue in the instant proceeding. We find that that the judge erred in this regard.

As the Supreme Court recognized long ago, the purpose of a charge is "merely to set in motion the machinery of an inquiry." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959) (citing *NLRB v. Indiana & Michigan Electric Co*., 318 U.S. 9, 18 (1943)). Thus, Board precedent makes clear that the dismissal of a charge is not an adjudication on the merits. *Tramont Mfg.*, *LLC*, 365 NLRB No. 59, slip op. at 8 (2017) (citing *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, 1100 fn. 2 (1983), and *Walter B. Cooke, Inc.*, 262 NLRB 626, 636 (1982)), remanded on other grounds 890 F.3d 1114 (D.C. Cir. 2018). "Subject only to possible limitations imposed by Section 10(b) of the Act, nothing precludes the General Counsel from proceeding on a timely filed charge even though a prior charge involving the same issue has been administratively dismissed." *American Laundry Machinery, Inc.*, 263 NLRB 944, 944 (1982); see also *Union Mining Co. of Allegany County, Inc.*, 264 NLRB 275, 276 fn. 4 (1982).

The judge's evidentiary ruling runs to counter to these principles. His ruling, in effect, treats the Regional Director's dismissal of Boyd's earlier charge in Case 12–CA–261361, filed on May 29, 2020, as a merits determination, applicable in the instant proceeding, at least with respect to events predating October 9, 2020.[8] In addition, as discussed more fully below, the judge's failure to consider all of the record evidence that predated October 9, 2020 interfered with the General Counsel's ability to prove the violation alleged in the complaint and establish the appropriateness of the requested make-whole remedy. The Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. See, e.g., *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). Under the circumstances of this case, however, we find that the judge's evidentiary ruling was an abuse of discretion, and we reverse that ruling.

[6] In dismissing the charge in Case 12–CA–261361, the Regional Director stated that, based on the Region's investigation, there was insufficient evidence to support the allegation that Boyd had been denied a limited-duty assignment because of her union activity, rather than because of a failure to submit the necessary documentation of her work restrictions.

[7] At the hearing in the instant proceeding, the General Counsel introduced emails between the Respondent's management officials from May 28-July 17, 2020, regarding EEO complaints and compliance matters in which Boyd was involved. The judge observed that the emails predated the Regional Director's dismissal of the charge in Case 12–CA–261361 on October 9, 2020 but were not in the possession of the Regional Director at the time of the dismissal of that charge. The judge thus determined that he would consider the emails in assessing the complaint allegation before him.

[8] We find *Krieger-Ragsdale Co*., 159 NLRB 490, 494 (1966), enfd. 379 F.2d 517 (7th Cir. 1967), cert. denied 389 U.S. 1041 (1968), distinguishable and the judge's reliance on it misplaced. There, a party in an unfair labor practice proceeding sought to relitigate issues decided in a related representation case and to introduce any relevant evidence bearing on the previously decided issue. By contrast, here, no allegations in Boyd's earlier charge were litigated because the dismissal of that charge was not an adjudication on the merits. In other words, the General Counsel did not seek to take the proverbial two bites at the apple, as the judge suggests, but instead sought to introduce relevant evidence to litigate the complaint allegation at issue here in the first instance.

Further, the fact that the dismissed charge in Case 12–CA–261361 was not appealed, as the judge noted, is of no consequence because the failure to appeal a dismissed charge does not foreclose the filing of a second timely charge and the issuance of a complaint thereon. See *Famet, Inc.*, 202 NLRB 409, 414 (1973), enfd. 490 F.2d 293 (9th Cir. 1973).

B. The Respondent's Unlawful Failure to Provide Boyd a Full-Time Work Schedule Dated to October 7, 2020, as Alleged in the Complaint

Having found that the judge erred by failing to consider evidence of a violation predating October 9, 2020, we next consider the General Counsel's argument that the record supports a finding that Respondent's unlawful discrimination against Boyd began on about October 7, 2020. Doing so, we find that the record establishes that Boyd was cleared to work a full-time schedule with appropriate assignments as of October 7, 2020, and, further, that an application of *Wright Line* warrants a conclusion that the Respondent violated Section 8(a)(3) and (1) by failing to offer Boyd a full-time work schedule since October 7, 2020, as alleged in the complaint.

As a result of his erroneous evidentiary ruling, the judge did not consider the October 5, 2020 CA-17 form that Boyd submitted to the Respondent on October 7, 2020 relating to her 949 claim. Considering that information here, we find, in agreement with the General Counsel, that it sufficiently establishes that, as of October 7, 2020, Boyd was medically cleared to work a full-time work schedule delivering mail or performing other tasks consistent with her medical restrictions. In this regard, according to OHCO Manager Claudette Ballard, who credibly testified about the role of management in fashioning a 2499 modified assignment for an employee, a CA-17 form is properly completed when side A of the form is filled out consistent with the employee's job duties, and the employee's physician indicates on side B the hours the employee is able to perform the duties listed on side A.[9] On October 5, 2020, Boyd received from her physician a CA-17 form that meets the criteria for a completed form. Side A of Boyd's October 5 form provides the hourly requirements for Boyd's job duties and the "other" box appears to state the lifting and carrying requirements for her position. Side B of that form, which Boyd testified was filled out by Dr. Stephens, specifies the number of hours each day that Boyd is able to perform the duties listed on side A. Side B also provides that Boyd is advised to resume work and that she is able to perform regular work for the requisite timeframes and weight limitations identified on side A on a full-time basis. Handwritten notations on side B also state that Boyd may need extra time to complete her tasks. Boyd testified that she submitted her October 5 CA-17 form to her supervisor and that she had a habit of submitting physician-completed CA-17 forms either the next day or within a few days of receiving them from her physician. Further, the Respondent did not contest having received Boyd's October 5 form on October 7, 2020. On this record, we find that the October 5, 2020 CA-17 form specifies that Boyd could work at least a full 8-hour day with appropriate assignments and that this form was received by the Respondent on October 7, 2020.

Having determined that Boyd was eligible to work a full-time 8-hour per day, 40-hour per week work schedule as of October 7, 2020, we find, as alleged in the complaint and consistent with the General Counsel's assertions, that the Respondent violated Section 8(a)(3) and (1) by failing to schedule Boyd for a full-time, 40 work hours per week schedule since that date. In so doing, we apply *Wright Line* and, for the same reasons the judge articulated in connection with the unexcepted-to findings in this case, we find that the General Counsel met her initial burden of proving that the Respondent's limited scheduling of Boyd since October 7, 2020 was unlawfully motivated. Specifically, we find Boyd engaged in union activity through her position as a Union official and that the Respondent was aware of such activity. In addition, we find, as the judge did, that the May and July 2020 emails of two high-level management officials (in which they referenced Boyd's protected activity and expressed their hope that disciplinary actions issued to her would stick) conveyed hostility towards her activities as a Union official and therefore satisfy the animus element of the General Counsel's initial burden.[10]

Turning to the Respondent's *Wright Line* defense burden, we find that, consistent with the judge's unexcepted-to findings, the Respondent has not established that it would have scheduled Boyd as it did since October 7, 2020, even absent her protected activity. As the judge found, the Respondent failed to show that, since October 7, 2020, it would still have offered her a limited duty assignment of 1.5 hours per day based on her medical documents even absent her protected activity. The judge rejected the Respondent's argument that evidence concerning the Respondent's treatment of five other employees was not relevant because their situations were distinguishable from Boyd's. The judge found, and we agree, that the record supports the conclusion that the Respondent made more effort to provide alternative work to other letter carriers with medical limitations and allowed them to work full-time or almost full-time schedules performing alternative duties during the duration of their limitations. The judge found "it hard to believe that with the Tallahassee Post Office's multiple locations, management could

[9] Ballard also testified that management may accept an incomplete CA-17 form and advise the employee that it needs to be filled out correctly, but the employee does not always provide a fully completed form before being issued a 2499.

[10] We find it unnecessary to pass on whether the Respondent's animus is further evidenced by additional pre-October 9 conduct, as the General Counsel urges on exception, since additional animus findings would not alter the outcome of this case or our remedial order.

not find more hours for Boyd, either driving, mixed driving and office, or office." The judge further found, and we agree, that the Respondent's continued resistance to giving Boyd more hours of work despite her repeated efforts to obtain them was inexplicable, particularly given that there was nothing in the record suggesting that Boyd had sought medical treatment for any neck flare-ups since Boyd's physician first mentioned them in August 2019.[11]

Based on the foregoing, we find that the judge erred in failing to consider evidence in support of the complaint allegation predating October 9, 2020. Further, as discussed, considering the entirety of the evidence in the case, we find that Boyd was able to work a full-time schedule as of October 7, 2020, and, applying *Wright Line*, we find, as alleged in the complaint, that the Respondent violated Section 8(a)(3) and (1) by failing to schedule Boyd for a full-time limited-duty assignment since October 7, 2020. We shall thus order appropriate make-whole relief, including making Boyd whole for any loss of earnings and other benefits she suffered as a result the Respondent's discriminatory denial of work hours to Boyd since October 7, 2020.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3:

> "3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act: since October 7, 2020, failed and refused to assign and schedule Teresa Boyd to a full-time limited duty assignment with 40 work hours per week."

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the polices of the Act. Specifically, we amend the judge's remedy in the following respects.

We amend the judge's remedy to provide that the make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971),[12] rather than with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection Service*, supra at 683; see also *Pepsi America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).

In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), we also amend the make-whole remedy to provide that the Respondent shall compensate Boyd for any other direct or foreseeable pecuniary harms incurred as a result of its unlawful conduct. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[13]

In addition, we shall order the Respondent to compensate Boyd for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). We shall also order the Respondent to file with the Regional Director for Region 12 a copy of Boyd's corresponding W-2 forms reflecting the backpay award. *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

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[11] In fact, Boyd's physician who mentioned the possibility of neck flare-ups in August 2019 completed a new CA-17 form relating to Boyd's 987 claim on January 29, 2020, attesting to Boyd's ability to work the full number of hours per day expected for her position.

[12] Interest shall be computed at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[13] The General Counsel requests that the Board grant several extraordinary remedies, including that we order the Respondent to: (1) compensate Boyd for nonpecuniary harms, including emotional distress damages; (2) issue Boyd a letter of apology signed by the postmaster, apologizing to Boyd for the Respondent's unlawful conduct and for any hardship or distress such conduct caused her; and (3) provide the Respondent's managers and supervisors employed at its facilities in Tallahassee, Florida with a copy of the judge's and Board's decisions finding a violation of the Act in this case, obtain written certifications from those managers/supervisors indicating that they have reviewed and understand the contents of the aforementioned decisions, and file copies of the certification with the Regional Director for Region 12. We deny these requests because the Board's traditional remedies are sufficient to effectuate the policies of the Act in this matter.

Member Prouty would grant the General Counsel's remedial request that the Respondent be ordered to provide its managers and supervisors employed at its facilities in Tallahassee, Florida with a copy of the Board's decision order and to file a written certification with the Regional Director for Region 12 from those managers and supervisors indicating that they have reviewed and understand their contents. Member Prouty believes that this remedy is well within the Board's authority under Sec. 10(c) of the Act and appropriately seeks to ensure that there is adequate dissemination of the Board's decision and order in order to effectuate the policies of the Act. Member Prouty notes that, as the local union president, Boyd interacts with the Respondent's managers and supervisors in pursuing grievances on behalf of unit employees and that, to prevent further unlawful conduct, it is imperative that the Respondent's managers and supervisors know that—consistent with the Board's decision and order herein—the Respondent cannot take retaliatory actions against her for doing so.

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Tallahassee, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against employees who engage in activities on behalf of National Association of Letter Carriers, Branch 1172, AFL–CIO.

(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 from the date of this Order, offer Teresa Boyd an 8 hours per day, 40 hours per week work schedule.

(b) Make Boyd whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of its unlawful conduct, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Boyd for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or by Board order, a report allocating the backpay award to the appropriate calendar years.

(d) File with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of Boyd's corresponding W-2 forms reflecting the backpay award.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facilities in Tallahassee, Florida copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities 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 October 7, 2020.[14]

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 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. August 15, 2023

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Lauren McFerran, Chairman

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Gwynne A. Wilcox, Member

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[14] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor Relations Board has found that we violated 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 discriminate against you for engaging in activities on behalf of National Association of Letter Carriers, Branch 1172, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Teresa Boyd an 8 hours per day, 40 hours per week work schedule.

WE WILL make Boyd whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to provide her more hours of work, plus interest, and WE WILL also make her whole for any other direct or foreseeable pecuniary harms suffered as a result of our unlawful conduct, plus interest.

WE WILL compensate Boyd for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of Boyd's corresponding W-2 forms reflecting the backpay award.

UNITED STATES POSTAL SERVICE

The Board's decision can be found at http://www.nlrb.gov/case/12-CA-271025 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

John King, Esq., for the General Counsel.
Kelly Elifson, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The case arises from an amended complaint issued on January 25, 2022 (the complaint), based on charges that Teresa Boyd (Boyd) initially filed on January 5, 2021, against the Respondent (the Postal Service).

The complaint alleges that since about October 7, 2020, the Respondent has violated Section 8(a)(3) and (1) of the Act by failing and refusing to assign and schedule city carrier (letter carrier) Boyd to a full-time limited duty assignment with 40 hours per week and instead scheduled her to work 1.5 hours per workday, 5 days per week, due to her activities as president of the National Association of Letter Carriers, Branch 1172, AFL–CIO (the Union).

This case was initially consolidated with Cases12–CA–278311 and 12–CA–278450, based on charges that Boyd filed alleging that various facilities of the Postal Service in Tallahassee, Florida, violated Section 8(a)(1) by failing and refusing to provide the Union with requested information. One such request was for information pertaining to her 1.5 hours per day work assignment. On January 25, the Regional Director issued an order severing them from the instant matter (GC Exh. 1(l)). On February 2, all parties entered into a formal settlement stipulation in these cases (GC Exh. 9), which is still being reviewed by the Agency.

Pursuant to notice, I opened the trial by Zoom on January 26, 2022. With the agreement of the parties, I conducted an in-person hearing in Tallahassee, Florida, from March 21–24, following.

All COVID protocols mandated by the General Counsel for off-site hearings, and concluded the trial by Zoom on April 1. I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

WITNESSES AND CREDIBILITY

Counsel for the General Counsel (the General Counsel) called:

1. Boyd.
2. Nakita Bush (Bush), city carrier, Lake Jackson Post Office (Lake Jackson).

3. La Deidra Gordon (Gordon), city carrier, Westside Station (Westside).
4. Sharell Lamb (Lamb), city carrier assistant, Lake Jackson.
5. Tammy Sheffield (Sheffield), city carrier, Leon Station (Leon).
6. Kimberly Strickland Abu Kdiess (Strickland), city carrier assistant, Leon.
7. Edward Miller (Miller), manager of customer services, Lake Jackson, as a 611(c) witness.
9. Waylon Morrison (Morrison), postmaster, Thomasville, Georgia station, as a 611(c) witness.

The Respondent's witnesses were:

1. Miller.
2. Morrison.
3. Claudette Ballard (Ballard), manager, Occupational Health Claims Office (OHCO), Jacksonville, Florida.
4. Linda Bedrosian (Bedrosian), occupational health process specialist, Human Resources Office (HR), Jacksonville, Florida.
5. Sylvia Morris (Morris), field manager, HR.
6. Camille Moscola-Calvo (Moscola-Calvo), postmaster, Tallahassee.

I will address credibility, applying the following well-established judicial precepts. Firstly, a witness may be found partially credible because the mere fact that the witness is discredited on one point does not automatically mean he or she must be entirely discredited. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004); *Excel Containers, Inc.*, 325 NLRB 17, 17 fn. 1 (1997).

Secondly, when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69, slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

Managements witnesses were sometimes ambiguous and/or uncertain in testifying about events related to Boyd's limited duty, but I do take into account that there were many documents involved over a period of years, as well as different claim numbers. I also take this into account when assessing Boyd's testimony. I also consider natural the inability of witnesses for the General Counsel to recall all the details surrounding their own claims.

Boyd was not fully credible. She testified that Morrison, to whom she submitted many or most of her CA-17s (forms for physicians to complete), told her on October 26, 2019, that her October 19, 2019, CA-17 was incorrectly filled out. On cross-examination, she testified that was the only time she could recall having been told that the CA-17 had to be fixed. However, her testimony was contradicted by a statement that she made in a January 4, 2020, email addressed to Morrison (GC Exh. 44), ("You also sent me back to have my CA-17 revised at least six (6) times because you said Linda [Bedrosian] would not accept them because they were incorrectly filled out."). I therefore credit Morrison's testimony that he advised Boyd on a number of occasions that the CA-17 she submitted was deficient.

Moreover, I believe that when Boyd described interactions with various managers and supervisors in her role as a union official, her depiction of their belligerence was exaggerated, and she understated her aggressiveness. In this regard, the Respondent disciplined her for her conduct on certain occasions and, although the disciplines were removed through the grievance procedure, I do not believe that management officials manufactured their assertions that she acted inappropriately.

I do, however, credit Boyd's testimony about having numerous conversations with Bedrosian in late 2019. Boyd's testimony on these conversations was sufficiently detailed, and I find her testimony plausible based on her ongoing efforts to obtain more hours. Bedrosian, on the other hand, testified that she "may have" spoken to Boyd but did not remember any conversations.

Morrison was notably defensive during cross-examination, and I had to tell him more than once to answer questions directly and not insist on offering explanations of his answers. He appeared to try to minimize management's role in formulating limited duty job offers (2499s) vis-à-vis OHCO. Furthermore, he was markedly evasive on cross-examination whether, in the absence of a modified job offer, he has assigned work duties to an employee different from his or her regular duties.

In contrast, Ballard testified credibly and did not appear to make any efforts to skew her testimony. I credit her testimony over Morrison's to the extent they differed over the role of local management in fashioning limited duty offers to employees based on their medical restrictions. The General Counsel avers (GC Br. at 13) that Ballard did not display candor on cross-examination. That was not my impression. In fact, on cross-examination, she testified that employees have submitted incomplete CA-17s and still been given limited duty job offers—testimony that supported Boyd's position.

Gordon's testimony about her submissions of CA-17s and receipts of 2499s was confusing, hard to follow, and contradictory. Most glaringly, she testified at one point that she worked between May and November 2020 under the terms of a 2499 but later testified that she stopped working in July 2020 and did not go back to work until November 2020. Accordingly, her testimony on her modified job offers was of questionable reliability.

FACTS

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the thoughtful posttrial briefs of the General Counsel and the Respondent, I find the following.

Board jurisdiction as alleged in the complaint is admitted, and I so find. The Respondent provides postal services throughout the United States and operates various facilities nationwide, including the following facilities that are under the jurisdiction of the Tallahassee, Florida Postmaster: the Main Post Office; stations in Centerville (Centerville), Lake Jackson, Leon, and Westside; the General Mail Facility; and a retail unit at Killearn.

The Union represents city carriers operating out of the Tallahassee Post Office, as well as city carrier assistants (CCAs), who are noncareer and nonpermanent. About 75 city carriers work

out of Lake Jackson.

At the outset, I will delineate the parameters of the evidence on which I will focus. On October 9, 2020, Acting Regional Director David Cohen (the Regional Director) dismissed charges that Boyd had filed alleging that the Respondent's limitations on her hours were in retaliation for her union, EEO, and other protected activities (R. Exh. 8, Case 12-CA-261361.) He concluded that the Postal service had demonstrated legitimate reasons for those limitations and that Boyd had failed to fully cooperate with management in pursuing her claim for more hours. He noted that in January 2020, Boyd had filed but withdrawn similar charges.

It is only reasonable to conclude that Boyd presented the Region with all relevant documents and all evidence supporting her claim of unlawful discrimination, and that the Regional Director properly considered them. Boyd did not appeal the dismissal, and I will not brush aside his decision and de novo consider events occurring prior to October 9, 2020. Accordingly, with one exception that I will describe, I will not address in detail events occurring prior to the date of the decision or consider them as background evidence of animus, even if they were within the 10(b) period. Analogously, the Board does not allow a party to relitigate in an unfair labor practice proceeding issues which were or could have been raised in a related representation case in the absence of newly discovered or previously unavailable evidence. *Krieger-Ragsdale Co.*, 159 NLRB 490, 494 (1966), enfd. 379 F.2d 517 (7th Cir. 1967), cert. denied 389 U.S. 1041 (1968), citing *Pittsburgh Plate Glass Co.*, 313 U.S. 146, 162 (1941).

Furthermore, I will not address in detail Boyd's communications with the Department of Labor (the DOL) regarding her workers compensation claims, over which I have no jurisdiction and, in any event, lack expertise to evaluate. The Postal Service has no control over the DOL, and actions of DOL either in favor or against Boyd cannot be imputed to the Respondent.

Employee injury framework

The statutory and regulatory scheme regarding postal employees injured on the job is complex and involves interplay between local management and other offices of the Postal Service, the DOL, and treating physicians. I will summarize it here.

An employee who sustains an on-the-job injury reports it by filing a claim of injury (form CA-1) with his or her supervisor. An employee wishing to seek medication attention obtains from the supervisor an authorization to see a physician (form CA-16) and a duty status report form (CA-17) to present to the physician for completion. A physician can obtain and print a blank CA-17 form from DOL's Employee Compensation Operations Management (EComp) portal. The employee must also submit electronically any claim for medical treatment to the DOL's Office of Workers Compensation (OWCP), which assigns a case number.

The CA-17 form has two sides. When management provides it to the employee, the left hand side (side A) is prepopulated with the requirements of the employee's position, i.e., the hours that an employee is expected to perform for each job activity for his or her job classification. The right hand side (side B) is for the physician to fill out, stating a description of the clinical findings, diagnosis due to injury, whether the employee is advised to resume work, and the employee's ability to perform regular work continuously or intermittently in terms of hours per day for each activity listed on side A. There is also a box for "other" on side A, for the physician's comments.

The employee submits the physician-completed CA-17 to his or her supervisor, who provides a copy to the EComp's office and the Occupational Health and Claims Office (OHCO) (formerly called the Health and Resource Management Office). Management then conducts a search for limited duty work within the restrictions set out by the physician and determines what work is available. Based thereon, management prepares a limited duty job offer (2499), which the OHCO reviews to ensure that the duties do not exceed the medical limitations. Management may accept an incomplete CA-17 and advise the employee that it needs to be filled out correctly, but the employee does not always provide a fully-completed form before being issued a 2499.[1]

Activities in the 2499 are set out in half-hour increments. If the employee has more than one active claim, the 2499 is based on the greatest limitations in each. After that, the 2499 is presented to the employee to accept or reject. If the employee submits a subsequent CA-17 that changes the medical restrictions, a new 2499 will be issued.

If employee has an existing 2499 and refuses a new 2499, the Postal Service requests that the DOL make a suitability ruling on the new job offer. When a ruling is pending, the employee continues to work under the existing 2499. If the DOL finds the new job offer suitable, the employee must accept it or lose benefits.

The Postal Service has a District Reasonable Accommodation Committee (DRAC), which can set up a meeting to provide an employee on limited duty an opportunity to provide additional information about his or her work limitations/restrictions. The DRAC has the authority to modify the 2499 with which an employee was presented. Employees' participation is voluntary, and nonattendance does not affect their benefits.

If OWCP denies a claim, benefits from the DOL are discontinued. The employee then can either go back to regular duties, request reasonable accommodation, or request light duty, which is also offered to employees who sustained off the job injuries. Light duty requests are considered by the postmaster on a case-by-case basis as far as whether work is available. The employee must renew the request every 30 days.

Boyd's employment and union activities

The Respondent has employed Boyd since August 1998, and she has been a letter carrier for 18 years. Boyd has held positions for the Union as follows: shop steward from 2008–2020; vice-president and shop steward from 2014–2016; and president and chief shop steward since January 2018. She has filed over 225 grievances in those positions. General Counsel's Exhibit 10 contains charges (not necessarily all) that Boyd has filed, going back to February 2018. Determining what percentage of her grievances or charges were meritorious over the years is impossible, and I will not hazard a guess.

General Counsel's Exhibit 10(a) contains charges that Boyd

[1] Ballard at Tr. 842.

filed relating to a supervisor's placing her on emergency placement, in May 2020, contending that it was in retaliation for her engaging in union activities; and not providing information regarding her 1.5 hours of work assignment. The charges were partially dismissed on November 18, 2020, or closed on compliance on March 31, 2021.

Emergency placement is a disciplinary action in which an employee is instructed to immediately clock out and leave the facility, pending investigation. The emergency placement was rescinded on about June 1, and the resulting notice of removal resolved on July 30, 2020. I will not further address this or the October 2019 emergency placement on which Boyd was placed, in connection with her union activities, which also was subsequently rescinded. Both were or should have been brought to the attention of the Regional Director in Case 12–CA–261361. The same holds true for an incident in December 2019, when Boyd testified that she was asked for the first time for medical clearance before she could come on post office property to conduct union business.

The General Counsel also submitted various documents concerning the Respondent's past failures to provide or timely provide information to the Union, for the proposition that the Respondent has general animus toward the Union and specific animus toward Boyd. I will only address those occurring after October 9, 2020:

1. A settlement agreement approved by the Regional Director on January 14, 2021, concerning various postal facilities in Tallahassee. Boyd signed it for the Union. (GC Exh. 7.) The charges were dismissed on November 28, 2020, or closed on compliance on March 31, 2021. (Jt. Exh. 2 at 1.)

2. A Board Decision and Order dated July 21, 2021, approving a formal settlement stipulation relating to Lake Jackson. (GC Exh. 3.) It was closed on compliance on October 21, 2021. (Jt. Exh. 2 at 1.)

3. An August 31, 2021, Order of the 11th Circuit Court of Appeals enforcing a Board Order, again relating to Lake Jackson. (GC Exh. 6.)

On the last day of hearing, counsel the General Counsel introduced management emails from May 28—July 17, 2020, in reference to EEO complaints and compliance matters. (GC Exh. 101.) They predate the Regional Director's dismissal on October 9, 2020, but it appears that they are the same document that the General Counsel identified but did not introduce on March 21 as General Counsel's Exhibit 17(c). He represented that he had just learned of these emails over the preceding weekend. Their designation as a plaintiff's exhibit indicates that the Respondent produced them in connection with other proceedings. Apparently, they were not in the possession of the Regional Director when he issued his dismissal, so I will consider them.

On May 28, Postmaster Blair Beaty wrote to Jeffrey Reeves of Post Office Operations that he was feeling harassed by being named in four EEO complaints and believed that Boyd was instructing employees to add them to their complaints. Reeves responded that she was on emergency placement (see above), to which Beaty responded, "Hope it sticks." (GC Exh. 101 at 2.)

On July 17, Paul Steele, manager of post office operations, wrote to Matthew Hasbrouck, operations program specialist, stating "On a positive note, I did issue the notice of removal to NALC President Teresa Boyd." (GC Exh. 101 at 1.) Hasbrouck replied, "Let's all hope that it sticks. She has gotten away with so much for so long." (Ibid.)

Boyd's on-the-job injuries

I will highlight what occurred prior to October 9, 2020, rather than describe in detail every incident and document.

Boyd has had approximately five on-the-job-injuries as a postal employee. The first was an automobile accident in March 2006, which caused injuries to her neck. She filed a workers compensation claim for that, as well as for carpal tunnel syndrome in her left hand, which was discovered when she had nerve conduction tests on her neck. She was out of work for 2 months. Upon her return, she worked 40-hour weeks doing limited-duty desk/clerical work (office work) for the first 2 weeks and after that delivering mail 4 hours a day and doing desk work 4 hours a day. Six months later, she was released to go back to regular duty but with a weight limitation restriction.

Her next injury was in 2009, for bilateral carpal tunnel syndrome. She received a modified job order and performed office clerical duties, such as answering phones and writing up certified mails, for about 2 months. She was then released to regular duty, with a weight restriction, and resumed delivering mail.

Her bilateral carpal tunnel syndrome returned in 2013, and she filed a new claim (case number ending in 799). As a result, she received a 2499, assigning her office work. After about 2 months, her physician released her to return to her regular duties.

In February 2015, she suffered a neck and back/lumbar sprain injury, filed another claim (claim number ending in 987), and submitted a CA-17 filled out by Dr. Richard Blecha on August 13.[2] Thereafter, she received and signed a 2499 that gave her regular duties but with a weight limitation.

In October 2016, she had an accident in which she broke her middle right finger, damaged her ulnar nerve, and had a nose contusion. She filed a claim (claim number ending in 949), which was accepted, either initially or on reconsideration.

Boyd returned to work in November 2017, when she was released to go back to work, with a weight restriction. She resumed her regular letter carrier duties.

She continued driving until June 2019, when her physician in a CA-17 for claim 949 stated that she could do no heavy lifting and no driving. As a result, she was assigned 8 hours of office work/union business and no driving. The doctor repeated this in a July 2019 CA-17. From May to October, she was assigned a desk job pursuant to those restrictions.

In a CA-17 that Dr. Blecha filled out on August 23, 2019, he stated that Boyd's lifting should be limited to intermittent 15 pounds, and he stated, "Will require more time than usual to complete mail delivery route. Will have occasional[sic] flare-ups of her neck problems such that she will not be able to turn

[2] She testified that the delay was due to her difficulty finding a doctor who would accept workers compensation. She saw other doctors for her other injuries.

her head & so will be unable to drive during those flare ups[sic] that usually last a few days." (GC Exh. 40.)

Dr. Blecha reiterated those limitations in a number of subsequent CA-17s. Some of them were contradictory on their face as far as her ability to drive. Thus, on the February 12, 2020 form, he added "She is unable to drive a postal vehicle." R. Exh. 1 at 10.

Morrison was the supervisor of customer service at Lake Jackson from June 2019 until April 20, 2020, and in that role supervised Boyd, as well as 46 other city carriers, 38 rural carriers, and 12 distribution clerks.

According to Boyd, Morrison first told her on October 29, 2019, that there was a problem with a (987) CA-17. He told her that one of the CA-17s dated October 19 was incorrectly filled out because it indicated she could do no tasks for over 1 hour. He told her to go home because he had no work for her based on those restrictions. She disputed his conclusion. As I stated earlier, I credit his testimony that he advised her on a number of occasions prior to that date that her CA-17s were inadequate.

In late 2019, Boyd had at least 10 conversations (four in December) with Bedrosian, in which she requested a 2499. In early December, Bedrosian stated that she had one ready. In mid-December, when Boyd gave Morrison a CA-17 dated December 19 from Dr. Blecha (GC Exh. 43, which is illegible), he said that he was waiting for Bedrosian to come up with a modified job offer.

On January 4, 2020, Boyd emailed Station Manager Matthew Staley, regarding management's failure to provide her a modified job offer despite her repeated requests since approximately September 2019. (GC Exh. 44.)

On February 11, 2020, Morrison presented Boyd with a modified job offer, which she accepted. (GC Exh. 50a; R. Exh. 3 at 1.) It gave her 1.5 hours a day, casing mail. This is the 2499 under which Boyd is still working. She objected that it was not a suitable job offer, and he responded that was all he had available.

In preparing the 2499, Bedrosian had agreed with Morrison that Dr. Blecha's CA-17s were very vague concerning the flare-ups and that because they could occur at any time on any day, management felt that her driving would be a safety hazard. As Morrison explained at trial, Dr. Blecha's CA-17s were contradictory as to whether she could drive.

On April 20, 2020, the DOL denied Boyd's claim for disability for her February 2015 injury (sprain of back, lumbar region and sprain of neck), based on her failure to provide additional evidence that they had requested.

Events in 2021

Respondent's Exhibit 9 shows that Occupational Health Nurse Stephen Johnson sent Boyd the following:

1. By letter of February 12, he invited her to meet with the DRAC via Zoom on February 18 to assess her job-related injuries and working status and the reasonable accommodations that she believed necessary.

2. After she did not appear[3], he sent her a letter dated February 18, requesting that she provide information and medical documentation from her medical provider within 14 calendar days of receipt of the letter.

3. By letter of March 8, he stated that she had not yet provided such and needed to submit it with 7 calendar days of receipt of the letter.

4. By letter of March 22, he advised Boyd that her case was being closed because she had submitted nothing that would enable the DRAC to determine whether she was an individual with a disability in need of reasonable accommodation.

Boyd offered no testimony regarding these letters and therefore did not deny receiving them. The DRAC had the authority to validate the 1-1/2 hours or determine that she could safely do more, in which case an updated 2499 would have been prepared that gave her more hours.

On February 2, Ballard mailed requests to DOL, one for claim 987 and the other for claim 949, for a second option, stating that the Postal Service needed clarification of Boyd's limitations and asking that she be scheduled for a second opinion. (R. Exh. 4 at 2, 5). DOL prepared the questions for the physician. Having gotten no response, Ballard sent a DOL letter dated March 8, pointing out that the doctor to whom the DOL had sent a second opinion request had failed to address certain questions. (Ibid at 9.) To date, DOL has still not responded.

Dr. Blecha filled out the following CA-17s, all of which contain a 15-pound continuous and 25-pound intermittent weight limitation on lifting/carrying:

1. July 21 – He checked that Boyd could work full-time, and he put driving a vehicle for 4–6 hours per day (6 hours' driving is on side A). In a July 26 letter, he stated that she "may have" occasional flare-ups typically lasting 2–3 days. (GC Exhs. 21, 22.) She hand-delivered these to Morrison on July 26.

2. September 21 – Dr. Blecha repeated what he stated in the July 21 CA-17, other than stating that she could work 8-plus hours a day and adding that the flare-ups occur only 3–4 times a year. (R. Exh. 1 at 11; GC Exh. 59.) She hand-delivered this to Miller on September 24 (see GC Exh. 59).

3. October 26 (he completed two forms) (R. Exh. 1 at 16, 18). Taken together, they stated that she could work 8-plus hours a day, could drive 4–6 hours, and "my have" occasional flare-ups three to four times a year, typically lasting 2–3 day. She emailed these to Miller on January 22, 2022. (GC Exh. 58a, 58b.) She could not recall if she provided them to him earlier.

Ballard testified that the September 21 CA-17 was incomplete because Dr. Blecha did not provide the hours that Boyd could do for each activity but that one of his October 26 CA-17s (R. Exh. 1 at 16) was complete. She did not testify specifically about the July 21 CA-17, but it was virtually identical to that one.

By letter of May 20, to Johnson of the DRAC, Boyd stated that, even though the DRAC had closed her case, she wanted to address her situation. She said that her only current restriction was a weight limit and that she could perform 97 percent of her regular job duties. She did not, however, request further action from the DRAC. (GC Exh. 91e.)

By letter of May 12, Miller informed Boyd that she had to submit updated medical documentation, requesting to work 8

[3] Unrebutted testimony of Ballard, Miller, and Moscola-Calvo, who were on the DRAC.

hours daily and 40 hours weekly as a light duty request. (GC Exh. 91b.) Boyd replied by email on May 19, stating that her injuries were job related and came under limited duty. (GC Exh. 91c.)

Treatment of other employees (comparators)

Miller testified that he has sent limited-duty employees to other facilities, depending on their restrictions and the needs of other stations. Postmaster Moscola-Calvo makes the final decisions. When he returned to Lake Jackson in May or June 2020, about 30 employees were performing limited duty. He assigned two of them to other facilities. "Employee 1," who had a weight restriction, was assigned to Westside, where she performed office work (assisting with customer service at the window and electronically). "Employee 2" was assigned to Centerville." Presently, Employee 1 is out of work because there is no work for her at either Lake Jackson or Westside; Employee 2 is back to full duty. Since his return, four letter carriers have gone on limited duty, two of them full-time.

Morrison testified that he was not aware of other limited duty carriers who were transferred to work at another station while he was at Lake Jackson. When he was there, two employees in addition to Boyd worked 1.5 hours. He provided no details.

The following witnesses of the General Counsel testified regarding their CA-17s and 2499s.

Bush is a city carrier at Lake Jackson. She had an on-the-job injury on February 10, 2021, and submitted a CA-17, signed by her physician on that same date, to a supervisor. See GC Exh. 80a. The doctor did not complete either side but in the "other" box stated no use of right hand. Both sides A and B were blank as far as activities. Station Manager Hamm instructed her to sit at the desk and answer the phone, and Bush worked a 40-hour week doing office work. Several times starting about a month later, Bush requested a 2499 from Hamm or Miller, who replied that they would get around to it. Bush never received a 2499 prior to being released by her physician to return to full duty on May 14, 2021 She never filed an OWCP claim.

Gordon is a city carrier at Lake Jackson. She worked there under a 2499 with weight restrictions, but in November 2021, Miller told her that she was transferred to Westside because no limited duty work was available for her at Lake Jackson. She worked 40 hours a week. She stopped working for Westside in February 2022, being told that she could no longer work her modified job, and she has not worked for the Postal Service since then.

Lamb is a CCA at Lake Jackson. She suffered an on-the-job injury in May 2021 and submitted to Miller a CA-17 signed by her physician on July 15, 2021. (See GC Exh. 83a at 3.) She received a 2499 on July 22, assigning her office duties. Ibid at 1. She performed those duties 8 hours a day at first, but her hours were later reduced to six or seven because she was not needed for eight. Since her permanent assignment to Lake Jackson in 2020, Miller has sent her to Leon a few times, stating that they needed her there. At Leon, she also performed office activities. She worked overtime at least once or twice a month until she recently stopped working.

City Carrier Sheffield is at Leon. She had a back injury in June 2020, and was out of work until December 20, 2020. She submitted a CA-17 to Morrison that put restrictions on her walking, standing, and lifting and prevented her from delivering mail. He assigned her to case mail for about an hour and perform office duties for the remainder of an 8-hour day. She received a 2499 in approximately January 2022. OWCP rejected her claim, and Morrison has given her light duty since then.

CCA Carrier Strickland is at Leon. She testified that in April, May, and June 2021, for two different on-the-job accidents, she submitted three CA-17s. In each case, she was issued a modified job assignment. See GC Exh. 82d. She worked 8 hours a day doing office work and then, with an updated CA-17, 4 hours a day doing office work and 4 hours casing mail.

ANALYSIS AND CONCLUSIONS

The 8(a)(3) Analytical Framework

In cases in which the issue is the motive behind an employer's action against an employee (was it legitimate or based on animus on account of the employee's union or protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

Under *Wright Line,* the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. *Wright Line*, above at 1089. The Board has held that the General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) anti-union animus, or animus against protected activity, on the employer's part. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019), the Board clarified the animus element of this test, explaining that the General Counsel "does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity." Id., slip op. at 7 (emphasis in original). "Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8.

Once the General Counsel makes out a prima facie case, the burden shifts to the respondent to show that the same action would have taken place even in the absence of the protected activity. *Wright Line*, above at 1089; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines*, Ibid; *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d

929 (D.C. Cir. 2011).

If a respondent's proffered justification for its action is found pretextual, it must be determined whether surrounding facts tend to reinforce that inference of unlawful motivation. *Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. at 3, 4 (2019), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The General Counsel argues (GC Br. 58, et. seq.) that *Electrolux* and *Tschiggfrie*, above, should be overturned, but that is a matter for the Board, not for me.

Respondent's refusal to increase Boyd's hours

The General counsel frames the issue as whether the Respondent failed and refused to assign Boyd to a full-time limited duty work schedule because of her union activities, not whether the decision not to allow her to drive was unlawfully motivated. (GC Br. 93). I disagree. Boyd has consistently sought to resume her regular duties as a letter carrier, and the issue boils down to whether because of Boyd's union and other protected activities, the Respondent, after about October 7, 2020, refused to increase her 1.5 hours a day work schedule and assign her to work 8 hours regular letter carrier duties, a mix of regular carrier duties and office work, or straight office work at Lake Jackson or at another station.

Elements one and two necessary for a prima facie case are satisfied by Boyd's positions with the Union. As to animus, I decline to accept the General Counsel's premise that the Respondent's history of unfair labor practices evinces implied animus against Boyd. I cannot conclude that the Tallahassee Post Office has such a history. Boyd has filed over 200 grievances and numerous charges, and while some, involving requests for information, have been found meritorious, the General Counsel has not established that the Respondent has a pattern of violating the Act. Significantly, the General Counsel provided no evidence that the Tallahassee Post Office has been found to have committed any violations of Section 8(a)(3), so that even if there were general animus, it would be difficult to find the nexus that *Tschiggfrie Properties,* above, requires.

Moreover, to the extent that the General Counsel argues that events occurring before October 9, 2020, demonstrated animus toward Boyd, I will not consider them for the reasons that I previously stated, other than the emails discussed below.

The General Counsel further contends that animus is shown by (1) the Respondent's treatment of other employees vis-à-vis Boyd, which I will subsequently discuss; and (2) May and July 2020 emails by Managers Beaty and Steele in which they both expressed hope that Boyd's emergency removal would stick.

Thus, Beaty, in connection with EEO complaints, accused Boyd of instructing employees to add his name to EEO complaints and said that he felt harassed. Steele, in reference to compliance matters, referenced Boyd's status as NALC president, and stated, "She has gotten away with so much for so long." Despite their ambiguity, those statements convey hostility toward Boyd for protected activities and satisfy the element of animus for purposes of a prima facie case. The Respondent did not call either of the two managers to offer any context that would show their statements were not related to Boyd's protected activities.

Accordingly, I find that the General Counsel has made out a prima facie case of unlawful discrimination, and I now turn to whether the Respondent has rebutted that prima facie case.

It goes without saying that the Postal Service has a right, indeed an obligation, to ensure that its letter carriers safely drive its vehicles without undue risk to either them or the public.

After October 9, 2020, Dr. Blecha filled out four CA-17s: one on July 21, one on September 21, and two on October 26, 2021. Ballard testified that one of the October 26 forms was complete. The July 21 CA-17, together with Dr. Blecha's July 26 letter contained the same information, so it must also be considered complete. The September 21 form did not provide any hours per activity on side B, so I will accept the Respondent's contention that it was defective.[4] In this regard, none of the comparators but Bush submitted a CA-17 with side B not completed, and Bush never filed an OCHO claim.

Dr. Blecha's July form and letter, taken together, stated that Boyd could work an 8-hour day and drive 4–6 hours even though she might have occasional flare-ups typically lasting 2–3 days.

In the September 21 CA-17, he added for the first time that such flare-ups occur only 3–4 times a year. He repeated this in the October CA-17, indicating that Boyd could be expected to be unable to drive at most 12 days a year. In both of these, he further stated that she could work 8-plus hours a day. Thus, all of the medical opinions he provided in 2021 were that Boyd could work at least a full 8-hour day and could drive most or all of the 6 hours that a letter carrier's position entails.

The emails of two high-level management officials in May and July 2020 show animus toward Boyd for assisting other employees with their EEO complaints and for activities as a union official and reflect a desire to keep her off Postal Service premises.

Regarding the treatment of other employees, the Respondent (R. Br. 8, et. seq.) argues that the comparators' situations were distinguishable from Boyd's: (1) Lamb's medical restrictions were different, including no driving restrictions and less limitations on hours; (2) Sheffield was actually on light duty status after denial of her DOL claim, not limited duty; (3) Bush never filed a OWCP claim and therefore could not have had a limited duty assignment; (4) Miller assigned Gordon work at Westside because there were already limited duty employees at Lake Jackson and no work was available for her; and (5) Strickland's limited duty assignments were at Leon, not Lake Jackson.

On the other hand, the General Counsel (GC Br. 52) contends that "light duty versus limited duty is a distinction without a difference," because each of the comparators had similar job functions as Boyd, and each of them was given the opportunity to perform out-of-craft work on a full-time or nearly full-time basis.

I agree with the General Counsel that the record supports the conclusion that the Respondent has made more efforts to provide alternative work, in particular, office duties, to other letter

[4] The Regional Director already considered and decided the question of whether Boyd's earlier CA-17s with side A activities not filled out were defective.

carriers with medical limitations. That other carriers had different injuries than Boyd's neck/lumbar sprain does not change the fact that they were allowed to work full-time or almost full-time performing office duties during the durations of their limitations. Indeed, the Respondent assigned Boyd full-time or part-time office work after previous injuries that she suffered. I find it hard to believe that with the Tallahassee Post Office's multiple locations, management could not find more hours for Boyd, either driving, mixed driving and office, or office.

The Respondent's disparate treatment of Boyd strongly suggests that unlawful animus motivated the decision to hold back her number of hours. See, e.g., *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 4 (2020); *La Gloria Oil & Gas Co.* 337 NLRB 1120, 1124 (2002), affd. 71 Fed.Appx. 441 (5th Cir. 2003); *Southwire v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987).

I add that Respondent's continued resistance to giving Boyd more hours of work despite her repeated efforts to obtain them strikes me as inexplicable. Significantly, there is nothing in the record that Boyd has sought medical treatment for any flare-ups since Dr. Blecha first mentioned them in August 2019. Clearly, the relationship between management and Boyd as a union official has been a rocky one, but refusing to give her more hours of work is not a proper vehicle for the Respondent to express displeasure with the way she has conducted union business.

For the above reasons, I conclude that the Respondent has failed to rebut the General Counsel's prima facie case.

The next question is the operable date to determine when the Respondent should have offered her an 8-hour day after October 9, 2020. I find July 26, 2021, the date that Boyd gave Miller the July 21, 2021 CA-17 and July 26 letter, to be appropriate. Together, they stated that she could work 8 hours a day and drive 4–6 hours, in spite of the possibility of having occasional flare-ups typically lasting 2–3 days.

Accordingly, I conclude that since July 26, 2021, the Respondent has violated Section 8(a)(3) and (1) by not offering Boyd an 8-hour workday.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The National Association of Letter Carriers, Branch 1172, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act: failed and refused to provide Teresa Boyd with more hours of work since July 26, 2021.

REMEDY

Because I have 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.

Because the Respondent discriminatorily denied hours of work to Teresa Boyd, it must make her whole for any losses of earnings and other benefits suffered as a result of that discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, the Respondent shall compensate Boyd for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *Advoserv of New Jersey, Inc.*, 363 NLRB 1324 (2016); *Don Chavas, LLC*, 361 NLRB 101 (2014).

The General Counsel seeks a number of novel remedies:

1. Compensation for all consequential economic damages and emotional distress that Boyd suffered.

2. Issuance of a letter of apology from Postmaster Moscola-Calvo to Boyd.

3. Requiring the Respondent to provide its managers/supervisors at Tallahassee, Florida facilities with a copy of any decision, obtain written certifications that they have read and understood the contents thereof, and submit copies of the certification to the Regional Director of Region 12.

The Board to date has not determined that such remedies should be considered and, without making a judgment of whether they are worthy of consideration, it is not within my purview to sua sponte expand remedies under the Act. Accordingly, I will not do so. As a matter of dicta, with regard to the letter of apology, the remedial order and notice adequately address the violation, and I find such letter unnecessary.

ORDER

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

1. Cease and desist from

(a) Discriminating against employees who engage in activities on behalf of National Association of Letter Carriers, Branch 1172, AFL–CIO.

(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) Offer Teresa Boyd an 8-hours a day, 40-hours a week work schedule.

(b) Make Boyd whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Tallahassee, Florida, copies of the attached notice

marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If during the pendency of these proceedings, the Respondent has gone out of business or closed any of its Tallahassee facilities, 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 July 26, 2021.

(e) 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.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. June 7, 2022

APPENDIX

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

The National Labor Relations Board has found that we violated 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 refuse to give you more hours of work or otherwise discriminate against you for engaging in activities on behalf of National Association of Letter Carriers, Branch 1172, AFL–CIO.

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.

WE WILL within 14 days from the date of the Board's Order, offer Teresa Boyd an 8-hour a day, 40-hour a week work schedule.

WE WILL make Boyd whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, in the manner set forth in the remedy section of the decision.

UNITED STATES POSTAL SERVICE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-271025 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[5] 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."