

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

Anthony Williams,)	
)	
Charging Party,)	
)	
and)	Case No. L-CA-13-059
)	
Chicago Transit Authority,)	
)	
Respondent.)	

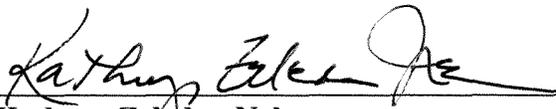
ORDER

On September 18, 2015, Administrative Law Judge Deena Sanceda, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its December 15, 2015, public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order. This non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 18th day of December, 2015.

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LOCAL PANEL**


Kathryn Zeledon Nelson
General Counsel

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ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On May 9, 2013, Anthony Williams (“Charging Party”), filed an unfair labor practice charge with the Local Panel of the Illinois Labor Relations Board (“Board”), alleging that the Chicago Transit Authority (“Respondent” or “CTA”), violated the Illinois Public Labor Relations Act (“Act”), 5 ILCS 315 (2012), as amended, as identified in Section 10(a) of the Act. The charges were investigated in accordance with Section 11 of the Act, and on December 23, 2013, the Board’s Executive Director issued an Amended Complaint for Hearing (“Complaint”).¹ On January 6, 2014, the Respondent filed an Answer to the Complaint. On December 11, 2014, the undersigned conducted a hearing on the matter, where the Charging Party presented evidence in support of his allegations and both parties were given an opportunity to participate, adduce relevant evidence, examine witnesses, argue orally, and file written briefs. After full consideration of the parties’ stipulations, motions, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find that:

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Respondent has been subject to the jurisdiction of the Local Panel of the Board, pursuant to Section 5(a-5) of the Act.

¹ On December 19, 2013, the Board’s Executive Director issued a Complaint for Hearing, which included an internal inconsistency, and on December 23, 2013, she issued an Amended Complaint to correct the inconsistency.

3. At all times material, the Amalgamated Transit Union, Local 308 (ATU) has been a labor organization and the exclusive representative of a bargaining unit (Unit) comprised of CTA employees including the classification or title of Rail Car Repairer.
4. At all times material, the Charging Party has been a public employee within the meaning of section 3(n) of the Act, and has been a member of the Unit employed by the CTA as a Rail Car Repairer.
5. At all times material, William Dorsey has been the CTA manager of the 95th Street Shop.
6. On or about December 10, 2012, the Respondent disciplined Charging Party with a written warning.
7. On or about January 7, 2013, ATU filed a grievance challenging Charging Party's written warning.

II. ISSUES AND CONTENTIONS

This case presents three issues. The first issue is whether the Respondent violated the Act as identified in Sections 10(a)(1), when Dorsey, acting as the Respondent's agent, told the Charging Party and his coworker Rashaan Carter that they would be disciplined if they did not withdraw their grievance. The second issue is whether the Respondent violated the Act as identified in Sections 10(a)(2) and (1) by constructively discharging Williams in that Dorsey's threats caused Williams to resign. The final issue is whether Dorsey's threats also constitute an unlawful constructive discharge under Section 10(a)(1) of the Act.² I will refer to these issues as Count I, II, and III respectively.

In support of Count I of the Complaint, Williams contends that Dorsey threatened him with discharge if he did not withdraw his grievance. The CTA denies this allegation. It first asserts that Williams' version of Dorsey's statements is factually incorrect. Specifically, the CTA argues that I should credit Dorsey's testimony that he did not tell Williams to withdraw the grievance, but rather to withdraw the documents attached to the grievance, because it is "beyond

² The Complaint did not allege that Dorsey threatened Williams in violation of Section 10(a)(1) because Williams filed a grievance, and Charging Party did not expressly seek to further amend the Complaint to allege that this action also violated the Act as identified in Section 10(a)(1). However, the record supports further amending the Complaint to include such a claim, which I will discuss further in my analysis of the case. Accordingly, I have exercised the discretion under Section 1220.50(f) of the Rules to amend the Complaint to add the allegation that the CTA constructively discharge Williams because Williams filed the grievance.

the realm of belief” that Dorsey would threaten Williams with discipline for filing a grievance. The CTA further asserts that even if I credit Williams’ version, this version is legally insufficient to violate the Act under Section 10(a)(1) independently because animus did not motivate Dorsey.

Regarding the constructive discharge allegations in Count II and III of the Complaint, Williams argues that Dorsey threatened to terminate him so that he would withdraw his grievance. He further argues that the CTA believed that the grievance had merit, and that if the grievance was successful, Williams would receive monetary compensation. The CTA maintains that there is insufficient evidence that Dorsey acted with animus. The CTA also contends that it did not subject Williams to intolerable working conditions, ergo it did not constructively discharge Williams.

III. FINDINGS OF FACTS

Based on the testimony of the parties’ witnesses, my observations of the demeanor of those witnesses and the documentary evidence in the record, I make the following findings of fact:

On December 10, 2012, the Charging Party, Anthony Williams and his coworker Rashaan Carter were disciplined for poor work performance for work conducted in September 2012. The CTA based this discipline on a rail car’s annual inspection where in November 2012 a CTA inspector determined that the rail car’s track brake required replacement because it dragged on the running rail. The CTA determined that the track brake dragged because of a loose joint nut, and that as the last repairers to replace the track brake in September 2012, Williams and Carter were directly responsible for the equipment failure.

The collective bargaining agreement between ATU and CTA provides that ATU can grieve an alleged violation of the collective bargaining agreement within 30 days of the alleged violation. Pursuant to the agreement, on January 4, 2013, Williams and Carter completed a joint grievance in response to this discipline, and ATU submitted the grievance to CTA on their behalf. In the grievance, Williams and Carter contend that because they properly replaced the equipment on September 5, 2012, any subsequent discovery of a loose nut did not result from their failure to secure it properly. They attached several documents to the grievance in support of their contention. The documents included CTA rail letters, CTA procedures, and notes from the CTA’s internal MMIS system regarding the repair history of the rail car written by themselves, other Rail Car Repairers, and Managers. Access to the MMIS system requires a

login and is limited to the onsite use of designated CTA employees. In the grievance, Williams and Carter that requested the CTA expunge the discipline from their work records and financially compensate them for any lost promotional opportunities caused by the unlawful discipline.

William Dorsey began working for the CTA as a Rail Car Servicer in the mid-1990s. Donald Miller began working for the CTA as Rail Car Repairer in the 1980s. Rail Car Servicers and Rail Car Repairers are Unit positions. At one point Dorsey and Miller were Unit members and ATU union stewards. As a steward, Dorsey assisted Unit members in filing grievances.

In 2013, Dorsey was the Senior Manager of the CTA's 95th street shop, and Miller was CTA's General Manager of Rail Heavy Maintenance. Miller and Dorsey supervised Rail Car Repairers, but Rail Car Repairers did not directly report to either Miller or Dorsey. As General Manager, Miller received all grievances filed by employees in the Rail Heavy Maintenance Department. He received an average of six grievances per month. In January 2013, Miller received a copy of Williams and Carter's joint grievance. Miller discussed the grievance with Dorsey. Miller told Dorsey that the documents attached to the grievance were confidential, and that removal of such documents from CTA property violates CTA rules. Miller stated to Dorsey "[w]e need to investigate this." Miller testified that he determined that attaching the confidential documents to the grievance violated CTA's Internal and External Electronic Communication Policy, Administrative Procedure 222.

Around February 1, 2013, while Carter was on vacation, Dorsey approached Williams about the grievance.³ Dorsey told Williams that the joint grievance included documents that he and Carter should not have submitted, and because of this, if he and Carter did not retract the grievance Dorsey would discipline them. Dorsey told him that, "[y]ou all are going to get suspended up to probably discharged. You[re] going to lose your job, Tony." Dorsey then instructed Williams to inform Carter of this discussion so they could determine which course of action to take. Based on that direction when Carter returned from vacation, Williams informed Carter of the conversation he had with Dorsey.

³ The parties do not dispute that Dorsey informed Williams and Carter of the issue with the grievance. However, the parties dispute the contents of the two conversations in which Dorsey discussed the grievance. For the reasons identified in my analysis, I credit Williams and Carter's versions of these conversations where they conflict with Dorsey's version. My findings herein reflect that credibility determination.

On February 20, 2013, Miller denied the joint grievance because he determined that Williams and Carter received proper discipline for the loose equipment on the rail car. The Union advanced the grievance to arbitration, where, in January 2014, a neutral arbitrator found that the CTA did not prove that Williams and Carter were at fault for the equipment failure. Accordingly, the arbitrator ordered the written warnings removed from their work records, but denied the request for monetary compensation.

On or around February 25, 2013, Dorsey approached Carter and Williams on the floor of the 95th street shop. Dorsey asked Carter if Williams had relayed to him the February 1st conversation. Carter told Dorsey that Williams had relayed a message, but asked that Dorsey tell him directly. Dorsey then told Carter and Williams that because the grievance included unauthorized attachments, if Carter and Williams did not withdraw the grievance Dorsey would issue further discipline, which could include discharge. Carter told Dorsey that they would not retract the grievance. Dorsey informed them that there would be further consequences. Carter responded, "You just do what you have to do." Dorsey responded, "I will do what I have to do." Dorsey then left Williams and Carter.

Williams decided that because he had already been with the CTA for 30 years he could not risk termination, and the best course of action was to retire. On March 13, 2013, Williams submitted his retirement paperwork, and his retirement from the CTA became effective on April 1, 2013. Williams' decision to retire was a direct result of the conversations he had with Dorsey. He did not think that he should withdraw his grievance, but he also did not want CTA to terminate him for not doing so.

On March 30, 2013, the CTA officially determined that documents attached to the grievance were confidential and wrongfully appropriated. As a result, the CTA concluded that Carter violated General Rules 7(a)(b)(c), 12(e), 13, 14(e) and 24, which prohibit a CTA employee from disclosing CTA's "official business" without permission, failing to safeguard CTA property, failing to use his best judgment, and failing to obey CTA rules, orders, bulletins, and instructions. The CTA charged Carter with an accelerated gross misconduct/behavioral violation, issued him with a Corrective Case Interview, and suspended him for three days. ATU grieved Carter's suspension. In May 2014, a neutral arbitrator upheld the CTA's finding that Carter committed a behavioral violation. However, the arbitrator found that under the CTA's Corrective Actions Guidelines, a first behavioral violation calls for a final warning and a one-day

suspension, that the CTA did not prove that accelerated discipline was warranted and accordingly reduced Carter's three-day suspension to one day.

Miller testified that he had initially recommended discharge, but that after he consulted CTA's labor relations, they collectively determined that a three-day suspension was more appropriate. Miller testified that he and Dorsey determined the appropriate discipline for Williams and Carter. Miller testified that he did not suspend Carter for filing the grievance, only for attaching the "wrongfully appropriated" documents. Miller further testified that he has never disciplined an employee for filing a grievance but that the CTA has previously disciplined employees for removing confidential CTA documents from CTA property without permission.

IV. DISCUSSION AND ANALYSIS

As an initial matter, I will address the parties' dispute over whether Dorsey told Williams and Carter to withdraw the grievance, or to withdraw the documents attached to the grievance. The Respondent argues that because of Dorsey's prior union affiliation I should credit his testimony. Dorsey testified that he remembers having the February 1st conversation with Carter, not Williams. Williams and Carter testified that Carter was on vacation on February 1st, and there is no reason to dispute this contention. Thus, I find that Dorsey could not have had this conversation with Carter. Dorsey further testified that in his February 25th conversation with Carter and Williams he only asked whether Williams informed Carter of the February 1st conversation, but he did not testify that he repeated the information to Carter. Given that Carter testified that Dorsey told him directly, and Dorsey remembers discussing the grievance directly with Carter, Dorsey could only have relayed this information in the February 25th conversation. Thus, I reject the Respondent's argument because Dorsey's recollection is inconsistent with the undisputed facts surrounding these conversations. Therefore, I credit Carter and Williams' testimony where they conflict with Dorsey's testimony.

Section 6 of the Act grants public employees, in relevant part, "the right of self-organization, [the right to] form, join or assist any labor organization [...] and [the right to] engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion." 5 ILCS 315/6 (2012). Section 10(a) of the Act identifies the various unfair labor practices a public employer commits if it infringes on a public employee's Section 6 rights.

1. Count I - Dorsey's statements in violation of the Act under Section 10(a)(1).

Section 10(a)(1) of the Act provides that it is an unfair labor practice for a public employer or its agents to “interfere with, restrain or coerce public employees in the exercise of the rights guaranteed” under Section 6 of the Act.

Filing a grievance is protected activity as defined in Section 6 of the Act because when an employee asserts rights rooted in a collective bargaining agreement that action is an extension of the concerted activity that resulted in the agreement. Dep't of Cent. Mgmt. Servs. (State Police), 30 PERI ¶70 (IL LRB-SP 2013); Chicago Park Dist., 7 PERI ¶3021 (IL LLRB 1991); see Pace Suburban Bus Div. of the Reg'l Transp. Auth. v. Ill. Labor Rel. Bd., 406 Ill. App. 3d 484, 495-499 (1st Dist. 2010); Nat'l Labor Rel. Bd. v. City Disposal Sys., Inc., 465 U.S. 822, 836 (1984) (noting that processing a grievance is concerted activity within the meaning of identical provisions of the National Labor Relations Act (NLRA) 29 U.S.C. §§ 151-169); Roadmaster Corp. v. Nat'l Labor Rel. Bd., 874 F. 2d 448, 452 (7th Cir. 1989); Interboro Contractors, Inc., 157 NLRB 1295 (1966), enf'd 388 F. 2d 495 (2d Cir. 1967).

Section 10(c) of the Act provides that an employer's expression of its “views, argument, or opinion” does not violate the Act as identified in Section 10(a) “unless a reasonable employee would view the statements as conveying a promise of benefit or threat of reprisal or force.” Champaign-Urbana (Pub. Health Dist.), 24 PERI ¶122 (IL LRB-SP 2008); City of Mattoon, 11 PERI ¶2016 (IL SLRB 1995). In order to demonstrate that an employer violated the Act as identified in Section 10(a)(1), a charging party must prove that the employer's conduct when viewed objectively from the standpoint of an employee, had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by the Act. Cnty. of Woodford, 14 PERI ¶2017 (IL SLRB 1998). This is because the Act is “concerned with the effect of an employer's actions on the free exercise of employee rights regardless of the employer's purpose.” City of Mattoon, 11 PERI ¶2016. A violation of the Act as identified in Section 10(a)(1) does not require the employer to intend to coerce the employees, or that the employees were actually coerced. Cnty of Cook and Cook Cnty. Sheriff, 28 PERI ¶155 (IL LRB-LP 2012); Vill. of Ford Heights, 26 PERI ¶145 (IL LRB-SP 2010); Vill. of Elk Grove, 10 PERI ¶2001 (IL SLRB 1993).

Respondent asserts that Williams has not proven that it violated the Act in accordance with Section 10(a)(1) because he has not demonstrated that the Respondent acted with animus. As

discussed in depth below, in a Section 10(a)(1) violation an employer's motivation is only considered when an alleged adverse employment action is taken against an employee for engaging in protected, concerted activity under the Act. Chicago Transit Auth., 30 PERI ¶9 (IL LRB-LP 2013); Cnty. of Cook and Cook Cnty. Sheriff, 28 PERI ¶155. Count I does not concern an alleged constructive discharge or other adverse actions. Accordingly, CTA's motive or intention is not relevant to this analysis.

Here, the Charging Party alleges that Dorsey threatened to discipline him if he did not withdraw the grievance. As previously explained, I credit Williams' account. I further find that Dorsey was acting as an authorized agent for the CTA when he spoke to Williams and Carter. An employee is an agent of the employer when, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. State of Ill., Secretary of State, 31 PERI ¶7 (IL LRB-SP 2014); Cnty. of Cook and Cook Cnty. Clerk, 10 PERI ¶3013 (IL LLRB 1994). Dorsey is a Senior Manager of the shop Williams was assigned. Along with the specific duties related to managing the shop, Dorsey possesses the authority to investigate alleged violations of CTA policies as evidenced by Miller instructing him to investigate Williams' alleged violation. For these reasons, I find that it was reasonable for Williams to believe that Dorsey's statements reflected CTA policy and that Dorsey was acting for management when he approached Williams regarding the grievance.

A threat does not need to be direct; the Board and the National Labor Relations Board ("NLRB") have found indirect or implied threats to be unlawful. See Vill. of Calumet Park., 22 PERI ¶23 (IL LRB-SP 2006); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). Where an implied threat is likely to have a chilling effect on employees' future activities, it violates the Act. Vill. of Calumet Park., 22 PERI ¶23; see Ohio Masonic Home, 225 NLRB 509 (1976). I find that threats of discipline in lieu of withdrawing a grievance would have an objectively chilling effect on employees' future activities, specifically filing grievances. Accordingly, find that the Respondent committed an unfair labor practice as identified in Section 10(a)(1) of the Act when Dorsey threatened Williams.

2. Count II - Constructive Discharge under Sections 10(a)(2) and (1) of the Act

Section 10(a)(2) of the Act provides that a public employer commits an unfair labor practice when it or its agents "discriminate in regard to hire or tenure of employment or any term or

condition of employment in order to encourage or discourage membership in or other support for any labor organization.” In Count II of the Complaint, the Charging Party alleges that the Respondent violated the Act as identified in Sections 10(a)(2) and (1) when its conduct following Williams’ grievance caused Williams to resign.⁴ That the employer took the adverse action in response to the employee’s protected conduct is insufficient to violate the Act as identified in Section 10(a)(2), the record must demonstrate that the employer took action with the specific intention of discouraging or encouraging union membership or support. In other words, the CTA must have intended to discourage union membership or support, and discouraging Williams from following through with his grievance was the means by which to achieve that end.

To establish a *prima facie* case of a 10(a)(2) discrimination violation, a charging party must prove by a preponderance of the evidence, that 1) the employee engaged in protected union or other statutorily protected activity, 2) the employer was aware of the employee’s protected activity, 3) the employer took adverse action against the employee, and 4) the employer’s action was motivated in whole or in part by the employee’s protected conduct or anti-union animus with the intent to discourage or encourage union membership or support. See Sheriff of Jackson Cnty. v. Ill. State Labor Rel. Bd., 302 Ill. App. 3d 411, 415 (5th Dist. 1999); Chicago Transit Auth., 30 PERI ¶9; City of Elmhurst, 17 PERI ¶2040 (IL LRB-SP 2001).

A union employee filing a single grievance on his behalf pursuant to a collective bargaining agreement is not necessarily union activity, but is otherwise statutorily protected. Chicago Park Dist., 7 PERI ¶3021; see Pace Suburban Bus Div., 406 Ill. App. 3d at 495-496 (affirming the Board’s decision that the employer violated the Act as identified in Section 10(a)(1) when it terminated an employee in retaliation for filing a grievance for reinstatement); Nat’l Labor Rel. Bd. v. City Disposal Sys., Inc., 465 U.S. at 836.

Filing a grievance can constitute union activity or simply protected concerted, depending on the circumstances. See Pace Suburban Bus Div., 406 Ill. App. 3d at 495-496; Cnty. of Cook, 27 PERI ¶57 (IL LRB-SP 2013). A union member filing a grievance pursuant the collective bargaining agreement between his union and his employer is statutorily protected because it

⁴ As pled in Count II, where alleged violations of Sections 10(a)(2) and (1) stem from the same conduct, the 10(a)(1) violation is derivative, i.e. a result of the 10(a)(2) violation. City of Chicago, 31 PERI ¶129 (IL LRB-LP 2015); State of Ill. Dep’t of Cent. Mgmt. Serv. (Dep’t of Pub. Aid), 10 PERI ¶2006 (IL SLRB 1993); see also Bloom Twnshp. High Schl. Dist. 206, Cook Cnty. v. Ill. Educ. Labor Rel. Bd., 312 Ill. App. 3d 943, 957 (1st Dist. 2000) (using the same analysis in interpreting very similar provisions of the Illinois Educational Labor Relations Act).

constitutes protected concerted activity as defined in Section 6 of the Act. Dep't of Cent. Mgmt. Servs. (State Police), 30 PERI ¶70 (identifying that the Board also recognizes protected and concerted activity that is not rooted in a collective bargaining agreement, but which the employee undertakes for the purpose of mutual aid or protection of fellow employees); City of Elmhurst, 17 PERI ¶2040; see Pace Suburban Bus Div., 406 Ill. App. 3d at 495-496; City Disposal Sys. Inc., 465 U.S. at 836; Pace Suburban Bus Div., 406 Ill. App. 3d at 495-496; Vill. of Calumet Park, 22 PERI ¶23; State of Ill. (Dep't of Human Servs. Ann Kiley Dev. Ctr.), 20 PERI ¶73 (IL SLRB 2004); Interboro Contractors Inc., 157 NLRB 1295 (1966), enf'd, 388 F. 2d 495 (2nd Cir. 1967). A union steward filing a grievance on behalf of unit members also constitutes protected union activity. Cnty. of Cook, 27 PERI ¶57 (employer's refusal to reinstate a union steward because she filed several grievances in one day constituted discrimination under Section 10(a)(2) of the Act) rev'd on other grounds, 29 PERI ¶44 (1st Dist. 2012). Other examples of union activity that satisfy the first prong to the 10(a)(2) test are active involvement in union organizing campaign, serving as a union steward, serving as a local union president, or serving on a negotiating committee. Ill. State Toll Hwy. Auth., 25 PERI ¶4 (IL LRB-SP 2009); Vill. of Oak Park, 28 PERI ¶111 (IL LRB-SP 2012); City of Princeton (Fire Dep't), 22 PERI ¶139 (IL LRB-SP 2006).

Apart from his filing the grievance and his union membership, Williams has demonstrated that he engaged in union activity such that retaliation for such action would discourage his membership in the union. I find that Williams' filing a grievance satisfies this prong not because it is union activity, but because it is protected concerted activity. As I have already found that Dorsey is an agent for the Respondent, it is also undisputed that through this agent, Respondent was aware of Williams' protected concerted activity. Therefore, I find that the Charging Party has proven the first two prongs of his *prima facie* case.

Next, to satisfy the third prong, Williams must prove that he suffered an adverse action. Here, Williams alleges that the Respondent constructively discharged him because Dorsey's illegal statements caused him to resign. A charging party may prove constructive discharge by one of two types of constructive discharge frameworks. The first is the traditional framework, where because of the employee's union or other statutorily protected activity the employer imposes intolerable work conditions compelling the employee to leave his job. Vill. of Glenwood 3 PERI ¶2056 (IL SLRB 1987); State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of

Conservation), 3 PERI ¶2034 (IL SLRB 1987); N.L.R.B. v. Grand Canyon Min. Co., 116 F. 3d 1039, 1049 (4th Cir. 1997); NLRB v. Sure-Tan, Inc., 672 F. 2d 592, 600 (7th Cir. 1982); Don Chavas, LLC, 361 NLRB No. 10 (2014). The NLRB has also long recognized a second type of constructive discharge scenario, where an employer confronts an employee with the Hobson's choice of either relinquishing his collective bargaining rights guaranteed under the NLRA or being terminated.⁵ M.P.C. Plating, Inc. v. N.L.R.B. 912 F. 2d 883, 886 (6th Cir. 1990); Titus Elec. Contracting, Inc., 355 NLRB No. 222 (2010); Intercon I (Zercom), 333 NLRB 223, 223 fn. 4 (2001) citing Hoerner Waldorf Corp., 227 NLRB 612, 613 (1976); Remodeling by Oltmanns, Inc., 263 NLRB 1152 (1982), enfd, 719 F. 2d 1420 (8th Cir. 1983).

Illinois courts have held that in reviewing the Board's decisions, NLRB and Federal court decisions are persuasive authorities for interpreting similar provisions in the Act. Am. Fed'n of State, Cnty. & Mun. Emp. v. Ill. State Labor Rel. Bd., 216 Ill. 2d 569, 579 (2005); Am. Fed'n of State, Cnty. & Mun. Emp. v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259, 264 (1989); see, e.g., Oak Brook Park, Dist., 31 PERI ¶193 (IL LRB-SP 2015) (applying NLRB cases holding that an employee must involve other employees in order to satisfy the "concerted" requirement when the alleged protected concerted activity does not involve the collective bargaining agreement). Because the Act is modeled after the NLRA, the Board and the reviewing courts have a long history of applying NLRB doctrines to the Act. See, e.g., City of Burbank v. Illinois State Labor Rel. Bd., 128 Ill. 2d 335, 538 (1989) (adopting the NLRB's burden-shifting analysis); City of Mt. Vernon, 4 PERI ¶2006 (IL SLRB 1988) (adopting the NLRB's *Spielberg, Dubo* and *Collyer* deferral standards); Cnty of Cook, and Cook Cnty. Sheriff, 3 PERI ¶3019 (IL LLRB 1985)(adopting the NLRB's *Interboro* doctrine); State of Ill. (Dep'ts of Cent Mgmt. Serv. and Corr.), 1 PERI ¶2020 (IL SLRB 1985)(adopting the NLRB and the U.S. Supreme Court's holdings that an employee has the to refuse to submit to an investigatory interview without union representation where the employee reasonably fears that the interview might result in discipline, i.e. *Weingarten* rights).

⁵ "The Random House Dictionary of the English Language 675 (unabridged ed. 1969) defines Hobson's choice as 'the choice of taking either that which is offered or nothing; the absence of a real choice or alternative [after Thomas *Hobson* (1544-1631), of Cambridge, England, who rented horses and gave his customer only one choice, that of the horse nearest the stable door].'" N.L.R.B. v. CER Inc., 762 F. 2d 482, 486 fn. 7 (5th Cir. 1985).

For these reasons, I recommend that the Board adopt the NLRB's Hobson's choice framework for cases involving alleged constructive discharges. I find that Dorsey's threat presented Williams with a classic Hobson's choice of foregoing his statutorily protected right to file a grievance, or lose his job. Accordingly, I find that the Charging Party has satisfied the third prong of the 10(a)(2) test.

Turning now to the fourth prong related to discriminatory motive. Motivation is question of fact. The fact finder may infer discriminatory motive via direct evidence such as statements or threats, or via circumstantial evidence. City of Burbank, 128 Ill. 2d at 345; Pace Suburban Bus Div., 406 Ill. App. 3d at 496-497. To infer discriminatory motive based upon circumstantial evidence, the fact finder may consider evidence such as the timing of the adverse action in relation to the occurrence of the union or otherwise protected activity, any pattern of the employer's conduct directed at those engaging in union or otherwise protected activity, shifting explanations for employer's actions, inconsistency in the reasons given for its action against the employee as compared to other actions by the employer, and an employer's expressed hostility towards unionization in conjunction with knowledge of the employee's union or otherwise protected activity. City of Burbank, 128 Ill. 2d at 346; Pace Suburban Bus Div., 406 Ill. App. 3d at 497.

I find that Dorsey's statements to Williams and Carter are direct evidence that the grievance motivated the Respondent, but does not alone itself suggest that the Respondent's intention was to discourage union membership or support. The timing also suggests that Williams' protected activity motivated the Respondent, because Dorsey issued his first threat less than one month after Williams filed the grievance. However, the suspicious timing between the protected activity and the adverse action also is not suggestive of illegal motivation towards union membership or support. Regarding the next factor, since Carter and Williams filed a joint grievance, I do not interpret Dorsey's statement to Carter as a pattern against those engaging in protected activity because it is the same incident. There are no shifting explanations for the Respondent's actions. Although, I do find that the CTA has been inconsistent in identifying which rules Williams and Carter violated by attaching the confidential documents. Specifically, Mitchell testified that he found that Williams and Carter violated Administrative Rule 222, but when the CTA formally disciplined Carter for that conduct, CTA did not allege that Carter

violated Administrative Rule 222, but different CTA rules. Finally, there is no evidence of hostility towards unionization.

As a whole the record lacks sufficient evidence to support a finding that Dorsey made the at-issue statements in an attempt to discourage or encourage union membership or support. Thus, Williams has not proven that the Respondent committed an unfair labor practice under Sections 10(a)(2) and (1) because he has not satisfied his *prima facie* case.⁶

3. Count III - Constructive Discharge under Section 10(a)(1) of the Act.

As a preliminary matter to analyzing Count III's merits, I will explain my determination that it is proper to amend the Complaint further to include Count III to allege that the Respondent violated the Act as identified in Section 10(a)(1) when Dorsey threatened to discharge Williams because Williams engaged in protected concerted activity for the purpose of collective bargaining or other mutual aid and protection, and this threat caused Williams to resign.

A. Amending the Complaint

Section 1220.50(f) of the Board's Rules provides that an "Administrative Law Judge, on the judge's own motion or on the motion of a party, may amend a complaint to conform it to the evidence presented in the hearing or to include uncharged allegations at any time prior to the issuance of the Judge's recommended decision and order." 80 Ill. Admin. Code § 1220.50(f).

Board precedent provides that the presiding ALJ may amend the complaint in two distinct instances: 1) where, after the hearing's conclusion, the amendment would conform the pleadings to the evidence and would not unfairly prejudice any party; and 2) to add allegations not listed in the underlying charge, so long as the added allegations are closely related to the original allegations in the charge, or grew out of the same subject matter during the pendency of the case. *Forest Preserve Dist. of Cook Cnty v. Ill. Labor Rel. Bd.*, 369 Ill. App. 3d 733, 746-747 (1st Dist. 2006); *Cnty. of DuPage and DuPage Cnty. Sheriff*, 30 PERI ¶115 (IL LRB-SP 2013); *Vill. of Wilmette*, 20 PERI ¶85 (IL LRB-SP 2004). The first instance is applicable in this case. Here, the additional 10(a)(1) allegation conforms the pleadings to the evidence presented at hearing in that the evidence presented in the hearing revealed that Dorsey's statements, while not intended

⁶ Since 10(a)(2) allegation failed, and it is the primary violation alleged in Count II, so does its 10(a)(1) derivative. *Bloom Twnshp. High Schl. Dist. 206*, 312 Ill. App. 3d at 957; see *City of Chicago*, 31 PERI ¶129; *State of Ill. Dep't of Cent. Mgmt. Serv. (Dep't of Pub. Aid)*, 10 PERI ¶2006.

to discourage or encourage union membership or support, were causally connected to Williams' protected activity.

Amending the Complaint does not unfairly prejudice a respondent if a respondent would raise the same or similar defenses to both allegations, and thus a reasonable respondent would have presented similar evidence and prepared a similar case in defending against the new allegations as it would in defending against the allegations in the charge or complaint. Vill. of Wilmette, 20 PERI ¶85; Redd-I, Inc., 290 NLRB No. 140 (1988).

In this case, the amendment does not prejudice the CTA because Count II of the Complaint is substantially similar to the amended count, and the Respondent's existing defenses are responsive to the previously pled counts. In Paragraph 12 of the Complaint, the Charging Party alleges that Respondent took the purported action because Williams "joined, supported or assisted the union and engaged in concerted activity for the purpose of collective bargaining or other mutual aid and protection and in order to discourage employees from engaging in such activities or other mutual aid and protection." Respondent's conduct as described Paragraph 12 of the Complaint violate the Act as identified in Sections 10(a)(2) primarily, and (1) derivatively, and violates the Act as identified in Section 10(a)(1) independently from Section 10(a)(2). The Respondent violates the Act as identified Sections 10(a)(2) and (1) if it took the purported action "in order to discourage employees from engaging in such activities or other mutual aid and protection." The Respondent commits an independent 10(a)(1) violation if it took the purported action because Williams "joined, supported or assisted the union and engaged in concerted activity for the purpose of collective bargaining or other mutual aid and protection[.]" The Respondent's motivation as alleged in Paragraph 12 of the Complaint violates the Act as solely identified in Section 10(a)(1) if it's actions were at least in part motivated because of Williams' protected concerted activity, regardless of whether Respondent's motive was to discourage union membership or support. Accordingly, because intent is only relevant to Count II, which was previously pled, allowing the additional count does not deprive the Respondent of the ability to raise an argument necessary to defend the additional count, because no additional argument is necessary.

A respondent is not prejudiced where it presented argument in its brief that addressed the amendments, and where respondent's defense in the face of the amendments remained unchanged. Cnty. of Lake, 28 PERI ¶67 (IL LRB-SP). Here, the Respondent's post-hearing

brief raises defenses applicable to the additional count. Specially, the Respondent's defense of Count II is applicable to the legal framework of the added count. In addition, Respondent's defense of Count I, that Dorsey lacked animus, while irrelevant to my legal analysis of Count I, is directly responsive to the added count. Thus, it is proper to add Count III to the Complaint to allege that the Respondent violated the Act as articulated in Section 10(a)(1) of the Act when Dorsey threatened to discharge Williams because Williams engaged in protected concerted activity, and Dorsey's threats caused Williams to resign.

B. Constructive Discharge

Where the basis of an unfair labor practice charge brought under Section 10(a)(1) of the Act is an alleged constructive discharge or other adverse employment action, the public employer's motive is examined in the same manner as in cases arising under Section 10(a)(2) of the Act. Chicago Transit Auth., 30 PERI ¶9; Chicago Park Dist., 7 PERI ¶3021. This requires the charging party to prove that the employees' protected activity illegally motivated the employer's adverse action. Pace Suburban Bus Div., 406 Ill. App. 3d at 495; Dep't of Cent. Mgmt. Servs. (State Police), 30 PERI ¶70; Chicago Park Dist., 7 PERI ¶3021. If a charging party establishes a *prima facie* case, the burden then shifts to the employer to demonstrate that it would have taken the same action for legitimate, non-pretextual business reasons even without the illegal motive. Pace Suburban Bus Div., 406 Ill. App. 3d at 500; Chicago Transit Auth., 30 PERI ¶9.

i. *Williams' prima facie case*

To satisfy his *prima facie* case, a charging party to prove, by a preponderance of the evidence, that 1) he was engaged in a statutorily protected activity, 2) his employer was aware of the nature of his conduct, and 3) the employer took adverse action against him for discriminatory reasons, *i.e.*, animus toward his participation in such activities. Pace Suburban Bus Div., 406 Ill. App. 3d at 494-495; Chicago Transit Auth., 14 PERI ¶3002 (IL LLRB 1997). The employee satisfies the third element when he establishes a causal connection between his protected concerted activity and the employer's adverse action, such that the activity was a substantial or motivating factor in the employer's adverse action against him. Pace Suburban Bus Div., 406 Ill. App. 3d at 495. As I found in the context of Count II's Section 10(a)(2) allegation, Williams has proven the first two prongs of his *prima facie* case.

Moving on to the third prong, the CTA contends that the Charging Party fails to prove that it violated the Act under Section 10(a)(1) because he cannot establish that Dorsey acted with anti-union animus, nor can he establish that Dorsey acted with animus towards Williams' filing the grievance. The Appellate Court instructed that "[S]ection 10(a)(1) broadly protects public employees in exercising their rights under the Act, in contrast to [S]ection 10(a)(2), which more narrowly protects union membership and activities, an employer violates [the Act as identified in S]ection 10(a)(1) if it discharges an employee in retaliation for exercising her rights under the Act, regardless of whether the employee establishes antiunion animus." Pace Suburban Bus Div., 406 Ill. App. 3d at 494. Thus, the CTA's first argument fails because anti-union animus is not relevant to the analysis of this count. Secondly, Dorsey's statement that Williams would lose his job if he did not withdraw his grievance is direct evidence that Dorsey was motivated at least in part by Williams' protected, concerted activity of filing the grievance. When a Charging Party provides direct evidence of illegal motive, circumstantial evidence is not required. Town of Decatur, 4 PERI ¶[2003 IL SLRB 1987). Nonetheless, I find that the record contains circumstantial evidence of suspicious timing, and Respondent's inconsistent actions which bolster Williams' *prima facie* case, though I make no finding of whether this circumstantial evidence alone is sufficient to satisfy Williams' burden. Therefore, I find that Williams has satisfied his *prima facie* case.

ii. CTA's burden to rebut Williams' prima facie case

The CTA maintains that its legitimate business reason for Dorsey approaching Williams regarding the grievance was because Williams violated CTA procedure when he attached unauthorized documents to the grievance, and that the grievance itself did not motivate Dorsey. However, simply proffering a legitimate business reason for the adverse action does not satisfy the employer's burden, as the fact finder, I must determine whether the CTA actually relied upon this reason. See Pace Suburban Bus Div., 406 Ill. App. 3d at 500 citing City of Burbank, 128 Ill. 2d at 346. If I find that the CTA did not actually rely on the proffered reason, then the reason is pretextual and the CTA's rebuttal fails. See Pace Suburban Bus Div., 406 Ill. App. 3d at 500. However, if I find that the CTA relied upon its proffered legitimate reason, then the inquiry continues as a "dual motive" case. See Id. The CTA then must demonstrate by a preponderance of the evidence that it would have taken the same adverse action notwithstanding Williams' protected activity. See Id.

Where an employer appears to have taken a disputed disciplinary action for arbitrary, implausible, or unreasonable reasons, an administrative agency may properly infer that the stated rationale was not in fact the reason for the discipline, and that the actual motivation was the employee's involvement in protected activities. State of Ill., Secretary of State, 31 PERI ¶7 (finding that because an employer's reason for discipline was plausible, it was not pretextual); Cnty. of Rock Island, 14 PERI ¶2029 (IL SLRB 1998)(inferring unlawful motive where there was insufficient evidence indicating that the employee's actions violated any departmental rules or standards of conduct and where discipline appeared to have been imposed for arbitrary, implausible or unreasonable reasons); Cnty. of DeKalb and DeKalb Cnty. State's Attorney, 6 PERI ¶2053 (IL SLRB 1990). However, it is not the Board's function or the function of its administrative law judges to substitute the agency's judgement for the employer's judgment in the discipline of public employees. State of Ill., Secretary of State, 31 PERI ¶7; Cnty. of Rock Island, 14 PERI ¶2029.

I find that the Respondent has proffered a legitimate business reason for threatening Williams with discipline for attaching confidential documents to his filed grievance. Dorsey and Miller provided uncontested testimony that the grievance did not motivate their inquiry, and that they have disciplined other employees for misappropriating confidential documents. The record also contains evidence that an arbitrator found that attaching to a grievance the at-issue documents violates CTA rules. Therefore, the proffered business reason is legitimate.

I also find that the CTA's legitimate reason is not pretextual in that it actually relied upon this reason when it took action against Williams. Miller testified that he reviews six grievances every month and that he is involved with all discipline that almost exclusively relates to discharge. Williams and Carter grieved their written warnings, and there is no indication that either Miller or Dorsey viewed the grievance itself as out of the ordinary. Furthermore, there is no evidence that the CTA retaliated against other employees for grieving discipline. While the record contains no explicit evidence, in its post-hearing brief the CTA argues that it would have taken disciplinary action against Williams regardless of his protected activity. Miller and Dorsey testified that they began investigating Williams' conduct because of the misappropriated documents, and specifically rejected any suggestion that it was because Williams filed a grievance. As I have already found that because the grievance instigated the investigation, Williams' grievance at least partially motivated Miller and Dorsey's actions. However, I do

credit Miller and Dorsey's testimony and conclude that they would have investigated the alleged misappropriation of the confidential documents even if Williams misappropriated the documents but did not file a grievance. Therefore, CTA successfully rebutted Williams' *prima facie* case, and did not constructively discharge Williams in violation of the Act as identified in Section 10(a)(1).

V. CONCLUSIONS OF LAW

- 1) Respondent violated the Act as identified in Section 10(a)(1) when through its agent Dorsey, threatened Charging Party with discipline if Charging Party did not withdraw the grievance.
- 2) Respondent did not violate the Act as identified in Section 10(a)(2) and (1) when it caused Charging Party to resign from employment with the Respondent.
- 3) Respondent did not violate the Act as identified in Section 10(a)(1) when it caused Charging Party to resign from employment with the Respondent.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that Count II and III of the Complaint against the Chicago Transit Authority be dismissed in their entirety.

IT IS ALSO HEREBY ORDERED that Respondent, the Chicago Transit Authority, its officers, and agents shall:

- 1) Cease and desist from:
 - a. Threatening employees with discipline for their protected activities;
 - b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act.
- 2) Take the following affirmative step which would effectuate the policies of the Act:
 - a. Post for 60 consecutive days, at all places where notices to the employees of the Chicago Transit Authority are regularly posted, signed copies of the attached notice.
 - b. Notify the Board, in writing within 20 days of the date of the Board's Order, of the steps that the Respondent has taken to comply herewith.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200-1240, the parties may file exceptions to this recommendation and briefs in support of those exceptions no later than 30 days after service of this recommendation. Parties may file

responses to any exceptions, and briefs in support of those responses, within 15 days of service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed, if at all, with Kathryn Nelson, General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 18th day of September, 2015.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**



**Deena Sanceda
Administrative Law Judge**

NOTICE TO EMPLOYEES

FROM THE ILLINOIS LABOR RELATIONS BOARD

L-CA-13-059

The Illinois Labor Relations Board, Local Panel, has found that the Chicago Transit Authority, has committed an unfair labor practice as identified in Section 10(a)(1) of the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from threatening employees with discipline for their protected activities.

WE WILL cease and desist from in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in the Act.

DATE _____

Chicago Transit Authority

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor

Springfield, Illinois 62702

(217) 785-3155

160 North LaSalle Street, Suite S-400

Chicago, Illinois 60601-3103

(312) 793-6400

THIS IS AN OFFICIAL GOVERNMENT NOTICE

AND MUST NOT BE DEFACED.