

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

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SUBJECT: U.S. Postal Service 177-2401-6750-6700
Case 25-CA-27956-1-P 506-2001-5000
506-2017-1700
506-4033-1200
506-4033-5500
506-6070-5000
512-5006-5052
512-5036-0100
512-5036-6718
512-5072-2000

This Section 8(a)(1) case was submitted for advice as to whether an administrative "Operations Support Specialist" is a statutory employee and, if so, whether the United States Postal Service,¹ in the aftermath of the events of September 2001, violated the Act by prohibiting the employee from discussing any anthrax-related matters with union-represented employees, instructing him that he could only address such concerns through his supervisory chain of command and disciplining him for allegedly failing to follow those instructions.

We conclude that the employee is a statutory employee, that he was engaged in protected concerted activity and that the Employer unlawfully retaliated against him by restricting his communications with employees and by disciplining him.

FACTS

A. Background

This case arose at the Employer's Fort Wayne, Indiana Processing Center. The Charging Party, John Bender, is a

¹ Also referred to herein as the Employer, the Postal Service or USPS.

31 year Postal Service employee. For the last 6 years, he has been an "Operations Support Specialist," an unrepresented, salaried position covered by the USPS "Executive and Administrative Schedule" (EAS).² Bender performs the bulk of his work at two computers in an office located in the front office area of the Fort Wayne facility. He also uses a computer located in the production area of the plant, where union-represented mail processing and other production employees work.³ During most of the events at issue here, Bender's immediate supervisor was Acting Manager of In-Plant Support, Deborah Neate.⁴ Neate, in turn, reported to Plant Manager Walter Hess, and Hess reported to Area Senior Manager Chuck Donnigan.

In general terms, as an Operations Support Specialist, Bender oversees and updates a variety of computer programs and generates statistical reports based upon those programs. Thus, Bender is responsible for maintaining the accuracy and completeness of a centralized data system that records data from machines throughout the facility, along with data entered manually by a data entry employee.⁵ He also maintains and updates various statistical record keeping and mail-sorting programs, puts new equipment into service, performs computerized checks on the scale system used to weigh the mail and monitors the facility's timekeeping records. In addition, Bender prepares statistical reports from the database as requested by facility managers and frontline production supervisors.⁶

² The EAS is the multigrade pay structure that applies to most USPS managerial and unrepresented administrative employees. Bender is the only Operations Support Specialist at the Fort Wayne facility, but not the only unrepresented EAS employee.

³ In USPS parlance, bargaining unit employees are referred to as "craft" employees.

⁴ In addition to Bender, Neate supervised three other unrepresented EAS employees: a data entry person, a Quality Control Specialist, and a Data/Directory Analyst Specialist.

⁵ Bender does not have any supervisory authority over this or any other employee. It appears that Bender performs the data entry clerk's functions in his absence.

⁶ For example, Bender integrates timekeeping records with data from the processing machines to produce productivity rates, and, from time to time, undertakes special projects, such as preparing statistical surveys so that management

Bender collects and reports the various data described above to the requesting supervisor or manager. The position description submitted by USPS lists ten "duties and responsibilities" of the position including preparing operating budgets, developing staffing schedules, and initiating and coordinating improvements in staffing and equipment utilization, production control and operations procedures. There is no evidence that Bender has ever actually performed any of these duties. In addition, there is no evidence that Bender plays any role in recommending or implementing decisions based upon the data he collects or the reports he generates. He has no policy making authority.

B. The Alleged Violations

On October 17, 2001,⁷ Bender found a printed e-mail message from USPS national headquarters taped to his computer monitor. The message, which was dated October 16, stated that Fort Wayne personnel should not open an incoming express mail package containing a computer tape because a similar package received at another USPS facility contained a white powder that was currently being tested for anthrax. The e-mail gave instructions for appropriate handling of the package. Upon reading the e-mail, Bender immediately went to the facility's express mail area to look for the tape package. He asked the union-represented express mail clerks if they had been informed of the possibility that the tape package contained anthrax. The clerks said they had not, but one said she had already placed the tape package in a utility cart for further processing. Bender told the employees to immediately wash thoroughly and return to work. He said he would check his e-mail for any further instructions. Bender was especially concerned about the handling of the tape package because the tape in the package would ultimately be processed in his immediate work area, and, if the employee who normally processed the tape was absent, by Bender himself.

On the way back to his office, Bender encountered Plant Manager Hess, told him about the possible anthrax-contaminated package and gave him a copy of the e-mail. After checking for new e-mail messages and finding none, Bender returned to the express mail area to let the clerks know there was no news. One of the clerks said that after

can realign the layout of existing equipment or to justify the acquisition of additional equipment.

⁷ All dates are in 2001, unless otherwise indicated.

Bender left, Hess, with the assistance of a maintenance supervisor, had opened the tape package, concluded there was no anthrax threat and told the clerks to go back to work. Bender told the clerks that he was concerned for his health and was going to request medical screening, and advised the clerks to do the same.⁸ Bender also told the clerks that he did not think that Hess was qualified to determine whether the package had been contaminated by anthrax.⁹

Later the same day, Hess conducted a scheduled "Crisis Plan" meeting with managers, supervisors and EAS employees to discuss USPS policy on handling possible anthrax contamination, and to review problems encountered during a prior incident. Bender was late to the meeting and became upset when dust flew out of his chair cushion as he sat down. He asked if it could be anthrax dust. Initially, some of the attendees thought Bender was joking or role playing, but when it became clear that he was truly concerned, a safety officer told him he could be checked by the injury compensation office. Bender became more agitated as he listened to the discussion of the earlier incident. Bender got the impression that Hess wanted people to merely cordon off the area surrounding a suspicious package or letter, a course of action Bender considered inadequate. When Bender asked Hess to confirm his impression, Hess sarcastically asked whether Bender would rather have him place the entire facility in isolation and shut down operations. Bender responded that he was not the manager of the facility, but felt they

⁸ Based upon Bender's narrative account of the events of October 17 (see *infra*, p. 5), it appears that the clerks took his advice and went to their supervisor's office to request medical screening.

⁹ He also he had another conversation with one of the express mail clerks about whether any mail in addition to the tape package had been moved from the express mail area that morning. Upon learning that it had, Bender attempted to find out where it had gone. In doing so, Bender briefed at least one (presumably represented) driver about the possibly contaminated tape package. Bender also advised another craft employee who might have handled mail from the express mail area to go to the supervisor's office to request medical treatment. USPS claims that one of the employees Bender contacted that morning left the facility in tears, believing she had been exposed to anthrax.

should follow instructions. Bender then left the meeting, went home for the day and took the next day off.¹⁰

On October 19, Bender sent a letter to Hess in which he charged Hess with callous disregard for the health and safety of the employees and complained that Hess had ignored outstanding USPS instructions on handling biohazards in order to show his superiors he could keep the mail moving. Bender also attached a narrative of the events of October 17, detailing his many frustrations with Hess' conduct that day, including Hess' failure to consider the feelings of the employees who had potentially been exposed to anthrax. Bender sent copies of the letter and attachment to Hess' immediate superior, Area Senior Manager Donnigan, to a USPS regional vice president, and to USPS headquarters.

Bender thereafter disseminated additional copies of the October 19 letter and attached narrative. On October 30, Bender wrote to Hess to let him know that he had sent copies of the letter and its attachment to several other individuals, including the president of the American Postal Workers Union and other members of a labor-management security and safety task force.¹¹ On October 31, he distributed five more copies of the October 19 letter and narrative to employees in the facility cafeteria, together with a short cover letter regarding the October 17 anthrax "threat." In the cover letter, which was addressed to "Fort Wayne employees," Bender promised to keep employees informed of future developments, invited them to contact him if they had any questions or suggestions and indicated that, depending on management's response to the October 19 letter, Bender might need the employees' assistance.¹²

Bender states that between October 17 and 31, he initiated one-on-one conversations about anthrax issues

¹⁰ It appears that Bender consulted the injury compensation staff. In any event, he was granted administrative leave for this absence.

¹¹ Bender also sent the October 30 letter and its attachments to local officers of the National Association of Postal Supervisors (NAPS), a professional membership organization for Postal Service supervisors and managers. Bender appears to be an NAPS member. The organization's membership criteria are unknown.

¹² At least one of the five copies of the cover letter and attachments was distributed to a union represented employee.

with approximately 30 craft employees, and was approached by other employees who wanted to discuss their anthrax concerns with him. The discussions occurred while he was on the work floor and covered topics ranging from the contaminated letters in the East coast mails and postal facilities to how anthrax matters were being handled at Fort Wayne. Bender told some of these employees about the letters he had sent to Hess and other managers.

On November 2, Bender was working on the floor when a bargaining unit clerk approached and told him that another employee had dropped a package that leaked a powdery substance. Bender and the clerk rushed to the scene, where they found that the employee who had dropped the package had been sent to a different work area. The package was still there and was not isolated or cordoned off. Bender reported the suspicious package to a safety inspector and complained that the proper procedures were not being followed. Bender then returned to his office.¹³

Shortly after this incident, Bender requested a meeting with Hess' immediate superior, Area Senior Manager Donnigan. Donnigan and Bender met later that morning. When Donnigan rebuffed Bender's initial attempt to discuss his complaints that safety procedures were being ignored, Bender tried to end the meeting. However, Donnigan would not let Bender leave; he said he had some things to say to Bender. Donnigan told Bender that if he had problems with how things were being handled, he was to follow the chain of command. He should raise his concerns first with his supervisor (Neate); if not satisfied with her response, then with Hess. If dissatisfied with Hess' response, Bender could then appeal to Donnigan. Donnigan told Bender that he was not, on pain of discipline, to address concerns or complaints to anyone else without following this procedure. At the end of the ten minute meeting, Bender gave Donnigan three documents he had prepared before their meeting. The first document stated that Bender felt he was being harassed, intimidated and discriminated against, that his rights and those of the employees to express their views had been violated, and that he would be retaining an attorney to represent him in any future meetings. The second document charged that Hess was gambling with the health and safety of employees by failing to take the potential for anthrax contamination seriously in his zeal not to disrupt operations. The document also states that the employees on all three shifts were waiting for Bender's

¹³ The safety inspector initiated an investigation that included contacting the addressee. The package contained a ceremonial drum and incense from Thailand.

report on management's response to the issues raised in the October 19 letter to Hess and other documents. The third document charged that Hess' recent actions had destroyed his credibility and ability to lead the Fort Wayne employees, and that Hess should be placed on probation and reassigned to another facility.

Later the same day, Bender was summoned to Neate's office to discuss his conduct with respect to the potential anthrax incident that morning. During the meeting, which lasted about 30 minutes, Neate initially observed that it was management's responsibility to keep employees calm during suspected anthrax incidents and that Bender had gone into an unacceptable "panic mode" that morning. Neate told Bender that he was not to talk to employees about anthrax matters. She also instructed him to confine his discussion with employees on the shop floor to work related matters or general, polite social discourse, and to avoid discussing current events. Neate cautioned Bender to summon a supervisor or manager and to remove himself from any potential anthrax situations.¹⁴

On November 4, Bender requested another meeting with Donnigan.¹⁵ Donnigan responded on November 6. He agreed to another meeting, but reiterated the prior instructions to go through the chain of command, and warned Bender that any further violation of his instructions could lead to disciplinary action, including removal. Donnigan agreed to overlook Bender's failure to follow those instructions by seeking another meeting with him before first seeking to resolve his concerns with Neate or Hess. Donnigan also cautioned that Bender was not to communicate his complaints or concerns to Postal Service regional management or

¹⁴ On November 5, at Bender's request, Neate put her "anthrax instructions" in writing, indicating that if Bender became aware of any suspicious parcels or powders, he was to contact the tour (shift) supervisor immediately.

¹⁵ Bender made the request by e-mail, to which he attached a two page letter reviewing the events of November 2 and, inter alia, acquiescing in Donnigan's instructions to follow the chain of command when aggrieved but insisting upon the right, when he disagreed, to voice his opinions to anyone who might listen to his views. Bender also attached a memo he sent to Neate the next day in which he asked her to put her November 2 instructions in writing and to clarify them. He specifically asked her to clarify the parameters of what he was allowed to say to employees and how he should proceed in the event of another anthrax scare.

headquarters, as they would simply refer the case back for resolution at the local level.

On November 5, Bender prepared an updated version of his October 31 cover letter to the Fort Wayne employees, adding details regarding the November 2 incident and his concern that that situation was also mishandled by management. Bender attached copies of the October 19 letter to Hess and his November 4 letter to Donnigan, and an undated one page flyer. The flyer contains a quotation attributed to Reverend Martin Niemoller¹⁶ and a message from Bender addressed to "Folks." The message text informed the reader that Bender was diligently working to get the employees' voices heard, but that he had been singled out by management and was expecting the worst. Bender also asked employees whether they believed their supervisors and managers were genuinely concerned for their safety and exhorted that their chance to speak up was coming soon. Bender gave a copy of the updated letter and all the attachments to an official with the Fort Wayne Mailhandlers local and also distributed copies to an unknown number of other individuals. Copies of the "Niemoller" flyer and the November 5 letter were thereafter posted on the Mailhandlers bulletin board.¹⁷

On November 7, Neate called Bender to her office and informed him that he was being placed on an immediate, emergency suspension pending an investigation for failing to follow instructions and for disrupting postal operations. Specifically, Bender was charged with ignoring Donnigan's instructions to raise any concerns or complaints through the chain of command, by preparing the November 5 documents and having them posted on the Mailhandlers bulletin board. During the meeting, Neate also reminded

¹⁶ Nielmoller was an anti-Nazi activist who was imprisoned during World War II. The quote is as follows:

In Germany they first came for the Communists and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics and I didn't speak up because I was Protestant. Then they came for me and by that time no one was left to speak up.

¹⁷ The posting did not include Bender's letters to Hess or Donnigan. Bender does not recall asking or giving the Mailhandlers permission to post the letter or flyer.

Bender of her instructions that Bender was not to talk to craft employees unless it involved matters related to his projects. Neate warned Bender that he was to refrain from any further posting or similar activities on Employer property or face disciplinary action. The meeting ended, and Bender turned in his keys and left the facility.

On November 10, Bender received written confirmation of his emergency suspension and notice of his right to appeal within ten days. On November 13, Bender submitted a written appeal to Neate. On November 15, Neate notified Bender that the emergency suspension had been rescinded, that he would be paid for the time he had already been off and that he was to remain on paid administrative leave until the investigation of his alleged misconduct was completed. Neate thereafter recommended issuing Bender a written warning in lieu of further suspension.

Bender returned to work on December 10. Upon arrival at the facility, Bender met with Neate and Ed Senter, who had recently replaced Neate as Acting Manager of In-Plant Support and would be Bender's new supervisor. Senter told Bender that he could only talk to employees about issues specifically related to his job functions. Thus, while on the floor, Bender was not to share safety concerns with any craft employees or union representatives. If he had safety concerns, he was to address them through the chain of command.

On December 13, Bender received a "Proposed Letter of Warning" setting forth two bases for discipline. The first was Bender's failure to follow instructions, i.e., Neate's instructions not to talk to employees about anthrax issues and Donnigan's instructions to follow the chain of command for any concerns or complaints. The proposed warning alleges that Bender violated these instructions by having the November 5 letter and Niemoller flyer posted on the Mailhandlers bulletin board. The second basis for discipline cited in the proposed warning was "inappropriate conduct" under USPS standards of conduct.¹⁸ This was again

¹⁸ Thus, USPS standard 666.2 provides that

Employees are expected to conduct themselves during and outside of working hours in a manner . . . which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be obnoxious

based on a determination that the letter and flyer were "offensive" and "created unpleasant working conditions" in that they implied that management had no concern for employee safety, compared conditions at Fort Wayne to those addressed by Niemoller, and told employees that Bender had been singled out for retaliation. On January 7, 2002, Hess affirmed the warning as recommended by Neate.¹⁹

The Employer argues that the instant charge should be dismissed because Bender, as an administrative employee, is not covered by a collective-bargaining agreement and therefore is not covered by the Act.²⁰ In the alternative, it contends that by spreading lies about management's response to the anthrax crisis, disregarding his supervisor's instructions and fostering a sense of panic among the employees, Bender lost any statutory protection he might otherwise have enjoyed.

ACTION

We conclude that Bender is a statutory employee, that he was engaged in protected concerted activity when he communicated with other employees regarding his concerns that the Employer had mishandled suspected anthrax situations, and that the Employer unlawfully retaliated against him because of his protected activities. We therefore conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) when it imposed restrictions on and disciplined Bender for raising anthrax-related concerns outside his supervisory chain of command.

Initially, we agree with the Region that Bender is an employee within the meaning of Section 2(3) of the Act, and not a manager. Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and

or offensive to other persons or to create unpleasant working conditions.

¹⁹ Hess stressed that comparing conditions at the Fort Wayne facility to the conditions Niemoller faced in Nazi Germany was offensive and discourteous in violation of USPS standards of conduct and noted that no craft employee or union had filed a complaint or grievance regarding management's handling of potential anthrax threats.

²⁰ The Employer has not expressly argued that Bender is a managerial employee or supervisor exempt from the Act's protections.

those who have discretion in the performance of their jobs independent of their employer's established policy."²¹ Notwithstanding the policy-related functions indicated in his position description, the evidence demonstrates that Bender performs only technical functions such as updating computer programs and collecting computerized data.²² The reports and analyses of the data he collects are used in decision-making by others, but there is no evidence that Bender plays any role in that decision-making or in formulating policy at any level of USPS' operations. In these circumstances, Bender is clearly an employee and entitled to the protections of the Act.

We also agree with the Region that Bender's conduct was concerted and not directed solely at his own safety concerns. Thus, as defined in Meyers Industries²³ and its

²¹ NLRB v. Bell Aerospace Co., 416 U.S. 267, 286-289 (1974). See generally NLRB v. Yeshiva Univ., 444 U.S. 672, 687 (1980) ("normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy").

²² See United States Postal Service, 232 NLRB 556, 557-558 (1978) (program managers who monitored outside research contracts were not managerial employees where they had only technical input as engineers into contractual requirements and their comments and recommendations regarding proposed technical changes to contract proposals were subject to final approval by higher personnel); Northeast Utilities Service v. NLRB, 35 F.3d 621, 626 (1st Cir. 1994) (power-pool coordinators and senior pool coordinators of regional electrical utility, held not managerial employees since they played no role in creation or implementation of operating procedures embodying employer's management policy and thus lacked a "congruence of interests" with the employer); S.S. Joachim and Anne Residence, 314 NLRB 1191, 1195, n. 8 (1994) (payroll coordinator found not to be a managerial employee where there was no evidence employee formulated and effectuated management policies by expressing and making operative the decisions of the employer; rather, employee's primary responsibility was to prepare paychecks according to existing practice; employee had no authority to deviate from established policy without written instructions and when problems arose, coordinator outlined facts and existing policy for supervisor to consider in making the final decision).

²³ Meyers Industries, 281 NLRB 882 (1986) (Meyers II), supplementing Meyers Industries, 268 NLRB 493 (1984) (Meyers

progeny, a conversation that involves only a speaker and a listener can be concerted, provided the conversation has either the object of inducing or initiating, or in some manner relates to, group action.²⁴ Thus, individual employee attempts to enlist the support of other employees to engage in protected activity are concerted, even if those attempts are unsuccessful.²⁵ For example, in Charles H. McCauley Associates, Inc.,²⁶ the Board affirmed the administrative law judge's conclusion that the employer had unlawfully discharged an employee for engaging in protected concerted activity, even though the employee acted alone. There, a draftsman, Beck, invited a coworker to attend a meeting with the employer to discuss better working conditions and benefits for all the employees. 248 NLRB at 347. The coworker declined the invitation and did not ask or authorize Beck to represent his interests. Ibid. Beck attended the meeting alone and raised concerns and objections regarding the employees' working conditions and benefits, suggested a number of improvements and informed

I), remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985).

²⁴ See Meyers II, 281 NLRB at 887, citing with approval Vought Corp., 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986)) (employee who spread a rumor to several coworkers was engaged in concerted activity when he urged them to complain to management) and Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) ("[i]t is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees").

²⁵ See, e.g., El Gran Combo, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988) (discharged employee repeatedly, but unsuccessfully, attempted to elicit support from other employees); Needell & McGlone, P.C., 311 NLRB 455, 456 (1993), enfd. 22 F.3d 303 (3d Cir. 1994) (unpublished) (employee who discussed with coworkers preferential treatment given another employee, but who was the only one to complain about the perceived favoritism at a staff meeting, was engaged in concerted activity where speaking out at the meeting was the "logical outgrowth" of the aggrieved coworkers' earlier discussion).

²⁶ 248 NLRB 346 (1980), cited with approval in Meyers II, 281 NLRB at 886, n. 1.

the employer of his plan to discuss his suggestions with his coworkers and, possibly, a union. Ibid. The employer forbade Beck from following either course of action and discharged him when he persisted. Id. at 347-348. The judge expressly rejected the employer's contention that Beck was solely seeking his own personal gain without the support or authorization of his peers, and found that Beck's conduct contemplated group action and was therefore concerted.²⁷

Based upon these principles, Bender's conduct can reasonably be viewed, at a minimum, as seeking to induce group action. On October 17, he sought out the clerks who had been in contact with the suspicious tape package, he urged them to wash their hands and/or to consider getting medical attention and he undertook to keep them apprised of any additional e-mail instructions that might have come in while they were talking. His October 31 letter to the employees similarly invited and anticipated group action. Thus, in that letter, Bender promised to keep the employees informed of future developments, invited them to contact him, and indicated that Bender might soon be needing their assistance. Further, by telling employees that their "chance to speak up is coming soon," the Niemoller flyer can also be viewed as anticipating or inviting a concerted course of action. In addition to such evidence of "inducement," there is at least some evidence of actual concert, i.e., the numerous one-on-one anthrax-related discussions Bender had with employees in the weeks between the two anthrax incidents, some of which were initiated by employees who approached Bender. Indeed, Bender only became involved in the November 2 anthrax incident after a unit clerk approached him to let him know of the broken, leaking package.

We further conclude that Bender's conduct was protected by the Act. The Board has long recognized that complaints arising out of the employment relationship, such as those regarding workplace safety, are matters of group concern within the "mutual aid or protection" clause of Section 7, and are presumptively protected.²⁸ There is no

²⁷ 248 NLRB at 350, quoting Mushroom Transportation Company, supra, 330 F.2d at 685 ("[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action").

²⁸ NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-16 (1962) (spontaneous work stoppage to protest an existing adverse working condition (the extreme cold) was protected); Caterpillar, Inc., 324 NLRB 201, 201 (1997) (health and safety concerns fall within the ambit of Section 7).

dispute that Bender was motivated by concerns about anthrax contamination. Protected communications do not lose the protection of the Act merely because the employer finds them distasteful or offensive.²⁹ Thus, the Employer's assertion that Bender lost any protection he might have enjoyed because of the offensive and inflammatory nature of his comparison of conditions at the Fort Wayne facility to the conditions Reverend Niemoller faced in Nazi Germany is without merit. Further, the Employer has not presented any evidence of serious disruption of its operations as a result of Bender's oral or written communications with fellow employees.³⁰

Having concluded that Bender was engaged in protected concerted activity, it is clear that the Employer's actions, in retaliation against that activity, of restricting Bender from discussing anthrax issues with craft employees and of imposing the January 7 written warning, were unlawful.³¹

Complaint should therefore issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by

²⁹ See, e.g., Southwestern Bell Telephone Co., 276 NLRB 1053, 1053 n. 2 (1985) (although offensive, "Definition of a Scab" flyer not so disruptive as to render its posting unprotected, despite evidence that employees were milling about and talking in huddles after its posting); Chromalloy Gas Turbine Corp., 331 NLRB No. 76, slip op. at 1, n. 3 (July 25, 2000) (rude, argumentative and demeaning nature of employee's remarks about employer manager at staff meeting did not render her activity unprotected).

³⁰ See, e.g., Martin Marietta Corp., 293 NLRB 719, 719, 725 (1989) (employee, who was highly critical of the employer's handling unexplained contamination incidents that led to the hospitalization of several employees, did not lose the protections of the Act by posting a notice to employees using the word "poison" in connection with the contamination incidents or because employees did not return to work promptly after the notice was posted; the posting, though offensive to the employer, was neither knowingly false nor malicious and whatever disruption flowed from the posting was minimal as the employees briefly lingered to discuss the notice after its posting).

³¹ See, e.g., Meyers I, 268 NLRB at 497; Dearborn Big Boy No. 3, Inc., 328 NLRB 705, 709 (1999); Timekeeping Systems, Inc., 323 NLRB 244, 244 (1997).

placing restrictions on and disciplining Bender in retaliation for his protected, concerted activities.

B.J.K.