

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

DOVER ENERGY, INC.,
BLACKMER DIVISION

Respondent

and

CASE 07-CA-094695

THOMAS KAANTA, an Individual

Charging Party

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S BENCH DECISION**

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STATEMENT OF THE CASE

On September 13, 2013, the Regional Director of the Seventh Region issued a Complaint and Notice of Hearing alleging that Dover Energy, Inc., Blackmer Division (herein Respondent) violated Sections 8(a)(1) and (3) of the Act by issuing a disciplinary warning to Union steward Thomas Kaanta for making an information request [GC 1(e); GC 6]. The Complaint further alleges that Respondent independently violated Section 8(a)(1) by unlawfully threatening Kaanta with discipline if he made any additional information request that Respondent considered to be “frivolous” [GC 1(e), paragraph 8].

On or about September 25, 2013, Respondent filed its Answer to the Complaint, admitting the filing and service of the charge and amended charge, the nature of Respondent’s operation and the Board’s jurisdiction in this matter [GC 1(g)]. Respondent also admitted that its Director of Human Resources, John Kaminski, was at all material times, a supervisor and agent of Respondent within the meanings of Sections 2(11) and (13), respectively. Respondent denied any violation of the Act.

A hearing was held in Grand Rapids, Michigan on December 2, 2013, before Administrative Law Judge Keltner W. Locke. On December 5, 2013, ALJ Locke issued a Bench Decision finding that Respondent did not violate the Act as alleged and recommending that the Board dismiss the Complaint [ALJD at 8].

STATEMENT OF FACTS

Respondent is a corporation with offices and a place of business in Grand Rapids, Michigan, where it is engaged in the manufacture and non-retail sale of pumps [ALJD at 3; GC 1(e); Tr at 20]. Respondent and Local 828, UAW (herein the Union) have a longstanding collective bargaining relationship and were party to a collective bargaining agreement that was

effective from December 1, 2007 through September 15, 2012, covering a unit of production and maintenance employees at Respondent's Grand Rapids facility [GC 7; Tr at 21-24]. In 2012, the parties entered into a successor agreement that is effective from September 15, 2012 through September 15, 2017 [GC 2; Tr at 22].

Charging Party Thomas Kaanta has been employed by Respondent for 35 years [Tr at 20]. He currently works as a machine repair journeyman [Tr at 21]. In June 2012,¹ Kaanta was elected by his co-workers to serve a three-year term as a Union steward [Tr at 24-25; GC 10 at 6, Section 8]. At all material times, the Local Union president was Dennis Raymond [Tr at 26].

As a steward, Kaanta was specifically authorized by the collective bargaining agreement to investigate and settle employee complaints and grievances [GC 7, Paragraph 11 at pg. 4; Tr at 48-49; 122]. It is undisputed that in this regard, Kaanta is authorized to make information requests to Respondent on his own initiative and without clearance from the Union's bargaining committee [Tr at 122]. Moreover, neither the collective bargaining agreement, nor the Local Union's by-laws, nor the Union's constitution, place any limitation on a Union steward's right to ask Respondent for any other information relevant to his representational functions [Tr at 47-49; 122-124].

Shortly after he was elected, Steward Kaanta submitted a request to Respondent seeking information regarding any extra-contractual financial relationships between Respondent and members of the Union, including its bargaining committee [GC 3; Tr at 27-28]. Kaanta requested this information out of a concern for the integrity of the collective bargaining process [Tr at 29-33; 91]. Specifically, Kaanta suspected that Union President Dennis Raymond worked for another company that was a subcontractor of Respondent [Tr at 32]. Kaanta believed that

¹ All dates hereafter are in 2012, unless otherwise indicated.

this might present a conflict of interest for President Raymond and he wished to address this with the Union to ensure a fair bargaining process for the employees [32-33; 91].

On or about June 12, Kaanta handed his written request to Respondent's Director of Human Resources John Kaminski [Tr at 28; 81]. Kaminski agreed to take a look at the request [Tr at 29; 81]. This exchange between Kaanta and Kaminski took approximately one minute [Tr at 29; 81].

After receiving the request from Kaanta, Kaminski went to Union President Raymond and asked if Kaanta had made the request on behalf of the Union's bargaining committee [Tr at 111]. Raymond told Kaminski that the request had not come from the bargaining committee [Tr at 111].² It is undisputed that after learning of Kaanta's information request, Local President Raymond did not direct, or even ask, Kaanta to withdraw the request [Tr at 124]. Nor did Raymond forbid Kaanta from making similar requests in the future [Tr at 124]. On June 19, without discussing the matter with Kaanta, Kaminski issued a letter notifying Kaanta that Respondent was denying his information request [GC 4; Tr at 36-37; 83].

On or about August 10, Kaanta submitted a different request to Respondent seeking information regarding employee wage rates [GC 5; Tr at 39-41]. Again, Kaanta's concern was the integrity of the ongoing collective bargaining process [Tr at 39-41; 45; 91]. Specifically, Kaanta wanted to know if Respondent was giving employees wage increases to influence their votes on ratification of a new contract. Kaanta was also concerned that wage increases to members of the bargaining committee might influence their decisions at the bargaining table [Tr at 39-41; 91].

² Kaminski testified that Local President Raymond told him "to not honor the request." This testimony was refuted by Raymond [Tr at 111-112].

Instead of discussing the matter with Kaanta, Kaminski again went to Local President Raymond. Raymond disavowed the request on behalf of the Union [Tr at 116]. Again, it is undisputed that after learning of Kaanta's August information request, Raymond did not direct, or even ask, Kaanta to withdraw the request, or place any limitations on his right to make information requests in the future [Tr at 124].

Following Raymond's disavowal of Kaanta's August information request, instead of simply disregarding the request, or specifically denying it as it had done in June, Respondent issued a warning to Kaanta on August 23, stating:

This is to serve as a verbal warning for continued frivolous requests for information (photocopies of all employee paychecks for a period ending December 1, 2007 and pay period August 5, 2012 and spreadsheets for total hours and pay for each pay period starting with August 12, 2012, and every pay period thereafter, until the contract is ratified) and interfering with the operation of the business. You are not on the Bargaining Committee and fail to work within the parameters of such to bring matters to the Bargaining Committee. We are not individually bargaining with you or any other individual. ***Similar requests such as this will result in further discipline up to and including discharge.*** [GC 6] [Emphasis added].

During the disciplinary meeting, Kaanta asked Kaminski: "You mean if I ask more questions, I could be fired?" Kaminski responded by shrugging his shoulders [Tr at 46].³

QUESTIONS PRESENTED

1. Did the Administrative Law Judge err in disregarding paragraph 8 of the Complaint and not making findings of fact and conclusions of law as to whether Respondent violated Section 8(a)(1) by threatening Union Steward Thomas Kaanta with discipline, up to and including discharge, if he makes any information requests in the future that Respondent deems "frivolous." [Exceptions 1-11].
2. Did the Administrative Law Judge err in not concluding that Respondent violated Section 8(a)(1) by threatening Union Steward Thomas Kaanta with discipline, up to and including discharge, if he makes any information requests in the future that Respondent deems "frivolous." [Exceptions 1-11].

³ It is undisputed that Union President Raymond was neither complicit in, nor agreed with, Respondent's decision to issue the disciplinary warning to Kaanta [Tr at 124; 121].

APPLICABLE LAW AND ARGUMENT

Section 8(a)(1) of the Act makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. It is well established that for the purpose of Section 8(a)(1), the motive for the employer’s action is irrelevant; if the action, or sequence of actions, reasonably tends to interfere with the free exercise of rights under the Act, it is unlawful. *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999) (“A finding that an employer has interfered with, restrained, or coerced employees in their exercise of statutory rights does not depend on the respondent’s motive or the success or failure of the coercion, but depends instead on whether the respondent engaged in conduct that may reasonably tend to interfere with the free exercise of rights under the Act”).

In *DaimlerChrysler Corporation*, 331 NLRB 1324 (2000), the Board found that an employer’s warning to a union steward that continued “harassing” information requests could result in discipline was an unlawful threat that violated Section 8(a)(1). In that case, the respondent issued a memorandum to the steward in response to a letter the steward sent to a company executive. The respondent’s memorandum accused the steward of making harassing and intimidating information requests, and concluded: “This is to advise you that continuance of this type of inappropriate, harassing activity may result in disciplinary action being taken up to and including discharge.” The administrative law judge, affirmed by the Board, held:

It is not necessary to decide whether Respondent had legitimate cause to threaten (the steward) with disciplinary action on account of his May 6 memo to (the company executive). (The respondent’s) May 6 memo to (the steward) is much broader in scope. The (respondent’s) memo begins by characterizing most of (the steward’s) information requests as attempts to harass, intimidate, and create work.

The memo, in threatening disciplinary action for “this type of inappropriate, harassing activity,” can be reasonably read to include virtually any request for information submitted by (the steward). When (the steward) asked Chrysler to

specify which of his letters fell into the category of correspondence for which he might be disciplined, it failed to do so.

Since the Company's threat is to discipline (the steward) for virtually any request that it finds offensive, it has clearly interfered with, restrained, and coerced him in his protected rights as a union steward.

The instant case is remarkably similar to *DaimlerChrysler*. In both cases, the respondent threatened a union steward with future discipline regarding the manner in which he performed a function of his union office – making information requests. In both cases, the respondent described the prohibited behavior in a way that was vague and overbroad – information requests that were “harassing” or, in the instant case, “frivolous.” And, in both cases, the future discipline is dependent on the respondent's subjective determination regarding the manner in which the steward carries out a function of his union office.

Just as in *DaimlerChrysler*, Respondent's overbroad prohibition against “similar,” “frivolous” information requests can reasonably be read to include virtually any request for information submitted by Kaanta. Indeed, Respondent's prohibition casts a much wider net and is a more egregious infringement of Section 7 rights than the threat in *DaimlerChrysler* because Respondent's August 23 verbal warning prohibiting “frivolous” information requests, by definition, forbids any information request that Respondent subjectively determines are unnecessary, lacking in substance and/or unworthy of serious consideration.⁴

It is undisputed that in his capacity as a steward, Kaanta not only had the right to make information requests, he was specifically authorized to do so as part of his duty to investigate and settle grievances. The August 23 warning places a prior restraint on any future information

⁴ Obviously, in the context of the adversarial grievance-arbitration process it is not uncommon for a party to believe that the position of the opposite party lacks merit and, perhaps, unworthy of serious consideration. Information requests made by Kaanta in support of, or to investigate, a position on a grievance that Respondent believes to be without merit would then necessarily fall within the prohibition established by Respondent's threat.

requests by Kaanta that Respondent might consider frivolous. To avoid discipline, therefore, Kaanta must curtail the legitimate exercise of his duties as a steward under Section 7.

Kaminski testified that he intended the verbal warning to include only information requests by Kaanta made outside the scope of his authority as a steward [Tr at 90]. But Respondent's intent is irrelevant. *Naomi Knitting Plant*, supra at 1280. The question in the context of an independent 8(a)(1) allegation is whether Respondent's actions would tend to interfere with Mr. Kaanta's Section 7 rights. Indeed, there is no evidence that Kaminski ever explained to Kaanta that the verbal warning against making frivolous information request did not apply to requests made "within the scope of his responsibility." Instead, when Kaanta asked Kaminski: "You mean if I ask more questions, I could be fired?" Kaminski responded by shrugging his shoulders [Tr at 46]. At the hearing, when Kaminski was asked what he meant by the warning's prohibition on "similar requests such as this," he testified: "[b]asically requesting additional information that would be considered collective bargaining" [Tr at 90].

Any argument by Respondent that the verbal warning, on its face, applies only to information requests outside of Kaanta's authority must likewise fail. At best, the warning is ambiguous as to the scope of prohibited information requests. The prohibition on "similar requests" in the final sentence of the warning is objectively meaningless. Longstanding precedent requires that the risk of ambiguity be held against the promulgator of such a directive rather than against the employees who are supposed to abide by it. See e.g., *ITT Federal Services Corp.*, 335 NLRB 998, 1002-1003 (2001).

As to the verbal warning's directive that Kaanta get authorization or go through bargaining committee prior to making information requests, Respondent has no basis for contending that it has the right to dictate unilaterally the manner in which Union officials carry

out their duties. As set forth above, nothing in the collective bargaining agreement provides Respondent with that power. More important, such an assertion runs counter to “[t]he entire process of collective bargaining.” As the Supreme Court noted in *Metropolitan Edison Company v. NLRB*, 460 U.S. 693, 704 (1983), at 704-705:

If, as the company urges, an employer could define, unilaterally, the actions that a union official is required to take, it would give the employer considerable leverage over the manner in which the official performs his union duties. Failure to comply with the employer's directions would place the official's job in jeopardy. But compliance might cause him to take actions that would diminish the respect and authority necessary to perform his job as a union official.

As set forth above, it is undisputed that neither the collective bargaining agreement, nor the Union’s by-laws or constitution, place any such limitation or prerequisite on Kaanta’s right as a Union steward to ask Respondent for information relevant to his representational functions [Tr at 47-49; 122-124]. It is likewise undisputed that Local President Raymond never placed any limitations on Kaanta’s right to make information requests in the future [Tr at 124]. To be sure, the only limitation placed on Kaanta’s legitimate exercise of his right to request information was imposed by Respondent.

During its closing argument, Respondent maintained that it is privileged to threaten Kaanta with discipline for future information requests because his June and August requests were not protected union activity. Citing an Advice Memorandum from the Office of the General Counsel, Respondent argued that where there is no statutory duty to provide information, the underlying request is not protected activity [Tr at 153]. This is obviously wrong. Were it otherwise, any request for information a union is not entitled to receive under Section 8(a)(5) – e.g., information regarding a non-mandatory subject of bargaining – would be unprotected. Simply put, just because an employer does not have a duty to provide information, it does not follow that the act of asking for the information is unprotected. As such,

Respondent's argument that the Union's subsequent disavowal of the information requests rendered Kaanta's act of requesting information unprotected is baseless.⁵

In any event, even if one accepts that Kaanta was not engaged in protected union activity when he made his June and August information requests, the Board made it absolutely clear in *DaimlerChrysler* that in the context of an unlawful threat which encompasses future protected activity, it is not necessary that the event precipitating the threat be protected activity. The judge in *DaimlerChrysler* specifically concluded: "It is not necessary to decide whether Respondent had legitimate cause to threaten (the steward) with disciplinary action on account of his May 6 memo to (the company executive). (The respondent's) May 6 memo to (the steward) is much broader in scope." *DaimlerChrysler*, supra at 1327.

The cases cited by Respondent during its closing argument bear no resemblance to the instant matter [Tr at 153-159]. *Tampa Tribune*, 345 NLRB 369 (2006), stands for the proposition that an individual employee involved in a personal protest regarding his terms and conditions of employment is not protected by the Act. That case does not apply here because Kaanta's request for information was related to the integrity of the collective bargaining process, an intra-union matter, not his terms and conditions of employment.⁶

Respondent also relies on *Silver State Disposal*, 326 NLRB 84 (1998) [Tr at 157]. In that case, the employer argued that a wildcat strike violated the collective bargaining agreement because the Union had waived the employees' Section 7 right to strike. *Silver State Disposal* is also distinguishable because in the instant case there is no evidence that the Union waived

⁵ Because the Union disavowed Kaanta's June and August information requests, the General Counsel has not at any time contended that Respondent had a duty to provide the requested information.

⁶ The application of *Emporium Capwell v. Western Addition Community Organization*, 420 U.S. 50 (1975) cited by Respondent and the ALJ is entirely misplaced in the context of the instant matter. Kaanta was not engaged in an effort to bargain with Respondent [Tr at 69-70]. Indeed, Kaminski testified that he never believed Kaanta was attempting to bargain directly with Respondent on behalf of himself or any other employees [Tr at 95].

Kaanta's right to make future information requests, or, for that matter to take steps (such as asking Respondent for information) related to his participation in the democratic intra-union process, which was the basis for his June and August information requests.

Finally, Respondent has also argued that this matter is moot because the disciplinary warning issued to Kaanta has expired [Tr at 103]. Be that as it may, Respondent's threat against Kaanta's future activity has obviously not expired. Moreover, an allegation is only deemed moot if a respondent effectively repudiates its unfair labor practice. *Passavant Memorial Hospital*, 237 NLRB 138 (1978). The Board permits a charged party to avoid liability for unlawful conduct only when it (1) repudiates the conduct in a matter that is timely, unambiguous, specific to the coercive conduct, free from other proscribed conduct, adequately published to employees, and (2) the repudiation is accompanied by assurances against further interference. *Id* at 138. The mere "expiration" of the verbal warning in the instant case does not satisfy the *Passavant* criteria for effective disavowal.

In sum, Respondent's August 23 verbal warning, on its face, unlawfully threatens Mr. Kaanta with discipline and discharge for performing one of his duties as a union steward if done in a manner that Respondent subjectively determines to be inappropriate. The Board has held that such a blanket threat plainly violates the Act. There is no basis for a different result in the instant case.

Thomas Kaanta was elected by his co-workers to represent their interests at work and protect their rights under the collective bargaining agreement. Kaanta will hold his steward position until at least June 2015. He cannot effectively execute the duties of his position under the cloud of Respondent's August 23 threat. Respondent's actions are an infringement not only

of Kaanta's rights as a steward, but the rights of the employees who elected him to be fairly represented by the Union.

CONCLUSION

For the reasons set forth above, Counsel for the General Counsel respectfully urges the Board to: (1) find that the Administrative Law Judge erred by failing to conclude that Respondent violated Section 8(a)(1) by threatening Union Steward Thomas Kaanta with discipline, up to and including, discharge if he makes information requests in the future that Respondent considers to be "frivolous," and (2) issue an appropriate remedial order.

Dated at Grand Rapids, Michigan, this 21st day of January, 2014.

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