

**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 REPLY BRIEF TO RESPONDENT’S ANSWERING BRIEF IN
RESPONSE TO GENERAL COUNSEL’S EXCEPTIONS TO ADMINISTRATIVE LAW
JUDGE’S BENCH DECISION**

I. Introduction

Pursuant to Section 102.46(h) of the Board’s Rules and Regulations, the General Counsel hereby replies to Respondent’s Answering Brief to the General Counsel’s Exceptions. In the Exceptions, the General Counsel argues that the Administrative Law Judge erred by failing to make 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 that Respondent deems “frivolous.” In its Answering Brief, Respondent argues: (1) that the Complaint does not allege that Respondent interfered with Steward Kaanta’s right to make information requests in the future [R Brief at 2, 6 and 7]¹; (2) that the General Counsel has changed his theory of the case [R Brief at 2, 7]; (3) that

¹ The following references are used in these exceptions:

- Transcript: Tr (followed by page number)
- General Counsel Exhibit: GC (followed by exhibit number)
- Administrative Law Judge’s Decision: ALJD (followed by page number)
- General Counsel’s Exceptions and Supporting Brief: GC Exc./Brief (followed by page number)
- Respondent’s Answering Brief: R Brief (followed by page number)

Respondent's August 23 threat to discipline or discharge Steward Kaanta for making "similar," "frivolous" information requests was not unlawful because the threat was not precipitated by protected activity [R Brief at 2-3, 12-13]; and (4) that despite the August 23 warning's plain language, Steward Kaanta should have understood that it did not apply to his right to engage in protected activity. For the reasons set forth below, the General Counsel respectfully submits that Respondent's arguments are entirely without merit.

II. The General Counsel's Reply

A. The Complaint Adequately Alleges that Respondent Unlawfully Threatened the Charging Party for Filing Information Requests.

Respondent argues that "nowhere in the Complaint" is it alleged that Respondent violated the Act by making threats that interfered with Steward Kaanta's right to make future information requests. Respondent's argument is belied by the pleadings and the undisputed facts, and is unsupported by extant law and rules of procedure. Complaint paragraph 8 states:

About August 23, 2012, Respondent, by its agent, John Kaminski, at the Grand Rapids plant, threatened employees with discipline for engaging in Union and protected concerted activities.²

Complaint paragraph 10 states:

By the conduct described above in paragraph 8, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

It is well established that "all that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense." *Pan American Grain Co., Inc.*, 343 NLRB 318, 326 fn. 16 (2004) quoting *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th

² In its Answer to paragraph 9(a) of the Complaint, Respondent admits that on August 23, 2012, it issued a verbal warning to Steward Kaanta. It is undisputed that the warning states, in part: "This is to serve as a verbal warning for continued frivolous requests for information ... Similar requests such as this will result in further discipline up to and including discharge [GC 6]."

Cir. 1951) affd. 345 U.S. 100 (1953). Moreover, Section 102.15 of the Board's Rules and Regulations states that a complaint "shall contain ... (b) a clear description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives by whom committed."

The Complaint allegations meet these criteria. Respondent not only should have recognized, but clearly did recognize, that the August 23 verbal warning and the facts related to it were relevant to these allegations and were being litigated. Indeed, in its closing argument at the hearing, Respondent specifically argued that the August 23 verbal warning was not a threat against Steward Kaanta making future information requests, stating: "The notion that this is a restraint of Mr. Kaanta's legitimate exercise of his authority as a steward is absolutely unfounded on the face of the document" [Tr at 150].

It is apparent that the Complaint adequately alleges that Respondent made threats that interfered with Steward Kaanta's right to make future information requests. Respondent obviously recognized this at the hearing, and any argument to the contrary at this juncture is specious.

B. The General Counsel's Theory of the Case Has Not Changed

Respondent also asserts in its Answering Brief that the General Counsel has changed his theory of the case in the Exceptions ["General Counsel's Exceptions seek the proverbial 'second bite at the apple' by offering a new theory and new allegations. The General Counsel now argues that the verbal warning at issue violates Section 8(a)(1) on the theory that it might have the effect of discouraging Kaanta from making future information requests."] [R Brief at 7]. The

assertion by Respondent that the General Counsel has changed his theory is not only baseless, it is baffling.

During the opening statement at the trial, Counsel for the General Counsel stated:

The General Counsel alleges two violations with respect to the Employer's actions. First, the threat to discharge Mr. Kaanta, a union steward, for making information requests violated Section 8(a)(1). The Respondent's admonition to Mr. Kaanta threatened to discharge him for any information requested that it determined to be, quote/unquote, "frivolous." In his capacity as a steward, Mr. Kaanta not only had the right to make information requests, he was specifically authorized to do so by the Union. The Company's threat of discipline and discharge of Mr. Kaanta and its attempt to define and limit his rights as a union steward clearly interfered with, restrained, and coerced him in the exercise of his Section 7 rights [Tr at 9-10].

In its closing argument, Counsel for the General Counsel stated:

In this case, it is undisputed that the Respondent issued Union Steward Kaanta, the Charging Party in this case, a verbal warning and threatened him with discipline up to and including discharge because of filing two information requests. The Respondent contends that it was privileged to do so because Mr. Kaanta was not engaged in union activity when he made his information requests. As to the 8(a)(1) allegation, the Company's argument must fail because the warning to Mr. Kaanta prohibits "frivolous" requests *in the future*.

...

In *DaimlerChrysler Corporation*, at 331 NLRB 1324, which I provided a copy to Your Honor and to the Respondent, the Board found that a prohibition on a union steward for making "offensive" information requests was overbroad and an unlawful threat. There is no basis for a different result in the case before Your Honor. As to the 8(a)(1) allegation, the Company's intent is irrelevant. The question is whether the Respondent's actions would tend to interfere with Mr. Kaanta's Section 7 rights [Tr at 137-139].

With all due respect to Respondent, if it was not aware of the General Counsel's theory of the alleged 8(a)(1) violation prior to receiving the Exceptions, then it has not been paying attention.

C. Respondent's Threat to Discipline or Discharge Steward Kaanta for any "Similar," "Frivolous" Information Request Can Reasonably be Understood to Encompass Future Protected Activity by Kaanta

Respondent argues that its August 23 memo to Steward Kaanta did not violate the Act because it was “unambiguously directed to requests that were beyond the scope of his authority as a steward.” As an initial matter, it should go without saying that the “scope of (Kaanta’s) authority as a steward” is defined by the Union, not Respondent. In this regard, it is significant to consider the undisputed testimony of Union President Dennis Raymond that 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 request information relevant to his representational functions [Tr at 47-49; 122-124]. Moreover, it is also undisputed that even after the Union told Respondent that it had not previously authorized two particular requests by Kaanta, it did not direct Kaanta to withdraw the requests, and it did not forbid Kaanta from making similar information requests in the future [Tr at 124].

Ultimately, the scope of Steward Kaanta’s authority (i.e., whether he is limited to making information requests related to processing and settling grievances) is irrelevant here because the prohibition in Respondent’s August 23 verbal warning is overbroad. The warning issued to Kaanta does not say that he will only be disciplined for making requests “outside the scope of his authority.” Nor does the warning explain what Respondent believed that scope to be. Likewise, there is no evidence that Respondent ever verbally explained to Kaanta that the August 23 threat/warning did not apply to information requests related to processing and settling grievances. Nor did Respondent explain to Kaanta what it meant by “frivolous” or “similar requests.” Significantly, Respondent had a perfect opportunity to clarify its position. At the time Kaanta received the warning from Respondent, he asked HR Director Kaminski: “You mean if I ask more questions, I could be fired?” Kaminski responded by shrugging his shoulders [Tr at 46].

It is axiomatic that in proving a violation of Section 8(a)(1), the focus is on whether the respondent engaged in conduct that may reasonably tend to interfere with the free exercise of rights under the Act. Respondent's August 23 warning is a textbook example of unlawful interference.

D. Respondent's Threat to Discipline or Discharge Steward Kaanta is Overbroad and Violates Section 8(a)(1) Regardless of Whether Kaanta Had Previously Engaged in Union Activity.

Respondent further argues that the General Counsel "failed to prove that Kaanta was engaged in activity protected by Section 7 ... Therefore, the Board should deny the Exceptions and dismiss the Complaint in its entirety." There is no basis in law to support Respondent's argument that a threat which encompasses protected activity only violates the Act if it derives from, or is precipitated by, protected activity.

At the hearing, the General Counsel argued that even though Respondent did not have a duty under Section 8(a)(5) to respond to Steward Kaanta after the Union disavowed his request, he nevertheless was engaged in protected activity when he made the requests. This argument was based on the undisputed fact that Steward Kaanta made the requests as an initial step to address his concerns about the integrity of the ongoing collective bargaining negotiations. It is well established that the Act does not foreclose employees from taking such steps as they deem necessary to align their union with their position, and that employer interference with such activity is an infringement of the right to self-organization. *NuCar Carriers, Inc.*, 88 NLRB 75, 76 (1950).

Despite this longstanding precedent and the undisputed facts in this case, the Administrative Law Judge determined that Steward Kaanta was not engaged in protected activity when he made his June and August 2012 information requests. The General Counsel believes

the Judge erred in this regard.³ But for purposes of these Exceptions, this is neither here nor there. The General Counsel’s argument in this case is that Respondent’s August 23 threat of discipline or discharge to Steward Kaanta was unlawful regardless of whether the activity that precipitated it was protected, because Respondent’s threat was much broader in scope and encompassed future protected activity.

This is precisely what the Administrative Law Judge concluded and the Board held in *DaimlerChrysler Corp.*, 331 NLRB 1324 (2000). In that case, the respondent threatened a steward with discipline regarding future information requests, not in response to an information request by the steward, but apparently in response to a letter the steward sent to a company executive. *Id.* at 1327, fn. 3. The Judge decided, and the Board affirmed, that **“[i]t 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). *Id.* at 1327. The Judge concluded: “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.” *Id.*

³ The General Counsel has not filed Exceptions to the ALJ’s recommended dismissal of the 8(a)(3) allegation. The General Counsel’s primary concern in this case is the expeditious restoration of Steward Kaanta’s Section 7 right to perform his representational function on behalf of the Union, and the employees who elected him, free from the threat of discipline and discharge. As to the 8(a)(3) allegation, the record is clear that Respondent has removed the warning from Steward Kaanta’s file, consistent with its personnel policies, and it cannot be used against him in the future [Tr at 103, 106]. An unlawful threat, however, does not expire; it must be remedied by the Board.

Just as in *DaimlerChrysler*, it is not necessary to decide whether Kaanta's August 2012 information request constituted protected activity. Respondent's August 23 warning/threat is much broader in scope. The prohibition against "similar," "frivolous" information requests can reasonably be read to include legitimate requests for information submitted by Kaanta on behalf of the Union. Indeed, as the General Counsel argues in his Exceptions, Respondent's prohibition in the instant case is a more egregious infringement of Section 7 rights than the threat in *DaimlerChrysler* because Respondent's threat prohibits information requests that Respondent subjectively determines to be unnecessary, lacking in substance and/or unworthy of serious consideration (i.e., frivolous).

It is clear from the Board's decision in *DaimlerChrysler*, that a threat of discipline for engaging in protected activity in the future need not be precipitated by, or derived from, protected activity.⁴ Threatening Kaanta, a steward authorized by his Union to make information requests (even if that authority is limited to information requests related to processing and settling grievances) with discipline or discharge for making "frivolous" requests absolutely interferes with his Section 7 rights, as well as the rights of the employees who elected him, and every current and future Union steward at Respondent's facility.

III. Conclusion

After the Union disavowed Steward Kaanta's August 10, 2012 information request, Respondent could have simply disregarded the request; thrown it in the trash and moved on. Or, it could have told Kaanta that the Union president had overruled his request and that Respondent

⁴ See also *Yale University*, 330 NLRB 246, 249-250 (1999) citing *New Fairview Hall Convalescent Home*, 206 NLRB 688, 747 (1973) [Employer lawfully warned employees against participating in unprotected activity (unprotected work stoppages), but violated Section 8(a)(1) because warning broadly prohibited employees from engaging in protected activity ("any strike, work stoppage, slow down, or withholding of any good or services"). Per the ALJ, requiring employer to post a notice explaining the limitation of its warning clarifies ambiguity, and "[t]he Company should not object to this opportunity to make its position clear." *Id.* at 747 (citation omitted)].

wouldn't be providing the information. Instead, Respondent threatened to fire Steward Kaanta if he made any "similar," "frivolous" request in the future. Because Respondent's prohibition can reasonably be understood to encompass future protected activity by Kaanta, it violates Section 8(a)(1).

For the reasons set forth in its Exceptions, Brief in Support, and above, the General Counsel respectfully urges the Board to find that the Administrative Law Judge erred by failing to conclude that Respondent violated Section 8(a)(1), and that it issue an appropriate remedial order.

Dated at Grand Rapids, Michigan, this 13th day of February, 2014.

/s/ Steven Carlson _____
Steven Carlson
Counsel for the General Counsel
National Labor Relations Board
Region Seven, Resident Office
Gerald R. Ford Building
110 Michigan Street, NW, Room 299
Grand Rapids, MI 49503-2363
steven.carlson@nlrb.gov