JD–13–14
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BATTLE'S TRANSPORTATION, INC.

and

Case Nos.5–CA–98088
5–CA–109554
5–CA–111085

JEROME KEARNEY, an Individual

Synta E. Keeling, Linda S. Harris Crovella, Greg Beatty, Esqs.
for the General Counsel.
Paul W. Mengel, III, Nicole L. DeVries, Esqs. (Piliero Mazza, PLLC)
Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on January 27-30, 2014. Jerome Kearney, the Charging Party, filed charges on February 8, July 22 and August 13, 2013. The General Counsel issued a consolidated complaint on October 30, 2013.

The complaint alleges several violations of Section 8(a)(1) alleging restraint, interference and coercion of Jerome Kearney, who was the union steward of the Amalgamated Transit Union (ATU) Local 1764. It also alleges violations of Section 8(a)(3) and (1) regarding Respondent's alleged discriminatory refusal to transfer Kearney back to Respondent's contract with the Department of Veterans Affairs (VA) in accordance with his seniority in January 2013, several instances of discipline between September 2012 and January 28, 2013, and Kearney's suspension of August 8, and termination on August 16, 2013.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Battle's Transportation, Inc. (BTI) , is a corporation, with an office and principal place of business in Washington, D.C. BTI provides wheelchair accessible van transportation to a number of clients, including the Department of Veterans Affairs (VA). Respondent derives gross revenues in excess of $500,000 and purchases and received goods, materials or services worth at least $1,000 from points outside of the District of Columbia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning

of Section 2(2), (6), and (7) of the Act and that the Union, ATU Local 174, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent hired Jerome Kearney as a van driver on May 3, 2010. BTI regarded Kearney as a stellar employee at least through February 2012. On August 26, 2012, Kearney became ATU Local 174's shop steward at BTI's Washington, D.C. facility. Respondent became aware of this no later than September 4, 2012. The Union and Respondent had a collective bargaining agreement that ran from May 28, 2010 to May 27, 2012. Negotiations for a successor contract began in the spring of 2012. As of the January 2014 hearing in this matter, Respondent and the Union had not reached agreement on a successor contract.

Section 8(a)(1) allegations

Complaint paragraph 5

The General Counsel alleges that Respondent is in violation of the Act by requiring employees to sign a confidentiality agreement which is attached to the Complaint as Appendix A. In pertinent part the agreement provides:

> 1. The Employee acknowledges that, in the course of employment by the Employer, the Employee has, and may in the future, come into the possession of certain confidential information belonging to the employer including but not limited to human resources related information, drug and alcohol screening results, personal/bereavement/family leave information, insurance/worker's compensation, customer lists (address, telephone number, medical/health related), investigations by outside agencies (formal and informal) financial, supplier lists and prices, fee/pricing schedules, methods, processes or marketing plans.
> 2. The Employee hereby covenants and agrees that he or she will at no time, during or after the term of employment, use for his or her own benefit or the benefit of others, or disclose or divulge to others, any such confidential information.

Complaint paragraph 6

On August 27, 2012, Tina Clarkson, Respondent's Chief Operating Officer, issued a memo to BTI's drivers working on the Veteran Affairs Contract. The memo stated in pertinent part:

> We were contacted this morning by the Front Office staff at the VA Medical Center. They wanted to report that Battle's Drivers notified clients that they were transporting that Thursday was the last day of our contract. They interpreted it that it was the last day we would be transporting them.
>
> It is important to correct this miscommunication and to advise all drivers that you are **<u>not to communicate any Battle's company business with our clients.</u>** If

there is information to communicate, the management staff will handle these matters.

Legal Analysis regarding complaint paragraphs 5 and 6

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). A rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; 2) that the rule was promulgated in response to protected activity or 3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). I conclude that neither the confidentiality agreement nor Tina Clarkson's August 27, 2012 explicitly restricts employees' Section 7 rights. Neither was promulgated in response to protected activity nor was either applied to restrict the exercise of Section 7 rights. The only question is whether they can reasonably be construed by employees to restrict their rights.

I believe the answer is easiest with regard to Clarkson's August 2012 memo. On its face the memo addresses a specific recent problem (misinforming a client as to the termination of Respondent's services) and would be reasonably construed to address that problem and not employees' Section 7 rights;. I find that it would not be reasonably construed to restrict Section 7 activity. I therefore dismiss complaint paragraph 6.

The confidentiality agreement is a closer call. However, given the examples of the types of information described in the agreement, I find that it would not be construed on its face as restricting employees in discussing wages, hours and other terms and conditions of employment. I therefore dismiss paragraph 5 as well.

Complaint paragraph 7

Jerome Kearney testified that on or about September 21, 2012, he was summoned to a meeting in Tina Clarkson's office. He stated the Clarkson first asked him why he hadn't told her that he was becoming the shop steward. Kearney replied that he did not think he had to do so. Clarkson told him that she thought it was common courtesy to tell her.

Kearney also testified that Clarkson held up the collective bargaining agreement and said to him, "you need to let us handle this, and if you have any problems, you need to come to us and let us know that you have any problems," Tr. 179-80. Clarkson testified that she never told Kearney "not to engage in negotiations regarding this collective bargaining agreement," Tr. 371-72. She did not directly contradict Kearney's testimony about the September 21, 2012 conversation. Therefore, I credit Kearney's account.

The test of whether this statement violates Section 8(a)(1) is whether Respondent's conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights, *Alliance Steel Products,* 340 NLRB 495 (2003); *Southwestern Bell Telephone Co.,* 251 NLRB 625, 631-32 (1980). In *Southwestern Bell,* the Board affirmed the decision of Judge Wacknov, who found that the company, by manager Larry Barnes, did not

violate the Act. Barnes told the company's union stewards that they, "would better serve the interests of both the Union and Respondent by asserting their influence of their positions to attempt to deter or dissuade employees from filing obviously nonmeritorious or nuisance grievances, thus resulting in a more harmonious relationship." I find Clarkson's statement to be a plea for a harmonious relationship and passivity on the part of the stewards, similar to that in the *Southwest Bell* case. I conclude that her statement does not rise to the level of a Section 8(a)(1) violation.

In *King Soopers, Inc.,* 332 NLRB 23, 26-27 (2000) the Board found a manager's threat to the shop steward's employment status, while pursuing a grievance, violated Section 8(a)(1). Clarkson's comment is closer to the statement in *Southwest Bell* and thus I find that Clarkson's comment was not coercive, so I dismiss this complaint allegation.

Complaint paragraph 8

The General Counsel alleges that Respondent violated the Act by asking the Union to remove Jerome Kearney as shop steward on about January 29, 2013. Tina Clarkson concedes that she did so, but Respondent argues that it was privileged to do so due to Kearney's conduct while representing unit driver Donald Dash in a disciplinary matter.

On January 24, 2013, Dash was terminated for not securing or improperly securing a passenger[1] in a wheelchair in his van. The passenger apparently slipped out of the wheelchair and was injured. At Dash's termination meeting on January 28, Kearney represented Dash. Attending the meeting for management were Tina Clarkson, Renee Williams, Respondent's operations manager and Debra Holton, the company safety manager. Holton stated that she spoke with 2 of the 4 passengers in the van and confirmed that Dash did not strap the injured passenger down. Kearney then stated that he spoke to another of the passengers, who said that the injured passenger tampered with the restraint straps.

The next day Tina Clarkson emailed Wayne Baker, the Union's president. She stated:

> It is not within the realm of a Union Steward position to contact Company clients and question them about their account of an accident. There are company protocols and procedures relative to an accident investigation none of which include the Union Steward. I consider this an act of insubordination and of Jerome acting outside the scope of his duties.

G.C. Exh. 6.

Clarkson did not specify which company protocols and procedures Kearney violated. Clarkson asked Baker to assign another steward to take Kearney's place. Baker responded by stating that Kearney was entitled to contact the passenger in the course of his representation of a unit member and rejected Clarkson's request. His also alleged that the request was a violation of Section 8(a)(1) and (2) of the Act, G.C. Exhs. 6 (a) and (b).

[1] Respondent refers to passengers as "clients."

Board law is crystal clear that unions and employers have to the right to select whomever they choose to represent them for purposes of collective bargaining and grievance adjustment. Conversely, the parties must deal with the other's chosen representative except in extraordinary circumstances not present in this case, *United Parcel Service,* 330 NLRB 1020 (2000).

There are no such extraordinary circumstances in this case. Respondent has not demonstrated that Kearney violated any company rule in contracting the passenger. It has also not established that he breached his obligation to comply with the Health Insurance Portability and Accountability Act (HIPPA), R. Exh. 3.

HIPPA generally restricts the disclosure of "protected health information (PHI) ." Respondent has not established that Kearney divulged or sought "protected health information" as that is defined by the HIPPA regulations. PHI is generally defined as:

Individually identifiable health information. Individually identifiable health information is that which can be linked to a particular person. Specifically, this information can relate to:

- The individual's past, present or future physical or mental health or condition,
- The provision of health care to the individual, or,
- The past, present, or future payment for the provision of health care to the individual.

Common identifiers of health information include names, social security numbers, addresses, and birth dates.

Assuming that the information sought and acquired by Kearney was PHI, HHS has made clear that use of such information by union representatives to rebut allegations of employee misconduct do not violate the HIPPA statute.

The Federal Department of Health and Human Services promulgated regulations to implement HIPPA. These regulations at 45 C.F.R.164.506 state that a covered entity may use or disclose protected health information for treatment, payment or "health care operations," with certain exceptions not relevant to this case.

"Health care operations" are defined at 45 CFR 164.501(6). This term includes, "[B]usiness management and general administrative activities of the entity, including, but not limited to: (iii) Resolution of internal grievances.

The preamble to HHS' final rule at 65 Fed. Reg. 82,462 at 82,491 (December 28, 2000) states:

> We also add to health care operations disclosure of protected health information for resolution of internal grievances. These uses and disclosures include disclosure to an employee and/or employee representative, for example when the employee needs protected health information to demonstrate that the employer's allegations of improper conduct are untrue.

In this case, Respondent did not refuse to deal with the Union's choice of a steward; it merely asked the Union to replace Kearney as steward. The Union then rejected the request. The General Counsel has not cited any cases for the proposition that a request to replace a union

or employer representative, without a refusal to deal with that representative, is a violation of the Act.

However, Jerome Kearney received a copy of Clarkson's letter and the Union's response, Tr. 195-196. Although, it is unclear whether he received a copy from Respondent, or only from the Union, I find that it was reasonably foreseeable that Kearney would be informed of Respondent's request. Therefore, I find that Respondent violated Section 8(a)(1) in requesting his removal as steward because the request was unjustified and coercive.

Section 8(a)(3) allegations

Complaint paragraph 9

Subparagraph 9(a): Alleged reduction in overtime hours

The General Counsel alleges that Respondent coerced Jerome Kearney by reducing his hours of employment between August 29, 2012 and December 17, 2012. During this period Kearney was driving passengers on the Veterans Affairs contract. He was guaranteed wages for 40 hours of work, if on the clock, regardless of how much time he spent driving. Kearney alleges that his opportunity to earn money with overtime was reduced after he became a union steward. Respondent's payroll records, R. Exhs. 13 and 14, indicate that this was not so for the period after September 28. However, the records for September 2012, prior to September 28 are not in the record. Payroll records for some weeks in June and July 2012 show Kearney was paid for less than 40 hours a week. Thus, there is no conclusive evidence with regard to this complaint allegation. I therefore dismiss it.

Subparagraph (b): September 2012 suspension

Respondent suspended Kearney for three days on September 17, 2012. While driving passengers for the Veterans Affairs, he allegedly refused a request by a dispatcher to pick up a passenger for a different contract. He also allegedly left the VA without authorization. Respondent suspended Kearney for insubordination, abandonment of his route and a gap in his work hours. The Union filed a grievance over the suspension. Respondent paid Kearney for the three days he missed work.

Respondent also claims that it expunged the suspension from its records. It states that this is memorialized in response to the Union's grievance. However, there is no documentary evidence in this record that the suspension and accompanying final written warning, G.C. Exh. 7, were expunged.

The General Counsel seeks a finding that Respondent violated Section 8(a)(3) and (1) by suspending Kearney on September 17, 2012, solely on the grounds that it has not established that it expunged the discipline from its records. However, given the fact that Respondent paid Kearney for his lost time, I find that the General Counsel has not proved that the suspension was motivated by anti-union animus. I therefore dismiss this allegation.

Subparagraph (c): verbal counselings for insubordination and failure to properly complete Respondent's Daily Vehicle Inspection Report

On January 9, 2013, while doing his pre-trip inspection report, Kearney noticed that the right headlight had burned out on his van. He noted this on his Daily Vehicle Inspection Report (DVI). Kearney then contacted one of Respondent's mechanics who replaced the light. Kearney submitted his DVI without indicating that the headlight had been replaced.

The next day, operations manager Renee Williams questioned Kearney as to whether he had driven his route with an inoperative headlight. Kearney told her the light had been replaced before he left on his route. According to Williams, Kearney became very agitated, raised his voice and ultimately walked out on her. Kearney denies raising his voice. The following day, January 11, 2013, Respondent gave Kearney a verbal warning for being disrespectful and insubordinate towards Williams, G.C. Exh. 11, and another, G.C. Exh. 12, for failing to note that the headlight on his vehicle had been replaced on January 9.

Respondent has disciplined other employees for failure to properly complete the DVI. It has also established that it has a legitimate interest in assuring the accuracy of the Daily Vehicle Inspection Reports even when they show a defect that was corrected. I find that the General Counsel has not established that the warning for failing to note the headlight replacement was motivated by anti-union animus. Since I find Renee Williams to be a generally more credible witness than Kearney, I credit her testimony that Kearney raised his voice and walked out on her. Thus, I find that neither of the warnings issued on January 11 violated Section 8(a)(3) and (1). I note in this regard that during his conversation with Renee Williams on January 10, Kearney was not acting in his capacity as union steward.

Subparagraph 9(d): discriminatory delay in transferring Kearney back to the Veterans Affairs contract

From the December 2010 until December 19, 2012, Kearney was assigned to the Veterans Affairs contract. On December 19, 2012, he and driver Michael Beckwith were transferred from the VA contract to the Charter Health contract. The two drivers suffered a wage loss because VA drivers were paid $14.69 per hour and Charter Health drivers were only paid $12.50 per hour. This transfer was made on the basis of seniority. The General Counsel does not allege that the December 2012 transfer was discriminatory. It may be related to the termination of Respondent's contract with Metro Access.

On January 24, 2013, Respondent terminated Donald Dash, a driver on the VA contract. On January 25, 2013 Michael Beckwith was transferred back to the VA contract, despite the fact that he had less seniority than Kearney, G.C. Exh. 18. Kearney was not transferred back to the VA until June 17, 2013, Tr. 128. Respondent alleges that Kearney's seniority was not honored due to his prior disciplinary record, i.e., failure to properly complete the DVI form and acting in an insubordinate manner towards Renee Williams, when she questioned him regarding the DVI on January 10.

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's

adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[2] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

I find that Respondent violated Section 8(a)(3) and (1) in transferring Beckwirth back to the VA contract instead of Kearney. Respondent was well aware of Kearney's union activity when it failed to transfer him back to the VA contract. I infer animus towards his union activity and discriminatory motive from the pretextual nature of Respondent's explanation for ignoring his seniority, *Norton Audubon Hospital,* 341 NLRB 143, 150-151 (2004).

First of all, there is nothing other than Respondent's self-serving testimony to support its contention that an employee's disciplinary record was to be taken into account in assigning drivers to the VA contract.[3] Respondent's November 19, 2012 memorandum regarding the assignment of drivers to the VA contract mentions only seniority as a consideration for such assignment, Exh. R-7. There is no mention of prior disciplinary records. There is certainly nothing that establishes that Respondent had any policy of ignoring a driver's seniority on the basis on the types of transgressions for which Kearny was disciplined on January 11.[4]

Moreover, the fact that Respondent transferred Kearney back to the VA contract in June 2013 belies its assertion that it had a non-discriminatory reason for transferring Beckwirth back to the VA contract in January 2013 rather than Kearney. At page 17 of its brief, Respondent states, "Mr. Kearney was moved to the VA Contract as a position became available and Mr. Kearney had demonstrated improvements in his disciplinary records." However, on May 2, 2013, Respondent chastised, if not disciplined, Kearney for his delay in signing an authorization form for a back-up check between April 9 and 11, G.C. Exh. 13.[5] In the paperwork given to Kearny upon his termination on August 16, his conduct in April was characterized as "insubordination," G.C. Exh. 9(b). Thus, there does not appear to be any improvement on the part of Kearney from Respondent's perspective that would distinguish Respondent's failure to transfer him back to the VA contract in January and its willingness to do so in June. I therefore find that the decision to ignore his seniority in January 2013 was discriminatory.

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[2] *Flowers Baking Company, Inc.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F. 3d 863 (6th Cir. 1995).

[3] I thus do not credit Tina Clarkson's testimony in this regard.

[4] As to Kearney's "insubordination," it is noteworthy that he did not refuse to perform a job-related task. He apparently walked out on Williams while she presented him with discipline he believed he did not deserve.

[5] In its position statement, G.C. Exh. 18, Respondent also justified disregarding Kearney's seniority on the basis of his contacting a passenger in relation to Donald Dash's termination. However, it apparently reassigned Beckwirth to the VA contract before it was aware that Kearney contacted the passenger.

Subparagraphs (e) and (f): August 2013 suspension and termination of Jerome Kearney

Respondent suspended and then terminated Jerome Kearney as the result of his conduct as the union representative at a disciplinary meeting for employee Marshon Williams on August 8.

Although it is clear that the primary reason for Kearney's discharge was his conduct during this meeting, Respondent also relies on the fact that Kearney did not clock out to attend the meeting, which it contends he was required to do. Nevertheless, I conclude that Respondent would not have suspended or terminated Kearney but for his conduct as Marshon Williams' union representative.

Marshon Williams had been suspended pending a determination of the appropriate discipline to be imposed. She left a passenger in her van while she went into a store either to use the restroom, or to buy something, or both. The passenger complained to Respondent.

The disciplinary meeting for Marshon Williams was conducted at about 1:00 p.m. on August 8, in the conference room at Respondent's main facility. Management was represented by Tina Clarkson and Operations Manager Renee Williams. Marshon Williams and Kearney were the only others present.

I generally credit Renee Williams' account as to what occurred at the meeting. Insofar as Kearney's and Marshon Williams' account differ, I credit Renee Williams' version events over theirs. It is clear that Marshon Williams did not recall very much of what went on. I have no reason to discredit Renee Williams' testimony, while Kearney's testimony is suspect with regard to a number of matters; for example, the shape of the table on August 8, denying that he raised his voice at Clarkson on August 8, and his loss of overtime in the fall of 2012.

After a brief introduction by Clarkson, Renee Williams read the passenger's complaint and Marshon Williams' response. She then asked Marshon Williams what she would have done differently. Marshon Williams apparently contacted a dispatcher who had her wait for the passenger for an extended period of time. I assume that Marshon Williams was claiming that she needed to use a restroom during the trip because she had to wait so long for the passenger beforehand.

Renee Williams said something to the effect that she was not aware that Marshon Williams had contacted the dispatcher. At this point, Kearney sarcastically asked Renee Williams what was her title. Renee Williams responded that Kearney knew her title.

Clarkson asked Kearney to get back to the topic at hand. Kearney said he was talking about the matter at hand. At this point, Kearney began speaking very softly, at times to Marshon Williams. At one point he mentioned the VA. Renee Williams responded that Marshon Williams was not a VA driver.

Kearney kept talking in a low voice (mumbling or muttering according to Clarkson and Renee Williams). It is unclear as to how long he did this or what he was talking about. It is

possible, although not clear that he was asserting that Marshon Williams was being treated disparately compared to other drivers.

When Kearney persisted, Tina Clarkson told him to "shut up." Kearney responded by telling Clarkson to shut up. Kearney got part way out of his chair, slammed his hand on the table in front of Clarkson and called her a liar and stupid in a raised voice.[6] Clarkson called Kearney stupid and then ended the meeting. Kearney and Marshon Williams then left the conference room.[7]

Kearney finished his vehicle routes that afternoon. On the evening of August 8, Renee Williams called Kearney and told him that he had been suspended.

On August 16, Respondent terminated Kearney for allegedly creating a hostile work environment and falsifying documents. The latter refers to his failure to clock in and out to attend the Marshon Williams disciplinary meeting on August 8.[8] The Employee Coaching and Counseling form presented to Kearney on August 16 also cites 2 prior instances of insubordination. These are his confrontation with Renee Williams regarding the Vehicle Inspection Report on January 10[9] and a confrontation with Williams over his delay in signing a disclosure form for a national security background check in April 2013, G.C. Exh. 9(b).[10]

Analysis

Did Respondent violate Section 8(a)(3) and (1) in discharging Jerome Kearney?

It is absolutely certain that Respondent would not have discharged Jerome Kearney but for his conduct at the disciplinary hearing for Marshon Williams on August 8, 2013.[11] A long line of Board cases establish that an employee, who is representing another employee, or a union steward, acting in his or her capacity as a union steward may not be legally discharged for some conduct that is normally considered discourteous or even insubordinate, *Max Factor & Co.,* 239 NLRB 804, 818 (1978); *Postal Service,* 250 NLRB 4, n. 1 (1980). Many of these cases rely on *NLRB v. Thor Power Tool Co.,* 351 F.2d 584, 587 (7th Cir. 1965) in which the Court found a union grievance committee person did not lose the protection of the Act by calling the plant superintendent a "horse's ass." In *Postal Service,* cited above, the Board found that an employee

[6] Kearney denied slamming his fist on the table in front of Clarkson or raising his voice at her, when he testified. In an affidavit to the Board, Kearney admitted to raising his voice. I credit Renee Williams' account of Kearney's conduct over his account for reasons I stated previously.

[7] Marshon Williams was eventually paid for the time she was suspended and apparently received no additional discipline.

[8] Respondent alleges that Kearney similarly falsified documents in not clocking in and out to attend a disciplinary meeting on July 15.

[9] See discussion of complaint paragraph 9(c) above.

[10] The Employee Coaching and Counseling form given to Kearney on May 2, 2013 regarding his conduct in April 2013, G.C. Exh. 13, is ambiguous as to whether he was actually disciplined for his delay in signing the disclosure form for the National Security background check.

[11] So far as this record shows Respondent has never terminated any employee for not clocking in or out, Tr. 66-72, G.C. Exh. 8. Respondent gave a writing warning to an employee who failed to clock in twice in the same month. Tr. 69.

did not lose the protection of the Act, while representing another unit member, because his single obscene remark was spontaneous and provoked by the failure of a supervisor to respond to his inquiry.

The Board set forth the criteria for evaluating an employee's conduct in such situations in *Atlantic Steel Co.,* 245 NLRB 814 (1979). Whether otherwise protected activity has lost the Act's protection is determined by balancing four factors: 1) the place of discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst and 4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.,* 343 NLRB 1431, 1437 (2004) .

The first factor is fairly easy to apply in the instant case and favors a finding that Kearney did not lost the protection of the Act. The discussion did not take place in a work area and thus was not disruptive of the work process, *Noble Metal Processing, Inc.,* 346 NLRB 795 (2006). The second factor, also favors Kearney at least to the extent that the subject of the discussion was to what extent Marshon Williams should be disciplined. Marshon Williams was paid for her time off and not disciplined further. However, the record does not indicate that the outcome of the disciplinary meeting had been determined when Kearney had his outburst. Indeed, the record indicates the contrary, Tr. 200, 324-25, 406.

Respondent contends that Kearney's outburst occurred when Clarkson tried to stop him from discussing matters irrelevant to Williams' discipline. The problem is that the record is unclear as to what Kearney was talking about to Marshon Williams or under his breath. It is clear that at some point he was attempting to shift culpability from Marshon Williams to the dispatcher who made her wait for the passenger and also wanted to argue that Marshon Williams was being treated disparately compared to other employees. While Renee Williams and Tina Clarkson may have viewed Kearney's interruptions or mutterings as irrelevant to Marshon Williams' situation, it is not clear that they were irrelevant to Kearney or from an objective standpoint.

As to the third factor, it is noteworthy that Kearney's outburst and allegedly disruptive behavior was brief and spontaneous, and that Kearney did not use profanity. I do not credit the testimony of Respondent's witnesses that Clarkson reasonably feared that Kearney would strike her. However, I find that he did make an aggressive gesture in her direction by slamming his hand on the table in front of her.

As to the fourth *Atlantic Steel* factor, Kearney's outburst was provoked, but not by an unfair labor practice. However, in determining that Kearney did not forfeit the protection of the Act, it is relevant that Kearney was not only provoked by being told to shut up but also by Respondent's previous discrimination and animus against him.

I therefore conclude that Jerome Kearney did not forfeit the protection of the Act on August 8, 2013. Thus, I also find that Respondent violated Section 8(a)(3) and (1) in suspending him on August 8, and terminating him on August 16, 2013.

Conclusions of Law

1. Respondent violated Section 8(a)(1) of the Act in requesting that the Union replace Jerome Kearney as its steward on January 29, 2013.

2. Respondent violated Section 8(a)(3) and (1) in ignoring Jerome Kearney's seniority and failing to transfer him back to the Veterans Affairs contract on January 25, 2013.

3. Respondent violated Section 8(a)(3) and (1) in suspending Jerome Kearney on August 8, 2013 and terminating his employment on August 16, 2013.

THE REMEDY

The Respondent, having discriminatorily discharged Jerome Kearney, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Backpay shall also include any loss of earnings and benefits suffered as a result of Respondent's failure to transfer Jerome Kearney to the VA contract on January 25, 2013.

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on their Social Security earnings records.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Battle's Transportation, Inc., Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, coercing or restraining an employee for his or her legitimate discharge of his or her duties as a union steward.

(b) Discharging or otherwise discriminating against any employee for engaging in union or other protected activity, including discharging their duties as a union steward.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jerome Kearney full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jerome Kearney whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision. This includes any loss of earnings and benefits suffered as a result of Respondent's failure to transfer Jerome Kearney to the VA contract on January 25, 2013.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and suspension, and within 3 days thereafter notify Jerome Kearney in writing that this has been done and that the discharge and suspension will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its Washington, D.C. facilities copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 25, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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13 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., March 26, 2014.

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT restrain, interfere with or coerce you for the legitimate exercise of your duties as a union steward.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in union or other protected activity, including discharging your duties if you are a union steward.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jerome Kearney full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jerome Kearney whole for any loss of earnings and other benefits resulting from his discharge and suspension, less any net interim earnings, plus interest compounded daily.

WE WILL make Jerome Kearney whole for any loss of earnings and benefits suffered as a result of our failure to transfer Jerome Kearney to the VA contract on January 25, 2013, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and suspension of Jerome Kearney.

WE WILL, within 3 days thereafter, notify Jerome Kearney in writing that this has been done and that the discharge and suspension will not be used against him in any way.

BATTLE'S TRANSPORTATION, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.