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

DURHAM SCHOOL SERVICES, L.P.,

and **Case No. 5–CA–106483**

TEAMSTERS LOCAL UNION NO. 776.

Counsel:

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DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves two distinct sets of allegations. First, the government alleges that an employee received an unlawful disciplinary warning for removing—despite being ordered to stop—paper taped across the facility's union bulletin board by management in an effort to block employees from viewing a union posting. The government also alleges that as this encounter concluded the facility manager impliedly and unlawfully threatened the employee with discharge. Second, the government alleges that the employer unlawfully refused to collectively bargain by delaying the commencement of collective-bargaining negotiations and by refusing to furnish and/or delaying furnishing the union with requested information.

As discussed herein, I find that the allegation related to the disciplining of the employee is properly deferred to the settlement already reached between the employee's union and the employer as part of their labor agreement's dispute resolution procedure. I further find that as the incident at the bulletin board concluded the employee was unlawfully threatened by management with an implied threat of discharge. As to the bargaining allegations, I reject the government's claim that the employer unlawfully delayed collective bargaining, but find that, as alleged, the employer unlawfully failed to furnish and delayed the furnishing of requested information to the union.

STATEMENT OF THE CASE

On June 4, 2013, Teamsters Local Union No. 776 (Union) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by Durham School Services, L.P. (Durham), docketed by Region 5 of the National Labor Relations Board (Board) as Case 05–CA–106483. Based on an investigation into the charge, on August 16, 2013, the Board's Acting General Counsel, by the Regional Director for Region 5 of the Board, issued a complaint alleging that Durham violated the Act. Durham filed an answer denying all alleged violations of the Act.

A trial was conducted in this matter on January 21, and February 11, 2014, in Baltimore, Maryland. Counsel for the General Counsel, the Union, and the Respondent filed post-trial briefs in support of their positions by March 18, 2014. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

Durham maintains an office and place of business in Spring Grove, Pennsylvania. It is engaged in the business of providing student transportation to school districts. During the preceding 12 months, Durham has derived gross revenues in excess of $250,000 in conducting its business operations, and during that same period purchased and received at its Spring Grove facility goods valued in excess of $5,000 directly from points outside of the State of Pennsylvania. At all material times, Durham has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

INTRODUCTION

I proceed in three parts. In part I consider the General Counsel's allegations stemming from an altercation between an employee and management involving the union's bulletin board. Specifically, I first consider the allegation that Durham unlawfully disciplined employee Kenneth Kephart in violation of Section 8(a)(3) of the Act, and the Respondent's claim that this allegation should be deferred to the resolution of the dispute reached by the employer and union in the labor agreement's grievance procedure. I then turn to the General Counsel's allegation that Durham unlawfully threatened Kephart with discharge for engaging in protected activity in violation of Section 8(a)(1) of the Act.

In Part II, I turn to the General Counsel's allegations that Durham violated Section 8(a)(5) of the Act by delaying negotiations for a successor labor agreement. I then consider the allegations that Durham violated Section 8(a)(5) by failing to furnish and delaying in furnishing the Union with requested information relevant to the Union's representation duties.

Finally, in Part III, I consider Durham's claim that the complaint in this case must be dismissed on grounds that the Acting General Counsel lacked authority to issue the complaint.

Part I
The section 8(a)(3) and 8(a)(1) allegations related to the bulletin board incident

A. Background

Durham is in the school transportation business. It contracts with school districts to provide bus transportation for school students. Since 2006, Durham has contracted with the Spring Grove, Pennsylvania school district to provide transportation services for grades K–12. Durham employs approximately 90 drivers at its Spring Grove, Pennsylvania facility.

The Union's was certified by the Board as the collective-bargaining representative for the facility's drivers in 2010. The Union and Durham were parties to a collective-bargaining agreement effective January 1, 2011 to August 31, 2013.[1]

B. The bulletin board incident

Article 10 of the labor agreement reflects the parties' agreement on the Union's use of a bulletin board at the facility. It states:

> The Company will provide the Union with a bulletin board at its facilities covered by this Agreement. The location of the bulletin board will be in a conspicuous place as determined by the Company because of space considerations. Additionally, the size of the bulletin board may vary from location to location as well.
>
> The Union shall have the right to post notices and meetings (regular, special or social) and bulletins of general, civic, or patriotic interest of the employees at the facilities covered by this Agreement. Any notice posted by the Union or on its behalf shall not be derogatory, offensive, or injurious to the employer's interest, and shall be signed by the authorized representatives of the Union.

Pursuant to this contractual language, the Union maintains a bulletin board in the drivers' lounge at the facility, approximately 3 X 3 feet, encased in glass and kept locked. Durham does not hold a key to the union bulletin board. The Union's business agent, Brad Hockenberry, and two union stewards have the keys. Hockenberry routinely comes to the facility and posts items on the union bulletin board. He does not and is not expected to seek advance approval for the material he posts. However, he does notify management in advance if he is coming to the facility.

On Friday, May 24, 2013, Hockenberry emailed Durham's regional manager, Erik Owings, and informed Owings that he would be at the Spring Grove facility that day to post union notices on the bulletin board. Hockenberry asked Owings to inform the Spring Grove site

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[1]The recognized bargaining unit is described in the labor agreement as follows:

> All full-time time and regular part-time drivers employed by the employer at its Spring Grove, Pennsylvania operations, but excluding all office clerical employees, managers, road supervisors, safety trainers, dispatchers, mechanics, professional employees, guards and supervisors as defined in the Act.

supervisor/general manager, George "Rick" Comer, that he would be on the premises for this purpose.

Hockenberry came to facility and posted the summary results of a national "safety survey" conducted by the Union regarding all of the Employer's locations. The two-page report summarized driver responses to questions concerning issues such as the prevalence of equipment malfunctions on vehicles, bus overcrowding, employees working while ill, and issues related to the transportation of "special needs" children. The report concluded with the statement that:

> All of the issues raised in this report are within the discretion and the responsibility of Durham School Services. Durham has not acted in good faith to meet its obligations set forth in the transportation agreement the company signed with these school districts.

In addition to the two-page report, the Union posted a cover letter from Hockenberry to the employees, thanking them for participating in the survey and asking them to review and think about the results and the safety conditions of their buses.

The cover letter and survey (three pages in total) were posted vertically, one page below the other inside the locked glass case covering the Union's bulletin board.

When Terminal Manager Comer saw the posting he contacted Durham's Regional Manager Owings.

According to the testimony of Comer and Owings, their view was that the concluding statement, quoted above, was objectionable based on the last sentence of article 10 of the labor agreement, which stated (set forth in full above) that "[a]ny notice posted by the Union or on its behalf shall not be derogatory, offensive, or injurious to the employer's interest."

On Owings' instructions, on Friday evening before leaving for the Memorial Day weekend, Comer taped white sheets of paper over the glass to cover all of the union's three-page posting from view. This left other union communications on the board still visible, but Hockenberry's cover letter and the safety survey pages could not be seen with the paper taped over them. This was the first time Durham had ever covered up anything on the union board.

On Tuesday, May 28, 2013, Comer asked a union steward at the facility, Belinda Messersmith, to remove the posting. Messersmith said she would have to talk to Hockenberry first.

On Wednesday, May 29, employee-driver Kenneth Kephart entered the driver's lounge at approximately 7 a.m. Melissa Bollinger, a driver on standby that day, was the only other employee in the lounge at the time. Kephart routinely reviews the union bulletin board for pertinent information and he approached the bulletin board. He saw that a portion of the bulletin board had been covered. He had not received any information or explanation as to who covered it up or why it had been covered. However, he presumed (correctly) that the Employer had covered it to prevent employees from viewing a posting that the Union wanted employees to see. Kephart's opinion was that the bulletin board was "for union business" and that "the Company had no right to cover it." Kephart tried to peek under the paper to see what was covered, but then began using his fingernails to peel the tape that was attached to the paper over the glass.

Comer and his assistant, Operations Specialist Desirae Tyson, have their offices just beside the driver's lounge, and the door to their office exits into the lounge. Tyson testified that she was alerted to Kephart's action by employee Bollinger. Tyson went out to confront Kephart telling him "you can't do that, you're not allowed to do that." She told him "it must stay covered as per Erik Owings." Tyson testified that Kephart said that he didn't "give a damn who Erik is." She testified that Kephart said, "It's his union board. The Union is his boss. He doesn't have to listen to me." Bollinger testified that Kephart told Tyson it "was his union board, and he could do whatever he wanted to do." She added that Kephart told Tyson, "he didn't answer to Durham, he answered to the Union."

Comer testified that Tyson "poked her head in [his] door and said, Rick, you better get out here." Comer came out, at which time Bollinger stepped into the offices "to get out of the way." Comer saw Kephart in the process of pulling the paper off. Comer told Kephart to stop, telling him that Owing ordered that the board be covered. As Kephart testified, he continued to remove the paper and tape even as Comer "forbid" him to continue. Kephart testified that he told both Comer and Tyson that "the Company has no right to do this. This is wrong. I have a right to see what's on that board." Comer testified that Kephart said, "you're not allowed to touch our union board. It's my board to read what I want." Comer also testified (in a point emphatically disputed by Kephart) that Kephart said that "I'm not his boss and he didn't have to listen to me." Tyson corroborated Comer's testimony that Kephart said this. Bollinger testified that she could not hear Comer and Kephart's conversation from Comer's office, where she had gone when Comer went out to talk to Kephart.

At some point, Comer walked back toward his office and, according to Kephart, told Kephart "maybe you shouldn't work here anymore." Comer and Tyson testified that Comer made a similar, but slightly different statement, that "if you're not happy here," or if he wasn't "happy with the way things were" then "there's the door." Kephart did not respond to this. Left alone, Kephart tried to read the documentation but after a few moments, "with such turmoil and stress," Kephart left the building. When Bollinger heard things had quieted down, she left Comer's office and Kephart was already gone. The entire incident took approximately thirty seconds to one minute.[2] Tyson then re-covered the union's posting in accordance with Comer's instructions.

When Kephart returned for his afternoon driving run, Hockenberry was there to meet him and told Kephart that they had to go to the office for a disciplinary write up. Hockenberry told Kephart he would be representing him at the meeting.

Hockenberry and Kephart went to Comer's office. Comer and Tyson were there. Comer said he had a "coaching memorandum" for Kephart and gave Kephart a written disciplinary warning. Comer said that he told Kephart "I was going to discipline him for disobeying what orders he was given, that he was being very insubordinate at the time." The disciplinary notice, which Comer read to Kephart, stated the "performance or behavior" at issue was:

> Total insubordination – not listening nor doing what was asked of him as an employee of Durham School Services, Also telling his immediate supervisor he did

[2]This estimation of the duration of the incident is based upon Kephart's testimony. The Respondent asks me to discredit it. However, I believe it was offered in a credible fashion and is not inconsistent with the overall evidence. In addition, although the Respondent elicited testimony from all three other witnesses who observed the incident—and they each testified after Kephart had testified—none offered an estimate of the duration of the incident, and none disputed or challenged Kephart's estimation. I credit Kephart's testimony on this point.

> not have to listen to him, basically telling me that the union can tell him what to do and I cannot.

Kephart denied saying anything regarding not having to listen to his supervisor, or about Comer not being his boss, or that he worked for or did what the Union said. He also asserted that Durham had no right to cover up the union's posting. At Hockenberry's suggestion, Kephart declined to sign the write-up. Hockenberry also took the position with Comer that this "was the Union's bulletin board and that he had no right to tape up what was on that board." Hockenberry took the position that the discipline was unjust and told Kephart and Comer that "we'll just grieve it."

C. The Kephart grievance

The labor agreement contains a broad grievance-arbitration procedure that applies to "[a]ny dispute, difference or grievance regarding the interpretation, application or breach of provisions of this Agreement." There is a three-step grievance procedure culminating in the submission of unresolved disputes to an arbitrator, whose decision "shall be final and binding upon the Parties." The agreement also contains a "non-discrimination and harassment" provision (art. 17) that provides, inter alia, that

> [t]he Company and the Union agree that there will be no discrimination by the Company or the Union against any employee because of his/her membership in the Union or because of any lawful activity and/or support of the Union.

The agreement further provides that:

> Any alleged violation of this section is subject to resolution through the grievance procedure, excluding any claims under the National Labor relations Act, 29 USC., 151 et seq., workers compensation claims, and unemployment compensation claims.

The same day that Kephart was disciplined, May 29, the Union grieved Kephart's discipline pursuant to the grievance procedure. The grievance, No. 47530, stated:

> The company is in violation of Article 13 and any others that apply.
>
> Ken received discipline for insubordination. This discipline has no merit or cause. Ken was simply trying to read his Union Bulletin Board.
>
> We want discipline removed from file.

Owings and Hockenberry had an email exchange on May 29 and 30, regarding the posting of the survey. Owings emailed Hockenberry the afternoon of May 29, stating that "[t]he safety survey results must be removed from the bulletin board since it violates Article 11." Hockenberry responded that the "Union's stance is the safety survey doesn't violate Article 11 of the CBA." Owings responded that the "grievance procedure is available to resolve but it must be removed during the grievance procedure." Hockenberry wrote back saying the Union disagreed, and then, asked what part of article 11 of the contract the posting allegedly violated. Owings wrote back that he meant that it was a violation of article 10, and that he had inadvertently referenced article 11. Hockenberry wrote back that the Union would arrange to cover the last paragraph of the survey (quoted above) as it was the only thing "that could possibly violate Article

10 of the CBA." The Employer agreed to this resolution. Hockenberry had the last two sentences covered and the rest of the survey and the cover letter remained posted and visible.

Kephart's grievance was not resolved at the initial step of the grievance procedure and Hockenberry moved it to the next step. Owings, on behalf of Durham, and Hockenberry, on behalf of the Union, discussed the grievance at a June 17 grievance hearing concerning a number of pending grievances. Owings and Hockenberry argued back and forth about the Kephart grievance. Owings stated that Kephart was told not to remove the paper and did so anyway. Hockenberry argued that Kephart had the right to look at the board. Finally, Owings offered to remove the discipline on a nonprecedent setting basis.

On July 1, 2013, in an email to the Union from Durham regarding a number of pending grievances, Durham put in a writing the June 17 offer to remove the discipline in the Ken Kephart grievance. That same day, Hockenberry filled out the grievance form, acknowledging this "agreement" under "action taken by business agent," writing: "Company agrees to remove discipline. per email," and then Hockenberry signed and dated this note. Hockenberry crossed out the Union's previous intention, stated on the grievance form, to "move [the grievance] to step 3." A copy was then provided to Owings.

Asked at the hearing if he considered the matter resolved by this, Hockenberry answered: "If the discipline would have been removed from his file, [ ] that's what the remedy of the grievance asked for." Owings testified that this indicated that "the grievance is closed because the resolution was reached." No other remedy has been requested by the Union with regard to this grievance and no further action taken on the grievance.

Analysis

A. The disciplinary warning

The General Counsel claims that Kephart was unlawfully disciplined with a warning in violation of Section 8(a)(3), and derivatively, in violation of Section 8(a)(1).[3]

As a threshold matter it is necessary to consider the Respondent's defense that the Board should defer this matter to the agreement reached through the union-employer contractual grievance-arbitration procedure.[4]

In considering deferral to the resolution of a dispute already reached by the parties, the Board applies the *Spielberg*[5]/*Olin*[6] factors to decide whether deferral is appropriate, just as it

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[3]As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any such violation is also a derivative violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

[4]See, *Sheet Metal Workers (Everbrite)*, 359 NLRB No. 121, slip op. at 2 (2013) ("while a deferral defense and the merits may be addressed in the same hearing and the same decision, whether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered") (internal quotation omitted).

[5]*Spielberg Mfg. Co.*112 NLRB 1080 (1955).

applies those factors to arbitration awards. *BCI Coca-Cola Bottling Co. of Los Angeles*, 359 NLRB No. 110, slip op. at 2 (2013); *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985), petition for review denied, 808 F.2d 1342 (9th Cir. 1987). Part of the rationale for this, as expressed by the Board in *Alpha-Beta,* supra (citing the views of former Board Member Penello in his dissent in *Roadway Express*, 246 NLRB 174, 177 (1979)), is particularly instructive here:

> As an administrative agency the Board should not take a narrow, legalistic view of the Act and seek to rule on every dispute that may fall within the letter of the Act, but should instead take a broad view of that Act and seek to further the spirit and purpose of the Act. The Board should encourage employers and unions to negotiate their differences arising during the term of their bargaining agreement, to discuss and settle grievances, and, if necessary, to arbitrate their differences.

Alpha Beta Co., supra at 1547.

Under *Spielberg/Olin*, the Board defers to an arbitration award when the arbitration proceedings were fair and regular, all parties agreed to be bound, the arbitral forum adequately considered the unfair labor practice issue, and the decision is not repugnant to the Act. See *Spielberg*, 112 NLRB at 1082; *Olin Corp.*, 268 NLRB at 574. The Board also considers whether the contractual issue and the unfair labor practice issue are factually parallel and whether the parties were generally aware of the facts relevant to resolving the unfair labor practice issue. *Postal Service*, 300 NLRB 196, 198 (1990). The Board also has "held "that the party who would have the Board reject deferral bears the burden of showing the Olin standards have not been met." Id.

In this case, the grievance proceedings leading to the resolution of the Kephart grievance were fair and regular. After the filing of the grievance and the inability of the parties to settle the matter at the initial stage of the grievance proceeding, a step 2 hearing was conducted on June 17, 2013. The result of this meeting was an oral offer by the Respondent, put in writing on July 1, 2013, to agree to the remedy requested by the Union in the grievance: the removal of the discipline from Kephart's record. The Union accepted the offer that same day. Hockenberry acknowledged this "agreement" on the grievance form, signed and dated it, and crossed through the previous note stating that the Union intended to pursue the grievance to step 3 of the grievance procedure.[7]

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[6]*Olin Corp.*, 268 NLRB 573 (1984).

[7]The General Counsel argues (GC Br. at 34) that the grievance proceedings were not fair and/or regular because the grievance was settled one month after the grievance and the unfair labor practice charge were filed. According to the General Counsel, "[t]o defer to such a settlement would encourage Respondent to delay granting a remedy and, in essence, to dare the Union to pursue the charge with the Board." This argument does not even rise to the level of specious. Given that the 12-month anniversary of the incident approaches, the fact that the matter was settled in the grievance-procedure in one month is a fact that militates strongly in favor of deferral, not against it. If, as implied by the General Counsel, the filing of the unfair labor practice charge contributed to the grievance resolution that does not detract from the appropriateness of deferral.

By all evidence, the parties agree to be bound by this agreement. Finally, the result is not repugnant to purposes and policies of the Act. As the Board has defined this last condition, a grievance settlement is not "clearly repugnant" unless it is "palpably wrong as a matter of law." *Alpha Beta*, supra. Here, all discipline has been removed from Kephart's file—the disciplinary action taken against him is null and void.

Assuming the validity of the General Counsel's case, an order to cease and desist and an order to post a notice are, reasonably speaking, the only further relief that could be ordered. These would not be inconsequential matters. An order to cease and desist, in particular would be a key component of a Board remedy—should a violation be found—and the settlement's reference to "nonprecedential" settlement may reasonably be understood to be a settlement that leaves Durham free to test the legitimacy of its action in a future case, should similar circumstances arise. But the failure to receive all relief to which a charging party is entitled does not render a settlement "palpably wrong." *Postal Service*, 300 NLRB at 198; *Catalytic, Inc.*, 301 NLRB 380 (1991). While the settlement is missing some things—nothing about the settlement indicates an erroneous view of Board precedent, or as a remedial proposition, is affirmatively inconsistent with Board principles.

I also note that the contractual issues at stake in Kephart's grievance were factually parallel to the unfair labor practice issue regarding the discipline. Moreover, the facts relevant to resolving the unfair labor practice issues were known to the parties. Thus, the labor agreement expressly prohibits "discrimination by the Company . . . against any employee because of . . . any lawful activity and/or support of the Union" and "[a]ny alleged violation of this section is subject to resolution through the grievance procedure. . . ." The parties resolved the grievance with knowledge of the facts and issues at stake.[8]

Finally, the General Counsel suggests that deferral is inappropriate because Board policy disfavors deferral of one issue closely related to another nondeferrable issue. However, this policy is chiefly applicable where, unlike here, the contractual procedures have not been concluded (i.e., *Collyer deferral*).[9] The "fundamental distinction" is that "were the Board to consider deferral under *Collyer* . . . for some of the intertwined issues in a proceeding before the Board, the result would necessarily entail further delay in reaching a final decision on those issues." *15th Avenue, Iron Works*, 301 NLRB 878, 879 fn. 11 (1991), enfd. 964 F.2d 1336 (2d Cir. 1992). But deferral of the disciplinary issue here, where the contractual procedures "have been completed . . . would not preclude the Board from now resolving the remaining issues presented to the Board. Id.

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[8]The full clause states:

> Any alleged violation of this section is subject to resolution through the grievance procedure, excluding any claims under the National Labor relations Act, 29 USC., 151 et seq., workers compensation claims, and unemployment compensation claims.

The parties' continued pursuit of resolution of the dispute in the grievance procedure even after the filing of the unfair labor practice charge over Kephart's warning demonstrates that the parties' interpret this language to permit (but not require) pursuit of claims under the Act through the grievance procedure.

[9]*Collyer Insulated Wire*, 192 NLRB 837 (1971).

The grievance procedure worked and the discriminatory warning against Kephart—assuming the merits of the General Counsel's case—has been rescinded. This is the gravamen of the remedy available and the only available remedy that would be directed to Kephart specifically. It satisfies the Board's deferral standards under the current circumstances. In light of the results of the grievance procedure I will dismiss the allegations of the complaint related to Kephart's discipline.[10]

B. The threat to discharge Kephart

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by threatening Kephart with discharge for looking at the bulletin board. The evidence shows that after his encounter with Kephart over the bulletin board, Comer walked back toward his office and, according to Kephart, told Kephart "maybe you shouldn't work here anymore." Comer and Tyson testified that Comer made a similar, but slightly different statement, that "if you're not happy here," or if he wasn't "happy with the way things were" then "there's the door."

> It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that support for their union or engaging in other concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved.

McDaniel Ford, Inc., 322 NLRB 956, 956 fn. 1 and 962 (1997); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (finding employer's statement that, if complaining employee was unhappy, "[m]aybe this isn't the place for you . . . there are a lot of jobs out there" was implied threat of discharge); *Intertherm, Inc.*, 235 NLRB 693, 693 fn. 6 (1978) (unlawful to tell employee that if "he was not happy with the Company he should look elsewhere for a job") enfd. in relevant part, 596 F.2d 267 (8th Cir. 1979); *Chinese Daily News*, 346 NLRB 906, 906 (2006) (unlawful to tell employee to resign if she was not happy with her job), enfd. 224 Fed.Appx. 6 (D.C. Cir. 2007).

The Respondent argues that Comer's statement to Kephart was not in response to protected activity, and that, in any event, Kephart had lost the protections of the Act through his conduct during the bulletin board dispute. I disagree as to both points.

First, although I do not reach the issue, I note that I find it unlikely that the Employer had the right to block or remove the union's posting. Where, as here, a union bulletin board has been established and accepted on the Employer's property, and the Union has been regularly allowed freely to post material without prior approval of the Employer, the contention that the Employer can prohibit the posting because it concludes with a statement that in the union's opinion "Durham has not acted in good faith to meets obligations" reflects a highly circumscribed view of the protections afforded by the Act.[11] But that is somewhat beside the point.

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[10] I note that in its brief, the Respondent does not seek deferral of the alleged unlawful threat to discharge Kephart. That allegation, involving a statement made to Kephart as Comer returned to his office after his encounter with Kephart is, in any event, not suitable for deferral. It was not, by all evidence, considered as part of the grievance, the parties did not agree to be bound as to that issue, and, in any event, it is not readily cognizable or readily remediable under the contract.

[11] It is "well established" that,

> when an employer permits, by formal rule or otherwise, employees and a union to post personal and official union notices on its bulletin boards, the employees' and

The point is whether Kephart was engaged in protected activity when he attempted to see what was posted on the Union's bulletin board, which the Employer, without notice and without explanation to employees, had covered with paper and tape. Kephart had every reason to think of this as the "union's bulletin board." The Union posted materials without prior approval, on a variety of subjects. *Only union personnel—not the employer—held keys to the bulletin board*. While this last point may explain why the Employer covered up instead of removing the survey, from an employee's point of view, the unexplained and crude covering up of a posting would not appear legitimate at all. Quite apart from whether the union had a right to post the survey—I believe it did, but no matter if did not—Kephart was acting to maintain the integrity of the bulletin board—a bulletin board that by practice, contractual agreement, and legal precedent, the Union had a right to maintain. As Comer testified, Kephart said, "you're not allowed to touch our union board. It's my board to read what I want."

The protected nature of Kephart's conduct does not turn on whether the Union had a right to post the particular item on the board—which Kephart, in any event, could not see. The key point is that Kephart was clearly acting on behalf of the employees and the union when he sought to clear from obstruction the Union's bulletin board, a fixture in the facility that was expressly sanctioned by the union-employer collective-bargaining agreement. This is protected activity, even if Kephart was wrong about his and the union's rights under the collective bargaining agreement. *NLRB v. City Disposal System, Inc.*, 465 U.S. 822 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966); *Kingsbury, Inc.*, 355 NLRB 1195, 1204 ("It is beyond cavil that an honest and reasonable assertion of collectively-bargained based rights--even if, unlike here, it is incorrect--is protected and concerted activity"); *Tillford Contractors*, 317 NLRB 68, 69 (1995) (unlawful to discharge a union steward who erroneously told an employee "You've got no goddamn business being here" and "The best thing you could do is get the hell away from us" where the confrontation was related to steward's (erroneous) effort to enforce collective-bargaining agreement).

I reject the Respondent's train of logic, which contends that, based on the Respondent's assertion that the union did not have the contractual right to post the last two sentences of the survey on the bulletin board, it follows that Kephart's effort to clear the Board of obstruction was unprotected activity. Even assuming, for the sake of argument only, that the posting exceeded the Union's posting rights under art. 10 of the agreement, this does not transform Kephart's effort to *view* the bulletin board into unprotected activity for which he may be fired.[12]

> union's right to use the bulletin board receives the protection of the Act to the extent that the employer may not remove notices, or discriminate against an employee who posts notices, which meet the employer's rule or standard but which the employer finds distasteful.

Container Corp., 244 NLRB 318 fn. 2 (1979), enfd. in relevant part 649 F.2d 1213 (6th Cir. 1981).

[12]I note that the Respondent's claim that the union "waived" the employees' right to *view* the bulletin board if the Respondent objected to something on it is simply false. It is well-settled that the waiver of a statutory right must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable"). At most, the Union waived its right to post certain items—this is a long way from and far from a clear and unmistakable waiver of an employee's right to *view* a bulletin board.

That leads to the second defense of the employer: the claim that Kephart acted during the incident in a manner so egregious that he forfeited his right to any protection under the Act. This is clearly not the case under long-standing Board precedent.

"[T]the Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves." *Health Car & Retirement Corp.*, 306 NLRB 63, 65 (1992), enforcement denied on other grounds, 987 F.2d 1256 (6th Cir. 1993), affirmed 511 U.S. 571, (1994). "The protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumer Power Co.*, 282 NLRB 130, 132 (1986). "Nevertheless, an employee's otherwise protected activity may become unprotected 'if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language.'" *Honda of America*, 334 NLRB 746, 747 (2001).

"In order for an employee engaged in such activity to forfeit his Section 7 protection his misconduct must be so 'flagrant, violent, or extreme' as to render him unfit for further service." *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). As the Board states:

> The turbulence inherent in union activity arises from rivalry and division likely to provoke even the docile to petulant behavior. . . . [E]motional excess manifested by employees in resisting management is not committed under this law to the absolute judgment of employers. Indeed, congressional guarantees embodied in Section 7 of the Act would be jeopardized if every act of disrespect or insubordination emerging from a protected dispute which divides management from its workforce, renders the employee involved as fair game for discipline.

F.W. Woolworth Co., 251 NLRB 1111, 1114 (1980), enfd. 655 F.2d 151 (8th Cir. 1981), cert. denied 455 U.S. 989 (1982).

As the Board as explained,

> A line must be drawn between situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which misconduct is violent or of such serious character as to render the employees unfit for further service.' *J.W. Microelectronics Corp.*, 259 NLRBN 327 (1981), enfd. mem. 688 F.2d 823 (3d Cir. 1982). 'The employee's right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious.' *Coors Container Co.*, 238 NLRB 1312, 1320 (1978) (profanity), enfd. 628 F.2d 1283 (10th Cir. 1980).

Kingsbury, Inc., 355 NLRB 1195, 1204 (2010)

Even assuming, without deciding that Comer and Tyson's version of events should be credited over Kephart's, what we have is an employee engaged in protected activity who, in the course of that protected activity, made a disrespectful statement (I "don't give a damn who Erik

[Owning] is" and for a brief period—30 to 60 seconds—refused orders to stop removing the paper and tape from the union bulletin board while declaring that he did not have to listen to his supervisor but would listen to the Union. Heated, for sure, his conduct may fairly be characterized as "emotional excess" and "impulsive." But while his "exuberance" exceeded the bounds of appropriate conduct it was not "activated by improper motives" and can hardly be called "egregious." At the end of the day, the entire incident lasted at most one minute, and involved only one unit employee witness to the incident, Bollinger.[13] The incident was not loud enough that Bollinger could hear the discussion when she stepped into the office to get out of the way. The incident involved removing tape and paper from a union bulletin board over the objections of management while declaring that he was not going to listen to management. Kephart did not threaten anyone. He carried out his actions without force or threat of force, and without outrageous or offensive conduct and, with the exception of the mild expletive "damn," without profanity.[14] The incident ended with Comer walking away and Kephart then did the same and left the building without further incident.

One does not have to endorse Kephart's emotional response to agree that it was not "flagrant violent, or extreme" in any sense or that it renders him unfit for further service. If this type of misconduct caused an employee to lose the protection of the Act, the Act would not apply to the many, many, heated labor-relations disputes that routinely arise.

Finally, I note that Board precedent has expressly left unresolved the question of whether a case such as this should be analyzed under the factors and standard set forth in *Atlantic* Steel, 245 NLRB 814 (1979), or, as I have done, based on the totality of circumstances.[15] However, were I to apply the factors and standards of *Atlantic Steel*, I would reach the same result. The first *Atlantic Steel* factor looks to the location of the incident. Here, the dispute occurred in the drivers' break room, there was only one employee witness, and the dispute, while heated, could not be heard by the employee when she ducked into an adjoining office. In considering the first *Atlantic Steel* factor, "the Board has recognized that an employee breakroom . . . is an area unlikely to disrupt production" and thus, weighs in favor of continued protection. *Fresenius United States Mfg.*, 358 NLRB No. 138, slip op. at 5 (2012); *Noble Metal Processing*, 346 NLRB 795 (2006). The subject matter of the comments is the second *Atlantic Steel* factor. Here, as discussed above, the subject matter of Kephart's comments was his concern over the right to view the union bulletin board. This is an entirely legitimate subject and weighs in favor of continued protection of the Act. The third *Atlantic Steel* factor is the nature of the outburst. Kephart's outbursts against Owings and his declarations that he could do what he wanted, and that the union (and not Durham) was his boss, were very brief—the whole incident lasted no more than a minute—and

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[13]Both the General Counsel and the Respondent, for very different reasons, argue that there were numerous employees in the breakroom who heard and/or saw the altercation. However, there is no record evidence for this. To the contrary, Bollinger testified (Tr. 245) that she believes she was the only employee in the lounge when Kephart entered.

[14]Although controversial in 1939 when uttered on screen ("Frankly, my dear, I don't give a damn"), the word has since lost most all of its shock value and may be accurately described as the most mild of expletives.

[15]See, *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 5–6 fn. 8 (2012) ("we acknowledge . . . that Board precedent does not firmly establish whether cases such as this one should be analyzed under *Atlantic Steel* or under a totality-of-circumstances approach" but declining to resolve the question).

were obviously impulsive, not premeditated, which weighs in favor of continued protection. *Fresenius*, supra at 5, citing *Kiewit Power Constructor Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011) (observing that the employee's conduct consisted of a brief, verbal outburst in finding factor weighed in favor of protection). Notably, there was no threat, no violence, or aggression directed at any person. Finally, the fourth *Atlantic Steel* factor concerns whether the outburst was provoked in any way by an employer unfair labor practice. While I have expressed my doubts as to the lawfulness of the employer's covering of the union bulletin board, it is neither alleged nor have I found it to be an unfair labor practice. Clearly, it was the Respondent's covering of the bulletin board that provoked Kephart. Assuming without deciding that it was not an unfair labor practice, this still leaves three of the four *Atlantic Steel* factors strongly in favor of continued protection under the Act, and they outweigh the (assumed) fourth factor. See *Noble Metal Processing*, Inc., 346 NLRB at 795, fn. 2 (lack of provocation "clearly outweighed by the initial three factors" which weighed in favor of continued protection of Act). I am unaware of any case in which such a brief, non-threatening, non profane (other than the alleged use of the mild expletive "damn") incident led to the loss of the Act's protection. Were I to apply *Atlantic Steel*, I would find that Kephart did not lose the protection of the Act.

I find that Kephart was engaged in protected activity when he sought to clear the obstruction from the union bulletin board. His misconduct when he continued to clear it despite being told not to by management was not so egregious as to lose the protection of the Act. I further find that in response to Kephart's protected activity, Comer invited him to resign, which, as discussed above, is an implicit threat of discharge, unlawful under the Act. I find that the Respondent violated Section 8(a)(1) of the Act, as alleged.

Part II
The 8(a)(5) bargaining allegations

A. The Union requests bargaining for a new contract

By letter dated July 13, 2012, Hockenberry wrote to Bill Grabe, previously the manager of Durham's Spring Grove facility, notifying Durham that the current labor agreement "shall expire" August 31, 2013. Citing the Pennsylvania State law governing public employees, the Union requested a "budget submission date" (an item applicable to public employers) and offered to "meet and confer" to negotiate a new contract. The Union sought dates to meet to exchange contract proposals.

Comer responded to Hockenberry's correspondence by letter dated July 18, 2012. He explained that Grabe no longer worked for Durham and that future correspondence should be addressed to Comer. Comer stated that the labor agreement would be in effect through August 31, 2013, "more than 13 months from the date of your letter":

> Accordingly, not only does your letter contain incorrect demands pertaining to the Pennsylvania Public Employee Relations Act and its applicability to our Company, your letter is premature in requesting to meet and confer for the purposes of negotiating a new contract. As a private employer, we are governed by the National Labor Relations Act, and therefore do not view this request as an appropriate 8(d) notice. Under 8(d), a party wishing to notify of its intent to negotiate a new agreement upon termination of the existing contract, must provide 60 days[ ] notice prior to the expiration of the Agreement and a request for bargaining.

> Because your demands pertaining to our obligations are incorrect and your demand for bargaining is premature, the Company will not take any action pursuant to your letter at this time.

More than six months later, on February 4, 2013, Hockenberry wrote to Owings, advising that the labor agreement would be expiring August 31, 2013, and requesting that Owings "contact me at your earliest convenience to set up dates and times for negotiation meetings."

On February 25, 2013, Hockenberry emailed Owings, asking for "a list of available dates to start the contract negotiations. We have our proposals ready and would like to get started as soon as possible."

Owings responded the next day, February 26, telling Hockenberry that "I have forwarded the letter that came from the local [the February 4 letter] to my Legal group that will coordinate the negotiations. I will let you know when I hear something." In a February 28 email from Owings to a member of the Durham "labor team," and copied to counsel for Durham's parent company, Owings forwarded the February 4 letter.

On May 7, Hockenberry emailed Owings, stating:

> I am requesting again, a list of available dates to start the contract negotiations. Please forward this email to whoever needs to receive it.

On May 20, Hockenberry again emailed Owings, this time stating:

> This will be the last official attempt to acquire available dates from Durham for the contract negotiations before moving forward to the Labor Board. Please send the Union a list of available date[s] to meet for our contract negotiations.

On May 22, Robert Henninger, a mediator with the Federal Mediation and Conciliation Service (FMCS) emailed Owings, stating that "[t]he Teamsters have requested that I reach out to you and try to get these negotiations moving. Please give me a call. Thanks."

On June 4, the Union filed an unfair labor practice charge against Durham, and one of the allegations involved the claim that Durham had refused to bargain in good faith by refusing to meet to negotiate.

On June 27, 2013, in an email to Owings largely concerned with grievance matters, Hockenberry added, "I also need dates for the contract negotiations to begin." In response, in a July 1 email, Owings told Hockenberry that "I have sent your request to begin negotiations to our Labor Department and will update you with available dates." Less than an hour later, Owings wrote Hockenberry, stating that "The Company offers July 23-24 as meeting days for CBA negotiations." The next day, in an exchange of emails, Owings and Hockenberry agreed to begin negotiations on July 23 at 9 a.m., at the union hall in York, Pennsylvania.

The parties met that day as scheduled and bargaining commenced on July 23 and 24, and, as of the date the hearing in this matter, negotiating meetings continued on approximately 12 to 14 dates.

Hockenberry testified that he first sought bargaining with Durham so far in advance of the agreement's expiration date because he had learned from Teamsters conventions and

seminars—the Teamsters represents thousands of Durham employees around the country—that Durham "take[s] a while to get to a collective-bargaining agreement. So we figured if we started early enough , we could meet the deadline of the expiration of our contract."

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B. Union information requests

1. Sterner Pay Records

10 The Union filed a grievance on November 29, 2011, over a new part-time position created by Durham to help mechanics perform their office work. Durham maintained that the position was not part of the bargaining unit and, therefore, not subject to seniority rules. The Union disputed this. Durham ultimately filled the position on or about February 29, 2012, with unit driver Robin Sterner, who continued to drive after adding the new position to her duties. By email dated
15 November 26, 2012, the Union requested Sterner's pay records from November 18, 2011, through March 30, 2012.

On January 14, 2013, Hockenberry emailed Owings, stating, with regard to this request:

20 > I also requested several weeks ago [ ] the pay records for Robin Steiner. I still have not received my request. That information is for the upcoming arbitration. If I do not receive the information I requested by the end of the week (January 18), I will be filing another ULP charge against you for not providing information needed in a timely manner.

25

Owings responded later that day, stating:

> The requested information on Robin Sterner is outside of the scope for grievance #39461. I cannot provide as pay is a secondary issue after the decision on
30 bargaining unit work is established.

Hockenberry responded the next day:

> I am requesting Robin Sterner paystubs from November 2011 through March
35 2012. It is not out of the scope of the grievance #39461. I'm using this information for the arbitration case. I expect this information to be sent to me by the close of business Friday, January 18. It is not your decision how I use this information.

On January 23, 2013, the Union filed a new grievance specifically over Durham's failure to
40 provide the requested pay records and citing article 25 which provides for the Union's right "consistent with the NLRA, to obtain copies of matters involving bargain unit employee's personnel files and work records."

In July or August, 2013, Hockenberry informed Owings that the Union was not going to
45 pursue the grievance regarding Sterner to arbitration. However, the request for Sterner's pay records was not rescinded and, to date, the records have not been furnished.

At the hearing, Owings explained that Durham had not provided the information because

50 > Our feelings were that it's a secondary issue. Resolving the disagreement on the position, if it's within the bargaining unit work comes before releasing the paper

records. . . . If it's determined that that is bargaining [unit] work, then it's relevant. If it's not bargaining [unit] work, then it's not relevant.

2. Bus 30 surveillance tapes

Surveillance cameras on the school buses record events on the bus while driving. This is for the safety and security of students and in order to be able to verify proper conduct and procedures by employees (e.g., drivers and monitors). The recording is on a "loop," meaning that it records over itself after a certain period of time. Durham has some buses with VHS and some with digital surveillance equipment. If the bus is in continuous normal operation, the period of time after which the recording is recorded over is approximately 30 days for VHS and a longer (but unspecified) time if the equipment is digital.

On April 5, 2013, Hockenberry requested the surveillance tape from bus 30. He wrote, "I would like to have it today if possible. It is toward a case." Nearly an hour later, Owings wrote back asking, "Is the tape on bus 30 to investigate/resolve a grievance?" Hockenberry replied the next day: "It is to hopefully resolve a [p]otential grievance or prevent one."

Upon receiving this request, Durham took no steps to preserve the requested data or to investigate whether and for how long the tape remained in existence. Owings testified that he had not viewed the tape. Durham never provided the requested surveillance tape.

Durham did not offer a reason for this until a June 17, 2013 grievance hearing. At the hearing (which was primarily about other matters) Owings had a conversation with Hockenberry in which Owings raised confidentiality concerns regarding the surveillance tapes. At the NLRB hearing Owings explained the confidentiality concerns as "the confidentiality as far as the student goes, I would need precisely why that tape would be needed. I would need to go to my customer [the school district] to request that we could share that information, if the students were on the tape."

Hockenberry testified that he told Owings at this meeting that he wanted the tape because he believed (based on information received from an employee) that Desirae Tyson, operating a bus one day, had engaged in discussion with other employees in which she discussed employee's confidential information that she had access to in her office job and that she indicated she could remove any employees she did not like. Hockenberry wanted the tape to verify whether this had happened.[16]

On July 11, 2013, Hockenberry, after discussing a different request for information, wrote: "I asked you several months ago for the video tape from bus 30. This was never provided either." Owings wrote back on July 13: "I responded to you as to why you needed the tape for bus #30 on 4/5/13 and never heard back from you."

Owings testified that with regard to disclosure of the surveillance tapes "We are always cautious because we're dealing with school children," and that "if there's a request to see a tape, I go to my customer and say this is the reasons why we see it, and we have to justify showing that to a third party." Owings testified that this was done "If there's a chance that a student can be seen on that video." In this case, Owings testified: "I never got a clear and concise, precise

[16]Owings testified that he did not recall any conversations with Hockenberry about why Hockenberry requested the surveillance tape. I credit Hockenberry's surer testimony on this point.

reason why they needed to see the tape, nothing that would have give me enough to go to my customer to say this is the reason why we need to share this tape."

On direct examination Owings testified that "going to the customer" was "required from the customer" but on cross-examination stated that it was a "past practice" and admitted that "[t]here's nothing specifically that addresses that in the contract," but that "[a]nytime there is anything policy-wise dealing with students, we discuss it with our customer." Owings stated at the hearing that he did not know whether or not there were students in the video requested by the Union.

Hockenberry testified at the hearing that his purpose for seeking the surveillance tape was information he had suggesting that office personnel (non unit employees) were on a bus one day (without students) and talking about drivers' personal information. He sought the tape to confirm this and if supported by the tape to file a grievance over it.

3. Zonar records

Durham maintains "zonar" equipment that monitors bus location, speed, and other information. On two consecutive days, April 16 and 17, 2013, driver Katie Williams was given warnings for excessive speed according to the zonar records. The Union grieved the discipline on April 24 (grievance no. 47536), and at that time, in the body of the grievance, requested all the zonar records from April 8 through 18.

In a May 7 email, Hockenberry wrote: "I still haven't received the copies of the zonar records that were request[ed] through the grievance #47536."

On June 17, 2013, Durham agreed to rescind the discipline. On July 11, 2013, Hockenberry reiterated the request for the zonar records. Owings responded on July 13, 2013, stating: "We withdrew the write up at our grievance hearing on 6/17/13. Since there is no longer a claim, the records will no longer be provided."

This rationale was reiterated by Owings at the hearing. He considered the grievance "closed" and therefore did not provide the zonar records. The zonar records were never provided.

Hockenberry testified at the hearing that he had sought the zonar records in order to investigate a concern he had that after the two disciplines issued against Williams, who was a union member. He wanted to review the tapes to investigate whether union members were being discriminated against in favor of financial core members with regard to the meting out of discipline. Hockenberry wanted to see if the zonar records showed that nonmember unit employees were not being disciplined for speeding while union member Williams was singled out.

4. Summer work information

On June 6, 2013, in an email to Owings, Hockenberry asked him to

> Please send me the list of drivers who signed up to do summer work. Also I need what work has already been performed and by whom.

On June 17, Owings orally informed Hockenberry that it would take a while to gather that information. In a July 11 email, Hockenberry reiterated his request for "a list of all summer work

that has been performed and who did the work." In a July 13, email, Owings told Hockenberry, "[w]e discussed the summer work at our grievance hearing on 6/17/13. I will provide you a copy of the work."

The requested information was furnished by Durham on July 15.

At the hearing, Hockenberry testified that he requested this information because he was concerned that Durham was assigning summer work to junior employees in violation of the seniority provisions of the labor agreement.

Analysis

A. The alleged unlawful delay in bargaining

The complaint alleges that from on or about February 25, to July 1, 2013, the Respondent unlawfully delayed bargaining with the Union in violation of Section 8(a)(5) of the Act.[17]

In support of this contention, the General Counsel relies on the Union's five requests to the Respondent to set dates for bargaining a new contract—made on February 4 and 25, May 7 and 20, and June 27, 2013, before receiving dates for bargaining from the Respondent on July 1. The Union accepted the July 23 and 24, 2013 dates offered by the Respondent on July 1, and the parties met for bargaining, and then met approximately a dozen times after that through the date of the hearing. The General Counsel does not allege a delay, a refusal to bargain, or any kind of bad-faith bargaining related to negotiations for the successor agreement for any period after July 1, 2013.

Section 8(a)(5) of the Act makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees."

Section 8(d) of the Act explains that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder."

Thus, the Act requires bargaining "in good faith," and makes an unfair labor practice out of the failure to do so. However, not every unlawful refusal to bargain requires a finding of "bad faith" on the part of the respondent. Just such a claim was rejected by the Supreme Court over 50 years ago in *NLRB v. Katz*, 369 U.S. 736 (1962), where the Court held that "[c]learly" the duty to bargain "may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused to negotiate *in fact*." Id. at 743 (court's emphasis).

Accordingly, in order to prove a breach of the Act, it is not necessary for the General Counsel to prove that Durham acted in bad faith. If Durham was statutorily required to come to the bargaining table but failed to "in fact," then its failure to meet and confer is a per se violation of the Act. In its brief, the General Counsel appears to argue both theories—i.e., that Durham's

[17]An employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co*., 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

delay was motivated by bad faith, and, without regard to its intent, Durham violated the Act by failing to establish dates for bargaining before July 1.

First, I agree with the Respondent that the General Counsel has not proven that Durham's delay in scheduling and commencing bargaining from February 4 through July 1, 2013, evidences bad faith.

"Good-faith bargaining 'presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract.'" *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001) (quoting *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960)), enfd. 318 F.3d 1173 (10th Cir. 2003). "In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." *Public Service Co*., supra at 487 (internal citations omitted).

In terms of bad-faith motive for Durham's conduct, the General Counsel speculates that the Respondent's initial lack of responsiveness to the Union's requests for bargaining was attributable to the fact of General Manager Comer's knowledge that in the spring of 2013 there were "rumors" of employee interest in a decertification petition—one was filed in mid-June 2013. But that is simply speculation on the General Counsel's part. Notably, after the decertification petition was filed the Respondent moved forward with negotiations. I am not willing to presume a linkage between rumors of employee interest in a decertification petition and the Respondent's delay in commencing bargaining.

In addition, as I have found, there were unlawful refusals to provide requested information during the same period of time that the Respondent was not responding to the Union's requests to schedule bargaining sessions. However, these requests and the Respondent's (rejected) reasons for not providing the information revolved around the grievance procedure and the policing of the extant agreement—they had nothing to do with bargaining for a successor agreement.

Bad faith has simply not been proven. And, indeed, as discussed, the Respondent's subsequent and overall conduct at the bargaining table and in scheduling meetings, was not shown to provide any support for the proposition that the initial scheduling delays were in bad faith. Equally likely is that the Respondent believed that the Union's request to meet to bargain for a successor agreement was premature, or at least, not something that required urgent attention. After all, the contract was not set to expire until August 31, 2013. Thus, when the Union began seeking bargaining sessions in February 2013, there was nearly six months to go before the contract expired. One can conceive of circumstances in which it could be evidence of bad faith for an employer (or union) to refuse to sit down with its counterpart to begin the process of bargaining for a new contract many months in advance of contract expiration. Take for example parties that face an unusually complex set of issues, or the situation where one party plans to pursue difficult or particularly radical proposals in negotiations. In such instances, it could be argued that a party evidences bad faith, and is attempting to avoid agreement, by delaying bargaining until a couple of months before the scheduled date for contract expiration. But no such factors were demonstrated here.

This brings us to the General Counsel's alternative—per se—theory of a bargaining violation. The General Counsel argues (G.C. Br. at 20) that "regardless of Respondent's intent, it violated the act when it failed to provide the Union dates and times to meet, failed to even respond to some of the Union's requests, and failed to provide a lawful justification for its behavior." Viewing the General Counsel's allegations through the prism of *Katz*, supra, and a

theory of a per se violation, there is no need to prove or even debate the subjective good or bad faith of the Respondent. The ultimate issue for decision under that theory is whether by delaying in responding to the Union and, therefore, failing to schedule or meet for bargaining with the Union from February through June 2013, the Respondent failed to satisfy its statutory duty to meet and confer for bargaining.

Clearly, had the Respondent's refusal to schedule or attend bargaining meetings continued into the 60 day period before contract expiration, or up to and beyond contract expiration it would be in violation of its duty to meet and confer. The Union is the statutory representative of the employees and the Respondent had (and has) a duty to bargain a successor contract. But the question of *when*—exactly—an employer and a union must sit down to negotiate the successor contract must be answered in the context of the circumstances.

Here, the General Counsel's allegations are limited to the claim that the Respondent violated its duty to bargain by failing to bargain many months prior to contract expiration. In this case the extant collective-bargaining agreement was not scheduled to terminate before August 31, 2013. The Union sought bargaining, first, in July 2012, over 13 months before the expiration of the agreement. The Respondent rejected this request to bargain as "premature," and the General Counsel does not suggest that this was wrong. As stated, on February 4, 2013, the Union again began requesting bargaining for a new contract, just a few days short of six months prior to the expiration of the collective-bargaining agreement. As the Respondent points out, as of July 1, 2013—sixty days before the termination of the agreement—the Respondent responded with acceptable dates for bargaining and the General Counsel's allegations of unlawful bargaining end. While there is no hard and fast rule, and while there could be circumstances in which a party is found to have committed a per se breach of its bargaining obligation by refusing to meet to bargain for a successor contract three, four, five, and six months in advance of the anticipated effective date of the new contract, there is no basis for such a finding here. The start date of negotiations for a successor agreement is a matter to be negotiated between the parties. I see no grounds for finding a violation based on this record simply because the Respondent waited until 60 days before the contract expiration to arrange for bargaining dates. While the parties did not achieve a new contract by the time the old one expired on August 31, there was no evidence presented that the starting date for negotiations hindered the negotiations or contributed to the failure to reach agreement. No claim is made that bargaining has been anything out of the ordinary since it started. There is no basis for finding a violation based on the Respondent's failure to agree to start negotiations in the spring of 2013.[18]

Notably, the General Counsel cites no case, and I am aware of none, in which the Board has held, based on no other bargaining conduct, that an employer or union violated the Act by failing to meet to bargain months and months in advance of the expiration of the contract. The

[18]The General Counsel argues (GC Br. at 18) that the parties failure to reach an agreement (as of the date of the hearing) "vindicated the Union's desire to begin negotiations as early as possible." This is a claim without evidence. The mere fact that no agreement has been reached may or may not vindicate the Union's desire to start negotiations "as early as possible." But the Union's desire to start negotiations as early as possible does not translate into a violation of the Act if the Respondent felt differently. The General Counsel argues that the fact that the parties have made "progress" in negotiations cannot dissipate a previous unfair labor practice by the employer. I agree. But, the General Counsel must still prove the alleged unfair labor practice. Without more, the fact that negotiations continued (and continue) beyond the contract's expiration date does not prove an unlawful delay in negotiations.

cases cited by the General Counsel are totally inapposite. For instance, in *Teamsters Local Union 612*, 215 NLRB 789 (1974), the Board found that a union violated the duty to bargain based on its refusal to respond to the employer's requests to bargain made ten weeks before the contract expired, and after the employer (lawfully) withdrew from a multiemployer bargaining group that was meeting with the union. However, in that case the union refused to meet any time before the contract expired except once in a brief "abortive parley" in which the union representative told the employer that "we would meet [ ] and negotiate if that is what we wanted to do, but we were wasting our time . . . that the only reason [he met] was to get around the unfair labor practice charge" filed by the employer. 215 NLRB at 791. The one meeting ended when the union representative told the employer representative "to return to Alabama and to stop bothering him" and that he would meet with the employer once the multi-employer master agreement had been settled. Thus, in *Local Union 612*, the respondent effectively permitted no bargaining meetings prior to contract expiration and on that basis the Board found that the union had refused to bargain collectively in violation of the Act. This is hardly comparable to the instant case, where the Respondent arranged for bargaining dates as of July 1, and then went on to meet consistently with the Union.[19]

I will recommend dismissal of the allegations of unlawful delay in bargaining.

A. Refusal to furnish and delay in furnishing requested information

"An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration." *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). As explained in *A-1 Door & Building Solutions,* supra:

> An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

See also, *Disneyland Park*, 350 NLRB 1256, 1257 (2007) ("Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information").

Where the information is requested in connection with a grievance, the Board's test for relevance remains a liberal one. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court endorsed the Board's view that a "liberal" broad "discovery type" standard must

[19]Other cases cited by the General Counsel are no more probative of the issue here. Thus, *Imperial Tile Co.*, 227 NLRB 1751 (1977) involved an employer that refused entreaties to meet with the union until six and half months *after* expiration of the labor agreement. This is very much at odds with the conduct of the Respondent in this case. *"M" System, Inc.*, 129 NLRB 527 (1960) involved an employer that engaged in overall surface bargaining for a first contract, and thus, the case bears not even remote relevance to the issue in question here: i.e., when, in preparing for a successor contract, is an employer (or union) obligated to commence bargaining?

apply to union information requests related to the evaluation of grievances. Analogizing the grievance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in *Moore's Federal Practice* that "it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy." 385 U.S. at 437 fn. 6, quoting 4 Moore, *Federal Practice* P26.16[1], 1175–1176 (2d ed.).

Board precedent has continued to abide by this standard. As the Board explained in *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991): "In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided." And "the fact that the information, if produced at the early stages of grievance discussions would tend to establish that a grievance is without merit, equally serves a legitimate function of collective bargaining as such disclosure would thereby enable a union to determine which grievances should be pursued to arbitration and which should be dropped." *LaGuardia Hospital*, 260 NLRB 1455, 1461 (1982). As the Board affirmed in *W–L Moulding Co.*, 272 NLRB 1239, 1240 (1984), quoting *NLRB v. Rockwell–Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969) and *Acme Industrial Co.*, supra at 437, in considering an information request, it is not the Board's role to pass on the merits of the Union's claim, "[t]he Board's only function in such situation is in 'acting upon the possibility that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" Accord, *Howard University*, 290 NLRB 1006, 1007 (1988).

Once the burden of showing the relevance of nonunit information is satisfied, the duty to provide the information is the same as it is with presumptively relevant unit information. Depending on the circumstances and reasons for the union's interest, information that is not presumptively relevant may have "an even more fundamental relevance than that considered presumptively relevant." *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969).

"An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Monmouth Care Center*, 354 NLRB 11, 51 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB No. 29 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). "[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "In evaluating the promptness of the employer's response, 'the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.'" *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005)).

Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act." *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

Below, applying these standards, I consider each of the four information requests placed at issue by the General Counsel.

1. The Sterner pay records

During the pendency of a grievance over the Respondent's creation of a part-time driver's helper position that the Respondent claimed was outside the bargaining unit, the Respondent filled the position (out of seniority) with a unit employee, Robin Sterner. Subsequently, on November 26, 2012, the Union requested her pay records for a period before and after her assumption of the part-time position (which she performed in addition to her driver's position).

The Respondent refused to provide the information, arguing first, in January 2013, that the requested information was "outside the scope for the grievance" and calling the issue of pay "secondary." Owings elaborated on this at the hearing, testifying that,

> Our feelings were that it's a secondary issue. Resolving the disagreement on the position, if it's within the bargaining unit work comes before releasing the paper records. . . . If it's determined that that is bargaining [unit] work, then it's relevant. If it's not bargaining [unit] work, then it's not relevant.

The wages of unit employees—and whatever the outcome of the grievance Sterner is and was a unit employee—are presumptively relevant and a central concern of contract administration. Indeed, "A union's right to such information cannot be seriously challenged." *Woodworkers v. NLRB*, 263 F.2d 483, 484 (D.C. Cir. 1959). See also *NLRB v. F.W. Woolworth Co.*, 352 U.S. 938 (1956), rev'g 235 F.2d 319 (9th Cir. 1956). Hockenberry's response to Owings put it well: "It is not your decision how I use this information."

There is no duty for a union to disclose why it wants or how it intends to use requested pay records for unit employees. Whether to determine just how much of Sterner's pay was now coming from work alleged to be nonunit work, or to determine whether it was worth pursuing the grievance to arbitration, or to prepare for future negotiations where this issue might be tackled, the issue of all wages paid by the employer to unit employees—whether as part of a labor agreement or an extracontractual payment to the employer by the employee—is central to the representational duties of a union.

In any event, in the face of the Respondent's refusal to provide the information, Hockenberry told the Owings—twice—in January 2013 that he was going to use the information to prepare for an arbitration. Hockenberry was not required to provide rationale for this presumptively—and obviously—relevant information request, but having done so the Respondent still would not provide the requested pay information, appropriating to itself the determination that Sterner's pay records were "secondary" and not (yet) relevant to the grievance. Of course, this response misconceives the union's right to engage in knowledge-based bargaining that is at the heart of the Act. It is not for the Respondent to arrogate to itself the decision on what information the Union needs to prepare for an arbitration.

Even after Hockenberry informed the Respondent in July or August 2013, that the grievances would not be going to arbitration, this does not nullify the presumptive relevance of the request for Sterner's pay records. First of all, the violation had already occurred by this point. The violation is not mooted by the unlawful delay. The perverse incentives of declaring a request moot attendant to an employer's unlawful delay in furnishing relevant requested information are obvious. *Bloomsburg Craftsmen, Inc.*, 276 NLRB 400 fn. 2 (1985) (the Board's "normal practice" is to require the party that has unlawfully refused to provide requested information to furnish it "despite the conclusion of the grievance procedure for which the Union originally requested it");

Grand Rapids Press, 331 NLRB 296, 300 (2000) (quoting, *Mary Thompson Hospital*, 296 1245, 1350 (1989) ("The right of the Union to the information requested must be determined by the situation which existed at the time the request was made"), enfd. 943 F.2d 741 (7th Cir. 1991)).

In any event, the decision not to go to arbitration is one less reason for relevance, but, the request is still for presumptively-relevant wage information. The Respondent has not tried much less succeeded in rebutting the presumption of relevance. There may be cases where the Respondent meets its burden of proving the information is no longer relevant, but this is hard to do with presumptively relevant, nonconfidential information such as unit employee wage information. See *Borgess Medical Center*, 342 NLRB 1105, 1106-1107 (2004) (union request for hospital's confidential "incident report" needed for arbitration is moot after conclusion of arbitration where the Respondent met its burden of proving that information no longer needed). The Respondent has not met that burden here.

The Respondent violated the Act by failing and refusing to furnish the requested information regarding Sterner's pay records.

2. Bus 30 surveillance tapes

On April 5, 2013, Hockenberry requested the surveillance tapes from bus 30 for the stated purpose of investigating a potential grievance.

The Respondent did not provide the requested information. It did not respond to the Union. And, although the Respondent knew that the information would be taped over, it took no steps to either provide or preserve the requested information.

Over two months later, the Respondent cited confidentiality concerns as a reason for not providing the tape. By that time, and certainly by now, according to the testimony, the tape is gone—taped over and irretrievable.

The Respondent's failure to provide the requested information in timely fashion is violative of the Act. As set forth above, when information is sought for the grievance procedure, the scope of information which a union is entitled to request and receive is judged by a "liberal" broad "discovery type" standard. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. In considering such an information request,"[t]he Board's only function in such situation is in 'acting upon the possibility that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *W–L Moulding Co.*, 272 NLRB at 1240, quoting *Rockwell–Standard Corp.*, 410 F.2d at 957 and *Acme Industrial Co.*, supra at 437. Accord, *Howard University*, 290 NLRB 1006, 1007 (1988). Clearly, the tapes would "be of use" to the Union in evaluating a grievance over this matter. Notably, at no time, has the Respondent asserted that the request lacks relevance.

Respondent never suggested that it was not satisfied with the Union's explanation that it needed the information to investigate a grievance. Instead, it ignored the request. It did not raise its confidentiality concerns until more than two months after the request, well beyond a reasonable time to provide this information which, by all evidence, it could have provided within days if not hours. And by then, according to the evidence, the tape was probably irretrievable. If the Respondent had confidentiality concerns it could have raised them before violating the Act, not after. In any event, a party may not refuse to provide requested relevant information on

grounds of confidentiality. It must seek to bargain an accommodation for its confidentiality concerns.[20]

The Respondent violated the Act by refusing to provide the requested bus 30 surveillance tapes.

3. Zonar records

The Union grieved the discipline given to driver Katie Williams for excessive speed on two consecutive days, April 16 and 17, 2013. The discipline was based on her bus's "zonar" records. The Union requested the zonar records on April 24 for all driver's buses within a specified time period, and when they were not received, requested them again on May 7. On June 17, 2013, Durham agreed to rescind the Williams' discipline. On July 11, 2013, Hockenberry reiterated the request for the zonar records. Owings responded on July 13, 2013, refusing to provide the records on grounds that the grievance was withdrawn.

This rationale was reiterated by Owings at the hearing. He considered the grievance "closed" and therefore did not provide the zonar records. The zonar records were never provided.

Hockenberry testified at the hearing that he had sought the zonar records in order to investigate a concern he had that union members were being discriminated against in favor of financial core members with regard to the meting out of driver's discipline.

The Respondent's refusal to provide the zonar records is violative of the Act and is illustrative of the same errors in meeting its obligations as discussed with regard to previous requests. Thus, the Union repeatedly requested the zonar information in conjunction with a pending grievance. The Respondent did not claim the request was not relevant, it simply ignored the request for nearly three months. At that point it refused to provide the records on grounds that the grievance had been resolved. However, the violation had already occurred. As discussed above, it is no defense to such a violation to delay providing the information and then claim that the information is no longer needed. In any event, as Hockenberry testified, he still needed the information to investigate his suspicion of discriminatory use of the zonar records.

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[20]The Board has explained:

> When an employer demonstrates a substantial confidentiality interest, it cannot simply ignore the Union's request for information. It must still seek an accommodation of its concerns and the Union's need for the requested information. The burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited.

Alcan Rolled Prods., 358 NLRB No. 11, slip op. at 7 (2012); *Pennsylvania Power*, 301 NLRB 1104, 1106 (1991) ("a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests"); *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998) ("an employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concern and its bargaining obligations, as is often done by making an offer to release information conditionally or by placing restrictions on the use of that information").

This is a valid request in furtherance of the Union's duty to represent the unit and police the collective-bargaining agreement. It is not necessary that the Union have a valid grievance in order for the Respondent to be required to honor the request. "[T]he fact that the information, if produced at the early stages of grievance discussions would tend to establish that a grievance is without merit, equally serves a legitimate function of collective bargaining as such disclosure would thereby enable a union to determine which grievances should be pursued to arbitration and which should be dropped." *LaGuardia Hospital*, 260 NLRB 1455, 1461 (1982).

4. Summer work information

Without explanation of any legitimate reason for the delay, the Respondent took six weeks—and into the middle of summer—to furnish the information requested June 6, 2013, regarding the list of drivers signed up for summer work, and any such work already completed. The Respondent's duty was to "respond as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993).

"In evaluating the promptness of the employer's response, 'the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.'" *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005)). A list of current employees volunteering for summer work, and any such work already completed, would appear to be the type of information that reasonably could be provided within days. The Respondent provides no evidence or argument to suggest otherwise. Even accepting the claim of the Respondent that on June 17 Owings orally informed Hockenberry that it would take a while to gather the information—a communication that Hockenberry could not recall and that is not corroborated in any of the email correspondence on the subject—no explanation for this delay was provided at trial or otherwise. With no explanation, I cannot accept the bare claim that "it would take a while" as reasonable grounds for delay of the furnishing of straightforward information that would seem to require little effort to provide. Notably, when it was provided, it proved to be (GC Exh. 29) a simple one-page list of 14 employees, with dates that they had performed work, only one day of which preceded the original June 6 request. This information could have been provided within a day or two of the request. The Respondent's delay in furnishing this information is violative of the Act.

Part III

The Respondent's claim that the Acting General Counsel lacked authority to issue the complaint in this matter

The Respondent argues that the Acting General Counsel lacked authority to issue the complaint in this matter for two reasons.

First, the Respondent asserts (R. Br. at 48), without any evidentiary support, that "the Board has not held a proper quorum since January 2012," and, therefore, all of its actions

> and those of its agents—including the issuance of this Complaint—were done so without proper jurisdiction and, thus, this Complaint must be dismissed in its entirety.

This argument must fail. The Respondent provides no evidence for its assertion that "the Board has not held a quorum since January 2012." The public record shows that as of August 5,

2013, three Senate-confirmed members of the Board were sitting. By August 12, 2013, all five current members of the Board were in Senate-confirmed seats and sworn into their positions. The complaint in this case issued August 16, 2013. (Chairman Pearce was subsequently sworn in for a second term on August 23, 2013.) Thus, the Respondent's suggestion that there was no quorum at the time the complaint in this case issued is meritless, even assuming, arguendo, what I take to be its implicit claim that previous recess appointments to the Board were flawed. See, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2012), cert. granted __ U.S. __, 133 S.Ct. 2861 (2013).

Second, the Respondent alleges (R. Br. at 49) that the Acting General Counsel at the time of the issuance of the complaint in this matter independently lacked authority to issue the complaint, or to delegate such power to the Regional Director, as his appointment was not in compliance with the Federal Vacancies Reform Act (FCRA), 5 U.S.C. § 3345 et. seq. In this regard the Respondent limits its claim to the contention that under the FCRA the Acting General Counsel, Lafe Solomon, could not be validly be appointed unless he was, within the previous 365 days, a personal assistant to the departing General Counsel (and he was not).

This argument was adopted by a court in *Hooks v. Kitsap Tenant Support Services*, 2013 U.S. Dist. LEXIS 114320, 196 LRRM (BNA) 2703 (W.D. Wash 2013), but I believe it involves a straightforward misreading of the FCRA.[21]

In any event, the Board has held that "regardless of whether the Acting General Counsel was properly appointed under the [FCRA], the complaint is not subject to attack based on the circumstances of his appointment," as the provision of the FCRA that deems an office "vacant" and actions taken by its occupant of "no force or effect" if filled in a manner inconsistent with the FCRA (5 U.S.C. § 3348), is expressly and specifically inapplicable to the office of the General Counsel of the Board. 5 U.S.C. § 3348(e)(1). See *Belgrove Post Acute Care Center*, 359 NLRB No. 77 fn. 1 (2013). The reasoning of *Belgrove* was adopted by the Board in *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. at 2 (2014). My charge is to apply Board precedent. *Waco Inc.,* 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied.") (Citation omitted); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). Accordingly, I reject the Respondent's FRCA defense.

[21]The court in *Kitsap Tenant Support Services*, supra, ruled that under 5 U.S.C. § 3345(a)(1), only the first assistant to the office shall perform in an acting capacity. Solomon was not the first assistant of the former General Counsel. However, the court's analysis completely ignores 5 U.S. C. § 3345(a)(3) which provide that "*notwithstanding paragraph (1)*, the President (and only the President) may direct an . . . employee of such Executive Agency to perform the functions and duties of the vacant office . . . in an acting capacity . . if" within the previous 365 days the "employee served in a position in such agency for not less than 90 days" and in a position for which the rate of pay "is equal to or greater than the minimum rate of pay payable for a position of GS-15." Before being named by the President as Acting General Counsel, Solomon was a longtime Board employee who held high-ranking positions for many years including the year preceding the date he was named Acting General Counsel. He met the qualifications for appointment under 5 U.S.C. § 3345(a)(3).

CONCLUSIONS OF LAW

1. The Respondent Durham School Services, L.P. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Teamsters Local Union No. 776 is the recognized collective-bargaining representative of the following appropriate unit of the Respondent's employees:

   All full-time time and regular part-time drivers employed by the employer at its Spring Grove, Pennsylvania operations, but excluding all office clerical employees, managers, road supervisors, safety trainers, dispatchers mechanics, professional employees, guards and supervisors as defined in the Act.

3. The Respondent violated Section 8(a)(1) by impliedly threatening to discharge employee Kephart.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested information regarding employee Sterner's pay records, the bus 30 surveillance tapes, and the zonar records, and delaying furnishing the Union with the requested summer work information.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall provide the Union with the previously-requested Sterner pay records, Zonar records, and to the extent they remain in the Respondent's possession custody or control, the previously-requested Bus 30 surveillance tapes.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, 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. 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 November 26, 2102. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 5 of the Board what action it will take with respect to this decision.

The General Counsel seeks two remedial provisions that I deny. The General Counsel seeks an order requiring the Respondent to bargain face-to-face, in good faith, for not less than 24 hours per month, in daily sessions of between four and six hours, or upon another mutually-agreed to schedule until the parties reach an agreement or a bargaining impasse. It is unclear to me that this would be an appropriate remedy if the Respondent had been found to have unlawfully delayed bargaining until July 2013, given that by all evidence the bargaining after that time was adequate (or at least, not legally objectionable). However, given that I have dismissed the unlawful delay allegations and, in terms of 8(a)(5) violations, found merit only in the refusal/delay in furnishing information allegations, there is no question that a remedy structuring the parties' bargaining is unwarranted.

The General Counsel also seeks as a remedy an order requiring a management official, or in the alternative, a Board agent, to read the notice to employees. I do not believe the General Counsel has demonstrated that this measure is needed to remedy the effects of the Respondent's unfair labor practices. In particular, as a rationale, the General Counsel points to the bulletin board incident, which it says "occurred in full view of other employees." Putting aside that I have deferred (and therefore dismissed) the allegations relating to the major part of the bulletin board incident, the record does not support the claim that the incident occurred "in full view." Rather, it occurred in the employee break room, near the management offices, and other than the one employee who alerted management to Kephart's effort to remove the tape from the bulletin board, there is no evidence that other employees witnessed the altercation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

Respondent Durham School Services, L.P., Spring Grove, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

   (a) Impliedly threatening an employee with discharge in response to their protected and concerted activities.

   (b) Failing and refusing to furnish information requested by the Union that is relevant and necessary for the Union to fulfill its role as the collective-bargaining representative of the unit employees.

   (c) Delaying the furnishing of information requested by the Union that is relevant and necessary for the Union to fulfill its role as the collective-bargaining representative of the unit employees.

   (d) 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.

[22]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.

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

   (a) Provide the Union with the previously-requested Sterner pay records, zonar records, and to the extent they remain in the Respondent's possession, custody or control, the previously-requested bus 30 surveillance tapes.

   (b) Within 14 days after service by the Region, post at its facility in Spring Grove, Pennsylvania, copies of the attached notice marked "Appendix."[23] 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, 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 November 26, 2012.

   (c) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

Dated, Washington, D.C. May 9, 2014

_____
David I. Goldman
U.S. Administrative Law Judge

[23]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."

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 impliedly threaten you with discharge in response to your protected activities.

WE WILL NOT fail and refuse to furnish information requested by the Union that is relevant and necessary for the Union to fulfill its role as your collective-bargaining representative.

WE WILL NOT delay the furnishing of information requested by the Union that is relevant and necessary for the Union to fulfill its role as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish the Union with previously-requested information that we unlawfully withheld to the extent we have or can obtain that information.

DURHAM SCHOOL SERVICES, L.P.
(Employer)

Dated _____ By _____

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.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-106483 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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.