JD–54–14
Washington, DC

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

BUSINESS RESOURCE SECURITY
SERVICES, USA, INC. (BRSS)

and Case 05-CA-119728

ROGER PROPHET, AN INDIVIDUAL

Brendan Keough, Esq.,
for the General Counsel.
Dr. Johnson Ayodele Akingbade,
of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

Eric M. Fine, Administrative Law Judge. This case was tried in Washington, D.C., on May 12, 2014. Roger Prophet filed the charge on December 27, 2013, and the first amended charge on March 5, 2014.[1] The General Counsel issued the complaint on March 28, 2014, alleging, as amended at the hearing, that Business Resource Security Services, USA, Inc. (BRSS) (Respondent) interrogated and threatened Prophet concerning his union activities in violation of Section 8(a)(1) of the Act; and discharged him in violation of Section 8(a)(3) and (1) of the Act.

On the entire record, and after considering the briefs filed by the General Counsel and the Respondent,[2] I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, has an office and place of business in the District of Columbia and has been engaged in the business of providing security guard services to various

[1] All dates are in 2013 unless otherwise indicated.

[2] Following the filing of briefs, counsel for the General Counsel filed a "Motion to Strike Portions of Respondent's Brief to the Administrative Law Judge." The General Counsel points out Respondent filed two briefs, the second version being a corrected version of the first which had been mistakenly filed unedited. The General Counsel asserts in both briefs Respondent makes assertions based on facts not placed in evidence at the hearing. It is asserted that those close claims and any post-hearing evidence submitted solely via Respondent's briefs should be stricken from the record and not considered. Respondent did not file an opposition to the General Counsel's motion, which I grant.

properties in the District of Columbia. During the past 12 months, a representative period, Respondent has provided services valued in excess of $50,000 for the United States government. Respondent admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act. Respondent also admits and I find the Service Employees International Union, Local 32BJ (the Union) is a labor organization under Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The facts in this case are largely not in dispute. Dr. Johnson Ayodele Akingbade, Respondent's president and owner was the only person called as a witness.[3] Akingbade has owned Respondent since 1997, the year it was established. At the outset of the hearing, the parties entered into evidence a signed stipulation of facts as well as some joint exhibits. The written stipulation reveals: Respondent and the Union have a collective-bargaining agreement pertaining to certain employees of Respondent, including employees located at 2860 South Capitol Street, SE, Washington D.C. Prophet began his employment with Respondent on December 27, 2011, and his employment was terminated by Respondent on October 19, 2013, because Prophet refused to respond to Respondent's email inquiry originally sent on October 8, and later re-sent on October 18. At the time of his termination, Prophet was working for Respondent at the D.C. Department of Transportation located at 2860 South Capitol Street, SE, Washington D.C.

Respondent employs about 135 to 140 security guards at 18 locations. Prophet worked for Respondent as a security guard. Respondent is a subcontractor to Allied Barton, a company also providing security services. Respondent began subcontracting work from Allied Barton in September 2009. At that time, Allied Barton had already entered into a collective-bargaining agreement with the Union. When Respondent began subcontracting from Allied Barton it adopted the collective-bargaining agreement between Allied Barton and the Union, which covers Respondent's security guards.

Concerning the facts resulting in Prophet's termination, by email dated August 3, Respondent office assistant Kim Wilson sent the weekly schedule for Respondent's security guards working at the 2860 South Capitol Street location for the period August 5 to August 11. The email was sent to Prophet, along with other security guards, and copied to Akingbade. The schedule attached to the email shows Prophet was scheduled to work on Tuesday, Wednesday, Saturday, and Sunday each with eight hour shifts. On August 3, Prophet sent an email to Wilson concerning the August 5 to 11 schedule, stating, "I start a new part-time job next week Saturday and Sunday." That same day Wilson forwarded Prophet's email to Akingbade.

On August 4, by email Wilson issued a revised weekly schedule for the period August 5 to August 11. The revised schedule was sent to Prophet along with the other security guards at the location in question and copied to Akingbade. The only change in the revised schedule was to remove Prophet from his Saturday and Sunday shifts and replace him with other security guards on those shifts. Prophet was replaced by guards Jackson on Saturday, August 10, and Hunter on Sunday, August 11. Akingbade testified this change was made pursuant to his instruction and was done in response to Prophet's email stating he had another job.

[3] I found Akingbade, considering his demeanor and the content of his testimony, to have testified in a credible fashion. In this regard, Akingbade testified in a straight forward and consistent manner and did not try to embellish his testimony.

On August 28, Profit sent Akingbade an email stating, "the weekend job didn't work out so I'm free for weekends." On August 29, Akingbade sent an email to Prophet stating, "You do not expect this Company to submit to your manipulation by inconveniencing our single-mindedly loyal employees in order to suit your change of fortune on your 'new jobs'. We have adhered to your wish to quit weekend assignments and we made our plan, long term, to exclude you on weekends accordingly. If we ever need your services on any weekends or occasions, we'll let you know."

On September 5, Union Grievance Representative Marizabel Orellana sent Akingbade an email stating she was attaching a "Grievance Initiation" letter regarding Prophet. Orellana stated, "Mr. Prophet reported to us when he was going to start his vacation two weeks ago, he received notice about change in position. When he returned to work last week only scheduled now for 16 hours instead of 32 as he had before. Please send your response to Teo (Rodriguez) within five business days." Rodriguez is the Union's chairman of the grievance committee. The attached grievance stated, in pertinent part:

> Claim #1: Member claims that his/her hours of work were or will be changed without sufficient cause or reason effective 8/12/13. The Union seeks that the Employer be directed to restore the member to his/her original work hours without loss in pay, benefits, and seniority.
>
> And in order to conduct our investigation into the merits of this grievance, please forward your personnel file concerning Mr. Prophet to the Union office by Sept. 12th, 2013.
>
> The first step of the grievance procedure is an informal hearing. After a determination that the grievance has merit, the Union will seek to schedule such a hearing. If the matter cannot be resolved through an informal hearing, the matter may proceed to arbitration to resolve the dispute.

On September 7, Akingbade sent an email to Rodriguez responding to Prophet's grievance. Akingbade stated as follows:

> 1. OFFICER ROGER PROPHET has lied to you (that he did not know why his assignments had reduced)-- and we will not take it likely. It was he who took himself out of his weekend duties (see his email dated 8/03/13 far underneath) when he informed us five weeks ago that he had secured a new job with another company on weekends. He followed up his email by calling on and telling our Office Staff to insure that he was not deployed any more weekends. We complied by taking him off his weekend assignments accordingly.
> 2. To our surprise, we received an email 8/28/13 from Officer Prophet, below, telling us his new job had collapsed and wanted his weekend assignment back--25 days after he secured the new job. Our response saying "No, but..." dated 8/29/13 is reproduced below.
> 3. His loyalty already came into question when, by his email dated 8/3/13, he informed us that he had chosen a new job in preference to ours on weekends; yet, we did not penalize him as we allowed him to retain his other shifts. This statement he made to SEIU 32BJ shows him as a barefaced liar and I am not too sure if it is safe to allow his lying to go unchallenged; it is possibly a symptom of worse developments waiting to occur, perhaps soon. We'll test the water and have him queried accordingly.
>
> We should like to know why his new employer dropped him after 25 days, in case the reason (e.g. if due to lying) is germane to the basis of his employment here. BRSS, as a policy, does not hire someone who was rejected by their former employer.
>
> We are sure that SEIU32BJ will be on our side in fishing out any undesirable element in this Company— one who had the audacity to come to you and has caused you and his Management to spend our scarce time on a matter that is all a lie!

Akingbade testified that when he said Prophet lied to the Union by not telling them why his assignment changed that Akingbade was not present when Prophet spoke to the Union about his grievance. Akingbade testified in reaching the conclusion that Prophet lied to the Union concerning the grievance, that Akingbade relied only on what he received from the Union in terms of the September 5 email and attached grievance. Akingbade testified he believed what Prophet said to the Union was what was communicated to Akingbade by the Union's grievance letter. Akingbade testified he did not send his grievance response to Prophet, rather he expected the Union to inform Prophet of Akingbade's response.

On September 25, Rodriguez sent Prophet a letter stating, in part

> We have carefully reviewed the facts and circumstances surrounding your grievance and have determined that it lacked sufficient merit for the Union to be likely to prevail in arbitration. For that reason, it is not in the interest of the Union and its membership to carry this case forward to arbitration.

Akingbade testified he never had a meeting with the Union over Prophet's change of schedule grievance. Akingbade testified he did not see a copy of the Union's September 25 letter to Prophet or know about the Union's decision to drop the grievance until December when Akingbade attended an unemployment hearing concerning Prophet.

On October 8, Akingbade sent an email to Prophet, which states as follows:

> 1. In the Grievance you filed against this Company through the Union dated September 5, 2013 (marked W), you alleged that this Management slashed your hours of work from four 8 hour shifts to two shifts after your "return from vacation", that you were only scheduled "for 16 hours instead of 32" as you had before.
>
> 2. You did not say that it was you who asked us to cancel your two shifts on weekend when you informed us, per your email dated 8/3/13 (marked V), that you were starting "a new job" "next Saturday and Sunday" ie. from Saturday 8/10 and Sunday 8/11/13.
>
> 3. When on 8/3/13 you saw the 8/5 to 8/11/13 Weekly Schedule released at 10.29 am same day 8/3/13 (marked VII) showing you being assigned for your regular duty Saturday 8/10 and Sunday 8/11/13, you, to our surprise, called our Office Assistant and told her to cancel both assignments as you were going to start a new job with another company on weekends starting on Saturday 8/10 and Sunday 8/11/13. You followed it up with an email; as aforementioned, dated same day 8/3/13 released at 4.13 pm (marked V).
>
> 4. Our Office Assistant had to take the trouble, the next day Sunday 8/4/13, to revise the entire Weekly Schedule (marked VI) to accommodate your weekend cancellation demand. She sent out the Revised Weekly Schedule (marked VI) at 9.51 am, Sunday 8/4/13. The cancellation affected some other Officers who had to be displaced and deployed to fill Officer Prophet's vacated two shifts, Saturday 8/10 and Sunday 8/11/13, respectively.
>
> 5. To our yet another surprise, you sent us an email dated 8/28/13 (marked 111) advising us that your new job had flopped and you wanted to be returned to your former two shifts Saturday and Sunday which you voluntarily abandoned for the sake of satisfying a new employer. We responded to you 8/29/13 (marked 11) declining your untenable, manipulative request. We commend the email to you for a fresh reading.
>
> It was a week later September 5, 2103 (marked IV) that we received a letter of your grievance falsely claiming that it was because you went on a vacation that we took the Saturday and Sunday assignments from you!

6. We are pained by your barefaced lie against this company and, as we said in our letter to the Union dated which 9/5/13 (marked 1), we planned to take up the matter seriously as we are now doing with you. You are advised to read our said email marked IV so you can assess the depth of our feeling on the matter.

7. We had deliberately allowed a good interval to see whether you would contest our explanation to the Union (marked 1) or you would take step to withdraw your false allegation against this Company. Neither action has taken place; hence we hereby request you to explain why a severe disciplinary action (including but not limited to termination) should not be taken against you for lying against this Management and for portraying your employer in bad light to the esteemed SEIU 32BJ Union.

8. This Management takes lying by a security officer very seriously. It destroys the trust our employees should expect to enjoy from us, their employer; and it is our firm belief that an employee who lies against his employer (to whom he is responsible for his/her means of livelihood) can, with considerable comfort, lie against any other person including our clients and members of the public; very easy against his/her fellow co-workers.

Lying or dishonesty is a contravention of BRSS Policy as contained in scattered pages of the BRSS HANDBOOK namely page 4 item 2 in a Policy memo titled "Re 36 point Ejection/Rejection/Termination Offences", page 49 second asterisked item in a memo titled "Employee Conduct and Work Rules", page 54, item 48 in a Policy Memo titled "Summary of Laxities, Lapses, Inadequacies, Pitfalls and Violations To Be Avoided or Corrected For a Successful Career With BRSS"; page 59 item XI; page 81 CODE OF CONDUCT, ITEM 11.

9. In the interim period since you made your false accusation against this company, we have begun a review of your overall record in this Company. We hope to conclude the exercise soon after the receipt of your response expected within 48 hours ending 7.30am Thursday 10/10/13.

10. Please comply with sending your response within the deadline of 7.30 am Thursday 10/10/13. FAILURE to respond is, in itself; a serious infraction per items 3 and 4 of page 4 of the BRSS HANDBOOK titled "Re: 36 point Ejection, Rejection, Termination Offences" and it amounts to insubordination per the 18th asterisked item on page 49 of the BRSS HANDBOOK.

Akingbade testified Prophet did not respond to Akingbade's October 8 email. However, Akingbade met with Prophet on October 10 in person concerning a stolen laptop at the worksite where Prophet was working. Akingbade testified he did not suspect Prophet of stealing the laptop, nor did he conclude Prophet stole it. Akingbade testified that, during the meeting, he asked Prophet for a response to the inquiry set forth in Akingbade's October 8 email.[4] He testified that Profit again did not respond to that question.

On October 18, Akingbade sent an email to Prophet stating that:

1. When you came to this Office 10/10/13 in connection with the incident at #2860 site, I seized the opportunity to remind you of our query below dated 10/8/13 and got a copy delivered to you as you were waiting in the Office lobby. You read the query and returned it to me saying you were already dealing with it.

2. Even though the deadline before the submission of your response passed 10/10/13 over a week ago, we have, since then, been waiting in vain for your response.

[4] At the trial, as a result of this testimony, counsel for the General Counsel amended the complaint to include a Section 8(a)(1) allegation concerning Akingbade's admitted questioning of Profit during the October 10 meeting.

> 3. We hereby, as a concession, give you 24 hours ending 11.25 am tomorrow Saturday 10/19/13 to receive your written response by email, fax or hand delivery. Otherwise, we shall take your lack of response by 11.1 am tomorrow 10/19/13 as an admission of all the charges leveled against you in our said query and shall go ahead to take an appropriate decision in line with the Company's policies, rules and regulations as contained in the BRSS HANDBOOK including what were liberally cited in our said query.

Akingbade testified that Prophet did not respond to the October 18 email.

On October 19, Akingbade sent Prophet an email the subject of which was "Letter of termination of your employment with BRSS, effective immediately, 10/19/2013." The email stated, in part:

> 1. We refer to our query dated 10/18/13 below granting you an unsolicited 24 hour extension following 8 days since the expiration of the deadline for the original query issued to you 10/08/13.
> 2. We observe, with utmost regret that, even in spite of the telephone reminder made twice yesterday into your voicemail by our Office Assistant, per her report below, and despite the pre-warning given in our said query, you have failed to respond to the query till now, 6 hours after the expiration of the deadline!
> 3. Your employment with this company is accordingly terminated effective immediately.[5]

Following his discharge, Prophet filed for unemployment benefits with the D.C. government. Prophet's initial claim was denied, to which he filed an appeal on November 20. The appeal raised the issue of whether Prophet was discharged for cause constituting misconduct under the District of Columbia regulations pertaining to its unemployment compensation act. The record contains a decision by a District of Columbia administrative law judge who rendered the decision on Prophet's appeal for benefits. A hearing was held before the judge on December 11, at which both Prophet and Akingbade attended.

The D.C. judge stated in her decision that Akingbade stated Respondent discharged Prophet because he interpreted Prophet's failure to respond to his inquiries as dishonesty and considered Prophet's failure to respond as insubordination. The D.C. judge stated:

> It is undisputed that Claimant (Prophet) asked to be removed from the weekend schedule to work another job. It is also undisputed that Claimant filed a grievance stating that Employer reduced his hours. In Claimant's testimony, he admitted that he asked Employer to remove him from the weekend schedule so that he could work his other job. Despite this, Claimant asserts that his statement in his grievance that Employer reduced his hours upon return from vacation was truthful. On this record, I find that Employer established that Claimant was not truthful to the Grievance Board in the reason why his hours were reduced. Claimant provided no mitigating reason why he made the statement.

The D.C. judge went on to state, "I do find that Claimant breached his obligation to be truthful to and about Employer. Therefore, under the facts of this case, I conclude that Employer established that Claimant's dishonesty was simple misconduct." The D.C. judge stated, "It is undisputed that Employer communicated to Claimant numerous times to respond to Dr. Akingbade as to why he stated in his grievance that the Employer had reduced his hours.

[5] At the time of the hearing there was no pending grievance over Prophet's discharge.

Employer also extended the deadline by which Claimant could respond by more than a week. Claimant did not respond to any of Employer's queries and Employer considered Claimant's action to be insubordination." The D.C. judge concluded Prophet was disqualified from receiving unemployment compensation for a period of 8 weeks, but thereafter could receive benefits.

Akingbade testified at the unfair labor practice trial the stolen laptop was not the reason he terminated Prophet. He testified, "I gave him a query to explain why, you know, why he went to the Union to lie, because it was a big lie he told. And we cannot accommodate somebody who lies in the Company. The lie he told was that he said I cut his hours because he returned from vacation. I didn't – if somebody goes on vacation, he has to get his hours back upon return according to the Union agreement. So he told them that I punished him for going on vacation, which is not true. He was the one who withdrew the two shifts." Akingbade testified his problem was Prophet did not answer Akingbade's query. Akingbade testified whatever response Prophet may have given would have been something to work on, but Prophet just ignored the query. Akingbade testified, "I don't know how we can establish discipline in an organization when an employee refuses to answer my query. That was why he lost and appealed to the Department of Unemployment. He lost there for the same reason. We went before the Administrative Judge hearing. He lost because the judge said I have the authority, I mean, I have a right to query to my employee. And this is -- for firing employee not to respond to his employer at all. Akingbade testified, he lost at the Union itself. The Union dismissed his claim. The Department of Unemployment dismissed it. The Administrative Judge dismissed it."

Akingbade testified that from the correspondence from the Union he believed that Prophet lied to the Union by claiming that it was because Prophet went on vacation that Akingbade reduced Prophet's hours. Akingbade testified he fired Prophet, "Because he refused to answer the query given to him." He testified "The query was to explain why he lied to the Company, why he gave -- I mean to the Union. Why he gave wrong information to -- why he lied to the Union about the reason why his hours were reduced. And according to our policy, which is in our manual, lying even in little things matters to us. And if somebody should lie against me, the Employer, my belief is that he could easily lie against anybody else. So we wanted him to clear that. He could have tendered an apology, which I would have accepted. He just refused to answer. He refused." When asked if that was the only reason Akingbade fired Prophet, Akingbade testified, "That was the reason, for refusing to answer a query." He testified, "It is the policy, in our policy. If you refuse to answer, it says insubordination."

Akingbade cited sections of Respondent's Handbook upon which he relied in his decision to terminate Prophet. Akingbade testified the employees receive and sign a copy of the handbook when they start working for Respondent. Akingbade also provided a copy of two different schedules from 10/7 to 10/13 and from 10/14 to 10/20 showing that Prophet worked 32 hours during those weeks. In this regard, Akingbade testified when he had the opportunity he gave Prophet extra hours as promised. Akingbade testified his terminating Prophet was not about his going to the Union and that he did not have anything against Prophet's going to the Union. Akingbade testified he took lying very seriously because Respondent's security officers are required to be very honest in everything they do. He testified Respondent relies on their reports, and this was especially in the case of Prophet, who was working at a site where only one officer worked at a time. Prophet worked at the D.C. government's Department of Transportation site.

Akingbade testified there is a contract signed between Allied Barton and the D.C. Government requiring Akingbade to discipline anybody who is dishonest. The contract provision is section C-19. He testified it is a contract for Citywide Security Services for security guard services in Washington, D.C. Akingbade testified he obtained a copy from Allied Barton's project manager as well as from the D.C. government website. Akingbade testified he downloaded the contract prior to discharging Prophet and that he uses the contract to train employees. Section C-19. of the contract reads "Removal of Contractor Employees from Post." It states at C-19.1:

> The contractor acknowledges that it's responsible for removal of contractor's employee from a post, and that it's responsible for ensuring that all employees comply with directives issued by the COTR.

It states:

> In addition, the contractor agrees to maintain satisfactory standards of employee competence, conduct, appearance, and integrity and shall be responsible for taking such disciplinary action as is deemed necessary with respect to its employees.

Section C-19.4, states: "The contractor shall be required to dismiss such employees within the timeframe ranging from immediately to the week after as specified by the COTR. Any employee so dismissed shall have no time eligible to work under this contract, should at no time be eligible to work under this contract." Akingbade testified that COTR is the agency in charge of supervising contractors. It is now known as DGA, Department of General Services.

Respondent's handbook contains Section 36, "Point Ejection/Rejection/Termination Offenses:" It states "Offenses that could lead to the instant ejection of (or other disciplinary action against) a Security Officer" include: "2. Telling lies or untruth or misrepresentation or engaging in deceit;" "3. Failure to respond and promptly to operational/administrative queries from the site coordinator, fellow colleagues or from Management;" "4. Failure to respond to other Management's request for information;" "36. Insubordination, rudeness or lack of cooperativeness and courtesy to the designated site coordinator and/or his/her assistant."

Article 10 section 4 of the collective-bargaining agreement in effect provides that:

> Assignments, promotions, and the filling of vacancies, shall be determined on the basis on seniority, provided that in the sole and exclusive opinion of the Employer of the Employee is qualified, suitable and available to work. Seniority shall be determinative when, and only when all other job-related factors are equal.

A. Analysis

In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the Court gave its approval to the Board's decision in *Interboro Contractors*, 157 NLRB 1295 (1966). In *Interboro* the Board found that it is a Section 7 right for an employee to assert rights conferred on him and his fellow employees through a collective-bargaining agreement. In *NLRB v. City Disposal Systems*, supra at 835-837, the Court stated:

> Moreover, by applying Section 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also

> the entire process envisioned by Congress as the means by which to achieve industrial peace.
>
> To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of Section 7. [Citations omitted.] Indeed, it would make little sense for Section 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.
>
> In practice, however, there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee's initial refusal to perform a certain job that he believes he has no duty to perform. It is reasonable to expect that an employee's first response to a situation that he believes violates his collective-bargaining agreement will be a protest to his employer. Whether he files a grievance will depend in part on his employer's reaction and in part upon the nature of the right at issue. In addition, certain rights might not be susceptible of enforcement by the filing of a grievance. In such a case, the collective-bargaining agreement might provide for an alternative method of enforcement, as did the agreement involved in this case, see *supra,* at 1507, or the agreement might be silent on the matter. Thus, for a variety of reasons, an employee's initial statement to an employer to the effect that he believes a collectively bargained right is being violated, or the employee's initial refusal to do that which he believes he is not obligated to do, might serve as both a natural prelude to, and an efficient substitute for, the filing of a formal grievance. As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity, just as he would have been had he filed a formal grievance.
>
> The fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7. (Citations omitted.)

The Court went to state:

> Respondent further argues that the Board erred in finding Brown's action concerted based only on Brown's reasonable and honest belief that truck No. 244 was unsafe. Brief of Respondent 38. Respondent bases its argument on the language of the collective-bargaining agreement, which provides that an employee may refuse to drive an unsafe truck "unless such refusal is unjustified." In the view of respondent, this language allows a driver to refuse to drive a truck only if the truck is objectively unsafe. Regardless of whether respondent's interpretation of the agreement is correct, a question as to which we express no view, this argument confuses the threshold question whether Brown's conduct was concerted with the ultimate question whether that conduct was protected. The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his

right was violated. See supra, Part II. No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced. The same is true of other methods by which an employee enforces the agreement. On the other hand, if the collective-bargaining agreement imposes a limitation on the means by which a right may be invoked, the concerted activity would be unprotected if it went beyond that limitation. See supra, at 1514.

In this case, because Brown reasonably and honestly invoked his right to avoid driving unsafe trucks, his action was concerted. It may be that the collective-bargaining agreement prohibits an employee from refusing to drive a truck that he reasonably believes to be unsafe, but that is, in fact, perfectly safe. If so, Brown's action was concerted but unprotected. As stated above, however, the only issue before this Court and the only issue passed upon by the Board or the Court of Appeals is whether Brown's action was concerted, not whether it was protected.

The NLRB's *Interboro* doctrine recognizes as concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective-bargaining agreement. We conclude that the doctrine constitutes a reasonable interpretation of the Act. Accordingly, we accept the Board's conclusion that James Brown was engaged in concerted activity when he refused to drive truck No. 244. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion, including an inquiry into whether respondent may continue to defend this action on the theory that Brown's refusal to drive truck No. 244 was unprotected, even if concerted. Id at 840-841.

In *City Disposal Systems, Inc. v. NLRB*, 766 F2d 969, 972 (6th Cir. 1984), the court on remand stated:

The primary question before us on remand is the first element of the standard: whether substantial evidence supports the finding that Brown's statements and actions in refusing to drive truck 244 were based on a reasonable and honest belief that he was being directed to perform a task that he was not required to perform under the collective bargaining agreement. It should be clear that this test is neither wholly subjective nor wholly objective. Action based upon an honest but unreasonable belief is not concerted. Similarly, an employee's action is concerted if it is both subjectively honest and objectively reasonable, “regardless of whether the employee turns out to have been correct in his belief that his right was violated.” *City Disposal,* 104 S.Ct. at 1516. To determine whether substantial evidence exists that Brown acted on an honest and reasonable belief that a collectively-bargained right was being violated, we examine the collective bargaining agreement that created Brown's employment rights, the objective evidence known to Brown indicating that a right was being violated, and Brown's own words and actions.

The court thereafter affirmed the Board’s finding that Brown honestly believed the truck he was assigned was unsafe was supported by substantial evidence. The court upon a review of the evidence stated that substantial evidence supports the ALJ’s finding that Brown was engaging in concerted activity when he refused to drive the truck. The court noted that the final question was although Brown’s activities were concerted was whether they were protected. In finding that Brown’s refusal to drive the truck was not “unjustified” within the meaning of the applicable provision of the collective-bargaining agreement, and because his actions were not “abusive”

that Brown's refusal to drive the truck was protected, and therefore he was discharged for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act.

In *Newark Morning Ledger,* 316 NLRB 1268, 1271-1272 (1995), the judge concluded that supervisor DeSimone had approved the assignment of two of three suggested apprentices by the union vice chapel chairman Korines to perform on a night shift as substitutes for journeymen. In this regard, the judge concluded that DeSimone explicitly refused to allow apprentice Flannery to be put up as a journeyman. The judge also found that Korines, having been notified of the refusal, decided to take matters into his own hands and physically modified the markup sheet by changing Flannery's assignment from apprentice to journeyman. The judge stated that:

> Korines testified that he interpreted the contract as meaning that he could, as vice chapel chairman, ignore the Company's refusal to give permission and refer a substitute apprentice to work as a substitute journeyman, with the Company having the remedy of refusing to allow the referred man to work the shift. As I have already indicated, this interpretation of the contract would effectively nullify section 3(a) thereof and is inconsistent with the acknowledged longstanding practice of the parties. In effect, Korines' interpretation would put the Company in the position of either accepting the nonapproved substitute or of sending him home and not having enough time to find a suitable person to man the job. In short, it is my opinion, that Korines, acting on his own, was seeking to unilaterally change the agreed-upon terms and conditions of referring substitutes for employment. Moreover, I find that in furtherance of this object, he altered the markup sheet in an effort to avoid the fact that DeSimone had refused to grant permission to have Flannery put up as a journeyman on the evening of October 31, 1992.
>
> The actions of a shop steward (or for that matter any employee) who honestly and reasonably seeks to enforce the terms of a collective-bargaining agreement constitutes protected concerted activity within the meaning of Section 7 of the Act. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), where the Supreme Court upheld the Board's *Interboro* doctrine. [FN5] See also *Howard Electric Co.*, 285 NLRB 911 (1987), and *Freeman Decorating Co.*, 287 NLRB 1235, 1239-1240 (1988).
>
> * * *
>
> In the present case, it is my belief that Korines was not honestly and reasonably acting to enforce the terms and conditions of the existing collective-bargaining agreement. On the contrary, I believe that he was acting with the intent of unilaterally changing the terms of the agreement and the longstanding practice of the parties with respect to the assignment of substitute journeymen and apprentices. To make matters worse, I believe that the evidence warrants the inference that after Leotsakos left on the evening of October 31, 1992, Korines altered a business record, namely, the markup sheet, which is the document telling the night foreman, which employees are to be assigned as journeyman and which are to be assigned as apprentices.
>
> In conclusion, it is my opinion, that Korines was not engaged in protected activity and that the threatened discharge by DeSimone was not unlawful within the meaning of Section 8(a)(1) and Section 7 of the Act.

In *Carolina Freight Carriers Corp,.* 295 NLRB 1080, 1083-1084 (1989), the General Counsel argued two events led the respondent employer to reject employee Ward's application for regular employee status and to fire Ward and that they involved protected activity on Ward's part. The specified events were: Ward's comments to a supervisor about the Thanksgiving holiday; and Ward's insistence, on October 22, that he was entitled to 6 hours' work. The judge

concluded with Board approval that as to the Thanksgiving holiday dispute that the respondent acted against Ward because of Ward's accusation to a supervisor that he was messing around with Wards paperwork to "screw me out of my holidays." The judge noted that the union contract provided for holiday pay for bargaining unit members employed at least 30 days prior to the holiday in question. The judge stated if a regular employee protested the respondent's failure to accord the employee a Thanksgiving holiday, the protest would fall within the protections of *City Disposal.* However, Ward was complaining about delays in the processing of his application, not about CFC's failure to grant the holiday to someone who was entitled to it. The judge concluded in finding that Ward's protest concerning the delay in his application did not constitute concerted activity by stating:

> I suppose one conceivably could argue that the collective-bargaining agreement might be read as prohibiting CFC from avoiding holiday pay obligations by delaying action on job applications. Or rather, one could argue that it was not unreasonable for Ward to believe that the agreement ought to be interpreted that way. But that seems farfetched to me. The likelihood is that when Ward made his screw-me-out-of-my-holiday remark, he knew that CFC had no contractual duty to process his application promptly. And even if Ward did believe that some contractual duty was involved, that belief was too unreasonable to serve as the basis for protected conduct.

In *ABF Freight Systems*, 271 NLRB 35, 36 (1984), the Board stated:

> As noted above, in *City Disposal*, the Supreme Court affirmed the *Interboro* doctrine, including the qualification that an individual employee's invocation of a collectively bargained right must be *reasonable* and *honest* in order to bring it within the protection of the Act. Taken as a whole, the evidence clearly establishes that, when Callahan refused to drive the tractor-trailer unit assigned to him 30 July 1981 complaining that it had faulty brakes and lacked required reflectors, he was not reasonably and honestly invoking a collectively bargained right, but was obstructively raising petty and/or unfounded complaints.[FN14] Thus, as more fully set forth above, the basis of Callahan's complaint about the brakes on the truck assigned to him was his purported opinion, which was contrary to the opinions of several other drivers and mechanics as well as Callahan's business agent, that the brakes did not function properly in moving tests. The honesty and reasonableness of Callahan's purported opinions about the truck's defects are particularly suspect in light of his history of rejecting four times as many trucks as the Respondent's other drivers, and the context and nature of Callahan's complaints indicate that they were neither reasonable nor honest attempts to invoke a right secured in the collective-bargaining agreement. Accordingly, we conclude that under the *Interboro* doctrine, as affirmed by the Supreme Court in *City Disposal*, Callahan's refusal to drive based on those complaints was neither concerted nor protected activity within the meaning of Section 7 of the Act. We therefore further conclude that, by discharging Callahan for his refusal to drive, the Respondent did not violate Section 8(a)(1) of the Act.

Similarly, in *Johnson-Stewart-Johnson Mining Co.,* 263 NLRB 123, 124 (1982) in approving the dismissal of a complaint concerning the discharge of an employee, the Board stated as follows:

> It is undisputed that Martorana refused to operate his assigned truck on December 4 without making any effort to locate it on "the line" or to inquire if the requested repairs were complete. It is further undisputed that Martorana refused to operate the truck

> without giving any reason to Respondent for that refusal and we note that Martorana, even at the hearing, could not give any reason for having been so cavalier. Under these circumstances, we find that Martorana's refusal to operate his assigned truck on December 4 was not based on a reasonable belief that the truck was unsafe and that the refusal was therefore not protected under the Act. Accordingly, we conclude that Respondent's discharge of Martorana for refusing to operate the truck was not a violation of Section 8(a)(1).[FN4]
> Fn 4 Since Martorana's refusal to drive his assigned truck on December 4 was not protected conduct under the Act, we find it unnecessary to reach the issue of whether the refusal constituted concerted activity.

Thus, the Board has held that, grievance filing is protected conduct when an employee has "an honest and reasonable basis for believing that he had standing to file a contractual grievance…". See, *Laidlaw Transit, Inc.,* 315 NLRB 509, 513 (1994); and *Regency Electronics,* 276 NLRB 4, 5 at fn. 3, and 9 (1985).

In *Nichols Aluminum, LLC,* 361 NLRB No. 22, slip op. at 3 (2014), the Board stated:

> Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. To determine whether an adverse employment action was effected for prohibited reasons, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014).[FN7] Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence.[FN8] If the General Counsel makes his initial showing, the burden shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. Id.
> With respect to the General Counsel's initial showing, it is undisputed that Bandy engaged in protected activity by participating in the January-April strike and that the Respondent was aware of that activity. At issue is whether the General Counsel demonstrated that the Respondent harbored antiunion animus, thus meeting his initial burden.

Similarly, in *Hitachi Capital America Corp.,* 361 NLRB No. 19, slip op. at 1 (2014), the Board stated:

> We affirm the judge's finding that the Respondent violated Section 8(a)(1) by discharging employee Virginia Kish. We agree with the judge that the General Counsel met his initial evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The record establishes that Kish engaged in protected concerted activity when she sent several emails to supervisors and/or agents of the Respondent questioning the Respondent's new Inclement Weather Day (IWD) policy on February 3, 2011; that the Respondent knew or suspected that Kish's activity was concerted; and that the Respondent demonstrated animus towards Kish's protected activity by giving her a warning concerning her

emails.[FN4] We also agree with the judge, for the reasons stated by her, that the Respondent failed to show, under *Wright Line*, that it would have discharged Kish even in the absence of her protected concerted activity.

It is clearly part of the General Counsel's burden of proof in its prima facie case to establish Prophet was engaged in protected and concerted activity when he filed a grievance over his schedule change. In order to meet this burden, the General Counsel must show that Prophet filed the grievance with a reasonable and honest belief that his rights under the collective-bargaining agreement were violated. For the reasons set forth below, I have concluded the General Counsel has failed to meet its burden of establishing that Prophet's filing of the grievance was protected concerted activity under the Act.

The facts reveal that on August 3, by email Respondent announced its schedule for the D.C. Department of Transportation building for security guard Prophet to work 32 hours for the week of August 5 to 11, with Prophet working 8 hours each on Saturday and Sunday of that week. On August 3, Prophet sent an email to Respondent concerning his scheduled weekend shifts on August 10 and 11 stating, "I start a new part-time job next week Saturday and Sunday." On August 4, Respondent, in an accommodation to Prophet, issued a revised schedule replacing him with two other guards for the upcoming Saturday and Sunday shift. Thus, Respondent changed the schedule of two other guards on short notice to accommodate Prophet's new other employment.

On August 28, Profit sent Akingbade an email stating, "the weekend job didn't work out so I'm free for weekends."[6] On August 29, Akingbade reacted strongly to Prophet's August 28 request by sending an email to Prophet stating, "You do not expect this Company to submit to your manipulation by inconveniencing our single-mindedly loyal employees in order to suit your change of fortune on your 'new jobs'. We have adhered to your wish to quit weekend assignments and we made our plan, long term, to exclude you on weekends accordingly. If we ever need your services on any weekends or occasions, we'll let you know."

On September 5, union representative Orellana sent Akingbade an email stating she was attaching a "Grievance Initiation" letter regarding Prophet. Orellana stated, "Mr. Prophet reported to us when he was going to start his vacation two weeks ago, he received notice about change in position. When he returned to work last week only scheduled now for 16 hours instead of 32 as he had before." The attached grievance stated, in pertinent part:

> Claim #1: Member claims that his/her hours of work were or will be changed without sufficient cause or reason effective 8/12/13. The Union seeks that the Employer be directed to restore the member to his/her original work hours without loss in pay, benefits, and seniority.
>
> And in order to conduct our investigation into the merits of this grievance, please forward your personnel file concerning Mr. Prophet to the Union office by Sept. 12th, 2013.
>
> The first step of the grievance procedure is an informal hearing. After a determination that the grievance has merit, the Union will seek to schedule such a

[6] The clear import of Prophet's email that the weekend job did not work out, signals that if it had worked as Prophet had planned he would have been unavailable to work for Respondent on weekends on a permanent basis. This is confirmed by the fact that Prophet did not state in his August 3 email that he was requesting off only for the weekend of August 10 and 11.

hearing. If the matter cannot be resolved through an informal hearing, the matter may proceed to arbitration to resolve the dispute.

On September 7, Akingbade sent the Union an email responding to Prophet's grievance. Akingbade stated as follows:

1. OFFICER ROGER PROPHET has lied to you (that he did not know why his assignments had reduced)-- and we will not take it likely. It was he who took himself out of his weekend duties (see his email dated 8/03/13 far underneath) when he informed us five weeks ago that he had secured a new job with another company on weekends. He followed up his email by calling on and telling our Office Staff to insure that he was not deployed any more weekends. We complied by taking him off his weekend assignments accordingly.
2. To our surprise, we received an email 8/28/13 from Officer Prophet, below, telling us his new job had collapsed and wanted his weekend assignment back--25 days after he secured the new job. Our response saying "No, but..." dated 8/29/13 is reproduced below.
3. His loyalty already came into question when, by his email dated 8/3/13, he informed us that he had chosen a new job in preference to ours on weekends; yet, we did not penalize him as we allowed him to retain his other shifts. This statement he made to SEIU 32BJ shows him as a barefaced liar and I am not too sure if it is safe to allow his lying to go unchallenged; it is possibly a symptom of worse developments waiting to occur, perhaps soon. We'll test the water and have him queried accordingly.

We should like to know why his new employer dropped him after 25 days, in case the reason (e.g. if due to lying) is germane to the basis of his employment here. BRSS, as a policy, does not hire someone who was rejected by their former employer.

We are sure that SEIU32BJ will be on our side in fishing out any undesirable element in this Company— one who had the audacity to come to you and has caused you and his Management to spend our scarce time on a matter that is all a lie!

On September 25, without conducting a meeting over the grievance with Respondent, the Union sent Prophet a letter stating, in part

> We have carefully reviewed the facts and circumstances surrounding your grievance and have determined that it lacked sufficient merit for the Union to be likely to prevail in arbitration. For that reason, it is not in the interest of the Union and its membership to carry this case forward to arbitration.[7]

On October 8, Akingbade sent an email to Prophet stating the grievance Prophet filed against Respondent alleged that Respondent slashed Prophet's hours from four shifts to two shifts after Prophet's "return from vacation." Akingbade pointed out that Prophet did not state that it was actually Prophet who, by email, asked Respondent to cancel Prophet's two weekend shifts because Prophet was starting a new job the next Saturday and Sunday. Akingbade stated that Prophet followed up the email with a call to Respondent's office assistant telling her to cancel Prophet's August 10 and 11 assignments because Prophet was starting a job with another company on weekends. Akingbade pointed out the office assistant had to take the trouble to rearrange Respondent's schedule for that week to accommodate Prophet's cancellation demand. He stated the cancellation impacted other officers who had to be displaced and deployed to fill Prophet's vacated two shifts. Akingbade pointed out that on August 28, Prophet sent Respondent a new email stating that he had lost his new weekend job requesting his prior shifts back. Akingbade stated that he responded by email on August 29 denying Prophet's "untenable, manipulative request." Akingbade stated on September 5,

[7] The Union's letter dropping the grievance was not copied to Akingbade, who did not learn of the Union's decision until he attended an unemployment hearing for Prophet on December 11, which Prophet also attended.

Respondent received Prophet's "grievance falsely claiming that it was because you went on a vacation that we took the Saturday and Sunday assignments from you!" He stated, "We are pained by your barefaced lie against this company…". He went on to state, "hence we hereby request you to explain why a severe disciplinary action (including but not limited to termination) should not be taken against you for lying against this Management and for portraying your employer in bad light to the esteemed SEIU 32BJ Union. This Management takes lying by a security officer very seriously. It destroys the trust our employees should expect to enjoy from us, their employer; and it is our firm belief that an employee who lies against his employer (to whom he is responsible for his/her means of livelihood) can, with considerable comfort, lie against any other person including our clients and members of the public; very easy against his/her fellow co-workers." Akingbade pointed out that lying or dishonesty is in contravention of various provisions in Respondent's handbook, and stated that since Prophet had made a false accusation against Respondent, they had begun to review Prophet's overall record. He stated, "We hope to conclude the exercise soon after the receipt of your response expected within 48 hours ending 7.30am Thursday 10/10/13." Akingbade stated, "FAILURE to respond is, in itself; a serious infraction under cited provisions in the handbook, and amounts to insubordination. Prophet did not respond to Akingbade's October 8 email. However, Akingbade met with Prophet on October 10 in person concerning a stolen laptop at the worksite where Prophet was working. Akingbade testified he did not suspect Prophet of stealing the laptop, but during the meeting Akingbade renewed his request to Prophet for a response to Akingbade's October 8 email, to which Prophet again failed to respond.

On October 18, Akingbade sent an email to Prophet stating that even though the deadline of October 10 had passed for Prophet's response to Akingbade's October 8 email, as a concession to Prophet, Akingbade was giving him until October 19 to respond. It stated, "Otherwise, we shall take your lack of response by 11.1 am tomorrow 10/19/13 as an admission of all the charges leveled against you in our said query and shall go ahead to take an appropriate decision in line with the Company's policies, rules and regulations as contained in the BRSS HANDBOOK including what were liberally cited in our said query." Prophet did not respond and on October 19, Akingbade sent Prophet a letter of termination by way of email, effective immediately. The email stated despite multiple reminders that Prophet had failed to respond to Respondent's query.

On December 11, both Prophet and Akingbade appeared for a D.C. government administrative law judge concerning Prophet's appeal for a prior denial of unemployment benefits. A hearing was held before the judge on December 11, at which both Prophet and Akingbade attended. The D.C. judge stated in her decision that Akingbade stated Respondent discharged Prophet because he interpreted Prophet's failure to respond to his inquiries as dishonesty and considered Prophet's failure to respond as insubordination. The D.C. judge went on to state:

> It is undisputed that Claimant (Prophet) asked to be removed from the weekend scheduled to work another job. It is also undisputed that Claimant filed a grievance stating that Employer reduced his hours. In Claimant's testimony, he admitted that he asked Employer to remove him from the weekend schedule so that he could work his other job. Despite this, Claimant asserts that his statement in his grievance that Employer reduced his hours upon return from vacation was truthful. On this record, I find that Employer established that Claimant was not truthful to the Grievance Board in the reason why his hours were reduced. Claimant provided no mitigating reason why he made the statement.

The D.C. judge went on to state, "I do find that Claimant breached his obligation to be truthful to and about Employer. Therefore, under the facts of this case, I conclude that Employer

established that Claimant's dishonesty was simple misconduct." The Board has held that decisions from state unemployment offices, although not controlling, have some probative value in Board proceedings. See, *Western Publishing Co., Inc.* 263 NLRB 1110 fn. 1 (1982).

As set forth above, I do not find the General Counsel has met his burden of establishing that Prophet filed grievance over his schedule change with a reasonable and honest belief that his rights under the collective-bargaining agreement were violated. It is clear that Prophet asked off his weekend shifts because as he reported to Respondent that he had obtained other weekend work. Respondent accommodated Prophet's request by, on short notice, rescheduling other guards to cover his shifts. When on August 28, Prophet lost his other weekend job and requested his weekend shifts back, he was met with a denial of the request and a somewhat angry response from Akingbade who felt that Prophet was disloyal for making the request in the first place and that Prophet's losing his interim employment raised competency questions to Akingbade. On September 5, Akingbade received a grievance from the Union concerning Prophet's loss of shift hours, while the grievance was nonspecific as to the basis of the claim, the cover letter from the Union accompanying the grievance stated, "Prophet reported to us when he was going to start his vacation two weeks ago, he received notice about change in position. When he returned to work last week only scheduled now for 16 hours instead of 32 as he had before." On September 7, Akingbade informed the Union that Prophet had lied to them, and that it was Prophet who took himself off weekend duties when he informed Respondent he had obtained another job.

I find Prophet's, statement as reported by the Union to Respondent, constituted a clear misrepresentation either directly or by omission and that it was reasonable for Akingbade to interpret it as such. The clear import of it was that Prophet was claiming that he had been removed from weekend shifts as a result of his taking vacation time, as opposed to his having requested off the shifts because he had obtained alternate employment. I do not find that Akingbade needed anything further then the letter accompanying the grievance from the Union, in combination, with Prophet's prior actions to conclude that Prophet had credibility problems. Akingbade's conclusion that Prophet had fabricated to the Union was subsequently confirmed when the Union received Akingbade's response accusing Prophet of lying it quickly dropped the grievance. Moreover, the findings of the D.C. judge who conducted a hearing over the matter and who heard Prophet testify concerning his statement to the Union's grievance board concluded that Prophet "was not truthful to the Grievance Board in the reason why his hours were reduced" and that Prophet "provided no mitigating reason why he made the statement."

While the findings of the D.C. judge are not binding on me, they are instructive, and they serve to confirm what I previously concluded that Prophet was untruthful to the Union's grievance Board. Moreover, while General Counsel cites a provision in the collective-bargaining agreement regarding seniority, there was no evidence presented that Prophet was aware of the provision at the time he filed his grievance, or that he was even replaced by less senior employees. The provision itself mentions seniority but states it shall be determinative "only when all other job-related factors are equal." There was also no contention here that Prophet believed that guards who had replaced him on his weekend shifts had less seniority. I have concluded that there was no such contention raised by Prophet to the Union. Thus, the General Counsel did not call Prophet to testify and there was no basis for me to conclude that his grievance was pinioned on anything but a misrepresentation, and I am not persuaded that he filed grievance with a reasonable and honest belief that his rights under the collective-bargaining agreement were violated. Accordingly, I do not find that he was engaged in concerted or protected activity when he filed the grievance. See, *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Newark Morning Ledger,* 316 NLRB 1268, 1271-1272 (1995);

Laidlaw Transit, Inc., 315 NLRB 509, 513 (1994); *Carolina Freight Carriers Corp.,* 295 NLRB 1080, 1083-1084 (1989); *Regency Electronics,* 276 NLRB 4, 5 at fn. 3, and 9 (1985); *ABF Freight Systems*, 271 NLRB 35, 36 (1984); and *Johnson-Stewart-Johnson Mining Co.,* 263 NLRB 123, 124 (1982).

I also find Akingbade, who runs a multi-site security company guarding government buildings, has established he has a reasonable and high priority of maintaining a workforce with employees of high integrity, both from the D.C. government contract which he testified about at the hearing, and from the very nature of the work being performed. Thus, I do not find that Akingbade's questioning of Prophet as to why he lied to the Union, with the threat of discipline or discharge for his failing to respond was violative of Section 8(a)(1) of the Act. First, I have concluded that Prophet's contacting the Union in the circumstances here did not constitute statutory protected conduct, and therefore the questioning Prophet about it was not violative of the Act. Moreover, I find that Akingbade did not react to the fact that Prophet had filed a grievance, but rather to the untruthful nature of Prophet's complaint. In this regard, Akingbade has established a substantial business interest in maintaining a work force with employees of high integrity. While Akingbade did not terminate Prophet until he repeatedly refused to answer Akingbade's queries as to his truthfulness, I do not that to be determinative here. As it was Akingbade's reasonable belief as to Prophet's misrepresentation that led to the queries, and the fact that Akingbade repeatedly offered Prophet the opportunity to rehabilitate himself with his employer should not alter the ultimate outcome of this case.

I do not find cases cited by the General Counsel such as *OPW Fueling Components,* 343 NLRB 1034, 1036-1037 (2004), enfd. 443 F.3d 490 (6th Cir. 2006), cert. denied 549 U.S. 1054 (2006), require a different result. There, employee Cox was a union bargaining committeemen who was signatory to the parties' current collective-bargaining agreement. In his position, Cox also processed grievances for the union. Cox was discharged after he wrote, without their permission, the signatures of two bargaining unit employees on a grievance relating to their seniority and recall rights. The employees protested their signatures on the grievance, and in the Board's decision the following was stated:

> Cox had the testimonial demeanor of a truthful witness. He admits that he should have placed his initials by the employees' signatures, as he did on another grievance, or indicate that the Union was the aggrieved party, as he did on the amended grievance. Cox also exhibited a strong, unyielding, sense of conviction in his beliefs when testifying about the substantive collective-bargaining issues underlying his initial Board charge and the grievance. I have no doubt that Cox was motivated in filing the grievance by nothing more than his sincerely held good-faith belief that his interpretation of the collective-bargaining agreement was correct. He filed the grievance solely to preserve the Union's right to pursue what he believed was the correct interpretation of the recall provision in the collective-bargaining agreement. There is no evidence that Cox would, or could, profit or gain anything from deceiving the Respondent. There is no evidence that Cox held any resentment or had any reason to be vindictive towards the named employees. The Respondent offers that "the only way that Cox could resurrect the settled issue of recall rights was to submit to the Company a bogus grievance that was 'signed' by two employees allegedly grieving the matter." (R. Br. at 26.) The facts are contrary. The amended grievance, which did not contain named employees, was processed by the Respondent. Regardless, the resolution of the grievance, as advocated by Cox, would have gained him nothing.
>
> Even absent my finding that Cox was acting in good faith, the reality of the grievance process in this case is such that no union official, especially not one as experienced as

> Cox, could possibly think that such a blatant deception could achieve any objective. Under the very best scenario the ruse would be discovered when the employees were told to return to their former positions, and the chance of the deception progressing that far is slight, if at all. Management knew that the employees did not want to return to OPWFC, and Cox made it clear to Orewiler that he would file a grievance if the recall was not corrected or if the Union was not allowed time to obtain input from the International. If his intent was to deceive, it is doubtful that he would give advanced notice of the deception, nor is there evidence that anyone was either deceived or harmed by his action.
>
> I find, based on the foregoing, that Cox's act of signing employees' names to a grievance was part and parcel of the grievance procedure and as such was protected concerted activity. *Roadmaster Corp*., above at 1197. I also find, as set forth above, that his conduct was not sufficiently egregious to remove his grievance-filing activity from the protection the Act.

Thus, in *OPW Fueling,* employee Cox was a long time union official who had improperly affixed the signatures of two bargaining unit employees to a grievance. However, Cox testimony revealed that Cox had filed the grievance based on a good faith belief of his interpretation of the collective-bargaining agreement, and in order to preserve the Union's right to pursue that interpretation. Thus, the grievance was filed in good faith based on a reasonable belief as to the application of the applicable collective-bargaining agreement, and therefore constituted protected conduct. Once it was established that the grievance constituted protected conduct, it was concluded that Cox improperly affixing the signature of the two bargaining unit employees was not so egregious as to remove Cox from the protections of the Act. The instant case is clearly distinguishable. Here, Prophet did not testify, and there was no evidence presented to establish his good faith belief that the collective-bargaining agreement had been violated when he filed his grievance. In fact, the only evidence presented consistently reveals the grievance was solely founded on a misrepresentation, including the facts leading up to Prophet's schedule change, the wording of the Union's cover letter to Respondent concerning Prophet's grievance, the Union's quick dismissal of the grievance when Akingbade accused Prophet of lying and providing documents to support the accusation, and Prophet's being discredited by the D.C. Unemployment judge who found that Prophet misrepresented what took place to the Union's grievance committee. Since the General Counsel failed to establish that Prophet filed the grievance on a reasonable and good faith belief that the collective-bargaining agreement had been violated, I have concluded that in the circumstances here the filing of the grievance did not constitute protect conduct within the meaning of the Act. Therefore, there is no need to address whether Prophet's fabrication was so egregious to remove him from the Act's protection from his otherwise protected conduct.[8]

Here, the General Counsel failed to call Prophet as a witness and contends what Prophet told the Union concerning his grievance is privileged information. The General Counsel cites *National Telephone Directory Corp.,* 319 NLRB 420, 420-421 (1995), in support of this proposition. There, a respondent employer served on a union a subpoena seeking the production of authorization cards signed by the respondent's employees. The Board in denying the respondent access to the requested information both in response to the subpoena and

[8] Similarly, *United Parcel Service of Ohio,* 321 NLRB 300, 325 (1996), cited by the General Counsel in his brief is distinguishable from the current case because there the judge found that the "grievants held honest and reasonable beliefs they were entitled to exit Respondent's premises free from the described problems and with pay for the delay's occasioned by the device and the guards' behaviors."

questioning at trial stated, "We find, for the reasons set forth below and in agreement with the General Counsel and the Union, that the confidentiality interests of employees who have signed authorization cards and attended union meetings are paramount to the Respondent's need to obtain the identities of such employees for cross-examination and credibility impeachment purposes." The Board referenced the privileged nature concerning an employee's signing of an authorization card. The Board was concerned with the possibility of intimidation of employees if their identities were disclosed.

I find *National Telephone Directory Corp.,* supra, to be inapposite to the facts presented in this case. Prophet's grievance filing was not a secret. In fact, it was filed on the basis that Respondent would be notified that it took place. Thus, what information Prophet informed the Union as to the basis of its filing would have been expected to be disclosed to Respondent during the course of the grievance process had the grievance continued. The grievance has also been dropped here, so there is no argument that keeping the reason for the grievance a secret is somehow based on a strategy for successfully processing the grievance. Finally, the reasons Prophet advanced to the Union for the filing of the grievance are part and parcel of the res gestae of Prophet's purported protected conduct; that is that he had a reasonable basis for the filing of the grievance under the contract and that it was filed in good faith. The General Counsel's argument here would eviscerate that requirement. The General Counsel has failed to establish any reason the grievance was filed here, other than it being totally premised on a misrepresentation as I have found for the reasons previously stated. This conclusion is only confirmed by Prophet's failure to be called as a witness to explain that he had a reasonable and good faith belief in filing the grievance that the contract was violated, and if so on what that belief was premised.

This decision should not be read by Respondent that it has broad license to question employees about their grievance filing activities. In this regard, the case law does not require an employee to be correct in terms of the outcome of the grievance, or in their interpretation of the contract. It also does not require them to be completely truthful in every aspect of their claim as the General Counsel points out. It merely requires that the employee has a reasonable basis and good faith belief that their contractual rights have been violated when they file a grievance. Had I found this had been established here, I would have recommended a finding of a violation of Section 8(3) and (1) of the Act concerning the Respondent's questioning, threatening, and subsequently discharging Prophet for his refusal to answer questions about his grievance activity. However, since I have concluded it has not been established that Prophet engaged in protected concerted conduct, I have therefore concluded the complaint should be dismissed.

On the basis of the foregoing, I shall recommend that the complaint be dismissed in its entirety. [9]

CONCLUSIONS OF LAW

1. The Respondent has not violated the Act, as alleged.

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[9] 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.

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

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., September 11, 2014

Eric M. Fine
Administrative Law Judge