

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

**OREGON SCHOOL EMPLOYEES
ASSOCIATION CHAPTER 204,
AMERICAN FEDERATION of TEACHERS,
LOCAL 6732 (FIRST STUDENT, INC.),**

and

Case 19-CB-106045

KEN HOWARD, an Individual.

Lisa J. Dunn, Esq., for the General Counsel.
Katelyn S. Oldham, Esq. (Tedesco Law Group),
for the Respondent.
William L. Messenger, Esq.
(National Right to Work Legal Defense Foundation),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eleanor Laws, Administrative Law Judge. This case was tried in Portland, Oregon on April 29, 2014. Ken Howard (Charging Party) filed the charge on May 18, 2013,¹ and the General Counsel issued the complaint on August 20. The Oregon School Employees Association Chapter 204, American Federation of Teachers, Local 6732 (Respondent, Union, or OSEA), filed a timely answer denying all material allegations.

The complaint alleges the Union violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) when one of its agents: (1) removed materials related to the rights of employees not to be members of Union and/or to object to the payment of dues and fees for nonrepresentational activities from the employee bulletin board in the drivers' break room; (2) informed employees that the Union would seek assistance from First Student to prohibit the posting of the materials related to the rights of employees not to be members of the Union and/or to object to the payment of dues and fees for nonrepresentational activities on the employee bulletin board; and (3) threatened an employee with bodily injury because he made statements in

¹ All dates are in 2013 unless otherwise indicated.

opposition to the Union and/or informed other employees of their rights not to be members of Union, to object to the payment of dues and fees for nonrepresentational activities, and/or to petition for a union-security de-authorization election.

5 On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

10 FINDINGS OF FACT

I. JURISDICTION

15 At all material times, First Student, Inc. (the Company), has been a Delaware corporation with an office and place of business in Gresham, Oregon, and has been engaged in the business of providing school bus transportation services to various school districts. The Company, at all material times, purchased and received at its Gresham facility goods valued in excess of \$50,000 directly from points outside the State of Oregon. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union admits, and I find that it a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

25 This complaint centers around a dispute between two bus drivers for First Student: Kenneth Howard, an outspoken antiunion advocate, and Christopher Botcheos, a union adherent who served as its interim secretary during the relevant time period.³

30 In and around February 2013, about 125 bus drivers worked at First Student’s Gresham facility. The drivers, driver-trainers, and monitors at the Gresham facility are represented by the OSEA. The Union and the Company are parties to a collective-bargaining agreement (CBA) effective 2010 to 2015. The CBA contains a union security clause requiring covered employees

² Abbreviations used in this decision are as follows: “Tr.” for transcript; “R Exh.” for Respondent’s exhibit; “GC Exh.” for General Counsel’s exhibit; “GC Br.” for the General Counsel’s brief; “R Br.” for the Respondents’ brief; and “CP Br.” for Charging Party’s brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

³ At the time of the hearing, Botcheos was the union president. The parties entered into the following stipulation: “Respondent admits that at all material times during February, 2013, Christopher Botcheos held the position of Respondent’s interim secretary, and in his capacity as interim secretary, has been an agent of Respondent within the meaning of § 2(13) of the Act.” (Tr. 7–8.) In her brief, counsel for the General Counsel renewed a motion to admit rejected GC Exh. 12, comprised of two grievances Botcheos filed on November 1, 2013, in his capacity as Union President. Botcheos filed no grievances during the time period at issue in this complaint. His later actions of filing grievances after assuming the position of Union President do not help me decide the issues before me, and I therefore decline to admit this evidence.

to remain members of the Union in good standing, and requiring First Student to deduct union dues from covered employees' wages and remit the funds to the Union.

5 As interim secretary for the Union, Botcheos attended union meetings and, as a member of the executive committee, made recommendations to union members. When new employees were hired, Botcheos introduced himself and provided information about the Union. Botcheos was also a union steward. Though he had acted in his capacity as a steward at the time of the hearing, his role was to receive complaints from members and represent them if they were facing potential discipline. Botcheos also served as a member of the Union's negotiating committee from April through October 2012. In that capacity, he attended bargaining sessions and communicated the status of negotiations to members.

15 Drivers work a morning route from roughly 6:30 to 9 a.m. Some drivers work a midday route from about 10 a.m. to 1:30 p.m. The afternoon route is from roughly 2 to 4:30 p.m. Michael Jourdan is the manager of the Gresham location. He had previously been a driver in Montana, where drivers were represented by a union, but he opted not to be a member of the union.

20 Drivers enter the workplace through a main entrance on the ground floor of the facility. Inside the entryway, there is a bulletin board on the right exclusively for the Union.⁴ (GC Exh. 2.) The bulletin board contains postings showing the Union's executive board members and stewards along with their contact information. There are also sometimes postings about upcoming union meetings and other events.

25 The drivers' break room is upstairs from the main entryway. It contains a few tables with chairs, a refrigerator and sink, and some cubbies. There is a bulletin board for all employees to use. Items posted on the bulletin board have included a calendar, advertisements for items drivers are selling, and upcoming events. Jourdan's office is adjacent to a driver's room. (GC Exhs. 4, 9.) At a safety meeting some time prior to February 2013, Jourdan told the drivers that they were not to remove anything from the drivers' room bulletin board without his permission.

35 Howard has worked for more than six years as a school bus driver at First Student's Gresham location. He is opposed to the Union, and posts signs in his car window saying "No Union" and "You are not entitled to what I have earned."⁵ Howard has been involved in efforts to decertify the Union, and he previously filed a complaint that the OSEA had misled employees about the requirement to be a union member.⁶

40 Howard has posted materials on the employee bulletin board and on the tables in drivers' room about employee rights regarding the Union, some of which are from the National Right to Work Foundation's website. For example, he has posted material on how to become a service fee payer, which means opting out of certain union dues. He has also posted information about how to work at First Student without being a union member, and how to resign union

⁴ The Union's right to maintain the bulletin board is set forth in Art. 9 of the CBA. (GC Exh. 13.)

⁵ Howard also has some signs reflecting a negative sentiment toward President Obama.

⁶ The complaint was resolved and as of November 2012, the Union has discontinued providing the alleged misinformation.

membership. (GC Exhs. 6-8.) Howard has posted similar material on a table in front of the bulletin board and on the other tables in the break room. Botcheos sometimes posted items in response to Howard's posts, but he usually ignored them.

5 The bulletin board became a point of contention at some point. According to Howard, some other individual or individuals repeatedly covered up his postings. Howard would then move the posting that covered up his posting, trying to ensure he did not cover up anyone else's postings. According to Botcheos, Howard would move things up to the left corner of the bulletin board to make more room for his postings. A couple of employees complained to Botcheos about Howard this. Botcheos told them it was the employees' board, not the Union's, so they needed to take their concerns to Jourdan.

15 On February 22, Howard and Botcheos got in a disagreement.⁷ Botcheos recalled that Howard was sitting at a table with some coworkers discussing Social Security. Howard commented that he did not intend to collect it. Botcheos responded that because Social Security is an insurance program employees pay into, collecting it is not accepting a gift. Howard called Botcheos unpatriotic, which offended him because he was in the Army, his father was a Marine, his two sons plan to be officers in the military, and his daughter is in the Coast Guard. Botcheos asked what branch of the service Howard served in, and he responded that he had not served. Howard got up from the table and started rearranging things on the bulletin board. Botcheos confronted him, and Howard said his postings were more important. Botcheos then tore down Howard's posting, threw it at his feet, and said "How important is it now?"

25 Howard, who did not remember much of the conversation, did not recall using the word "unpatriotic" but he knew whatever word he used offended Botcheos and prompted him to talk about his military service. Howard did not think Botcheos' removal of materials was related to the exchange. Though he could not remember whether the two incidents occurred on the same day or during the same week, he recalled the verbal exchange did not take place immediately before Botcheos removed the material. Instead, Howard recalled that Botcheos was near the bulletin board and loudly said that he was removing Howard's materials but not removing any other postings. Botcheos then removed the postings Howard had put up, but no other postings. Botcheos did not mention the Union. At the time, an OSEA card and an anti-National Right to Work Foundation letter were posted on the employee bulletin board.

35 Howard and Botcheos took the matter to Jourdan. What happened next comes in three different versions. Howard recalled that he and Botcheos went to see Jourdan together. Botcheos expressed his belief that neither prounion nor antiunion materials belonged on the employee bulletin board. Jourdan agreed, and a rule banning such materials took effect.

40 According to Botcheos, Howard went to get Jourdan and they all went into Jourdan's office. Botcheos explained to Jourdan that his issue was with Howard moving things around, and had nothing to do with union vs. nonunion. Jourdan decided the board would not be used for union, nonunion, or other political topics, and he would police the board on a weekly basis.

⁷ Howard could not recall the date of the agreement. Botcheos' testimony that it was on February 22 is unrefuted.

Jourdan recalled Howard came to see him, with Botcheos close behind. Howard was upset because Botcheos moved his materials on the bulletin board, and Botcheos said he was just trying to clean up the board because Howard's materials were covering everything else. Jourdan told them that employees should not be moving each others' postings, and they should see him if something needed to be removed. He did not recall whether he said anything about political information. Jourdan denied that Botcheos suggested leaving union and nonunion material off the bulletin board, but instead recalled him saying the board was getting cluttered. Jourdan viewed the incident as a squabble between employees, and no discipline ensued.

Later that afternoon, a dispute arose between Botcheos and Howard inside the front entryway by the Union's bulletin board. In his written statement made shortly after the incident, Howard said that during a conversation between himself, Botcheos, and another employee, Howard mentioned the option of a deauthorization election. Botcheos then stepped close to Howard's face, and told him forcefully that the next time he saw him alone in the parking lot, he would stomp on him. Botcheos then swore at Howard. Howard told Botcheos and the other person that he was going to speak with Jourdan, he then reported what occurred to Jourdan and wrote a statement. (GC Exh. 11.) Afterward, he looked for Botcheos and the other person, but they had left.

At the hearing, Howard testified that he heard Botcheos talking about union membership with another individual. The other individual was wearing a training vest, so Howard assumed it was a new employee. Though unable to recall the employee's gender with certainty, Howard thought the employee was male. Howard joined the conversation and explained the rights to be a service fee payer, to leave the membership, to get a discount on dues as a service fee payer *Beck* objector,⁸ and the right to have a de-authorization election. Botcheos stepped much closer to Howard and, in addition to saying he would stomp on him, Botcheos also said he would hit him, kick him, and knock him down in the parking lot if he found him alone. Howard walked slowly out to the parking lot, but then came back in, told Botcheos and the other employee he was going to talk to Jourdan, and proceeded to do so.

Botcheos recalled he was talking to an employee named Allison by the bulletin board. Michele Hart, a relatively new driver and union member, walked in she and Botcheos had a conversation about the Union. Howard interrupted, and said that Botcheos should be telling everyone about the decertification petition and the employees' right to sign the petition. Botcheos told Howard he was having a private conversation and he should stay out of it. He then stepped aside with Howard and told him very forcefully that this was personal and he didn't like him.

Hart recalled that she and Botcheos were in front of the OSEA bulletin board talking about some of the information on the board, and Howard interrupted. Botcheos told Howard he was talking to Hart, and instructed him to move along. Howard did not want to move along, and just kept talking, which she perceived as rude. Botcheos and Howard then had a brief conversation, about 10 feet away. Hart could only hear bits and pieces, but heard Botcheos reiterate that Howard should be on his way and he was being rude. She did not hear any threats.

⁸ This refers to *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), pursuant to which a represented employee who objects to paying full dues may pay a reduced fee.

Jourdan spoke with Botcheos and Hart. Botcheos said he was having a conversation with another driver, and Howard interrupted. Botcheos stepped closer to Howard and they had a private conversation. According to Jourdan’s notes, Botcheos told Howard he did not like him but they had to see each other at work. Any place else they should just walk away. Botcheos denied threatening Howard. Hart reported the same thing, but she did not hear what Botcheos said to Howard during their private conversation. She said there were no raised voices and there was no indication of any violent activity. (R Exh. 1.) Jourdan also spoke with Allison, who said the same thing as Hart. Jourdan could not substantiate that any threat was made and no discipline ensued.

III. DECISION AND ANALYSIS

A. Alleged Removal of Antiunion Material from Employee Bulletin Board

Complaint paragraphs 5(a) and 6 allege that the Respondent violated Section 8(b)(1)(A) of the Act when Botcheos removed materials related to the rights of employees not to be members of Union and/or to object to the payment of dues and fees for nonrepresentational activities from the employee bulletin board in the drivers’ break room.

Under Section 8(b)(1)(A), it is an unfair labor practice for a “labor organization ... to restrain or coerce employees in the exercise of the rights guaranteed in Section 7.” Section 7 provides that employees have the right to engage in concerted activities and the “right to refrain from any or all such activities.” Conveying a message critical of a union is protected dissident activity under Section 7, and it is therefore unlawful for a union to restrain such activity. See *Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981).

Before addressing the merits of the “restraint or coercion” claim, I must determine whether the actions at issue were those of a “labor organization.” See *Carpenters Local 102 (Millwright Employees Assn.)*, 317 NLRB 1099, 1102 (1995). The parties have stipulated that Botcheos, as interim secretary of the Union during the events at issue, was a union agent. The remaining inquiry, therefore, is whether Botcheos was acting as a union agent when he removed Howard’s posting.

Section 2(13) of the Act states that “[i]n determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.” In other words, an individual need not be actually authorized to take the actions at issue if it appears he or she possesses such authority. In determining whether an individual has apparent authority, the Board applies common law principles which it summarized in *Mastec North America, Inc.*, 356 NLRB No. 110, slip op. at pp. 1–2 (2011):

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. [Citations and internal punctuation omitted.]

Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's manifestations to the agent that the principal wished the agent to undertake those actions. See Restatement 2d, Agency, § 33. See also *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 (1991); *M. W. Kellogg Constructors*, 273 NLRB 1049, 1052 (1984), *enfd.* in part 806 F.2d 1435 (9th Cir. 1986)(standard is whether it was reasonable to believe steward acting on Union's behalf).

“The burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority.” *Longshoremen ILWU/Local 6 (Sunset Line & Twine Co.)*, 79 NLRB 1487, 1508 (1948). Thus, the General Counsel must establish that Botcheos removed the Howard's posting while acting in his representative capacity.

I find the General Counsel has failed to sustain this burden. In this regard, I credit Botcheos' testimony that his action of removing Howard's materials and throwing them at his feet occurred out of anger over being called “unpatriotic” or a similar adjective. Botcheos' testimony was more certain than Howard's, and the chain of events inherently more plausible. Though denying he called Botcheos unpatriotic, Howard admittedly said something to Botcheos that angered him and prompted him to talk about his military service. Howard did not know whether this conversation was the same day or even the same week as the incident at issue, but professed certainty that there was no causal relationship between the two. The fact that Botcheos had never been motivated in the past to remove Howard's antiunion materials along with the fact that he has not attempted to interfere with Howard displaying his materials on the tables in the break room, supports Botcheos' testimony Howard's comment spurred his actions. Despite bearing the burden of proof, the General Counsel called no witnesses to corroborate Howard's account of what occurred, even though about 10 other employees were in the break room at the time and Howard's testimony about when the relevant events occurred was unclear.

Moreover, the General Counsel did not present evidence that the Union empowered Botcheos with regard to the employee bulletin board. Instead, it is clear that Jourdan, not the Union, controlled the bulletin board. Though the General Counsel contends that a couple of employees had complained to Botcheos about Howard moving things on the board, Botcheos provided unrefuted testimony that he told them to address any concerns with Jourdan.

The General Counsel points to *Int'l Brotherhood of Teamsters, Local 705 (K-Mart)*, 347 NLRB 439, 441 (2006), to support its contention that Botcheos had apparent authority to act for the Union. In that case, however, union stewards and business agents threatened employees with a fine and discharge for supporting the union's decertification and forcibly removed a decertification petition from an employee's hands. Their actions were clearly connected to their status as union agents, unlike here. I note that the incident did not occur in the context of a union event or during discussion of the Union. Botcheos was working as a driver at the time of the incident. He did not mention the Union when he removed Howard's posting, nor did he comment on posting's message, which is unknown. Though there is little doubt the posting Botcheos removed was similar to Howard's typical antiunion postings, neither Botcheos nor even Howard himself recalled material's contents, nor is there evidence the content was announced to the other employees in the room. Even assuming the employees present knew

Botcheos was a union steward and officer, under the circumstances here, I do not find it would have been reasonable for them to believe Botcheos was acting on the Union's behalf.

5 The General Counsel further relies on *International Longshoremen's Ass'n, Local 20, AFL-CIO*, 323 NLRB 1115, 1122-23 (1997). That case, however, involved a union president's removal of multiple postings from the bulletin board the union maintained.⁹ The postings were memos from a member urging the union to make concessions, and the repeated removal of the postings prompted the member to make a formal written request to the union's president for permission to post factual information and correspondence on the union's board. This is
10 meaningfully distinguishable from Botcheos' one-time emotionally-driven removal of unidentified materials from a board he did not control or maintain.

15 The General Counsel argues that Botcheos' previous posting of responses to Howard's postings show that his concern was with the content of Howard's postings rather than Howard's actions of moving others' postings. I do not doubt that Botcheos fundamentally disagreed with the content in Howard's postings. Until the events at issue, his response to them was to post a counterpoint when he felt it was warranted, not to remove Howard's postings. The fact that Botcheos, and apparently the other union officers and stewards, had left Howard's antiunion materials intact until February 22, and did not otherwise interfere with his efforts to distribute his
20 materials, leads me to conclude there was a catalyst for Botcheos' actions. Howard's testimony that Botcheos simply walked up to the board unprompted and loudly announced he was removing Howard's materials but nobody else's does not make sense given the context. Botcheos' testimony that he was angered by a comment and subsequently reacted adversely to Howard moving others' postings to make room for his own provides a more plausible
25 explanation.¹⁰

In sum, I agree with Jourdan's observation that the bulletin board incident was a squabble between employees, divorced from Botcheos' status as a union agent. Accordingly, I recommend dismissal of complaint allegation 5(a).
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B. Alleged Assistance from Employer to Prohibit Postings

35 Complaint paragraphs 5(b) and 6 allege that the Respondent violated Section 8(b)(1)(A) when Botcheos, in the driver's common room at the Gresham facility, informed employees that Respondent would seek assistance from First Student to prohibit the posting of the materials related to the rights of employees not to be members of Respondent and/or to object to the payment of dues and fees for nonrepresentational activities on the employee bulletin board.

40 The complaint allegation does not align with the testimony adduced at the hearing. As the Union points out, there is no evidence that Botcheos notified employees that he sought to have First Student's management prohibit anything. The proper allegation, at least in hindsight,

⁹ *Helton*, supra, is likewise distinguishable, because it involved the union's discriminatory maintenance of its own bulletin board.

¹⁰ The General Counsel contends that there was no evidence Howard was moving posted materials on February 22. This is belied by his testimony that he was moving other employees' postings before and including February 22, 2013, because they were covering his postings. (Tr. 30.)

is that Botcheos “enlisted the intervention of manager Jourdan in restricting § 7 related materials, while still permitting the posting of other materials.”¹¹ (GC Br. 19.) This issue was fully litigated and I will therefore decide it. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *HiTech Cable Corp.*, 318 NLRB 280, 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997).

The alleged violation stems from a conversation in Jourdan’s office involving only three individuals: Howard, Botcheos, and Jourdan. As noted in the statement of facts, there are three different versions of what occurred. It is undisputed that the outcome of the meeting resulted in Jourdan imposing a ban on political material on the bulletin board, though Jourdan could not recall whether he said anything about political information. The General Counsel contends that Jourdan would have no impetus other than Botcheos’ request for imposing restrictions on union or antiunion postings. When asked whether Botcheos suggested that union and nonunion material should be left off the board, however, Jourdan responded, “No. I don’t think he made that suggestion. I think what he said was that it was getting cluttered, and he was attempting to unclutter it, to some extent.” (Tr. 107.) While Jourdan’s testimony is phrased with some uncertainty, he clearly did not view complaint as stemming from a union versus nonunion dispute. Jourdan’s testimony about this conversation is bolstered by his testimony that he viewed the incident as a squabble between employees. Had Botcheos suggested that union and antiunion materials be left off the board, Jourdan’s view of the dispute’s genesis and nature undoubtedly would have involved union sentiment. Finally, Jourdan’s testimony that Botcheos did not suggest banning union and nonunion materials is supported by Botcheos’ testimony that he never made such a suggestion.

Of the three individuals party to the conversation, Jourdan is the only neutral when it comes to the Union. Clearly, Botcheos strongly supports the Union, and his recollection therefore is prone to being more favorable toward the Union. It is just as clear that Howard strongly disfavors the Union, and therefore his recollection is prone to being less favorable toward the Union. There is no indication that Jourdan favors either side. I found Jourdan to be a credible witness based on his thoughtful and sincere demeanor. He did not appear to be embellishing his testimony nor was he susceptible to being directed by questions. For this reason and the reasons articulated directly above, I credit Jourdan’s testimony.

Based on the foregoing, I find the General Counsel has failed to sustain its burden to prove that Botcheos enlisted management to prohibit employees from posting Section 7 materials on the employee bulletin board. I therefore recommend dismissal of this complaint allegation.

C. Alleged Threat of Bodily Harm

Complaint paragraphs 5(c) and 6 allege that the Respondent violated Section 8(b)(1)(A) when Botcheos, in the downstairs area at the Gresham facility, threatened Howard with bodily injury because he made statements in opposition to the Union and/or informed other employees of their rights not to be members of Union, to object to the payment of dues and fees for nonrepresentational activities, and/or to petition for a union-security de-authorization election.

¹¹ My findings are limited to whether Botcheos’ actions and I do not make any findings as to whether Jourdan’s rule violates Section 8(a)(1) of the Act because such an allegation is not before me.

The facts are undisputed that the alleged threat occurred while Botcheos was by the Union’s bulletin board talking about the Union to a new employee. In this context, I find he was acting as the Union’s agent.

Threats of violence are deemed coercion and restraint within the meaning of Section 8(b)(1)(A). *Teamsters Local 115 (Kurz-Hastings, Inc.)*, 344 NLRB 644 (2005). The test to determine whether a remark rises to the level of a threat “whether a remark can reasonably be interpreted by an employee as a threat.” *Smithers Tire*, 308 NLRB 72 (1992).

There are only two individuals who heard what was said: Howard and Botcheos. Not surprisingly, they offer different accounts of what occurred. For the reasons set forth below, I do not find either particularly reliable.¹²

Beginning with Howard, his testimony at the hearing and in his June 2013 affidavit includes alleged threats not written down in his contemporaneous statement. In his statement, he wrote:

I had mentioned the option of the decertification election. Chris then stepped up to my face and forcefully told me that once (or the next time) he finds me alone in the parking lot, he would ‘stomp on me’ and then swore at me. The other driver just stood there behind Chris about 5 feet.

(GC Exh. 11.) At the hearing, Howard testified:

He said-- well, in my handwritten testimony, I wrote only the last item, which was stomp on me. And later I remembered that he would -- he said that he would hit me and kick me. And a little later than that, I remember adding that he would knock me down in the parking lot if he found me alone.

Howard attributed his initial memory lapse to being rattled by Botcheos’ threat. His actions, however, raise doubt about this. Had Botcheos threatened to knock him down in the parking lot, it seems highly unlikely parking lot would be the first place Howard would go. The Union further notes that Howard did not convey a need for help, protection or assistance at the time, but instead “went to the supervisor to make his second complaint against Mr. Botcheos that day and then spent nearly an hour writing out a half-page.” (R Br. 27.) Given that at least one other employee was present, Howard’s failure to speak up at the time of the alleged threat is suspect.

In his statement, Howard characterized the conversation as being among him, Botcheos, and the other employee. It is clear, however, that Botcheos and Hart were engaged in a conversation with each other and Howard interrupted. Moreover, in his statement, Howard said

¹² There are varying accounts about who else was in the area. Botcheos testified Allison and Hart were present. Hart did not recall another employee being present. Howard recalled another employee was present, whom he later thought was to be male. Jourdan’s testimony that he talked to both Hart and Allison, and they said essentially the same thing, convinces me that at some point they were both in the area and overheard part of the conversation between Howard and Botcheos.

his mention of the option of the decertification election was what prompted Botcheos to threaten him. At the hearing, however, he testified that he explained the rights to be a service fee payer, to leave the membership, to get a discount on dues as a service fee payer *Beck* objector, and the right to have a de-authorization election.

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In addition, I find it suspicious that Howard remembered that Botcheos swore at him, but could not recall what he said. I credit Botcheos' testimony that, as a boy scout leader and salesman, he has made it a habit to avoid profanity.¹³ Finally, Hart, who witnessed the exchange but could not hear all of it, observed there were no raised voices or any indication of violent activity. Jourdan, who saw Howard just after the incident occurred, could not substantiate any threat upon his investigation, and concluded discipline was not warranted.¹⁴ For these reasons, and considering Howard's clear antiunion animus, I do not credit either of his accounts regarding what Botcheos said.

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I find Botcheos' testimony is also problematic. According to Jourdan's investigation notes, Botcheos told Howard he did not like him but they had to see each other at work. Any place else they should just walk away. At the hearing, Botcheos recalled his statement as follows, "I, you know, walked up towards him and stuff like this, and I -- you know, he said very -- you know, forcefully said that, you know, this is personal. I just don't like you." (Tr. 175.) As the Charging Party points out, "[i]t defies credulity that Howard would immediately seek out his manager, and write the words found in his statement, if Botcheos merely said 'I just don't like you.'" (CP Br. 9.) Howard had just interrupted Botcheos' conversation with Hart to suggest he inform her about decertification. For Botcheos to step aside with Howard merely to say he personally dislikes him strikes me as implausible.

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Who said what to whom the afternoon of February 22 remains unclear to me. The Charging Party asserts that Howard's actions of reporting the alleged threat to Jourdan and making a statement render his testimony credible. For the reasons set forth above, I disagree. The General Counsel contends Howard's testimony was inherently credible, while Botcheos' testimony was inherently less probable and was directed by leading questions from the Union's attorney. The arguments to support this contention, however, focus on the bulletin board incident, not the alleged threats.

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The General Counsel bears the burden to prove the threat occurred by preponderant evidence. As the only evidence to support this allegation is testimony riddled with credibility problems, I find this burden has not been met. Accordingly, I recommend dismissal of this complaint allegation.

¹³ In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). Though I do not credit Botcheos' testimony regarding much of the exchange, I found his testimony that he does not use profanity to be clear, straightforward, and compelling.

¹⁴ The General Counsel asks that I draw an adverse inference based on the Union's failure to call Allison as a witness because she would have been disposed to testify favorably for the Union. Since the testimony from Jourdan, a neutral, shows she did not hear the private conversation between Botcheos and Howard, and Jourdan, no inference is warranted.

CONCLUSIONS OF LAW

5 The Respondent did not violate Section 8(b)(1)(A) of the Act by removing materials
related to the rights of employees not to be members of Union and/or to objecting to the payment
of dues and fees for nonrepresentational activities from the employee bulletin board in the
drivers' break room; informing employees that the Union would seek assistance from First
10 Student to prohibit the posting of the materials related to the rights of employees not to be
members of the Union and/or to object to the payment of dues and fees for nonrepresentational
activities on the employee bulletin board; and threatening an employee with bodily injury
because he made statements in opposition to the Union and/or informed other employees of their
rights not to be members of Union, to object to the payment of dues and fees for
15 nonrepresentational activities, and/or to petition for a union-security de-authorization election.

Accordingly, based on the foregoing findings of fact and conclusions of law and the
15 entire record, I issue the following recommended¹⁵

ORDER

20 The complaint is dismissed.

Dated, Washington, D.C. July 28, 2014



25

Eleanor Laws
Administrative Law Judge

¹⁵ 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.