Battle's Transportation, Inc. *and* Jerome Kearney. Cases 05–CA–098088, 05–CA–109554, and 05–CA–111085

February 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On March 26, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. Thereafter, both the Respondent and the General Counsel filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to extent consistent with this Decision and Order.[2]

For the reasons stated by the judge, we adopt his finding that the Respondent violated Section 8(a)(1) of the Act by requesting that the Union replace employee Jerome Kearney as its steward.[3] We further adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by ignoring Kearney's seniority and failing to transfer him back to the Veterans Affairs contract in January 2013, and by suspending and discharging him in August 2013.[4] As explained below, however, we find, contrary to the judge, that the Respondent's confidentiality agreement and its August 27, 2012 memo to employees were overbroad and violated Section 8(a)(1).[5]

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees' exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999)). In *Lutheran Heritage*, the Board held that a rule that does not explicitly prohibit Section 7 activity would nonetheless be unlawful if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." 343 NLRB at 647. The determinative issue regarding both the confidentiality agreement and the August memo is whether employees would reasonably construe the language contained therein to prohibit protected activity.

1. Confidentiality Agreement. As set forth in the judge's decision, the Respondent requires its employees to sign a confidentiality agreement, which reads in pertinent part:

> The Employee acknowledges that, in the course of employment by the Employer, the Employee has, and may in the future, come into the possession of certain confidential information belonging to the employer including but not limited to human resources related information, drug and alcohol screening results, personal/bereavement/family leave information, insurance/worker's compensation, customer lists (address, telephone number, medical/health related), investigations by outside agencies (formal and informal)[,] financial, supplier lists and prices, fee/pricing schedules, methods, processes or marketing plans.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We modify the judge's remedy to clarify that backpay for the Respondent's delay in transferring Kearney back to the VA contract is to be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014), and to conform to our modified Order.

[3] Member Johnson agrees that the Respondent's request was unlawful here, where the Respondent failed to introduce evidence of company protocols or policies that would have prohibited Kearney from contacting clients and where the Respondent's characterization of Kearney's contact with a client as "insubordination" effectively punishes Kearney for acting in his steward capacity. Member Johnson notes, however, that he might reach a different result in a case where an employer merely requests replacement of a union steward, and the employer presented evidence that the steward had violated company policy.

Member McFerran agrees that the request to remove the steward was unlawful, but, contrary to the judge, she would not reach that conclusion only where it is reasonably likely that the steward in question would be informed of the Respondent's request. When an employer intercedes with employees or their union in this way, the employer unlawfully interferes with union activity protected by Sec. 7. See, e.g., *McDaniel Ford*, 322 NLRB 956, 960 (1997) (suggestion to employees that they select new shop steward "unlawfully interfered with the administration of the Union" and violated Sec. 8(a)(1)).

[4] In adopting the judge's Sec. 8(a)(3) conclusions, we do not rely on the judge's recitation of the *Wright Line* standard. Regarding Kearney's suspension and discharge, we also find it unnecessary to pass on the judge's finding, relative to the fourth *Atlantic Steel* factor, that the Respondent's previous discrimination and animus against Kearney provoked his outburst. Rather, we find that Clarkson's statement to Kearney to "shut up" was sufficient provocation.

[5] For the reasons set forth in the judge's decision, Member Johnson would adopt the judge's recommendation to dismiss these Sec. 8(a)(1) allegations.

> The Employee hereby covenants and agrees that he or she will at no time, during or after the term of employment, use for his or her own benefit or the benefit of others, or disclose or divulge to others, any such confidential information.

The judge found that employees would not reasonably construe the agreement to restrict discussion of their wages or other terms and conditions of employment, "given the examples of the types of information described in the agreement." Contrary to the judge, we find the confidentiality agreement overbroad to the extent that it bars employees from discussing "human resources related information" and "investigations by outside agencies," because employees would reasonably construe those phrases to encompass terms and conditions of employment or to restrict employees from discussing protected activity, such as Board complaints or investigations.[6] See *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 72–73 (2014) (finding unlawful a rule instructing employees to "[k]eep customer and employee information secure" and that "[i]nformation must be used fairly, lawfully and only for the purpose for which it was obtained"); *MCPc, Inc.*, 360 NLRB 216, 216 (2014) (finding unlawful a rule prohibiting "dissemination of confidential information within [the company], such as personal or financial information"); *Hyundai America Shipping Agency*, 357 NLRB 860, 871, 873–874 (2011) (finding unlawful a handbook confidentiality rule prohibiting disclosure of information from an employee's personnel file and also an oral rule prohibiting discussion about any matters under investigation by employer's human resources department). In addition, the portion of the confidentiality agreement that prohibits employees from using such information "for his or her own benefit or the benefit of others" would reasonably be construed to limit protected concerted activity.

2. August 27 memo. The judge found that the memo addressed a specific recent problem and that employees would reasonably construe it to address that problem and not to restrict their Section 7 rights. Again, we disagree.

[6] Member Johnson adheres to his dissent in *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2014), advocating that the Board apply, as the judge essentially did here, familiar concepts of statutory interpretation, including the principle of "ejusdem generis." The majority's construction violates the direction in *Lutheran Heritage* that the Board consider context and give rules a "reasonable reading," "refrain from reading particular phrases in isolation," and not presume "improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646 (citing *Lafayette Park Hotel*, 326 NLRB 824, 825, 827 (1998)). Accordingly, Member Johnson does not believe that employees would reasonably construe the confidentiality agreement to have the meaning ascribed by his colleagues.

The judge's decision quotes portions of the August 27, 2012 memo, but not all the portions that are relevant to our analysis. As relevant, the memo states (emphasis in original):

> We were contacted this morning by the Front Office staff at the VA Medical Center. They wanted to report that Battle's Drivers notified clients that they were transporting that Thursday was the last day of our contract. They interpreted it that it was the last day we would be transporting them.
>
> It is important to correct this miscommunication and to advise all drivers that you are **not to communicate any Battle's company business with our clients.** If there is information to communicate, the management staff will handle these matters.
>
> **Please be advised of the following:**
>
> - There will be no change in Battle's relationship with the Dept. of Veterans Affairs come August 31st
> - However, unless extended before August 31st, the Collective Bargaining Agreement with the [Union] will expire on August 31st
> - Whether the CBA expires or not, Battles must continue to provide service to the VA
> - All drivers are expected to report to work as usual after August 31 even if there is no CBA in place
> - Even if there is no CBA in place after August 31st, Battles will continue to honor the terms of the expiring Agreement until another can be negotiated.

Reading the memo as a whole, we find that the prohibition against employees discussing "any Battle's company business with our clients" is unlawfully vague and overbroad. Employees would reasonably construe this prohibition to restrict discussion about union-related matters.

The Respondent issued the memo in response to, and to prevent further confusion caused by, one or more of the Respondent's drivers, who informed the Respondent's clients that the "contract" was ending. The clients apparently interpreted those statements to mean the contract to transport the clients was ending rather than the collective-bargaining contract, or perhaps that the expiration of the collective-bargaining agreement would impact transportation services. We need not resolve that uncertainty, however, because the Respondent's August 27 memo instructed the drivers not to communicate with clients about "*any* Battle's company business," without

qualification (emphasis added). In these circumstances, we find that employees would reasonably interpret that instruction to prohibit employees from discussing matters affecting their terms and conditions of employment, including the expiration of their collective-bargaining agreement, with clients. That perception is reinforced by the fact that the memo goes on to advise employees on the details of the expiration of the collective-bargaining agreement. Such prohibitions on discussions with third parties clearly violate employees' Section 7 rights. See *Lutheran Heritage Village-Livonia*, 343 NLRB at 646; see also *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291–292 (1999) (finding unlawful a rule stating "[m]uch of the Hotel business is confidential and must not be discussed with any party not associated with the Hotel"). Indeed, employees' ability to communicate with customers about terms and conditions of employment for mutual aid or protection is a right protected by Section 7 of the Act, notwithstanding that the listener might misinterpret or react unfavorably to the communication. See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568, 578–579 (1988); *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230–231 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980); *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979). In this case, the miscommunication over the ramification of the contract expiration does not justify an overbroad prohibition on discussing "company business." Accordingly, we find that the Respondent's August 27 memo violated Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Battle's Transportation, Inc., Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, coercing, or restraining an employee for acting in his or her capacity as a union steward.

(b) Ignoring seniority, suspending, discharging, or otherwise discriminating against any employee for engaging in union or other protected activity, including discharging his or her duties as a union steward.

(c) Maintaining rules which employees would reasonably construe to discourage engaging in union or other protected concerted activities, specifically the portions of the Respondent's confidentiality agreement that prohibit the discussion of "human resources related information" and "investigations by outside agencies," and the Respondent's August 27, 2012 memo, instructing employees not to discuss "any Battle's company business" with clients.

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

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

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

(b) Make Jerome Kearney whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Jerome Kearney for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

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

(f) Rescind the rules set forth in paragraph 1(c), above, or revise them to remove any language that prohibits or would reasonably be read to prohibit conduct protected by Section 7 of the Act.

(g) Notify all current employees that those rules have been rescinded or, if they have been revised, provide them a copy of the revised rules.

(h) Within 14 days after service by the Region, post at its Washington, D.C. facilities copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized repre-

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

sentative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 27, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT restrain, interfere with, or coerce you for acting in your capacity as a union steward.

WE WILL NOT ignore your seniority, suspend, discharge, or otherwise discriminate against you for engaging in union or other protected activity, including acting as a union steward.

WE WILL NOT maintain rules which you would reasonably construe to prohibit engaging in union or other protected concerted activities for purposes of collective bargaining or other mutual aid or protection, specifically the portions of our confidentiality agreement that prohibit the discussion of "human resources related information" and "investigations by outside agencies," and our August 27, 2012 memo that instructs you not to discuss "any Battle's company business" with clients.

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

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

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

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

WE WILL compensate Jerome Kearney for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

WE WILL rescind the unlawful portions of the confidentiality agreement and August 27, 2012 memo, or revise them to remove any language that prohibits or would reasonably be read to prohibit you from engaging in union or other protected concerted activities for purposes of collective bargaining or other mutual aid or protection.

WE WILL notify you that those rules have been rescinded or, if they have been revised, provide you a copy of the revised rules.

BATTLE'S TRANSPORTATION, INC.

The Board's decision can be found at www.nlrb.gov/case/05-CA-098088 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

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

DECISION

STATEMENT OF THE CASE

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

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

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, Battle's Transportation, Inc. (BTI), is a corporation, with an office and principal place of business in Washington, D.C. BTI provides wheelchair accessible van transportation to a number of clients, including the Department of Veterans Affairs (VA). Respondent derives gross revenues in excess of $500,000 and purchases and received goods, materials, or services worth at least $1000 from points outside of the District of Columbia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, ATU Local 174, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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

The 8(a)(1) Allegations

Complaint Paragraph 5

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

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

Complaint Paragraph 6

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

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

Legal Analysis Regarding Complaint Paragraphs 5 and 6

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). A rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true, a violation is established by a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) that the rule was promulgated in response to protected activity; or (3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). I conclude that nei-

ther the confidentiality agreement nor Tina Clarkson's August 27, 2012 memo explicitly restricts employees' Section 7 rights. Neither was promulgated in response to protected activity nor was either applied to restrict the exercise of Section 7 rights. The only question is whether they can reasonably be construed by employees to restrict their rights.

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

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

Complaint Paragraph 7

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

Kearney also testified that Clarkson held up the collective-bargaining agreement and said to him, "[Y]ou need to let us handle this, and if you have any problems, you need to come to us and let us know that you have any problems" (Tr. 179–180). Clarkson testified that she never told Kearney "not to engage in negotiations regarding this collective bargaining agreement" (Tr. 371–372). She did not directly contradict Kearney's testimony about the September 21, 2012 conversation. Therefore, I credit Kearney's account.

The test of whether this statement violates Section 8(a)(1) is whether Respondent's conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights, *Alliance Steel Products*, 340 NLRB 495 (2003); *Southwestern Bell Telephone Co.*, 251 NLRB 625, 631–632 (1980). In *Southwestern Bell*, the Board affirmed the decision of Judge Wacknov, who found that the company, by Manager Larry Barnes, did not violate the Act. Barnes told the company's union stewards that they "would better serve the interests of both the Union and Respondent by asserting their influence of their positions to attempt to deter or dissuade employees from filing obviously nonmeritorious or nuisance grievances, thus resulting in a more harmonious relationship." I find Clarkson's statement to be a plea for a harmonious relationship and passivity on the part of the stewards, similar to that in the *Southwest Bell* case. I conclude that her statement does not rise to the level of an 8(a)(1) violation.

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

Complaint Paragraph 8

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

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

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

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

(GC Exh. 6.)

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

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

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

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

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

that is defined by the HIPPA regulations. PHI is generally defined as:

> Individually identifiable health information. Individually identifiable health information is that which can be linked to a particular person. Specifically, this information can relate to:
>
> - The individual's past, present or future physical or mental health or condition,
> - The provision of health care to the individual, or,
> - The past, present, or future payment for the provision of health care to the individual.

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

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

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

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

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

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

In this case, Respondent did not refuse to deal with the Union's choice of a steward; it merely asked the Union to replace Kearney as steward. The Union then rejected the request. The General Counsel has not cited any cases for the proposition that a request to replace a union or employer representative, without a refusal to deal with that representative, is a violation of the Act.

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

The 8(a)(3) Allegations

Complaint Paragraph 9

Subparagraph 9(a): Alleged Reduction in Overtime Hours

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

Subparagraph (b): September 2012 Suspension

Respondent suspended Kearney for 3 days on September 17, 2012. While driving passengers for the Veterans Affairs, he allegedly refused a request by a dispatcher to pick up a passenger for a different contract. He also allegedly left the VA without authorization. Respondent suspended Kearney for insubordination, abandonment of his route, and a gap in his work hours. The Union filed a grievance over the suspension. Respondent paid Kearney for the 3 days he missed work.

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

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

Subparagraph (c): Verbal Counselings for Insubordination and Failure to Properly Complete Respondent's Daily Vehicle Inspection Report

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

The next day, Operations Manager Renee Williams questioned Kearney as to whether he had driven his route with an inoperative headlight. Kearney told her the light had been replaced before he left on his route. According to Williams,

Kearney became very agitated, raised his voice, and ultimately walked out on her. Kearney denies raising his voice. The following day, January 11, 2013, Respondent gave Kearney a verbal warning for being disrespectful and insubordinate towards Williams (GC Exh. 11, and another, GC Exh. 12) for failing to note that the headlight on his vehicle had been replaced on January 9.

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

Subparagraph 9(d): Discriminatory Delay in Transferring Kearney Back to the Veterans Affairs Contract

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

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

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity, and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[2] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

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

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

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

Subparagraphs (e) and (f): August 2013 Suspension and Termination of Jerome Kearney

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

[2] *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1996); *W. F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995).

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

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

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

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

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

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

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

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

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

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

Kearney kept talking in a low voice (mumbling or muttering according to Clarkson and Renee Williams). It is unclear as to how long he did this or what he was talking about. It is possible, although not clear that he was asserting that Marshon Williams was being treated disparately compared to other drivers.

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

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

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

Analysis

Did Respondent Violate Section 8(a)(3) and (1) in Discharging Jerome Kearney?

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

The Board set forth the criteria for evaluating an employee's conduct in such situations in *Atlantic Steel Co.*, 245 NLRB 814 (1979). Whether otherwise protected activity has lost the Act's protection is determined by balancing four factors: (1) the place

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

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

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

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

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

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

of discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004).

The first factor is fairly easy to apply in the instant case and favors a finding that Kearney did not lose the protection of the Act. The discussion did not take place in a work area and thus was not disruptive of the work process, *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006). The second factor, also favors Kearney at least to the extent that the subject of the discussion was to what extent Marshon Williams should be disciplined. Marshon Williams was paid for her time off and not disciplined further. However, the record does not indicate that the outcome of the disciplinary meeting had been determined when Kearney had his outburst. Indeed, the record indicates the contrary (Tr. 200, 324–325, 406).

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

THE REMEDY

The Respondent, having discriminatorily discharged Jerome Kearney, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Backpay shall also include any loss of earnings and benefits suffered as a result of Respondent's failure to transfer Jerome Kearney to the VA contract on January 25, 2013.

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

[Recommended Order omitted from publication]