

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

UNITED PARCEL SERVICE, INC.

and

Case 07-CA-164488

CORNELIUS SEARCY, An Individual

Rana Roumayah, Esq.,
for the General Counsel.
Bonnie Mayfield, Esq. (Dykema Gossett PLLC),
for the Respondent.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 7, 2016. The Charging Party filed the charge on November 19, 2015.¹ The first amended charge was filed on December 11, 2015, and the second amended charge on January 26, 2016. The General Counsel issued the complaint on April 25, 2016, and the Respondent filed an Answer on May 9, 2016, denying all material allegations.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it denied the Charging Party's request for representation at a meeting when he had reasonable cause to believe that disciplinary action against him would result from the meeting.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs² filed by the parties, I make the following

¹ All dates are in 2015 unless otherwise indicated.

² The Respondent also filed Proposed Findings and Conclusions.

FINDINGS OF FACT

I. JURISDICTION

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The Respondent, a corporation, transports and delivers packages throughout the United States, and has a facility in Detroit, Michigan (the Macomb North facility on Hoover Road). During calendar year 2015, that facility performed services valued in excess of \$50,000 in States other than the State of Michigan. The 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.

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The Respondent further admits, and I find, that Local 243, International Brotherhood of Teamsters (Union), is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

Cornelius Searcy, the Charging Party, has been employed by the Respondent since 1995. At the relevant time, he was an air box driver who worked evenings (3 to 8 p.m.), with duties including picking up packages and dropping them off at the airport for overnight air delivery. He was injured on Monday afternoon, June 15, 2015, and went to the Respondent's doctor at the Concentra Medical Center (the clinic), accompanied by an on-road supervisor, Edward Theut.³ The doctor stated that Searcy had injured his knee, needed medication, and should go home to rest the knee. Theut called Richard Godfrey, the building manager, from his cell phone, then handed the phone to the doctor. The doctor then told Searcy that he could return to work. Searcy disagreed and said he was going to the hospital. Theut followed him there and waited until after he was evaluated. That doctor diagnosed Searcy with abdominal strain and knee pain, possibly a torn meniscus. (GC Exh. 9.) He recommended that Searcy treat his knee by staying off the leg as much as possible and elevating the leg to waist level. He also recommended ice packs and medication for both the abdomen and the knee. When Searcy and Theut left the hospital in the early morning hours, Richard Godfrey, the building manager and Searcy's second line supervisor, who had arrived to relieve Theut, was waiting. Godfrey tried to talk to Searcy but Searcy told Godfrey that it was late and they could discuss the matter at work.

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That afternoon (Tuesday, June 16), Searcy returned to the clinic doctor. The doctor completed a physician work activity status report, diagnosing Searcy with an abdominal injury and pain, and knee pain. He prescribed medication and imposed restrictions: no lifting over 20 pounds and only occasional standing. (R. Exh. 4.) Godfrey then prepared a Temporary Alternate Work Offer (TAW) dated June 15, the date of the injury. (R. Exh. 2.) The only physical limitation he noted was no lifting over 20 pounds. On the form, Godfrey listed various tasks within that restriction that constituted the modified job offer: customer contacts, safety training, CSHP activity and package car audit. Searcy, however, was not presented the document to sign until June 17, which he did. His first line supervisor, Matt Crepeau, the Local sort supervisor,

³ Theut and another manager testified that it was standard practice for a supervisor to accompany injured employees when they sought medical treatment for an on the job injury. Their purpose was to advise the doctors that the company would provide temporary accommodation within the employee's restrictions.

gave Searcy the form and stated that Godfrey had to add information to the form before he, Godfrey, signed it. Searcy made a copy of the document for his records. Sometime thereafter, Godfrey amended the form, changing the date to June 17, adding the start date of June 17, adding the number of work hours/day requested by the injured worker, and adding a task to the list—de-labeling bags. (R. Exh. 3.) Godfrey testified that he had had a conversation with Crepeau in the afternoon of Wednesday, June 17. Godfrey asked Crepeau what task he planned to assign Searcy to perform that evening, and Crepeau responded that he intended to have Searcy de-label bags. Based on that discussion, Godfrey added de-labeling bags to the job offer assignment list. Godfrey then signed the offer, without presenting the revised offer to Searcy or advising him of the changes made.

De-labeling bags consists of removing a large tight mesh bag from a container, or tub, and ripping the old mailing label from it, so that a new label could be attached to send it out. The individual bags are very light, perhaps 2.5 ounces. Approximately 200–300 such bags were piled in the tub, which measured approximately 3 feet by 4 feet wide and 3 feet high.⁴ After the label was removed, the bags were hung on a rack. Searcy testified that he was, at the time, unable to perform this task since it required him to stand and bend over into the tub to pull the bags out. Godfrey testified that he assumed that Searcy could perform the task, since he could turn the tub on its side and pull the bags out while seated, though he did not discuss that with Searcy or Crepeau.

On Wednesday evening, when Crepeau asked Searcy to de-label bags, Searcy advised Crepeau that he was unable to perform that task, so Crepeau gave him another assignment that could be performed while seated. On Thursday, June 18, Crepeau again assigned Searcy to de-label bags, and Searcy reminded him he was unable to do so. Crepeau said those were Godfrey's instructions, but gave Searcy another assignment that he could perform seated in the conference room. Crepeau then went to Godfrey's office and told him that Searcy said he could not de-label bags. Godfrey called the OWCP supervisor, Gary Guest, for guidance. Guest told Godfrey that Searcy had two options, to de-label bags or go home. Godfrey testified that termination was not discussed. Godfrey and Crepeau went to the conference room to talk to Searcy.

Upon entering the room, Godfrey told Searcy he was not to use his phone. Searcy replied that he was not on the phone, but reading a text message. Godfrey told him not to. Searcy then asked for a representative. Godfrey replied "there is no discipline here; I am just going to ask you two questions." He asked whether Crepeau had assigned him to de-label bags, and Searcy said yes. Godfrey then asked whether his restrictions state no lifting over 20 pounds, and Searcy agreed. Godfrey then said "(N)othing about sitting or standing? So that's your option, okay, you need to do that." Searcy replied that he had to return to the clinic because he should not be standing. The discussion continued, with Searcy noting that Godfrey had seen the emergency room report regarding his knee, and he asked to go back to the clinic. Godfrey said no, and told Searcy "okay, here's your options." Searcy then again requested a steward, and Godfrey again stated "here's your options." Again Searcy requested a steward and Godfrey said there was no steward. Searcy again asked Godfrey to get someone to represent him, and Godfrey finally agreed to find a representative. He told Crepeau to get someone, and both of them left the room.⁵

⁴ There was no testimony as to what material the tub was made of, or its weight.

⁵ Searcy had recorded this portion of the meeting on his cell phone. He began recording as soon as

(GC Exh. 3, 5, & 6.) At that time, they saw Kevin Beecham, an alternate steward, entering the facility to begin his shift, and asked him to represent Searcy.

5 Searcy was not given time to talk to Beecham about the situation. Searcy requested permission to tape the meeting, which Godfrey denied. Godfrey asked Searcy again what the problem was with the assignment to de-label bags. Searcy said he was unable to do it because his knee was swollen, and said he wanted to go to the clinic. Godfrey said he could go when he had his next scheduled appointment. Godfrey told Searcy he had two options. Searcy recalled that Godfrey told him he could either de-label bags or be fired for refusing to do the work. Godfrey recalled that he said Searcy could de-label bags or go home. Searcy told Beecham that he was not refusing to do the assignment, but that he could not do it due to his injury, and that he would go home. Godfrey agreed, but said he would not be paid for that time, and told Searcy to clock out. Searcy became upset, and said this was retaliation, and that he was going to file a grievance.

15 No discipline was imposed on Searcy but he was not paid for the remainder of the shift on June 18, after he left work. However, he did file a grievance and he was eventually paid for that time.

20 Searcy testified that he initially requested a representative because he did not trust Godfrey and wanted a witness to document the meeting. He had become concerned when Crepeau told him that he was following Godfrey's instructions when he directed him to assign Searcy to de-label bags, after he (Searcy) and Crepeau had just, the day before, discussed the fact that Searcy was unable to perform that task. He was also concerned that Godfrey would discipline him when, during the meeting, Godfrey kept asking him questions. Godfrey misstated Searcy's restrictions, saying he only had a lifting restriction, and no standing restriction. He then told Searcy he had to perform the de-labeling assignment, and twice told Searcy he had "two options." For all these reasons, Searcy felt he needed a representative present.

30 Godfrey testified that he did not intend to discipline Searcy, but to clarify his medical restrictions.

III. LEGAL STANDARDS AND ANALYSIS

35 An employer violates Section 8(a)(1) of the Act when it denies an employee's request for union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Section 7 of the Act guarantees employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Court held that the action of an employee in seeking to have a union representative present at such an interview "clearly falls within the literal wording of Section 7." The employee is, thus, seeking the "aid or protection" of a union representative against a perceived threat to the employee's job security. *Lennox Industries, Inc.*, 244 NRB 607, 608 (1977).

Crepeau and Godfrey entered the conference room, and ceased recording when they left to get a steward.

The right to representation extends only to investigatory interviews and does not extend to training sessions, imparting instructions, correcting work techniques, or other routine workfloor conversations. *Weingarten* at 258, citing *Quality Mfg. Co.*, 195 NLRB 197, 199 (1972).

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Whether the employee's belief is reasonable is an objective standard, considering all the surrounding circumstances. *Weingarten* at 257.

Once an employee makes a request for union representation, the employer may grant the request, discontinue the interview, or offer the employee the choice between continuing the interview without a representative or having no interview at all. *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Co.*, 251 NLRB 850, 857 (1980), enfd. in relevant part 674 F.2d 576 (6th Cir. 1982); *USPS*, 241 NLRB 141 (1979).

In the instant case, Searcy made several requests for a representative before Godfrey consented to do so. The Respondent argues that the discussion was not investigatory and that Searcy did not have a reasonable belief that discipline might result from the interview, so it was not improper to deny the request. I disagree.

Searcy was seated alone in a conference room, working, when Godfrey and Crepeau entered. They closed the door behind them. Godfrey did not explain the reason for the meeting but began by admonishing Searcy not to use his cell phone. Searcy then requested union representation. Despite that request, Godfrey began questioning Searcy. Although Godfrey responded to Searcy's request for representation by saying "there is no discipline here," he continued "I am just going to ask you two questions." He then asked whether Crepeau had assigned Searcy to de-label bags, and whether Searcy had a lifting restriction of 20 pounds. Godfrey testified that he sought clarification of Searcy's restrictions, but never explained what he meant by that. It certainly wasn't clear from his questions to Searcy what he wanted clarified other than to establish that Searcy had refused to perform an assignment. He already knew Searcy's restrictions (though he ignored the standing restriction) and had spoken to the clinic doctor. He didn't ask Searcy why he felt he couldn't perform the de-labeling task or explain why he thought Searcy could do it. This was not a routine conversation. Instead, Godfrey's purpose was to give Searcy an ultimatum.⁶

The Respondent cited *Stewart-Warner Corp.*, 253 NLRB 136 (1980), and *Bridgeport Hospital*, 265 NLRB 421 (1982), but neither situation is comparable. The discussion in *Stewart-Warner* was a routine conversation about work, discussing duties, while *Bridgeport Hospital* involved staff meetings where no questions were asked of employees.

Therefore, I find that this was an investigatory interview.

In order to determine whether Searcy had a reasonable belief that he might be disciplined, the incident must be viewed in context, and that context includes the events of the prior two

⁶ Although Searcy testified that Godfrey told him to de-label bags or be fired, I credit Godfrey's testimony that the options he gave Searcy were to de-label bags or go home (which Searcy may very well have interpreted as firing).

days. After Searcy's injury, a supervisor accompanied him to the clinic and then to the hospital. Godfrey spoke to the clinic doctor, who then changed his instructions to Searcy about returning to work. Godfrey was in the parking lot in the wee morning hours when Searcy and the supervisor left the hospital. Searcy was asked to sign a Temporary Alternate Work offer form, though he had never been asked to do so for previous work related injuries. Two restrictions were imposed on Searcy due to his injury: no lifting over 20 pounds and only occasional standing. When Godfrey completed the Temporary Alternate Work offer form, he only noted the lifting restriction, not the standing restriction. When Crepeau gave the form to Searcy to sign, it included the following tasks: customer contacts, safety training, CSHP activity and package car audit. Godfrey made changes to that form after Searcy signed it, including adding the task of de-labeling bags, a material and significant change. Nonetheless, Godfrey did not reissue the form to Searcy, who was, thus, unaware of the modifications. When Crepeau asked Searcy to de-label bags on Wednesday, before that task was added to the form, Searcy advised him that he was unable to perform that assignment, and Crepeau found other work for him to do. Nonetheless, the following evening, Crepeau again assigned Searcy to de-label bags, and said those were Godfrey's instructions. For all these reasons, Searcy had an objective basis for his apprehension that Godfrey was setting him up for discipline.

Searcy was performing another assignment when Godfrey and Crepeau entered the conference room and closed the door. Godfrey did not explain the reason for the meeting but began by directing Searcy not to use his telephone. Searcy had just refused to perform an assignment Godfrey had given him through Crepeau, which could constitute insubordination. Therefore, he made his first request for a representative. Godfrey's statement to Searcy that "there is no discipline here" is ambiguous. It indicates that he had not already decided to discipline Searcy, but that is of no moment. Searcy would have no right to representation if the meeting were simply for the purpose of issuing previously determined discipline. The fact that Godfrey did not intend to discipline Searcy at the outset and only intended to discuss Searcy's medical restrictions is not relevant to the question whether Searcy had a reasonable belief that he might be disciplined. *Consolidated Edison of N.Y.*, 323 NLRB 910 (1997). Godfrey did not state that discipline would not be issued after he asked his questions, regardless of Searcy's answers. Godfrey's questions to Searcy regarding his refusal to de-label bags (that could be construed as insubordination) and his misstatement of Searcy's restrictions (ignoring the standing restriction) demonstrate that Searcy's suspiciousness was reasonable.⁷

Godfrey did ultimately stop the meeting in order to obtain a representative for Searcy, after his repeated requests for such. Whether any representative had been in the facility before that is immaterial. There was no urgency to having this meeting. The proper course of action when there is no representative in the facility is to offer the employee the option to proceed without representation or to reconvene when a representative is available, and Godfrey did not offer Searcy that choice.

The Respondent cited several cases *Alfred M Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978), is a Circuit Court case, that overturned the Board's decision. That court applied a subjective standard, analyzing the employer's motivation, and that subjective standard has not

⁷ I note that the grievance documents characterize Searcy's "refusal" to perform as the employer's position, not "inability."

been adopted by the Board. Likewise, in *NLRB v. USPS*, 689 F.2d 835 (9th Cir. 1982), the Board did not adopt the court's analysis. *Spartan Stores, Inc. v. NLRB*, 628 F.2d 953 (6th Cir. 1980) is inapplicable, as Searcy did not refuse to participate in the discussion.

5 Therefore, I find that Searcy had a reasonable belief that the meeting might result in disciplinary action against him.

For these reasons, I find that the Respondent violated Section 8(a)(1) of the Act as alleged.

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CONCLUSIONS OF LAW

1. By failing to provide the Charging Party with a union representative when requested in an investigatory or fact finding interview which the employee reasonably believed might result in discipline, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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2. By failing to provide the Charging Party with a union representative when requested in an investigatory or fact finding interview which the employee reasonably believed might result in discipline, the Respondent violated Section 8(a)(1) of the Act.

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REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

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ORDER

The Respondent, United Parcel Service, Inc., Detroit (Macomb North), Michigan, its officers, agents, successors, and assigns, shall

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1. Cease and desist from
 - a) Denying to any bargaining unit employee at its Macomb North facility in Detroit, Michigan, the right to be represented upon request by Local 243, International Brotherhood of Teamsters (the Union) at any investigatory or fact finding interview that the employee reasonably believes may result in disciplinary action.
 - b) 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.

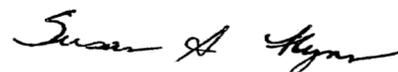
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⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

- 5 a) Within 14 days after service by the Region, post at its Macomb North facility in
Detroit, Michigan copies of the attached notice marked "Appendix."⁹ Copies of
the notice, on forms provided by the Regional Director for Region 7, after being
signed by the Respondent's authorized representative, shall be posted by the
Respondent and maintained for 60 consecutive days in conspicuous places
10 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
15 ensure that the notices are not altered, defaced, or covered by any other material.
In the event that, during the pendency of these proceedings, the Respondent has
gone out of business or closed the facility involved in these proceedings, the
Respondent shall duplicate and mail, at its own expense, a copy of the notice to
all current employees and former employees employed by the Respondent at any
20 time since June 18, 2015.
- b) Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the Region
attesting to the steps that the Respondent has taken to comply.

25 Dated, Washington, D.C. September 1, 2016



30 Susan A. Flynn
Administrative Law Judge

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT deny your request for union representation at any investigatory or fact finding interview which you reasonably believe might result in disciplinary action.

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

UNITED PARCEL SERVICE, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number, 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours of Operation: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/07-CA-164488 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED WITH ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE COMPLIANCE OFFICER, (313) 226-3200.