

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

DIVERSIFIED RESTAURANT HOLDINGS INC.  
D/B/A BAGGER DAVE'S BURGER TAVERN

and

Case 09-CA-181503

DANIEL GNAU, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S MEMORANDUM  
IN OPPOSITION TO RESPONDENT'S MOTION FOR A  
MORE DEFINITE STATEMENT AND BILL OF PARTICULARS**

NOW COMES COUNSEL FOR THE GENERAL COUNSEL in opposition to Respondent's Motion for a More Definite Statement and Bill of Particulars which was filed on March 10, 2017, and respectfully submits to the Administrative Law Judge that said motion should be denied for the reasons stated herein.

Among other things, Respondent maintains that the complaint fails to comply with § 10264.2 of the National Labor Relations Board's Case Handling Manual because: it does not identify the employees with whom Charging Party Daniel Gnau (Gnau) shared and discussed employee wage rate information; it fails to specifically identify the activities or manner in which such information was shared and discussed; it fails to produce the electronic image of the wage rate information that was shared and discussed; it does not identify the dates and locations on and at which the foregoing information was shared and discussed; it fails to identify the person who was the subject of an unlawful Section 8(a)(1) threat; and it fails to specify the dates and locations of the occurrences which were alleged to constitute unlawful interferences within the meaning of Section 8(a)(1). Respondent subsequently contends that the complaint allegations are not sufficiently detailed and are too vague to enable it to file an Answer or adequately

prepare for a hearing. Respondent further asserts that the complaint is deficient in that the named employer (Respondent) was not Gnau's employer.

Contrary to Respondent's claims, Counsel for the General Counsel avers that the complaint complies with Section 102.15 of the Board's Rules and Regulations in that it provides a clear and concise description of the alleged unfair labor practices and, where known, includes approximate dates and places of those occurrences, along with the names of Respondent's agents who committed the acts in question. In the course of addressing the concerted activity which constitutes the basis for the alleged issuance of unlawful discipline, the complaint sufficiently apprises Respondent of the circumstances surrounding the protected conduct which caused Gnau's discharge and receipt of a written warning.

Although complaint allegations are required to be sufficiently detailed to enable the parties to understand and respond to the issues in dispute, such are not required to include the names of employees who are the subjects of Section 8(a)(1) threats. Nor is it necessary for a complaint to identify everyone who was present when an alleged unlawful act occurred or specify all persons who engaged in alleged protected activity. Thus, Respondent's claims that the complaint should have identified the employees with whom Gnau was engaged in protected discussions about wage rate information and the employee who was told that discussing wages with other employees was a "fireable" offense is unavailing.

It is well established that a complaint need only allege ultimate facts and evidentiary matters are not required to be alleged beyond that which is necessary to enable Respondent to know with what it has been charged. *Bob's Casing Crews, Inc. v. NLRB*, 458 F.2d 1301 (C.A. 5, 1972); *NLRB v. Duncan Foundry & Machine Works, Inc.*, 435 F.2d 612 (C.A. 7, 1970); *North American Rockwell Corp. v. NLRB*, 389 F.2d 866 (C.A. 10, 1968); *Plumbers and Steamfitters*

*Union Local 100 (Beard Plumbing Company)*, 128 NLRB 398 enf'd, 291 F.2d 927 (C.A. 5, 1961); *Local 363, International Brotherhood of Boilermakers (The Fluor Corporation Ltd.)*, 123 NLRB 1877 (1913). The instant complaint clearly identifies the facts which enable Respondent to understand the matters with which it has been charged. Moreover, the production of the electronic image of the wage rate information is not required at this point given its evidentiary disposition and value.

In short, Respondent's motion, as demonstrated by its request for the electronic image of the wage rate data, is nothing more than an attempt to obtain evidence by means of pretrial discovery. The Board has long held, with court approval, that it will not permit such discovery in unfair labor practice cases. *NLRB v. Robbins' Tire & Rubber Co.*, 437 U.S. 214 (1978); *McLain Industries Inc. v. NLRB*, 521 F.2d 596 (C.A. 6, 1974); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 1255, 1256 (C.A. 6, 1970); *Krieger Ragsdale & Company, Inc.*, 372 F.2d 517 (C.A. 7, 1967), cert. denied, 389 U.S. 1041 (1968); *North American Rockwell Corp.*, supra; *NLRB v. Vapor Blast Manufacturing Company*, 287 F.2d 402 (C.A. 7, 1961), cert. denied 368 US. 823 (1961); *Raser Tanning Company v. NLRB*, 276 F.2d 80 (C.A. 6, 1960); *NLRB v. Gala-Mo Arts, Inc.*, 232 F.2d 102 (C.A. 8, 1956); and *NLRB v. Glove Wireless Ltd.*, 192 F.2d 748 (C.A. 9, 1951). Respondent's motion should accordingly be denied since it sets forth no compelling reasons for the Board to change its longstanding policy with regard to pretrial discovery.

As previously noted, Respondent contends that it was not Gnau's employer. Not only does Respondent's assertion of this issue constitute a veiled attempt at pretrial discovery, but it essentially constitutes a defense which could be raised in its Answer to the complaint. If Respondent's motion is granted in this regard, it would require Counsel for the General Counsel

to establish Respondent's employer status with respect to Gnau and do so by means of pretrial discovery. For this reason alone, Respondent's contention is without merit.

In addition to its Bill of Particulars, Respondent requested an extension of time in which to file its Answer along with a postponement of the hearing. Since the March 14, 2017 answer due date has expired, Counsel for the General Counsel does not object to Respondent being given a reasonable time in which to file its' Answer. However, it is urged that a postponement not be granted given the approximate 2-month period in which Respondent has to sufficiently prepare for the scheduled May 30, 2017 hearing.

Finally, since the complaint allegations satisfy the specificity and sufficiency requirements of Case Handling Manual §10264.2 and Section 102.15 of the Board's Rules and Regulations, Counsel for the General Counsel requests that Respondent's Motion be denied forthwith.

Dated: March 30, 2017

Respectfully submitted,

A handwritten signature in black ink that reads "Kevin P. Luken". The signature is written in a cursive style with a large initial "K" and a distinct "P" and "L".

Kevin Luken  
Counsel for the General Counsel  
National Labor Relations Board, Region 9  
550 Main Street- Room 3003  
Cincinnati, Ohio 45202-3271

CERTIFICATE OF SERVICE

March 30, 2017

I hereby certify that I served the attached Counsel for the General Counsel's Memorandum in Opposition to Respondent's Motion for a More Definite Statement and Bill of Particulars on all parties by electronic mail today to the following:

Andrey T. Tomkiw, Esq.  
Tomkiw Mackewich, PLC  
612 East 4th Street  
Royal Oak, MI 48067-2802  
Email: [atomkiw@tomkiw.net](mailto:atomkiw@tomkiw.net)

Mr. Daniel Gnau  
870 Fernshire Dr  
Dayton, OH 45459-2310  
Email: [dangnau@gmail.com](mailto:dangnau@gmail.com)



Kevin P. Luken  
Counsel for the General Counsel  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271