

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

FCA US LLC

Respondent Employer

and

SHERI ANOLICK, an Individual

Case 07-CA-213717

Charging Party Anolick

and

BEVERLY SWANIGAN, an Individual

Case 07-CA-213746

Charging Party Swanigan

and

BRIAN KELLER, an Individual

Case 07-CA-213748

Charging Party Keller

-AND-

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO**

Respondent Union

and

SHERI ANOLICK, an Individual

Case 07-CB-213726

Charging Party Anolick

and

BEVERLY SWANIGAN, an Individual

Case 07-CB-213747

Charging Party Swanigan

and

BRIAN KELLER, an Individual

Case 07-CB-213749

Charging Party Keller

GENERAL COUNSEL’S OPPOSITION TO RESPONDENT EMPLOYER’S MOTION TO STRIKE PARAGRAPH 12 OF THE AMENDED CONSOLIDATED COMPLAINT

Pursuant to Section 102.24(a) of the Board’s Rules and Regulations Counsel for the General Counsel (General Counsel) respectfully files this opposition to Respondent Employer’s Motion to Strike Paragraph 12 of the Amended Consolidated Complaint (Motion) filed on July 29, 2020.¹ The Motion lacks merit and should be denied by the Administrative Law Judge.

I. BACKGROUND

On February 19, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) issued alleging, in pertinent part, that during contract negotiations, Respondent Employer by its agents, gave assistance and support to Respondent Union in order to obtain benefits, concessions, and advantages for Respondent Employer in the negotiation, implementation, and administration of the collective bargaining agreement, in violation of Sections 8(a)(1) and 8(a)(2) of the Act. The Complaint further alleged that Respondent Union by its agents, received assistance and support from Respondent Employer, in violation of Section 8(b)(1)(A) of the Act.

On March 4, Respondent Employer filed its Answer to the Complaint (Answer) denying the commission of any unfair labor practices. On March 24, Respondent Employer filed a Motion for a Bill of Particulars, asserting that the Complaint fails to specify the factual basis upon which certain former Respondent Employer employees provided assistance and support through the UAW-Chrysler Skill Development and Training Program d/b/a UAW-Chrysler National Training Center (NTC) to certain of Respondent Union employees in order to purportedly obtain unspecified benefits, concessions and advantages in the negotiation of an

¹ All dates refer to calendar year 2020, unless otherwise noted.

unidentified 2015 collective-bargaining agreement. Specifically, according to Respondent Employer, the:

Complaint does not identify (i) what “benefits, concessions, and advantages” FCA *supposedly obtained* from the UAW by virtue of the alleged assistance and support, (ii) a single provision of any of the 2015 collective bargaining agreements that supposed would have been different absent the alleged assistance and support, and (iii) any manner in which the “implementation” and “administration” of the 2015 collective bargaining agreements were supposedly impacted by the alleged assistance and support. Making matters worse, the Complaint is not even clear as to what time period the General Counsel contends is at issue. Although the Complaint focuses on an unspecified 2015 collective bargaining agreement, the General Counsel nevertheless appears to take issue with conduct going back to 2009 by alleging that FCA engaged in contract negotiations for an unspecified 2015 collective bargaining agreement “[s]ince about 2009.” (emphasis added)

On March 27, General Counsel filed an Opposition to Respondent Employer’s Motion for a Bill of Particulars, asserting, among other things, that:

[R]eading Complaint paragraphs 11 and 12 together, the Complaint alleges that Respondent Employer engaged in the conduct of giving assistance to Respondent Union by authorizing Respondent Union’s agents to charge NTC credit cards for personal expenses and by paying the salaries of Respondent Union officials who were not assigned to work at NTC. The Complaint alleges that *this conduct* was engaged in to obtain benefits, concessions, and advantages for Respondent Employer in the negotiation, implementation, and administration of the collective bargaining agreement, and that this conduct violated Section 8(a)(1) and (2) of the Act. The Complaint does not allege, as Respondent Employer inquires in its Motion, that this conduct resulted in obtaining benefits, concessions, and advantages in the negotiation, implementation and administration of the collective bargaining agreement. It is the conduct which violated the Act even absent actually obtaining any benefits, concessions, and advantages.

Although evidence of benefits, concessions, or advantages could be used as evidence in support of the alleged violations, such evidence is not required. Section 8(a)(2) prohibits an employer from contributing financial or other support to a union, and a union’s acceptance of such support likewise violates Section 8(b)(1)(A). *See, e.g., Wells Enterprises, Inc.*, 365 NLRB No. 7, slip op. at 1 n.1 (Dec. 22, 2016) (transmitting vending machine proceeds and other monies to union constituted unlawful financial assistance and acceptance of support). The actions, as alleged in the Complaint, even absent any actual benefits, concessions, or advantages actually obtained by the Respondent Employer, would be sufficient to establish a violation of the Act.

The Complaint involves clearly delineated acts in paragraph 11 which were taken to obtain the benefits, concessions and advantages in the negotiation, implementation, and administration of the collective bargaining agreements, and that these actions violated the Act regardless of whether Respondent Employer ever obtained any of those benefits, concessions or advantages. The Complaint does not, as Respondent Employer claims, assert that actual benefits, concessions and advantages were obtained through this unlawful conduct. In comparison, Complaint paragraph 13 explicitly alleges that Respondent Union received assistance and support from Respondent Employer.

* * *

As discussed above, it makes no sense for Respondent Employer to request information on the alleged benefits, concessions and advantages which were actually obtained where the Complaint makes no such allegation. The Complaint clearly alleges that Respondent Employer engaged in conduct as specified in paragraph 11 in order to obtain benefits, concessions, and advantages without asserting that the conduct resulted in any benefits, concessions, and advantages. Because the Complaint does not allege that the conduct resulted in any benefits, concessions, and advantages, it is clear that Respondent Employer's Motion seeks pre-trial discovery of information which goes beyond what is alleged to be unlawful. This is not allowed by the Board's Rules. (emphasis in original)

On April 2, Deputy Chief Administrative Law Judge Arthur Amchan issued an Order Granting in Part, Denying in Part Respondent Employer's Motion for a Bill of Particulars (Order), and provided in relevant part:

FCA is entitled to know what benefits, concessions and advantages, the General Counsel believes FCA was seeking by its alleged illegal conduct. Thus, I grant the motion for a bill of particulars in this regard. The General Counsel must specify the benefits, concessions and advantages that it alleges FCA was seeking² by the conduct set forth in paragraph 11. In addition, the General Counsel must identify which collective bargaining agreements are at issue in this case if it has not done so already.

On June 18, an Amended Consolidated Complaint and Notice of Hearing (Amended Complaint) issued modifying aspects of the Complaint including by adding additional alleged

² Although Respondent Employer's Motion for a Bill of Particulars sought information on what benefits, concessions and advantages that the Complaint alleges that it *obtained*, it did not seek information on what benefits, concessions and advantages that the Complaint alleges that Respondent Employer had *sought*.

agents and clarifying some of the allegations including the applicable collective-bargaining agreements. In respect to the current Motion, the Amended Complaint modified paragraph 12, clarifying that Respondent Employer engaged in the alleged unlawful conduct “in order to obtain benefits, concessions, and advantages for Respondent Employer in the negotiation, implementation, and administration of the collective bargaining agreements referenced above in paragraph 8(a), as noted in plea agreements in federal case 2:17-cr-20406-PDB-RSW.”

On July 29, Respondent Employer filed the instant Motion. In its Motion, Respondent Employer asserts that the General Counsel has failed to comply with the Order insofar as the Amended Complaint did not identify what benefits, concessions and advantages the General Counsel believes that Respondent Employer was seeking by its alleged illegal conduct. In support of its Motion, Respondent cites [Central Freight Lines](#), 133 NLRB 393, 396 n.5 (1961), and [Flaum Appetizing Corp.](#), 357 NLRB 2006, 2008, 2012 (2011).³

II. ARGUMENT

Legal Framework

Section 102.15 of the Board’s Rules defines the requirements for an unfair labor practice complaint:

The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts, which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and names of respondent’s agent or other representatives by who committed.

³ The Motion also refers to the Unfair Labor Practice Proceedings Manual § 10280.2(c), but fails to note that the section addresses a General Counsel motion to strike an improper or deficient answer of a respondent, and fails to explain if or how the section should be applied by analogy.

Similarly, the Motion cites Unfair Labor Practice Proceedings Manual § 10388.3, impliedly asserting that there has been an unquestionable failure of proof on an allegation. The Motion provides no reason how there has been any failure to prove an allegation at hearing when, as yet, there has been no hearing and no evidence presented.

The role of an unfair labor practice complaint was succinctly explained by the Sixth Circuit over 70 years ago in [NLRB v. Piqua Munising Wood Products Co.](#), 109 F.2d 552, 557 (6th Cir. 1940):

The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.

Stated differently, “[a]n unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different legal contexts.” [St. Regis Enterprises, LLC](#), 364 NLRB No. 137, slip op. at 3 (2016) (quoting [Artesia Ready Mix Concrete, Inc.](#), 339 NLRB 1224, 1226 (2003)). See also, [Boilermakers, Local 363 \(Fluor Corp.\)](#), 123 NLRB 1877, 1913 (1959) (“A complaint is but the statement of the issues to be tried; consequently, matters of evidence need not be stated in the complaint. The latter is a matter of proof to be produced at the hearing. The General Counsel need not disclose matters of evidence in his complaint beyond those necessary to enable Respondents to know with what they are charged. . . . All that is required of the complaint is that there be a plain statement of the facts claimed to constitute an unfair labor practice that Respondents may put upon their defense”). Thus, “[t]he General Counsel is not required to plead his evidence or the theory of the case in the complaint.” [Affinity Medical Center](#), 364 NLRB No. 67, slip op. at 2 (2016). “As a general matter, a bill of particulars is justified ‘only when the complaint is so vague that the party charged is unable to meet the General Counsel’s case.’” *Id.* (citing [McDonald’s USA, LLC](#), 362 NLRB No. 168, slip

op. at 1 (2015)); see also, [North American Rockwell Corp. v. NLRB](#), 389 F.2d 866, 871 (10th Cir. 1968) (denying a request for a bill of particulars).

Respondent Employer's Motion Lacks Merit.

Neither *Central Freight Lines*, nor *Flaum Appetizing Corp.*, assists Respondent Employer's arguments in its Motion. In *Central Freight Lines*, the Board did not address the trial examiner's footnote, which provided very little information regarding granting a motion to strike, which is the sole source of information cited by the Motion. The trial examiner had granted the respondent's motion to strike paragraph 8 of the complaint for a failure to furnish a bill of particulars as directed by the trial examiner on March 24, 1960. No further details on the bill of particulars or motion to strike were provided. Further complicating the issue is that the trial examiner's order was issued on March 24, 1960, in a hearing which was held on multiple dates in several locations from September 15, 1959 in Beaumont, Texas, to April 28, 1960 in Dallas, Texas, and involved multiple allegations and several other considerations, but provides no further information on why the motion to strike was granted.

Similarly, the Motion's reliance on *Flaum Appetizing Corp.* (Flaum), is unavailing and ignores the underlying facts. The General Counsel's motion to strike defenses was granted because the respondent failed to provide sufficient information to satisfy its obligation under the associate chief administrative law judge's order, but there are key facts why such a remedy was granted. The issue before the Board was Flaum's answer to the compliance specification in which the employer asserted certain defenses regarding backpay. Two years earlier, the Second Circuit enforced the Board's finding that Flaum had unlawfully discharged 17 employees and ordered a make-whole remedy for those employees. In its answer to the compliance specification, Flaum asserted defenses that the discriminatees were undocumented aliens who

were not entitled to backpay, had willfully violated the Immigration Reform and Control Act and were therefore not entitled to be lawfully employed in the U.S. The General Counsel filed a motion for a bill of particulars requesting that Flaum plead with specificity the facts in support of its affirmative defenses, which was granted, requiring Flaum to provide the names of the discriminatees and to state which affirmative defense applied to each of them with a brief statement of facts constituting the offense each allegedly committed and when it was committed. Flaum's response was a limited generalization that none of the discriminatees were entitled to work in the U.S., that each provided fraudulent documentation and photo identification, and that Flaum did not learn of this until the Board hearing. Flaum failed to provide a further response when requested. Accordingly, Flaum's failed to provide the information responsive to the bill of particulars, in support of its new defense and notwithstanding the prior findings that it had violated the Act.

In contrast, a more relevant case is [*McDonald's USA, LLC*](#), 362 NLRB 1347, 1347, (2015), in which the Board denied the employer's requests to appeal the administrative law judge's order denying its motion for a bill of particulars, and its alternative motion to strike the joint employer allegations and dismiss the complaint. McDonald's claimed that the General Counsel's failure to plead factual allegations in support of the joint employer allegations left it without adequate notice of the charges to prepare its defenses for trial. *Id.* In rejecting the employer's arguments, the Board found that the complaint allegations were sufficient to put the employer on notice. In reaching its conclusion, the Board noted that:

Under Section 102.15 of the Board's Rules and Regulations, a well-pleaded complaint requires only "(a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

Further, a bill of particulars is justified “only when the complaint is so vague that the party charged is unable to meet the General Counsel’s case.” The General Counsel is not required to plead his evidence or the theory of the case in the complaint. *Id.* (internal citations omitted)

See also, [*North American Rockwell Corp. v. NLRB*](#), 389 F.2d 866, 871 (10th Cir. 1968), above (denying a request for a bill of particulars).

Here, Respondent Employer’s Motion impliedly rests on the inaccurate assumptions that:

1) the Complaint alleged that there are specific benefits, concessions and advantages that Respondent Employer was seeking by its conduct which improperly exceed the Complaint allegations; 2) the Amended Complaint, by referring to the plea agreements in the criminal case, fails to satisfy the Order; and 3) this alleged failure to provide details which go beyond the Complaint or Amended Complaint somehow establishes that the General Counsel is withholding information regarding the specific benefits, concessions and advantages sought by Respondent. That is not the case. Further, as noted above, Respondent Employer’s assertions do not comport with the Board’s Rules and Regulations, even assuming that more information was available.

Instead, by its Motion, Respondent again seeks to establish facts which go beyond the requirements to be pleaded in a complaint and seeks to narrow the allegations of the Complaint based on a false assumption that further information responsive to the Order is being withheld. That is not the case. The Amended Complaint provides additional information in response to the Order, and meets the requirements of the Board’s Rules and Regulations under the same analysis as the Board noted in *McDonald’s*. The General Counsel respectfully submits that Respondent Employer’s Motion should be denied.

III. CONCLUSION

As discussed, Respondent Employer's assertion that Amended Complaint paragraph 12 should be stricken is without merit. Based on the foregoing reasons, the General Counsel respectfully requests Respondent Employer's Motion be denied.

Dated at Detroit, Michigan, this 14th day of August 2020.

/s/ Larry A. Smith _____

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**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT EMPLOYER'S MOTION TO STRIKE PARAGRAPH 12 OF THE
AMENDED CONSOLIDATED COMPLAINT, dated August 14, 2020 by e-file to:**

Division of Judges

I further certify that on August 14, 2020, I served the above by **electronic mail** or **facsimile** upon the following persons:

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August 14, 2020

Date

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Attorney

Name

/

Signature