

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

BEAUMONT ROYAL OAK

Respondent

and

CASE 07-CA-244615

MICHIGAN NURSES ASSOCIATION

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S
REPLY AND OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS OR ALTERNATIVELY FOR A
BILL OF PARTICULARS**

Now comes Dynn Nick, Counsel for the General Counsel, and pursuant to Section 102.24 of the Board's Rules and Regulations, responds to Respondent's Motion to Dismiss or Alternatively for a Bill of Particulars as follows:

1. The Complaint in this case issued on January 31, 2020. On February 14, 2020, Respondent filed an Answer to that Complaint, in which it admitted or denied each Complaint allegation. Section 102.20 of the Board's Rules and Regulations provides that a respondent "shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial." Nowhere in its answer does Respondent contend that it is without knowledge sufficient to specifically admit or deny any of the Complaint

allegations. Now, over seven months after the Complaint issued and after Respondent filed an Answer to that Complaint, it seeks to Dismiss or obtain a Bill of Particulars.

2. The procedural rules contained in Sections 102.24(a) and (b) of the Board's Rules and Regulations governing motions for summary or default judgment with the Board also apply to pretrial motions to dismiss before an Administrative Law Judge (ALJ); that is, the ALJ should "construe the complaint in the light most favorable to the General Counsel, accept all factual allegations as true, and determine whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." *Detroit Newspapers Agency*, 330 NLRB 524, 525 n. 7 (2000).

3. With respect to the adequacy of a Complaint and Motions for a Bill of Particulars, like all pleadings before the Board, the requirements of a complaint are governed by the Board's Rules rather than the Federal Rules of Civil Procedure. See *Nissan North America, Inc.*, Case 10-CA-198732, unpub. Board order issued Nov. 16, 2017 (2017 WL 5516533), at n. 2; and *Component Bar Products, Inc.*, 364 NLRB No. 140, slip op. at 10 (2016). Section 102.15 of the Board's Rules states that a complaint "will" contain:

- (a) A clear and concise statement of the facts upon which the Board asserts jurisdiction, 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 who committed the acts.

“Applying this rule, the Board and the courts have consistently found that an unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different contexts.” *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1226 (2003), citing, e.g., *NLRB v. Piqua Munising Wood Products Co.*, 109 F.2d 552, 557 (6th Cir. 1940) (“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.”). 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.” *Affinity Medical Center*, 364 NLRB No. 67, slip op. at 2 (2016), quoting *North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968). Thus, in *Affinity*, the Board held that the judge erred in requiring the General Counsel to provide additional information regarding a proposed amendment to the complaint, as the proposed amendment already stated the nature of the alleged conduct (specific unilateral rule changes), the names of the supervisors allegedly involved in each change, the dates of the changes, and the location. See also *Lloyd A. Fry Roofing Co. v. NLRB*, 222 F.2d 938, 940 (1st Cir. 1955) (employer was not prejudiced by the General Counsel's failure to furnish

particulars regarding the alleged 8(a)(1) interrogations and threats where the complaint identified the month of the alleged violations and the officials responsible); and *Dal-Tex Optical Co.*, 130 NLRB 1313 n. 1 (1961) (employer's motion for particulars was properly denied where the complaint described the nature of the activity, the dates, and the names of the agents that committed the alleged acts). Thus, as the Board has found, the names of employees to whom an alleged threat or other 8(a)(1) violation was directed need not be pleaded and a Respondent is not entitled to disclosure of the names before the hearing. See *Walsh- Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295 (1960); and *Storkline Corp.*, 141 NLRB 899, 902–903 (1963), *enfd.* in part 330 F.2d 1 (5th Cir. 1964). See also *Pacific 9 Transportation, Inc.*, 21–CA–116403, unpub. Board order issued June 11, 2015 (2015 WL 3643583), where the Board reaffirmed this long-standing principle.

4. Counsel for the General Counsel submits that in all instances raised by Respondent's Motion, Respondent has been adequately advised by the Complaint as to the specific nature of the violation charged, the name of Respondent's representative involved, the manner by which it is alleged to have engaged in unfair labor practices, and the approximate dates that the alleged unfair labor practices were committed.

5. Respondent, in section II A of its Motion, first argues that Complaint paragraphs 7(a), 9(b), 11(a), 13, 16, 17, and 18, concerning alleged unlawful interrogation by Respondent supervisors or agents, are conclusory, fail to state a

claim and provide insufficient information. In this regard, Respondent cites *Rossmore House*, 269 NLRB 1176 (1984), *afd.* Sub nom *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), which lays out a five-part test required to determine whether statements about union activity rise to the level of an unlawful coercive interrogation: (1) the background – *i.e.*, whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator – *i.e.*, his or her placement in the respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. *Public Service Company of New Mexico*, 360 NLRB 573 (2014) *enfd.* 843 F.3d 999 (D.C. Cir. 2016). Respondent apparently argues that without the *Rossmore House* factors being alleged in the Complaint, “The identical conclusory legal assertions in each of the Complaint Paragraphs and sub-Paragraphs detailed above claiming that the alleged interactions were ‘coercive’ or ‘interrogations’ were ‘coercive,’ or otherwise unlawful, fail to state a claim as a matter of law.” Such an argument is absurd on its face and Respondent’s demand for such information goes well beyond any pleadings requirement. Indeed, as discussed above, even the names of employees who were subjected to the 8(a)(1) violation need not be plead. See *Walsh- Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295 (1960); and *Storkline Corp.*, 141 NLRB 899, 902–903 (1963), *enfd.* in part 330 F.2d 1 (5th Cir. 1964). See also *Pacific 9 Transportation, Inc.*, 21–CA–116403, unpub. Board order

issued June 11, 2015 (2015 WL 3643583), where the Board reaffirmed this long-standing principle.

In its Motion, Respondent further offers cases that utilized the *Rossmore House* five-factor test. See *Abramson, LLC*, 345 NLRB 171, 172 (2005); *Temp Masters, Inc*¹, 344 NLRB 176 (2005); *Toma Metals, Inc.*, 342 NLRB 787 (2004) However, there is no indication in the decisions of those cases that Counsel for General Counsel made any more detailed allegations in those complaints than what is alleged in the instant Complaint.

Respondent next offers *Montgomery Ward and Co.*, 187 NLRB 956, 964 fn. 9 (1971), in which it claims the ALJ in that case found a “complaint alleging that supervisors ‘verbally abused employees know as union supporters’ was insufficient to place in issue whether the alleged verbal abuse violated the Act.” Such a claim by Respondent is completely inexplicable, as the ALJ in that case in fact found, “that the pleading *is sufficient* to place in issue the question as to whether or not there was verbal abuse of employees that would constitute interference, restraint, or coercion of employees in the exercise of rights guaranteed by the Act.” (Emphasis added.) *Montgomery Ward and Co.*, fn. 9.

Finally, Respondent cites to *United Biscuit Co.*, 101 NLRB 1552, 1554 (1952), where the ALJ in that case ordered “the substance of the intimidatory and coercive statements attributed to the [employer].” What Respondent fails to mention is that the ALJ only directed the Counsel for General Counsel in that case

¹ Counsel for the General Counsel was unable to locate this case, as the citation appears to be incorrect.

to provide the name of the supervisor who committed the unfair labor practices and not names of witnesses or other details of the alleged unfair labor practice. *Id.* The instant Complaint, of course, already lists the names of the alleged supervisors/agents who are alleged to have committed unfair labor practices.

6. Respondent, in section II B of its Motion, next contends that Complaint paragraphs 7(c), 8(a), 8(b), 8(f), 10(a), 10(b), 10(c), 12(a), 14, and 15, concerning alleged threats by Respondent supervisors/agents are similarly vague to those paragraphs alleging interrogation, discussed in 5, above. Respondent then goes into various circumstances where a potential threat may be protected by Section 8(c) of the Act, citing several Board cases where an employer's alleged threats did not violate the Act. While Respondent is free to posit an 8(c) defense at trial and/or its post-hearing brief—as apparently all the employers in the cases Respondents cite did—there is no case law, manual, or rule that dictates that Counsel for General Counsel plead with any more specificity than what is currently pled in the instant Complaint. See *Lloyd A. Fry Roofing Co. v. NLRB*, 222 F.2d 938, 940 (1st Cir. 1955) (employer was not prejudiced by the General Counsel's failure to furnish particulars regarding the alleged 8(a)(1) interrogations and threats where the complaint identified the month of the alleged violations and the officials responsible); and *Dal-Tex Optical Co.*, 130 NLRB 1313 n. 1 (1961) (employer's motion for particulars was properly denied where the complaint described the nature of the activity, the dates, and the names of the agents that committed the alleged acts). Thus, as the Board has found, the names of

employees to whom an alleged threat or other 8(a)(1) violation was directed need not be pleaded and a Respondent is not entitled to disclosure of the names before the hearing. See *Walsh- Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295 (1960); and *Storkline Corp.*, 141 NLRB 899, 902–903 (1963), *enfd.* in part 330 F.2d 1 (5th Cir. 1964). See also *Pacific 9 Transportation, Inc.*, 21–CA–116403, unpub. Board order issued June 11, 2015 (2015 WL 3643583), where the Board reaffirmed this long-standing principle.

7. In section II C of its Motion, Respondent asserts that Complaint Paragraphs 9(d), 9(e), 9(f), 12(b), and 12(c), which allege that Respondent violated Section 8(a)(1) of the Act by discriminatorily enforcing Respondent’s Solicitation and Distribution policy do not comport with NLRB Casehandling Manual, Section §10264.2, bullet point 3 of the first paragraph, which requires that a complaint identify “[t]he names of the alleged discriminatees and dates of the underlying acts.” If Respondent had read on a bit further into §10264.2, it would have noticed bullet point 2 of the second paragraph, which unambiguously provides, “Names of employees alleged to be the objects of 8(a)(1) or 8(b)(1)(A) conduct who are not entitled to specific individual relief *should not appear in the complaint.*”

(Emphasis added.) Thus, contrary to Respondent’s assertion, the instant Complaint fully complies with the NLRB Casehandling Manual.

8. Respondent’s argument in in Section II D, appears to take a 180-degree turn from its previous arguments. Instead of contending the instant Complaint is being too vague, Respondent now faults the Complaint allegations in Paragraphs

19 and 20 for being too specific, by “cherry-pick[ing],” i.e., quoting the exact portions of the rules or policies that Counsel for General Counsel alleges are a violation of the Act. Without citing any precedent for its reasoning, Respondent faults Counsel for General Counsel for not including in the Complaint the category of the rule under *The Boeing Co.*, 365 NLRB No. 154 (2017) and, incredibly, for not including Respondent’s justification for such rules. Counsel for General Counsel humbly demures to Respondent to provide such justification, either at hearing or in a post-hearing brief. However, there is no requirements to provide in a complaint what amounts to Counsel for General Counsel’s theory of the case and potential Respondent defenses. See, e.g., *McDonald’s USA, LLC*, 362 NLRB No. 168 (2015); *Artesia Ready Mix Concrete, Inc.*, 339 NLRB 1224, 1226 n. 3 (2003); *Boilermakers Local 363 (Fluor Corp.)*, 123 NLRB 1877, 1913 (1959); and *North American Rockwell*, above, 389 F.2d at 871. Thus, Complaint Paragraphs 19 and 20, as alleged, fully comport with all Board requirements.

9. In Respondent’s argument Section E 1-3, it contends that Complaint allegations 7(c), 10(a), 10(b), 10(c), 11(b), 12(a), 12(b), 12(c), 14 and 15, lack sufficient specificity as to when and where the alleged unfair labor practices occurred. Respondent further contends that the Complaint fails to indicate how three named supervisors are involved in the case. With respect to the specificity required in a complaint as to when and where alleged unfair labor practices took place, §102.15 of the Board’s Rules and Regulations provides:

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 the names of respondent's agents or other representatives by whom committed.

The Board has long recognized that a complaint involving 8(a)(1) interrogations and threats where the complaint provides the month of the occurrence and identifies the official responsible is sufficient to acquaint the respondent with the charges and issues to be considered at the trial.² *Lloyd A. Fry Roofing Co. v. NLRB*, 222 F.2d 938, 940 (1st Cir. 1955); see also *Dal-Tex Optical Co.*, 130 NLRB 1313 n. 1 (1961) (employer's motion for particulars was properly denied where the complaint described the nature of the activity, the dates, and the names of the agents that committed the alleged acts). As such, a specific location is not strictly required. Given that the instant Complaint provides the month and the approximate location of the alleged unfair labor practice, the Complaint easily meets the standards set forth by the Board.

In regard to Michael Dixon, Maureen Cooper and Bridget Reaume, the three individuals listed in Paragraph 6 of the Complaint who are not specifically named in any of the operative paragraphs, Counsel for General Counsel has not and will not allege that any of them have committed an unfair labor practice in this

² Complaint paragraphs 7(c), 10(a), 10(b), 10(c), 12(a), 14 and 15 allege 8(a)(1) interrogation and threats by a supervisor/agent. Complaint paragraphs 11(b), 12(b) and 12(c) allege 8(a)(1) oral promulgation of a rule prohibiting employees from talking about unions and discriminatory enforcement of Respondent's Solicitation and Distribution policy. Although the Board cases cited herein relate to interrogation and threats, Counsel for the General Counsel respectfully submits, given that all the allegations all concern 8(a)(1) conduct by a supervisor/agent, the same specificity standard be applied.

case based on the information/evidence presently in possession of Counsel for General Counsel. To the extent the evidence at trial does not disclose that these individuals committed any unfair labor practices, their supervisory status will only be relied on if they testify at trial as a Respondent witnesses to any of the allegations contained in the Amended Complaint.

In sum, the instant Complaint fully comports with all Board rules and case law describes clearly and is more than sufficient to acquaint Respondent with the issues to be considered at trial. Respondent's Motion to Dismiss or Alternatively for a Bill of Particulars is without merit and should be denied in its entirety.

Dated at Detroit, Michigan, this 18th day of August 2020.

(SEAL)

/s/ Dynn Nick

Counsel for the General Counsel
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 5-200
Detroit, Michigan 48226
dynn.nick@nlrb.gov
(313) 335-8037

On August 18, 2020, the undersigned filed **COUNSEL FOR THE GENERAL COUNSEL’S REPLY AND OPPOSITION TO RESPONDENT’S MOTION TO DISMISS OR ALTERNATIVELY FOR A BILL OF PARTICULARS** with the National Labor Relations Board Judges Division and emailed it to the parties of record at the following addresses:

Amy Bachelder,
Counsel for the Charging Party abachelder@michlabor.legal

Jonathan Kaplan
Counsel for Respondent jkaplan@littler.com

Dated: August 18, 2020

/s/ Dynn Nick

Counsel for the General Counsel
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 5-200
Detroit, Michigan 48226
dynn.nick@nlrb.gov
(313) 335-8037