

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

FULL-FILL INDUSTRIES, LLC

And

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 538

Cases 25-CA-249830
25-CA-251056
25-CA-251084
25-CA-252037
25-CA-253355
25-CA-256552

GENERAL COUNSEL'S OPPOSITION
TO EMPLOYER'S MOTION FOR BILL OF PARTICULARS

Comes now Counsel for the General Counsel and submits this Opposition to Employer's Motion for Bill of Particulars filed by Full-Fill Industries, LLC (Respondent). General Counsel asserts that the Consolidated Complaint contains a sufficiently clear and concise description of Respondent's alleged unlawful acts as required by Section 102.15 of the Board's Rules and there is no basis for granting a bill of particulars. As grounds therefore, the General Counsel states that:

On August 26, 2020, the Acting Regional Director issued a Consolidated Complaint and Notice of Hearing. Respondent's Answer to the Consolidated Complaint was filed on September 1. The hearing was recently scheduled for February 23, 2021. In its Motion for Bill of Particulars, Respondent asserts that the Complaint is too vague and conclusory for it to prepare a defense. The Board has already ruled, in response to Respondent's earlier motion to

dismiss, that “Respondent has not demonstrated that the consolidated complaint fails to state a claim upon which relief can be granted.”¹

Section 102.15 of the Board’s Rules requires that complaints must only contain two things: (1) “a clear and concise statement of facts upon which the Board asserts jurisdiction,” and (2) “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.” The General Counsel is not required to plead evidence or the theory of the case in a complaint. See McDonald’s USA, LLC, 362 NLRB 1347 (2015); see also Artesia Ready Mix Concrete, Inc., 339 NLRB 1224, 1226 n. 3 (2003), and cases cited therein. 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 Med. Ctr., 364 NLRB No. 67, slip op. at 2 (2016), quoting North Am. Rockwell Corp. v. NLRB, 389 F.2d 866, 871 (10th Cir. 1968). In the present case, all of the pleadings in the Consolidated Complaint are more than sufficient to provide Respondent with the requisite due process and Respondent’s motion for a bill of particulars should be denied.

Respondent first argues that three individuals named in the Consolidated Complaint, Dave Clapp, Steve Clapp, and William Lowe, are identified as supervisors and agents of Respondent but are not specifically otherwise alleged to have engaged in unfair labor practices. Respondent has admitted in its Answer to the individuals’ Section 2(11) supervisory and

¹ Respondent filed its Motion to Dismiss on September 22, 2020. Respondent argued that the Consolidated Complaint failed to provide a clear and concise description of the acts that constituted unfair labor practices and that the Consolidated Complaint should be dismissed or, in the alternative, that a new consolidated complaint with specific factual allegations should be issued. The Board denied Respondent’s motion on November 17; in doing so, the Board also noted that Respondent’s alternative request for relief, for a more definite complaint, was not properly before the Board.

2(13) agency status, so clearly Respondent is aware of the individuals named. Further, Dave Clapp and Steve Clapp are admitted owners of Respondent, so they are ultimately responsible for all of the unfair labor practices alleged in the Consolidated Complaint. Respondent indicates it is “left to guess as to what involvement these individuals may have had,” but surely Respondent is in the best position to know what acts, if any, Dave Clapp and Steve Clapp committed with regard to the discriminatory conduct alleged in paragraph 6 of Consolidated Complaint. As for Lowe, Respondent is well aware that Lowe is the Warehouse Lead with supervisory authority over discriminatee Justin Kindle identified in paragraphs 6(c) and 6(d) of the Consolidated Complaint. What role Lowe played and whether he was the ultimate decision maker in issuing discipline to Kindle is something that Respondent is in the best position to know and the General Counsel will have to explore at hearing. But, certainly, Respondent is aware of sufficient facts to prepare a defense based on the information contained in the Consolidated Complaint.

Respondent next lists a series of arguments, complaint paragraph by complaint paragraph, asserting the Consolidated Complaint fails to allege facts sufficient to state a claim and that the allegations in the Consolidated Complaint are vague and conclusory. Respondent also proceeds to present a legal defense to the various allegations, asserting, for example, the General Counsel has not met its burden of establishing unlawful discipline or a Weingarten violation. However, the Board has already rejected Respondent’s arguments that the pleadings in the Consolidated Complaint were insufficient to state a claim and Respondent’s arguments on the merits are more appropriately addressed to an administrative law judge after a hearing has been held and all of the facts have been developed on the record.

Concerning the surveillance allegations, although Consolidated Complaint paragraphs 5(a) and 5(b) identify the dates, actors, and location for the conduct, Respondent asserts that is

not enough. The pleadings meet the requirements of Section 102.15 of the Board's Rules, and Respondent can point to no authority that the General Counsel must plead the specific location at Respondent's facility where the surveillance occurred. Rather, identifying the specific date, agents involved, and the fact that the surveillance took place at the Respondent's facility is sufficient information for Respondent to prepare a defense. Respondent also objects to the failure to identify the employees who were surveilled or the union activity they were engaging in. However, the General Counsel need not plead the identity of employees who are subjected to Section 8(a)(1) violations, nor provide the identity of witnesses prior to the hearing. See, e.g., Storkline Corp., 141 NLRB 899, 902–903 (1963), enfd. in part 330 F.2d 14 (5th Cir. 1964); Walsh-Lumpkin Wholesale Drug Co., 129 NLRB 294, 295 (1960). In fact, Respondent arguably now asks for the very information (the identity of employees and the nature of their union activity) that is the subject of the unlawful surveillance in the first place.

Respondent objects to paragraph 5(c) of the Consolidated Complaint concerning the destruction of union literature. However, the Consolidated Complaint properly identifies the “4 Ws:” who committed the act (Jesse Gonzalez), what was done (destruction of union literature in the presence of employees), when it was done (October 24, 2019), and where it was done (at Respondent's facility). Contrary to Respondent's assertion, and as already noted above, the General Counsel is not required to identify victims or witnesses of Section 8(a)(1) conduct prior to the hearing.

Respondent argues that it cannot answer paragraph 5(d) of the Consolidated Complaint because it is not clear where the threat was made, to whom the threat was directed, what the threat actually was, or that the threat was coercive. Again, the General Counsel's pleading meets the requirements of Rule 102.15, including identifying Respondent's supervisors who threatened

to conduct a search of employee lockers because the employees engaged in union activity. Witnesses are not required to be identified and paragraph 9 of the Consolidated Complaint alleges that the identified conduct was unlawfully interfering with, restraining, or coercing employees. Respondent's apparent Boeing defense is more properly addressed to an administrative law judge after a hearing on the record and is not a basis for a bill of particulars to be issued.

Turning to the alleged discipline, Respondent asserts that paragraphs 6(a), 6(c), and 6(d) in the Consolidated Complaint are insufficient as they do not identify the supervisor who engaged in the misconduct and do not identify the specific union or protected concerted activity engaged in by the discriminatees. Again, the Board has already upheld the sufficiency of the pleadings in the Consolidated Complaint in this case. To the extent Respondent is confused because its agent is not named in the Consolidated Complaint, at this stage of the litigation surely Respondent, not the General Counsel, is in the best position to know exactly which member of Respondent's management team was responsible for making the decision to issue discipline to the named discriminatees on the dates specified. That is particularly true where Respondent has already admitted in its answer that the discipline was issued, so it is hard to see how Respondent is now "unable to meet the General Counsel's case." Respondent's motion should be denied. The same is true with regard to Respondent's assertions about 6(b) and 6(e) of the Consolidated Complaint. To the extent Respondent is wanting to argue the merits of a violation and its apparent defense about established policies, such arguments are best addressed to an administrative law judge after a full record has been developed at hearing.

Respondent's assertions with regard to paragraph 8 of the Consolidated Complaint should likewise be rejected. Taken together, Paragraphs 7 and 8 of the Consolidated Complaint fully

comply with Section 102.15 of the Board's Rules. Those paragraphs identify the date of the violation, where the violation took place, and which agents of Respondent were involved. They also fully lay out a sufficient unfair labor practice claim under NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975): George Halls requested Union representation during an interview, he was in the bargaining unit, he believed that the interview could result in disciplinary action, and Respondent denied his request and proceeded with the interview. Again, the Board has already approved of the sufficiency of this pleading in denying Respondent's prior motion to dismiss. Respondent's motion for a bill of particulars should be denied.

Finally, Respondent apparently objects to the conclusory nature of Consolidated Complaint paragraphs 9 and 10. While those paragraphs are, in fact, the concluding paragraphs of the complaint allegations, that is the very purpose they serve and should not be seen as a basis to require a bill of particulars. (Nor is it clear what sort of more particular information can be required with regard to those paragraphs.) Paragraph 9 properly alleges that the conduct identified in paragraphs 5 and 8 of the Consolidated Complaint interferes with, restrains, or coerces employees in violation of Section 8(a)(1). Similarly, paragraph 10 states that the conduct in Consolidated Complaint paragraph 6 constitutes unlawful discrimination due to the named employees' union activity and has the unlawful effect of discouraging membership in a union, in violation of Section 8(a)(1) and (3) of the Act. There is no basis for a bill of particulars to be issued and Respondent's motion should be denied.

WHEREFORE, Counsel for the General Counsel asserts that Respondent's Motion for Bill of Particulars should be denied in its entirety. The pleadings in the Consolidated Complaints meet the requirements of Section 102.15 of the Board's Rules, Respondent has sufficient

information to meet the General Counsel's case, and there is no legal basis upon which a bill of particulars should be required.

SIGNED at Indianapolis, Indiana, this 21st day of December 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Derek A. Johnson", with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Opposition to Employer's Motion For Bill of Particulars has been filed electronically with the Division of Judges through the Board's E-Filing System this 21st day of December 2020. Copies of said filing are being served upon the following persons by electronic mail:

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