

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Toledo Area Regional Transit Authority,

Respondent.

Case Number 2012-ULP-07-0192

**ORDER
(OPINION ATTACHED)**

Before Chair Zimpher and Board Member Brundige: December 12, 2013.

On July 23, 2012, the Amalgamated Transit Union, Local 697 (“ATU”) filed an unfair labor practice charge against the Toledo Area Regional Transit Authority (“TARTA” or “Respondent”), alleging that TARTA violated Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1) and (A)(2). On November 1, 2012, the State Employment Relations Board (“Board” or “Complainant”) determined that probable cause existed to believe that TARTA had committed or was committing unfair labor practices, referred the matter to mediation, and if mediation proved unsuccessful, authorized the issuance of a complaint and referred the matter to hearing. The parties met for a mediation session but were not able to resolve their differences.

On January 10, 2013, a complaint was issued. On March 14, 2013, an evidentiary hearing was held, wherein testimonial and documentary evidence was presented. Subsequently, the parties filed post-hearing briefs. On September 18, 2013, Administrative Law Judge Beth A. Jewell (ALJ Jewell) issued a Proposed Order and, on September 20, 2013, a Corrected Proposed Order was issued. In her Corrected Proposed Order, ALJ Jewell recommends the Board find that: (1) the Toledo Area Regional Transit Authority (“TARTA”) is a “public employer” as defined in O.R.C. § 4117.01(B); (2) the Amalgamated Transit Union, Local 697, (“ATU”) is an “employee organization” as defined in O.R.C. § 4117.01(D); (3) TARTA violated O.R.C. § 4117.11(A)(1) when it sent an email requiring ATU Business Agent, Cynthia Betz, to make “advance arrangements” to visit its Toledo Area Regional Paratransit Service (“TARPS”) facility and when it sent a letter requiring Ms. Betz to make “advance arrangements” or “obtain permission” to visit its TARPS facility; (4) TARTA violated O.R.C. §§ 4117.11(A)(1) and (A)(2) when it prohibited ATU from using the employee

mail slots in the lockers at the TARPS facility to communicate with TARPS bargaining-unit members; and (5) TARTA violated O.R.C. §§ 4117.11(A)(1) and (A)(2) when it posted Ms. Betz's wages on the TARPS employee bulletin board.

On October 10, 2013, TARTA filed a 12-page document of exceptions to the Proposed Order and a 13-page brief in support of its exceptions. On October 11, 2013, Counsel for Complainant filed a motion to strike Respondent's exceptions, in whole or in part, and a motion for an extension of time to file a response. On October 17, 2013, the Board's Office of General Counsel issued a procedural order, granting an extension of time to file a response to the exceptions and holding in abeyance the Board's ruling on the motion to strike. On October 30, 2013, Counsel for Complainant filed a response to TARTA's exceptions to the Proposed Order.

Complainant's Counsel requests that the Board strike Respondent's exceptions and brief in support for exceeding the page limit set forth in Ohio Administrative Code ("O.A.C.") Rule 4117-1-02(C). The motion to strike is *denied* on the grounds that Complainant's Counsel was granted an extension of time to file a response to Respondent's exceptions and, therefore, Complainant has suffered no undue prejudice.

After reviewing the unfair labor practice charges, complaint, answer, Corrected Proposed Order, exceptions, response to exceptions, and all other filings in this case, the Board adopts the reasoning in ALJ Jewell's Corrected Proposed Order and incorporates by reference the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Corrected Proposed Order, finding that: (1) the Toledo Area Regional Transit Authority ("TARTA") is a "public employer" as defined in O.R.C. § 4117.01(B); (2) the Amalgamated Transit Union, Local 697, ("ATU") is an "employee organization" as defined in O.R.C. § 4117.01(D); (3) TARTA violated O.R.C. § 4117.11(A)(1) when it sent an email requiring the ATU Business Agent, Cynthia Betz, to make "advance arrangements" to visit its Toledo Area Regional Paratransit Service ("TARPS") facility and when it sent a letter requiring Ms. Betz to make "advance arrangements" or "obtain permission" to visit its TARPS facility; (4) TARTA violated O.R.C. §§ 4117.11(A)(1) and (A)(2) when it prohibited ATU from using the employee mail slots in the lockers at the TARPS facility to communicate with TARPS bargaining-unit members; and (5) TARTA violated O.R.C. §§ 4117.11(A)(1) and (A)(2) when it posted Ms. Betz's wages on the TARPS employee bulletin board.

Respondent, Toledo Area Regional Transit Authority, is hereby ordered to take the following actions:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by requiring the

ATU Business Agent to make “advance arrangements” with or “obtain permission” from the Director of Paratransit Services prior to visiting the TARPS (Knapp Street) facility, prohibiting the ATU’s use of the mail slots in the employee lockers at the TARPS facility and by posting the ATU Business Agent’s name and wages behind locked glass doors on the TARPS employee bulletin board, and from otherwise violating O.R.C. § 4117.11(A)(1); and

- (2) Initiating, creating, dominating, or interfering with the formation or administration of any employee organization by prohibiting the ATU’s use of the mail slots in the employee lockers at the TARPS (Knapp Street) facility and by posting the ATU Business Agent’s name and wages behind locked glass doors on the TARPS employee bulletin board, and from otherwise violating O.R.C. § 4117.11(A)(2).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) consecutive calendar days in all the usual and customary posting locations where bargaining-unit employees represented by the Amalgamated Transit Union, Local 697 work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo Area Regional Transit Authority shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B);
- (2) Allow the Amalgamated Transit Union, Local 697 to use the mail slots in the employee lockers at the TARPS facility;
- (3) Allow the Amalgamated Transit Union, Local 697 Business Agent access to the TARPS facility without making advance arrangements or obtaining permission; and
- (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the ORDER becomes final of the steps that have been taken to comply therewith.

It is so ordered.

ZIMPHER, Chair, and BRUNDIGE, Board Member, concur.



W. CRAIG ZIMPER, CHAIR

TIME AND METHOD TO PERFECT AN APPEAL

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal setting forth the order appealed from and the grounds of appeal with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order. A copy of the notice of appeal must also be filed with the State Employment Relations Board, at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, pursuant to Ohio Administrative Code Rule 4117-7-07.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, on this 13th day of December 2013.



ERIN E. CONN, ADMINISTRATIVE ASSISTANT



**NOTICE TO EMPLOYEES
FROM THE
STATE EMPLOYMENT RELATIONS BOARD**

POSTED PURSUANT TO AN ORDER OF
THE STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After an evidentiary hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that the Toledo Area Regional Transit Authority (TARTA) has violated the law and has ordered TARTA to post this notice. TARTA intends to carry out the order of the State Employment Relations Board and to do the following:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by requiring the ATU Business Agent to make "advance arrangements" with or "obtain permission" from the Director of Paratransit Services prior to visiting the TARPS (Knapp Street) facility, prohibiting the ATU's use of the mail slots in the employee lockers at the TARPS facility and by posting the ATU Business Agent's name and wages behind locked glass doors on the TARPS employee bulletin board, and from otherwise violating O.R.C. § 4117.11(A)(1);and
- (2) Initiating, creating, dominating, or interfering with the formation or administration of any employee organization by prohibiting the ATU's use of the mail slots in the employee lockers at the TARPS (Knapp Street) facility and by posting the ATU Business Agent's name and wages behind locked glass doors on the TARPS employee bulletin board, and from otherwise violating O.R.C. § 4117.11(A)(2).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) consecutive calendar days in all the usual and customary posting locations where bargaining-unit employees represented by the Amalgamated Transit Union, Local 697 work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo Area Regional Transit Authority shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B);
- (2) Allow the Amalgamated Transit Union, Local 697 to use the mail slots in the employee lockers at the TARPS facility;
- (3) Allow the Amalgamated Transit Union, Local 697 Business Agent access to the TARPS facility without making advance arrangements or obtaining permission; and
- (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the ORDER becomes final of the steps that have been taken to comply therewith.

SERB v. TOLEDO AREA REGIONAL TRANSIT AUTHORITY

Case No. 2012-ULP-07-0192

BY _____

DATE _____

TITLE _____

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

STATE EMPLOYMENT RELATIONS BOARD,	:	CASE NO. 2012-ULP-07-0192
	:	
Complainant,	:	
	:	
v.	:	BETH A. JEWELL
	:	Administrative Law Judge
TOLEDO AREA REGIONAL TRANSIT AUTHORITY,	:	<u>PROPOSED ORDER</u>
	:	
	:	
	:	
Respondent.	:	

I. INTRODUCTION

On July 23, 2012, the Amalgamated Transit Union, Local 697 (“ATU” or “Union”) filed an unfair labor practice charge against the Toledo Area Regional Transit Authority (“TARTA”), alleging that TARTA violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(2).¹ On November 1, 2012, the State Employment Relations Board (“SERB,” “Board,” or “Complainant”) determined that there was probable cause to believe that TARTA had committed or was committing unfair labor practices, authorized the issuance of a complaint, and referred the matter to mediation prior to issuing a complaint and holding a hearing.

Following a mediation session that did not result in settlement, a complaint was issued. The Union filed a motion to intervene, which was granted in accordance with Rule 4117-1-07(A). A hearing was held on March 14, 2013, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

II. ISSUES

1. Whether TARTA violated R.C. 4117.11(A)(1) when it requested that the ATU Business Agent make advance arrangements to visit its Toledo Area Regional Paratransit Service (“TARPS”) facility.
2. Whether TARTA violated R.C. 4117.11(A)(1) and (A)(2) when it restricted the ATU’s use of mail slots in the lockers at the TARPS facility.

¹ All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

3. Whether TARTA violated R.C. 4117.11(A)(1) and (A)(2) when it posted the ATU Business Agent's name and wage information on the TARPS employee bulletin board.

III. FINDINGS OF FACT²

1. TARTA is a "public employer" as defined by R.C. 4117.01(B). (S. 1)
2. In 2008, TARTA brought its TARPS program, in-house. TARPS is a separate division of TARTA that employs Paratransit Operators to provide transit services to persons with disabilities. (S. 5; T. 95)
3. The ATU is an "employee organization" as defined by R.C. 4117.01(D) and is the Board-certified bargaining representative for a TARTA bargaining unit that includes TARTA's fixed-route transportation employees and TARTA's maintenance employees, and a bargaining unit that includes TARTA's TARPS Paratransit Operators. (S. 2)
4. TARPS drivers work varying schedules and spend the majority of their time outside the TARPS facility operating buses on which they are unable to use their cell phones. The TARPS drivers work on the road, not near their lockers, which are located in a break room in the TARPS facility. (T. 21, 23, 71, 72, 96-98, 107)
5. In 2009, TARTA and the ATU entered into an initial collective bargaining agreement ("CBA") for the TARPS bargaining unit. The CBA was effective through November 30, 2010, and the parties extended the contract to May 31, 2011, through a series of extensions. The agreement contains a grievance-arbitration process that is binding. (S. 6; C. Exh. A)
6. On November 9, 2011, the Union filed an unfair labor practice charge against TARTA that was assigned SERB Case No. 2011-UPL-11-0292. SERB found probable cause to believe TARTA had committed an unfair labor practice and directed the matter to an evidentiary hearing. A prehearing conference was held on May 15, 2012, the parties entered a settlement agreement on June 19, 2012. SERB dismissed the unfair labor practice charges pursuant to the settlement agreement. (S. 7; T. 29; C. Exh. G)

² References in the record to the Joint Stipulations of Fact filed by the parties are indicated parenthetically by "S." References to the Complainant and Intervenor's Exhibits in the record are indicated parenthetically by "C. Exh.," followed by the exhibit letter. References to the Respondent's Exhibits in the record are indicated parenthetically by "R. Exh.," followed by the exhibit number(s). References to the transcript of hearing are indicated parenthetically by "T." References to the record in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related Finding of Fact.

7. Since at least 1989, the ATU has communicated with TARTA bargaining unit members using TARTA's employee mailboxes. The ATU uses the mailboxes to provide bargaining-unit members with forms and other pertinent information. Several of the forms the ATU provides include members' personal information. Both parties were aware of this practice. (S. 8; T. 14-15, 16, 18, 20-21, 24-25, 27-28, 30, 31, 75, 99, 102-103, 117-120, 130-131; C. Exh. D, I, N, O, P)

8. Previously, all employee mailboxes were located at TARTA's Central Office. On February 24, 2012, TARTA opened a new facility for its TARPS operations ("Knapp Street facility"). At the Knapp Street Facility, TARTA did not install employee mailboxes. TARTA assigned each TARPS employee a locker with a mail slot. After the move to the new building, the ATU requested and received from a TARTA Supervisor a list of the TARPS bargaining-unit members and their corresponding mail slot/locker numbers. Until May 14, 2012, the ATU used the mail slots in the lockers as it had used the mailboxes at the previous TARPS facility. (T. 22-25; C. Exh. D)

9. ATU Business Agent Cynthia Betz was elected by the ATU membership and began serving as Business Agent in January 2011. Prior to her election, Ms. Betz worked as a fixed-route TARTA bus operator beginning in 1989, and served terms as ATU Recording Secretary and Union President. Ms. Betz is the only full-time Union officer. As Business Agent, Ms. Betz is responsible for the day-to-day administration and financial duties for the ATU's TARTA bargaining units. TARTA issued Ms. Betz and Union President Carly Allen security passes that allow them access to TARTA's Central Office building and to the Knapp Street facility. Until April 23, 2012, Ms. Betz used her security pass to access the TARPS facility, where she would meet with members in the break room before or after their shifts or while they were on break. On April 23, 2012, TARTA Human Resources Director Geneva Mason sent Cynthia Betz, the ATU Business Agent, an email requesting that she make arrangements before visiting the new TARPS facility. (T. 9, 10-12, 17, 99, 113)

10. The ATU has a union bulletin board located in the locker room at the Knapp Street facility. Under Article 5 of the CBA, the ATU's postings on this bulletin board are "subject to the approval of the General Manager or designee." (S. 8; T. 20, 21-22, 24, 55, 56, 57, 101-102, 113, 152-153; C. Exhs. A, p. 3; D, K)

11. On May 14, 2012, one day before the prehearing conference in SERB Case No. 2011-ULP-11-0292, TARTA Human Resources Director Geneva Mason sent Ms. Betz a letter informing her that in accordance with TARTA's Locker Policy, the ATU was not permitted to use the mail slots in the lockers as a means of communication. The letter also reads that the ATU was

expected to communicate with its members by posting on the bulletin board. Ms. Mason wrote as follows: "Along with the requirement to obtain permission to post notices, as stated in my email dated April 23, you are to make arrangements with Jon Elson prior to visits at the TARPS facility. This is a public facility where everyone obtains permission prior to his/her visit." (S. 10; T. 28, 34; C. Exhs. C, G; R. Exh. 3)

12. Since May 14, 2012, the ATU has experienced difficulty communicating with its members as well as signing up new members. It has cost the ATU more time and additional expense to use the Post Office to mail forms and to coordinate the distribution of other information to its members. The inability to communicate with bargaining-unit members via the mail slots has caused the ATU a delay in signing up and initiating the collection of dues from new members. (T. 21, 34, 35, 110, 115-116)

13. No policy prohibiting the use of the mail slots in the lockers was issued to the TARPS employees. TARPS bargaining-unit members continue to use the mail slots to communicate with one another, particularly to inquire with each other about trading shifts through TARTA's Trade-A-Day program. (T. 56, 100-101)

14. The ATU and TARTA entered into a Memorandum of Understanding ("MOU") in April 2012. The terms of the MOU provided an opportunity for TARPS drivers to apply for and accept employment as TARTA fixed-line bus operators without losing seniority within the TARPS bargaining unit during the 90-day probationary period. In early May 2012, TARTA posted a memorandum to TARPS drivers inviting them to apply for the fixed-line positions. Posted next to the memorandum, behind locked glass doors on the TARPS employee bulletin board, was a piece of paper setting forth TARTA's fixed-line hourly wage rates effective August 2011. Below these wage rates in boldface type were the words, "Cindy Betz" and "Business Agent," Ms. Betz' annual salary, and a dollar amount purported to be her hourly wage. Ms. Betz' name was the only name posted on the paper. (T. 35, 36-38, 103-104, 150; C. Exh. E)

15. Ms. Betz is elected to her position by the ATU members. Her job duties include representing ATU members, day-to-day administration, and managing the union's finances. Under the ATU bylaws, Ms. Betz is paid on a salary basis rather than an hourly basis, with the salary calculated as a percentage of the pay rate of the top mechanic in the fixed-line employees' bargaining unit. Ms. Betz is not paid overtime. The next election for Ms. Betz's position will be held in December 2013. (T. 8-9, 41)

16. After the posting of Ms. Betz's wages, Ms. Betz spoke with TARTA Management about removing the posting. Ms. Betz also spoke with

approximately 20 ATU members regarding her wages. ATU President Allen spoke with two or three ATU members regarding Ms. Betz's wages. The posting resulted in discord among the ATU members, as the TARPS drivers are paid between 10.00 and 14.38 dollars per hour and last received a raise in 2008. (T. 38, 40, 104, 188, 39, 40, 41, 121-123; C. Exhs. A, E)

IV. ANALYSIS AND DISCUSSION

R.C. 4117.03(A) provides as follows:

Public employees have the right to:

- (1) Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in, except as otherwise provided in Chapter 4117. of the Revised Code, any employee organization of their own choosing;
- (2) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection;
- (3) Representation by an employee organization;
- (4) Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements;
- (5) Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.

R.C. 4117.11 provides in relevant part as follows:

(A): It is an unfair labor practice for a public employer, its agents or representatives to:

- (1) Interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117 of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.

(2) Initiate, create, dominate, or interfere with the formation or administration of any employee organization, or contribute financial or other support to it; except that a public employer may permit employees to confer with it during working hours without loss of time or pay, permit the exclusive representative to use the facilities of the public employer for membership or other meetings, or permit the exclusive representative to use the internal mail system or other internal communications system[.]

As fully discussed below, the evidence presented at the evidentiary hearing demonstrates that TARTA violated R.C. 4117.11(A)(1) and (A)(2). TARTA violated R.C. 4117.11(A)(1) by issuing the April 23, 2012 email from Ms. Mason requiring “advance arrangements,” and by issuing the May 14, 2012 letter from Ms. Mason to the ATU Business Agent, requiring Ms. Betz to make “advance arrangements” with or “obtain permission” from the Director of Paratransit Services prior to visiting the Knapp Street facility. TARTA violated R.C. 4117.11(A)(1) and (A)(2) when it prohibited the ATU’s use of the mail slots in the lockers at the TARPS facility. TARTA violated R.C. 4117.11(A)(1) and (A)(2) when it posted the Ms. Betz’s name and wages behind locked glass doors on the TARPS employee bulletin board.

Whether an employer has violated R.C. 4117.11(A)(1) is determined objectively. The question is “whether under all the facts and circumstances one could reasonably conclude the employees were interfered with, restrained, or coerced in the exercise of their Chapter 4117 rights.” In re Pickaway Cty. Human Servs. Dept., SERB 93-001 (3-24-93), *aff’d sub nom. State Emp. Relations Bd. v. Pickaway Human Servs. Dept.*, 1995 SERB 4-46 (4th Dist. Ct. App., Pickaway, 12-7-95)(“Pickaway”). This inquiry includes a “thorough review of the circumstances under which the alleged misconduct occurred and its likely effect on the guaranteed rights of employees.” Id.

Establishing that a violation of R.C. 4117.11(A)(1) occurred does not depend on whether the interference, restraint, or coercion succeeded or failed. Interference, restraint, or coercion can be established solely by demonstrating that the employer’s action reasonably tends to interfere with, restrain, or coerce employees in the exercise of their protected activity. In re Harrison Hills School Dist. Bd. of Edn., SERB 2010-011 (8-12-10)(“Harrison Hills”) *appeal pending*, Harrison Hills School Dist. Bd. of Edn. v. State Emp. Relations Bd., Harrison C.P. No. 2010 CVH 0111; see also In re Lakota Local School Dist. Bd. of Edn., SERB 89-019 (8-23-89).

In In re Napoleon Local School Dist. Bd. of Edn., SERB 96-001 (1-31-96)(“Napoleon”), SERB opined as follows:

Access to a public employer’s property can be essential to effectuate various public employees’ rights. For example,

employees' ability to exercise their statutory rights to form, join, or participate in an employee organization of their own choosing, or to engage in other concerted activities, might be jeopardized in certain cases if the employees and the union organizers are not allowed to meet, discuss, and communicate on issues regarding organizational matters in the cafeteria, parking lot, or other places on the employer's property. Of course the public employer has the right to limit non-working activities on the work site to non-working time and non-working areas to make sure that the employees' work is done in a proper and safe environment. In determining the legality of access policies, various factors should be taken into account: the statutory rights involved, e.g., whether organizational or strike activities; whether the individuals involved are working employees, off-duty employees, strikers, or non-employee union organizers; and the type of public employer involved, e.g., whether it is a state agency's office or a highly sensitive place like a hospital, school, etc.

The locus of the accommodation between the employees' statutory rights and the employer's property rights may fall at differing points along the spectrum depending on the nature and strength of the respective employees' rights and the employer's property rights asserted in any given context...[A]ccommodation between employees' statutory rights and employer's property rights 'must be obtained with as little destruction of one as is consistent with the maintenance of the other[.]'

Napoleon, at 3-6 (citation omitted).

Viewed under the totality of the circumstances present at the time the April 23, 2012 e-mail and the May 14, 2012 letter were issued, the advance arrangements/obtain permission requirement constitutes a violation of R.C. 4117.11(A)(1). At the time the letter was issued, Ms. Betz was preparing to attend a SERB Prehearing Conference in an unfair labor practice case, the subject matter of which was a previous unfair labor practice charge filed by the Union. At approximately the same time, Ms. Betz was informed that the ATU could no longer communicate with its bargaining-unit members via the mail slots in the employee lockers in the Knapp Street facility. Also at this time, TARTA posted Ms. Betz's ATU Business Agent salary information on the locked TARPS employee bulletin board.

The May 14, 2012 letter purported to obligate Business Agent Betz to take the additional step of contacting TARTA Director of Paratransit Services Elston to make "advance arrangements" and "obtain permission" prior to entering the Knapp Street facility. While TARTA argues that in actual practice it has never denied Ms. Betz access, and that the only requirement it was imposing upon Ms. Betz was that she let TARTA management know when she would be in the Knapp Street facility, this is not how the letter reads. The requirement to make "advance arrangements," contained in both the letter and in Ms. Mason's April 23, 2012 email, is ambiguous and implies more than simply calling ahead. The phrase, "obtain permission," contained in the letter, implies that TARTA could deny access upon request. Ms. Betz needs access to the TARPS building to perform her duties, which include making herself available to bargaining-unit members. While a mere requirement that Ms. Betz notify somebody or sign in upon arrival at the Knapp Street facility may well make reasonable business sense from a safety and security standpoint, such as for building-wide emergencies or drills, a notification requirement is not what TARTA articulated in the e-mail or letter. The written communications requiring Ms. Betz to make "advance arrangements" and/or to "obtain permission" constrained Ms. Betz's access to the TARPS bargaining-unit members and, therefore, reasonably tend to or interfere with or restrain these public employees in the exercise of their R.C. 4117.03 rights.

Viewed under the totality of the circumstances, TARTA's issuance of the e-mail and letter reasonably tend to interfere with, restrain or coerce employees in their exercise of their right to participate in traditional, face-to-face solicitation on nonworking time, a right long recognized in the private sector as well. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). The advance arrangements/obtain permission requirement goes well beyond the accommodation of the employer's property interest as recognized in Napoleon, supra. In Napoleon, SERB recognized that the public employer has the right to limit non-working activities on the work site to non-working time and non-working areas to make sure that the employees' work is done in a proper and safe environment. When Ms. Betz was elected to the ATU Business Agent position, TARTA issued her a security pass which allows her access to its facilities. While TARTA claims that its advance arrangement/obtain permission policy is uniform, TARTA offered no specific evidence of others of whom it has required the same steps. Other people who have access to the Knapp Street facility via their security passes, including Union President Allen, have not been asked to make similar arrangements before entering the TARPS facility.

TARTA argues that it requires Ms. Betz to call ahead to avoid possible interruption of employees' work. Ms. Betz meets with TARPS bargaining-unit members in the Knapp Street facility break room before or after their shifts or while members are on break. The TARPS drivers are on the road, not inside the Knapp Street facility, during their work hours. If, as TARTA claims, Ms. Betz was observed talking with nonbargaining-unit dispatchers and one bargaining-unit employee on work time, this concern may be addressed by means less restrictive than requiring the ATU to make "advance arrangements" or "obtain permission," such as reminding the ATU and

bargaining-unit members that union communications must be restricted to non-work time and non-work areas.

TARTA also violated R.C. 4117.11(A)(1) when it prohibited the ATU's use of the mail slots in the lockers at the TARPS facility. The ATU had an established practice for over 20 years of using employee mailboxes for communication and distribution of pertinent union information. Both parties were aware of this practice. The parties' CBA and TARTA's locker policy are both silent on and do not conflict with this use of mail slots or mailboxes. In fact, the practice of using the Central Office mailboxes for union communications continues for the TARTA fixed-line drivers, who have the same locker policy and the same contract language regarding bulletin boards. Ms. Mason's May 14, 2012 letter, issued one day before the Prehearing Conference in SERB Case No. 2011-ULP-11-0292, to Ms. Betz was first time TARTA had prohibited the ATU's use of mail slots for union communications.

TARTA violated R.C. 4117.11(A)(1) by promulgating a blanket rule prohibiting the ATU's use of the mail slots. The NLRB has held that an employer's policy prohibiting the distribution of union materials in employee lockers is presumptively unlawful under Section 8(a)(1) of the NLRA where the lockers are located in an area apart from the designated work areas, and where no evidence exists that employees are afforded access to the locker area during work time. Sprint United Mgmt Co., 326 N.L.R.B. 397, 398 (1998). Similarly, the TARPS drivers' lockers are in the TARPS facility and accessed by TARPS employees only during non-work time. Like the employer in Sprint United, TARTA has failed to establish any business necessity for prohibiting the ATU's use of the mail slots that would overcome its presumptive invalidity.

TARTA cites Guard Publishing Co., 351 N.L.R.B. 1110, 1114 (Dec. 16, 2007) ("Guard Publishing"). Guard Publishing concerned a policy prohibiting nonwork-related use of the employer's e-mail system. In Guard Publishing, the NLRB noted that it is well settled that employees have no statutory right to use an employer's media or equipment for the purpose of exercising Section 7 rights.³ The General Counsel had urged, and the NLRB declined to adopt, an exception for email communications. In Guard Publishing, the Board noted, "We do not pass on circumstances, not present here, in which there are no means of communication among employees at work other than email." Guard Publishing, 351 N.L.R.B. at 1116 n. 13.

The facts of Guard Publishing are thus distinguished from the facts presented in this case. TARPS employees work different shifts and do not work alongside other bargaining-unit members. They work individually, on the road, driving buses. Indeed, to communicate with each other about shift trades, the TARPS employees regularly use the mail slots. Finally, and of the utmost significance, unlike the employer's e-mail system in Guard Publishing, the TARPS employee lockers and mail slots are not used

³ In Ohio's public sector, the analogous statutory rights are public employees' rights set forth in R.C. 4117.03.

or accessed by employees during their work shifts. The lockers are located in an area apart from designated work areas, and employees are not afforded access to the locker area during work time. Because TARTA's locker policy restricts distribution during non-work time and in non-work areas, the policy is unlawful.

To establish an (A)(2) violation requires a demonstration of substantial evidence of material harm to the union in the administration or performance of its duties. The actions of the employer must prevent the union from performing administrative duties or interfere with its administration. Harrison Hills, supra; In re Springfield Local School Dist. Bd. of Edn., SERB 97-007 (5-1-97)(Springfield). Whether a violation of R.C. 4117.11(A)(2) has occurred is determined objectively, without regard to the employer's subjective intent. In re Clark Cty. Bd. of Dev. Disabilities, SERB 2010-014 (8-19-10)(Clark County).

TARTA violated R.C. 4117.11(A)(2) in prohibiting the ATU's use of the mail slots in the lockers. This restriction has materially harmed the ATU's administration and the performance of its duties. Harrison Hills, supra; see also Springfield, supra. TARPS drivers work different schedules and spend the majority of their time outside the Knapp Street facility operating TARPS buses on which they are not able to use their cell phones. Thus, since May 14, 2012, the ATU has experienced difficulty communicating with its members as well as enrolling new members. The ATU has invested more time and additional expense to mail enrollment and other forms and to coordinate the distribution of other information to its members, and has experienced a delay in enrolling and initiating the collection of dues from new members.

TARTA devotes a substantial portion of its post-hearing brief to explaining how TARTA believes the ATU should communicate with its members. TARTA claims that the 15-minute segment it affords to the Union during new employee orientation is sufficient for the ATU to enroll new members; however, Ms. Betz explained that the ATU does not distribute enrollment forms until a new employee has completed his or her probationary period. While TARTA argues that Ms. Betz can communicate with bargaining-unit members by regular mail, e-mail, and Facebook, Ms. Betz also testified that not all members have computers, and the existence of ordinary U.S. mail alone never has been viewed as a sufficient method for union access and communication. TARTA has suggested that the ATU could use the employee bulletin board to distribute information, but the ATU bulletin board is used not for individual or specific communications, but rather to announce union meetings and for other communications of a general nature. Moreover, under the CBA, postings on the bulletin boards must be approved in advance by TARTA. Grievance forms, enrollment forms, leave forms, and other union communications are not appropriately or practically distributed via a bulletin board. TARTA has violated R.C. 4117.11(A)(2) by prohibiting the union from using employee lockers for communications because this action has prevented the Union from performing its administrative duties and has interfered with the administration of the Union.

TARTA violated R.C. 4117.11(A)(1) when it posted Ms. Betz's name and ATU Business Agent wage information on the TARPS employee bulletin board. Any conduct which reasonably tends to or attempts to interfere with, restrain, or coerce an employee organization in its choice of bargaining representative is a violation of R.C. 4117.11(A)(1). See In re OAPSE, SERB 95-008 (6-6-95) (interpreting R.C. 4117.11(B)(1)). TARTA's posting of Ms. Betz's name and her Business Agent salary violated R.C. 4117.11(A)(1) because it reasonably tended to or attempted to interfere with the employees' selection of their collective bargaining representative. Ms. Betz is elected to her position by the ATU membership. Her salary is set by the ATU by-laws. Her job duties include representing ATU members. The next election for the Business Agent position will take place in December 2013. Ms. Betz is salaried at \$57,699.20 a year, which is a set percentage of the top TARTA mechanic's hourly wage. The TARPS drivers make between \$10.00 and \$14.38 an hour and have not had a raise since 2008. Thus, discord among ATU members resulted in response to the posting of her wages. Ms. Betz spoke with approximately 20 members of the ATU about her wages. Furthermore, while TARTA provided evidence as to its subjective motivation⁴ in making the posting, determining whether an employer has violated R.C. 4117.11(A)(1), or (A)(2) for that matter, is an objective analysis. Pickaway, supra.

TARTA violated R.C. 4117.11(A)(2) when it posted Ms. Betz's name and ATU Business Agent wage information on the TARPS employee bulletin board. To violate R.C. 4117.11(A)(2), the actions of the employer must prevent the union from performing administrative duties or interfere with its administration. Here, as a result of the posting of Ms. Betz's wages, Ms. Betz handled inquiries from approximately 20 ATU members about her wages, and ATU President Allen spoke with two or three members as well. Further, Ms. Betz spent time calling Jim Gee, TARTA's General Manager, to ask him to have her wage information removed from the bulletin board. The posting not only increased the workload for the ATU, but also negatively impacted the relationship between the ATU and its members. Thus, TARTA also violated R.C. 4117.11(A)(2) when it posted Ms. Betz's name and ATU Business Agent wage information on the TARPS employee bulletin board.

V. CONCLUSIONS OF LAW

Based upon the entire record, the following Conclusions of Law are respectfully recommended:

⁴ This evidence is less than credible. TARTA claims, variously, that it posted Ms. Betz's name and salary because management wanted to let the bargaining-unit members know who their union business agent was, and because Ms. Mason apparently was under the mistaken impression that Ms. Betz's salary information was contained in the ATU and TARTA's fixed-line CBA. Ms. Betz's salary information did not pertain or relate in any way to the business matter of the posting, which was made pursuant to an MOU to advise TARPS employees of an opportunity to apply for TARTA fixed-line positions. The ATU Business Agent is elected by the ATU members, not by not applying through TARTA.

1. The Toledo Area Regional Transit Authority is a “public employer” as defined by R.C. 4117.01(B).
2. The Amalgamated Transit Union, Local 697, is an “employee organization” as defined by R.C. 4117.01(D).
3. The Toledo Area Regional Transit Authority violated R.C. 4117.11(A)(1) when it sent an e-mail requiring Amalgamated Transit Union, Local 697 Business Agent Cynthia Betz to make “advance arrangements” to visit its TARPS facility, and when it sent a letter requiring Ms. Betz to make “advance arrangements” or “obtain permission” to visit its TARPS facility.
4. The Toledo Area Regional Transit Authority violated R.C. 4117.11(A)(1) and (A)(2) when it prohibited the Amalgamated Transit Union, Local 697 from using the employee mail slots in the lockers at the TARPS facility to communicate with TARPS bargaining-unit members.
5. The Toledo Area Regional Transit Authority violated R.C. 4117.11(A)(1) and (A)(2) when it posted Ms. Betz’s wages on the TARPS employee bulletin board.

VI. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully recommended:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board issue an **ORDER**, pursuant to Ohio Revised Code § 4117.12(B)(3), requiring the Toledo Area Regional Transit Authority to do the following:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by requiring the ATU Business Agent to make “advance arrangements” with or “obtain permission” from the Director of Paratransit Services prior to visiting the TARPS (Knapp Street) facility, prohibiting the ATU’s use of the mail slots in the lockers at the TARPS facility and by posting the ATU Business Agent’s name and wages behind locked glass

doors on the TARPS employee bulletin board, and from otherwise violating R.C. 4117.11(A)(1); and

- (2) Initiating, creating, dominating, or interfering with the formation or administration of any employee organization by prohibiting the ATU's use of the mail slots in the lockers at the TARPS (Knapp Street) facility and by posting the ATU Business Agent's name and wages behind locked glass doors on the TARPS employee bulletin board, and from otherwise violating R.C. 4117.11(A)(2).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) consecutive calendar days in all the usual and customary posting locations where bargaining-unit employees represented by the Amalgamated Transit Union, Local 697, work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo Area Regional Transit Authority shall cease and desist from the actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B);
- (2) Allow the Amalgamated Transit Union, Local 697 to use the mail slots in the lockers at the TARPS facility;
- (3) Allow the Amalgamated Transit Union, Local 697 Business Agent access to the TARPS facility without making advance arrangements or obtaining permission;
- (4) Notify the State Employment Relations Board in writing within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

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John R. Kasich, Governor

Case No. 2012-ULP-07-0192

CERTIFICATION

I, the undersigned General Counsel for the State Employment Relations Board hereby certify that the attached is a true and exact reproduction of the original Order of the State Employment Relations Board entered on its journal on the 13th day of December, 2013

Donald M. Collins
General Counsel