

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: July 31, 2008

TO : Michael Josserand, Regional Director  
Region 27

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: United States Postal Service and 536-2581-6767-5000  
Postal Workers and APWU Local 229 548-4001-5000-0000  
Cases 27-CA-20774, 27-CB-5009 548-6075-0000-0000

The Region submitted this case for advice on whether the Union violated Section 8(b)(1)(A) and (2) by insisting the Charging Party, who resigned her membership after being accused of misusing her steward position, be removed from a vacation scheduler job, and whether the Employer violated Section 8(a)(1) and (3) by yielding to the Union's demand. We conclude that the Union acted lawfully because the vacation scheduler is engaged in contract administration on behalf of the Union, the Union has a legitimate interest in ensuring the contract's vacation provisions are enforced to the benefit of all unit members, and the Union's interest outweighs any infringement on the Charging Party's Section 7 rights. Absent withdrawal, the charges should be dismissed.

### FACTS

The charged unions, the American Postal Workers Union (APWU) and APWU Local 229 (the Union), represent a unit of employees at the United States Postal Service's Denver Mail Center. APWU and USPS have agreed in their nationwide contract that the Union will administer certain vacation provisions of the contract:

The Union shall administer employees' choice of vacation periods pursuant to the guaranteed leave provision of the applicable Local Memorandum of Understanding and provisions of the Collective Bargaining Agreement.

The Union shall select one or more representatives to carry out the above administrative responsibilities and these representatives shall be granted the time necessary to do so. If no one from the Union is available to make the decision, Management will do so pursuant to the National Agreement and Local Memorandum of Understanding.

The Local Memorandum of Understanding between the Union and the USPS Denver facility (the Employer) limits the percentage of employees who may take leave at the same time during certain periods of the year. For the clerk craft, which includes the Charging Party, the local agreement states as follows:

The choice vacation period will be the third full week of January through the week of Thanksgiving and the one (1) week period beginning December 24th through January 2nd. . . .

Employees shall be entitled to two (2) rounds of bidding by seniority. . . .

The number of employees who shall receive leave each week during the choice vacation period shall be 8% or a minimum of one leave slot whichever is greater of the two except during the prime vacation period defined as the first full week of March through and including Labor Day week which shall be 13%.

Pursuant to these contractual provisions, the Union selects two members each year to be its representatives in administering the vacation provisions. The Union's vacation schedulers receive no additional pay or any other employment benefit, but the assignment is considered a perk because the schedulers are relieved of their normal duties for two weeks while they create the vacation schedule. According to the Union, grievances over vacation have dramatically decreased since the Union began administering the contract's vacation provisions.

Employees must submit their vacation requests by January 2, and the schedule must be completed by January 15. The vacation scheduler calls employees who do not submit requests to remind them to do so. Once all requests are submitted, the vacation scheduler calculates how many people can take vacation each week under the local agreement. If more than the permitted number of employees request vacation for the same week, the vacation scheduler determines who is entitled to take leave under the contract's seniority system. She then contacts the employees whose vacation requests will be denied to ask for their second choices. If she cannot reach those employees, the vacation scheduler contacts the Union steward for advice on how to proceed. When the schedule is complete, the vacation scheduler sends one copy to management and one copy to the Union.

In late 2007, the Union told the Employer whom it had chosen to be its representatives in creating the vacation schedule. Because those particular employees frequently call in sick, the Employer rejected these selected

individuals and asked the Charging Party, a distribution clerk, to do the job. The Employer did not consult the Union before assigning the vacation scheduler job to the Charging Party.

The Charging Party was a union member for fourteen years and a steward for four years. She resigned as steward and quit the Union in 2007 after being accused of self-scheduling overtime, receiving special treatment from management, and filing grievances only for her own benefit. The Charging Party claims that the Union failed to defend her against these false accusations.

The Charging Party states the Employer believed she was a good choice for the vacation scheduler position because she had previously been a steward and was familiar with the contract. She worked as vacation scheduler for four days before the Union found out. The Union told the Employer that the Charging Party could not do the job because she is not a Union member, and the Employer removed her from the position. The Employer's labor representative told the Charging Party that the Union is contractually entitled to select the vacation scheduler. The Charging Party responded, "[S]ince when does management give up so easily?" and suggested the Employer force the Union to file a grievance over the issue. The Charging Party was returned to her regular job as distribution clerk.

#### **ACTION**

We agree with the Region that the charges should be dismissed, absent withdrawal, because the Union's legitimate interest in contract administration outweighed any infringement on the Charging Party's Section 7 rights, and it therefore lawfully had her removed from the vacation scheduler position.

Section 7 protects the right of employees to engage in concerted activity for mutual aid or protection, but it also protects an employee's right to refrain from such concerted activity.<sup>1</sup> Coercive or discriminatory action by an employer based on the exercise of Section 7 rights may be an unfair labor practice under Section 8(a)(3), and similar acts by a union may violate Section 8(b)(1)(A) and (2). In some instances, however, a union's discriminatory conduct does not violate Section 8(b)(1)(A) or (2) if the union acts for legitimate business reasons that outweigh

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<sup>1</sup> Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954) (stating Section 7 protects an employee's right to be a "good, bad, or indifferent" union member).

the employee's Section 7 rights.<sup>2</sup> This is because "[c]onduct which is engaged in solely for the purpose of promoting *legitimate* union objectives under the collective-bargaining relationship cannot be classified as an arbitrary encouragement of union membership."<sup>3</sup>

The Board has consistently found that ensuring a contract is enforced is a legitimate union objective that often outweighs employees' Section 7 rights, entitling a union to remove union members from contract-related positions for dissident behavior. For example, in Shenango Inc., the union removed a disloyal employee from his position as chairman of the union's plant safety committee, a position established by the collective bargaining agreement.<sup>4</sup> The Board noted that the union had a legitimate interest in appointing people to the safety committee who "can best serve the Union and its membership" and "enable the union to administer the contract and carry out its side of the relationship with the employer."<sup>5</sup>

Further, the Board has held that a union is entitled to demand loyalty from the people it chooses to represent it in dealing with an employer. In Longshoremen ILA Local

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<sup>2</sup> Shenango Inc., 237 NLRB 1355, 1355 (1978) ("The issue [in this 8(b)(1)(A) case] is one of balancing the employee's Section 7 right to engage in internal union affairs against the legitimacy of the union interest at stake in the particular case."); General Motors Corp., 313 NLRB 998, 998 fn. 2 (1994) (applying Shenango Inc. to 8(b)(2) case). See also Saturn Corp., 26-CB-3904, at 14, Advice Memorandum dated September 10, 2001 (balancing Section 7 rights of employee against union's interest).

<sup>3</sup> Painters Dist. 2, 239 NLRB 1378, 1379 (1979), enf. denied 620 F.2d 1326 (8th Cir. 1980) (quoting Local Union 798, Painters, 212 NLRB 615, 618 (1974) (dissent)).

<sup>4</sup> Shenango Inc., 237 NLRB at 1355.

<sup>5</sup> Id. See also Longshoremen ILA Local 1294 (International Terminal), 298 NLRB 479, 479 (1990) (holding that union legitimately removed safety man for disloyalty because "any informal safety grievances not resolved by the safety man would have to be considered in subsequent stages by the Respondent's elected officers"); Gulton Electro-Voice, Inc., 266 NLRB 406, 406 (1983) (stating union may give superseniority to union personnel who perform "grievance processing or other on-the-job contract administration responsibilities" even though this tends to encourage union membership).

1294 (International Terminal),<sup>6</sup> the contract provided that the union could select one union member to act as its "safety man," who corrected unsafe working conditions and informally resolved grievances. The union removed a member from the position after he unsuccessfully ran for union president. The Board concluded that the removal for disloyalty did not violate the Act. The Board reasoned that the union's actions demonstrated that its decision was not based on arbitrary and invidious considerations but rather on "loyalty factors rationally related to suitability for the job."<sup>7</sup>

Similarly, in Service Employees Local 254 (Brandeis University),<sup>8</sup> the Board held that the union lawfully removed an employee from an appointed position on a contractually created labor-management committee for unsuccessfully seeking to replace the chief steward. The Board reasoned that the union had a right "to have as its representatives in dealing with the employer only those persons of whose undivided loyalty it is assured."<sup>9</sup>

Conversely, the Board has found a violation when a union discriminates against a non-member for reasons that are not legitimately related to contract administration or effective unit representation. In United States Postal Service,<sup>10</sup> the union and employer agreed that only union members would be selected as instructors in the training academies the employer operated. The Board found that this agreement violated the Act because the instructors were not agents of the union and did not assist the union in performing its collective bargaining function.<sup>11</sup>

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<sup>6</sup> 298 NLRB 479 (1990).

<sup>7</sup> Id. at 479. Although the Board apparently adopted the ALJ's further conclusion that the membership requirement was not illegal, the Board did not directly address this finding. Id. at 479, 482. As there is no clear rationale for this principle, we do not rely on this finding in International Terminal as support for our conclusion here.

<sup>8</sup> 332 NLRB 1118 (2000).

<sup>9</sup> Brandeis University, 332 NLRB at 1123; see also General Motors Corp., 313 NLRB 998, 998 fn. 2 (1994) (concluding that "the Union had the right to demand loyalty from persons whom it had designated to serve in these appointive positions [as joint trainers]").

<sup>10</sup> 345 NLRB 1203 (2005).

<sup>11</sup> Id. at 1214.

In this case, we conclude that the Union was entitled to remove the Charging Party from the vacation scheduler position. The contract here requires the Union to administer the vacation system, an arrangement that has achieved the parties' intended purpose of reducing vacation-related grievances. The scheduler determines how many people can take vacation at any given time under the contract and who can take vacation by seniority if all requests cannot be granted. Thus, the person assigned to this job represents the Union, and the Board has held that the Union has the right "to have as its representatives in dealing with the employer only those persons of whose undivided loyalty it is assured."<sup>12</sup> We note that the Board has never directly addressed whether a union may consider non-membership alone as evidence of disloyalty, and we need not decide that issue here. While the Union asked the Employer to remove the Charging Party because of her lack of membership, the Charging Party herself says her stewardship was marred by allegations that she abused her steward position and received special treatment from management - allegations that she was, in essence, disloyal. Those allegations and the Union's response to them caused her to quit her Union membership. Under these particular facts, the Charging Party's lack of union membership is directly connected to her prior behavior, and the Union was legitimately entitled to take into account that behavior in filling "positions where teamwork, loyalty, and cooperation are necessary to enable the Union to administer the contract and carry out its side of the relationship with the employer."<sup>13</sup>

This case is distinguishable from the unlawful membership requirement in United States Postal Service, where the instructor position at issue did "not assist in administering the contract" or "speak on behalf of the Union."<sup>14</sup> Here, the vacation scheduler's sole purpose is to administer the contract's vacation provisions, and the person assigned to the job represents the Union. Employees have a "reasonable expectation that the union representatives would represent them with single-minded

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<sup>12</sup> Brandeis University, 332 NLRB at 1123.

<sup>13</sup> Shenango Inc., 237 NLRB at 1355; see also Brandeis University, 332 NLRB at 1122; International Terminal, 298 NLRB at 482.

<sup>14</sup> United States Postal Service, 345 NLRB at 1214.

loyalty to their interests."<sup>15</sup> Therefore, the Union was entitled to insist that the Charging Party, who resigned from the Union to protest her treatment by the leadership and rank-and-file, be removed from the vacation scheduler position. The Employer did not violate the Act by acceding to the Union's lawful demand.

Accordingly, the Region should dismiss the charges, absent withdrawal.

B.J.K.

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<sup>15</sup> Esi, Inc., 296 NLRB 1319, 1320 (1989) (stating the Union unlawfully appointed a supervisor as its representative on a joint committee).