

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

# Advice Memorandum

DATE: May 26, 2009

TO : James J. McDermott, Regional Director  
Region 31

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

SUBJECT: Service Employees International  
Union, Local 1877  
Case 31-CA-29060

177-1683-8750  
506-6090-1300  
524-0133-3125

This case was submitted for advice as to whether the Union violated the Act by discharging its employee, who was also a member, in retaliation for her support of a dissident group that pressured the Union to change the way it represented its members. We conclude that the Region should dismiss the charge, absent withdrawal. Although the conduct of the employee at issue was protected by Section 7 of the Act, the Union's legitimate business interests outweighed the employee's right to engage in this protected activity.

### FACTS

Service Employees International Union, Local 1877 ("Union" or "Union-Employer") is the collective-bargaining representative of janitors employed by various companies that provide janitorial services to office buildings in southern California. The Union and the janitorial companies have an informal arrangement under which employees may perform single, short-term tasks or longer-term, full-time assignments for the Union in lieu of performing bargaining unit janitorial work. Such employees are known as "lost-timers." The Union's lost-time policy describes such longer-term, full-time work as being "similar to regular field staff" work; states that lost-timers are expected to work the "same schedule as

organizers"; and requires the Union to pay lost-timers \$13.13 per hour.<sup>1</sup>

The Charging Party worked as a bargaining-unit janitor for ABM Industries ("ABM") for a number of years and has been a member of the Union for about 14 years. Between mid-2005 and September 2008, the Charging Party performed three long-term stints as a "lost-timer" union representative due to turnover among the Union's regular staff employees.<sup>2</sup> The Charging Party's duties as a union representative required her to handle members' complaints and attempt to resolve their workplace disputes - including suspensions and discharges - with the affected members' supervisors or managers. When a dispute could not be resolved, the Charging Party would refer the matter to another Union official or file a grievance with the help of the Union's regional director ("Director").

In July 2008, a group of dissident members known as "Martin's group" began pressing the Union to, among other things, abandon its plan to implement a centralized call center to handle members' employment related concerns. Martin's group believed that the call center would exacerbate already poor service provided to the members by the Union.

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<sup>1</sup> The collective-bargaining agreement covering the Union's staff employees specifically excludes lost-timers from its coverage.

<sup>2</sup> The Charging Party's three stints as a lost-timer were from mid-2005 to late 2005, early 2006 to late 2006, and February 2007 to September 2008. She earned \$11.62 per hour, the wages she would have received for performing bargaining-unit janitorial work, during her first two stints and part of her third stint. From November 2007 to September 2008, the Charging Party earned \$13.13 per hour in accordance with the Union's lost-time policy. Following each stint as a lost-timer, the Charging Party returned to her janitorial position with ABM. In 2008, the Charging Party was one of three ABM bargaining unit janitors who worked full-time for the Union as a lost-timer.

The Charging Party supported and actively participated in Martin's group. She signed petitions and attended membership meetings in August and September 2008 where Martin's group objected to the call center and raised several other concerns regarding the quality of representation. In September 2008, the Union's president promised to address some of the concerns raised by Martin's group, including a promise not to implement the call center in any area where their concerns had not been addressed.

On September 24, 2008, the Director told the Charging Party and another lost-timer who supported Martin's group that they could no longer continue in their positions as lost-timers because they disagreed with the actions and philosophy of the Union's leadership. The Charging Party reiterated her desire to continue working as a lost-timer, but the Director stated that this was not possible because the Union wanted to implement the call center and wanted its representatives to support its position on the matter. On September 29, 2008, the Charging Party returned to work for ABM at her contractual wage rate.

#### **ACTION**

The Region should dismiss the charge, absent withdrawal. Although the conduct of the Charging Party was protected by Section 7 of the Act, the Union-Employer's legitimate business interest in its representatives' support for its policies, and in its ability as an exclusive bargaining representative to speak with one voice, outweighed the Charging Party's right to engage in this protected activity.<sup>3</sup>

When a union takes adverse action against its own employees for engaging in activities that are protected by Section 7, the Board applies a balancing test to determine whether the union-employer violated the Act.<sup>4</sup> First, the

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<sup>3</sup> Accordingly, we need not address the Union-Employer's Wright Line defense or its contention that the Charging Party is not its employee under Section 2(3) of the Act.

<sup>4</sup> Operating Engineers Local 370, 341 NLRB 822, 824-825 (2004); Service Employees, Local 1, 344 NLRB 1105, 1106-1107 (2005). This test is expressly derived from the

Board determines whether the employee engaged in Section 7 activity; if so, the Board then determines whether the union-employer had a legitimate countervailing interest that outweighed the employee's exercise of the Section 7 right.<sup>5</sup>

In Operating Engineers Local 370,<sup>6</sup> the Board found that a union-employer lawfully discharged its paid organizer for criticizing the union's decision to allow employers to cease making pension fund contributions on behalf of probationary apprentices. The Board reasoned that the organizer's conduct involved, at most, a relatively weak Section 7 interest because (1) the pension fund issue had no impact on the working conditions of the organizer or his coworkers, and (2) to the extent he was making common cause with the apprentices' interests as employees, his efforts were directed not toward the apprentices' employers but toward their bargaining representative.<sup>7</sup> The Board further found that the union-employer had a legitimate interest in the loyal service of its key paid employees and their cooperation with its policies.<sup>8</sup> In addition, as an

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balancing test applied to employers who, in other contexts, have interfered with Section 7 rights. See Operating Engineers Local 370, 341 NLRB at 824, citing Eastex, Inc. v. NLRB, 437 U.S. 556, 573-574 (1978) (striking balance between employees' Section 7 right to distribute newsletter on employer's property against employer's property rights) and Republic Aviation v. NLRB, 324 U.S. 793, 797-798 (1945) (striking balance between Section 7 right of employees to solicit or distribute at workplace against equally undisputed right of employers to maintain discipline in their establishments).

<sup>5</sup> Service Employees, Local 1, 344 NLRB at 1106.

<sup>6</sup> 341 NLRB at 824-825.

<sup>7</sup> Id. at 825.

<sup>8</sup> Id. at 824. In support, the Board cited LMRDA and Section 8(b)(1)(A) cases finding that a union has a legitimate interest in the loyalty of its agents and their cooperation with union policies. See Finnegan v. Leu, 456 U.S. 431 (1982) (under LMRDA, union president lawfully removed

exclusive bargaining representative of employees, the union-employer had a legitimate interest in speaking with one voice.<sup>9</sup> Balancing the union-employer's legitimate interests against the organizer's weak Section 7 interest, the Board held that the organizer's persistent criticism of the union-employer's policies, in front of its members, justified his discharge.<sup>10</sup>

In Service Employees, Local 1,<sup>11</sup> on the other hand, the Board struck the balance in favor of the exercise of Section 7 rights. There, a union-employer discharged a business representative for making common cause with

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appointed business agents who campaigned for another candidate, because president must have the power to appoint agents of his choice to carry out his policies); Shenango, Inc., 237 NLRB 1355 (1978) (union president lawfully removed plant safety committee chairman who campaigned for another candidate because it required teamwork, loyalty, and cooperation to administer contract). The Board noted that the analysis in Section 8(b)(1)(A) cases was relevant to a Section 8(a)(1) case because both types of cases implicate the conflict between the protection of Section 7 rights and unions' legitimate interest in the loyalty of their employees to union policies. 341 NLRB at 824 n.7.

<sup>9</sup> Id. at 824, citing Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (union has legitimate interest in presenting united front and in not seeing strength dissipated by subgroups pursuing separate interests).

<sup>10</sup> See also California Union of Safety Employees, Case 20-CA-32425, Advice Memorandum dated September 9, 2005 (applying balancing test and finding that a union-employer lawfully disciplined/discharged administrative employees who refused to sign a letter criticizing their former collective-bargaining representative, where the former representative sought to decertify the union-employer in the only bargaining unit it represented and the union-employer planned to use the letter in an effort to defeat the challenge).

<sup>11</sup> 344 NLRB at 1106-1107.

coworkers in opposing the union's new system for servicing members. The Board found this to constitute Section 7 activity in light of the new system's dramatic change in the business representatives' daily work functions.<sup>12</sup> The Board accorded significant weight to this Section 7 activity because an attempt to band together with coworkers to improve daily working conditions is "classic protected concerted activity."<sup>13</sup> And, while the union-employer had a legitimate interest in assuring that its employees loyally supported its policies, the Board emphasized that the business representative's opposition to the new system was limited to in-house discussions with fellow business representatives and union officials, rather than complaints to the union's members.<sup>14</sup> Thus, the conduct at issue was much less likely to impair the union-employer's legitimate interests than the paid organizer's conduct in Operating Engineers Local 370. In these circumstances, the Board found the discharge to be unlawful.

Applying the Board's balancing test here, we initially conclude that the Charging Party's criticism of the Union's policies and support of Martin's group constituted protected, concerted activity. Section 7 protects the right of employee-members to press their union to change its policies, so long as the activity bears some relation to "employees' interests as employees."<sup>15</sup> Because the Union's call-center plan would change the method by which its union representatives take member complaints, it likely would affect the Charging Party's working conditions as a union representative to some degree. Also, to the extent that taking members' complaints via a call center would affect the Union's ability to carry out its duties as their bargaining agent, the Charging Party was arguably acting in

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<sup>12</sup> Ibid.

<sup>13</sup> Id. at 1107.

<sup>14</sup> Ibid.

<sup>15</sup> Office Employees Local 251 (Sandia National Laboratories), 331 NLRB 1417, 1424 (2000).

support of the members' interests as employees.<sup>16</sup> Indeed, as a lost-timer who could reasonably expect to return to a bargaining-unit janitorial position in the future, the Charging Party's interests as an employee would be aligned with those of the members.

Unlike in Service Employees, Local 1,<sup>17</sup> however, the Charging Party's opposition to the call center was based on her belief that it would result in lower-quality service to members; there is no evidence that the Charging Party (or anyone else) objected to the call center because of its potential impact on terms and conditions of the Union's employees. And, as in Operating Engineers Local 370,<sup>18</sup> to the extent the Charging Party was making common cause with the members' employment interests in opposing the call center, these efforts involved relatively weak Section 7 rights because they were directed at the employees' bargaining agent, not their employer.

On the other side of the equation, the Union-Employer has a strong institutional interest in the loyal cooperation and support of its union representatives as it implements policies toward its members, as well as in speaking with one voice as an exclusive bargaining representative of employees. The Charging Party's duties as a lost-timer union representative included fielding work-related complaints from members and attempting to resolve them informally, referring complaints that could not be resolved to other Union officials, and occasionally helping to file grievances. As a key contact for members regarding such matters, the Charging Party's loyal support of Union policies was integral to its representative function. The Charging Party's active opposition to the call center and other aspects of the Union's representation therefore interfered with its ability to carry out its policies. And, unlike in Service Employees, Local 1, the Charging Party's criticism of the Union's policies was not

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<sup>16</sup> See Operating Engineers local 370, 341 NLRB at 824.

<sup>17</sup> 344 NLRB at 1107.

<sup>18</sup> 341 NLRB at 825.

limited to discussions with Union officials or staffers; it included her participation in complaints raised by Martin's group at general membership meetings.<sup>19</sup> The Charging Party's conduct therefore was likely to impair the Union-Employer's legitimate interests.

Under the circumstances, the balance of interests in this case favors the Union-Employer over the Charging Party. Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

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<sup>19</sup> Compare 344 NLRB at 1107. See also Operating Engineers Local 370, 341 NLRB at 830 (union's "customers are its members").