

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

Advice Memorandum

DATE: June 17, 2002

TO : Veronica I. Clements, Acting Regional Director
Bruce I. Friend, Assistant to Regional Director
Region 32

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

SUBJECT: APWU Local 339 (USPS) 536-2509-8700
Case 32-CB-5421 536-2530

This Section 8(b)(1)(A) case was submitted for advice on whether the Union unlawfully harassed a nonmember employee because she filed a Board charge.

We conclude that the Union violated Section 8(b)(1)(A) when it first unlawfully refused to represent the nonmember employee and then harassed and attempted to ostracize her.

FACTS

Charging Party Yanez became involved in a dispute over bidding rights to the position of express mail technician. In August 2001, the Union supported the Employer in awarding that position to a former Union officer. Yanez filed Section 8(a)(3) and 8(b)(1)(A) charges over that result, alleging employment discrimination by the Employer and a breach of the duty of fair representation by the Union. The Region dismissed both charges and the dismissals were upheld on appeal.

Yanez also had filed a grievance concerning the above dispute. At that time, Yanez told Union President Ramage that she felt the Union was biased against her and that Yanez would seek grievance representation by another local. The Region recently discovered that Union President Ramage told Yanez that the Union would not represent her. The Region intends to issue a Section 8(b)(1)(A) complaint against that statement in light of prior violations by the Union and President Ramage.¹

¹ In October 1997 in Case 32-CB-4976, the Union via the conduct of President Ramage violated 8(b)(1)(A) by denying temporary schedule changes to an employee because he was a nonmember. In July 1998 in Case 32-CB-4983, the Union again violated 8(b)(1)(A) by discriminating against nonmembers

The Union mails a monthly newsletter to its 525 union members. The Union's newsletter contains a column written by President Ramage. In the Union's February 2002 newsletter, Ramage wrote a column castigating Yanez as a "scab" who claimed that the Union was biased against her. Ramage's column also stated that Yanez had filed charges against the Union, the charges had been dismissed, and Yanez (at that time) was appealing the dismissal. Ramage then stated: "If you see SCAB YANEZ, give her a HONK. If SCABS would spent (sic) as much time and energy supporting and working for the UNION as they spend trying to undermined (sic) the UNION, we would have a stronger UNION."

Over the next three days, 6 or 7 employees approached Yanez at work and said "honk honk." Other employees apologized to Yanez for the Union newsletter. No employees approached Yanez to discuss her being a nonmember. Yanez thereafter started calling in sick on occasion for about three weeks because she was feeling stress from working under these conditions.

In the Union's March newsletter, Ramage published a list of 94 nonmember employees. Ramage asked members to talk to these "scabs" to "find out why they want YOU to pay their way." At the end of the column, Ramage noted: "SCAB YANEZ has complained to management because some of the DUES PAYING MEMBERS have given her a HONK! HONK! on the work room floor. Be wise and do your HONKING! off the clock." No employee has "honked" at Yanez since publication of the March newsletter.

ANALYSIS

The Union violated the Act when it first refused to represent Yanez and then harassed and attempted to ostracize her because she was a nonmember who filed charges with the Board.

It is well settled that abusive, intemperate language in the heat of a labor dispute is not unprotected.² In

regarding temporary schedule changes. The Region obtained a formal settlement and consent judgment for this second violation. However, the Region does not intend to seek contempt proceedings based upon Ramage's unlawful statement to Yanez that the Union would not represent her.

² See, e.g., Longview Furniture Co., 100 NLRB 301, 304 (1952), enforcement denied in relevant part and remanded

particular, a union's publishing of a list of nonmembers with accompanying castigating language is not unlawful.³ On the other hand, harassing and/or ostracizing an employee for having engaged in Section 7 activity may constitute unlawful "restraint" within Section 8(b)(1)(A).⁴

In Newport News Printing Pressmen, supra, the union warned an employee that if he accepted a certain job from the employer, the union "will make it hard for you." Thereafter, the employee at work was subjected to "aggravated horseplay" in the form of cursing, name-calling, clippings and stickers placed on his locker, and physical pranks involving the tossing of rags, dirt, dust and water. The ALJ recommended dismissing the employee filed Section 8(b)(1)(A) allegation on the view that, in the past at his workplace, "horseplay, name-calling and pranks of high and low grade was the rule rather than the exception." The ALJ also noted that there was no evidence that the union was responsible for what amounted to workplace misconduct. The Board disagreed, finding that the Union was responsible for the employee misconduct and also finding that the "harassment" constituted unlawful restraint of the employee's Section 7 activity in violation of 8(b)(1)(A).

In Kalamazoo Typographers Union, supra, employees whistled, hummed, name-called, and made animal noises at a nonmember employee in the workplace. At one point, the union accused a union member employee of speaking to that nonmember instead of ostracizing her, as he was supposed to

206 F.2d 274 (4th Cir. 1953). See also Perry Norville Co., 80 NLRB 225, 235-37, 245 (1948) ("rats ... skunks ... scabs ... God damn cowards" not outside protection of Act); Int'l Longshoremen's and Warehousemen's Union (Sunset Line and Twine), 79 NLRB 1487, 1493, 1505 (1948) ("dirty bastards" not outside protection of Act).

³ Letters Carriers v. Austin, 418 U.S. 264 (1974) (publishing a "List of Scabs", nonmembers at that time, in union newsletter calling each "a traitor to his God, his country, his family and his class," not unlawful libel). See also UAW Local 148 (McDonnell-Douglas), 296 NLRB 970 (1989) (publishing list of "scabs" together with their addresses and phone numbers not a violation of 8(b)(1)(A) in the absence of a nexus between the published list and anonymous threatening phone calls).

⁴ Newport News Printing Pressmen, Local 288 (The Daily Press), 188 NLRB 475 (1971); Kalamazoo Typographers Union No. 122 (Kalamazoo Gazette), 193 NLRB 1065 (1971).

do. The Board found that the union violated Section 8(b)(1)(A) "by taking steps to and in fact causing its members . . . to ostracize Betsy Mason, so long as she worked there, in retaliation for her past nonunion status and antiunion activity . . ."

The harassment of Yanez here was less egregious than the harassment found unlawful in Newport News Printing Pressmen. And Union President Ramage's attempt to ostracize Yanez was less explicit than that found unlawful in Kalamazoo Typographers Union. However, the instant case involves both union harassment and an attempt to ostracize a nonmember employee after having unlawfully refused to represent her. Union President Ramage not only unlawfully refused to represent Yanez, he then reinforced that violation by urging members to "honk" at Yanez because she had filed a Board charge "undermining" the Union. We conclude that accumulative impact of the above conduct, including the Union's prior two 8(b)(1)(A) violations against other nonmembers, amounted to unlawful restraint of Yanez protected activity.⁵

[FOIA Exemptions 2 and 5

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B.J.K.

⁵ This case thus is clearly distinguishable from the cases cited supra, at notes 2 and 3, finding no violation because of the mere use of vituperative language. Those case did not arise in the factual context of a retaliation against a Board charge which reinforced an earlier unlawful refusal to represent.