

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

Advice Memorandum

DATE: August 11, 2006

TO : Celeste Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 506-4067-9000
506-4067-9700

SUBJECT: New York City Ballet 512-7550-3700
Case 2-CA-37290 512-7550-7000

The Region submitted this Section 8(a)(1) case for advice on whether the Charging Party employee's use of accusatory, insulting language together with an alleged threat, in an e-mail sent to the Employer and Union bargaining committee members criticizing a recently negotiated bargaining agreement, resulted in the e-mail losing the protection of the Act under Atlantic Steel Co.¹

The alleged threat in the e-mail, the Shakespeare quotation "I shall have my pound of flesh", generally is an idiomatic expression threatening to collect a debt or obligation rather threatening physical violence. We conclude that (1) the Charging Party used this quotation idiomatically as a lawful threat to continue legal proceedings to the fullest extent; and (2) this idiomatic use of the quotation, together with the intemperate language contained in this e-mail, was not sufficiently egregious misconduct to remove the e-mail from the protection of the Act.

FACTS

The Employer employs approximately 63 basic orchestra members and six rotation players (rotators). Rotators are the first musicians offered work when a basic orchestra member is temporarily absent. The Employer also employs musicians called "extras" for occasions when rotators are unavailable. Both basic orchestra members and rotators are covered by a bargaining agreement between the Union and the Employer.

When an orchestra seat becomes vacant, the Music Director allows the top candidates chosen from open auditions to play with the orchestra before finally selecting a replacement. The parties refer to this practice as "trialing" and refer to the open audition candidates as "trialists." Charging Party Martin Stoner, a

¹ 245 NLRB 814 (1979).

rotator, has been a long-time spokesperson for the rotators involved in several grievances filed over the filling of orchestra vacancies with "trialists" instead of rotators. Stoner has also filed an EEOC age discrimination suit against the Employer because of its method of filling orchestra vacancies.

The parties' 1999-2002 collective-bargaining agreement was extended by a Memorandum of Agreement in 2002. This Memorandum expired, and the parties began negotiating for a successor contract in June 2005.² During bargaining, the parties considered the outstanding grievances dealing with the placement of "trialists" instead of rotators into orchestra vacancies. The Union proposed that the Employer agree to immediately admit all the rotators into the permanent orchestra. Since this would expand the size of the basic orchestra, the Employer rejected the proposal as too costly.

On December 7th, the parties met informally to again discuss the rotators. Present for the Employer were its General Manager Ken Tabachnick and its attorney Bernie Plum. Present for the Union were vice-president Jay Blumenthal and chair of the audition committee, Bob Biddlecom. Stoner also attended because his outstanding EEOC lawsuit could be affected by the negotiations.³

The Employer proposed that the rotators become permanent members of the orchestra upon the occurrence of any vacancies, i.e., the Employer would not hold open auditions of trialists. This proposal also would resolve all outstanding disputes regarding the rotators, including Stoner's lawsuit. The Union and Stoner agreed to this proposal. The Employer's negotiation team then conferred with the members of its Music Staff, who refused to forsake the conducting of open auditions to fill orchestra vacancies. Tabachnick informed the Union and Stoner that the proposal had been rejected by the Music Staff.

The parties continued to bargain over the terms and conditions of the rotators. On January 20, 2006, the parties agreed upon a contract that resolved some, but not all, rotator issues. The successor agreement accorded rotators the same benefits and obligations provided for full orchestra members, but did not change the disputed

² All dates are in 2005, unless otherwise noted.

³ Stoner was also pursuing an action against the Employer for breaching a prior allegedly confidential settlement agreement.

practice of using trialists. The bargaining agreement was ratified by the membership on March 3, 2006.

By e-mail dated March 11, 2006, Stoner complained to Tabachnick about the new agreement. He copied his e-mail to five unit employees who were members of the Union's bargaining committee. Stoner's e-mail stated in pertinent part:

I write to complain about the new contract. It is terrible for the rotation players and clearly retaliatory for my (and our) protected activity. Moreover it is unacceptable to me and I shall take whatever legal options are available to me to have the offending contract provisions removed and rescinded. . . .

You moreover asked me to drop my lawsuit (Stoner II) and all remaining grievances in return for me becoming of the basic orchestra without audition. Bernie Plum even stated that the then current auditions would not take place (or that no winner would be picked) so that the two senior most Rotation Players would go in immediately. Then you reneged on your offer and subsequently negotiated a contract that is very bad particularly for rotation players. You (and Bernie Plum) are simply liars. . . .

I know that you and your legal eagle (the jerk Bernie Plum) thought that you were very successful in the instant negotiations. Rather, you are simply fools for underestimating my resolve in this matter. I will do whatever it takes to win - and I will win because I am right. "When you are right, you are right." And you are 100% wrong. Let's be perfectly clear - you are trying to intimidate me into stopping my concerted protected activity. However, that violates the National Labor Relations Act, as amended. I may not win at the labor board. I may not win in Court, but rest assured "I shall have my pound of flesh." Martin Stoner

Tabachnick issued Stoner a written reprimand stating that Stoner's e-mail was inappropriate and unprofessional in tone and manner. Tabachnick stated that Stoner had every right to express his opinion regarding the new contract, and to pursue legitimate rights and goals, but that he did not have the right to engage in personal attacks. Tabachnick referred to Stoner's remarks about Bernie Plum, and described Stoner's closing comment as threatening. The reprimand concluded that further abusive verbal behavior or threats would lead to further discipline.

ACTION

The Shakespearean quotation "I shall have my pound of flesh" is an idiomatic expression generally used as a threat to collect a debt or obligation, and not as a threat of physical violence. We conclude that the circumstances here indicate that Stoner used this phrase in its idiomatic sense as a threat to pursue his legal rights and not as a literal threat of violence. We also conclude that this idiomatic expression, together with the other intemperate language in the e-mail, was not sufficiently egregious misconduct to render the e-mail unprotected.

"It is axiomatic that concerted activities must have a lawful objective and must be carried on in a lawful manner."⁴ Consequently, threats of bodily harm or threats to destroy property are not protected under the Act.⁵ On the other hand, ambiguous threats⁶ and idiomatic expressions that do not connote violence⁷ generally do not constitute unprotected conduct. In particular, threats to pursue legal recourse are not unprotected under the Act.⁸

⁴ AAR Technical Service Center, 249 NLRB 1201, 1203 (1980).

⁵ Id. (threat of plant sabotage); Georgia Kraft Co., 275 NLRB 636, 637 (threat of bodily injury); Christie Electric Corp., 284 NLRB 740, 745 (1987) (bomb threat and threat of bodily harm).

⁶ Kingsport Press, 269 NLRB 1150, 1157, 1161 (1984) (statement by employee being escorted from the plant, "that when he came back in on Tuesday for his meeting, that... if he was fired, that he wouldn't have to be walked out of the plant, that he would have to be carried out" too ambiguous to constitute a threat).

⁷ AT&T Broadband, 335 NLRB 63, 69 ("marked man" an idiomatic expression suggesting that individual would be subject to the "loathing" of fellow workers for disloyalty and not a threat of death or bodily harm).

⁸ See Vought Corp., 273 NLRB 1290, 1295 (1984) (employee threat to supervisor that "I'll have your ass" held not a threat to do anything more than file a grievance or Board charge and thus not unprotected); Patriot Contract Services, LLC, 5-CA-29880, Advice Memorandum dated August 29, 2003 (alleged threat against ship's Captain in the e-mail message to "hound [the Captain's] ass through EEOC, NLRB, and my faverite (sic) Labor Racketeering intill (sic) he retires," protected conduct).

1. Stoner's statement "I shall have my pound of flesh" was idiomatic and not an unlawful threat of violence.

The quotation "I shall have my pound of flesh" comes from Shakespeare's play "The Merchant of Venice," where the moneylender Shylock demands that Antonio provide the "pound of flesh" that Antonio had promised Shylock for not timely repaying his debt. In the play, the statement constitutes a threat of literal physical violence and even death. However, the phrase "pound of flesh" over time has become an English idiom for a threat to collect a debt, and not as a threat of physical violence.

An early *Dictionary of Phrase and Fable* defines the phrase as "the whole bargain, the exact terms of the agreement, the bond *literatim et verbatim*."⁹ The *American Heritage Dictionary* defines the phrase idiomatically as "A debt harshly insisted upon."¹⁰ The *New Dictionary of Cultural Literacy* notes that "People who cruelly or unreasonably insist on their rights are said to be demanding their 'pound of flesh.'"¹¹

We conclude that the circumstances here indicate that Stoner did not use this quotation as a literal threat of physical violence. The context of Stoner's use of the phrase clearly indicates that he intended its idiomatic meaning, i.e., vindication of his legal rights to the fullest extent possible.

Stoner used the phrase in the context of complaining about the Employer's having reneged on its agreement over the use of rotators. The Employer's reneging on that agreement necessarily meant that pending grievances and Stoner's lawsuit would not be resolved and would continue. The subject of Stoner's e-mail, a reneged contract agreement leading to continued legal action, comports exactly with an idiomatic use of this phrase, insistence on the full terms of a contract agreement. Stoner also placed the phrase at the end of a sentence in which Stoner directly refers to his legal cases. The clear meaning conveyed by the quotation in that sentence is that, while Stoner may not be successful in his legal cases, he intends to have his day in court. Finally, the Employer adduced no

⁹ *Dictionary of Phrase and Fable*, E. Cobham Brewer, 1898.

¹⁰ *American Heritage Dictionary of the English Language: Fourth Edition*, 2000.

¹¹ *The New Dictionary of Cultural Literacy, Third Edition*, (2002).

evidence, and indeed never suggested, that Stoner in the past has been violent or has otherwise been predisposed to violence. We therefore conclude that Stoner's use of this quotation was idiomatic, as a lawful threat to pursue his grievances legally, and not as an unprotected threat of physical violence.

2. Stoner's e-mail did not lose protection of Act under Atlantic Steel

When an employee is disciplined for alleged misconduct while engaged in protected concerted activity, the Board must resolve "the question [of] whether the conduct is sufficiently egregious to remove it from the protection of the Act."¹² When considering whether an employee's misconduct meets this standard, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.¹³

We agree with the Region that the Charging Party was otherwise engaged in protected concerted activity when he forwarded his e-mail, with copies to the bargaining committee members, discussing the merits of the recently negotiated contract. We, therefore, consider the four Atlantic Steel factors.

In addressing the first factor, the Board considers the location of the discussion to weigh in favor of the conduct not losing the protection of the Act when the conduct occurs in a private location without other employees present.¹⁴ Stoner's e-mail was transmitted over the internet to the Employer and to five employee members of the Union's bargaining committee. Outside of the five bargaining committee members, there is no indication that any other employee was privy to this e-mail or otherwise learned of its content. Furthermore, because of the e-mail

¹² Stanford Hotel, 344 NLRB No. 69, slip op. at 1 (2005), citing Aluminum Co. of America, 338 NLRB 20, 20 (2002). See also Consumer Power Co., 282 NLRB 130, 132 (1986).

¹³ Atlantic Steel Co., 245 NLRB at 816.

¹⁴ See Stanford Hotel, 344 NLRB No. 69, slip op. at 1-2 ("away from his normal working area in an employee lunchroom"); Felix Industries, 331 NLRB 144, 145, (2000) (private conversation over the phone), enf. denied on other grounds 251 F.3d 1051 (D.C. Cir. 2000), on remand 339 NLRB 195 (2003); cf. Aluminum Co. of America, 338 NLRB at 20.

nature of this communication, its transmission via the internet and limited disclosure, Stoner's statements would not likely impair the Employer's ability to maintain discipline among orchestra members at their place of employment.¹⁵ Therefore, the "location" of this communication weighs strongly in favor of Stoner's e-mail retaining the protection of the Act.

As to the second factor, the Board considers the subject matter to weigh in favor of the conduct not losing protection when the subject matter of the discussion is protected in nature.¹⁶ The topics addressed in Stoner's e-mail, i.e., the grievances and Stoner's lawsuit, and Stoner's dissatisfaction with the recently negotiated contract, clearly constitute protected activity. Therefore, the subject matter weighs in favor of Stoner's conduct retaining the protection of the Act.

When considering the third factor, the nature of the outburst, the Board recognizes that an employee's right to engage in protected activity permits some leeway for impulsive behavior; nevertheless, the Board balances that leeway against an employer's right to maintain order and respect.¹⁷ Here, Stoner's threat to "have his pound of flesh" was a lawful idiomatic threat to continue legal proceedings. Stoner otherwise did not use profanity or any obscene language, but rather engaged in mere name-calling, i.e., "liars," "jerks," and "fools." We note that Stoner's e-mail was a written document, as opposed to a spontaneous oral outburst, so Stoner had time to reflect on his comments. However, there is no indication that the hyperbolic name-calling was done maliciously or with an intent to defame. In context, the language was at worst intemperate and perhaps subjectively offensive, not

¹⁵ Burle Industries, Inc., 300 NLRB 498, 504 (1990) (right to act in concert must be balanced against employer's right to maintain respect and order), citing NLRB v. Illinois Tool Works, 153 F.2d 811 (7th Cir. 1946).

¹⁶ See Winston-Salem Journal, 341 NLRB 124, 125 (2004) (supervisor was criticizing employees' performance and employee responded by reiterating a point raised by employees and union); Felix Industries, 339 NLRB at 196 (discussion concerned employee's rights under the collective-bargaining agreement).

¹⁷ See Stanford Hotel, 344 NLRB No. 69, slip op. at 2: "As to the third factor, . . . [the] outburst was profane and offensive, which weighs against the remarks retaining the protection of the Act." See also Woodruff & Sons, 265 NLRB 345, 347 (1982).

abusive, which weighs strongly in favor of Stoner's otherwise protected e-mail retaining the Act's protection.

Finally, with regard to the fourth factor, the Board considers whether the employee's misconduct occurred in response to or in the context of the Employer's commission of unfair labor practices.¹⁸ Stoner's e-mail was sent, at least in part, in response to the Employer's reneging on its contingent agreement with the Union and Stoner, which would have made Stoner a member of the basic orchestra in exchange for his dropping the grievances and law suit. The Region dismissed Stoner's Section 8(a)(3) and (5) charges alleging that the Employer rejected this proposal in bad faith and/or in retaliation against Stoner for his protected conduct. These dismissed charges are now being considered by the Office of Appeals. Should the dismissal be upheld, this factor would weigh against e-mail retaining the protection of the Act. On the other hand, should the appeal be sustained, this factor too would weigh in favor of protecting the e-mail.

We assume, arguendo, that that the dismissal will be upheld, establishing that Stoner's activity was not provoked by any Employer's violations. Nevertheless, since first three factors all weigh strongly in favor of retaining the Act's protection, we conclude that the e-mail was protected activity in its entirety.¹⁹ Accordingly, the Region should issue complaint, absent settlement, alleging the Employer's written reprimand violated Section 8(a)(1).

B.J.K.

¹⁸ See Felix Industries, Inc., 339 at 196.

¹⁹ Compare Winston-Salem Journal, above, 341 NLRB at 125 (during crew meeting discussion of performance, employee's protected repetition of point raised by other employees and union did not lose Act's protection even though employee, unprovoked by any violations, called supervisor a racist) with Waste Management of Arizona, 345 NLRB No. 114 (2005) (in presence of other employees, employee's protected claim about wages lost Act's protection when employee, unprovoked by any violations, repeatedly screamed obscene epithets at supervisor) and Piper Realty Co., 313 NLRB 1289 (1994) (during employee's presumed protected protest of work assignment in discussion with supervisor overheard by other employees, employee unprovoked by any violations lost Act's protection when he repeated obscene epithets in belligerent manner).