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International Union of Operating Engineers, Local 513, AFL-CIO and Ozark Constructors, LLC, A Fred Weber—ASI Joint Venture. Case 14-CB-10424

April 19, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND PEARCE

The single issue in this case is whether the Respondent violated Section 8(b)(1)(A) of the Act by fining employee Mark Overton \$2500 because, in compliance with the Charging Party Employer's safety rules, which are incorporated by reference in the parties' collective-bargaining agreement, Overton reported a safety violation by another employee to the Employer.¹ The judge found the violation as alleged.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.²

The Respondent contends that by disciplining Overton it did not restrain or coerce him in the exercise of his rights under Section 7 of the Act because Overton acted alone and not concertedly. The Board has consistently found Section 8(b)(1)(A) violated, however, where a union disciplines an employee for reporting a work-rule infraction by another employee, if the disciplined employee is under a duty to make such reports, notwithstanding that the disciplined employee acted alone. See *Teamsters Local 439 (University of the Pacific)*, 324 NLRB 1096 (1997); *Carpenters District Council of San Diego (Hopeman Bros.)*, 272 NLRB 584 (1984); *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977), *enfd. mem.* 588 F.2d 838 (7th Cir. 1978). We find these precedents controlling.³

¹ On September 4, 2009, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent Union filed exceptions and a supporting brief, the General Counsel and the Charging Party Employer filed answering briefs, and the Respondent filed a reply brief.

² The judge's proposed notice has been modified to conform to the Board's standard remedial language. *Teamsters Local 896 (Anheuser-Busch)*, 339 NLRB 769, 770-771 (2003).

³ Accord: *Teamsters Local 896 (Anheuser-Busch)*, *supra* (finding unlawful union's threat to discipline employees who complied with contractual duty to report fellow employees' safety violations where,

We reject as untimely the Respondent's argument, raised for the first time on exceptions, that Overton exceeded his collective-bargaining agreement obligations by reporting both the safety incident and the person responsible for it. We find that by failing to make this argument to the judge below, the Respondent has waived it. See, e.g., *Smoke House Restaurant*, 347 NLRB 192, 195 (2006).

Finally, for the reasons stated by the judge, we reject the Respondent's contention that it disciplined Overton for "abusive" conduct toward fellow Operating Engineers, not for reporting a safety violation.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Union of Operating Engineers, Local 513, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. April 19, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

inter alia, threat contravened Act's basic policy of promoting collective bargaining). We do not rely on the judge's conclusion that an employee who complies with an employer's rule to report co-employee misconduct is deemed to engage in Sec. 7 activity because that employee has refrained from joining fellow employees in ignoring an outstanding order. See *Teamsters Local 439 (University of the Pacific)*, *supra*, 324 NLRB at 1096 fn. 1 (omitting the judge's "refraining from" analysis from the 8(b)(1)(A) rationale).

⁴ We correct two errors in the judge's characterization of precedent. The judge stated that the Board found concerted activity in *Teamsters Local 439 (University of the Pacific)*, *supra*, and *Chemical Workers Local 604 (Essex International)*, *supra*. The Board did not so find in either case.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

Federal law provides that labor organizations may set their own internal rules regarding acquisition and retention of union membership and governance of their internal affairs, including the imposition of internal discipline on members. Such procedures, however, may not be improperly used to affect the union members' employment relationship.

We represent certain employees of Ozark Constructors, LLC (Ozark), and have entered into collective-bargaining agreements or contracts with Ozark concerning those employees. Our current contract incorporates by reference Ozark's safety rules. Those safety rules provide that covered employees have the responsibility to report to management any safety "accidents/incidents." Thus, making such reports is part of covered employees' contractual and work duties.

Since our members covered by this contract have the obligation to report to management any safety accidents/incidents, and since this obligation may include the responsibility to report on fellow union members, we give our members, all of whom have this responsibility, the following assurances.

WE WILL NOT impose a fine on any employee because he or she reports another employee-member to his or her employer for safety rule infractions, at a time when doing so is part of the work duties of the employee who makes the report.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above, which are guaranteed you by Federal labor law.

WE WILL rescind in full the fine levied against Mark Overton on or about January 20, 2009.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the internal union proceedings against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and WE WILL, within 3 days thereafter, notify Overton in writing that this has been done and that we will not use this matter against him in any way.

WE WILL, within 14 days from the date of the Board's Order, request that the International Union of Operating Engineers purge its records of the proceedings brought against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and WE WILL concurrently furnish Overton with a copy of this request.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 513, AFL-CIO

Rotimi Solanke, Esq., for the General Counsel.
Jeffrey E. Hartnett, Esq. and James F. Faul, Esq. (Bartley Goffstein, LLC), of St. Louis, Missouri, for the Respondent.

Russell Riggan, Esq. (Lewis, Rice & Fingersh, LLC), of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in St. Louis, Missouri, on May 18, 2009. The charge was filed January 21, 2009, and the amended charge was filed March 25, 2009. The complaint issued March 31, 2009. It alleges that the Respondent, International Union of Operating Engineers, Local 513, AFL-CIO, violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by filing an internal union charge against employee Mark Overton, and fining him \$2500 because, in compliance with the collective-bargaining agreement and safety policies in effect, he reported a safety violation by an employee to the employer and thereby engaged in protected concerted activity within Section 7 of the Act.¹

At the conclusion of the General Counsel's case-in-chief, the Union moved to dismiss the complaint on the basis that no prima facie case was presented. The Union presented no evidence in its defense.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Charging Party, a Missouri limited liability company with an office and place of business in St. Louis, Missouri, has been engaged in the construction industry with a construction

¹ All dates are from November 2008 to April 2009 unless otherwise indicated.

jobsite at the Taum Sauk upper reservoir dam in Missouri. During the 12-month period ending February, the Charging Party, in conducting its business operations at the Taum Sauk upper reservoir dam jobsite, purchased and received goods valued in excess of \$50,000 directly from points outside the State of Missouri. The Union admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act and that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Taum Sauk Reservoir Project*

Fred Weber, Inc. (FWI), of St. Louis, Missouri, is a union-affiliated heavy and highway construction company. ASI Constructors, Inc. (ASI), a nonunion dam construction company from Pueblo, Colorado. In 2007, FWI and ASI entered into a joint venture (the Company) for the purpose of reconstructing the Taum Sauk Reservoir in southeast Missouri (the project).

The Taum Sauk Reservoir is a hydroelectric facility containing five operating plants and a large crushing plant.² The Company serves as the project's general contractor. The project has, at times, employed up to 700 people. Roger Gagliano, of FWI, and Lee Schermerhorn, of ASI, serve as the project's construction managers. Gagliano generally handles the personnel and collective-bargaining issues, while Schermerhorn oversees the day-to-day construction operations. Andy Westbrook and Kevin Delo serve as the project's two general superintendents. The project's general superintendents, safety manager, and engineering manager report to Gagliano and Schermerhorn. Leadmen, also known as working foremen, are embedded with work crews on the project.³

The equipment at issue in this controversy involves the telebelt, a heavy piece of construction equipment operated by the project's operating engineers. An attached conveyer belt, spanning approximately 130 feet, transfers materials such as roller-compacted concrete, coarse aggregate, and other materials for the various parts of the project site. The telebelt sits on a truck and is stabilized by four steel legs, called outriggers. The outriggers have to be fully extended on level ground to prevent the telebelt from overturning.⁴

B. *The National Maintenance Agreement*

Since 1971, some form of a National Maintenance Agreement (NMA) has been utilized by labor organizations, management, and owners on construction projects employing members of the International Union of Operating Engineers. Effective April 2, 2007, the Union, the Company and the project's owners adopted the "Revised 1996" version of the NMA as the general collective-bargaining agreement applicable to the operating engineers on the project. The NMA incorporates by refer-

² GC Exh. 3.

³ I found the General Counsel's witnesses—Gagliano, Overton, and Westbrook—to be credible witnesses and nearly all of their testimony went unrefuted. (Tr. 31–38, 40–42, 47–52, 62, 101–102.)

⁴ The testimony of Gagliano and Overton regarding the proper and safe set up of the telebelt was not disputed. (GC Exhs. 7(a), 7(b), and 10; Tr. 45–46, 58–60, 106–108, 125.)

ence the local collective-bargaining agreement previously entered into between FWI and the Union for a 5-year term commencing May 1, 2004. The local collective-bargaining agreement covers work at various Missouri locations, including the project site, and automatically renews for additional 1-year periods until such time as either party provides 60-days' prior notice of termination. Accordingly, union members working on the project are governed by the NMA and local collective-bargaining agreement.⁵

The Union, one of four labor organizations on the project, represents the approximately 200 operating engineers employed there. Approximately 6 of those operating engineers are members of operating engineers' locals specializing in dam construction in other parts of the country and work on the project pursuant a traveler permit. The issue of "travelers" has been a sore topic with the Union, given the fact that travelers are being hired for the project in lieu of unemployed union members.⁶

The NMA recognizes the applicability of the Company's safety rules and regulations at article XVII: "The employees covered by the terms of this Agreement shall at all times while in the employ of the Employer be bound by the safety rules and regulations as established by the Owner, the Employer, this agreement, or by applicable Safety Laws."⁷

C. *The Company's Safety Regulations*

The Company's Safety Orientation check-off sheet (safety orientation) contains a comprehensive list of the safety topics discussed during employee orientation. The safety orientation includes, in pertinent part, the following employee responsibilities:

32. Employees MUST report all accidents/incidents to their supervisor immediately, no matter how slight. This allows us to provide prompt care, and investigate & eliminate hazards that may cause others to be injured.

35. Employees are expected to learn and comply with all project safety rules, regulations and policies applicable to their specific work tasks, as a condition of employment.

The last page of the safety orientation consists of a signed acknowledgement by the employee that he or she participated in the safety orientation during which all of the safety topics were discussed, fully understands all of the Company's safety policies, rules and regulations, and knows where to find the safety manual. Every operating engineer on the project signed the safety orientation acknowledgment sheet. In addition, the Company holds daily meetings onsite to discuss various safety issues. The failure to report a safety violation subjects an employee to discipline.⁸

⁵ GC Exhs. 4–5.

⁶ That the Company was able to employ travelers given the negative views of the Union indicates that otherwise eligible, but unemployed, union members were not previously trained to operate a telebelt. See art. XIX of the NMA and sec. 3.03(C) of the local collective-bargaining agreement. (GC Exh. 4 at p. 11; GC Exh. 5 at p.15; Tr. 35–40, 67–68, 162.)

⁷ GC Exh. 4 at p. 11.

⁸ The safety orientation and the NMA both refer to the Company's safety rules and regulations, but no written proof of such rules or a

D. Overton is Issued a Traveler Permit

Mark Overton, a Colorado resident, has worked as an operating engineer for ASI on dam construction projects in several states. He is a member of the International Union of Operating Engineers, Local 953, AFL-CIO (Local 953), based in Albuquerque, New Mexico. In December 2007, ASI hired Overton to work on the project as a telebelt operator and trainer. As a telebelt operator, Overton receives directives from supervisors on the placement of telebelts on the project site, coordinates the placement and operation of the project's four telebelts, and trains others in the operation of the telebelts.

Upon arriving at the project, Overton applied for union membership by attempting to transfer his membership from Local 953. Given his position on the employment of nonbargaining unit members on the project, Stephen Gunter, the Union's business representative, denied Overton's application on the ground that the hall was "overfull," but issued him a traveler permit to work as an operating engineer at the project site pursuant to the terms of the local collective-bargaining agreement. As such, Overton is paid by Ozark as an hourly employee in accordance with the pay scale set forth in the local collective-bargaining agreement.⁹

E. Overton Becomes a Working Foreman

In September 2008, Overton was promoted to the job classification of a working foreman. In that capacity, he leads a crew of about nine operating engineers and laborers who work with telebelts and pump trucks. Although he has training duties and reports directly to the superintendents, Andy Westbrook and Kevin Delo, Overton does not have supervisory functions or responsibilities, as he does not have the authority to hire, fire, or discipline employees. As such, he remained part of the collective-bargaining unit. In fact, working foreman have filed grievances against the Company and have been represented by the Union in that regard.¹⁰

Prior to November 20, Overton's performance as a working foreman had been relatively uneventful. There were two instances during the summer of 2008 when Pat Kammer, a shop steward and foreman, complained to Overton that laborers were performing the bargaining unit work of operating engineers. However, neither Kammer, nor anyone else, ever complained to the Company about Overton's treatment of bargaining unit members.¹¹ Gunter would have had an opportunity to express

disciplinary policy were offered in evidence. Nevertheless, in the absence of testimony or evidence by the Union to refute the testimony of the General Counsel's witnesses that the Company had such rules in place, I find that they existed. (GC Exhs. 6, 11; Tr. 42-44, 60-61, 108-109, 151-154.)

⁹ Overton's testimony regarding his background and communication with the Union was also credible and unrefuted. (Tr. 98-122.)

¹⁰ I considered, but did not end up giving much weight to Gagliano's reference to Overton as a "working supervisor" in his protestation letter to the Union, dated December 11. Consistent with an evaluation as to an employee's potential supervisory status in these cases, I considered all of the actual functions served by Overton on the project. (GC Exh. 9; Tr. 41-42, 47-48, 52, 74-76, 97, 100-102, 116, 158-159.)

¹¹ Westbrook credibly testified that, except for one comment about how Overton was leading his crew, he never received a complaint about

such concerns during his weekly meetings with Gagliano and Westbrook, as well as the monthly tripartite meetings with them and the project's owners to discuss work, safety, and personnel matters. Yet, he never did at any time prior to March 2009.¹² On the other hand, Overton's status on the project as a traveler has evoked criticism by Gunter and other union representatives and members.¹³

F. The Allison Safety Violation

As he arrived at the project site during the morning of November 20, Overton observed a telebelt with an outrigger that was not fully extended. As a shortened outrigger could cause the telebelt to become unstable and overturn, resulting in serious personal injury or property damage, this condition constituted a safety violation.¹⁴

Being required to report the incident, as explained during safety orientation, Overton immediately went to the office of Jim Andrews, the Company's safety officer. Overton and Andrews then proceeded to the telebelt and measured the outriggers. They found that the fully extended outrigger measured 64 inches, while the shortened outrigger measured only 30 inches. After confirming the safety violation, Overton sought to determine who operated that telebelt. Overton called Steve Newton, a union steward, who reported that Ryan Allison, an operating engineer and union member, was the last one to operate the telebelt. Overton also spoke with Dwayne Wehner, another operating engineer and union member, who reported that he helped Allison set up the telebelt that night.¹⁵

On the same day, Overton reported the safety violation to Westbrook. Westbrook then directed Overton to prepare an incident report, as employees were instructed to do during safety orientation. The failure to report the incident would have subjected Overton to discipline.¹⁶

Overton's treatment of bargaining unit members. While the General Counsel offered two exhibits containing vague statements about Overton's allegedly abusive behavior, the record contains no specific examples of any abusive conduct by Overton. (GC Exhs. 8B and 17; Tr. 63-64, 157, 165-166.) In fact, it was not until March 2009, well after the unfair labor practice charges were filed, that Gunter complained at a tripartite meeting about the alleged mistreatment of bargaining unit members by Overton. (Tr. 66-67, 155-157.)

¹² Despite no mention of problems with Overton, Gunter has filed several grievances and raised other issues with Gagliano. (Tr. 61-66.)

¹³ Although it was conceded that Overton had a "gruff" nature, the lack of union testimony leaves me to rely solely on the testimony of Overton and Westbrook that there were no complaints by the Union or other employees of abusive conduct prior to the filing of the Company's unfair labor practice charge. (Tr. 122-123, 142, 144, 156-157; GC Exh. 10.)

¹⁴ Overton's description of the positioning of the outriggers was not disputed. (Tr. 110-111, 147, 152; GC Exhs. 10, 14.)

¹⁵ Wehner's role in helping Allison set up the telebelt was never clarified. However, coupled with the information he received from both Wehner and Newton, I find that Overton reasonably concluded that Allison was primarily responsible for the telebelt setup. (Tr. 60, 111-116.)

¹⁶ The testimony of Overton and Westbrook that any employee would have been required to report the safety violation was credible, corroborated by item 32 of the safety orientation and not refuted by any other evidence. (Tr. 60-61, 115-116, 151-152.)

After confirming the incident with the safety department, Westbrook issued a letter, dated November 20, suspending Allison for 3 days on the following ground:

During the set up of the equipment, you failed to follow established safety instructions by not having the outriggers of the equipment fully extended. It is the responsibility of each operator to operate his or her equipment in a safe and conscientious manner. Your failure to follow established protocols could have resulted in serious injury to one of your coworkers as well as extensive damage to the equipment.

The suspension letter was copied to Gagliano and Kemmer, and faxed to Gunter on November 21. Allison did not grieve the discipline and served a 3-day suspension from November 21 to 23.

G. The Union Retaliates Against Overton

Upon receiving the suspension letter on November 21, Kemmer faxed a copy of it to Gunter. The next business day, November 24, Gunter filed internal union charges against Overton for "violation of Article XXI, Section 21:01, subdivision (F) Gross disloyalty or conduct unbecoming a member". The charge further stated, in pertinent part:

Mark Overton wrote up Ryan Alliso for failing to have an outrigger fully extended on the telebelt, when he had already been informed that Duane Wehner was the operator who had failed to fully extend the outrigger.

The above isn't the first incident of Mark Overton being adversarial with Local 513 operators. There has been an ongoing problem with him screaming at and speaking in an abusive manner to his brother operators, which he has been warned about repeatedly. Also, numerous operators have run the telebelt for an extended period of time and he eventually finds a way to get rid of them.

It appears that Mark Overton has been dissatisfied with working in Local 513's jurisdiction ever since he was informed, some months ago, that he wouldn't be allowed to bring his buddies in from other states to run the telebelts, but instead he would have to train Local 513 operators on them. This is no way justifies Mark Overton's misconduct and behavior.¹⁷

By letter dated the same day, Dan McNamee, the Union's recording secretary, provided Overton with a copy of the union charges and informed Overton of his right to respond in writing to the charges within 3 weeks of receipt of the letter. McNamee's letter further informed Overton of the Union's procedural process:

You will be required to appear before the Executive Board, at a later date, at which time a pre-trial hearing will be held to determine if the charges have merit, and in hopes that the charges may be resolved at this pre-trial hearing.

You will be notified of the time and place of when the next Executive Board meeting will be held.

Failure to appear at this pre-trial hearing or to notify us in time of a reason why cannot appear on the scheduled date may convince the Board of your guilt, and will obligate the Board to forward the charges to the membership for consideration and a vote as to your guilt [or] innocence of the charges.^[18]

Overton provided Gagliano with a copy of the Union's charges. Gagliano responded with a letter to McNamee, dated December 11, with copies to Dick Dickens, the Union's president, and Gunter. In his letter, Gagliano disputed the charges by questioning why the Union did not comply with the NMA's dispute resolution procedures or file a grievance challenging the discipline. He also noted that the Union made no previous mention of abusive treatment of its members by Overton at any project meetings, suggested that the union charges were an attempt to intimidate the working foremen on the project, and demanded the Union withdraw the charges.¹⁹

The Union did not respond to Gagliano's letter. Instead, McNamee sent Overton a letter, dated January 6, 2009, informing him that the Union would proceed to the next step at its January 20 executive board meeting:

You are requested to appear before this meeting at which time the charges that have been filed against you will be reviewed and a pretrial held, so that we may determine if the charge has merit to present to the entire membership at the next regular meeting.

Failure to appear before the meeting may convince the board of your guilt, and will then recommend that the charges be presented to the entire membership to vote and decide you're your guilt or innocence.^[20]

Overton did not attend the Union's executive board meeting on January 20. The minutes reflect that "[m]erit was found in charges and a fine of \$2500 was recommended if he wishes to not go to trial by the membership."²¹ However, McNamee's letter on behalf of the Union, dated January 26, indicated, in pertinent part, that it was more than a recommendation:

This letter is to inform you that merit was found in the charges of November 24, 2008 and a fine of \$2,500.00 was levied against you.

If you wish not to accept this fine, you also have a right to trial at the next Local Union Meeting. Please notify me immediately so I know whether to set up a trial at the next Local Meeting.

It is also my duty to inform you that you have a right to file an appeal with the General Executive Board in

¹⁸ Again, while Overton learned that Wehner had a role in helping Allison set up the telebelt, Allison did not grieve his suspension and, as such, took full responsibility for the safety violation. Given that documentary background, Overton's credible testimony and the lack of any testimony by Allison or Wehner, I find that Overton reasonably believed that Allison either had primary or sole responsibility for setting up the telebelt. (GC Exh. 8A; Tr. 116-117.)

¹⁹ GC Exh. 9.

²⁰ GC Exh. 12.

²¹ GC Exh. 16.

¹⁷ GC Exh. 8B.

Washington, D.C., but before you may appeal, you must first have paid the fine, in accordance with Article XXIV, Subdivision 7, Section (f) of the International Constitution.^[22]

On January 21, 2009, the Company responded by filing an unfair labor practice charge against the Union. The Company's amended charge (GC Exh. 1(d)) alleged the Union

[R]estrained and coerced employees of Ozark Constructors, LLC in the exercise of rights guaranteed to them in Section 7 of the Act, as amended by filing internal union charges and assessing a \$2,500 fine against employee Mark R. Overton in retaliation for reporting to his employer a violation of safety standards.^[23]

In its March 2 position statement responding the charges, the Union insisted that its internal charges against Overton were not related to the Allison discipline. It states, in pertinent part:

[T]he charges against Mr. Overton were based upon his abusive treatment of fellow members. The Board refused to consider matters relating to safety. Overton was found guilty of verbal abuse of fellow members, conduct of which the company had been made aware on numerous occasions by several individuals.

As to Ryan Allison, Overton was told by another member at the time of the incident that it was that member, not Allison, who committed the purported safety violation. Overton told the member that he was going to charge the violation to Allison anyway. This was simply another incident of Mr. Overton being abusive to fellow members. His conduct toward Allison is not "employment" related, but an abuse of a fellow member.^[24]

Legal Analysis and Discussion

Section 8(b)(1)(A) of the Act recognizes the right of a labor organization to "prescribe its own rules with respect to the acquisition or retention of membership therein." In that regard, the Board has consistently held that a union has a legitimate interest in promoting harmony within its ranks and may lawfully seek to protect this interest by imposing internal union discipline pursuant to a properly adopted rule prohibiting members from reporting misconduct by fellow members to their employer. *Communications Workers Local 5795 (Western Electric Co.)*, 192 NLRB 556 (1971); *Letter Carriers Local 3825*, 333 NLRB 343, 345 fn. 4 (2001); *Letter Carriers (Postal Service)*, 316 NLRB 1294, 1303–1304 (1995); *Electrical Workers Local 1547 (Redi Electric)*, 300 NLRB 604, 607 (1990).

Such a right is limited, however, to the extent that the discipline affects a member's employment status. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967). In *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), the Supreme Court subsequently refined that test to a determination as to whether the

union discipline or rule: (1) is geared to a legitimate union interest; (2) impairs no policy imbedded in the labor laws; and (3) is reasonably enforced against a union member who is free to leave the union. In both cases, employees had been fined by a union when they engaged in concerted activities.

More recently, in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418–1419 (2000), the Board articulated its latest approach for reviewing the propriety of union discipline under Section 8(b)(1)(A):

[W]e find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act.

In determining whether an internal union rule is geared to a legitimate union interest or affects a member's employment status, the Board must determine whether enforcement of the rule has an external effect and, thus, tends to restrain or coerce employees in the exercise of their Section 7 rights. Circumstances of union discipline that have an unlawful external effect fall into two areas. The first includes instances where union members make statements pursuant to the grievance process. *Cement Workers D-357 (Southwestern Portland Cement)*, 288 NLRB 1156 (1988). The other instance, applicable here, is where an employee is required by his employer to report certain information that contravenes the interests of the union or its members. *Oil Workers Local 7-103 (DAP, Inc.)*, 269 NLRB 129, 130–131 (1984). The reason that union discipline would unlawfully coerce or restrain in the latter instance is because it would affect the union member's employment status. See *Scofield v. NLRB*, supra at 428; *NLRB v. Allis-Chalmers Mfg. Co.*, supra at 195. Accordingly, the Board has typically held that a union commits an unfair labor practice if it disciplines a member who reports a work rule infraction by a co-employee to his employer when that member is required to do so by his employer. See *Shipbuilders Local 9 (Todd Pacific)*, 279 NLRB 617 (1986); *Carpenters (Hopeman Bros.)*, 272 NLRB 584 (1984); *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977), enfd. 588 F.2d 838 (7th Cir. 1978).

It is undisputed that Overton reported a safety violation by another employee-member, which he was required to do pursuant to the Company's safety rules and the NMA that incorporated them as part of employees' terms and conditions of employment. Overton's failure to report the incident could have resulted in his discipline and, thus, affected the employer relationship. Moreover, it is reasonable to expect that Overton's failure to act on a safety violation, which could have resulted in serious personal injury or death, would have contravened the NMA, as well as numerous Federal and State labor laws involving worker safety. Lastly, Overton was faced with the classic Hobson's choice, since he was required by the NMA to be a member of the Union—albeit under the status of a permitted "traveler"—and, thus, was not reasonably free to simply "leave" the Union and remain employed on the project.

²² GC Exh. 13; Tr. 119–121.

²³ GC Exh. 1(a), (d).

²⁴ The Union essentially reiterated this position at trial. (GC Exh. 17; Tr. 89.)

Overton's Section 7 Activities

The Union contends that Overton was not engaged in concerted activity because he acted alone in reporting Allison's safety violation. The Union's strict construction of the statute is certainly consistent with the Supreme Court's decision in *Meyers Industries*, 268 NLRB 493, 497 (1984), which clarified that, generally, "concerted" activity consisted of an employee's activity engaged with or on the authority of other employees, and not solely by and on behalf of the employee. Such interpretation, however, does not reflect the evolution of court and Board decisions providing Section 8(b)(1)(A) with a much broader scope than those analyzed under Section 8(a)(1). See *Elevator Constructors (Otis Elevator Co.)*, 349 NLRB 583, 596-597 (2007) (employee-member's conduct in following supervisor's direction to stand aside while subcontractor's employee performed bargaining unit work considered Sec. 7 activity); *Teamsters Local 439 (University of the Pacific)*, 324 NLRB 1096 (1997), *enfd.* 175 F.3d 1173 (9th Cir. 1999) (newly appointed leadman-member engaged in concerted activity by reporting, as required, nonperformance of fellow union member); *Chemical Workers Local 604 (Essex International)*, above; employee-member engaged in concerted activity by reporting, as required, fellow member's work rule violation). *Communications Workers Local 13000 (Verizon Communications)*, 340 NLRB 18 (2003) (potential disobedience by an employee-member of union rule requiring members to refuse "mandatory" overtime).

An employee who complies with an employer's rule to report coemployee misconduct is deemed to engage in concerted activity within the context of Section 8(b)(1)(A) because Section 7 also gives employees "the right to refrain from any or all such activities" by refusing to join with other employees who wished to ignore the employer's outstanding orders. Even where nonsupervisory leadmen act alone, the Board has broadly interpreted Section 8(b)(1)(A) if compliance with the Union's actions or mandate would affect the employee-member's employment status. See *Teamsters Local 439*, *supra* at fn. 1, and *Carpenters (Hopeman Bros.)*, above. Under the circumstances, Overton was engaged in Section 7 activity when he reported, as required, Allison's safety violation.

Overton's Discipline

The Union contends that the General Counsel failed to establish a prima facie case by offering testimony that a fine was actually imposed on Overton. It also argues that, without such testimony, the documentary evidence merely establishes that a fine was merely recommended and not imposed. This defense is unfounded in two respects.

First, the actual imposition of union discipline is not required in order to find a violation of Section 8(b)(1)(A). A union's mere threat of internal discipline violates an employee-member's Section 7 rights where: (1) it reasonably tends to restrain or coerce members from exercising their Section 7 rights to complain concertedly to management about safety violations, including those committed by a fellow member; or (2) reasonably would compel union members to act in contravention of a collective-bargaining agreement. See *Anheuser-Busch, Inc.*, 339 NLRB 769 (2003); *Stationary Engineers Local*

39 (San Jose Hospital), 240 NLRB 1122 (1979). Clearly, the internal Union charges served on Overton conveyed the message that any he needed to refrain from exercising his Section 7 rights in the future by not reporting, as required, coworker safety violations. Moreover, by failing or refusing to report the safety violation in contravention of the Company's safety rules, he would have been violating the provisions of the applicable labor agreements.

In any event, notwithstanding counsel's contentions, the record evidence demonstrates that Overton was tried and issued a fine on January 20 because he reported a safety violation by another union member. While I indeed sustained a form objection when Overton was asked about the fine,²⁵ the undisputed record evidence reveals that, on January 20, the Union's executive board pronounced that "merit was found in the charges and a fine of \$2500 was levied against [Overton]."²⁶ It is true that the fine was merely a recommendation, but the testimony of Overton establishes that he took no further action to appeal the action. By its terms, the letter clearly indicated that the "levied" fine certainly did not go away.

The Position Statement

The General Counsel's offered the position statement as evidence of the Union's reason for engaging in conduct violative of Section 8(b)(1)(A). The Union objected that it was irrelevant and merely sets forth the Union's generalized statement of position. I overruled the objection and received the position statement in evidence in accordance with longstanding Board law. The Union, having lost that argument, advances the novel argument that, based upon its position statement, "standing without comment, and supported by the record in the General Counsel's case, the General Counsel has failed to carry its burden. The charge must be dismissed."²⁷

Position statements are frequently received as evidence in Board cases as admissions against interest if those assertions conflict with the party's current litigation position or the testimony of the party's witness. *Union-Tribune Publishing Co.*, 353 NLRB No. 2 slip op. at 13 (2008); *Jerry Ryce Builders*, 352 NLRB 1262, 1264 fn. 6 (2008); *Evergreen America Corp.*, 348 NLRB 178, 187-188 (2006); *Rogers Corp.*, 344 NLRB 504 (2005); *United Scrap Metal, Inc.*, 344 NLRB 467, 468 (2005); *Smucker Co.*, 341 NLRB 35, 40 (2004); *Tarmac America, Inc.*, 342 NLRB 1049, 1049 fn. 2 (2004); *Navigator Communications Systems*, 331 NLRB 1056, 1058 fn 10 (2000); *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998).

The fact that the Union did not call any witnesses, while the position statement was offered on the General Counsel's case, presents an interesting issue. The position statement alleges, in essence, that the Union brought charges against Overton because of his abusive conduct toward fellow union members and that the safety violation report was the last straw in that sequence of events. The General Counsel offers as relevant evidence only that portion of the position statement that asserts that the Union charges Overton because he reported Allison.

²⁵ Tr. 121.

²⁶ GC Exh. 16.

²⁷ U. Br. at 17.

The Union, on the other hand, suggests that the portion of the position statement alleging abusive behavior by Overton is somehow fatal to the General Counsel's prima facie case.

I tend to agree with the General Counsel on this point. The position statement contained an admission by the Union that, at least in part, explains that its motivation for charging Overton was due to his reporting Allison's safety violation. Such an allegation corroborates the testimony of the General Counsel's witnesses. While it also contains allegations that the General Counsel denies, the fact is that the General Counsel did not offer the document for that purpose. The position statement thus contains a mixed bag of allegations—some favorable to the General Counsel and some not. Contrary to the Union's assertions, however, the portions of the position statement that are unfavorable to the General Counsel's case did not go undenied, uncontradicted, or unimpeached. The record contains credible and unrefuted testimony by Overton, Gagliano, and Westbrook that there were no complaints by the Union or other employee-members about abusive treatment by Overton. Accordingly, I disagree with the Union's contention that its position statement defeats the General Counsel's prima facie case. Under the circumstances, the Company's actions constituted a violation of Section 8(b)(1)(A).

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. At all material times, the Union was the exclusive bargaining representative within the meaning of Section 9(a) of the Act of the Company's employees, including the operating engineers.
4. By the fine levied against him on or about January 20, 2009, the Union restrained and coerced Mark Overton and other similarly situated employees within the meaning of Section 8(b)(1)(A) of the Act.

REMEDY

Having found the Union engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the purposes of the Act. Thus, my recommended Order requires that the Union rescind the fine it levied against Mark Overton on January 20, 2009. Moreover, the Union is required to remove from its records any reference to the internal proceedings against Overton which are the subject of this case and notify Overton in writing that this action has been taken and that this matter will not be considered in any future proceedings. The Union is also required to request that the International Union of Operating Engineers purge its records of this matter and furnish Overton with a copy of that request. Finally, the Union is required to post official notices to members concerning this matter and to provide signed copies of that notice to the Company for posting if it so desires.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

ORDER

The Union, International Union of Operating Engineers, Local 513, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from
 - (a) Imposing a fine on any employee because he or she reports another employee-member to his or her employer for work rule infractions, at a time when it is part of the work duties of the employee who makes the report to do so.
 - (b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.
 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Rescind in full the fine levied against Mark Overton on or about January 20, 2009,
 - (b) Within 14 days from the date of this Order, remove from its files any and all references to the internal union proceedings against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and within 3 days thereafter notify Overton in writing that it has done so and that it will not use this matter against him in any way.
 - (c) Within 14 days from the date of this Order, request that the International Union of Operating Engineers purge its records of the proceedings brought against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and concurrently furnish Overton with a copy of this request.
 - (d) Within 14 days after service by the Region, post at its office in St. Louis, Missouri, and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix."²⁹ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Union's authorized representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.
 - (e) Sign and return to the Regional Director sufficient copies of the notice for posting by the Company, if willing, at all places where its notices to employees are customarily posted.
 - (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the

²⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Union has taken to comply.

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of

the Act.

WE WILL NOT impose a fine against an employee-member because he or she reports another employee-member to his or her employer for work rule infractions, at a time when the employee-member's work duties require such reports.

WE WILL fully rescind the fine levied against Mark Overton on or about January 20, 2009.

WE WILL, within 14 days from the date of this Order, remove from our files any, and ask the Company to remove from the Company's files, all references to the internal union proceedings against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and within 3 days thereafter notify the employee it has been done.

WE WILL, within 14 days from the date of this Order, request that the International Union of Operating Engineers purge its records of the proceedings brought against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and WE WILL furnish Overton with a copy of this request.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 513, AFL-CIO