No. 09-2550

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID WILLIAMSON, III

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of David Williamson, III ("Williamson"), to review a Decision and Order issued by the National Labor Relations Board ("the Board") on January 30, 2009, and reported at 353 NLRB

No. 85. (JA 5-7.)[1] In its Decision and Order, the Board dismissed an unfair-labor-practice complaint against Local 324, International Union of Operating Engineers, AFL-CIO ("Local 324" or "the Union"). The Board specifically found that the Union did not violate Section 8(b)(1)(A) and (B) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(b)(1)(A) and (B)) ("the Act") by expelling Williamson from membership in the Union. (JA 5-7, 11-12.) In the present proceeding, the Union has intervened on the side of the Board, and Williamson has challenged only the Board's dismissal of the Section 8(b)(1)(B) complaint allegation.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)). This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), because the events giving rise to the unfair-labor-practice complaint occurred in Livonia, Michigan, and the Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).[2] (*See* JA 5 n.1.)

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[1] Record references are to the Joint Appendix ("JA") filed by Williamson, with all leading zeros in the page numbers omitted. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to Williamson's opening brief.

[2] The First, Second, Fourth, Seventh, and Tenth Circuits have upheld the issuance of decisions by the same two-member quorum. *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S.

The petition for review was filed on December 7, 2009. This filing was timely, as the Act places no time limit on the institution of proceedings to review Board orders.

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board had a rational basis for concluding that the Union did not violate Section 8(b)(1)(B) of the Act by expelling Williamson from its membership.

Aug. 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 488 (Nov. 2, 2009); *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). The Supreme Court heard oral argument in *New Process Steel* on March 23, 2010. The issue has been briefed to this Court in *SPE Utility Contractors, LLC v. NLRB*, Nos. 09-1692 and 09-1730, and *NLRB v. Hartford Head Start Agency, Inc.*, Nos. 09-1741 and 09-1764.

STATEMENT OF THE CASE

Acting on unfair-labor-practice charges (JA 289, 291, 293) filed by Williamson, the Board's General Counsel issued a complaint alleging that the Union violated Section 8(b)(1)(A) and (B) of the Act by terminating Williamson's union membership because of his activities as a labor consultant/project developer for his employer, Hydro Excavating, LLC ("the Company"). (JA 297-300.) Following a hearing, an administrative law judge issued a decision and recommended order dismissing the complaint allegation that the Union had violated Section 8(b)(1)(A) of the Act by its conduct against Williamson. (JA 11-12.) However, the judge found that the Union had violated Section 8(b)(1)(B) of the Act, as alleged. (JA 12-13.)

On January 30, 2009, after considering the exceptions filed by the parties, the Board issued a decision adopting the judge's dismissal of the Section 8(b)(1)(A) allegation, but reversing the judge's findings in regard to the Section 8(b)(1)(B) allegation. (JA 5-7.) The Board found, contrary to the judge, that Williamson's activities as a labor consultant/project developer did not fall within the scope of conduct covered by Section 8(b)(1)(B) of the Act, and therefore that the Union's expulsion of Williamson for those activities could not give rise to a Section 8(b)(1)(B) violation. (JA 7.) The Board accordingly dismissed the complaint in its entirety. *Id.*

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: Williamson's Membership in Local 324; the International Constitution's Prohibition of Member Conduct that "Creates Dissension" or "Destroys the Interest and Harmony of the Local Union"

David Williamson became a member of Local 324 in 1979 and thereafter served the Union in various official capacities, including as its business representative for 11 years. (JA 8; 205-06.) Although Williamson was removed from that position in 2004 following his conviction of a felony, he continued to enjoy the benefits of union membership, gaining employment with several employers that had working relationships with Local 324. (JA 8; 207-08, 259.)

Williamson's long experience with Local 324 afforded him some familiarity with the Union's rules and the circumstances in which the Union could discipline, and even expel, its members. (JA 229.) In particular, the Constitution of the International Union of Operating Engineers, AFL-CIO ("the International Union"), Article XXIV(7)(e), provides that:

> "[a]ny officer or member of a Local Union . . . who creates dissension among the members . . . [or] who destroys the interest and harmony of the Local Union . . . may be disciplined or, upon trial therefor and conviction thereof, be fined, suspended or expelled from his Local Union."

(JA 9 n.2; 310.)

B. Williamson Takes a Position as a Project Developer and Labor Consultant for the Company, a Newly-Created Entity Engaged in Work To Which Local 324 Has a Claim; Williamson Contacts Various Unions To Introduce the Company, and To Gather Information About Potential Labor Contracts for the Company's Owner, But He Does Not Contact Local 324

In August 2005, Company Owner Todd Chartier hired Williamson to serve as a project developer and labor consultant for the Company, a start-up enterprise that would use a new technology known as hydro-excavating to remove soil from the ground through water pressure. (JA 5 & n.5; 155.) The Union had represented employees involved in similar types of excavation work. (JA 8; 183-84, 352.) In addition, during the relevant time period, the Union was the collective-bargaining representative of employees in several other construction companies owned by the Chartier family. (JA 8; 179.)

Williamson's role as a project developer and labor consultant for the Company was to drum up business, and to gather certain information for Chartier. (JA 5, 7; 156-58, 209.) Specifically, Williamson was charged with investigating which unions would be interested in representing the Company's employees and what those unions would demand in terms of employee compensation. (JA 5, 7; 156-58, 170-72, 209-10, 213.) Williamson understood that Chartier needed this information in order to "comparison-shop" for the most cost-effective labor agreement. (JA 5; 157-58, 209-10.) Williamson also understood, however, that he

was not authorized to negotiate with the unions for better contract terms, to offer or accept any contract proposals, or to bind the Company in any way. (JA 7; 157-58, 160-61, 209-10, 212, 215, 237, 240-41, 264, 318.)

Williamson thus contacted several unions during the fall of 2005, with a view to simply gathering comparative information and reporting it to Chartier. (JA 5-7; 209-12.) Williamson contacted Laborers' Local Union 1191 ("the Laborers") first, and asked Business Representative Bruce Ruedisueli whether the Laborers were interested in the kind of work that the Company would be doing. (JA 5; 211.) Ruedisueli answered in the affirmative and volunteered that the Laborers could represent all of the various employees involved in the Company's work, under a "wall-to-wall" agreement. (JA 5; 212.) Ruedisueli offered Williamson an existing Laborers collective-bargaining agreement as a template for wage rates and fringe benefits, which Williamson passed along to Chartier. (JA 5; 213.) However, just as Ruedisueli was communicating with Williamson over the remaining potential contract terms, Ruedisueli's boss instructed him to leave the matter alone because the work at issue belonged to the Operating Engineers (i.e., the Union herein). (JA 5; 200-01, 352.)

Williamson thereafter contacted the Michigan Regional Conference of Carpenters ("the Carpenters"), and spoke to Secretary/Treasurer Ralph Mayberry. (JA 5; 213.) As with Ruedisueli, Williamson asked Mayberry if the Carpenters

would be interested in the Company's hydro-excavating work. (JA 5; 213-14.) Mayberry said yes, and he suggested that the parties could use the Carpenters' residential rates. (JA 5; 214.) Mayberry subsequently faxed a copy of the residential rates to Chartier. *Id*.

Williamson also contacted Millwrights Local 1102 ("the Millwrights"), and spoke with Secretary/Director Doug Buckler. (JA 5; 137, 214.) Again, Williamson explained the Company's work and asked if the Millwrights would be interested in it. (JA 5; 215.) Buckler, like the others, said yes. (JA 137-38, 140-41, 195, 215.) From a business-development standpoint, Buckler also indicated that he could help the Company secure work at area power plants. (JA 5-6; 138, 215-16.) In an effort to get the Company on the relevant bid lists for power-plant work, Buckler offered to provide, and did provide, a letter-of-intent stating that the Company and the Millwrights were exploring a collective-bargaining agreement. (JA 5-6; 138-39, 215-17.) Williamson did not solicit this letter-of-intent, nor did he negotiate over its contents. *Id*. The letter, moreover, did not create a contract of any kind between the Company and the Millwrights. (JA 6; 139.)

In each of the communications described above, Williamson made clear to the union representatives that he could only gather information for Chartier, and that Chartier would have to make any decisions regarding an actual collective-bargaining agreement. (JA 7; 144, 212, 215, 237.) True to this representation,

Williamson met with Chartier on a regular basis to pass along the information he had gathered, and to give Chartier the option of following up. (JA 6; 159-61, 217-18.)

While reaching out to the various unions above, Williamson never contacted Local 324 to discuss the Company's work or to inquire about its interest in that work. (JA 210-11, 285.)

C. Local 324 Learns of Williamson's Information-Gathering Activities and, Perceiving Them as Undercutting the Union, Files Charges Against Him Under the International Constitution; Local 324 Votes To Expel Williamson for Urging Other Unions To Claim the Company's Work

By mid-November 2005, Local 324's Business Manager, John Hamilton, had received several complaints from union members about Williamson's exploratory conversations with other unions. (JA 10; 191.) Hamilton initiated an investigation of the matter and thereafter received confirmation that Williamson had, indeed, contacted other unions to solicit interest in the Company's work. (JA 10; 191-95.) Specifically, Hamilton received a letter from the Laborers, dated November 8, 2008, confirming that "Business Representative Bruce Ruedisueli of Laborers' Local 1191 was contacted by Dave Williamson . . . regarding a contract for the operation of hydro-excavators." (JA 10; 192-93, 352.) The letter concluded that "[h]ydro-excavators are the work of the Operating Engineers [Local 324]," and gave assurances that the Laborers would not claim such work. *Id.*

Hamilton received similar information from Doug Buckler, of the Millwrights, that Williamson had contacted the Millwrights regarding the Company's hydro-excavation work. (JA 9-10; 140-41, 194-95.) Buckler said that the Millwrights would be interested in sharing the work in question with Local 324. (JA 9-10; 140-41.)

Based on the above information, Hamilton filed internal union charges against Williamson for attempting to give away work within Local 324's traditional jurisdiction. (JA 6; 308-09.) Specifically, the charges accused Williamson of violating Article XXIV(7)(e) of the International's Constitution by "urging other unions to execute labor agreements" with the Company, and soliciting them to "claim work falling within the traditional jurisdiction of [Local 324]." (JA 6; 309.) On December 14, 2005, following a trial on the charges, the membership of Local 324 voted to fine Williamson and expel him from membership.[3] (JA 6; 315.)

Despite the internal union proceedings against him, Williamson continued his work for the Company without incident. (JA 9; 184, 274-76.) In early 2006, after Local 324 had already voted to expel Williamson, the Company began

[3] Williamson appealed this disciplinary decision to Local 324's parent organization, the International Union. (JA 6; 317-19.) His expulsion was stayed while his appeal was pending in the first half of 2006. (JA 6; 316.) When Williamson ultimately lost his appeal, on July 21, 2006, the expulsion took effect. (JA 321.)

collective-bargaining negotiations with Local 324. (JA 6; 184, 238-39, 275.) At that point, which was after his expulsion for making initial contacts with other unions in 2005, Williamson served on the Company's bargaining committee. (JA 6; 162, 184-85, 230, 275.) Local 324 did not object to his participation in the negotiations or otherwise interfere with his performance of the bargaining duties assigned to him by the Company. (JA 9-10; 185, 275-76.) Williamson ultimately was laid off by the Company in the normal course of business, in late 2006, due to a lack of work. (JA 9; 235.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found (JA 5, 7) that Local 324 did not violate Section 8(b)(1)(A) and (B) of the Act (29 U.S.C. § 158(b)(1)(A) and (B)) by expelling Williamson from its membership. The Board adopted (JA 5) the administrative law judge's reasoning that the Union's expulsion of Williamson did not violate Section 8(b)(1)(A) of the Act because the Union acted out of legitimate concern regarding its work jurisdiction, and there was no countervailing adverse impact on Williamson's employment. (JA 5, 12.) Contrary to the judge, however, the Board found (JA 5, 6-7) that the Union also did not violate Section 8(b)(1)(B) of the Act because the Union's decision to expel Williamson did not follow from any activities in which Williamson was engaged as an employer "representative"

within the meaning of Section 8(b)(1)(B) of the Act.[4] The Board accordingly dismissed the complaint against the Union in its entirety. (JA 7.)

SUMMARY OF ARGUMENT

The Board reasonably found (JA 5, 7) that the Union did not violate Section 8(b)(1)(B) of the Act (29 U.S.C. §158(b)(1)(B)) by expelling Williamson from its membership because of his activities as a project developer and labor consultant for the Company. Section 8(b)(1)(B) of the Act prohibits a union from restraining or coercing an employer "in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances." Interpreting this statutory language, the Supreme Court has long recognized that union discipline does not run afoul of Section 8(b)(1)(B) unless the disciplined union member was "actually engaging" in "collective bargaining, grievance adjustment, or some other closely related activity" on behalf of the employer, and was disciplined for those activities. *NLRB v. Electrical Workers*, 481 U.S. 573, 583 n.5, 586-87 (1987) ("*Royal Electric*") (internal quotation marks omitted).

In the present case, substantial evidence supports the Board's finding (JA 5, 7) that Williamson was not the Company's Section 8(b)(1)(B) representative

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[4] The Board assumed (JA 5 n.3), for purposes of its decision, that the General Counsel's allegation of a Section 8(b)(1)(B) violation was closely related to a timely filed unfair-labor-practice charge, as required under Section 10(b) of the Act (29 U.S.C. § 160(b)).

because he did not perform any of the covered activities during the relevant time period. Accordingly, as the Board reasonably found (JA 5, 7), the Union did not violate Section 8(b)(1)(B) by disciplining Williamson. Rather, as the Board found (JA 6-7), the Union voted to expel him solely for his conduct as a labor consultant for the Company in 2005, which consisted of nothing more than the preliminary activity of gathering information from local unions and passing it along to Company Owner Chartier for further consideration. Because Williamson's duties did not extend to collective bargaining, grievance adjustment, or other closely related activities, the Board properly found (JA 7) that Williamson was not the Company's Section 8(b)(1)(B) representative, and therefore that the Union's vote to expel him was not coercive of the employer rights guaranteed by Section 8(b)(1)(B) of the Act.

On review, Williamson fails to identify even a single case in which an individual was deemed a Section 8(b)(1)(B) representative where, as here, his duties were limited to information-gathering. Moreover, the record does not support Williamson's assertion (Br. 16-19, 21-22, 24-25) that his labor-consultant duties in 2005 extended beyond information-gathering to encompass statutorily-covered functions. Having come up short in terms of the law and the evidence related to his 2005 labor-consultant activities, Williamson emphasizes (Br. 22-23, 25) that he did ultimately perform statutorily covered functions in 2006, as a

member of the Company's collective-bargaining committee. However, Williamson's actions in 2006—after the Union had already voted to expel him—are irrelevant, as the Union undisputedly did not discipline him for those later actions. The Court should therefore deny Williamson's petition for review and uphold the Board's dismissal of the Section 8(b)(1)(B) complaint allegation.

ARGUMENT

THE BOARD HAD A RATIONAL BASIS FOR CONCLUDING THAT THE UNION DID NOT VIOLATE SECTION 8(b)(1)(B) OF THE ACT BY EXPELLING WILLIAMSON FROM ITS MEMBERSHIP

A. Overview of Uncontested and Contested Issues; Standard of Review

The issue before this Court is extremely limited. In his opening brief, Williamson does not challenge the Board's finding (JA 5) that the Union did not violate Section 8(b)(1)(A) of the Act by expelling him from its membership. Accordingly, Williamson has abandoned any right to object to the Board's dismissal of that unfair-labor-practice complaint allegation. *Conley v. NLRB*, 520 F.3d 629 (6th Cir. 2008) (employer waived appellate challenge to Board findings not argued in its opening brief); *NLRB v. Valley Plaza, Inc.*, 715 F.2d 237, 240-42 (6th Cir. 1983) (same). This leaves for review only Williamson's challenge to the Board's dismissal (JA 5, 7) of the remaining complaint allegation, that his expulsion violated Section 8(b)(1)(B) of the Act.

However, "[w]here the Board has found no violation and dismissed the unfair labor practices complaint, that finding 'must be upheld unless it has no rational basis' or is 'irrational or unsupported by substantial evidence.'" *United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992) (quoting *United Mine Workers of Am., Dist. 31 v. NLRB*, 879 F.2d 939, 942 (D.C. Cir. 1989)). In short, to sustain the Board's decision, the reviewing court need not agree that the Board reached the best outcome. *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). Moreover, the standard of review is not modified in any way where, as here, the Board disagrees with the administrative law judge as to legal issues or inferences derived from the evidence. *Id.*; *accord Exum v. NLRB*, 546 F.3d 719, 724-25 (6th Cir. 2008).

In the present case, the Board reasonably found (JA 6-7), consistent with well-settled legal principles, that the Union's expulsion of Williamson was not coercive of the management rights guaranteed by Section 8(b)(1)(B) of the Act, because the expulsion was not directed at any activities in which Williamson engaged as a management representative under Section 8(b)(1)(B) of the Act. Specifically, substantial evidence supports the Board's finding (JA 6-7) that the Union expelled Williamson solely for his labor-consultant activities in 2005, and that those activities did not fall within any function covered by Section 8(b)(1)(B) (i.e., collective bargaining, grievance adjustment, or other closely related activity).

The Board therefore reasonably dismissed the Section 8(b)(1)(B) complaint allegation.

B. Under Section 8(b)(1)(B) of the Act, a Union Does Not Restrain or Coerce an Employer in the Selection of Its Bargaining Representative by Disciplining a Member for Conduct that Does Not Constitute Collective Bargaining, Grievance Adjustment, or Other Closely Related Activities on the Employer's Behalf

Section 8(b)(1)(B) of the Act (29 U.S.C. § 158(b)(1)(B)) makes it an unfair labor practice for a union "to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . ." The wording of that section "reveals that it is the employer, not the supervisor-member, who is protected from coercion." *Royal Electric,* 481 U.S. at 594.[5]

The single purpose of Section 8(b)(1)(B) is to protect the integrity of the grievance adjustment and collective-bargaining processes. *Id.* at 595. Congress

[5] The administrative law judge analyzed (JA 12-13) Williamson's activities under *Royal Electric*, a case that addresses unlawful coercion of an employer in the selection or control of *supervisor* representatives, even though Williamson himself was not a supervisor. The Board accepted (JA 6 n.9) the judge's approach, in the absence of relevant exceptions, and did not resolve whether a non-supervisory employee-representative such as Williamson may be the object of coercion under Section 8(b)(1)(B) of the Act. For purposes of this brief, the Board continues to assume that *Royal Electric* and its related precedents are applicable to Williamson's situation, and accordingly treats the Section 8(b)(1)(B) law applicable to "supervisors" and "supervisor-members" as equally applicable to "employee-representatives."

recognized that to permit a union to coerce an employer in the selection of its bargaining or grievance representatives "would create a disincentive" for employers to agree to take part in the collective-bargaining and grievance adjustment activities that public policy favors. *Maritime Overseas Corp. v. NLRB*, 955 F.2d 212, 216 (4th Cir. 1992).

The classic Section 8(b)(1)(B) violation occurs when a union engaged in a long-term bargaining relationship directly pressures the *employer* to influence its choice of bargaining or grievance representatives. *Royal Electric*, 481 U.S. at 580, 591. Indirect pressure on the employer, in the form of union discipline of a supervisor who also is a union member, can also violate Section 8(b)(1)(B), but "only when th[e] discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." *Id*. at 582 (citing *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 804-05 (1974)); *accord Int'l Union of Elevator Constructors (Otis Elevator)*, 349 NLRB 583, 585 (2007). Quite obviously, when a union disciplines a supervisor-member for the manner in which he or she performs grievance adjustment and bargaining duties, the discipline's likely effect is to change the manner in which those duties are performed. *IBEW v. NLRB*, 487 F.2d 1143, 1153-54 (D.C. Cir. 1973), *aff'd sub nom. Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974). Such discipline interferes

with the employer's control over its representatives by effectively forcing the employer to choose between replacing them or facing de facto non-representation by them. *American Broadcasting Cos. v. Writers Guild of America, West, Inc.*, 437 U.S. 411, 423 (1978).

In *Royal Electric*, however, the Supreme Court made clear that not all union discipline violates Section 8(b)(1)(B) of the Act. The Court held that Section 8(b)(1)(B) only forbids discipline that is directed at a member's 8(b)(1)(B) representative activities on behalf of his or her employer—that is, "collective bargaining, grievance adjustment, or some other closely related activity (e.g., contract interpretation [])."[6] *Royal Electric*, 481 U.S. at 586-87. There accordingly can be no violation of Section 8(b)(1)(B) of the Act unless the member was "actually engaging in grievance adjustment, collective bargaining, or related activities," and was disciplined for those activities. *Id*. at 583 n.5 (internal quotation marks and citation omitted). "A mere theoretical connection to those duties . . . is too remote to cause a [S]ection 8(b)(1)(b) violation." *Id*. Thus, the

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[6] In *Royal Electric*, 481 U.S. at 586-87, the Court approved the Board's longstanding view that contract interpretation is an integral part of the collective-bargaining process and is therefore encompassed within the term "collective bargaining" in Section 8(b)(1)(B). *See San Francisco-Oakland Mailers' Union No. 18*, 172 NLRB 2173, 2174 (1968) (finding individuals involved in contract interpretation to be Section 8(b)(1)(B) representatives); *accord Int'l Bhd. of Teamsters, Local No. 507 (Klein News)*, 306 NLRB 118, 120 n.14 (1992) (citing cases).

mere possibility that an individual might at some later date perform duties covered by Section 8(b)(1)(B), and that past discipline might then adversely affect the performance of those duties, "is simply too speculative to support a finding that an employer has been 'restrain[ed] or coerce[ed]' in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." *Id*. at 588-89 (quoting Section 8(b)(1)(B) of the Act). *Accord Carpenters Dist. Council of Dayton (Concourse Constr. Co.)*, 296 NLRB 492, 493 (1989).

Consistent with the Supreme Court's pronouncements in *Royal Electric*, the Board has held that it "may not . . . find a violation of Section 8(b)(1)(B) when the [disciplined member] . . . . was not engaged in the adjustment of grievances or collective bargaining during the incident that led to the discipline." *Elevator Constructors (Otis Elevator)*, 349 NLRB at 585. Rather, "only where the representative is *coerced in performing covered functions* is it presumed that the union's conduct will adversely affect the representative's future performance of 8(b)(1)(B) duties." *Int'l Bhd. of Teamsters, Local No. 507 (Klein News)*, 306 NLRB 118, 120 (1992) (emphasis added). Moreover, the Board must "determine in which capacity the union sought to discipline the individual" (*Writers Guild of America, West, Inc.*, 350 NLRB 393, 400 (2007))—in other words, whether the

discipline was for performing Section 8(b)(1)(B) activities, or for non-covered functions.

In the present case, the Union's discipline of Williamson could not have been for his performance of collective-bargaining duties because, as shown above, the Union and the Company did not have a collective-bargaining relationship when the Union voted to expel him in December 2005. The Union therefore also could not have expelled him for involvement in the interpretation of a collective-bargaining agreement, or for the adjustment of grievances under such an agreement. Accordingly, as the Board appropriately recognized, the only question left for consideration is whether Williamson was engaged in activities so "closely related" to collective bargaining at the relevant time as to make him a Section 8(b)(1)(B) representative vulnerable to coercion under Section 8(b)(1)(B) of the Act. (JA 6-7, citing *Royal Electric*, 481 U.S. at 586.) As shown below, the Board reasonably concluded (JA 5, 7) that Williamson's activities as a project developer and labor consultant were not sufficiently closely related to collective bargaining to make him a Section 8(b)(1)(B) representative, and therefore that the Union did not violate Section 8(b)(1)(B) of the Act by expelling him for the preliminary information-gathering duties that he performed in 2005.

C. The Board Had a Rational Basis for Concluding that the Union Did Not Expel Williamson for Engaging in Any Activities as a Section 8(b)(1)(B) Representative

The Board reasonably concluded (JA 7) that Williamson's activities in 2005—the activities for which Local 324 voted to expel him—were not the activities of an employer-representative within the meaning of Section 8(b)(1)(B) of the Act, and therefore that the General Counsel failed to carry his burden of proving a Section 8(b)(1)(B) violation. The undisputed evidence shows that, in 2005, the Company had no collective-bargaining relationship with any union, nor had the Company even identified the union with whom it intended to bargain. As a result, the Board was well warranted in finding that "Williamson plainly was not involved in collective bargaining or the adjustment of grievances," or any activities related to the interpretation or application of an existing collective-bargaining agreement. (JA 6; 156-57, 263.)

The Board further reasonably found (JA 7) that Williamson's functions as a project developer and labor consultant during the relevant time period were not sufficiently closely related to collective bargaining to come within *Royal Electric*'s definition of Section 8(b)(1)(B) activities. Rather, as the Board correctly noted (JA 7), his duties "extended only to investigation, not negotiation." By Williamson's own account, in 2005 he was charged with nothing more than gathering information to enable Company Owner Chartier to "comparison shop" for the most

cost-effective bargaining relationship. (JA 209-13.) Indeed, Chartier—the principal—testified that Williamson's duty was simply to "go out and explore" the various collective-bargaining arrangements available, so that *Chartier* could determine with whom the Company should bargain. (JA 160-61.) Williamson unquestionably understood this, and accordingly testified without contradiction that he did not have the authority to negotiate or execute a collective-bargaining agreement.[7] (JA 209-10, 212, 215, 237, 240-41, 264, 318.) Thus, he merely solicited information from various unions "regarding their interest in the [Company's] work, the standard contracts that might apply, and the best terms available," all the while making clear to the unions he contacted that any and all decisions about collective bargaining would be made by Company Owner Chartier. (JA 7; 209-10, 212, 215, 237, 144, 318.)

Moreover, after receiving information from a given union, Williamson would simply pass it on to Chartier. Chartier, in turn, would then decide whether and with whom to pursue a collective-bargaining relationship. Thus, as Williamson further testified, he only "had authority to bring information back to

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[7] Although Williamson testified on cross-examination that he had some authority to negotiate for the Company, he clarified that he did not assume this authority until 2006, when he became a member of the Company's collective-bargaining committee. (JA 237-38.) Williamson never claimed that he had authority to negotiate in 2005, when he was merely a project developer and labor consultant for the Company.

Mr. Chartier," and "to gather information on his behalf." (JA 7; 237.) It was Chartier alone who retained full decision-making authority.

Given this uncontroverted evidence that Williamson's duties were limited to the preliminary function of gathering and reporting information, the Board reasonably concluded (JA 6-7) that Williamson could not and did not negotiate with any union over a collective-bargaining agreement or otherwise enter into any understanding that could even remotely bind the Company in a collective-bargaining context. Because Williamson's activities "related solely to investigation, not negotiation," as the Board found (JA 7), he was not the Company's Section 8(b)(1)(B) representative. This finding is in accordance with the settled principles noted above at pp. 16-20. *See also Elevator Constructors (Otis Elevator Co.)*, 349 NLRB at 586 (finding that employee was not a Section 8(b)(1)(B) representative where his role was "merely to pass along" information relevant to contract interpretation to the job superintendant, "and then to follow [his] instructions" regarding the contract interpretation to be applied).

In sum, the Board reasonably found (JA 7) that Williamson was not involved in collective bargaining, or anything closely related to collective bargaining, when the Union voted to expel him in December 2005. Because Williamson's activities were outside the scope of the collective-bargaining matters with which Section 8(b)(1)(B) is concerned, the Board appropriately concluded (JA 5, 7) that the

Union did not violate Section 8(b)(1)(B) of the Act by expelling him for his 2005 information-gathering activities. *See Royal Electric*, 481 U.S. at 586 ("[C]learly, [an individual] cannot be [unlawfully] disciplined for acts or omissions that occur during performance of [Section] 8(b)(1)(B) duties if he or she has none.")

D. Williamson Fails To Show that the Board Erred in Concluding that He Was Not a Section 8(b)(1)(B) Representative

On review, Williamson fails to identify a single Board case where an individual whose duties were limited to the sort of preliminary information-gathering that he conducted was deemed a Section 8(b)(1)(B) representative. (*See* Br. 14-21.) Instead, Williamson seizes on a few passing record references to advance several misguided factual arguments, contending (Br. 24-25) that the Board ignored evidence supposedly showing that he was involved in negotiating proposals. Williamson also erroneously points (Br. 22-23, 25) to his involvement in collective bargaining after Local 324 had already voted to expel him in 2005. Williamson mistakenly maintains (Br. 25-27) that the Board should have considered his subsequent involvement with collective bargaining in assessing whether he was a Section 8(b)(1)(B) representative at the relevant time. For the reasons noted below, the Court should reject these contentions.

In claiming that he was a Section 8(b)(1)(B) representative, Williamson first cites (Br. 16-17) the fact that he obtained a letter-of-intent from the Millwrights,

indicating that the Millwrights were exploring a collective-bargaining relationship with the Company. The evidence unambiguously shows, however, that this letter was not provided for purposes of collective bargaining or in contemplation of actual negotiations at all. Rather, Millwrights' Representative Buckler provided the letter-of-intent, on his own initiative, to assist the Company in getting on bid lists for local power-plant work. Indeed, Williamson's own uncontroverted testimony establishes this. (JA 215-17.) The Board thus reasonably found (JA 7) that "the only purpose of th[e] letter was to help the Employer obtain work." There is absolutely no evidence that Williamson negotiated in any way to secure the letter, or to define its contents.

Williamson similarly errs in contending (Br. 18) that he was a Section 8(b)(1)(B) representative because he allegedly began "drafting" a collective-bargaining agreement with Laborers' Representative Ruedisueli in the fall of 2005. To support his assertion, Williamson relies on nothing more than Ruedisueli's vague testimony that he and Williamson had decided to "put something together" for Ruedisueli's boss (Laborers' Business Manager Jimmy Cooper) and had, to that end, "started a rough draft of an agreement." (JA 200-01.) There is no evidence as to what Williamson did in the preparation of this purported agreement, much less evidence to suggest that Williamson negotiated for the Company over its terms. The weight of evidence relating to this supposed "agreement" is further

diminished by Chartier's and Williamson's uncontoverted testimony that Williamson lacked authority to negotiate an agreement for the Company or to otherwise bind it in any way. (JA 160-61, 209-10, 212, 215, 237, 240-41, 264, 318.) Thus, as the Board reasonably found (JA 7), Ruedisueli's "testimony that he and Williamson 'even tried to start the rough draft' . . . before his boss told him to stop, standing alone and bereft of detail, does not support a finding that Williamson was authorized or permitted to engage in 8(b)(1)(B) activities."

Williamson also erroneously claims (Br. 21) that he assisted the Company in resolving a prevailing-wage issue, and that his involvement with this matter made him the Company's Section 8(b)(1)(B) representative. Again, the evidence on this point is insufficient: it consists of nothing more than Williamson's testimony that he "looked at some of [Company Owner Chartier's] old agreements with the [T]eamsters" and, in doing so, noticed that "he had a prevailing wage issue at the bridge in Port Huron." (JA 262.) There is no evidence as to when Williamson encountered this prevailing wage issue, much less evidence to establish that the issue arose before the Union voted to expel him in December 2005. Accordingly, the scant testimony on this subject provides no support for Williamson's bold assertion (Br. 21) that he "assisted" in the resolution of a prevailing-wage issue during the relevant time period.

In addition to the claims addressed above, Williamson cites (Br. 26-27) the undisputed but irrelevant fact that in 2006—after the Union had already voted to expel him for activities he undertook in 2005—he participated in the eventual negotiations for a collective-bargaining agreement with Local 324. Williamson misguidedly argues (*id*.) that his participation in the 2006 negotiations is relevant because his expulsion did not actually take effect until July 2006, when the International Union finally disposed of his appeal from Local 324's expulsion decision. The effective date of the expulsion, however, has no significance in this proceeding. Rather, the legal inquiry here is limited to whether Local 324 disciplined Williamson for conduct covered by Section 8(b)(1)(B) of the Act. *See Royal Electric*, 481 U.S. at 582 (noting that Section 8(b)(1)(B) of the Act is violated "only when an employer representative is disciplined for behavior that occurs *while he or she is engaged in [Section] 8(b)(1)(B) duties*" (emphasis in original)). Bearing the salient legal inquiry in mind, the evidence clearly establishes that the Union disciplined Williamson in December 2005 for his earlier labor-consultant activities, and for no other reason. Williamson, in fact, testified that he was disciplined solely for the reasons stated in the internal union charge against him. (JA 245.) Accordingly, Williamson's involvement in collective bargaining in 2006, while he was appealing Local 324's disciplinary decision, has

no bearing on the lawfulness of the Union's December 2005 vote to expel him for his earlier information-gathering activities.[8]

Finally, there is no merit to Williamson's claim (Br. 24-25) that his pursuit of collective-bargaining agreements for the Company, as a labor consultant, was tantamount to "negotiations over proposals," which are "consistent with collective bargaining." As shown above, the evidence simply fails to establish the premise from which his argument proceeds—i.e., that Williamson made or accepted proposals for a collective-bargaining agreement. Williamson himself admitted, in his testimony, that he had no authority to accept any proposals on behalf of the Company; rather, he only had "authority to bring back information to Mr. Chartier," and to "gather information on his behalf." (JA 7; 237.) In a more contemporaneous account of his 2005 activities, provided in his January 2006 appeal to the International Union, Williamson similarly denied that he had negotiated any collective-bargaining agreements as a labor consultant for the Company and underscored that his "personal total involvement in this contractual

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[8] In a further effort to shoehorn his 2006 collective-bargaining activities into this case, Williamson observes (Br. 27) that the statute of limitations did not begin to run on his Section 8(b)(1)(B) charge until July 2006, when the International Union disposed of his appeal. Although the pendency of an internal union appeal can be relevant in resolving a *procedural* question as to when an instance of union discipline becomes "actionable" (Br. 27) under Section 10(b) of the Act (29 U.S.C. § 160(b)), that procedural question is not presented here. (*See* JA 10 *and cases cited therein*.)

process has been to gather information and report my findings to the owner." (JA 318.) In these circumstances, the Board properly rejected Williamson's inconsistent claim that he was involved in something akin to negotiation as a labor consultant for the Company. (JA 7.)

In sum, Williamson fails to provide any basis for disturbing the Board's amply supported finding (JA 7) that his activities as a project developer and labor consultant did not render him an employer representative under Section 8(b)(1)(B) of the Act. The Board therefore reasonably concluded (JA 5, 7) that the Union's decision to expel him for those activities did not violate Section 8(b)(1)(B) of the Act. The Court should accordingly affirm the Board's dismissal of the Section 8(b)(1)(B) complaint allegation against the Union.

CONCLUSION

The Board respectfully requests that the Court deny the petition for review.

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FOR THE SIXTH CIRCUIT

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v.	: Board Case No.
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NATIONAL LABOR RELATIONS BOARD	:
	:
Respondent	:
	:
and	:
	:
LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO	:
	:
Intervenor	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the Board certifies that its final brief contains 6,557 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, D.C.
this 7th day of April, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2010, I electronically filed the National Labor Relations Board's brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system on the following counsel:

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