Local 324, International Union of Operating Engineers, AFL–CIO (Hydro Excavating, LLC) ***and*** **David Williamson, III.** Case 7–CB–15343

January 30. 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On February 12, 2008, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting brief. Thereafter, the Respondent and the General Counsel each filed answering briefs and reply briefs.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

This case involves alleged violations of Section 8(b)(1)(A) and (B) of the Act arising from the Respondent's expulsion of Charging Party David Williamson from membership because of his activities on behalf of his employer, Hydro Excavating (the Employer). We agree with the judge, for the reasons stated by him, that the Respondent did not violate Section 8(b)(1)(A) by expelling Williamson. Contrary to the judge, however, we find that the Respondent's expulsion of Williamson also did not violate Section 8(b)(1)(B). That finding is based on our conclusion that Williamson was not an 8(b)(1)(B) representative at the time of the expulsion.[3] We therefore dismiss the complaint in its entirety.

I. FACTS

In August 2005,[4] Todd Chartier hired Williamson, a member of the Respondent, to work as a project developer and labor consultant for the Employer, a startup company that would use a new technology, hydro excavating, at construction sites.[5] As a project developer, Williamson was expected to use his business contacts to obtain work for the Employer. As a labor consultant, Williamson investigated which labor organizations might claim the work and which would offer the most cost-effective terms in a collective-bargaining agreement. In his investigations, Williamson met with representatives of the Laborers, the Carpenters, and the Millwrights. Williamson met first with Bruce Ruedisueli, a Laborers business representative. Williamson described the Employer's business and asked Ruedisueli if the Laborers had any interest in the hydro-excavating work. Ruedisueli expressed interest in a wall-to-wall agreement that would cover the entire bargaining unit, but Williamson responded that such an arrangement might raise jurisdictional problems with other unions. Ruedisueli suggested that a contract like the Laborers' landscapers agreement could be used to set rates. Williamson asked Ruedisueli to send him a copy of the contract. Williamson made clear, however, that Chartier, not Williamson, would make any ultimate decision. Williamson and Ruedisueli were in the process of putting together a draft agreement when Ruedisueli's boss told him to leave the work alone because it was the Operating Engineers' work.

Williamson next met with Ralph Mayberry, secretary/treasurer of the Michigan Regional Conference of Carpenters. Williamson again explained the Employer's business and asked if the Carpenters would be interested in the hydro-excavating work. Mayberry expressed interest in the work and suggested that they use the Carpenters' residential rates. Mayberry subsequently faxed a copy of the Carpenters' residential rates to Chartier.

Williamson also met with Doug Buckler, the Millwrights' financial secretary/director. Buckler also expressed interest in the work. As part of his project development duties, Williamson asked Buckler if he knew of any work opportunities for the Employer. Buckler offered to help Williamson obtain work at several power plants for a company called the Washington Group (which had a blanket maintenance contract with Detroit Edison) by providing Williamson with a letter of intent indicating that the Employer and the Millwrights were exploring a collective-bargaining agreement. The letter would enable the Employer to get on Detroit Edison's

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] For purposes of this decision, we shall assume, as the judge found, that the 8(b)(1)(B) allegation is closely related to the timely filed Sec. 8(b)(1)(A) charge, and thus satisfies the requirements of Sec. 10(b).

[4] All dates hereafter refer to 2005 unless otherwise stated.

[5] A hydro-excavator machine removes soil from the ground through water pressure. This technique is safer for digging around fiber optic cables and gas lines than the traditional method of using a backhoe and vacuum truck.

bid lists. Williamson testified that the letter had no other significance.[6]

Williamson met with Chartier on a regular basis to share the information that he gathered. Chartier eventually chose to recognize the Respondent and began negotiating a contract with it in January 2006. Williamson thereafter served as a member of the Employer's negotiating team.

In November, John Hamilton, the Respondent's business manager, filed internal charges against Williamson, accusing him of violating article XXIV (7)(e) of the International Union's Constitution "by urging other unions to execute labor agreements with Local 324 Contractors [i.e., the Employer] and claim work falling within the traditional jurisdiction of the Operating Engineers." (GC Exh. 3.) Williamson did not attend the December 14 trial on these charges, and, on December 16, the Respondent informed him that the membership had voted to fine him $500 and to expel him from membership. The Respondent also informed Williamson that his expulsion would be stayed until the International Union's general executive board ruled on any appeal. On July 21, 2006, the Executive Board informed Williamson that his appeal was denied.

II. DISCUSSION

A. Section 8(b)(1)(B)

Section 8(b)(1)(B) provides that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]" The proscribed conduct may take one of two forms. "It may be applied directly against the employer to force the employer to select or replace an 8(b)(1)(B) representative *or indirectly against the employer's 8(b)(1)(B) representative in order to 'adversely affect' the manner in which the representative performs the covered functions of collective bargaining, grievance processing, or related activities—like contract interpretation.*"[7] The prohibited conduct alleged here is of the second type. Thus, in order to make out a violation, the General Counsel must present evidence sufficient to establish that the activities for which the Respondent expelled Williamson fell within the scope of the conduct covered by Section 8(b)(1)(B)—"that is, collective bargaining, grievance adjustment, or some other closely related activity (e.g., contract interpretation, as in *Oakland Mailers*)." *NLRB v. Electrical Workers,* 481 U.S. 573, 586 (1987) (*Royal Electric*).[8]

B. Judge's Decision

The judge found that Williamson was not a statutory supervisor.[9] He also found that he "had no authority to engage in actual negotiations during this preliminary phase, or to make any binding commitments on behalf of the employer." Notwithstanding these facts, the judge concluded that Williamson was an 8(b)(1)(B) representative because his activities—"his efforts to seek out which unions might claim work his employer planned to perform and which would offer the most competitive rates in a collective bargaining agreement"—came within *Royal Electric*'s definition of 8(b)(1)(B) activities, i.e., "'collective bargaining, grievance adjustment, or some other closely related activity.'"

C. Analysis

Williamson plainly was not involved in collective bargaining or the adjustment of grievances during the relevant period. Nor could his activities have included contract interpretation because there was no collective-bargaining agreement in existence at the time the Respondent brought Williamson up on charges. We thus assess whether Williamson's activities as a project developer/labor consultant were sufficiently closely related

[6] Williamson also had some contacts with the Teamsters. He contacted a teamsters local by phone and left a message. Also, while he was at a jobsite with a client, a teamsters representative visited the site and asked whether there were any teamsters on the job. Williamson responded in the negative. Williamson testified that the Teamsters representative "didn't express an interest" in the work. In his decision, the judge stated that the Teamsters representative "came on the job and made a claim to the work." We find it unnecessary to resolve this possible discrepancy because the judge's finding that Williamson was engaged in 8(b)(1)(B) activities does not rest on Williamson's contacts with the Teamsters. Further, even if the Teamsters representative did claim the work, that would not affect our finding that Williamson was not engaged in 8(b)(1)(B) activities.

[7] *Teamsters Local 507 (Klein News),* 306 NLRB 118, 120 (1992) (footnotes omitted) (emphasis added), citing *Florida Power Co. v. Electrical Workers*, 417 U.S. 790, 805 (1974). As explained in *Elevator Constructors Local 2 (Unitec Elevator Services),* 339 NLRB 941, 941 (2003):

> In *Florida Power,* [417 U.S. at 804–805], the Supreme Court created an "adverse-effect" test to determine when union discipline of a supervisor-member violates Section 8(b)(1)(B). The Court held that a union's discipline of a supervisor-member can constitute a violation of Section 8(b)(1)(B) only when that 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.

[8] In *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications)*, 172 NLRB 2173 (1968) (*Oakland Mailers*), the Board suggested that contract interpretation was so closely related to collective bargaining that it also was an 8(b)(1)(B) activity.

[9] However, he agreed with the General Counsel that a finding of supervisory status was not a prerequisite to a finding that an individual is an 8(b)(1)(B) representative. Since the Respondent did not except to this finding, we do not address it here.

to collective bargaining to come within *Royal Electric*'s definition of 8(b)(1)(B) activities. We find they were not.

While Chartier gave Williamson the authority to ascertain which unions might be interested in representing the Employer's employees and to explore what available terms would be most competitive, Williamson's authority extended only to investigation, not negotiation. Williamson testified without contradiction that he did not have the authority to negotiate or execute a collective-bargaining agreement. He only "had authority to bring back information to Mr. Chartier," and to "gather information on his behalf." Williamson further testified that Chartier was "looking for the most cost-competitive vehicle out there. He was comparison shopping. That was [Williamson's] task." Chartier's testimony was similar. When asked "what, specifically, were Mr. Williamson's job duties," Chartier replied "[t]o go out and explore, you know, what similar companies and what unions they were using." Chartier testified elsewhere that Williamson's duties were to "just explore and see what's out there . . . see how we're going to be competitive, see what direction we're going to go." Chartier further testified that Williamson "brought back information and reported to me about who was interested, who wasn't, what direction we could possibly go and what would be the best interest." When asked if Williamson offered his opinion regarding the information he supplied, Chartier responded that "[h]e gave me his opinion if I asked for it." These activities were related to investigation, not negotiation.

Thus, none of the above activities constitute 8(b)(1)(B) activities. In finding otherwise, the judge relied on the letter of intent that Williamson obtained from the Millwrights, finding that it "indicat[ed] an interest" in entering negotiations with the Employer. However, the only purpose of that letter was to help the Employer obtain work, as the judge himself earlier acknowledged when he found that the letter "would enable the Employer to get on Detroit Edison's bid lists."

The judge also relied on the fact that Williamson and the Laborers representative had begun "drafting an agreement." But the representative's testimony that he and Williamson "even tried to start the rough draft" of an agreement 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.

III. CONCLUSION

The General Counsel had the burden of presenting evidence sufficient to establish that Williamson was the Employer's 8(b)(1)(B) representative at the time the Respondent expelled him from membership.[10] We conclude that the General Counsel did not meet that burden. As set out above, the evidence establishes that Williamson, in his role of labor consultant, was not authorized to bargain or to enter into a collective-bargaining agreement on behalf of the Employer and that he did not do so. In investigating which unions might be interested in representing the Employer's employees and what available terms would be most competitive, Williamson merely solicited information from the unions regarding their interest in the work, the standard contracts that might apply, and the best terms available. We find that these activities do not fall within the scope of activities covered by Section 8(b)(1)(B) and that therefore Williamson was not the Employer's 8(b)(1)(B) representative when the Respondent expelled him from membership. We thus reverse the judge's finding of the 8(b)(1)(B) violation.

ORDER

The complaint is dismissed.

Sarah Pring Karpinen, Esq., for the General Counsel.
Robert J. Finkel, Esq., and *Michael L. Weissman, Esq.,* for the Respondent.
Marc Jerabek, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Detroit, Michigan, on August 29, 2007. David Williamson III, an individual, filed the initial charge on September 22, 2006, and amended it on October 12, 2006, and May 29, 2007.[1] Based on the charge as amended, the Regional Director, on behalf of the General Counsel, issued the complaint and notice of hearing on June 27, 2007. The complaint alleges that Respondent Union, Local 324, International Union of Operating Engineers, AFL–CIO, violated Section 8(b)(1)(A) and (B) of the Act by terminating the Charging Party's membership in the Union on July 21, 2006, because of his activities as a labor consultant/project developer for Hydro Excavating, LLC, the Employer. The complaint alleges, alternatively, that the Charging Party either acted as the Employer's representative for purposes of collective bargaining, or assisted the Employer with collective bargaining.

The Respondent filed its answer to the complaint on July 10, 2007, denying that it violated the Act as alleged. Specifically, the Respondent denied, inter alia, that the Charging Party's duties met the definition of a 8(b)(1)(B) representative. The Respondent also denied that it terminated the Charging Party's

[10] See, e.g., *Masters, Mates & Pilots (Marine Transport)*, 301 NLRB 526, 528 (1991), enfd. in part and remanded sub nom. *Maritime Overseas Corp. v. NLRB*, 955 F.2d 212 (4th Cir. 1992).

[1] The charge was initially dismissed by the Region on November 21, 2006. The Charging Party filed an appeal, which ultimately led to issuance of the instant complaint.

membership on July 21, 2006. The Respondent asserted, as an affirmative defense, that it actually expelled the Charging Party from the Union on December 14, 2005, more than 6 months before the unfair labor practice charge was filed and served. Thus, in the Respondent's view, the complaint is barred by Section 10(b) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Employer, a limited liability corporation with an office and place of business in Marine City, Michigan, provides construction and excavation services for various entities and corporations throughout the State of Michigan. The Employer annually purchases goods and supplies valued in excess of $50,000 from outside the State of Michigan and causes such goods and supplies to be delivered directly to its various jobsites in the State of Michigan. The Respondent admits and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

Williamson, the Charging Party, first joined the Union in December 1979. After serving as a steward and craft foreman, he was appointed business representative in June 1993. He held that position until June 2004 when he was removed after being convicted of a felony, i.e., aiding and abetting embezzlement from the Carpenters union, as a result of actions he took in connection with the construction of a home. Although no longer able to hold union office, Williamson remained a member of the Union and worked in the industry for several employers until his expulsion that is at issue in this case.

In August 2005, Williamson was hired by Todd Chartier to work for a startup company that would utilize a new technology for excavating construction sites. Chartier's family owned several companies that were already signatory to collective-bargaining agreements with the Union. Because the new company was not yet fully operational, Williamson was put on the payroll of one of these union-signatory companies, MLC Rentals. He was paid and received fringe benefits under the collective-bargaining agreement. The new company, Hydro-Excavating, LLC, is the Employer.

The process utilized by the Employer to excavate involves the use of a new piece of equipment called a hydro-excavator (also referred to in the record as an evacuator). This machine sucks the soil from the ground through water pressure. This technique is safer for excavations around fiber optic lines, high pressure gas lines, and other sensitive areas where digging risks severing such vital links. The new equipment and process contrasts with traditional excavation using a backhoe, for example, where the soil and other material is then extracted by a vacuum truck. Williamson testified that this work was not in the exclusive jurisdiction of Respondent, a claim contradicted by the Respondent's witnesses. There is evidence in the record that several employers performing similar work in Michigan have collective-bargaining agreements with unions other than the Operating Engineers. There is also evidence that, on some sites, there is a division of work with operating engineers operating the backhoe while laborers or other trades run the vac-trucks.

According to Williamson, he was hired by the Employer to be a labor consultant and project developer. With respect to the latter, he was expected to use the contacts he developed during his 27 years in the industry to facilitate and obtain work for the new company. As a labor consultant, Williamson was charged with investigating which labor organizations in the industry might claim such work and which would offer the most cost-effective deal on a collective-bargaining agreement that would enable the Employer to compete with other companies doing excavation work. Williamson testified that he contacted representatives from the Laborers, Painters, Millwrights, and Carpenters Unions. Williamson did not contact his own union because he believed that would be best left to Chartier, who was also a member of the Respondent and, because he did not have the history that Williamson had, would be free of any hard feelings. Chartier, who testified as a witness for the General Counsel, essentially corroborated Williamson with respect to the duties of his position. According to Chartier, he always intended to operate as a union contractor but didn't know which unions would stake a claim to this type of work and what they would demand as compensation for employees operating the new equipment.

In carrying out his labor consulting duties, Williamson met with Bruce Ruedisueli, a laborers business representative, on two occasions. At the first meeting, Williamson described the business his new employer was entering and asked if the Laborers had any interests in this work. According to Williamson, Ruedisueli expressed interest in a wall-to-wall agreement covering the entire unit of employees who would be working for the Employer. Williamson advised Ruedisueli that such an agreement might cause jurisdictional problems with other unions. Ruedisueli suggested that a contract like the Laborers' landscapers agreement could be used to set the rates. Williamson asked Ruedisueli to send him a copy of the contract. Williamson testified further that he made it clear to Ruedisueli that the decision would be made by Chartier, not him. Ruedisueli, who was called as a witness by the Respondent, corroborated Williamson. In fact, Ruedisueli testified that he and Williamson were in the process of putting a draft agreement together when his boss, Laborers Business Manager Jimmy Cooper, told him to leave the work alone because it was the operating engineers' work.

Williamson also met with Ralph Mayberry, secretary/treasurer of the Michigan Regional Conference of Carpenters. This meeting followed the same format as his meeting with Ruedisueli. Williamson testified that Mayberry also expressed interest in the work and suggested they use the Carpenters' residential rates, a copy of which was faxed to Chartier for consideration. During their meeting, Mayberry also asked Williamson if he had talked to the Teamsters yet and Williamson

said he had not. Mayberry did not testify in this proceeding.

Williamson also met with Doug Buckler, who was the Millwrights financial secretary/director at the time. Buckler also expressed interest in the work. In addition, as part of his project development duties, Williamson inquired if Buckler knew of any work opportunities for the new company. Williamson testified that Buckler offered to help Williamson get work at several power plants for a company called the Washington Group that had a blanket maintenance contract with Detroit Edison. Buckler offered to provide Williamson with a letter of intent indicating that Williamson's employer and the Millwrights were exploring a collective-bargaining agreement. This letter would enable the Employer to get on Detroit Edison's bid lists. Buckler, called to testify by the General Counsel, corroborated Williamson. Buckler also testified that a few days after writing the letter of intent he contacted the Respondent's business manager, John Hamilton, and told him about Williamson's inquiries. According to Buckler, he expressed an interest in sharing the work with the Operating Engineers.

Williamson testified that he also left two messages with the Painters Union but received no response. Although Williamson testified on direct examination that he advised Chartier not to talk to the Teamsters because of that union's onerous pension withdrawal liability provisions, he acknowledged on cross-examination that he did have communications with a teamsters representative. At first, he testified that the Teamsters' representative called him and that they only communicated by phone. Later, he admitted having contact in person on a jobsite where the Employer was working when the Teamsters' representative came on the job and made a claim to the work. His testimony on direct and cross-examination was also contradicted by statements previously made by Williamson in response to Respondent's intra-union charges and in the written appeal he filed from the Region's dismissal of his charge.

Williamson testified that his contacts with the other unions, as part of his labor consulting duties, began soon after he was hired by the Employer and continued at least through the end of 2005. During this time, he also worked on a few other small labor issues for the Employer, including a prevailing wage issue on a bridge project. There is no dispute that Williamson did not supervise any employees and Williamson admitted that he did not handle employee grievances for his employer.

Williamson testified that he met with Chartier on a regular basis to share with him the information he was gathering from the contacts described above. Ultimately, Chartier chose to recognize the Respondent for this new work and began negotiations for a collective-bargaining agreement in January 2006. Williamson served as a member of the Employer's negotiating committee, without objection from the Respondent's bargaining representatives. After about five or six negotiation sessions, the parties reached agreement on a contract, sometime in March 2006. That agreement, effective March 31, 2006, through March 30, 2008, was executed on June 9, 2006. At that point, Williamson was placed on the Employer's payroll and began receiving benefits under the new agreement. Chartier testified that, after the contract went into effect Williamson helped in the office with setting up the payroll and answering questions from employees about their benefits. He also performed duties related to safety on the jobsites.

In November 2005, Williamson received a letter from the Respondent, dated November 10, informing him that charges had been filed against him by Business Manager Hamilton. Although the letter states that a copy of the charges was included, Williamson testified that he actually received the charges separately. The charges, signed by the Respondent's executive board and dated November 9, 2005, accuse Williamson of violating article XXIV (7) (e) of the International Union's constitution by "urging other unions to execute labor agreements with Local 324 Contractors and claim work falling within the traditional jurisdictional of the Operating Engineers."[2] On November 23, 2005, Williamson filed his response, disputing the allegations in the charge. In his response, Williamson noted that the Employer was still a nonsignatory "interested in working towards a fair and equitable work document that will allow the employer to remain competitive in today's challenging work climate." On November 28, 2005, the Respondent sent Williamson notice that a trial on his charges was to be held on December 14, 2005. Williamson did not attend his trial based on his belief from past experience that the deck would be stacked against him. On December 16, 2005, Respondent notified Williamson of the results of the trial, i.e., the membership had voted to fine him $500 and expel him from membership. He was told he had the right to appeal and that if he did so his expulsion would be stayed until the International Union's general executive board ruled on his appeal. Williamson filed an appeal on January 5, 2006, and was informed by letter dated June 20, 2006, that his appeal would be heard in Washington, D.C., on July 13, 2006. Williamson attended his appeal hearing in Washington and was informed by letter dated July 21, 2006, that the Respondent's decision to expel him had been upheld.

Williamson continued to work for the Employer until he was laid off due to a lack of work in November 2006. He continued to receive the contractual fringes and continued to pay his dues, despite his expulsion. The Respondent never refunded Williamson's dues. Both Williamson and Chartier testified that the Respondent's December 14, 2005 decision to expel Williamson had no effect on his employment. In fact, it was after this action had been taken that Williamson participated in collective-bargaining negotiations between the Respondent and the Employer as a representative of the Employer. Williamson testified that he had difficulty finding work in Michigan after he was laid off and eventually sought work in Florida because of better job opportunities there. Williamson admitted that despite his expulsion from the Union he could still work for a signatory contractor provided he tendered the 2 percent working dues. He also conceded that he had no evidence of the Respondent interfering with his efforts to find work. Instead, he claimed that, if a signatory contractor had hired him, his presence on the job would be a "distraction."

[2] Art. XXIV (7) (e) sets forth several grounds for disciplining members, including being an habitual drunkard. It also includes general provisions regarding conduct that "creates dissension among members; destroys the interest and harmony of the Local Union; . . . violates the trade rules of the locality in which he is working."

At the hearing, the Respondent offered evidence indicating that Williamson had expressed bitterness toward the Union based on his belief that the Respondent had not supported him when he was going through the criminal proceedings. On cross-examination, the Respondent's counsel questioned Williamson whether he believed Business Manager Hamilton was politically motivated in seeking to expel him, or that some other factor was behind the Union's charges. However, Hamilton himself admitted during his testimony that the sole reason for Williamson's expulsion was his contacts with the other unions regarding the Employer's hydro-excavating work, which Hamilton viewed as an attempt to give away work within the Respondent's traditional jurisdiction.

B. Section 10(b) Defense

The Respondent has raised, as an affirmative defense, that the complaint is time barred under Section 10(b) of the Act. The Respondent bases this defense on two grounds: (1) that the alleged unfair labor practice, i.e., Williamson's expulsion from the Local Union, occurred on December 16, 2005, more than 6 months before the charge was filed on September 22, 2006; and (2) that the 8(b)(1)(B) allegation was not raised in the charge until the May 29, 2007 amended charge, long after the allegedly unlawful expulsion. With respect to the first ground, counsel for General Counsel argues that the unfair labor practice did not become actionable until the International Union's general executive board upheld Respondent's action on July 21, 2006, because the Respondent's decision to expel Williamson was stayed pending his appeal. Williamson filed the charge within 2 months of this decision. I agree with the General Counsel on this point. The Board has traditionally held, in cases alleging the unlawful imposition of union discipline, that Section 10(b) does not begin to run until the conclusion of the internal union appeal process. *Sheet Metal Workers Locals 102 & 108 (Comfort Conditioning Co.),* 340 NLRB 1240, 1242 (2003); *Sheet Metal Workers Local 75 (Owl Constructors),* 290 NLRB 381, 383 (1988). Adhering to this precedent, I must reject the Respondent's argument based on the earlier date when the Respondent first informed Williamson of his expulsion.

The Respondent's other 10(b) argument is a closer call. As the Respondent notes, the charge as initially filed and amended during the 10(b) period, did not cite Section 8(b)(1)(B) of the Act and merely claimed, as the basis for the charge, "wrongful termination of membership in Local #324."[3] The Respondent showed at the hearing, through quotes from Williamson's affidavit provided in support of the charge and statements made in his appeal from the dismissal, that Williamson believed his expulsion was unlawful because motivated by political considerations and animosity on Hamilton's part. Williamson also cited a number of procedural irregularities in the filing and processing of the intra-union charges as the basis for his allegation that the expulsion was unlawful. Nowhere in the portions of the affidavit that are in evidence, or in his appeal to the Board's General Counsel, does Williamson claim that his expulsion violated Section 8(b)(1)(B). Even the Region's November 21, 2006 dismissal letter only addresses a claim that Williamson's union discipline was a breach of the Union's duty of fair representation under Section 8(b)(1)(A). It was not until Williamson filed the second amended charge on May 29, 2007, that Section 8(b)(1)(A) and (B) are specifically alleged as the statutory sections violated.[4] Counsel for General Counsel argues that there is no Section 10(b) problem here because the allegations in the May 2007 amended charge and the complaint are "closely related" to the timely filed charge alleging that the Respondent's "wrongful termination" of Williamson's union membership violated "Section 8(b)(1)" of the Act. See *Carney Hospital,* 350 NLRB 627 (2007); *Redd-I, Inc.,* 290 NLRB 1115, 1118 (1988).

Under *Redd-I,* supra, otherwise untimely allegations may be litigated if they are legally and factually "closely related" to allegations of a timely filed charge. The traditional test applied by the Board to make this determination considers three factors: (1) whether the otherwise untimely allegations are of the same class as the violations alleged in the timely filed charge, meaning that the allegations must all involve the same legal theory and usually the same section of the Act; (2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely-filed charge;[5] and (3) whether a respondent would raise the same or similar defenses to both allegations and then whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegation.[6] Id. at 1118. In its more recent decision in *Carney Hospital,* supra, the Board held that the mere chronological coincidence of alleged violations does not warrant the implication that all of a respondent's challenged actions are factually related. In that case, the Board was addressing whether otherwise untimely 8(a)(1) allegations committed during a union's organizing campaign were factually closely related to timely filed 8(a)(3) allegations occurring during the same campaign. The Board held they were not. In reaching this decision, the Board clarified the "closely related test" as follows:

> Where the two sets of allegations 'demonstrate similar conduct, usually during the same period with a similar object', or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, we will find the second prong of *Redd-I* satisfied.

350 NLRB 627 at 630.

[3] The charge and first amended charge did not even cite Sec. 8(b)(1)(A). In fact, the space on the charge form where a charging party would indicate which subsection of Sec. 8(b) had been violated was left blank in the initial charge and cited only "Section 8(b)(1)" in the first amended charge.

[4] The basis of the charge, i.e., "the above-named union wrongfully terminated my membership in the Union," is unchanged from the original charge.

[5] In *Redd-I,* supra, the Board explained that the allegations must involve similar conduct, usually during the same period, with a similar object. 290 NLRB supra at 1118.

[6] In *Redd-I,* supra, the Board said it "may" consider this third prong of the test, suggesting that similarity of defenses and evidence may not be necessary to permit litigation of an otherwise untimely charge that is closely related factually and legally.

Although the charge, as initially filed and amended within the 10(b) period, did not specifically allege Section 8(b)(1)(A) or Section 8(b)(1)(B) as the sections of the Act allegedly violated, it clearly raised the issue of the lawfulness of the Respondent's expulsion of Williamson from membership. The alleged breach of the duty of fair representation claim encompassed by Section 8(b)(1)(A) was timely raised as is apparent from the Region's dismissal letter addressing this issue. I thus reject any 10(b) defense to this allegation. The 8(b)(1)(B) allegation, first specifically alleged in the second amended charge that was filed more than 6 months after Williamson's expulsion, is closely related factually to the timely filed charge in that it arises from the same factual situation, i.e., the intra-union charges filed and processed against Williamson by the Respondent based on his activities on behalf of the Employer. There is also a causal connection between the timely 8(b)(1)(A) and allegedly untimely 8(b)(1)(B) allegations in that it is precisely Williamson's activities as an alleged 8(b)(1)(B) representative of the Employer that motivated the Union's charges against him. Thus, regardless of which section of the Act is alleged to have been violated, the lawfulness of the Respondent's actions in seeking to expel Williamson from membership have always been at issue.

The Respondent essentially argues that the duty of fair representation allegation under Section 8(b)(1)(A) and the 8(b)(1)(B) allegation are not closely related legally because they involve different and, perhaps conflicting, legal theories. Although the General Counsel appears to be making alternate arguments under the two sections, the claims are closely related in the sense that they are of the same class of violation, i.e., union restraint and coercion under Section 8(b)(1) of the Act. Moreover, the Respondent's conduct at issue had the same object, regardless of which section of the Act is alleged, i.e., to punish Williamson for his activity on behalf of his employer in gathering information regarding which unions might make a claim for the Employer's work and what they would demand in compensation for such work. I thus find that the allegations at issue are also closely related legally. See *National Licorice Co. v. NLRB,* 309 U.S. 350, 369 (1940); *NLRB v. Jack La Lanne Management Corp.,* 539 F.2d 292, 295 (2d Cir. 1976).

Finally, while there may be some differences in the defenses that a respondent would raise to an 8(b)(1)(A) and an 8(b)(1)(B) allegation, I find that the differences are not substantial enough to preclude litigation of the 8(b)(1)(B) allegation here. Because both allegations turn on an evaluation of the Union's conduct in pursuing intra-union charges against Williamson, the Respondent necessarily would have preserved similar evidence to defend against both allegations. I note here that there is essentially no dispute that the Respondent expelled Williamson precisely because of conduct which the General Counsel alleged was engaged in by Williamson as an 8(b)(1)(B) representative. In order to pursue a defense that Williamson's actions did not constitute 8(b)(1)(B) duties, the Respondent would be expected to offer the same evidence that it would rely on to show that its discipline of Williamson did not breach its duty of fair representation to him as an employee. See *Trim Corp. of America,* 349 NLRB 608, 609 (2007).

Any due-process concerns the Respondent may have over the late amendment of the charge to add the 8(b)(1)(B) allegation may be disposed of by reference to a long line of Board and court decisions that have consistently held that "it is not the function of the charge to give notice to a respondent of specific claims against him. Rather, that is the function of the complaint." *Redd-I, Inc.,* 290 NLRB supra at 1116–1117. The Supreme Court recognized years ago that the Board is not precluded from dealing adequately with unfair labor practices which are related to those alleged in a charge and which grow out of them while the proceeding is pending before the Board. *National Licorice Co. v. NLRB,* supra.

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. [ ] The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce, as this Court has recognized from the beginning. Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

NLRB v. Fant Milling Co., 360 U.S. 301, 307–308 (1959), citations and footnotes omitted.

Having carefully considered the matter, I reject the Respondent's affirmative defense and find that the complaint allegations are not barred by Section 10(b) of the Act.

C. The 8(b)(1)(A) Allegation

The complaint alleges that the Respondent's expulsion of Williamson from the Union, based on his activities as a labor consultant/project developer for the Employer, violated Section 8(b)(1)(A) of the Act. It appears that the General Counsel's theory is that Respondent's discipline of Williamson was unlawful because it punished him for complying with his employer's instructions and thereby impacted his employment relationship. The General Counsel relies on the Board's decision in *Electrical Workers Local 2321 (Verizon),* 350 NLRB 258 (2007), among others. The Respondent, on the other hand, relies on a long line of cases in which the Board has, with limited exceptions, recognized a union's right to enforce internal rules against its members, who are free to resign and escape its control. See *Scofield v. NLRB,* 394 U.S. 423, 430 (1969), and its progeny.

The Board, in *Office Employees Local 251 (Sandia Corp.),* clarified the scope of Section 8(b)(1)(A) in the context of union discipline:

> [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.

331 NLRB 1417, 1418 (2000). In *Sandia,* the Board found that union discipline of dissident members for opposing the policies of the local president was a purely internal matter and did not violate the Act where there was no impact on the employment relationship of the members who were disciplined. The critical issue in these types of cases is whether union discipline has "some nexus with the employer-employee relationship." *Electrical Workers Local 2321 (Verizon),* supra at 262.

The General Counsel seems to concede that the Respondent's discipline of Williamson did not impair access to the Board, involve unacceptable methods of union coercion, such as physical violence, or otherwise impair any policies imbedded in the statute. The General Counsel seeks to fit this case into one of the *Sandia* exceptions by arguing that the nexus to Williamson's employment relationship was the fact that he was disciplined for complying with his employer's directives, i.e., to contact other unions regarding their interest in representing the employer's employees. The General Counsel cites cases, such as *Verizon,* supra, where a rank-and-file employee was disciplined by his union for complying with his employer's instructions.[7] See *Elevator Constructors (Otis Elevator Co.),* 349 NLRB 583 (2007) (employee fined by union for complying with employer's instruction to work on a composite crew with members of another union). *Carpenters District Council of San Diego (Hopeman Bros.),* 272 NLRB 584, 588 (1984) (employee disciplined by union for reporting misconduct by another employee). None of the cases cited by General Counsel involved an employer directive like the one here, which involved soliciting other unions to perform work which Williamson's union had an arguable claim to perform.

The undisputed evidence in the record also establishes that Williamson suffered no adverse employment consequences as a result of the Respondent's discipline of him. Williamson and Chartier conceded that Williamson continued working for Hydro Excavating, serving in the same capacity as before his expulsion, with no adverse employment consequences. He even served on the Employer's negotiating committee that bargained successfully with the Respondent for a contract, without objection from the Respondent. I also note that the Union had a legitimate interest in preserving its work jurisdiction which would clearly have been undermined by Williamson's activities as a labor consultant for his employer. Balancing the Union's interest against the minimal impact on Williamson's employment relationship, I find that the Respondent's discipline of Williamson did not violate Section 8(b)(1)(A) of the Act.

[7] The *Verizon* case involved an employee who was disciplined by his union for failing to engage in a concerted campaign by the union to refuse to work voluntary overtime. The discipline caused the employee to lose the opportunity to work overtime. 350 NLRB 542 (2007).

D. 8(b)(1)(B) Allegation

The complaint also alleges that the Respondent's discipline of Williamson violated Section 8(b)(1)(B) of the Act. Under that section of the Act, it is an unfair labor practice for a union to restrain or coerce an employer in the selection of its representative for purposes of collective bargaining or the adjustment of grievances. The unlawful conduct may be applied directly against the employer to force it to select or replace an 8(b)(1(B) representative or, as is alleged in this case, indirectly against the employer's 8(b)(1(B) representative in order to adversely affect how the representative performs his collective bargaining or grievance adjustment duties. It is well-established that a union's discipline of a supervisor-member is prohibited under Section 8(b)(1)(B) if the supervisor-member is the employer's representative for purposes of collective bargaining or grievance adjustment and the discipline may have a foreseeable adverse effect on the future performance of his collective bargaining or grievance adjustment duties. In addition, union discipline is prohibited only when the supervisor-member is disciplined for conduct that occurs while he or she is engaged in 8(b)(1)(B) duties or closely related activities. *NLRB v. Electrical Workers Local 340 (Royal Electric),* 481 U.S. 573, 582 (1987); *Elevator Constructors (Otis Elevator Co.),* supra 585.

Hamilton, the Respondent's business manager who initiated the intra-union charges against Williamson and presided over the trial that led to his fine and expulsion from the Union, admitted that the sole basis for this discipline was Williamson's activities in contacting other unions regarding the hydro-excavating work that the Employer planned to perform. Hamilton viewed Williamson's activities as an attempt to give away work that belonged to the Respondent. The critical issue in this case is whether Williamson was Hydro Excavating's 8(b)(1)(B) representative when he contacted and met with the other unions. Counsel for the General Counsel argues that Williamson, although not a statutory supervisor, was nevertheless an 8(b)(1)(B) representative.[8] The Respondent, on the other hand, argues that Williamson was a supervisor but not an 8(b)(1(B) representative. Williamson and Chartier denied that he had any supervisory authority and there is no evidence to contradict this testimony. Thus I find that he was not a supervisor within the meaning of the Act.

The General Counsel contends that, under Board law, Williamson may be found to be an 8(b)(1)(B) representative even if he is not a statutory supervisor. While acknowledging that this may be an unusual situation, the General Counsel cites language in a Board decision that supports her contention. In *Elevator Constructors Local 1 (National Elevator Industry),*[9] the Board found it unnecessary to rely on the administrative law judges' supervisory finding because they agreed with his finding that the disciplined union member was an 8(b)(1)(B) repre-

[8] Counsel for General Counsel also argued that Williamson was not a managerial employee, even though the Respondent made no such claim. General Counsel's position is forced by its alternative theory above that the Respondent's discipline violate Sec. 8(b)(1)(A). If Williamson was a supervisor or managerial employee, he would have no protection under Sec. 8(b)(1)(A).

[9] 339 NLRB 977 fn. 2 (2003).

sentative. The Board cited only the Supreme Court's decision in *Royal Electric,* supra at 584. Although the General Counsel has cited no other case involving the situation here, I agree that the tenor of the Court's decision in *Royal Electric,* supra, and the emphasis in subsequent Board decisions on finding that the individual performed 8(b)(1)(B) duties and was disciplined for actions in the course of performing those duties, renders a finding of supervisory status unnecessary.

The evidence before me establishes that Williamson was hired by Chartier, early in the formation of his company, to assist Chartier in finding a suitable union with which to bargain over wages, hours, and other terms and conditions of employment for the employees who would be hired to do the hydro excavation work that was planned. Williamson was tasked with determining which unions already performed this work, or might make a claim to such work, and then to seek out the most cost-effective terms for a collective-bargaining agreement. Williamson carried out this task by meeting with several unions to discuss potential contract demands. As a result of these meetings, he obtained a letter of intent from one union indicating an interest in entering collective-bargaining negotiations with the Employer. He also participated in meetings with the Laborers' Union representative who testified that they had begun drafting an agreement. In addition, while on one of the Employer's jobsites, Williamson dealt with a teamsters representative who appeared on the job and made a claim to the work. Finally, there is Williamson's uncontradicted testimony that he also assisted his Employer in dealing with an outstanding prevailing wage issue. Although there is no dispute that Williamson had no authority to engage in actual negotiations during this preliminary phase, or to make any binding commitments on behalf of the employer, I find that his activities constitute 8(b)(1)(B) activities, i.e., "collective bargaining, grievance adjustment, or some other closely related activity." *Royal Electric,* supra, at 586.[10]

Having found that Williamson was an 8(b)(1)(B) representative and that the Respondent disciplined him for activities engaged in as such a representative, it remains to be determined whether the discipline may have a foreseeable adverse effect on the future performance of his 8(b)(1)(B) duties. *Elevator Constructors Local 10 (Thyssen General Elevator Co.),* 338 NLRB 701, 702 (2002). The Respondent argues that General Counsel has failed to prove any adverse effect on the Employer as a result of Williamson's discipline. In this regard, the Respondent points to the undisputed fact that Williamson continued to work for the Employer, in the same capacity, until November 2006 and served without objection from the Respondent as a member of the Employer's negotiating committee. However, the Board has said that whether a union's coercion has succeeded or failed is immaterial. The test is whether it may reasonably be said that the respondent's action meaningfully detracted from the undivided loyalty owed by the supervisor to his employer and if such action thereby interfered with management's right to select its representative. *American Federation of Musicians Local 76 (Jimmy Wakely Show),* 202 NLRB 620 (1973), as quoted in *Local 342-50, Food & Commercial Workers (Pathmark Stores),* 339 NLRB 148, 150 (2003). See also *American Broadcasting Co. v. Writers Guild,* 437 U.S. 411, 432 (1978). Here, the fine and expulsion imposed on Williamson for his efforts to seek out which unions might claim work his employer planned to perform and which would offer the most competitive rates in a collective-bargaining agreement would foreseeably have an impact on an 8(b)(1)(B) representative's ability to make an unbiased recommendation to his employer. Under these circumstances, the Employer's ability to rely on the undivided loyalty of his chosen representative would be compromised.[11]

I found above, in dismissing the 8(b)(1)(A) allegation based on the same conduct by the Respondent, that the Respondent had a legitimate interest in work preservation for its members that outweighed any impact on Williamson's status as an employee. My finding here that the Respondent violated Section 8(b)(1)(B) is based on the impact of its discipline on the Employer's right to select Williamson as its representative for purposes of collective bargaining and grievance adjustment, which involves different concerns. Section 8(b)(1)(B), in contrast to Section 8(b)(1)(A), is designed to protect the right of an employer to engage in collective bargaining free of union restraint and coercion. In these circumstances, whatever interest the Respondent had in preserving work for its members cannot justify actions which would reasonably restrain the Employer in selecting its representatives.[12]

CONCLUSIONS OF LAW

1. By terminating the Charging Party's membership in the Union, effective July 21, 2006, the Respondent has restrained and coerced the Employer in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the Act.

2. Respondent has not engaged in any other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. At a minimum, Respondent must be

[10] By January 2006, when Williamson began serving as a member of the Employer's negotiating committee with the Respondent, he clearly was performing 8(b)(1)(B) duties. Although the Respondent had already taken action to expel him, that decision was on appeal to the International Union. The expulsion did not become effective until July 2006, after the parties had concluded negotiations. The threat of expulsion thus hung over Williamson throughout the period he served as a collective-bargaining representative.

[11] It is interesting to note that Chartier's decision to negotiate a contract with the Respondent, rather than pursue relations with any of the other unions Williamson had contacted, occurred about the time that the Respondent informed Williamson of the charges against him.

[12] Contrary to the Respondent's assertions in its brief, the evidence does not establish that the hydro excavation work to be performed by the Employer was clearly within its trade jurisdiction. The credible evidence in the record in fact shows that other unions have collective-bargaining agreements with other employers in Michigan covering this work.

required to rescind Williamson's expulsion and reinstate his membership in the Union without loss of benefits retroactive to July 21, 2006. I shall also recommend that the Respondent be required to reimburse Williamson for any expenses he incurred in fighting the charges against him, including travel expenses associated with his appearance at the appeal hearing in Washington, DC. See *Elevator Constructors Local 10 (Thyssen General Elevator Co.),* supra at 703.

The General Counsel also seeks a backpay remedy for work opportunities lost as a result of Williamson's expulsion from the Union. I find no basis in the record for ordering such relief. Although Williamson testified that it would be difficult for him to find a job with a union contractor after his expulsion, and that if he were hired it would be a "distraction," he provided no specifics showing that he has in fact been denied work because of the Respondent's actions against him. Moreover, he admitted that he could still obtain employment with a union-signatory contractor by paying working dues. He also acknowledged that other former members who have been expelled by the Respondent are still working for signatory employers. In the absence of evidence that the Respondent caused or attempted to cause employers to refuse to hire the Charging Party, backpay is not warranted. See *Iron Workers, Local 111 (Northern States Steel Builders),* 298 NLRB 930, 935 (1990) (Board ordered backpay as a remedy for union's unlawful conduct in the absence of employer complicity based on a finding that union's misconduct caused the severance or interference with tenure or terms of employees' employment).

General Counsel also requests a remedy for the potential loss of health insurance benefits when Williamson retires based on a rule prohibiting nonmembers from paying into union administered health insurance funds after retirement. Such an order is unnecessary as Williamson's reinstatement to membership will alleviate this obstacle to obtaining health insurance upon retirement.

Because the complaint does not allege that Williamson's fine was unlawful, I shall not require the Respondent to refund the fine, if paid. In this regard, I note that there is no evidence that the fine, like Williamson's expulsion, was stayed pending his appeal to the International Union. Under these circumstances, any allegation that the fine was unlawful might be barred by Section 10(b) of the Act.

[Recommended Order omitted from publication.]