Nos. 10-1121 & 10-1137

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of the International Union of Operating Engineers, Local 513, AFL-CIO ("the Union") to review, and on the cross-application of the National Labor Relations Board ("the

Board") to enforce, a Board Order issued against the Union on April 19, 2010, and reported at 355 NLRB No. 25 (2010). (A 13.)[1]

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in that circumstance, to cross-apply for enforcement.

The Union filed its petition for review on May 28, 2010. The Board filed its cross-application for enforcement on June 14. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

[1] Citations are to the deferred joint appendix filed on January 11, 2011. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Union violated Section 8(b)(1)(A) of the Act by fining employee Mark Overton because he reported a safety violation to his employer where he would be subject to discipline by his employer for failure to make the report.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed by employer Ozark Constructors, LLC ("the Company"), the Board's General Counsel issued a complaint alleging that the Union violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by filing an internal union charge against employee Mark Overton, and then fining him $2500, because Overton reported a safety violation to the Company in compliance with safety rules made applicable by the parties' collective-bargaining agreement. (A 14; 111-15.) Following a hearing, an administrative law judge issued a decision finding that the Union violated the Act as alleged. The Union filed exceptions to the judge's decision. The Board affirmed the judge's rulings, findings, and conclusions, and adopted his recommended order, with some modifications.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company is Formed for the Reservoir Project with Managers and Operating Engineers Working On-Site; the Operating Engineers Set-Up and Run the Telebelt, which is Designed to Have Four Extended Outriggers for Safety

Fred Weber, Inc. is a union affiliated highway and heavy construction company in St. Louis, Missouri. (A 15; 24, 119.) ASI Constructors, Inc., is a nonunion dam construction company from Pueblo, Colorado. (A 15; 24, 119.) In 2007, the two companies entered into a joint venture called Ozark Constructors, LLC ("the Company") for the purpose of reconstructing the Taum Sauk Reservoir, a hydroelectric facility, in southeast Missouri. (A 15; 23-24, 119.) The Company, serving as the project's general contractor, has at times employed up to 700 people. (A 15; 26.)

Roger Gagliano, of Fred Weber, Inc., and Lee Schermerhorn, of ASI Constructors, serve as the project's construction managers. (A 15; 26, 40.) Gagliano generally handles personnel and collective-bargaining issues. (A 15; 105.) The project also employs two general superintendents, a safety manager, and an engineering manager, all of whom report to Gagliano and Schermerhorn. (A 15; 42.)

The Union, one of four labor organizations on the project, represents the approximately 200 operating engineers employed there. (A 15; 27, 29.)

All operating engineers working on the project must be members of the Union to remain employed on the project. (A 18; 30, 155.)

Among the duties of operating engineers on the project is the set-up and running of the telebelts, heavy pieces of construction equipment used at the site. (A 15; 37, 220-21, 227.) A conveyer belt attached to the telebelt spans approximately 130 feet to move materials such as roller-compacted concrete, coarse aggregate, and other materials used on the project site. (A 15; 41, 99, 220-21.) The telebelt sits on a truck stabilized by four steel legs, called outriggers, which must be fully extended on level ground to prevent the telebelt from overturning. (A 15; 50, 71-72.) A shortened outrigger could cause the telebelt to become unstable and overturn, resulting in serious personal injury or property damage. (A 15; 50, 75, 88.)

B. A Collective-Bargaining Agreement Covers the Union Employees and Includes a Safety Article; the Company's Safety Orientation Checklist Requires Employees To Report All Incidents to Supervisors

Since 1971, some form of a collective-bargaining agreement known as the National Maintenance Agreement ("NMA") has been utilized on construction projects employing members of the Union. (A 15; 120-40.) For the Taum Sauk reservoir project, the Union, the Company, and the project's owners adopted the "Revised 1996" version of the NMA as the general collective-bargaining agreement applicable to the operating

engineers. (A 15; 27, 120.) The NMA incorporates by reference the local collective-bargaining agreement previously entered into between Fred Weber, Inc. and the Union. (A 15; 28, 141-207.) Accordingly, union members working on the project are governed by both the NMA and the local collective-bargaining agreement. (A 15; 29-30.)

The NMA explicitly recognizes the applicability of the Company's safety rules and regulations in Article XVII: "The employees covered by the terms of this Agreement shall at all times while in the employ of the Employer be bound by the safety rules and regulations as established by the Owner, the Employer, this agreement, or applicable Safety Laws." (A 15; 133.) To help implement its safety rules and regulations, the Company's Safety Orientation check-off sheet contains a comprehensive list of the safety topics discussed during employee orientation. (A 15; 33, 208-19.) The safety orientation includes, in pertinent part, the following employee responsibilities:

> 32. Employees MUST report all accidents/incidents to their supervisor immediately, no matter how slight. This allows us to provide prompt care, and investigate & eliminate hazards that may cause others to be injured.
> ****
> 35. Employees are expected to learn and comply with all project safety rules, regulations and policies applicable to their specific work tasks, as a condition of employment.

(A 15; 211.) The last page of the safety orientation consists of a signed acknowledgement by the employee that he or she participated in the safety orientation during which all of the safety topics were discussed, fully understands all of the Company's safety policies, rules and regulations, and knows where to find the safety manual. (A 15; 219.) Every operating engineer on the project must sign the safety orientation acknowledgment sheet. (A 15; 35.) The failure to report a safety violation subjects an employee to discipline. (A 15; 50-51, 57, 59, 103-04.)

C. The Company Hires Operating Engineer Overton; the Union Denies Overton's Membership Transfer and Issues a Traveler Permit; Overton Is Promoted to Working Foreman in the Collective-Bargaining Unit

Mark Overton, a Colorado resident, has worked as an operating engineer for ASI Constructors on dam construction projects in several states. (A 16; 64.) He is a member of the International Union of Operating Engineers, Local 953, AFL–CIO, based in Albuquerque, New Mexico. (A 16; 29, 66.) In December 2007, the Company hired Overton to work on the project as a telebelt operator and trainer. (A 16; 29, 64, 66.) The Company hired Overton from outside the Union because of his experience with the very specialized equipment used on the project, including the telebelt. (A 15-16; 29, 31, 64.)

Upon arriving at the project, Overton applied for union membership by attempting to transfer his membership from Local 953 to the Union. (A 16; 67.) Stephen Gunter, the Union's business representative, denied Overton's application on the ground that the hall was "overfull," but issued him a traveler permit to work as an operating engineer at the project site pursuant to the terms of the local collective-bargaining agreement. (A 16; 67.) A traveler permit allows operating engineers who are members of union locals specializing in dam construction in other parts of the country to work on the reservoir project. (A 15; 29.)

In September 2008, Overton was promoted to the job classification of a working foreman. (A 16; 29, 65.) In that capacity, he lead a crew of about nine operating engineers and laborers who work with telebelts and pump trucks. (A 16; 65.) Overton received directives from supervisors on the placement of telebelts on the project site, coordinated the placement and operation of the project's telebelts, and trained others in the operation of the telebelts. (A 16; 39, 65.) Although he had training duties and reported directly to superintendent Andy Westbrook, Overton did not have supervisory functions and remained part of the collective-bargaining unit. (A 16; 32, 38, 43, 66.) For example, other working foremen have filed

grievances against the Company and have been represented by the Union. (A 16; 61.)

D. Overton Sees an Outrigger that Is Not Fully Extended; Overton Reports to the Safety Officer and Investigates the Telebelt's Set-up; Overton Reports to His Immediate Supervisor; Supervisor Westbrook Suspends Employee Allison for the Safety Violation

When he arrived at the project site during the morning of November 20, Overton observed a telebelt with an outrigger that was not fully extended. (A 16; 74.) Failure to fully extend an outrigger is a safety violation. (A 16; 48, 75.) Overton immediately went to the office of Jim Andrews, the Company's safety officer. (A 16; 76-77, 90.) Overton and Andrews went to the telebelt and measured the outriggers. (A 16; 77, 92.) They found that the fully extended outrigger measured 64 inches, while the shortened outrigger measured only 30 inches. (A 16; 77.)

After confirming the telebelt safety violation, Overton called Steve Newton, a union steward, to find out who operated the telebelt. (A 16; 78, 96.) Newton reported that Ryan Allison, an operating engineer and union member, was the last one to operate the telebelt. (A 16; 78, 96.) Overton also spoke with Duane Wehner, another operating engineer and union member, who reported that he helped Allison set up the telebelt the previous night. (A 16; 79, 97.) On the same day, Overton reported the safety

violation to superintendent Westbrook. (A 16; 79-80.) Westbrook then directed Overton to prepare an incident report, as employees were instructed to do during safety orientation. (A 16; 94.) After confirming the incident with the safety department, Westbrook suspended Allison for 3 days for "fail[ing] to follow established safety instructions by not having the outriggers of the equipment fully extended." (A 17; 244.) Allison did not grieve the discipline and served a 3-day suspension. (A 17; 104.)

E. Union Business Representative Gunter Files Internal Union Charges Against Overton; the Company Has Received No Prior Complaints About Overton; the Union Informs Overton of the Procedural Process that It Will Follow in Pursuing the Charge Against Him

A copy of Allison's suspension letter was faxed to Gunter on November 21. On November 24, the next business day, Gunter filed internal union charges against Overton for "violation of Article XXI, Section 21:01, subdivision (F) Gross disloyalty or conduct unbecoming a member." (A 17; 223.) The charge further stated, in pertinent part:

> Mark Overton wrote up Ryan Allison for failing to have an outrigger fully extended on the telebelt, when he had already been informed that Duane Wehner was the operator who had failed to fully extend the outrigger.
>
> The above isn't the first incident of Mark Overton being adversarial with Local 513 operators. There has been an ongoing problem with him screaming at and speaking in an abusive manner to his brother operators, which he has been warned about repeatedly. Also,

> numerous operators have run the telebelt for an extended period of time and he eventually finds a way to get rid of them.
>
> It appears that Mark Overton has been dissatisfied with working in Local 513's jurisdiction ever since he was informed, some months ago, that he wouldn't be allowed to bring his buddies in from other states to run the telebelts, but instead he would have to train Local 513 operators on them. This is no way justifies Mark Overton's misconduct and behavior.

(A 17; 223.)

Prior to November 20, no one had complained to the Company about Overton's treatment of bargaining unit members. (A 17; 53, 106, 108.) Union business representative Gunter had an opportunity to express such concerns during his weekly meetings with construction manager Gagliano and superintendent Westbrook, as well as the monthly tripartite meetings with them and the project's owners to discuss work, safety, and personnel matters. (A 17; 52-55; 106.)

By letter also dated November 24, Dan McNamee, the Union's recording secretary, provided Overton with a copy of the union charges and informed Overton of his right to respond in writing to the charges within 3 weeks of receipt of the letter. (A 17; 222.) McNamee's letter further informed Overton of the Union's procedural process:

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

> You will be notified of the time and place of when the next Executive Board meeting will be held.
>
> Failure to appear at this pre-trial hearing or to notify us in time of a reason why you cannot appear on the scheduled date may convince the Board of your guilt, and will obligate the Board to forward the charges to the membership for consideration and a vote as to your guilt [or] innocence of the charges.

(A 17; 222.)

F. Overton Informs Construction Manager Gagliano About the Charge; Gagliano Disputes the Charge to the Union and Demands that It Be Withdrawn; the Union Informs Overton that It Will Proceed to the Next Step of a Pretrial at an Executive Board Meeting; Overton Does Not Attend the Meeting

Overton provided construction manager Gagliano with a copy of the Union's charge. (A 17; 39-40, 83.) Gagliano responded with a letter to McNamee, dated December 11, with a copy to Gunter. (A 17; 46, 224-26.) In his letter, Gagliano disputed the charges by questioning why the Union did not comply with the NMA's dispute resolution procedures or file a grievance challenging the discipline. (A 17; 225.) He also noted that the Union made no previous mention of abusive treatment of its members by Overton at any project meetings, suggested that the union charges were an attempt to intimidate the working foremen on the project, and demanded the Union withdraw the charges. (A 17; 225.)

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

> You are requested to appear before this meeting at which time the charges that have been filed against you will be reviewed and a pretrial held, so that we may determine if the charge has merit to present to the entire membership at the next regular meeting.
>
> Failure to appear before the meeting may convince the board of your guilt, and will then recommend that the charges be presented to the entire membership to vote and decide your guilt or innocence.

(A 17; 241.) Overton did not attend the Union's Executive Board meeting on January 20. (A 15; 84.)

G. The Union Finds Merit to the Charges and Informs Overton that It Has Levied the $2500 Fine Against Him

The Executive Board meeting minutes reflect that "[m]erit was found in charges and a fine of $2500 was recommended if he wishes to not go to trial by the membership." (A 17; 245.) McNamee sent a letter to Overton on behalf of the Union, dated January 26, indicating, in pertinent part, "that merit was found in the charges of November 24, 2008 and a fine of $2,500.00 was levied against you." (A 17; 242.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Schaumber and Pearce) found, in agreement with the administrative law judge, that the Union violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by fining employee Mark Overton $2500 because, in compliance with the employer's safety rules, Overton reported a safety violation by another employee. (A 13.) The Board relied on its consistent findings in controlling cases that a union violates Section 8(b)(1)(A) when it disciplines an employee for reporting a work-rule infraction by another employee, where the reporting employee has a duty to make such reports. (A 13.)

The Board's Order requires the Union to cease and desist from the unfair labor practice found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). (A 20.) Affirmatively, the Order requires the Union to rescind the fine levied against Overton, remove from its files any and all references to internal union proceedings against Overton in connection with the fine levied against him, and to notify Overton in writing that it has done so and will not use this

matter against him in any other way. (A 20.) The Union must also post copies of a remedial notice at its office. (A 20.)

SUMMARY OF ARGUMENT

A union has the prerogative to regulate its own internal affairs with an important caveat that the Supreme Court has clearly set forth—it cannot coerce an employee to follow a union stricture that will impact that employee's employment status. The Union did just that, coercing employee Mark Overton with internal charges and a $2500 fine for reporting a safety violation that he was required to report, and the Board reasonably found that the Union violated Section 8(b)(1)(A) of the Act by its actions.

Overton was a working foreman, covered by the collective-bargaining agreement, on a dam reconstruction project where his crew set up and operated heavy construction equipment, including telebelts. Like all employees, Overton had signed a safety orientation checklist agreeing to report all violations of safety rules, which were made applicable through the collective-bargaining agreement. Thus, on the day that he discovered a telebelt with a shortened outrigger, he risked discipline if he did not report this serious safety hazard. In the end, because Overton reported what he saw, he faced internal union charges and a significant fine of $2500 levied by the Union.

Well-established Supreme Court and Court approved Board precedent makes clear that an employee cannot lawfully be made to face the choice that Overton did: be disciplined by your employer for failing to abide by a work rule or be fined by your union. The Union's attempt to cloud the issue by relying on cases involving a different statutory provision, Section 8(a)(1), does not relieve it of its burden under Section 8(b)(1)(A) to refrain from interfering with the employment status of its members (or in Overton's case, an employee working under a traveler permit). The Supreme Court has already explored Congressional intent with respect to Section 8(b)(1)(A), and the Court's guidance is the basis for the Board's indistinguishable precedent upon which it relied here. Finally, the Board's most recent comprehensive look at Section 8(b)(1)(A)'s regulation of intraunion conduct affirms the same principle that the Board applied here—Section 8(b)(1)(A) prohibits union conduct against members that impacts on the employment relationship.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY FINING EMPLOYEE MARK OVERTON BECAUSE HE REPORTED A SAFETY VIOLATION TO HIS EMPLOYER WHERE HE WOULD HAVE BEEN SUBJECT TO DISCIPLINE BY HIS EMPLOYER FOR FAILURE TO MAKE THE REPORT

A. Principles of Union Coercion and Standard of Review

A union is free to enforce a rule governing internal matters, so long as the rule reflects a "legitimate union interest, [and] impairs no policy Congress has imbedded in the labor laws . . . ." *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (hereafter "*Scofield*"). On the other hand, where the application of an internal union rule either does not reflect a legitimate union interest, or impairs federal labor policy, even purely internal union discipline of a member for violating such a rule may constitute unlawful coercion in the exercise of an employee's statutory rights. *See id.* at 432; *Int'l Union of Elevator Constructors v. NLRB*, 665 F.2d 376, 379-80 (D.C. Cir. 1981).

Section 7 of the Act (29 U.S.C § 157) guarantees employees the right to "form, join, or assist labor organizations . . . and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." as well as the right to "refrain from any or all such activities . . . ." Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) implements the guarantees of Section 7 by making it an unfair labor practice for a union

to "restrain or coerce" employees in the exercise of their statutory rights. These provisions reflect the "policy of the Act . . . to insulate employees' jobs from their organizational rights." *Scofield*, 394 U.S. at 429 n.5 (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954)). Section 8(b)(1)(A) also recognizes a union's right to manage its internal affairs by further providing that a union is entitled "to prescribe its own rules with respect to the acquisition and retention of membership." That proviso "assures a union freedom of self-regulation where its legitimate internal affairs are concerned." *NLRB v. Marine Workers*, 391 U.S. 418, 424 (1968).

The Supreme Court has repeatedly held, notwithstanding that proviso, that Section 8(b)(1)(A) of the Act bars enforcement of internal union regulations that have the external effect of impacting an employee's employment status. *See Scofield*, 394 U.S. at 428; *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 195 (1967) (distinguishing permissible internal union rules from rules whose enforcement would have an external effect, such as interfering with an employee's relationship with his employer). Accordingly, the Board has held, with judicial approval, that when an employee is required to report work rule infractions of fellow employees to the employer, a union violates Section 8(b)(1)(A) if it disciplines the employee for carrying out that job responsibility. *Teamsters Local 896*

(Anheuser-Busch), 339 NLRB 769 (2003); *Teamsters Local 439 (University of the Pacific)*, 324 NLRB 1096 (1997), *enforced*, 175 F.3d 1173 (9th Cir. 1999); *San Diego County Dist. Council of Carpenters (Hopeman Brothers, Inc.*), 272 NLRB 584 (1984) (hereafter "*San Diego Carpenters*"); *Local 604, Int'l Chemical Workers Union (Essex Int'l)*, 233 NLRB 1239 (1977), *enforced*, 588 F.2d 838 (7th Cir. 1978) (hereafter "*Local 604, Chemical Workers*"). In each of these cases, the gravamen of the violation is the effect of the union's action on the employee's employment status.

The findings of fact underlying the Board's decision are "conclusive" if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 488. *Accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007).

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them so long as they are neither arbitrary nor contrary to law. *Int'l Transp. Servs. v. NLRB*, 449 F.3d 160,

163 (D.C. Cir. 2006). Furthermore, the Court will "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citing *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)).

B. The Board Properly Found, Based on Substantial Evidence, that the Union Violated the Act by Charging and Fining Employee Overton Because He Reported a Safety Violation As He Was Required to Do By His Employer Or Risk Facing Discipline

The Union's imposition of a fine upon Overton went beyond the confines of lawful internal union affairs. Rather, as the Board found (A 18), it had an impact on Overton's employment status, because Overton faced the risk of discipline if he complied with the Union's injunction against reporting union members for safety violations. Because permitting such discipline conflicts with "the policy of the Act . . . to insulate employees' jobs from their organizational rights," *Scofield*, 394 U.S. at 429 n.5, the Board found (A 13), in accordance with its settled precedent, that the Union's actions violated Section 8(b)(1)(A). *See also Allis-Chalmers*, 388 U.S. at 195 (enforcement of internal union strictures that have an external effect on an employee's relationship with his employer is unlawful).

Overton came to work one morning and discovered a telebelt in a precarious and dangerous position, with one of its outriggers much less extended than it needed to be to prevent the catastrophe of it tipping over. (A 16; 74.) He then did exactly what the Company required of him and all its employees as stated in the collective-bargaining agreement and safety orientation—he reported the incident to the safety officer and his own supervisor. (A 15; 76-80, 133, 211.) Overton acted because he knew that he had to; in his words, "because that is what I am supposed to do." (A 15; 80.) Overton's supervisor, Andy Westbrook, who ultimately handled the incident, was clear on this point as well; Overton was "most definitely" required to report the incident. (A 15; 103.) As the Board found, based on uncontradicted evidence by Overton's supervisor and the project's general manager, if Overton had not reported the safety violation, he would have been subject to discipline. (A 15; 50-51, 57, 59, 103-04.)

Thus, the Union charged and fined[2] Overton for submitting a report that he was required to make. There may have been bad blood between the Union and Overton due to his traveler status (A 15; 31, 223), but in its

[2] Contrary to the Union's characterization (Br 5), the Union ultimately did more than "recommend" that Overton be fined. Overton received a letter from the Union saying that "a fine of $2,500.00 was levied against you." (A 17; 243.) If Overton wanted to file an appeal with the Union's General Executive Board in Washington, DC, he had to first pay the fine. (A 17-18; 243.)

internal charge, the Union relied on the safety incident with member Allison (A 17; 223). Union members cannot lawfully be presented with what the judge aptly termed (A 18) a "classic Hobson's choice" whereby "they risk[] union discipline if they report[] fellow members and employer discipline if they d[o] not." *Teamsters Local 896*, 339 NLRB at 769. "When a union punishes a member for complying with his employer's instructions, it is no longer regulating its purely internal affairs, but enforcing a rule with external effects, i.e., enforcing a rule that affects an employee's relationship with his employer, which is prohibited by Section 8(b)(1)(A)." *NLRB v. Teamsters Local 439*, 175 F.3d at 1176 (upholding Board's finding of Section 8(b)(1)(A) violation).

Given the undisputed facts described above, the Board reasonably found (A 13) certain precedential cases to be "controlling" here and to support its conclusion that the Union violated Section 8(b)(1)(A) of the Act when it charged and fined Overton. As discussed above at p.18, the Board has consistently found that a union commits an unfair labor practice if it disciplines an employee who reports a work rule infraction of a co-worker to his employer when that employee is required to do so by his employer. The Board's reasoning in such cases has uniformly been that union discipline in those circumstances goes beyond internal union affairs and unlawfully

affects the individual's employment status. *See Teamsters Local 439*, 324 NLRB at 1098; *San Diego Carpenters*, 272 NLRB at 587; *Local 604, Chemical Workers*, 233 NLRB at 1240. These cases are indistinguishable from the situation presented here.

In each of the cases, the Board found, as here, that the respondent union had unlawfully disciplined a leadperson or member for reporting rule infractions to his supervisor. In each of the cases, as here, the Board relied on the fact that the leadperson or member's "job duties require[d] that he report employee violations of the [e]mployer's standards of conduct." *San Diego Carpenters*, 272 NLRB at 584 n.1. In *San Diego Carpenters*, the Board found a violation of Section 8(b)(1)(A) where a union fined and put on probation a member who reported that a fellow employee, in violation of the employer's rules of conduct, had threatened him with a knife. 272 NLRB at 585-86. In *Teamsters Local 439*, the Board found the same violation where a leadperson was fined $500 for reporting two employees who were sitting in a closet during work time. 324 NLRB at 1097, 1099. Finally, in *Local 604, Chemical Workers*, the Board found the same violation where a member reported two employees for leaving their work stations and one employee for wearing a tank top, both in violation of work rules. 233 NLRB at 1240. The Union's actions here, in charging and fining

Overton for reporting a union member's failure to properly set-up a piece of heavy construction equipment, thus creating a safety hazard, are no different than those union actions that the Board has repeatedly found violate Section 8(b)(1)(A).

C. The Union Does Not Dispute Why It Charged and Fined Overton But Seeks to Apply a Different and Inapplicable Test that is Inconsistent with Supreme Court and Board Precedent Interpreting and Applying Section 8(b)(1)(A)

The Union does not dispute that it pursued internal charges against Overton for reporting a safety violation by a union member. The Union also does not dispute that Overton, or any of its members covered by the collective-bargaining agreement, had a duty to report such a violation or face discipline on the job. Instead, the Union wishfully says that it permissibly charged and fined Overton for performing his job duties because Overton acted alone in going to his supervisor and the safety officer.

The Union, however, completely relies (Br 9-19) on inapposite cases involving the question of whether an individual acted concertedly in assessing whether an *employer* has violated Section 8(a)(1) of the Act by interfering with an employee's Section 7 rights.[3] Additionally, the Union's

[3] Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

prayer (Br 10) to this Court to "re-establish Congress' intent" in this area of the law ignores the Supreme Court's teaching on the matter as well as the fact that interpretation of the Act is firmly within the Board's province. Finally, the Board's most recent re-examination of its body of Section 8(b)(1)(A) precedent fully supports its conclusion here.

The Union exclusively relies on decisions addressing what constitutes concerted activity in the context of coercion by employers (in violation of Section 8(a)(1) of the Act), rather than engaging in the proper analysis of what constitutes union coercion under Section 8(b)(1)(A) of the Act. The issue here is the dilemma faced by a union member when required to do one thing (make a report) by his employer and another (not make the report or face a fine) by his union. In contrast, in the Section 8(a)(1) cases relied upon by the Union, the issue is how much protection an individual can expect when he acts alone rather than in concert with his fellow employees or as a union member. *See Prill v. NLRB*, 835 F.2d 1481, 1482 (D.C. Cir. 1987) (employer did not commit an unfair labor practice under Section 8(a)(1) when it fired an employee after he had an accident in a company truck and refused to have it towed to the employer, but instead had state officials do an inspection); *Int'l Transp. Serv. v. NLRB*, 449 F.3d at 166 (D.C. Cir. 2006) (setting forth definition of concerted activity in context of individual

employees bringing complaints about working conditions to management and then being subject to coercion by their employer). *Prill* and its progeny simply do not assess the situation presented here, where Overton's reporting *to management* a safety violation as he, and all other members, were *required* to do, led to his being charged and fined by the Union for doing his job.

The Union was charged with a violation of Section 8(b)(1)(A) and the Board properly applied precedent interpreting that statutory provision.[4] Rather than applying *Prill* and other Section 8(a)(1) cases here, the Board applied its long-standing precedent stemming from the Supreme Court's guidance in *Scofield* and *Allis-Chalmers* that Section 8(b)(1)(A) bars enforcement of internal union regulations having the external effect of impacting an employee's employment status. *Scofield*, 394 U.S. 428; *Allis-Chalmers*, 388 U.S. 195. This Court, too, has recognized the application of Supreme Court precedent in the Section 8(b)(1)(A) context, noting it has "been consistently interpreted to insulate employees' job security from unions' rights to self government." *Elevator Constructors*, 665 F.2d at 380.

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[4] The Union attempts (Br 20-23) to distinguish *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984), but neither the Board nor the judge in this case relied on *City Disposal* as support for finding that the Union violated Section 8(b)(1)(A) of the Act. *City Disposal* is a Section 8(a)(1) case involving concerted activity under that separate statutory provision and, as such, is simply outside the scope of analysis here.

The Supreme Court has simply not agreed with the Union's position (Br 9) that finding a Section 8(b)(1)(A) violation where a union interferes with an employee's relationship with his employer is "anathema" to the Act's purpose. Indeed, the Union's wish that (Br 10) this Court re-establish Congressional intent in this area of the law ignores the Supreme Court's examination of that intent. In *Allis-Chalmers*, the Court made clear that "Congress did not propose any limitations with respect to the internal affairs of unions, *aside from* barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195 (emphasis added).

As the Board recognized here (A 13 n.4), it has, in line with this Supreme Court guidance, not required a finding of concerted activity to support a violation of Section 8(b)(1)(A) in situations where unions have disciplined employees for reporting work rule or safety violations when a failure to report could impact the employee's employment status. In *San Diego Carpenters*, the judge specifically found that the fined union member was "not acting in concert with any other employee" and, in fact, was acting "in concert with his employer, not fellow employees" when he reported a work rule violation. *Id* (relying on *Allis-Chalmers* and *Scofield* in finding a violation); *see also Local 604, Chemical Workers*, 233 NLRB at 1239

(finding union violated Section 8(b)(1)(A) where employee did not act concertedly in reporting a coworker's rule violation as required by his job).[5]

The Union inexplicably also relies (Br 18-20) on *Office and Professional Employees International Union, Local 251 (Sandia Corporation)*, 331 NLRB 1417 (2000) (hereafter "*Sandia*"), as support for its argument that the Court should revisit Section 8(b)(1)(A)'s reach. However, the teachings of *Sandia* only reinforce the Board's decision here. In *Sandia*, the Board concluded that Section 8(b)(1)(A) reaches external enforcement of union rules that impact the employment relationship. *Id.* at 1418. In full, the Board spelled out three situations in the intraunion context where Section 8(b)(1)(A) proscribes union conduct against union members

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[5] Furthermore, the Union's comment (Br 22) that the Company's safety rules and regulations were "unilaterally imposed" is a red herring. The collective-bargaining agreement expressly recognizes that the Company may have such rules, providing in Article XVII that employees "shall at all times while in the employ of the Employer be bound by the safety rules and regulations as established by the Owner, the Employer, this agreement, or applicable Safety Laws." (A 15; 133.) Additionally, the Board has not relied on the collectively bargained nature of work rules in other situations where it has found that a union violated Section 8(b)(1)(A) for disciplining members who reported other members. *See San Diego Carpenters*, 272 NLRB at 585-87 (finding unlawful fining of leadman for reporting a violation of one of the "Standard Rules of Conduct" where no evidence suggested the rules were collectively bargained); *Local 604, Chemical Workers*, 233 NLRB at 1240 (finding unlawful fining and suspension of a member for reporting a violation of a no tank top rule that was a longstanding shop policy where no record evidence indicated the rule was collectively bargained).

including where union conduct: impacts on the employment relationship; impairs access to the Board's processes; and clashes with the statutory policy interest and prohibitions incorporated into the Act. *Id.* Accordingly, whatever changes that decision may have effected has to other issues, it serves only to reaffirm the longstanding principles applied by the Board here. Indeed, the Board has applied the first category of *Sandia* to the situation of an employee's reporting requirements to an employer. In *Teamsters Local 896*, the Board relied on *Sandia* in finding that a union violated Section 8(b)(1)(A) with a bulletin board notice threatening internal union discipline against members who complied with their responsibilities to report fellow members. 339 NLRB at 769, 773-74.

The Union's conduct in fining Overton for his report of a safety violation clearly falls under the first category recognized by the Board in *Sandia*. Thus, under both *Sandia* and long-standing Board precedent applying the Supreme Court's pronouncements on Section 8(b)(1)(A), the Union unlawfully sought to coerce Overton (and other travelers or members who would become aware of the fine levied against Overton) into not reporting safety violations and thus risking harm to his employment status.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Union's petition for review and enforcing the Board's Order in full.

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January 2011

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)):

It shall be an unfair labor practice for a labor organization or its agents—
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. . . .

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner/Cross-Respondent	*	Nos. 10-1121, 10-1137
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 14-CB-10424
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,521 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 24th day of January, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system. I hereby certify the Board has served two copies of its brief by first-class mail upon the following counsel:

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