

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

Advice Memorandum

DATE: September 30, 2003

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: International Union of Operating Engineers 260-6796
Stationary Engineers, Local 39 512-5006
Case 32-CA-20575-1 524-3301
524-3325
524-3350-6200

The Region submitted this Section 8(a)(1) and (4) case for advice as to whether Local 39, as an employer, unlawfully told its employees that they must remain Local 39 members in order to have access to records necessary to perform their jobs and to receive Local 39 pension, annuity, health, and welfare benefits; and whether Local 39 unlawfully terminated employee Rebecca Wood for providing information to a former employee, Lisa Van Wormer, who had filed both an unfair labor practice charge and a small claims lawsuit against Local 39.

We conclude that Local 39 unlawfully told its employees that membership was required in order to have access to records necessary to perform their jobs and that Local 39 unlawfully conditioned its employees' eligibility for Local 39's benefits plan on their joining Local 39. We further conclude that Wood's discharge violated Section 8(a)(4) because it was carried out in retaliation for her having spoken with Van Wormer.

FACTS

International Union of Operating Engineers Stationary Engineers, Local 39 (Local 39 or the Employer) maintains several business offices in Northern California and employs approximately 12 clerical employees. In 2002, the Employer was named in two unfair labor practice charges which alleged, inter alia, that it unlawfully required its employees to become and remain Local 39 members, and that it unlawfully acted as its employees' collective-bargaining agent and collected dues from them pursuant to a union security clause in a collective-bargaining agreement which

Local 39 had entered into with itself.¹ The charges were resolved in November 2002 by way of an informal settlement agreement which required Local 39 to cease and desist from conditioning employment on Local 39 membership unless such membership was necessary to its employees' job performance, and to rescind the collective-bargaining agreement and reimburse any employee who requested a refund for dues and fees paid after October 24, 2001 (the Section 10(b) limit). As of May 2003, only Van Wormer and one other former employee had requested reimbursement.

Wood worked as one of three clerical employees at the Employer's Sacramento office. Wood's duties included answering phones, typing correspondence, maintaining dues records, and responding to inquiries concerning dues payments.

According to Wood, on November 18, 2002, Local 39 Business Manager Jerry Kalmar assembled the clerical staff at its Sacramento office to advise them of the settlement agreement. He read the Board Notice and informed employees of their right to resign membership in Local 39 and cease paying dues. Kalmar also told employees that in order to have access to Local 39 records and to remain eligible for their current "Cadillac benefits," they had to be Local 39 members.

The Employer contends that its membership records are confidential. In this regard, the Employer required Wood to sign a document which states that such information "is not to be released to unauthorized persons," and recites that unauthorized removal or use of Local 39 records and information, or misuse of information or member lists, is grounds for discipline up to and including discharge.

On May 5, 2003² Wood answered a telephone call from Van Wormer, who asked Wood to confirm how much she had paid in dues for August, September, and October 2001. Wood looked up the information on her computer and told Van Wormer the amounts. Although Wood knew Van Wormer as a former colleague, she had not seen or spoken with her since Van Wormer's August 2002 discharge, and Wood had not been involved with Van Wormer's unfair labor practice charge. Wood did not suspect that Van Wormer's call was related to

¹ Cases 32-CA-19591 and 32-CA-19896. Van Wormer, the charging party in the latter case, amended her charge to allege that she was unlawfully terminated, but withdrew this allegation after the Region found it without merit.

² All dates hereafter are 2003 unless otherwise noted.

her Board case or to any other legal action against Local 39. Rather, she treated Van Wormer's request as she would any other dues inquiry. In this regard, Wood stated that she and the other clericals routinely provided dues information to members, suspended members, and non-members, including agency fee payers and members' spouses. Wood had never been told that dues information was considered confidential.

On May 6, Van Wormer called Local 39 again and spoke with clerical Linda Middleton. Van Wormer requested that a printout of her dues information for August, September, and October 2001 be mailed to her, and when Middleton expressed reservations about doing so, Van Wormer explained that Wood had already given her the information over the phone. Middleton reported both Van Wormer's phone call and the fact that Wood had given dues information to Van Wormer over the phone to their supervisor, Joan Bryant.

On May 12 Van Wormer served the Employer with a small claims lawsuit seeking to recover dues that Local 39 had unlawfully collected from her, but which fell outside the Section 10(b) period covered by the settlement agreement.

That same day Bryant called Wood into her office. Bryant said that Middleton had told her about Wood's phone call with Van Wormer. Wood did not deny giving Van Wormer dues information, but said she had acted without any malicious intent and that she gave such information to people every day. Bryant replied that Wood had given Van Wormer, a non-member, confidential Union information and added, "Don't you know that [Van Wormer] is still in litigation with this organization?" and "Don't you remember I had to post that thing [the Board Notice] on the wall?" Wood told Bryant that the computer indicated Van Wormer was suspended, and that she routinely gave dues information to suspended members. Bryant then said, "I told you guys the day I terminated [Van Wormer] that I didn't want you to engage in any conversation with her."³ Wood replied that she did not recall such a directive. Bryant then excused her, and Wood returned to work.

³ The Employer maintains that when Van Wormer was discharged it informed employees that they were not to talk to her during work time and that any telephone calls from her were to be referred to Local 39 management. Wood, however, denied that the Employer ever instituted such a rule. According to Wood, on the day Van Wormer was discharged Bryant told the clericals that while she knew they would be concerned about Van Wormer, they were not to call her that day during work hours.

Shortly after Wood arrived for work on May 14 Bryant asked her to join her in the office of Director of Public Employees Perry Bonilla. Bonilla said Bryant had informed him about what happened and that he was very disappointed in her. Bonilla placed Wood on paid administrative leave on May 14 and 15. She received a message to report to work on May 16.

Wood arrived at work on May 16 to find that her desk had been cleared off. Bryant asked Wood into her office and told her that she had been terminated. Bryant handed Wood a termination notice which states, in relevant part, that her discharge was based upon the following:

On or about May 5, 2003, you gave confidential dues records to Lisa Van Wormer[,] who is not a member of Local 39. District Representative Joan Bryant questioned you about this matter [and] you admitted speaking to Lisa Van Wormer on the date in question and giving her three (3) months of dues records.

* * *

It should also be noted that you were specifically warned and directed not to speak to Lisa Van Wormer during work time and to direct all of her phone calls and inquiries to a management representative....

* * *

In addition, you were aware that Lisa Van Wormer had filed past litigation against Local 39. You were made aware of this fact on several occasions. The fact that you gave confidential information to an individual, who is not a member of the Union, and who has in the past and has currently filed litigation against the Union is unacceptable, inappropriate, and terribly disappointing.

ACTION

The Region should proceed in accordance with the following.

- A. The Employer's requirement that its employees belong to Local 39 in order to have access to membership information is unlawful because it is not reasonably related to the proper performance of their jobs.

A union-employer, like any other employer, may impose on its employees requirements "reasonably related to the proper performance of their jobs."⁴ And, a union-employer's requirement that its employees belong to it, pay dues, fees, and assessments to it, and attend its meetings need not, in and of itself, violate the Act. Id. at 432-433. However, a union-employer must affirmatively advise its employees of their right to engage in concerted activities unaffected by such membership requirements. Id. at 433. Specifically, a union-employer must

state positively that its requirements of membership, and attendant obligations, are imposed only as a necessary part of the employee's job; that the union-employer does not propose to represent its employee members for the purposes of collective bargaining or the adjustment of grievances; that its employees are free to join another labor organization in order to exercise their statutory rights; and that where a majority of its employees do choose such other labor organization the union-employer will bargain with it, upon request.

Ibid.

As to when union membership may legitimately be required, a union-employer must "satisfactorily demonstrate" the job-relatedness of its membership requirement.⁵ In Teamsters Welfare Fund, the employer, a trust fund, imposed a membership requirement on all its salaried employees, contending that it was necessary to maintain its relationship with the local unions it serviced. Id. at 917. The court found that the employer had failed to establish that its membership requirement bore a "nexus to specific jobs," observing that there was no testimony concerning the employer's data processors, confidential secretaries, or maintenance employees; little testimony about field representatives' job responsibilities; and that the only witness to testify did not perform any of the jobs in question. Ibid. Further, the court agreed with the ALJ's characterization of the limited evidence concerning job-relatedness as "vague, conclusionary, and hardly reliable." Ibid.

⁴ Retail Store Employees Union, Local 428 (Rose C. Wong), 163 NLRB 431 (1967).

⁵ NLRB v. Mich. Conf. of Teamsters Welfare Fund, 13 F.3d 911, 918 (6th Cir. 1993), enforcing 306 NLRB 243 (1992).

Applying the foregoing precedent here, we conclude that the Employer has not satisfactorily demonstrated that Local 39 membership is reasonably related to the clericals' proper performance of their jobs. The Employer has shown no nexus between the specific jobs clericals perform -- which include answering phones, typing correspondence, maintaining dues records, and responding to inquiries concerning dues payments -- and its requirement that they be Local 39 members. As in Teamsters Welfare Fund, we find that the Employer's vague and conclusory statements about the assertedly confidential nature of information to which they have access falls short of establishing that Local 39 membership is a "business necessity" within the meaning of Retail Store Employees. Moreover, the Employer required Wood -- and presumably its other clericals -- to sign a document acknowledging that membership information is not to be released to "unauthorized persons." Therefore, to the extent the Employer is legitimately concerned about limiting the disclosure of membership information, it already requires an assurance from its employees in this regard, and it has not shown how requiring clericals to become Local 39 members further advances this interest. Having failed to satisfy its burden under the first prong of the Retail Store Employees standard, we conclude that the Employer's membership requirement violates Section 8(a)(1).⁶

B. Kalmar's statement that eligibility for Local 39's benefits plan required Local 39 membership also violated Section 8(a)(1).

Although the Union asserts that the benefits plans its employees participated in require Union membership, it has offered no evidence to substantiate this claim and it is not clear it could legitimately do so.⁷ If the

⁶ Accordingly, the Region should not allege this violation in terms of Kalmar's failure to provide employees with the assurances required under Retail Store Employees. In fact, his statement is not inconsistent with the assurances which he read. Thus, Kalmar did not say that Local 39 would represent its employees for collective bargaining or grievance adjustment purposes; and he neither suggested that employees could not join another union or that Local 39 would not bargain with such a union, upon request, where a majority of the employees had chosen to be represented by it.

⁷ See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) (in order to be lawful an employer's statement must

plans in issue are the trust fund plans available to employees the Union represents, they would generally not require Union membership. For, a union acting as a Section 9(a) representative may not limit eligibility for its benefits plan to union members.⁸ Under the same reasoning, if participation of the Union's employees in the benefits plan is a matter within the Union's control, and the Union provides the benefit as a condition of employment, it would discriminate by prohibiting nonmember employees from participation, while providing coverage to member-employees.⁹

Conceivably, a trust plan could permit formerly represented employees to retain coverage as long as they maintain their membership in the Union. If Local 39 merely truthfully described such a requirement to employees, its statements might be protected under Section 8(c). However, Local 39 has not provided evidence of any such requirement; Kalmar's statement did not purport to be an explanation of such a requirement; and the context in which the statement was made indicates that it was a threat to discriminatorily deny benefits, consistent with earlier threats to deprive employees of benefits if they advocated changes in their terms and conditions of employment.

C. Wood's discharge violated Section 8(a)(4) because it was in retaliation for providing information to a charge-filer.

be based on objective fact to convey its belief as to demonstrably probable consequences beyond its control; any implication that the employer may or may not take action solely of its own initiative for reasons unrelated to economic necessities and known only to it transforms a statement from a reasonable prediction based upon available facts to a threat of retaliation based on misrepresentation and coercion, which is without First Amendment protection).

⁸ See generally F&C Transfer Co., 277 NLRB 591, 596 (1985), citing Kaufman DeDell Printing, 251 NLRB 78, 79-80 (1980) (paying contractual wages and making pension and welfare contributions only for bargaining unit's union members, but not its non-members, unlawful).

⁹ Certainly, if the benefits Kalmar referred to were not the Union trust plans, and were separately provided by the Local 39 to its employees, any Union membership requirement would be within the Local 39's control and references to such a requirement would be unlawful.

Section 8(a)(4) provides only that "[i]t is unlawful to discharge or otherwise discriminate against an employee who has filed charges or given testimony under this Act." However, the Board and courts have broadly interpreted Section 8(a)(4) to find violations for discharges because of charge filing or related conduct, even if the discriminatee did not herself file a charge, testify, or assist in a Board investigation.¹⁰ In Norris the father, who had not been involved in his son's cases, was laid off eight months after the son had settled the second of two unfair labor practice charges. The ALJ found that the employer transferred its "unlawful motivation" from the son, whose charges admittedly caused it "consternation, worry, inconvenience, and expense" and "carried through with its threat to get rid of the entire...family by laying off" the father.¹¹ Likewise, in Operating Engineers Local 302,¹² the Board found that a union-employer violated Section 8(a)(4) where circumstantial evidence showed that it terminated an employee because it believed she had provided information to the charging party in another ULP case.¹³

Here, we agree with the Region that Wood's termination letter and the Employer's June 3 position statement demonstrate that Wood's discharge flowed from Local 39's animus toward Van Wormer. Thus, Local 39 discharged Wood because she had provided information to an individual who "has in the past and has currently filed litigation against

¹⁰ See Norris Concrete Materials, 282 NLRB 289, 291-292 (1986) (Board found that the employer violated Section 8(a)(4) because it laid off an employee to punish him for his son having filed charges with the Board).

¹¹ Id. at 299. Although the ALJ discussed employer references to the "entire" and "whole" family, father and son were the only family members who worked for the employer.

¹² 299 NLRB 245, 245 n.1, 249 (1990).

¹³ See also Cafe LaSalle, 280 NLRB 379, 395 (1986) (finding a Section 8(a)(4) violation where employer refused to give a letter of recommendation to an employee, who neither filed nor testified in Board proceeding, but who was a named discriminatee in ULP charge union filed on her behalf), quoting NLRB v. AA Electric Co., 405 U.S. 117, 124 (1972) ("The approach to Section 8(a)(4) generally has been a liberal one in order to fully effectuate the section's remedial purpose.").

the Union." That evidence of animus against charge filing is sufficient to make out a Section 8(a)(4) violation.¹⁴

Additionally, since the rule against contacts with Van Wormer that Wood assertedly violated was an outgrowth of Local 39's animus toward Van Wormer, Local 39 cannot rely upon the purported violation of the rule to justify Wood's discharge.¹⁵ Further, we reject the Employer's claim that dues information is confidential, and that Wood was thus lawfully terminated for violating its policy in this regard. Wood stated that she was never advised that dues information was confidential, and the evidence reveals that clericals routinely provided dues information to non-members without consequence.

Accordingly, absent settlement, the Region should issue a Section 8(a)(1) and (4) complaint consistent with the foregoing.

B.J.K.

¹⁴ In addition, if the evidence supports a conclusion that Local 39 mistakenly believed Wood acted in concert with Van Wormer in filing the Board charge or the lawsuit, the Region is authorized to allege that Wood's discharge independently violated Section 8(a)(1). See, e.g., United States Service Industries, Inc., 314 NLRB 30, 30-31 (1994), enfd. 80 F.3d 558 (D.C. Cir. 1996) (Table), quoting Monarch Water Systems, 271 NLRB 558 (1984).

¹⁵ If Wood's account is credited, i.e., that the Employer only admonished employees not to call Van Wormer from work on the day she was fired, Wood did not even violate this directive.