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

Advice Memorandum

DATE: March 11, 1996

TO: Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: Coburn, Inc.
Case 8-CA-27336

512-0125-7500
512-5036-6720-5900
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This Section 8(a)(1) case was submitted for advice as to whether it would be an appropriate vehicle for the Board to revisit Parker-Robb Chevrolet, Inc., [1] because the Employer discharged a supervisor in an attempt to create a defense for its unlawful discharge of two Union supporters.

FACTS

Douglas Steiner (the Supervisor), the Charging Party, was employed as a first shift printing department manager for Coburn, Inc. (the Employer). He directed the work of both first and second shifts and reported directly to the Employer's President, Chuck Zimmerman. The Region found that the Supervisor is a Section 2(11) supervisor.

Shortly after Christmas, 1994, employees contacted the United Steelworkers of America, AFL-CIO-CLC (the Union) to begin a Union organizing campaign. On February 4, 1995,[2] the Union held a meeting and approximately six employees attended. On February 11, the Union conducted another meeting and approximately ten employees attended and signed cards. Brian Kline, an employee, attended the foregoing meetings, signed a Union card, and took cards and literature to distribute to employees. In addition, he

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[1] Parker-Robb Chevrolet, Inc., 262 NLRB 402 (1982).

[2] All dates hereinafter occurred in 1995.

expressed his Union sympathies to the second shift supervisor, Monti Shambaugh.[3] Dean Bates, an employee, who signed a Union card but did not attend the Union meetings, expressed his interest in the Union to the Gluing and Finishing supervisor, Joe Harris.

On February 15, while cleaning up the Offset Department, the Supervisor and Kline emptied a barrel of #1 roller wash into smaller containers. Kline asked the Supervisor for permission to take the empty barrel home. [4] The Supervisor granted Kline permission. Kline then took the barrel to Bates, a maintenance employee, to have the lid removed. Bates was unavailable. Kline left the barrel with a note attached instructing Bates to remove the lid. The following day, February 16, Bates removed the lid. Kline forgot to pick up the barrel February 16, because he was passing out Union literature and discussing the Union with employees. On February 17, which was Kline's day off from work, he picked up the barrel. [5] Kline cleaned out the barrel before removing it. Diane Masters, Personnel and Safety Manager, observed Kline on the Employer's premises February 17, and learned from Bates that Kline removed a barrel.

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[3] The Employer, by letter dated April 5, 1995 indicated that Monti Shambaugh is a Section 2(11) supervisor.

[4] Employees regularly took barrels home and often at the encouragement of crib room attendant Barbara Hoover.

[5] The Employer does not have an employee handbook, but posted on a bulletin board near a time clock is a notice which states that "there shall be absolutely NO UNAUTHORIZED PERSONNEL upon the premises without prior consent. This means during the weekend hours as well....(Friday, Saturday and Sunday)....all shifts. Thank you for your cooperation in this matter." Despite the foregoing notice, employees, prior to the instant case, have been on the Employer's property on their respective days off and have not been reprimanded.

On February 18, the Employer discharged Kline and Bates, and on February 21, Kline and Bates received discharge letters. Kline's letter indicated that he was terminated because of his unauthorized removal of a possibly contaminated barrel, "which may needlessly expose the company to environmental liabilities," and demanded that he return the barrel. His letter also stated that he violated a rule forbidding employees from being on the Employer's premises during weekend hours, including Fridays. Bates' discharge letter stated that he was discharged for the unauthorized removal of a possibly contaminated barrel. As a result of the foregoing discharges, the Union filed a charge, on February 24, in Case 8-CA-27174, against the Employer and alleged that the Employer violated Section 8(a)(1) and (3) of the Act by terminating Kline and Bates because of their activities on behalf of the Union. The Region concluded the charge was meritorious and issued complaint, absent settlement, on April 14.[6]

On February 20, two days after Kline and Bates were discharged, the Employer met with the Supervisor. The Employer asked him if he had given Kline permission to take the barrel. The Supervisor indicated he had, and the Employer stated that if he had, it had no recourse but to discharge him. The Employer then inquired as to whether the Supervisor had told Kline to clean out the barrel before Kline removed it. The Supervisor responded that he was unable to recall whether or not he directed Kline to clean out the barrel. The Employer then asked the Supervisor if he would sign a paper stating that he told Kline to clean out the barrel. The Supervisor refused to do so because he was not certain he had told Kline to clean out the barrel. The Employer then said it had no recourse but to discharge him, and did so.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, for the reasons set forth below.

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[6] The hearing in Case 8-CA-27174 is scheduled for January 30, 1996.

In Parker-Robb Chevrolet,[7] the Board overruled a line of cases in which it had previously found that the discharge of a statutory supervisor violated Section 8(a)(1) of the Act if it was an "integral part" or "pattern of conduct" of employer activity intended to discourage the Section 7 activity of its statutory employees. The Board further stated that, notwithstanding the general exclusion of supervisors from coverage under the Act, the discharge of a supervisor may violate Section 8(a)(1) in circumstances where such a finding is necessary "to vindicate employees' exercise of their Section 7 rights." Id. at 403. The Board then reiterated its long-standing position, unaffected by its decision in Parker-Robb, that:

> ...when a supervisor is discharged for testifying at a Board hearing or a contractual grievance proceeding, for refusing to commit unfair labor practices, or for failing to prevent unionization, the impact of the discharge itself on employees' Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board processes or grievance procedures, compels that they be protected despite the general statutory exclusion. Id. at 404.

The Board stated that all supervisory discharge cases may be resolved through the following analysis:

> The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity - either by themselves or when allied with rank-and-file employees - is not unlawful for the simple reason that employees, not supervisors, have rights protected by the Act. Id. at 404.

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[7] 262 NLRB 402 (1982).

An employer may not discharge a supervisor "for giving testimony adverse to the employer's interest either at an NLRB proceeding or during the processing of an employee's grievance under the collective bargaining agreement." Id. Furthermore, under Oakes Machine [8], an employer may not discharge a supervisor because of his anticipated testimony at "proceedings within the ambit of the National Labor Relations Act." [9]

In Oakes Machine, the Board affirmed the ALJ's conclusion that the employer violated Section 8(a)(1) of the Act by discharging its supervisor. There, an employee expressed concern about having to work in close proximity to a radioactive source. After computing an equation in radiation safety literature that revealed that he had been exposed to unsafe levels of radioactivity, the employee showed his calculations to a supervisor, who verified their accuracy. The supervisor then indicated that more information was needed before a final conclusion could be reached regarding exposure to radioactivity. As a result, the employee contacted a county health official, who agreed to survey the plant premises that same day. At the conclusion of the health official's survey, the health official told the employer's vice president that removal of the radioactive source from its holder violated the regulations concerning its handling and the incident would be "logged." Thereupon, the employer asked its vice president and supervisor how the employee, who had called in outsiders before coming to the employer with his concerns, should be disciplined. The vice president stated

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[8] Oakes Machine Corporation, 288 NLRB 456, 457-458 (1988), citing Orkin Exterminating Company, 270 NLRB 404 (1984)(unfair labor practice to constructively discharge a supervisor because of his expressed intention to testify before the National Labor Relations Board on behalf of discharged employee); Glover Bottled Gas Corporation, 275 NLRB 658 fn. 7, 673-674 (1985)(unfair labor practice to discharge a supervisor because of her anticipated testimony before the National Labor Relations Board on behalf of discharged employees), enfd. mem. 801 F.2d 391 (2d Cir. 1986).

[9] Oakes Machine, supra at 457.

that the employee should be fired. The supervisor protested, saying that the employee had the right to contact the health department and that he would testify for the employee if the employee was fired. The employer then discharged the supervisor. The Board held that the supervisor's statement of intention to testify on the employee's behalf "in court" included "proceedings within the ambit of the National Labor Relations Act." [10] Accordingly, the Board found that the employer discharged its supervisor, because of his anticipated testimony before the National Labor Relations Board, in violation of Section 8(a)(1).

We conclude, in the instant case, that a Section 8(a)(1) complaint should issue, absent settlement. We conclude that here, as in Oakes Machine, the Supervisor was discharged because of his anticipated testimony before the National Labor Relations Board on behalf of discharged employees. In this regard, we note that the Region concluded in Case 8-CA-27174 that the Employer violated Section 8(a)(1) and (3) of the Act by terminating Kline and Bates because of their activities on behalf of the Union. The Employer asserts it discharged Kline for the unauthorized removal of a possibly contaminated barrel and violating a rule forbidding employees from being on company premises during weekend hours, including Fridays, and Bates for his participation in the unauthorized removal of a possibly contaminated barrel. The Region determined that other employees had taken barrels before Kline and Bates did so, and had come on the Employer's premises during their days off, but were not reprimanded. Based on the foregoing circumstances, the Region found the Employer's asserted reason for Kline and Bates' discharge pretextual, and concluded that they were discharged because of their Union activity.

The Employer discussed the discharge of Bates and Kline with the Supervisor. The Employer asked the Supervisor if he had given Kline permission to take the barrel, and the Supervisor indicated he had. The Employer then stated that if he had, it had no other recourse but to let him go. By this exchange, the Employer invited the Supervisor to alter his anticipated testimony or support of

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[10] Id.

Kline and Bates by essentially implying that if he changed his account of what occurred he would not be terminated. We note that the Employer then asked the Supervisor if he had told Kline to clean out the drum before he took it. The Supervisor stated that he could not remember, and the Employer asked him if he would sign a paper stating that he told Kline to clean out the barrel. The Supervisor refused to sign such a paper, and the Employer then discharged him. Consequently, the Supervisor refused to substantiate the Employer's asserted reason for the discharge of Kline and Bates, i.e., the unauthorized removal of a possibly contaminated barrel. The Employer then discharged him for this refusal.

We conclude that the Employer discharged the Supervisor because he would not support the Employer's defense of its discharge of Kline and Bates. As stated above, the Supervisor indicated that he gave Kline permission to remove the barrel and could not recall giving Kline instructions to clean out the barrel. Thus, the Supervisor's responses undermined the Employer's defense. The Employer's first statement that he would have to discharge the Supervisor can be viewed as a threat of reprisal against the Supervisor if he did not change his story so as to perfect an Employer defense to the discharge of Kline and Bates. Any doubt about what the Employer intended is laid to rest by the ensuing conversation in which the Employer asked the Supervisor, still under the threat of discharge, to state in writing that he had told Kline to clean out the barrel, and upon hearing the Supervisor say that he could not truthfully so state in writing, actually discharged him. Thus, we conclude the Employer discharged the Supervisor because his anticipated testimony undermined the Employer's defense of its discharge of Kline and Bates. Therefore, we conclude the Employer violated Section 8(a)(1) of the Act.

Accordingly, for the reasons set forth above, a Section 8(a)(1) complaint should issue, absent settlement.[11]

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[11] In Parker-Robb, the Board held that discharging a supervisor for union or protected concerted activity was not a violation of the Act. Notwithstanding its new position in Parker-Robb, the Board reiterated its long-standing view that an employer violates the Act when it

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discharges a supervisor for testifying at a Board hearing or for refusing to commit an unfair labor practice. Since we conclude that the Employer violated the Act under these exceptions, and the Charging Party supervisor did not engage in any Section 7 activity, there is no basis to ask the Board to reconsider Parker-Robb in this case.