

There was no formal job description for the Assistants; rather, the Union's constitution described their duties as to "serve under [the Trustees'] direction." The Charging Party states that a Trustee told her that her job as an Assistant was to help get the Local "back on track." The Charging Party states that her duties varied daily, but included making copies, driving to pick up supplies, making phone calls, writing checks, writing death claim letters, and accompanying International organizers to garages to distribute flyers. The Charging Party also states that she and other Assistants attended strategy meetings between the Trustees and the Union's lawyers while they discussed the Chicago Transit Authority's proposals during negotiations, and that she once offered a suggestion regarding the bathrooms provided to bus operators. The Union states that the Charging Party was assigned to work as an office assistant, and that most of her work was clerical in nature. Although the Charging Party occasionally received calls from members complaining about the quality of their representation, it does not appear that this was one of her assigned tasks. Indeed, the Union states that her inability to answer members' questions contributed to its decision to assign her clerical work rather than send her to the field to represent members. Other Assistants were primarily responsible for member representation at the garage level and in disciplinary hearings.

Tensions quickly emerged between the Assistants and the International staff invited by the Trustees to help manage the Local. On November 1, the Assistants called a meeting with the Trustees in order to address the Assistants' concerns. Specifically, the Assistants complained about not being given the dates on which member disciplinary hearings were scheduled, not being paid for time they spent representing Local members at hearings, being undermined by the International staff, other problems representing members' interests regarding layoffs, and an overall lack of grievance processing. The Charging Party did not plan or speak at the meeting, but did nod in agreement with the other Assistants' comments.

On November 19, the Local sponsored a grievance training seminar. About 60-70 people attended, including Local members, Assistants, Trustees, and International staffers. After the International president talked about the value of staying united during the trusteeship, the Charging Party raised several complaints in the presence of all the attendees. Specifically, she complained about a "lack of representation of the members," including the recurring problem that the International was not giving the Assistants enough time to represent the members. She stated that the Assistants would not find out that a member needed to be represented until that day, which "caused major delays" and would "cause the member to be out of work or on suspension without pay until they could schedule a hearing with representation." In addition, the Charging Party stated that a "division" had formed between the International staffers and the Assistants, and complained that the International

staffers were disrespectful to the Assistants and Local members.³ The Charging Party states that she aired these criticisms at the grievance training seminar because she felt that the members were “not being represented” and that if there were “issues facing the members,” she was the “correct person to speak up about it.”

Two days later, on November 21, the Union terminated the Charging Party’s employment as an Assistant; she has returned to her position as a bus operator with the Chicago Transit Authority. The Charging Party contends that she was discharged in retaliation for the comments she made at the November 19 meeting, while the Union states that she was discharged because of her poor work performance and inability to work with the International staffers assisting the Local.

ACTION

The Region should dismiss the charge, absent withdrawal. Although the Charging Party’s conduct was protected by Section 7, the Union-Employer’s legitimate business interest in its representatives’ support for its policies, and in its ability as an exclusive bargaining representative to speak with one voice, outweighed the Charging Party’s right to engage in this protected activity.⁴

When a union takes adverse action against its own employees for engaging in activities that are protected by Section 7, the Board applies a balancing test to determine whether the union-employer violated the Act.⁵ First, the Board determines whether the employee engaged in Section 7 activity; if so, the Board then determines

³ The Charging Party had several confrontations with a particular International staff member.

⁴ Accordingly, we need not address the Union-Employer’s *Wright Line* defense or its contention that the International and the Local are not a joint employer.

⁵ *Operating Engineers Local 370*, 341 NLRB 822, 824-25 (2004); *Service Employees Local 1*, 344 NLRB 1104, 1105-1107 (2005). This test is expressly derived from the balancing test applied to employers who, in other contexts, have interfered with Section 7 rights. See *Operating Engineers Local 370*, 341 NLRB at 824, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573-574 (1978) (striking balance between employees’ Section 7 right to distribute newsletter on employer’s property against employer’s property rights) and *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945) (striking balance between Section 7 right of employees to solicit or distribute at workplace against equally undisputed right of employers to maintain discipline in their establishments).

whether the union-employer had a legitimate countervailing interest that outweighed the Section 7 right.⁶

In *Operating Engineers Local 370*,⁷ the Board found that a union-employer lawfully discharged its paid organizer for criticizing the union's decision to allow employers to cease making pension fund contributions on behalf of probationary apprentices. The Board reasoned that the organizer's conduct involved, at most, a relatively weak Section 7 interest because 1) the pension fund issue had no impact on the working conditions of the organizer or his coworkers, and 2) to the extent he was making common cause with the apprentices' interests as employees, his efforts were directed not toward the apprentices' employers but toward their bargaining representative.⁸ The Board further found that the union-employer had a legitimate interest in the loyal service of its key paid employees and their cooperation with its policies.⁹ In addition, as an exclusive bargaining representative of employees, the union-employer had a legitimate interest in speaking with one voice.¹⁰ Balancing the union-employer's legitimate interests against the organizer's weak Section 7 interest,

⁶ *Service Employees Local 1*, 344 NLRB at 1106.

⁷ 341 NLRB at 824-825.

⁸ *Id.* at 825.

⁹ *Id.* at 824. In support, the Board cited LMRDA and Section 8(b)(1)(A) cases finding that a union has a legitimate interest in the loyalty of its agents and their cooperation with union policies. See *Finnegan v. Leu*, 456 U.S. 431 (1982) (under LMRDA, union president lawfully removed appointed business agents who campaigned for another candidate, because president must have the power to appoint agents of his choice to carry out his policies); *Shenango, Inc.*, 237 NLRB 1355 (1978) (union president lawfully removed plant safety committee chairman who campaigned for another candidate because it required teamwork, loyalty, and cooperation to administer contract). The Board noted that the analysis in Section 8(b)(1)(A) cases was relevant to a Section 8(a)(1) case because both types of cases implicate the conflict between the protection of Section 7 rights and unions' legitimate interest in the loyalty of their employees to union policies. 341 NLRB at 824 n. 7.

¹⁰ *Ibid.*, citing *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (union has legitimate interest in presenting united front and in not seeing strength dissipated by subgroups pursuing separate interests).

the Board held that the organizer's persistent criticism of the union-employer's policies, in front of its members, justified the discharge.¹¹

In *Service Employees Local 1*,¹² on the other hand, the Board struck the balance in favor of the exercise of Section 7 rights. There, a union-employer discharged a business representative for making common cause with coworkers in opposing the union's new call center system for servicing members. The Board found this to constitute Section 7 activity in light of the new system's dramatic change in the business representatives' daily work functions.¹³ In determining that the union-employer's interest did not outweigh the employee's Section 7 interest, the Board stressed two factors as "particularly significant."¹⁴ First, the Board found the employee's Section 7 activity to be "more compelling" than the Section 7 activity in *Operating Engineers Local 370*, because an attempt to band together with coworkers to improve daily working conditions—as opposed to only criticizing union policy on behalf of members—is "classic protected concerted activity."¹⁵ Second, while the union-employer had a legitimate interest in assuring that its employees loyally supported its policies, the Board emphasized that the business representative's opposition to the new system was limited to in-house discussions with fellow business representatives and union officials, rather than complaints to the union's members.¹⁶ Thus, the conduct at issue was much less likely to impair the union-employer's

¹¹ See also *California Union of Safety Employees*, Case 20-CA-32425, Advice Memorandum dated September 9, 2005 (applying balancing test and finding that a union-employer lawfully disciplined/discharged administrative employees who refused to sign a letter criticizing their former collective-bargaining representative, where the former representative sought to decertify the union-employer in the only bargaining unit it represented and the union-employer planned to use the letter in an effort to defeat the challenge); *Service Employees International Union, Local 1877*, Case 31-CA-29060, Advice Memorandum dated May 26, 2009 (applying balancing test and finding that a union-employer lawfully discharged employee who supported and actively participated in dissident union member organization that was critical of union's proposed member call center and other aspects of the union's representation).

¹² 344 NLRB at 1106-1107.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

legitimate interests than the paid organizer's conduct in *Operating Engineers Local 370*. In these circumstances, the Board found the discharge to be unlawful.

Applying the first prong of the Board's balancing test, we conclude that the Charging Party's criticism of the Union at the November 19 meeting constituted protected, concerted activity. Initially, the Charging Party's complaints to the International President reiterated some of the concerns raised by the Assistants regarding working conditions at the November 1 meeting.¹⁷ Another Charging Party complaint—that International staffers had been disrespectful to the Assistants—also impacted the Charging Party's own working conditions as an Assistant. Moreover, to the extent the Charging Party's complaints addressed the concerns of members rather than the Union's employees, the "mutual aid or protection" clause of Section 7 covers concerted activities in support of employees of other employers.¹⁸ In addition, the Board has held in Section 8(b)(1)(A) internal union discipline cases that the Act protects the right of employee-members to press their union to change its policies, so long as the activity bears some relation to "employees' interests as employees."¹⁹ Although the Charging Party was temporarily serving as an Assistant (and previously had temporarily served as Financial Secretary-Treasurer), she could expect to return to her position as a bus operator in the bargaining unit. Thus, the Charging Party's concerns about the representational efficacy of the Union related to her interests as an employee of the Chicago Transit Authority, and therefore merited Section 7 protection. For all of the foregoing reasons, the Charging Party's comments at the November 19 meeting constituted protected, concerted activity.

Applying the second prong of the balancing test, however, we conclude that the Union-Employer's legitimate interest in speaking with one voice and maintaining the loyal support of its policies by its employees outweighs the Charging Party's Section 7 interest. First, the Charging Party's Section 7 interest was relatively weak. Her November 19 comments focused primarily on the quality of representation bargaining unit members were receiving, as opposed to criticisms concerning her own working

¹⁷ *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986) (concerted activity includes "individual employees bringing truly group complaints to the attention of management"); *Five Star Transportation*, 349 NLRB 42, 43-44, 59 (2007) (drivers' individually-written letters to school committee raising concerns over a change in bus contractors were logical outgrowth of concerns expressed at an earlier group meeting).

¹⁸ *Eastex, Inc.*, 437 U.S. 556, 564-565 (1978).

¹⁹ *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1424 (2000). See also *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1122 & fn. 13 (2000).

conditions.²⁰ She aired those comments because she felt members were “not being represented” and she believed she was the “correct person to be speaking about it,” even though her duties as an Assistant were clerical in nature and did not involve “representing” members. In contrast, the Union-Employer’s interest in speaking with one voice and maintaining the loyal support of its employees for its policies is relatively strong, given the imposed trusteeship and the Local’s precarious financial position. Moreover, the Charging Party criticized the Union’s policies in front of the Union’s members at a public meeting, rather than confining her complaints to in-house discussions with other Union employees or officers.²¹ As a result, the Union-Employer’s legitimate interests are much more likely to be impaired.²²

²⁰ See *Operating Engineers Local 370*, 341 NLRB at 825 (union organizer’s criticism of union’s decision to allow employers to cease making pension fund contributions on behalf of probationary apprentices constituted, at most, a weak Section 7 interest because the pension fund issue had no impact on working conditions of organizer or his coworkers and, to the extent he was making common cause with the apprentices, his efforts were directed not toward their employers but their bargaining representative). Compare *Service Employees Local 1*, 344 NLRB at 1106 (union business representative who made common cause with coworkers in opposing union’s new call center engaged in relatively strong Section 7 activity, as banding together with coworkers to improve daily work functions is “classic protected concerted activity”).

²¹ See *Operating Engineers Local 370*, 341 NLRB at 824-25 (union-employer’s legitimate interest that its employees support its policies outweighed organizer’s Section 7 interest, if any, in protesting union’s pension contribution waiver policy for probationary apprentices, particularly where organizer criticized union at meeting in front of membership). Compare *Service Employees Local 1*, 344 NLRB at 1106 (union-employer’s legitimate interest in assuring business agents’ loyal support of its policies outweighed by business agent’s strong Section 7 interest, where business agent’s criticism of union policy was confined to in-house discussions with fellow business agents and union officials).

²² The Charging Party’s polite demeanor when airing her complaints at the November 19 meeting does not alter the result. Although the union employee in *Operating Engineers Local 370* used profanity when criticizing the union’s policies, it was the broadly-disseminated nature of his comments to union members, rather than the manner in which the comments were presented, that the Board deemed critical when weighing the competing interests of the parties in that case, 341 NLRB at 824-825, and when subsequently distinguishing it in *Service Employees Local 1*, 344 NLRB at 1106.

Under the circumstances, the balance of interests in this case favors the Union-Employer over the Charging Party. Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.