

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARLIN O. OSTHUS, Regional Director of
the Eighteenth Region of the National Labor
Relations Board, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Plaintiff,

vs.

RELCO LOCOMOTIVES, INC.,

Defendant.

No. 4:12-cv-00205 – JEG

**MEMORANDUM OPINION
AND ORDER**

This case is before the Court upon the petition of Plaintiff Marlin Osthus on behalf of the National Labor Relations Board (the NLRB) for a preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act (the NLRA), 29 U.S.C. § 160(j), against Defendant RELCO Locomotives, Inc. (RELCO), for alleged violations of Sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(1) and (3). This Court reviews the petition, evidence, briefs, arguments of counsel, and the entire record of this case pursuant to 29 U.S.C. § 151, et seq.

I. PROCEDURAL AND FACTUAL BACKGROUND

International Brotherhood of Electrical Workers Local Union 247 (the Union) filed a charge and two amended charges under the NLRA against RELCO starting in February of 2012, alleging RELCO engaged in and is currently engaging in unfair labor practices in violation of the NLRA. The Union contended RELCO terminated two employees – Mark Douglas (Douglas) and Jerry Sindt (Sindt) – because they supported the Union and its activities at RELCO’s site in Albia, Iowa. If the Union is correct, RELCO acted in violation of Sections 8(a)(1) and (3) of the NLRA. Additionally, the Union asserted RELCO violated Section 8(a)(1) of the NLRA by interrogating and threatening employees about supporting the Union as well as soliciting employee

EXHIBIT A

grievances and promising to remedy any grievances. The Union's case was heard by Administrative Law Judge Eric M. Fine (ALJ) on June 6 and 7 of 2012, and the ALJ's decision was entered on September 25, 2012, in favor of the Union.

Marlin Osthus, on behalf of the NLRB, filed a Petition for Injunction under Section 10(j) of the NLRA on May 18, 2012, requesting that this Court enter a preliminary injunction against RELCO and order RELCO to abide by the regulations set forth in the NLRA as well as reinstate Douglas and Sindt at RELCO's Albia plant. RELCO opposed the NLRB's request for a preliminary injunction on July 19, 2012, asserting it terminated Douglas and Sindt for legitimate reasons independent of any Union involvement the men may have had, and that it did not otherwise violate the NLRA as alleged by the NLRB. A hearing was held before this Court on July 24, 2012.

II. STANDARD OF REVIEW

This Court will only grant preliminary relief under Section 10(j) of the NLRA if the matter is "serious and extraordinary," and it is clearly "just and proper" to grant such relief in equity. Sharp v. Parents in Cmty. Action, Inc., 172 F.3d 1034, 1038 (8th Cir. 1999); see also Osthus v. Whitesell Corp., 639 F.3d 841, 845 (8th Cir. 2011). "A preliminary injunction is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant." Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003) (internal citations omitted). The NLRB must therefore prove the following four factors: "(1) the likelihood of [the NLRB's] success on the merits; (2) the threat of irreparable harm to [the NLRB] in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to [RELCO]; and (4) the public interest." Id. (citing Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir.

1981) (en banc)); see also Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (holding that the party “seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest” (citations omitted)); Sharp, 172 F.3d at 1038-39 (articulating the Dataphase four-part test with the elements in a different order for purposes of a case dealing with Section 10(j) of the NLRA).

“Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction,” as a preliminary injunction is inappropriate if there is an adequate remedy at law for the movant. Watkins, 346 F.3d at 844 (citing Adam-Mellang v. Apartment Search, Inc., 96 F.3d 297, 299 (8th Cir. 1996); Gelco Corp. v. Coniston Partners, 811 F.2d 414, 420 (8th Cir. 1987); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 738 (8th Cir. 1989)). “The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” Planned Parenthood v. Rounds, 530 F.3d 724, 732 n.5 (8th Cir. 2008) (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959)). Likelihood of success on the merits is a threshold issue for issuance of a preliminary injunction, but if there is insufficient showing of irreparable injury to the NLRB, a preliminary injunction is unwarranted. See id. at 732-33 (holding that the likelihood of success on the merits element is only one consideration before the issuing court). “Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter, 555 U.S. at 22 (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam)).

III. DISCUSSION

The NLRB argues that a preliminary injunction is necessary because RELCO violated the NLRA by interrogating its employees about their union-related activities, offering to remedy any employee grievances brought to management, and terminating Douglas and Sindt at RELCO's plant in Albia, Iowa. The NLRB asks this Court to do the following: (1) order RELCO to follow the NLRA; (2) reinstate Douglas and Sindt as employees at the RELCO plant in Albia, Iowa; and (3) grant the NLRB access to RELCO's records to monitor RELCO's compliance with the terms of this Order. As RELCO is already required to follow the NLRA, and any order by this Court on that issue would be redundant of RELCO's current obligations, the Court declines to issue any such order. See 29 U.S.C. § 158 (listing unfair labor practices for employers). Additionally, as this Court is denying the NLRB's petition in full, it need not provide the NLRB with access to RELCO's records to monitor compliance with this Order. As for the reinstatement of Douglas and Sindt, the NLRB bears the burden of proving the four Dataphase factors for issuance of such injunctive relief, and this Court finds that the NLRB has failed to satisfy its burden at this preliminary stage.

A. Likelihood of Success on the Merits

In order to prove it is likely to succeed on the merits of its underlying case before the Board, the NLRB must establish the following three elements of its unfair labor practices claim: (1) Douglas and Sindt were "engaged in protected activity"; (2) RELCO knew of Douglas and Sindt's protected activity; and (3) RELCO acted as it did, by terminating Douglas and Sindt, "on the basis of anti-union animus." See N.L.R.B. v. Rockline Indus. Inc., 412 F.3d 962, 966-67 (8th Cir. 2005) (quoting FiveCAP, Inc. v. N.L.R.B., 294 F.3d 768, 777 (6th Cir. 2002)). Once the

NLRB has made this showing, the burden shifts to RELCO to provide a legitimate reason for terminating these two individuals and to establish that RELCO would have taken the same action notwithstanding their protected union-related conduct. See id. at 967 (citing N.L.R.B. v. La-Z-Boy Midwest, 390 F.3d 1054, 1057 (8th Cir. 2004); Hall v. N.L.R.B., 941 F.2d 684, 688 (8th Cir. 1991)).

Douglas and Sindt testified before the ALJ that they both actively supported the Union's efforts at RELCO's plant in Albia, Iowa, and attempted to increase involvement in the Union prior to their termination on January 2, 2012. The Court will assume for purposes of this Order that the NLRB met its burden to prove Douglas and Sindt were engaged in protected activity – namely, that the men were actively recruiting other employees to join the Union's efforts at RELCO.

The question of whether RELCO knew that Douglas and Sindt were involved with the Union is essentially a credibility contest between Douglas and Sindt on one side, and RELCO supervisor Cliff Benboe (Benboe) on the other side. However, the burden of proving RELCO's knowledge rests with the NLRB, and this Court finds that the NLRB failed to meet this burden for Sindt at this preliminary stage, though it has satisfied this burden for Douglas. The only proof the NLRB provides regarding RELCO's knowledge of Douglas' protected activity is Benboe's instruction to Douglas that he refrain from handing out Union authorization cards during his work hours. Benboe is the supervisor who was responsible for giving Douglas notice of his termination, and he did have knowledge that Douglas was in possession of authorization cards and was possibly distributing them to other employees at RELCO. This Court will therefore charge RELCO with notice that Douglas was engaging in protected activity under the NLRA for purposes of this Order.

The only evidence the NLRB provides regarding RELCO's knowledge of Sindt's involvement in protected activity is a conversation between Benboe and Sindt in October of 2011, when Benboe asked Sindt what he thought about the Union and whether he felt he was treated fairly at RELCO. Sindt never admitted that he was involved in union-related activities but rather answered neutrally and said he had no preference with regard to unionized and non-unionized workplaces. Benboe cannot be charged with knowledge of Sindt's involvement with the Union based on this conversation alone. The NLRB has therefore failed to prove at this preliminary stage that RELCO had any knowledge of Sindt engaging in protected activity. However, even if the NLRB has satisfied this element, it still fails the third prong of the test for both Douglas and Sindt.

The NLRB failed to provide sufficient evidence at this stage of the proceeding to prove Douglas and Sindt were terminated due to anti-union animus fostered by RELCO. Instead of providing evidence to prove RELCO's anti-union reason for terminating these two employees, the NLRB attempts to shift the burden on the third element of the test and require RELCO to prove it had legitimate reasons to terminate Douglas and Sindt. This is improper, as the NLRB bears the burden to prove RELCO acted in an anti-union manner, and only when this is sufficiently proved will RELCO bear the burden to prove it had legitimate reasons to terminate Douglas and Sindt. See Rockline, 412 F.3d at 966-67 (requiring the movant to prove the defendant acted with anti-union animus before the burden shifts to the defendant to prove legitimate reasons for discharging an employee). The NLRB attempts to skip the third element and instead require RELCO to set forth its reasons for terminating Douglas and Sindt. This Court finds the NLRB has therefore failed to satisfy the third element of the test as to both Douglas and Sindt.

The Court cannot at this preliminary stage adequately determine the NLRB's likelihood of success on the merits. A preliminary injunction is therefore unwarranted.¹

B. Irreparable Harm to the NLRB

Even if the NLRB is able to prove it is likely to succeed on the merits of the underlying claim, it cannot prove it will suffer irreparable harm without the preliminary injunction it seeks. “[T]he irreparable harm to be addressed under § 10(j) is the harm to the collective bargaining process or to other protected employee activities if a remedy must await the Board’s full adjudicatory process.” Sharp, 172 F.3d at 1038. Further, “[t]he question in each case is whether the extraordinary remedy of a preliminary injunction is necessary either to preserve the status quo or to prevent frustration of the basic remedial purpose of the Act.” Id. at 1039 (citation and internal quotation marks omitted). Proving irreparable harm is a high burden for the NLRB to meet, as the Court must be satisfied that the facts of this case present “one of those rare situations in which the delay inherent in completing the adjudicatory process will frustrate the Board’s ability to remedy the alleged unfair labor practices.” Id.

The NLRB argues the collective silence of RELCO’s employees regarding union-related activity illustrates the chilling effect the termination of Douglas and Sindt has had on the Union and its attempt to establish itself at RELCO’s plant in Albia, Iowa. However, the Union presence before Douglas and Sindt were terminated was meager at best, and the NLRB fails to provide any evidence that the employees who signed authorization cards prior to the

¹ This Court has read the ALJ’s September 25, 2012, decision. Although the ALJ found the Union successful on the merits of its claim against RELCO, the ALJ’s decision is not a final decision in this case, and RELCO has an opportunity to appeal. Where the ALJ found the Union’s witnesses, including Douglas and Sindt, quite credible, and the RELCO witnesses completely lacking in credibility, this Court finds that even if Douglas and Sindt are believed over Benboe and other RELCO witnesses, there is insufficient evidence to prove at this preliminary stage that RELCO terminated Douglas and Sindt based on an anti-union animus.

terminations have declined invitations to Union meetings due to RELCO's actions. Although the NLRB attempts to distinguish this case from the situation in Sharp, the Union presence here does mirror that of the union in Sharp – it was quite unsuccessful prior to and after the terminations at issue. See Sharp, 172 F.3d at 1039-40.

In October of 2010, RELCO's employees voted against representation by the Brotherhood of Railroad Signalmen, a different union than the one Douglas and Sindt were involved with in late 2011. The Union at issue – IBEW – started its campaign to unionize RELCO in early 2011. A Union organizer at RELCO's plant in Albia, Iowa, Courtland Pfaff (Pfaff), testified that approximately fifteen employees attended a Union-organized meeting on September 26, 2011, shortly after Pfaff started at the plant. In October of 2011, a few Union organizers passed out handbills to employees as they entered the RELCO facility. Pfaff noted in his affidavit that thirty-nine RELCO employees had signed authorization cards, which were used to designate employees interested in learning more about the Union's efforts, and that none of these individuals had responded to his communications about meeting to further the Union's campaign. Of the approximately 115-140 employees at RELCO's plant in Albia, Iowa, in 2011, the thirty-nine employees who signed authorization cards constituted only 27-33% of the total employees. Only 10-13% of RELCO's employees even attended a meeting for the Union. Douglas and Sindt were terminated in January of 2012.

In Sharp, the court found it important that although there had been organizing efforts by union officials before and after the employee at issue was terminated, "Union meetings were poorly attended, and the Union's support never reached 25% of PICA's work force." Sharp, 172 F.3d at 1040. Further, there was no proof of any "on-going collective bargaining or scheduled union election being frustrated or disrupted by the alleged unfair labor practices," and the union

at issue “was not recognized or certified.” Id. at 1039. The court dealt with a situation where there may have been some chilling effect due to the employee’s termination and reasoned that “[t]he Board presented some evidence that PICA’s actions had a chilling effect on the Union’s organizing efforts during the 1996-1997 school year[, b]ut that evidence does not establish that the delays inherent in the Board’s adjudicatory procedures will frustrate its very potent remedial powers.” Id. at 1040. Although the employee who had been terminated would surely appreciate reinstatement and the ability to again take part in unionization efforts, such reinstatement is not warranted at the preliminary injunction stage “where there [i]s no collective bargaining in process, no recognized or certified union, no on-going organizing activities, no showing of strong union support among [the defendant’s] employees, and only one union activist discharged.” Id. Such facts make a claim for § 10(j) relief incredibly weak. See id.

Similarly, there is no evidence of collective bargaining occurring at RELCO, there is no recognized or certified union, there is no evidence of strong support for union activities before or after the terminations at issue, and only two union participants were discharged.² Preliminary injunctions under § 10(j) are not meant to be used as tools to create union support where a union cannot rally support on its own; rather, they are extraordinary remedies for rare situations in which such action is “necessary either to preserve the status quo or to prevent frustration of the basic remedial purpose of the Act.” Id. at 1039 (citation and internal quotation marks omitted). This is not one of those extraordinary situations. The NLRB has failed at this preliminary stage

² The NLRB would like to combine the discharged employees in prior RELCO cases currently on appeal to the two in this case in order to bolster evidence of RELCO’s anti-union actions. However, those cases are not final decisions, and the employee terminations here are different enough to necessitate focusing this Court’s analysis primarily on Douglas and Sindt. Further, a rational argument can be made, as RELCO does, that the other pending actions create an increased level of caution at RELCO to avoid conduct that could be interpreted as anti-union.

to prove the union-related efforts at RELCO will be irreparably harmed without the immediate reinstatement of Douglas and Sindt, and a preliminary injunction is therefore unwarranted in this case.

C. Balance of Harm

In balancing the harm to union-related efforts at RELCO if Douglas and Sindt are not reinstated with the harm to RELCO if Douglas and Sindt are reinstated, this Court finds that issuing a preliminary injunction in this case would result in a greater net harm than denying the requested relief. Douglas and Sindt had numerous performance deficiencies during their employment at RELCO, as discussed by both parties, and the NLRB has provided very little evidence that these individuals were terminated based on their involvement with the Union. Sindt repeatedly failed to acquire his welding certificate, and Douglas on multiple occasions failed to follow safety protocols. Both individuals were given mediocre performance evaluations throughout their time at RELCO. Douglas even testified he refused to read performance evaluations he disagreed with, illustrating a poor attitude toward RELCO management and an unwillingness to improve as an employee.

If the NLRB succeeds in the underlying case, Douglas and Sindt may receive a monetary award if they were wrongfully discharged. See Sharp, 172 F.3d at 1040. They have a legal remedy that can be satisfied, regardless of any preliminary injunctive relief. However, if Douglas and Sindt are reinstated through this Court's issuance of a preliminary injunction and RELCO is successful on appeal, this Court will have reinstated poor performers, undercut the authority of RELCO management, and possibly even hurt RELCO's production if the performance evaluations of Douglas and Sindt are used to indicate their future productivity. The

NLRB is essentially asking this Court to decide the case on its merits and give it the final remedy it seeks in the underlying case without giving RELCO its full appellate rights. The NLRB has not met its burden with regard to the harm-balancing element in the preliminary injunction analysis.

D. Public Interest

As discussed in full above, the public interests articulated by the parties are the interests in collective bargaining and the ability to organize unions and other associations as compared to the interest of companies like RELCO to receive full appellate rights in the adjudication of wrongful termination and unfair labor practices claims. These interests mirror the harms the respective parties are attempting to avoid, and further discussion here would be repetitive. This Court therefore finds that, just as the greater harm at stake here is the harm to RELCO if Douglas and Sindt are reinstated before RELCO has received its full appellate rights, the public interest in allowing for full adjudication on the merits of a wrongful termination claim is crucially important. Douglas and Sindt are not left without a remedy, and there is virtually nonexistent union presence at RELCO to require a remedy, independent of these terminations. Without a showing of irreparable harm to collective bargaining and unionization efforts, or anti-union animus on RELCO's part when it discharged Douglas and Sindt, the NLRB cannot prove the public interest weighs in favor of granting a final remedy to the NLRB before RELCO has exhausted its appellate rights.

IV. CONCLUSION

After a thorough review of the record and in accordance with the standard of review this Court must follow, the Court concludes that a preliminary injunction is not warranted in this case. Accordingly, the NLRB's Petition for Injunction (ECF No. 2) is **denied**.

IT IS SO ORDERED.

Dated this 4th day of October, 2012.



JAMES E. GRITZNER, Chief Judge
U.S. DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2013 **Exhibit A to Respondent, RELCO Locomotives, Inc.'s Brief in Support of its Exceptions to the Administrative Law Judge's Decision and Order** was filed with the Executive Secretary's Office of the National Labor Relations Board, electronically by using the E-Filing system on the Board's website.

Lester Heltzer Executive Secretary National Labor Relations Board 1099 14th Street, NW, Suite 6300 Washington, DC 20570-0001	
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And on that same day, the foregoing was served via electronic mail upon:

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And on that same day, the foregoing was served via regular U.S. mail upon:

International Brotherhood of Electrical Workers Local 347 850 18th St. Des Moines, IA 50314
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/s/ Paul E. Starkman

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