

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

Advice Memorandum

DATE: April 30, 2013

TO: Olivia Garcia, Regional Director
Region 21

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

SUBJECT: Pacific Maritime Association	240-3367-0833-0000
Case 21-CA-093140	240-3367-8353-0000
	524-0167-3000-0000
ILWU Local 13 (Pacific Maritime Association)	548-2035-0000-0000
Case 21-CB-093165	

The Region submitted these cases for advice as to whether the Union and Employer violated Sections 8(b)(1)(A) and 8(a)(1) of the Act respectively, by creating and maintaining special grievance procedures that allow employees to file discrimination and/or harassment grievances against other employees directly with an arbitrator.

We conclude that the parties did not violate the Act because the special grievance procedures address unlawful discrimination that is not protected conduct under the Act, and it therefore is not reasonably foreseeable that employees would be subject to adverse employment actions for engaging in Section 7 activity.

FACTS

Background

Pacific Maritime Association (“Employer”) is a multi-employer association that has a collective-bargaining agreement with the International Longshore and Warehouse Union on behalf of its locals, including ILWU Local 13 (“Union”). Pursuant to the agreement, the parties operate exclusive joint hiring halls at each port through the Joint Port Labor Relations Committees. These joint committees determine dispatch order, but also handle grievances and other issues at the local level.

Section 13.2 of the collective-bargaining agreement states in pertinent part:

All grievances and complaints alleging incidents of discrimination or harassment (including hostile work environment) in connection with any action subject to the terms of this Agreement based on race, creed color, sex (including gender, pregnancy, sexual orientation) age (forty or over), national origin, or religious or political beliefs, or alleging retaliation of any kind for filing or supporting a complaint of such discrimination or harassment, shall be filed solely under the ... Special Section 13.2 Grievance Procedures

Section 13.2 directs employees to follow “Special Section 13.2 Grievance Procedures” in the parties’ handbook when filing grievances and complaints under Section 13.2. Pursuant to those instructions, employees can file grievances against other employees directly with a local arbitrator, who determines whether the grievance meets the criteria set forth in Section 13.2, and if so, holds a hearing to determine guilt. Employees found guilty of violating the policy are subject to discipline varying from a minimum of seven days off work and participation in a diversity-training program up to and including termination. Parties may appeal the arbitrator’s decision to a Coast Appeals Officer.

Grievances Filed Against the Charging Party

The Charging Party is an employee who actively participated in a September 2012¹ Union election. During the campaign, the Charging Party published and distributed a flyer endorsing certain candidates for office and opposing others. In the flyer, the Charging Party accused an incumbent officer of splitting his time between running an illegal football-betting card business and a medical business he allegedly owns. The flyer also accused that officer of giving the business a mailing list of Local 13 members. Attached to the flyer was a cartoon drawing depicting the officer at a gambling table dressed in a female nurse’s uniform.

On September 28, that officer filed a grievance against the Charging Party under Section 13.2 alleging discrimination based on sex and sexual orientation. The officer stated that the flyer offended him because he is a heterosexual male, not female and not a transvestite, and that the portrayal of him in the flyer made him feel embarrassed, ashamed and ridiculed.

¹ Hereafter, all dates are in 2012 unless otherwise noted.

On October 9, an arbitration hearing was held and on November 6, the arbitrator issued his decision finding that the Charging Party had violated Section 13.2 and imposing a discipline of 180 days off all work.

On November 13, the Charging Party filed Section 8(a)(1) and 8(b)(1)(A) charges against the Employer and Union, respectively, alleging that they violated the Act by creating and maintaining a grievance-arbitration system that effectively permits employees to be prosecuted for engaging in Section 7 activities.

On November 30, an Appeals Officer denied the Charging Party's appeal of the arbitrator's decision,² and the Charging Party was placed on the non-dispatch list effective December 12, 2012. The Region has determined that the Charging Party lost the protection of the Act by knowingly or recklessly publishing false statements in the flyer.

Related Board Case

In a prior case involving these same parties, the Board dismissed allegations that Section 13.2 had been unlawfully applied against similar activity by the Charging Party.³ In that case, the consolidated complaint alleged that the Employer violated Section 8(a)(1) of the Act by its involvement in and prosecution of a grievance against the Charging Party under Section 13.2. The complaint also alleged that the Union violated Section 8(b)(1)(A) of the Act by its involvement in the prosecution of three grievances against the Charging Party under Section 13.2, by implementing penalties against the Charging Party pursuant to the grievances, and by maintaining records of the grievance proceedings. The Board dismissed the complaint in its entirety. With respect to one grievance, the Board concluded that the hearing alone was not enough to impose liability on the Union and Employer when no disciplinary action had been taken against the employee.⁴ With respect to another grievance, the Board found that the Charging Party was disciplined for conduct that was neither protected nor concerted.⁵

² Noting that the Charging Party has been found guilty of violating Section 13.2 in two prior instances, the Appeals Officer imposed an additional 180 days off for a total of 360 days off work, with 180 days off being suspended.

³ *Pacific Maritime Association*, 358 NLRB No. 113 (Sept. 14, 2012).

⁴ *Id.*, slip op. at 3.

⁵ *Id.*, slip op. at 2. The Board concluded that allegations regarding a third grievance were time-barred. *Id.*, slip op. at 1.

In footnote 13 of the decision, the Board pointed out that the Acting General Counsel had not alleged that the Section 13.2 procedure itself violated the Act. While noting that Section 13.2, on its face, does not reach Section 7 activity, Members Block and Griffin hypothesized that a grievance-arbitration system established by an employer and a union might result in liability under the Act if it were demonstrated that it was “reasonably foreseeable” that employees could be subject to adverse employment consequences under the system for engaging in Section 7 activity.⁶

ACTION

We conclude that the Special Section 13.2 Grievance Procedures are maintained to address unlawful discrimination/harassment that is not protected by the Act. Therefore, it is not reasonably foreseeable that the processing of grievances and/or complaints under the Special Section 13.2 Grievance Procedures would result in employees being subject to adverse employment actions for engaging in Section 7 activity.

It is well established that employer conduct that has a reasonably foreseeable effect of discouraging employees from invoking their Section 7 rights violates Section 8(a)(1) of the Act.⁷ Similarly, union conduct that has the “natural and foreseeable effect” of coercing employees in the exercise of protected rights violates 8(b)(1)(A) of the Act.⁸ In *Pacific Maritime Association*, a majority of the panel indicated that there might be circumstances in which a freely-negotiated grievance-arbitration procedure would be violative if it were demonstrated that it was reasonably foreseeable that employees could be disciplined under that procedure for engaging in protected activity.⁹

⁶ *Id.*, slip op. at 3, fn.13.

⁷ *Prudential Insurance Co.*, 317 NLRB 357, 357-358 (1995) citing *Laredo Packing Co.* 254 NLRB 1, 2 (1981) (employer’s warning to employee about “getting bad advice” regarding filing grievances and statement that employer would not cooperate in resolving grievances had the foreseeable effect of discouraging the employee from using the grievance process because statements suggested that it was futile to seek help from the exclusive representative.).

⁸ See, e.g., *G & H Towing Co.*, 168 NLRB 589, 591 (1967) (although picket line violence was directed at supervisors, it could not help but have coercive impact on employees whose loyalty the respondent union was seeking to retain).

⁹ 358 NLRB No. 113, slip op. at 3, fn.13.

We conclude that the Special Section 13.2 Grievance Procedures do not produce the type of reasonably foreseeable interference with Section 7 rights that the Board relies on when finding a violation. The elimination of discrimination from the workplace has been recognized as a "matter of highest priority" embodied in our national labor policy.¹⁰ Furthermore, the Board has held that unions as collective-bargaining representatives of employees have a legitimate and important interest in making the workplace free of discrimination.¹¹ Here, Section 13.2 addresses discrimination that employers and unions are required to eliminate from the workplace under equal employment opportunity laws. Therefore, the parties have a substantial and legitimate reason to address discrimination and harassment in this manner, and there is no evidence that this provision was negotiated for any reason other than this substantial and legitimate reason.

Section 13.2 of the agreement merely permits employees to file grievances against their fellow employees that are limited to discrimination or harassment that is unprotected under the Act, i.e., discrimination and harassment based on race, creed, color, sex, age, national origin, religion, or political belief. We find that the consequences and effects of such a grievance are unlikely to have a direct impact on Section 7 rights. Therefore, we do not find it reasonably foreseeable that employees will face discipline for exercising Section 7 rights because the grievance procedure only addresses unprotected conduct. Indeed, there is no evidence that Section 13.2 has been used to discipline employees for any protected activity. In both the prior case involving the Charging Party and the instant case, Section 13.2 grievances that resulted in discipline were found not to have been based on any protected activity.

Accordingly, the Region should dismiss the instant charges, absent withdrawal.

/s/
B.J.K.

Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 66 (1975), citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

¹¹ *Westinghouse Electric Corp.*, 239 NLRB 106, 108 (1978) (holding union entitled to information which relates to alleged discrimination), enf'd as modified sub nom. *Electrical Workers IUE v. NLRB*, 648 F2d 18 (D.C. Cir. 1980).