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

DATE: November 4, 2013

TO: Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT:		
	ABC Union Cab, Ace Cab, Inc., A NLV Cab Co.,	506-2017-9100-0000
	Vegas-Western Cab, Inc., and Virgin Valley Cab	506-8000-0000-0000
	Company Inc., a single Employer	506-8033-7500-0000
	Case 28-CA-108504	506-8067-5000-0000

This case, involving the discharge of 371 employees, was submitted for advice as to whether a strike to protest the Union and Employer entering into a collective bargaining agreement without member ratification was protected activity under the Act. We conclude that the strike was not protected under the Act because it was in direct opposition to the Union's position and strategy and therefore was proscribed by the exclusivity principle in Section 9(a) of the Act. Accordingly, the charge should be dismissed, absent withdrawal.

FACTS

ABC Union Cab Company, Inc., Ace Cab, Inc., A-N.L.V. Cab Co., Vegas-Western Cab, Inc., and Virgin Valley Cab Company, Inc. (the Employer)[1] operate taxi cabs in Las Vegas, Nevada. The United Steelworkers Union (the Union) has represented the Employer's employees since 1989.[2] There are approximately 1,900 drivers in the bargaining unit.

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[1] The Region would find that the five companies are a single employer under the Act. This issue has not been submitted for advice.

[2] The Union was certified as the collective bargaining representatives of the employees at ABC Union Cab Company, Inc., Ace Cab, Inc., A-N.L.V. Cab Co., Vegas-Western Cab, Inc., on May 26, 1989 and certified as the collective bargaining representative of the employees at Virgin Valley Cab Company, Inc. on January 22, 2008.

The most recent collective bargaining agreement between the Employer and the Union expired on September 12, 2012. The parties began bargaining for a new agreement on July 25, 2012. The Union negotiating committee included four taxi cab drivers from the bargaining unit and one full-time Union staff person who served as chief negotiator and spokesperson for the Union. On October 11, 2012, the Employer presented a last, best, and final offer, which the Union submitted to its membership for a ratification vote. The offer was rejected by 99.5% of the members. The Union then replaced its chief negotiator.

The parties continued negotiating and, in early March 2013, the Employer again submitted a last, best, and final offer. The Union's chief negotiator told negotiating committee members that he would forward this offer to them so that they could make it available to the membership and that he would schedule a ratification vote. However, on March 10, 2013,[3] the Union's chief negotiator accepted the Employer's offer without the committee's knowledge or a ratification vote of the membership.

The new agreement maintained the language of the previous agreement with respect to the no-strike clause. The no-strike clause provided that the "Union agree[d] it [would] not call, engage in, encourage and/or sanction any strike, sympathy strike, work stoppage, slowdown, picketing, sitdown, boycott or other interference with the conduct of the Employer's business." It also provided that neither the Union nor any employee individually could honor any picket line during the term of the agreement. Finally, the discipline clause in the contract provided that employees could be discharged for participation in a slowdown, work stoppage, strike, sympathy strike, or boycott in violation of the agreement.

On March 11, the Union sent a letter to employees advising them of the terms of the new agreement and informing them that the Union had decided to invoke its legal right to sign the contract.[4] The Union stated that it had heard that some of the employees had wanted to strike, but that it believed this was based on misinformation and misguided goals. The Union asked all employees to give the new contract a chance.

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[3] All subsequent dates are in 2013 unless otherwise stated.

[4] The Union's constitution does not require member ratification of collective bargaining agreements.

On March 21, an article in the Las Vegas Journal reported that the Employers' drivers were laying the groundwork for a wildcat strike.[5] That same day, the Union sent a letter to employees informing them that the new contract was in effect, that any strike would be illegal, and that employees could lose their jobs if they participated in a strike. It again urged employees to give the new contract a chance to succeed and stated that "we need to enforce any violations of the contract utilizing the grievance and arbitration procedure."

On March 29, approximately 371 employees went on strike to protest the Employer and Union signing a new agreement without a membership ratification vote. On April 1, 2013, the Union sent a letter to employees advising them that the strike was unauthorized and illegal. It instructed employees to stop the strike and return to work. It characterized the strike leaders as selfish and misguided individuals who had put employees' jobs at risk by encouraging participation in an illegal strike with no chance of success. Finally, it stated "if you truly want to improve the contract, then help the Union build solidarity to project a unified front moving forward."

On April 3, the Employer began discharging employees. In total, the Employer discharged all 371 employees that participated in the strike for violation of company policies and the collective bargaining agreement. On April 4, the Union filed a grievance regarding the discharges.

On July 23, the Union and the Employer signed an agreement allowing for the conditional return of 348 listed individuals. The agreement stipulated that the individuals had abandoned their jobs and participated in a strike that violated the collective bargaining agreement's no strike clause. It further provided that in order for an individual to receive an offer of re-employment, the individual would have to re-apply, meet the requirements for employment set forth in the collective bargaining agreement, and agree that he or she would not support or encourage any individuals not offered re-employment who continued to participate in the strike. Anyone returning under the agreement would also suffer a loss of seniority for the work time missed due to their participation in the strike and loss of seniority for purposes of the bid seniority list.

The agreement specified that the remaining listed 20 individuals were alleged to have engaged in strike misconduct and that the parties would therefore further review evidence and discuss whether each of these individuals would be offered re-employment. One of these 20 individuals filed the instant ULP charge alleging,

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[5] Tim O'Reiley, *Frias Cabbies May Stage Strike*, Las Vegas Review-Journal, Mar. 21, 2013, *available at* http://www.reviewjournal.com/business/organized-labor/frias-cabbies-may-stage-strike.

among other things, that the Employer violated Sections 8(a)(1) and 8(a)(3) by discharging the striking employees.

ACTION

We conclude that the strike was unprotected under the Act because it was in direct opposition to the Union's position and strategy and therefore was proscribed by the exclusivity principle in Section 9(a) of the Act. Accordingly, the charge should be dismissed, absent withdrawal.

Section 9(a) provides that "representatives designated…for the purposes of collective bargaining by the majority of the employees in a unit…shall be the exclusive representatives of all the employees in such unit…" It is well established that a union, as the exclusive representative of employees in dealing with an employer, has a legitimate interest in speaking with one voice, and that an employer likewise has an interest in bargaining with one duly elected representative.[6] Consistent with this principle, otherwise protected dissident employee activity can lose the protection of the Act if employees are attempting to bargain directly with the employer or the employees' position is inconsistent with the union's position,[7] whereas dissident conduct that is "more nearly in support of the things which the union is trying to accomplish" will be protected.[8]

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[6] *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 69-70 (1975).

[7] *Coca Cola Puerto Rico Bottlers,* 358 NLRB No. 129, slip op. at 3 (Sept. 18, 2012); *see also Bridgeport Ambulance Service*, 302 NLRB 358, 358 n.2, 364 (1991) (employees engaged in a walkout motivated by discharge of coworker did not lose the protection of the Act when the dissidents' raised additional issues of generalized dissatisfaction with the union because the additional discussion was not in derogation of the union or inconsistent with its bargaining positions), enfd. 966 F.2d 725 (2d Cir. 1992).

[8] *NLRB v. R.C. Can Co.*, 328 F.2d 974, 979 (5th Cir. 1964), enfg. 140 NLRB 588 (1963). *See, e.g.*, *East Chicago Rehabilitation Center, Inc.*, 259 NLRB 996, 996 n.2, 1000 (1982) (spontaneous employee walkout protesting unilateral change in lunchtime practice protected where the union also protested the change during bargaining), enfd. 710 F.2d 397 (7th Cir. 1983); *United Cable Television Corp.*, 299 NLRB 138, 143 (1990) (finding employee letter to coworkers voicing dissatisfaction with wage levels agreed to by the union protected even though its message and tone were inconsistent with the employer's and the union's expressed desire to resolve their protracted dispute; the employee was not seeking to usurp or replace the union, and his message—that the employer could afford to pay higher wages—was not inconsistent with the union's bargaining position and objectives).

Here, the strike to protest the contract and the absence of a ratification vote was in direct opposition to the Union's decision to execute the contract without a ratification vote and its strategy and objective to enforce the contract through the grievance and arbitration procedure. Prior to the strike, in its letter of March 11, the Union advised employees that they should give the new contract a chance and that it believed the idea of going on strike was based on misinformation and misguided goals. And on March 21, the Union vehemently stressed to employees that the Union did not condone, authorize, approve, support, or ratify a strike; warned employees that they could lose their jobs if any of them participated in a strike; and again asked employees to give the contract a chance to succeed. On April 1, three days after the strike began, the Union sent a letter to employees instructing them to stop the strike and return to work. It characterized the strike as illegal and with no chance of success and described its leaders as selfish and misguided individuals. It also urged employees who wanted to improve the contract to help the Union build solidarity to project a unified front moving forward.[9]

In summary, the Union clearly expressed to employees, both before and during the strike, that it did not support the strike[10] and that its strategy was to enforce the new contract utilizing the grievance and arbitration procedure.[11] The strike was therefore clearly inconsistent with the Union's position and certainly not in support of what the Union was trying to accomplish. Accordingly, we conclude that the strike was not protected under the Act.

The fact that the Union filed a grievance objecting to the mass discharge does not compel a different conclusion here, considering the Union's consistent and resolute

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[9] *Cf. Northeast Beverage Corp.*, 349 NLRB 1166, 1189 (2007), enf. denied 554 F.3d 133 (D.C. Cir. 2009) (employees did not lose Act's protection where union said the employees' appearance at the union hall to attend contract negotiations was unwise but it did not state that the positions of the union and the employees were in opposition).

[10] *See, e.g., Energy Coal Partnership*, 269 NLRB 770, 771 (1984) (holding that a strike to protest the slow pace of negotiations was unprotected where the union strongly opposed the strike and so informed the dissidents both before and during the strike).

[11] *Cf. Edmonds Villa Care Center*, 249 NLRB 705, 706 (1980) (finding that employees did not lose protection of the Act when they sought premium pay for working while short staffed because the newly-certified union had yet to adopt any bargaining positions or policies), enf. denied mem. 692 F.2d 766 (9th Cir. 1982).

opposition to the strike, and the stark contrast between the Union and the strikers with regard to their strategy and objectives.[12] Indeed, the terms of the settlement agreement that the Union ultimately agreed to stated that the strike had been in violation of the collective bargaining agreement's no-strike clause, imposed penalties on those who participated in the strike, and required any individual re-applying to the Employer to agree not to support or encourage any individuals not offered re-employment who continued to participate in the strike.

While arguably the collective bargaining agreement in effect at the time of the strike did not preclude employees from engaging in an unauthorized strike,[13] it is unnecessary to decide this issue considering our conclusion that the strike was not protected under the Act. Accordingly, the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

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[12] *Cf. United Cable Television Corp.*, 299 NLRB at 143 (1990) (reasoning that an employee's letter was not inconsistent with the union's position, in part, because the union pursued a grievance to arbitration on the employee's behalf after he was discharged for posting the letter).

[13] *See Silver State Disposal Service*, 326 NLRB 84, 86 (1998) (language that prohibits the union from calling, encouraging, or condoning strikes does not prohibit employees from engaging in unauthorized or wildcat work stoppages). The charging party also alleges here that the collective bargaining agreement was not valid because it was not ratified by the membership as required by Nevada State Law. Though we need not reach this question, arguably the Nevada State Law in question, Nev. Rev. Stat. § 614.170, does not require that a union's membership ratify a contract in order for it to be properly executed. Further, if the state was to interpret the statute in this way, the statute would likely be preempted as an obstacle to the Act's regulation of the collective bargaining process. *See Brown v. Hotel and Restaurant Employees & Bartenders Int'l Union Local 54,* 468 U.S. 491, 501-503 (1984).