

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

Advice Memorandum

DATE: June 19, 2014

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: ILWU Local 23
Case 19-CB-117573

536-2545-1200
536-2581-3314
536-2581-3360
548-6030-6725-5000

This case was submitted for advice as to whether the Union unlawfully refused to dispatch an employee suspended from dispatch by an arbitrator under a provision of the ILWU's contract with a multi-employer association, where the employee was seeking work with an employer that was not a party to that contract. We conclude that the Union acted lawfully because its refusal to refer was based on the employee's serious misconduct i.e., the employee's serious physical assault on a local union president. Thus, the Union's action was neither arbitrary nor did it tend to encourage Union membership. Instead, the Union acted reasonably to protect other employees and union officers, and in order to run its dispatch hall in an efficient and orderly manner.

FACTS

Background

The Pacific Maritime Association ("PMA") is a multi-employer association representing shipping companies and terminal operators in shipping ports across the West Coast. The PMA and the ILWU are parties to a collective bargaining agreement called the Pacific Coast Longshore Contract Document ("PCLCD"). The PCLCD is administered at various West Coast ports including Los Angeles, California, and Tacoma, Washington, by a Joint Port Labor Relations Committee ("Joint Committee"), on which local employers and the ILWU have equal representation.

Pacific Rail Services, LLC ("PRS") provides intermodal services for numerous railroads at various locations throughout the United States, including Tacoma, Washington, the only facility involved herein. PRS is not a member of the PMA and has a separate collective bargaining agreement with the ILWU, which provides that ILWU Local 23 (the Union or Local 23), located in Tacoma, will supply the Employer

with local labor through its hiring hall. The PRS hiring hall is located physically in the same space as the PMA's hiring hall in Tacoma.

The alleged discriminatee is a crane operator and 17-year member of ILWU Local 13, which is located in Los Angeles. He served on Local 13's executive board from April 2012 to approximately May or June 2012. However his term was cut short after he was found to have violated the Local's by-laws by disclosing information to the PMA about the content of union meetings. The discriminatee has occasionally worked out of Local 23 in Tacoma. Under ILWU guidelines, a member in good standing may be dispatched from any port where there is an ILWU-operated hiring hall.

The discriminatee is a self-described "activist" with a long history of dissident activity directed against Local 13's leadership. With the assistance of a labor consultant, the discriminatee co-authors articles and cartoons critical of both locals' officers and policies.

In September 2012, Local 13's then Secretary-Treasurer filed a grievance against the discriminatee alleging that he had posted a flyer, that, among other things, falsely accused the Secretary-Treasurer of gambling and engaging in fraudulent acts, and included a cartoon -- drawn by the discriminatee -- depicting the Secretary-Treasurer as a female nurse, which the Secretary-Treasurer asserted was harassment based on sex and sexual orientation. Because the grievance alleged sex and sexual orientation discrimination under Section 13.2 of the PCLCD, it was handled under the parties' Special Grievance/Arbitration Procedures allowing for a direct hearing before an arbitrator in 30 days or less, and a final appeal to the Coast Appeals Officer. On November 6, 2012, after a timely hearing, an arbitrator issued his decision in this matter suspending the discriminatee from PMA work in Local 13's jurisdiction for 180 days based on this conduct. This decision was later confirmed by the Coast Appeals Officer.¹ The discriminatee started serving his suspension on December 12, 2012.

Thereafter, the discriminatee traveled to Tacoma, Washington and was dispatched out of the Local 23 hall to work with PRS. Subsequently, a Local 13 official contacted the Local 23 president and informed him of the discriminatee's suspension. The Local 23 President also saw a January 24, 2013² blog post by the discriminatee that was critical of him. Local 23 then adopted a non-dispatch rule for members suspended from other locals, which formally went into effect in mid-June,

¹ The Division of Advice later found that the posting of the flyer and the cartoon was unprotected. *ILWU Local 13 (Pacific Maritime Association)*, Advice Memorandum, Case 21-CB-93165, dated April 30, 2013 at 5.

² All dates hereafter are in 2013, unless otherwise noted.

and was applied to bar the discriminatee from dispatch to PRS.³ The discriminatee's suspension ended in June, and he was able to return to Local 13's jurisdiction and seek PMA work at the Port of Los Angeles.

The Discriminatee's Second Suspension

Following his return to Los Angeles, on July 3 the discriminatee was involved in a fight with the Local 13 President, who, as Secretary-Treasurer, had filed the grievance that led to the discriminatee's September 2012 suspension. As a result of the fight, Local 13 sought a temporary restraining order against the discriminatee and, under the authority of the Joint Committee, placed him on no-dispatch status pursuant to the anti-harassment article in the PCLCD, pending an arbitration hearing.

While the arbitration record is clear that both the Local 13 President and the discriminatee voluntarily left the Local 13 office lobby and went across the street to an alley to discuss their differences, the arbitrator -- based on testimony that the discriminatee had made statements attesting to his anger over his September 2012 suspension and indicating that he held the Local 13 President responsible for that suspension -- concluded that the discriminatee's attack on the Local President was premeditated. The Local 13 President testified that the attack was unprovoked; he received significant injuries including lacerations requiring stitches, a broken nose and ribs, and a concussion; and he filed a police report. The discriminatee received minor injuries and decided not to file a police report. Although he submitted a statement to the Arbitrator, he did not testify at the hearing on his own behalf. He admits that after being struck by the Local President, he picked him up and ran him into a wall; then, after escaping a headlock, he kned the Local President in the face twice and threw him on the ground.

The arbitrator issued his decision on August 2 finding the discriminatee guilty of assault on a fellow union member. The discriminatee was suspended from dispatch for 540 days and barred from all work sites and dispatch halls covered by the PCLCD. The Coast Appeals Officer upheld the arbitrator's award on August 28. The Coast Appeals Officer's decision is not appealable.

The discriminatee travelled back to Tacoma in search of work on November 16. After arriving at Local 23's dispatch hall at the appropriate dispatch time and location for PRS employment, he was informed that Local 23 would not dispatch him from their hall. When the discriminatee sought the reason, a Local 23 representative presented and relied upon the August 2 arbitrator's decision. When the discriminatee

³ The Region found merit to allegations in Cases 19-CB-107522 and 19-CB-110796 that this rule was discriminatorily enacted and enforced against the discriminatee, and these matters are being held in abeyance pending the disposition of this matter.

pointed out that the arbitrator's decision, made under the authority of the PCLCD, only applied to dispatches for PMA employment, Local 23 still refused to dispatch him, citing the language that the discriminatee was prohibited from all dispatch halls.

ACTION

We conclude that the charge herein should be dismissed, absent withdrawal, because the Union's failure to refer the alleged discriminatee was based on his serious misconduct and was neither arbitrary nor did it tend to encourage union membership.

A union owes a duty of fair representation to all applicants using its exclusive hiring hall⁴ and may not operate it in an arbitrary, discriminatory, or unfair manner.⁵ A union acts arbitrarily "if, in light of the factual and legal landscape at the time, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational."⁶

Specifically, when a union operating an exclusive hiring hall prevents an employee from being hired or causes an employee's discharge, the Board presumes that the effect of the union's action is to unlawfully encourage union membership because the union has displayed to all users of the hiring hall its power over their livelihoods.⁷ However, that presumption may be rebutted where the union's action was necessary to the effective performance of its representative function,⁸ e.g., where

⁴ See *Breining v. Sheet Metal Workers Local 6*, 493 U.S. 67, 87-88 (1989).

⁵ See *Miranda Fuel Co.*, 140 NLRB 181, 184 (1962). Two circuit courts of appeals have held that a union owes a "heightened duty" of fair dealing toward employees in the hiring hall context that requires it to act by reference to objective criteria. See *Jacoby v. NLRB*, 233 F.3d 611, 615-617 (D.C. Cir. 2000), reversing and remanding 329 NLRB 688 (1999); and *Lucas v. NLRB*, 333 F.3d 927, 934-935 (9th Cir. 2003), reversing and remanding 332 NLRB 1 (2000). The Board has not, however, adopted the "heightened duty" standard. See *Teamsters Local 631 (Vosburg Equipment, Inc.)*, 340 NLRB 881, 881 n.4 (2003).

⁶ *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

⁷ *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 2 (2000), *revd. on other grounds*, 333 F.3d 927 (9th Cir. 2003); *Stage Employees IATSE Local 412 (Various Employers)*, 312 NLRB 123, 127 (1993); *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681, 681 (1973), *enf. denied on other grounds and*

the employee's conduct interfered with the mechanics of the referral process;⁹ the employee's conduct harmed the union's reputation and relationship with employers to which it supplied labor,¹⁰ or the employee's conduct was of a nature that continued referrals could endanger employees or union agents or expose the union to liability for future misconduct.¹¹ In these circumstances, it would not be reasonable to infer that the union's action would unlawfully encourage union membership.¹²

remanded per curiam, 496 F.2d 1308 (6th Cir. 1974), *reaff'd*, 220 NLRB 147 (1975), *enf. denied*, 555 F.2d 552 (6th Cir. 1977).

⁸ *Id.* See, e.g., *Laborers' International Union Of North America, Local 872, AFL-CIO*, 359 NLRB No. 117, slip op. 2, 11-12 (May 3, 2013) (alleged discriminatee's "tirade of continuous screaming, her repeated use of expletives, and her persistent refusal either to 'calm down' or to leave" justified union's ejection of alleged discriminatee from the hall; the ejection was necessary for the effective performance of the union's representative function).

⁹ *Carpenters Local 522 (Caudle-Hyatt)*, 269 NLRB 574, 576 (1984) (union lawfully caused discharge of employees who had circumvented hiring hall and obtained work directly from employer); *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983) (union lawfully denied employee referral after employee had circumvented hiring hall by applying for work directly from employer).

¹⁰ *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1295-96 (1984) (union lawfully refused to refer employee with history of misconduct and incompetence on various jobs to which he had been referred); *Longshoremen ILA Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334, 337 (1981) (union lawfully refused to refer employee who had engaged in wildcat strike in violation of contractual no-strike clause).

¹¹ See *Plumbers, Local 521 (Williams Plumbing)*, Case 9-CB-10077, Advice Memorandum, dated September 3, 1999 at 3 (union lawfully refused to refer member who had violent history after he threatened union President in union hall; union could well believe that continued referral of this employee with knowledge of his violent tendencies could subject it to liability); *IBT and its Local 714 (McCormick Place and Other Employers)*, Case 13-CB-10629, Advice Memorandum, dated November 2, 1999 at 8 (former officer of a local now in trusteeship because of "pervasive and on-going corruption" disqualified himself from referral when he threatened a resort to "bodily harm" at a union business meeting because the trusteeship was extended).

¹² See *Philadelphia Typographical Union No. 2 (Triangle Publications)*, 189 NLRB 829, 830 (1971) (union lawfully caused employee's layoff because employee, while

In the instant case, we conclude that the Union acted reasonably and far from arbitrarily in refusing to dispatch the discriminatee after learning of his violent altercation with its sister local's President, and after receiving the arbitration decision that banned the discriminatee from "all work sites and dispatch halls" based on a finding that he committed premeditated assault.¹³ Thus, the Local's exclusion of the discriminatee from its hiring hall clearly was not "so far outside a 'wide range of reasonableness' as to be irrational' under its duty of fair representation."¹⁴ The effective and orderly operation of the hiring hall must include reasonable protection for Union agents operating the hall, as well as for the employees that the Union refers to the subject workplace. In addition, the Union was reasonably concerned about future liability and potential harm to the Union's relationship with PRS if it referred a registrant with a propensity for violent misconduct. Finally, the discriminatee's conduct, as determined by the arbitrator, was sufficiently egregious as to foreclose any reasonable interference that the Union's action in not referring him would encourage Union membership.

Accordingly, the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

serving as union treasurer, embezzled substantial union funds, threatening the union's financial survival; in these circumstances, union's actions would not be "construed as having a foreseeable consequence of encouraging union membership.").

¹³ Although the arbitrator's decision arguably did not apply to referrals to non-PMA employers (note, however, that it banned the discriminatee from "all work sites and dispatch halls," and the Tacoma hall serviced PMA employers as well as PRS), the Union was entitled to take cognizance of the factual findings in the decision even if the decision was not directly applicable to non-PMA employers. .

¹⁴ *Laborers' International Union Of North America, Local 872, AFL-CIO*, 359 NLRB No. 177, slip op. at 3, quoting *Ford Motor Co. v. Huffman* 345 U.S. 330, 338 (1953). Although the Board has not adopted the "heightened" DFR standard for hiring halls applied by two Circuit Courts, see fn. 5 above, we would reach the same conclusion under that heightened standard.