

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Elizabeth A. Kinney, Regional Director, Region 13

Robert E. Allen, Associate General Counsel, Division of Advice

Salsedo Press, Cases 13-CA-30904, 13-CA-30959

524-0183-3333, 506-2017-0100, 506-4067-0100, 524-0183-3367

This case was submitted for advice as to whether the Employer, a staff-owned cooperative, violated Section 8(a)(1) and (3) by discharging employees who concertedly tried to advance their interests as prospective shareholders by negotiating changes in the Employer's by-laws.

FACTS

Salsedo Press (the Employer) or the Co-op is a staff-owned cooperative engaged in the business of printing posters, letterhead and business cards in Chicago, Illinois, and is comprised of approximately eight shareholders, nine non-shareholders who perform production unit work and two non-shareholder office clericals. In 1986, the Employer incorporated as a for-profit corporation with a cooperative structure where by each member shares the profits and losses equally.⁽¹⁾ According to the corporate by-laws, membership in the cooperative is limited to persons who "patronize" the Employer through contribution of their labor in full or part-time employment, complete a trial period of one and one-half years to three years of employment, are approved by a two-thirds vote of the current membership,⁽²⁾ and have paid the membership share of \$3000 determined by the Co-op.

Article II, Section 2 of the Co-op's bylaws specifically provides that an employee must either be accepted as a member or "terminated as an employee" within the trial period.⁽³⁾ In the past, the Employer has invited to all non-shareholder employees to join the Co-op.⁽⁴⁾

Each Co-op member is entitled to purchase one membership share, which is equal to one vote on the Board of Directors. Thus, each Co-op member has the same amount of voting power. Each member participates in aspects of the management and decision-making process of the Employer, including the hiring and firing of employees, and decisions regarding capital allocation and distribution.⁽⁵⁾ However, there is an annually elected hierarchy of management officials which consists of a president, vice president and secretary-treasurer. In addition, most, if not all, of the Co-op members appear to be supervisors within Section 2(11) of the Act.

All shareholders are guaranteed an equal salary over a period of five years once their membership share is paid in full. However, shareholders do not earn overtime during that five-year period. The membership share may be purchased by full payment anytime after Co-op membership is offered and accepted, or by payment over a period of time. If the new member elects to pay over time, he or she is encouraged to attend and participate in the meetings once \$500 is tendered toward the total cost of the membership share, but the new member may not vote until the full payment is made.

Between 1977 and events described below, the Employer had a one-page collective bargaining agreement with the Chicago Typographical Union No. 16 (the Union) which was described as effective until the parties signed a new agreement. This agreement did not contain specific terms and conditions but stated that wages, hours and working conditions would be negotiated at a future time.⁽⁶⁾ This agreement remained in effect until April 13, 1992, when a new contract was executed with a retroactive effective date of March 27, 1992. The new agreement provides for the wages and benefits for all hourly production employees in the press and stripping departments. The current contract expires on March 26, 1996.

In the summer of 1990, the Employer held a workshop where Pat Gleason, the secretary-treasurer of the Co-op, explained the cooperative concept to the non-shareholders. The class covered such topics as the cooperative's philosophy of joint participation in management, the requirements and benefits of cooperative membership, and the profit and loss statement of the Employer. Charging Parties Leobardo Ballesteros and Jaime Murillo and two other non-shareholders attended the class. (7)

During the first week of February 1992, (8) Vasquez, Ballesteros and Murillo, along with Maria Arroyo and Mel Fletcher, two non-shareholder office employees, were individually invited to join the Co-op. At the times Vasquez, Ballesteros and Murillo were invited, each discussed with the Co-op members their desires to continue earning overtime as owners, and to obtain information about Union representation and a receipt or contract to document their \$3000 payment and corresponding ownership interest in the Co-op, before paying the membership share. When they questioned Gleason or other Co-op members about these concerns, the members indicated that the Co-op was willing to negotiate the terms of membership.

At the same time they were individually meeting with the Co-op members to discuss their invitations to join, Vasquez, Ballesteros and Murillo also attended some of the meetings which the production non-shareholders held to discuss their dissatisfaction with their wages, vacation and insurance benefits, (9) the lack of a union contract and their desire to obtain information about union representation. (10) The concerns voiced at these meetings were the subjects of a letter dated February 21, sent to the Co-op and signed by the seven non-shareholders. Specifically, the letter requested that the non-shareholders become a "part of the Union," (11) and called for a salary increase.

During February and March, the Co-op invited all of the non-shareholders to attend its usual biweekly meetings so the Co-op members could respond to the letter described above. In addition, at various meetings, Vasquez, Ballesteros and Murillo each acted as a spokesman to negotiate the terms of Co-op membership for the non-shareholders. Thus, the stated objectives of the seven production non-shareholders were primarily two-fold. Vasquez, Ballesteros and Murillo were interested in modifying the terms of Co-op membership, specifically, in having their salaries equal the salaries of other Co-op members in a period of three years as opposed to the current five year period, receiving overtime as Co-op members, and a obtaining Co-op contract or receipt to reflect their ownership interest. The four other production non-shareholders, who had not been employed long enough to receive invitations to join the Co-op, were potentially interested in Co-op issues although they were primarily concerned with union representation. The interests of both groups paralleled in that all seven were interested in negotiating wages and benefits.

At the initial meeting, the Co-op members and the non-shareholders generally discussed the Union, employee complaints, and the Co-op's willingness to negotiate and respond to non-shareholder proposals. As the meetings progressed, the Co-op members specifically agreed to accept proposals for a Co-op contract and a work contract from the non-shareholders, and agreed to put the new Co-op members into the Union (12) conditioned on the new members paying half of the initiation fee, which had been previously paid by the Employer. The Co-op members also stated they would allow non-shareholders to join the Union, would continue to pay the Union dues and would grant employees seniority from their dates of hire. (13) The owners also proposed, and all agreed to, a 50 cents an hour raise for the non-shareholders earning less than \$10.00 an hour.

On or about March 13, the seven non-shareholders presented a handwritten proposal to Gleason and Victor Cortes, the Co-op president, requesting a reconsideration of the terms of the by-laws by which non-shareholders could become members, higher salaries, vacation, medical and insurance benefits, changes in overtime, guaranteed weekly work hours and seniority. Vasquez, as spokesman at the meeting, specifically disassociated himself, Ballesteros and Murillo from the other non-shareholders and told Gleason and Cortez that the three invitees were more interested in joining the Co-op and discussing a Co-op contract and would "like to forget about the Union contract." At that time, the Co-op informed the non-shareholders that it was losing money and that allowing them to join the Union would be too costly for the employer. (14) Since that time, the Co-op has not held any additional meetings and or otherwise responded to the non-shareholders' proposal.

On or about March 27, Vasquez, Ballesteros, and Murillo were individually called into the Co-op office; each one was handed a letter detailing his termination from the Employer. The Employer cited the clause in the corporate by-laws which provided that an employee who does not become a member of the Co-op within the specified period must resign from employment with the Employer. Each was told that the current members of the Co-op had considered and rejected the proposal's request for changes in the by-laws of the Co-op concerning overtime, the salary equalization adjustment and a contract indicating

individual member ownership.

The four other non-shareholders who signed the letter and attended the meetings to discuss union representation and proposed changes in employees' terms and conditions are still employed by the Employer. In addition, Arroyo and Fletcher, the other non-shareholders offered Co-op invitations, are still employed, and are in the process of paying the membership share and completing the Co-op membership requirements. [\(15\)](#)

ACTION

We concluded that the Section 8(a)(1) and (3) charges should be dismissed, absent withdrawal, because the overall thrust of the activities of Vasquez, Ballesteros and Murillo concerned Co-op membership and thus did not constitute protected activity.

In order to understand the basis of our conclusion that the Charging Parties' attempts to negotiate changes in the by-laws were not protected, it is helpful to analyze the evidence in light of Section 8(a)(1) and (3) separately.

Section 8(a)(3)

We concluded that the Employer did not violate Section 8(a)(3) because Vasquez, Ballesteros, and Murillo were discharged not for joining with the non-shareholders in seeking union representation, but rather because they had not accepted the terms of the invitation to join the Co-op within the requisite period specified in the by-laws, and had instead tried to negotiate more favorable terms.

As noted above, the precise nature of the relationship between the Employer and the Union is unclear. It is clear, however, that the non-shareholder employees, except for Murillo, who was already a Union member, believed that they needed the Employer's permission to join the Union. Hence, many of the proposals in the non-shareholders' February 21 letter concerned Union membership and the benefits the employees believed would flow from such membership.

However, the only non-shareholders the Employer terminated were Vasquez, Ballesteros and Murillo. The evidence supports the conclusion that they were discharged because of their failure to accept their invitations to join the Co-op under its existing terms and procedures. Vasquez had specifically stated that he, Ballesteros and Murillo, unlike the other non-shareholders, were more interested in joining the Co-op and discussing and modifying the terms of a Co-op contract than in discussing a Union contract. [\(16\)](#) Arroyo and Fletcher, who were invited to join at the same time, unconditionally accepted the Co-op's invitations and apparently did not seek to negotiate the existing terms of the membership. Arroyo and Fletcher are in the process of paying the membership share and completing the membership requirements. The four non-shareholder employees who also participated in the meetings and discussions with the Co-op and clearly expressed their interest in joining the Union and in improving the existing benefits for all non-shareholders were not discharged by the Employer and continue to be employed. Indeed, as a result of the meetings with the Co-op members, the remaining non-shareholders received a wage increase and their terms and conditions of employment do not appear to have been adversely affected. Therefore, we concluded that the Employer did not terminate the Charging Parties because of their interest in Union membership, [\(17\)](#) and the discharges did not violate Section 8(a)(3). [\(18\)](#)

Section 8(a)(1)

Next, we concluded that the discharges did not violate Section 8(a)(1) because the primary purpose of Vasquez, Ballesteros, and Murillo -- to advance their interests as prospective shareholders -- brought them outside the objectives of the mutual aid and protection clause of Section 7.

The test the Board applies to determine whether employees' activity is covered by the mutual aid or protection clause of Section 7 of the Act is whether it relates to the interests of "employees qua employees." [\(19\)](#) That test is not met in these cases.

Initially, we note that it is well-settled that in cases involving employee-owned cooperatives, the degree of participation in management and/or labor policy formulation and whether the shareholder-employees have an effective voice in formulating

such policy⁽²⁰⁾ and whether they enjoy preferential treatment over non-shareholders determines whether employees deserve the protection of the Act. Thus, where shareholders receive preferential treatment over non-shareholders because of their status as shareholders, the Board has determined that there is a "divergence of proprietary and bargaining interests" between the shareholders and other employees which requires that the shareholders lose their protection as bargaining unit employees and be excluded from the unit.⁽²¹⁾ In the instant case, Vasquez, Ballesteros, and Murillo, as prospective shareholders, were seeking the preferential treatment of higher salaries, profit sharing, and voting rights, all offered to the members as benefits of ownership. By obtaining such preferential treatment, the non-shareholders who accept Co-op membership will remove themselves from their protected status as unit employees. More importantly, the Charging Parties sought ownership and management responsibilities and powers as shareholders. In Harrah's Lake Tahoe Resort and Casino, the Board determined that an employee's activities on behalf of an ESOP proposal to purchase 50 percent of his employer's parent corporation were not protected by Section 7 of the Act because the "strategic overall objective" of the proposal was to transfer ownership and control to employees, and any benefits that would flow to employees presupposed corporate ownership.⁽²²⁾ This analysis controls the instant cases.

We note that the evidence in these cases of managerial authority through Co-op membership is persuasive. In Harrah's, the employee's ESOP proposal sought to purchase only 50 percent majority stock in the company; thus the employees would have gained little voting control of the employer through the purchase. In this case, the Co-op members as shareholders own 100 percent interest in the Employer and sit on the Board of Directors. The Co-op operates the day-to-day management and decision-making process of the Employer through joint participation of all its members. It would follow that if the Board found more limited ESOP activity unprotected in Harrah's, the attempts in the instant case not only to become shareholders but also to negotiate changes in the structure and procedures of the Co-op should also be unprotected. Thus, the overall objective of Vasquez, Ballesteros, and Murillo to change the terms of the Co-op, and in essence to obtain managerial authority, did not pertain to their terms and conditions of employment as statutory employees and was therefore unprotected.

This conclusion is also consistent with the Board decisions such as Oregon State Employees Association⁽²³⁾ and Butchers' Union Local 115.⁽²⁴⁾ In those cases, employee efforts designed to oust management officials and insert themselves into the management hierarchy were beyond the sphere of Section 7.⁽²⁵⁾

In sum, the activities which were the basis for the decision to terminate Vasquez, Ballesteros and Murillo were their efforts to negotiate changes in the existing terms and procedures of the Co-op. Specifically, the meetings in which they each discussed their prospective owner status and discussions with the Co-op members in support of their proposal were designed to change the terms by which they would become the shareholders, or managers of the Employer. Although at times their concerns intersected with those of the non-shareholders who were seeking to advance their interests as employees, i.e., the desire to negotiate better wages and benefits and obtain information about the Union, the fact remains that the overall thrust of their activities, as Vasquez, Ballesteros and Murillo admitted, was to obtain more favorable terms than the Co-op's existing procedures and to cast themselves as shareholders, or managers under their own proposed terms.⁽²⁶⁾ The Employer was thereafter entitled to refuse their requests to negotiate the Co-op bylaws and to terminate them in accordance with its existing by-laws.

Accordingly, we conclude that these cases should be dismissed, absent withdrawal.

R.E.A.

¹ Prior to 1986, the Employer existed as a non-profit corporation.

² Members can also be expelled from the Co-op by a two-thirds vote following notice and a hearing.

³ There is no evidence that employees who reject membership in the Co-op are permitted to remain members.

⁴ There is no evidence that this rule has ever been discriminatorily applied.

⁵ Work allocation is handled by Chris Burke, a supervisor who is a shareholder.

⁶ The Region has concluded that the Union is not the Section 9(a) representative of the employees. It appears that the shareholders were all Union members even though, as noted above, the shareholders are supervisors. We do not pass on the legality of the relationship between the Employer and the Union in light of the numerous factual questions regarding its precise nature.

⁷ Charging Party Ernesto Vasquez had been informed by his supervisor about the Co-op six months after he was hired.

⁸ All events occurred in 1992, unless otherwise noted.

⁹ According to Vasquez, the production group as a whole did not believe they were going to become owners and wanted to seek better benefits.

¹⁰ Of the three charging parties, only Murillo was a member of the Union.

¹¹ Based on statements of Vasquez and Ballesteros, it appears that the Employer has paid the monthly Union dues for all the Union members and that the non-shareholders believed that it was only the Employer who could, or would, "put them into" the Union.

¹² See fn. 11, above.

¹³ It is not known whether the Employer previously used a seniority system.

¹⁴ It is not clear from the available evidence whether this statement indicates that Employer was unwilling to pay monthly dues or higher wages pursuant to a Union contract.

¹⁵ There is no evidence that either Arroyo or Fletcher met with the other non-shareholders or otherwise attempted to change the existing terms and procedures of Co-op membership.

¹⁶ Thus, there is no merit to the argument that Vasquez, Ballesteros and Murillo were discharged because of their roles as spokesmen for all the non-shareholders.

¹⁷ As noted above, Murillo was already a Union member.

¹⁸ See, e.g., *Barnet of Indiana*, 284 NLRB 1024, 1027 (1984) (argument that employer suspended employees because they filed grievances rejected where there was no direct evidence to support claim and other evidence showed that other employees filed many more grievances and expressed complaints without suffering any retaliation). See also *Case Acquisition Corporation d/b/a W.R. Case & Sons Cutlery Co.*, 307 NLRB No. 233 (1992). Compare *Norris/O'Bannon, A Dover Resources Company*, 307 NLRB No. 183 (1992).

¹⁹ *Harrah's Lake Tahoe Resort and Casino*, 307 NLRB No. 29 (1992), slip op. at 1, citing *G & W Electric Specialty*, 154 NLRB 1136, 1137 (1965). See also *Lutheran Social Services of Minnesota*, 250 NLRB 35 (1980) (counselor's concerns regarding employer's treatment of disturbed children and managerial competence not protected since there was no showing of effect on employee terms and conditions); *Damon House, Inc.*, 270 NLRB 143 (1984) (the "overall thrust" of employees' letter was an attack on the quality of employer's service, not employees' working conditions).

²⁰ See *Alderwood Products Corp.*, 81 NLRB 136 (1949); *Brookings Plywood Corp.*, 98 NLRB 794, 798 (1952).

²¹ In *Red & White Airway Cab Co.*, 123 NLRB 83, 85 (1959), owner-driver stockholders were excluded from the unit of non-stockholders because the stockholders annually elected the entire board of directors, which supervised a paid manager, and they received preferential treatment not enjoyed by non-stockholders in the selection of shifts, and through their freedom from the manager's exercise of disciplinary action. In *Sida of Hawaii, Inc.*, 191 NLRB 194, 195 (1971), the Board excluded the stockholder employees because they had almost complete control over the selection of officers and directors who had charge of managing the company, and they enjoyed preferential treatment over non-stockholders.

²² 307 NLRB No. 29, slip op. at 5.

²³ *Oregon State Employees Association*, 242 NLRB 976, 994 (1979) (where an employee was lawfully discharged after he threatened executive director that "he'd get his job," the Board held that his statements to the membership about the collective bargaining agreement, grievance and employee exclusion from the union were conduct merely incidental to his objective of persuading the membership to terminate the director); see also *Martin Iron Works*, 267 NLRB 239, 242 (1983).

²⁴ *Butchers' Union Local 115*, 209 NLRB 806, n. 1, 811 (1974) (the employer lawfully discharged an employee for seeking an executive position on its management staff "at the expense of an incumbent official.")

²⁵ See also *Nepi Rubber Products Corp.*, 303 NLRB No. 19 (1991), slip op. at 2, ALJD slip op. at 12.

²⁶ See *Harrah's Resort Lake Tahoe Casino*, supra, *Nepi Rubber Products Corp.*, supra.