

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: May 19, 1994

TO: Louis J. D'Amico, Regional Director, Region 5

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

SUBJECT: National Association of Letter Carriers, Case 5-CA-23892

506-0170, 506-2001-5000, 506-2017-2500, 506-4033-4100 506-4033-9200, 506-4067-9500, 506-6070-2500, 506-6070-2550, 506-6070-5000, 506-6090-0500, 506-6090-1900, 506-6090-5450, 506-6090-6300, 506-6090-6800, 512-7550-0143, 512-7550-5000, 512-7550-6000

This Section 8(a)(1) and (3) case was submitted for advice on whether the Charging Party, an employee and member of a labor union-employer, was engaged in protected concerted activity when he disseminated information as to the employer's officials' financial practices which allegedly breached the employer's constitution. [FOIA EXEMPTIONS 2 & 5]

FACTS

Charging Party David Noble was hired by the United States Postal Service (USPS) as a letter carrier in May 1975. He has been a member of the National Association of Letter Carriers (NALC) since 1975. In January 1979, he took a leave of absence from the USPS to work for the NALC, where he was assigned to a staff position in the Minneapolis regional office. In January 1981, Noble was appointed by NALC president, Vincent Sombrotto, to the position of Assistant to the President for arbitration at the NALC headquarters in Washington, D.C. In this capacity, he designed NALC's computer arbitration system and read and coded for entry the USPS' 25,000 arbitration decisions. He also met twice a month with the Contract Administration Unit to discuss pending grievances and arbitrations, represented the Union at fourth step grievance meetings with the Postal Service, and was the Union's witness in contract interpretation disputes. Noble also drafted all the non-economic bargaining proposals which the Union presented at contract negotiations in 1981, 1984, 1987, and 1990.

Sometime in November 1992, while working at NALC headquarters, Noble was told by two NALC employees who attended a 1992 convention, that during the convention, one of the business agents (Matthew Rose) had raised the issue of whether officers should receive compensation for time spent at the convention in addition to receiving a full salary for that time. Noble told them he would investigate this matter.

Another NALC employee told Noble that the entire executive council was secretly reimbursing itself for social security tax payments and that NALC's 10 resident officers were drawing about \$500 per month in a phony "in-town entertainment" scheme. Noble began investigating this allegation also. He conferred with another NALC employee, in the computer department, who furnished Noble with a software package that Noble used over the course of several months to access NALC files. Using this software package he was able to obtain information which showed that NALC was making monthly payments to the property management company that managed the Washington, D.C. apartments of President Sombrotto and Secretary-Treasurer O'Connell. Noble asserts that these payments were not authorized by the NALC constitution. During this period, Noble also obtained documents and records that were allegedly slid under the locked door to his office overnight by unknown persons.

In March, 1993 Noble shared the information he had gathered with full time letter carrier John Hilsman, who is also steward for NALC Branch 142. Together, they searched the transcript proceedings of the NALC conventions dating back to 1968, but found no evidence to indicate that the NALC membership had authorized such payments. They found instead, that in the 1986 proceedings officers were denied reimbursement for unitemized expenses. They then decided to file internal charges against the NALC officers. Noble first spoke with Bruce Simon, the General Counsel for NALC on August 12 and apprised him of the internal charges that he had prepared and requested to meet with Sombrotto and Simon. Simon told Noble that he would talk to

him the following week, but Noble told him that he could not wait that long. Noble filed internal union charges on August 13 against 23 of NALC's 28 national officers. He filed charges against the remaining five national officers on August 16.

On August 14, 1993, Noble distributed letters exposing the alleged corruption and explaining his internal charges to several hundred NALC branches throughout the country. In this letter Noble states: "[T]he cost to the membership of these rip-offs is almost \$200,000 per year". The letter also states:

.....To this point, the Executive Council's stain extends only to the honor of the resident officers, national business agents and trustees who put their personal profit before the interests of the membership. That stain will spread, however, to discolor NALC unless we act quickly and decisively. You and I are now on trial--by our actions we will determine whether history will see NALC as a clean union, with a proud membership that would not tolerate corruption at the top, or whether we will replace the old Teamsters as the disgrace of the labor movement.

The letter closes by asking NALC members to call or write and join Noble in his effort to "take our union back".

On August 17, 1993, Noble attended a Minneapolis Branch 9 meeting where he explained the charges he filed against the NALC officers and answered questions from members. He spoke to the members about the evidence he had gathered in support of his charges, and spoke to some members of the Minneapolis office to rally support for a movement he wished to found, the Letter Carrier Reform Movement.

On August 18, 1993, an article about the charges that Noble filed appeared in the Minneapolis Tribune and the New York Newsday. Noble stated that the information which he gave to those newspapers consisted of copies of the charges he had filed, and the circumstances surrounding the charges. After the New York Newsday printed the article, Noble says he mailed it copies of the actual vouchers.

On August 22, 1993, Noble and Hilsman attended a NALC rap session in North Carolina. There, Noble and Hilsman set up a table in the back of the room and disseminated letters to NALC members which contained information on the charges. They also spoke with several NALC members about the charges. It was at this meeting that Noble conversed with national business agent Matthew Rose. Rose was one of the officers charged, and the person who had allegedly raised the question about the propriety of the compensation to officers for time they spent at conventions in addition to their regular salary. Noble told Rose that he would withdraw the charges if Rose agreed to stop taking the payments and repay the Union. Rose refused.

By letter dated August 26, 1993, Sombrotto notified Noble that "effective August 30, 1993, you are suspended indefinitely from your employment with NALC, without pay, until further notice". No reason was given for the suspension in the letter. As late as September 27, 1993, Noble had not been given a reason for his suspension.

On September 1, 1993, Noble mailed to the same NALC branches, copies of another letter in which he updated members on what had happened since he filed the charges. In that letter, Noble stated that the officers "now admit taking nearly \$190,000 each year in previously undisclosed FICA and Medicare tax reimbursements, 'in-town entertainment' allotments and lost time payments at conventions." Noble further stated that the officers "will claim that the payments were authorized in some cases, apparently, because they passed secret resolutions in closed Executive Council meetings". Noble stated that he received anonymously mailed copies of what appear to be Executive Council resolutions, one authorizing FICA reimbursements and the other authorizing payment of "in-town entertainment expenses" without itemization. Both resolutions are dated December 8, 1980, the first day that "Sombrotto loyalist Richard P. O'Connell served as secretary-treasurer, having been installed the night before to replace Gus Johnson, with whom Sombrotto had been feuding." Noble asserted that the executive council lacks the authority to approve such secret payments to itself. Noble quoted the section of the NALC constitution which he asserts has been violated and stated "[a] thousand Executive Council resolutions, passed by officers behind closed doors, could not supercede the constitution's express rule." Included in the letter were three letter vouchers submitted by Sombrotto and two by Bill Young, the assistant secretary treasurer, for "in-town expenses." The vouchers showed payments of \$500 each month to Sombrotto for October, November and December, 1992 and to Young for September and November, 1992. The vouchers showed NALC accounting codes which designated payments of \$69, \$11, and \$31 to Sombrotto, and payments of \$13.40 and \$8.90 to Young as reimbursements. The remaining payments were designated as income.

Noble's letter went on to state that all the locks and computer passwords were changed at NALC headquarters and officers told the staff that anyone who helped Noble make his case would be fired. He told the members that he had been suspended without pay with no reason given but stated:

....I was prepared to lose my job as the price I would have to pay for alerting the membership. What matters now is what happens to NALC, not what happens to my job. But those are hardly the actions that would be expected of people who have done nothing wrong and who have nothing to hide.

Noble further stated that he received a strong response to his first letter from the membership, making clear that "there are many people of conscience in the NALC who are unwilling to have the clean image of NALC sullied by officers whose desire for personal enrichment exceeds their sense of service to the membership." He told the members about the Letter Carrier Reform Movement which he founded with Hilsman and Jim Draper in order to establish an Education and Legal Defense Committee. Among the first reform activities of the Committee would be "spearheading an effort to open NALC's books for membership inspection and ferreting out corruption in NALC at all levels." Noble closed the letter by stating: "NALC needs your help in this effort. Please call or write and join us."

In its position statement to the Region dated October 21, 1993, the NALC contended that it placed Noble on suspension because: (1) it learned that Noble had distributed or was distributing "false and defamatory" allegations to the media (NY Newsday and Minnesota Star Tribune); (2) he had passed out confidential company records, i.e., copies of officers' personal expense vouchers, obtainable only by pilfering from the NALC files, and (3) Noble had "acknowledged political motivations for his action." In the eyes of the NALC, this constituted theft, and all these acts together warranted the NALC's placing Noble on suspension while the Vice President reviewed the case to determine Noble's employment status. The NALC maintained that Noble had not been permanently discharged.

Noble has been working as a city letter carrier in Washington, D.C. since his suspension. In March, 1994 Noble announced his candidacy for president of the NALC.

ACTION

We conclude that complaint should issue, absent settlement, alleging that NALC violated Section 8(a)(1) by indefinitely suspending Noble for his protected concerted intraunion activities and also Section 8(a)(3) for engaging in these union activities as a union member. [FOIA EXEMPTIONS 2 & 5

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In *Welfare and Pension Funds*, 251 NLRB 1241, n.2 (1980), the Board expressly agreed with the Administrative Law Judge's finding that an administrator of union welfare and pension funds was unlawfully discharged in retaliation for protected concerted intraunion activities that he engaged in as secretary-treasurer of the Union. These activities included: assisting a union member in filing a complaint with the Department of Labor (DOL) over election irregularities; providing a union member with information pertaining to union finances; advocating that the union actively press employers to abide by the terms of the agreement between the union and the employer association and to make the required payments into the funds for covered employees; and supporting certain claimants' efforts to obtain benefits from the funds. The Board held that such intraunion activity fell within the protection of Section 7 of the Act. Accordingly, the Board agreed with the Administrative Law Judge's conclusion that the employer violated Section 8(a)(1) of the Act by discharging the union official for engaging in such activity. However, unlike the Administrative Law Judge who found that the employer's conduct also violated Section 8(a)(3) because the discriminatee was engaged in union activities, the Board found it unnecessary to pass upon the Section 8(a)(3) issue because the remedy for that violation would be the same as for the independent Section 8(a)(1) violation.

In *Carpenters Local Union No. 35*,² relying on *Welfare and Pension Funds*, the Board found that two employees of a union were engaged in intraunion activity protected by Section 7 of the Act when, acting in their capacity as union members, and, with regard to one, acting as a trustee of the Union, they complained to DOL and/or the Marin County Credit Association of alleged irregularities in election procedures and alleged misuse of funds. In *Carpenters*, assistant union business representatives Martin and Prescott,³ examined the union's books and records for several months and uncovered what they believed to be

evidence of financial improprieties. Based on their investigation, they believed that the union's financial secretary (Wilson) was improperly arranging to have dues of retired members paid out of union funds, that checks were surreptitiously being written for that purpose, that an improper reimbursement had been made to an individual and that documents were forged on his behalf. Martin was also concerned about Wilson's handling of a \$1200 check which had been donated to the union. Martin spoke to Wilson and the president of the union as well as to the executive board and general membership about these issues. Over several months Martin, at times accompanied by Prescott and at other times by one or two other union members, made several trips to DOL and complained about irregularities in the election process and the mishandling of union funds. Martin also sought to obtain information from the Marin County Credit Association, in which the union had an account, in an effort to document his allegation of misuse of union funds by Wilson. Wilson successfully sought to have Martin and Prescott terminated.

In holding that the discharges violated Section 8(a)(1), the Board in *Carpenters* found that the discharges were clearly motivated, not by employee misconduct, but rather by the employees' protected intraunion activities.⁴ Thus, the Board rejected the ALJ's conclusion that Prescott's and Martin's conduct was unprotected as being similar to that of corporate employees attempting to effectuate changes in the management hierarchy.⁵

In the instant case, following *Carpenters and Welfare and Pension Funds*, we conclude that the Employer violated Section 8(a)(1) by indefinitely suspending Noble for engaging in the protected concerted intraunion activity of investigating whether officers of the NALC were engaged in financial improprieties by being paid amounts not authorized by the NALC constitution and disseminating this information.

We conclude that Noble's activities were concerted in that they were engaged in with, and on behalf of other employees and Union members.⁶ Three other NALC employees told Noble about the compensation and "in town entertainment" issues and asked him to investigate those issues. Noble then conferred with another NALC employee who furnished him with the software package which he used to access NALC files to obtain information concerning NALC's payments for the Washington, D.C. apartments of the President and Secretary/Treasurer. Noble shared this information with NALC member and USPS employee Hilsman, and both searched convention transcripts dating back to 1968 seeking to discover whether the NALC membership ever authorized these payments. After their investigation revealed no such authorization, Noble filed the internal union charges. Noble sent letters apprising NALC members employed by USPS of their officers' conduct and seeking support from them to require the Union leadership to abide by the Union constitution. Based upon these facts, we conclude that Noble's conduct was concerted.

Consequently, under the rationale of *Carpenters and Welfare and Pension Funds*, we conclude that Noble's activities were protected in that they were intraunion activities on behalf of, and in concert with, other union members who were represented by the NALC as a labor organization.

The Region should also argue that the Employer's indefinite suspension of Noble violated Section 8(a)(3) because it was based on his union activity of investigating and disseminating information as to conduct of officers of the union of which he was a member.⁷ Thus, Noble acted in his capacity as a member of NALC when he engaged in this conduct. We realize that the Board did not reach this Section 8(a)(3) issue in *Welfare and Pension Funds* even though the General Counsel had argued this theory, and that as in *Welfare and Pension Funds*, the remedy for the Section 8(a)(3) violation as to Noble would be the same as for the Section 8(a)(1) violation.⁸ However, the Region should also argue the Section 8(a)(3) theory of violation because this legal area is unusual and difficult due to the peculiar problems resulting from a union acting as an employer. Consequently, the Board should have before it both possible theories of violation.

Retail Clerks, supra,⁹ and *Ernest S. Cerelli*, supra,¹⁰ are distinguishable from the instant case. In this case, Noble, was not engaged in activities seeking to influence or change the NALC hierarchy at the time of his suspension.¹¹ Rather, he was seeking to have the NALC officers abide by the NALC constitution. We would further distinguish *Retail Clerks* and *Ernest S. Cerelli* in that, at the time of his suspension, NALC did not give as a reason his attempting to change management or his running for NALC office. NALC's contention to the Region after the charge was filed that it indefinitely suspended Noble because of his "political motivations" is merely a rationalization offered months after the suspension.

We further conclude that Noble's actions did not lose the protection of the Act under any of the defenses raised by the NALC.

First, the NALC claims that Noble distributed "false and defamatory" allegations to the media and passed out confidential company records obtainable only by pilfering from the NALC files. The Region found that even though Noble was not the custodian of the information, there is no evidence that the officers' expense vouchers were confidential. Moreover, although he had to use a computer program to retrieve the records, there is no evidence that the information which he was able to gather from the computer was considered confidential prior to his publicizing the information. Thus, there is no evidence that Noble was ever told that the information was confidential and not to be disseminated.¹²

Second, the NALC asserts that it was justified in suspending Noble because he made "false and defamatory allegations." The Board has held, however, that the Act protects statements which are false, misleading, or inaccurate, while it does not protect the dissemination of information that is "deliberately or maliciously false or made with reckless disregard for the truth".¹³ Affirmative evidence of malice is necessary in order for conduct to lose the Act's protection.¹⁴ Thus, the Board in *Phoenix Newspapers, Inc.*, held that an article in an internal union newsletter which indicated bias or contained hyperbole, was not so reckless or maliciously untrue as to lose the Act's protection.¹⁵

In the instant case, there is no evidence that Noble's charges, letters to Union members, or statements to the newspapers were either untrue or malicious. Rather, Noble stated his belief that the NALC constitution had been violated and supported that contention with evidence that the payments in question were not authorized by the NALC membership. Noble and Hilsman researched NALC convention records going back over twenty-five years to ascertain the accuracy of their charges. Certainly these statements cannot be said to be "deliberately or maliciously false or made with reckless disregard of the truth". Even though the NALC asserts that the payments were authorized, it does not challenge the truth of the statement that the membership had not authorized the payments. Thus, there is no merit to this defense by the NALC.

Finally, we conclude that Noble's charges, letters and statements did not constitute disparagement of the employer which would cause his activities to lose the protection of the Act. The Board and Supreme Court have held that where employees' concerted activities involved a "malicious attack on the products, services or reputation of their employer without reference to an ongoing labor dispute," their activity will lose the protection of Section 7 and provide the employer with just cause for their discharge.¹⁶ More recently, in *Allied Aviation Service Co. of New Jersey*,¹⁷ the Board held that communications of employees to third parties do not lose their protection as long as they are related to a legitimate ongoing labor dispute and do not constitute a "disparagement or vilification of the Employer's product or reputation." The Board also noted that "great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues." The Board held that the latter may be protected when related to an ongoing labor dispute, but the former is not.

In *Firehouse Restaurant*,¹⁸ the Board held that such disparagement may be a reason to deny reinstatement even where the original conduct or statement which precipitated the discharge was protected. In that case, the Board affirmed the Administrative Law Judge's decision finding that the employer violated Section 8(a)(3) and (1) by failing to return one waiter to his job when he returned from vacation, and discharging two other waiters who retained an attorney to enforce a contract provision requiring the employer to provide meals for the waiters. The Board however, also affirmed the ALJ's refusal to order reinstatement because the three waiters "engaged in egregious conduct toward their employer by disparaging the quality of the food served" in the restaurant and publicizing this information in the press.¹⁹ Following this rationale, the Division of Advice concluded in another case that a union did not have to reinstate an employee whom it had discharged for leading an organizing campaign among its employees, because the employee, after his discharge, in letters to various labor and civil rights officials, Senators, and Congressmen, accused the union president of racism and other misconduct.²⁰ The employer asserted that these letters were intended to unseat the union president through the internal union political process.

In *Firehouse and Carpenters*, the employees, after their discharge, disparaged the employer's product and reputation. This activity was unprotected and terminated their right to backpay and reinstatement. However, both of these cases are distinguishable from the instant case, because Noble's conduct was protected in that he did not disparage the Employer's product or reputation.²¹

While Noble questioned the propriety of several financial practices of the NALC's officers, he never attacked the product, services, or reputation of the NALC. His charges, letters and statements in fact emphasize the need for members to preserve the good reputation that the NALC has heretofore retained. While the officers of the NALC may feel that they have been disparaged, we conclude rather that this conduct merely raises a highly sensitive issue because it questions the officers'

financial integrity, without disparaging the union itself or its representation function. The intraunion charges and the letters and statements are couched in specific terms which explain the dispute without attacking the NALC or Sombrotto or other officers.²² These statements are neither a malicious attack on the products, services or reputation of the NALC without reference to a labor dispute, nor a villification of the NALC. In the instant case, Noble's statements in his letters and charges voiced bona fide complaints that related to the NALC constitution.

Further, although Noble provided information to the newspapers, we conclude that this was a reasonable way of getting the information out to the members, considering the size of the membership and the fact that the membership is nationwide. The publication of the charges did not disparage the employer and therefore are within the protection of Section 7.

[FOIA EXEMPTIONS 2 & 5

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CONCLUSION

In sum, we conclude that Noble was engaged in protected concerted activity and that the NALC violated Sections 8(a)(1) and (3) when it suspended him indefinitely. [FOIA EXEMPTIONS 2 & 5

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R.E.A.

[FOIA EXEMPTIONS 2 & 5] [FOIA EXEMPTIONS 2 & 5]

¹ The NALC, in its position statement, asserts that Noble told business agent Matthew Rose at the August 22nd meeting that Noble was organizing a rival slate to run against incumbent NALC officers.

Noble denies telling Rose or any NALC officers that he intended to run for union office.

² 264 NLRB 795, 797 (1982).

³ Martin also served as a trustee of the union's executive board.

⁴ The Board, at note 2, noted that the complaint did not allege a violation of Section 8(a)(3), and consequently found it unnecessary to determine whether the discharge violated Section 8(a)(3).

⁵ The ALJ relied on Butchers Union Local 115 (Ernest S. Cerelli), 209 NLRB 806 (1974). In Ernest S. Cerelli, the Board adopted the ALJ's decision that the employer, a labor union, did not violate Section 8(a)(3) and (1), by discharging an employee because the employer thought the employee was going to run for union office. The Board in Ernest S. Cerelli, at n.1, relied on Retail Clerks Union, Local 770 Retail Clerks International Association, 208 NLRB 356 (1974).

⁶ See Meyers Industries (Meyers II) 281 NLRB 882, 885 (1986).

⁷ See Penn Yan Express, Inc., 274 NLRB 449, 456-457 (1985). Concert is not a necessary element of Section 8(a)(3). Consequently, even if Noble had been acting alone, the Employer's conduct would have violated Section 8(a)(3).

8 This Section 8(a)(3) theory was not alleged in the complaint in Carpenters.

9 In Retail Clerks, the Board found that an employer which was a labor union was privileged to discharge employees who had been active in the election campaign of the president's opponent in an intraunion election, because the employees sought to "effect a change in the top management of their Employer Union."

10 In Ernest S. Cerelli, the Board applied Retail Clerks to find privileged the discharge of an employee because the employer, a labor union, thought the employee was going to run for union office. The employee in Cerelli was not engaging in any other activity that might be protected. Consequently, Cerelli is also distinguished on that basis.

11 Noble founded the Letter Carrier Reform Movement along with USPS employees Hilsman and Draper prior to his suspension. However, the purpose of that Movement was to establish an Education and Legal Defense Committee which would engage in several reform activities. Among the first of the reform activities was spearheading an effort to open NALC's books for membership inspection and ferreting out corruption in the NALC at all levels. The Letter Carrier Reform Movement did not support any slate of candidates for NALC office. Nor did Noble announce his intention to run for office in the NALC at the time that this reform movement was founded.

12 The instant case is distinguishable from one where an employee knowingly disseminates material that he knows is confidential and knowingly violates the employer's rule prohibiting dissemination of such material. See International Business Machines Corp. 265 NLRB 638 (1982). (where the Board held it was not unlawful for an employer to discharge an employee who knowingly disseminated confidential information in violation of company policy).

13 El San Juan Hotel 289 NLRB 1453, 1455 (1988). See also New York University Medical Center 261 NLRB 822, 824 (1982), and Great Lakes Steel 236 NLRB 1033, 1035-1037 (1978) enfd. 625 F.2d 131 (6th Cir. 1980).

14 Cincinnati Suburban Press, Inc., 289 NLRB 966, 967-968 (1988).

15 294 NLRB 47, 50 (1989).

16 Jefferson Standard Broadcasting, 346 US 464, 477 (1953).

17 248 NLRB 229, 230-231 (1980).

18 220 NLRB 818 (1975).

19 Id. at 825.

20 United Brotherhood of Carpenters, Case 5-CA-20172, Advice Memorandum dated May 24, 1989.

21 Also, Carpenters apparently involved unprotected Retail Clerks conduct of trying to unseat the union president. As discussed above, Noble was not engaged in Retail Clerk's type conduct at the time of his suspension.

22 Charge No. 1 states: Without authorization by the membership and in contravention of the Constitution, in concert with some or all of the NALC's Executive Council members, and with the acquiescence of the NALC's Trustees, Vincent R. Sombrotto knowingly accepted income above the constitutionally authorized amount by having NALC pay him up to \$500.00 per month under the guise of "in-town expenses." Charges 2 through 4 used this same language in referring to the payments for FICA and Medicare tax payments, double compensation for time spent at national conventions, and payment of Washington housing costs. Charge 5 states: Vincent R. Sombrotto violated his fiduciary duties to the membership by failing to disclose his participation in the violations described in Charges 1 through 4, above. Charges 6 and 7 also state that Sombrotto violated his fiduciary duties to the membership by failing to investigate breaches of fiduciary duties, and by failing to disclose and prevent Constitutional violations committed by the NALC Executive Council and Trustees.