

**International Brotherhood of Electrical Workers,
Local 429 and its agent Nashville Electrical Joint
Apprenticeship Training Committee and Danny
Page.** Case 26–CB–004240

August 3, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On June 30, 2006, the National Labor Relations Board issued a Decision and Order in this proceeding,¹ finding that Respondent International Brotherhood of Electrical Workers Local 429 (the Union) and its agent, Respondent Nashville Electrical Joint Apprenticeship Training Committee (JATC), violated Section 8(b)(1)(A) and (2) of the Act by: (1) attempting to rotate Charging Party Danny Page from his employment with Elec Tech Electrical Services (Elec Tech) to a different employer; and (2) disciplining Page by delaying for 6 months his scheduled pay increase and his completion of the JATC's apprenticeship program. Those unfair labor practice findings depended on the Board's preliminary finding that the JATC was a general agent of the Union because it was created by a collective-bargaining agreement between the Union and the Middle Tennessee Chapter of the National Electrical Contractors Association (the Employer Association) to administer the parties' joint apprenticeship program.

The Board filed a petition to enforce its Order with the United States Court of Appeals for the Sixth Circuit, and the Respondents cross-petitioned seeking review of that Order. The court found that, based on the record before it, it was "unable to discern the factual and legal basis for the Board's determination of agency."² Accordingly, the court remanded this proceeding to the Board with instructions to "articulate and apply recognized principles of agency law before it may assert jurisdiction over an entity it concludes acts as an agent of the union or employer."³

On May 15, 2008, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position. The General Counsel, the Union, and the JATC filed statements of position. Thereafter, the Board invited the parties to file supplemental position statements, and the General Counsel, the Union, and the JATC did so.

¹ 347 NLRB 513 (2006).

² *NLRB v. Electrical Workers Local 429*, 514 F.3d 646, 651 (6th Cir. 2008).

³ *Id.*

The Board has delegated its authority in this proceeding to a three-member panel.

Having reconsidered the entire record in light of the court's decision and the initial and supplemental statements of position, we reaffirm our earlier conclusions that the Respondents violated the Act by attempting to rotate Page to a different employer and by disciplining him. In reaffirming those conclusions, however, we no longer rely on the Board's original finding that the JATC was a general agent of the Union by virtue of the latter's collective-bargaining agreement with the Employer Association. Rather, we find agency based on the Union's and the JATC's actual conduct.

I.

The Union and the Employer Association created the JATC to oversee the training and hiring of apprentice electricians. The apprenticeship program is funded by an apprenticeship and training trust fund, to which all participating employers contributed. The Union and the Employer Association each appointed an equal number of JATC representatives, who had complete authority to administer the program and were responsible for matters pertaining to apprentices' qualifications, selection, employment, education, and training. The JATC's written apprenticeship and training standards required it to make decisions pertaining to its policies and rules in a consistent and nondiscriminatory manner.⁴

⁴ The Board found, in the original decision, that JATC representatives administered the JATC program "on behalf of the employers and the Union," and not as fiduciaries under the Employee Retirement Income Security Act. See 347 NLRB at 515. Further, the Board characterized the JATC as a "Federal tax-exempt educational organization," 347 NLRB at 518, rather than as an ERISA employee welfare benefit plan. The Board distinguished the JATC from an employer-union jointly administered trust fund, in which the trustees owe a fiduciary responsibility to the fund's beneficiaries under *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (employer appointed trustees of a trust fund could not be deemed collective-bargaining representatives of the employer for the purpose of Sec. 8(b)(1)(B) of the Act because that role is inconsistent with the trustees' fiduciary duty to the trust beneficiaries).

We note, however, that Sec. 3(1) of Title I of Employee Retirement Income Security Act (ERISA) defines an "employee welfare benefit plan" to include "any plan, fund, or program" including "apprenticeship or other training programs." 29 U.S.C. Sec. 1002 (1). To comport with Sec. 302(c)(6) of the Labor-Management Relations Act (LMRA), expenses of a joint apprenticeship committee, as here, must be drawn from a separate trust fund. The existence of that fund triggers ERISA coverage over a joint apprenticeship committee. See ERISA Advisory Op. No. 94–14A (April 20, 1994), discussed in *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 326 (1997). See also *Honolulu Joint Apprenticeship & Training Committee (HJA) v. Foster*, 332 F.3d 1234, 1237 (9th Cir. 2003) ("It is undisputed that HJA is a fiduciary, that [apprentice] Foster is a beneficiary, and that the apprenticeship program is a 'welfare benefit plan' under ERISA.").

The JATC employed a program training director, Elbert Carter. In addition to his JATC duties, Carter assisted the Union in collecting dues from apprentices. The Union sent Carter regular monthly updates about apprentices who were delinquent in their dues. Union Business Manager Jerry Lee testified that Carter's responsibility to inform apprentices about their dues arrearages was similar to the role played by Union Secretary John Hooper in informing full-fledged journeymen members about their dues delinquencies. Regarding the Union's efforts to collect dues arrearages from apprentices, Lee testified, "[W]e do it through Elbert Carter." Carter, in turn, testified that when the Union notified him about a dues delinquency, he contacted the apprentice and tried to convince the apprentice to pay his dues.

In 2001, Page was enrolled in the JATC apprenticeship program. He was also a member of the Union, although his antipathy toward the Union was widely known. Page became delinquent in his union dues, and, in about April 2001, Carter, in the presence of Business Manager Lee and Business Manager Jerry Grant, who, along with Secretary Hooper, served as union-appointed voting members of the JATC, confronted Page about that delinquency. With his father's assistance, Page subsequently paid his dues through November 2001. By July 2002, however, Page was again delinquent in his dues, by over 6 months. At that time, Page was working for his father's company, Elec Tech.

On July 10, 2002, Carter scheduled a special JATC meeting and proposed that Page be rotated to a different employer. JATC members Hooper and Grant, joined by Employer-appointed member Bert Noll, voted to rotate Page. Noll, who knew of Page's dues delinquency, remarked about the vote, "Hell, yes, it's about [dues]."

Page then informed the Union that he would no longer be a union member. The JATC ultimately rescinded Page's rotation but then disciplined him, allegedly for his conduct in opposing the rotation, by delaying for 6 months his promotion to the next salary level and his completion of the JATC training program.⁵

II.

As indicated, we have decided to reaffirm the Board's conclusions that the Respondents violated Section 8(b)(1)(A) and (2) by rotating and disciplining Page. Initially, we reaffirm the Board's findings, for the reasons given in its 2006 decision, that the JATC's decisions to rotate and discipline Page were motivated by his dues delinquency and his expressed antipathy toward the

⁵ Employer representative Noll was also on the JATC panel that voted to discipline Page.

Union. See 347 NLRB 513, 517–518.⁶ We also reaffirm the Board's finding that the JATC's actions are attributable to the Union. We do not adhere to the Board's original rationale: that the JATC was a general agent of the Union by virtue of the Union-Employer Association agreement and the JATC's administration of the apprenticeship program.⁷ Instead, as we explain below, our finding of agency is based on the record evidence establishing that the JATC's actions against Page were directed by union officials and agents, and that the union-appointed members of the JATC did not act as trustees, but rather acted in their capacities as union officials, to advance only union interests.

The Board and the courts have long held that the actions of a collectively bargained benefit or trust fund can be attributed directly to a union in at least three situations: (1) when provisions of a collective-bargaining agreement impinge on the trustees' duty to administer the funds solely for the benefit of the employees; (2) when the trustees' actions are in fact directed by union officials; or (3) when the trustees' acts are undertaken in their capacities as union officials rather than as trustees. See *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929, 931 (1984); see also *Griffith Corp. v. NLRB*, 660 F.2d 406, 410 (9th Cir. 1981), cert. denied 457 U.S. 1105 (1982). This case falls into the second and third categories. Here, the record establishes that union officials and agents directed the JATC's actions against Page and that the union-appointed JATC members acted in their capacities as union officials in taking those actions.

The JATC's actions against Page were instigated and carried out by JATC Director Carter, a special agent of the Union, and by union officials who served as JATC members.

Although JATC Director Carter was not a union official, the evidence establishes that he was acting as a special agent of the Union when he instigated the JATC's actions against Page. Section 2.01, comment d., of the Restatement (Third) of Agency (2006), explains that a "special agent" is one "who is authorized to conduct a single transaction" or "a series of transactions" specified by the principal. Here, the Union clearly empowered Carter to conduct a series of transactions pertaining to dues delinquencies. The Union's own representatives

⁶ Nothing in the Sixth Circuit's decision disturbed the Board's findings regarding the Respondents' unlawful motivation. In fact, the court expressly did not pass on those findings. See 514 F.3d at 650 fn. 2. No party has moved for reconsideration of those findings.

⁷ The Board had found that the Union and the Employer Association delegated to JATC the "complete authority" for selecting, training, assigning, and administering the joint apprenticeship program. (347 NLRB at 514–515.)

explained that Carter led the Union's efforts to collect delinquent dues from apprentices. As described, Union Business Manager and JATC member Lee testified, "we do it through Elbert Carter." Thus, Carter acted within the scope of his limited special authority when he confronted apprentices regarding their union dues. We therefore find that Carter was acting as a special agent of the Union when he scheduled a special meeting of the JATC and recommended that Page be rotated from Elec Tech to a different employer because of his dues delinquency.⁸ We reject the Respondents' suggestion that the Union had no control over Carter, at least in the circumstances of this case where he was acting at the Union's request and in its sole interests in the area of dues collection.

In addition, a finding of union liability is appropriate because the record establishes that, with respect to these actions taken against Page, the union-appointed members of the JATC were acting in their capacities as union officials, rather than as trustees of the JATC. Ordinarily, we proceed on the premise that a trustee is *not* acting for the appointing union (or employer) unless contrary evidence shows otherwise. See *Commercial Property Services*, 304 NLRB 134 (1991). In the present case, the evidence indeed shows otherwise. As described, the Board has already found that the union agents on the JATC voted to rotate and discipline Page only because of his union-dues delinquency and opposition to the Union; the assertedly legitimate reasons advanced for those actions have been rejected by the Board as pretexts. The Union's dues-collection and membership interests, however, were wholly irrelevant to the administration of the JATC and the training of apprentices.⁹ The inescapable conclusion, then, is that the union-appointed JATC members were acting in their capacities as union agents, advancing union interests only, when they voted to take action against Page.

This case is thus similar to *Service Employees Local 1-J (Shor Co.)*, supra, 273 NLRB 929. There, a fund administrator—who was also the union president—suspended an employee's health and welfare benefits,

⁸ As the Board found in the original proceeding, Carter recommended to the voting JATC members that Page be rotated. The Board found that Carter's stated reasons for the rotation were "implausible." 347 NLRB at 517. Thus, Carter was a crucial link in the chain of impermissible motivation and actions against Page.

⁹ As the court noted, this case arises in Tennessee, a right-to-work State, in which employees cannot lawfully be required to join a union (or pay dues) as a condition of employment. Thus, Page was not required to join the Union or to pay union dues in order to maintain his employment with a union contractor or to participate in the JATC. See 514 F.3d at 647.

allegedly for the legitimate reason of protecting fund assets. *Id.* at 934. The Board found that the stated reason was pretextual and that the actual reason was to retaliate against the filing of a decertification petition. The Board found that the fund administrator exercised his authority to suspend benefits to further the interests of the union. The same analysis applies with equal force here to the union-appointed JATC members who voted to rotate and discipline Page. Compare *Garland-Sherman Masonry*, 305 NLRB 511 (1991) (no agency relationship when trustee acted to protect the fund's interests and not for the interests of either the company or the union).

The Respondents counter that there is nothing in the collective-bargaining agreement or in the JATC's administration of the apprenticeship program demonstrating that the Union controlled the JATC, the votes of the union-appointed members, or those of the Employer Association-appointed members. These contentions miss the point. It may be that nothing in the Union-Employer Association collective-bargaining agreement or in the JATC's operations established any express or implied legal right of control by the Union over the JATC's actions toward apprentices generally. But, here, the evidence shows that the JATC *in fact* entertained and took actions against an apprentice based on the suggestion of Carter, who was acting as a special agent of the Union, and based on the votes of Grant and Hooper, who were also acting as agents of the Union in so voting, exclusively to serve the Union's dues-collection and membership interests—and not to further any legitimate JATC interests. In those circumstances, we conclude that the Union actually did exercise control over the JATC in this instance, notwithstanding the terms of the parties' contract. Having found that Carter, Lee, and Grant were all acting as union agents when they exercised their authority as committee employees or members to initiate and approve the cited actions, we further conclude that the JATC was acting as an agent of the Union when it took the retaliatory actions against Page based on his failure to pay dues to the Union.

Likewise, the Respondents' contention that the Union did not formally control the votes of its appointed members to the JATC is irrelevant. To be sure, the union-appointed members were trustees and agents of the JATC, with the authority and the responsibility to properly administer the apprenticeship training program. Despite those obligations, as in *Shor*, supra, we are simply finding that the union-appointed members, although ostensibly administering the apprenticeship program,

actually acted to pursue the Union's unlawful interests in rotating and disciplining Page.¹⁰

Finally, we recognize that the union-appointed members of the JATC did not have the capacity on their own to discipline or take other actions against apprentices. The union-appointed representatives had 50 percent of the JATC vote, and the Employer Association representatives had 50 percent. We are not persuaded, however, that this circumstance absolves the Union of liability here. Notably, Page would not have been rotated but for Hooper's and Grant's affirmative votes, which were necessary to create a majority. Noll's affirmative vote was also needed, but the evidence indicates that he, too, may not have been acting to further the apprenticeship program's legitimate interests. As described, and as the Board previously found, Noll later conceded that, at the meeting when the JATC voted to rotate Page, "Hell, yes, it's about [dues]." In its original decision, the Board found that Noll's statement supported a finding of unlawful motivation stemming from Page's dues delinquency. We agree with that finding whether Noll himself may have acted on the basis of Page's dues delinquency or may have merely acquiesced to the Union's interests in derogation of his duty to serve only the JATC's interests.¹¹ As a result, we find that Noll's formal status as an Employer-appointed JATC member does not preclude holding the Union responsible for the JATC's actions taken against Page.

III.

In sum, the record establishes that the JATC rotated and disciplined Page at the direction of union officials and agents, including union-appointed JATC members, all of whom were wearing their "union hats" in pursuit of union interests only. We therefore find that both the Union and the JATC are responsible for those actions, which violated Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that the Respondents engaged in activities violative of Section 8(b)(1)(A) and (2) of the Act, we shall order them to cease and desist and to take certain

¹⁰ In those circumstances their conduct bound both entities, because the union representatives were both union and JATC agents, acting within the scope of their authority to vote on JATC matters, such as the rotation and discipline of Page.

¹¹ *Longshoremen Local 27*, 205 NLRB 1141, 1147 (1973), enf. 514 F.2d 481 (9th Cir. 1975) (union violates Sec. 8(b)(1)(A) and (2) when employer member of joint committee acquiesces in impermissible action against employee that is sought by union). Alternatively, Noll may be viewed as a special limited agent of the Union regarding the JATC's actions toward Page. Member Hayes finds it unnecessary to consider this alternative.

affirmative action designed to effectuate the policies of the Act.

Because the Respondents' disciplining of Page by delaying his promotion to the next pay level was discriminatory and may have resulted in a loss of earnings, we shall order the Respondent Union to make Page whole for any loss of earnings he may have suffered as a result of the discrimination against him, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, because the Respondents' imposition of a 6-month delay in Page's completion of his training was also discriminatory, we shall order the Respondent JATC to restore Page to the status he would have held but for this unlawful discipline.

ORDER

The Respondents, International Brotherhood of Electrical Workers, Local 429 and its agent, Nashville Electrical Joint Apprenticeship Training Committee (JATC), Nashville, Tennessee, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Attempting to cause apprentices to be rotated from their current employers in retaliation for their union dues delinquency or antiunion views.

(b) Disciplining employees because of their union dues delinquency or antiunion views.

(c) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Daniel Page for any and all loss of earnings suffered by him as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Restore Page to the status he would have held but for his unlawful discipline.

(c) Within 14 days from the date of this Order, remove from their files any reference to the attempted rotation and/or disciplining of Daniel Page and, within 3 days thereafter, notify him that this has been done and that the unlawful action will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel rec-

ords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their Nashville, Tennessee locations copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by Respondent Union and Respondent JATC's authorized representatives, shall be posted by the Union and the JATC and maintained for 60 consecutive days in conspicuous places including all places where notices to apprentices and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their members and apprentices by such means.¹³ Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondents have taken to comply.

APPENDIX

NOTICE TO MEMBERS AND APPRENTICES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹³ We have provided for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT attempt to cause the rotation of apprentices from their current employers in retaliation for their union dues delinquency or their antiunion views.

WE WILL NOT discipline apprentices because of their union dues delinquency or their antiunion views.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights listed above.

WE WILL make Daniel Page whole, with interest, for any loss of earnings resulting from his unlawful discipline.

WE WILL restore Daniel Page to the status he would have held in the apprenticeship training program but for his unlawful discipline.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful attempt to rotate and our discipline of Daniel Page, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 429 AND ITS
AGENT NASHVILLE ELECTRICAL JOINT
APPRENTICESHIP TRAINING COMMITTEE