

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

DATE: August 15, 2016

TO: George P. Velastegui, Regional Director  
Region 32

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

SUBJECT: International Union of Operating Engineers, 506-2017-1700  
Local 3 (Construction Testing Services) 506-2017-2500  
Case 32-CB-167632 506-4033-9200  
506-6090-1300  
506-6090-5400

The Region submitted this case for advice as to whether Operating Engineers Local 3 (“the Union”) violated Section 8(b)(1)(A) of the Act based on two separate fines it imposed on the Charging Party for (b) (6), (b) dissident Union activity. We conclude that the Union violated Section 8(b)(1)(A) when it fined the Charging Party for challenging the Union’s bargaining strategy, but that it did not violate the Act when it fined the Charging Party for (b) (6), (b) derogatory comments toward a (b) (6), (b) (7)(C) (b) (6), (b) (7)(C)

**FACTS**

Since (b) (6), (b) (7)(C), the Charging Party has worked as a (b) (6), (b) (7)(C) primarily analyzing welds for various companies, including Construction Testing Services (“the Employer”), which is located in Pleasanton, California. The Employer has a collective-bargaining relationship with the Union, and the Charging Party became a Union member when (b) (6), (b) started working for the Employer. Over time, the Charging Party grew increasingly dissatisfied with (b) (6), (b) treatment by the Employer and the Union’s inability to correct it. The issues (b) (6), (b) was concerned about included the lack of compensation for travel time and the Employer’s failure to pay pension hours for travel time.

In late (b) (6), (b) (7)(C) or early (b) (6), (b) (7)(C) 2015,<sup>1</sup> the Charging Party became a shop steward. Around that time, the then-current master collective-bargaining agreement

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<sup>1</sup> All subsequent dates are in 2015 unless otherwise indicated.

between the Union and a multi-employer association, the Council of Engineers and Laboratory Employers, Inc. (“CELE”), of which the Employer is a member, was due to expire, and negotiations for a successor contract were scheduled.

On (b) (6), (b) (7)(C) the Charging Party sent an email to various Union members proposing a series of telephone conferences every Friday night to discuss the contract. The Charging Party organized the calls on (b) (6), (b) (7)(C) own, without the Union’s permission, and did not invite Union officials to participate. The Union contends that it would not have approved the calls because the Charging Party did not impose any controls on who could participate, and conceivably persons who were not in the bargaining unit could have listened in or spoken on the calls.

On (b) (6), (b) (7)(C) the Charging Party emailed fellow Union members regarding the proposed new contract. (b) (6), (b) (7)(C) noted several aspects of the proposal (b) (6), (b) (7)(C) found objectionable. (b) (6), (b) (7)(C) attached a draft alternative contract that (b) (6), (b) (7)(C) had prepared (b) (6), (b) (7)(C). The draft contract was a redline version of the soon-to-expire master agreement with changes proposed by the Charging Party. The Charging Party also informed members in the email that they had the power to seek a vote decertifying the Union. (b) (6), (b) (7)(C) attached a blank NLRB decertification petition form as an example.

On (b) (6), (b) (7)(C) the Charging Party was elected as an employee member of the Union’s negotiation committee. On (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) sent another email to the same group of recipients as (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) email, but not to the other employee members of the Union’s negotiation committee. In this (b) (6), (b) (7)(C) email, the Charging Party again stated (b) (6), (b) (7)(C) was preparing (b) (6), (b) (7)(C) own contract proposal for both the Union and the CELE to consider. (b) (6), (b) (7)(C) also urged (b) (6), (b) (7)(C) members to file “grievances” seeking the removal of a particular Union official from (b) (6), (b) (7)(C) position.

Between (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) the Charging Party attended 10 to 12 contract bargaining sessions. The Union’s Senior Business Representative states that the Charging Party raised certain issues throughout negotiations, but did not present the Union with (b) (6), (b) (7)(C) draft contract proposals. Other committee members testified that the Charging Party seemed disinterested in the negotiation process and would sometimes arrive late or leave early.

On June 25, the Union’s negotiating committee and the CELE reached a tentative agreement on a new collective-bargaining agreement. On June 27, the Union members voted against ratification of the tentative agreement. The parties reached a second tentative agreement on July 13, which was voted down on July 18.

On July 21, the Union and the CELE held a further negotiation session and reached a third tentative agreement. According to representatives from both the

Union and the CELE, the Charging Party verbally supported the tentative agreement at this negotiation session. The Charging Party denies this and claims (b) (6), (b) (7)(C) did not expressly state that (b) (6), (b) (7)(C) would support the tentative agreement.

On (b) (6), (b) (7)(C) the Charging Party sent an email to a group of Union members with the subject matter line “(b) (6), (b) (7)(C)” and recommended that they vote no on the third tentative agreement until the Union [and the CELE corrected pay issues, apparently referring to (b) (6), (b) (7)(C) concerns with the lack of pay and pension hours for travel time. Fellow members on the Union’s negotiating committee responded and criticized the Charging Party.

On (b) (6), (b) (7)(C), the day before a third scheduled ratification vote, the Charging Party sent an email to fellow negotiating committee members with the subject heading “(b) (6), (b) (7)(C)” and attached a version of (b) (6), (b) (7)(C) own draft collective-bargaining agreement. The Charging Party claims that (b) (6), (b) (7)(C) intent was to have a “backup plan” so that a strike could be avoided if the third tentative agreement was voted down the next day. However, other committee members concluded that the Charging Party hoped that the tentative agreement would be voted down, and had been secretly preparing (b) (6), (b) (7)(C) alternative version of a contract behind the Union’s back. They were concerned that this may force a strike if the third tentative agreement was voted down.

On July 25, the Union held a third ratification vote. At the voting location, the Union President read the new proposals to the membership. The Charging Party interrupted the Union President in front of the membership to note (b) (6), (b) (7)(C) disagreement with the proposed contract. Despite the Charging Party’s efforts, the members voted to ratify the tentative agreement.

Subsequently, the Charging Party sent emails complaining about alleged procedural irregularities in the July 25 ratification vote. On (b) (6), (b) (7)(C) a (b) (6), (b) (7)(C) (b) (6), (b) (7)(C), who had previously criticized the Charging Party because of (b) (6), (b) (7)(C) position during negotiations, emailed the Charging Party stating, “Its (sic) all history, Contract talks are over now maybe you had better get over it. You were there, You saw it, You heard it, You counted them. Enough of the Mindless bullshit its (sic) DONE.” The (b) (6), (b) (7)(C) said in another email to the Charging Party: “They say it’s best if you know who your enemies are before going to war. I think (b) (6), (b) (7)(C) had better look around.”

On (b) (6), (b) (7)(C) the Charging Party sent an email to the (b) (6), (b) (7)(C) with copies to a smaller group of employees, stating, among other things,

(b) (6), (b) (7)(C) stands to put over \$1,000 a day into the apprenticeship program if this contract stands. That equates to over \$1,000,000 during the life of this contract. With the high level of accountability and oversight at the union, that means you and (b) (6), (b) (7)(C) now have a very healthy slush fund to do whatever you want with. Your dog in this fight is not the members best interest, it's your best interest.

The (b) (6), (b) (7)(C) is the current (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). The Charging Party states that the new collective-bargaining agreement will increase the amount journeymen members are required to contribute to the Union's apprenticeship program. (b) (6), (b) (7)(C) concedes (b) (6), (b) (7)(C) has no evidence that the (b) (6), (b) (7)(C) or (b) (6), (b) (7)(C) were embezzling funds, although (b) (6), (b) (7)(C) states the Union denied (b) (6), (b) (7)(C) requests to review the program's records.

Also on July 28, a (b) (6), (b) (7)(C) and the (b) (6), (b) (7)(C) each filed separate internal Union member-to-member charges against the Charging Party. The (b) (6), (b) (7)(C) charge alleged that the Charging Party's conduct during negotiations had violated provisions of the International Union's constitution prohibiting members from engaging in subversive tactics or other conduct that would interfere with the Union performing its contractual and legal obligations.<sup>2</sup> Specifically, (b) (6), (b) (7)(C) noted that the Charging Party had pledged to support the third tentative agreement at the bargaining table, but secretly campaigned against the agreement. The (b) (6), (b) (7)(C) charge alleged that the Charging Party's (b) (6), (b) (7)(C) email, which accused (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) of using the monies from the Union's apprenticeship program as a "slush fund," was slander and defamation of a fellow member in violation of the Union's Bylaws.<sup>3</sup>

On November 5, the Union held a trial before the membership on the two internal charges. The Charging Party was found guilty of both charges. On December 1, (b) (6), (b) (7)(C) received two letters from the Union indicating that the membership had found (b) (6), (b) (7)(C) guilty of the charge. As a remedy for the (b) (6), (b) (7)(C) charge,

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<sup>2</sup> The (b) (6), (b) (7)(C) internal charge referred to Article XVI, Sections 1 and 4 of the International Union's constitution.

<sup>3</sup> The (b) (6), (b) (7)(C) internal charge referred to Art. III, Sections 1(i) and (v) of the Local Union's Bylaws.

the Union imposed a \$9,000 fine. As a remedy for the (b) (6), (b) (7)(C) charge, it imposed a \$1,000 fine.<sup>4</sup>

Union counsel has assured the Region that it will not utilize collection enforcement or litigation to collect the fines. Nevertheless, the Union has not disavowed the fines or advised the Charging Party that it will not seek to collect them.

### ACTION

We conclude that the Union violated Section 8(b)(1)(A) when it fined the Charging Party for engaging in internal Union dissident activity aimed at changing the Union's bargaining strategy. We further conclude that the Union did not violate the Act when it fined the Charging Party for (b) (6), (b) (7)(C) derogatory comments toward the (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C).

#### **A. The Applicable Legal Principles**

Section 7 of the Act “guarantees to employees the right to question the wisdom of their [bargaining] representative or to take steps to align their union with their position”<sup>5</sup> where they engage in such activity “for the purpose of collective bargaining or other mutual aid or protection.”<sup>6</sup> “[A] union violates Section 8(b)(1)(A) when it restrains or coerces employees in the exercise of that right.”<sup>7</sup>

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<sup>4</sup> The fine for the (b) (6), (b) (7)(C) charge initially totaled \$4,000, but the Union held \$3,000 in abeyance so long as the Charging Party did not violate the International Union's constitution in the following two years.

<sup>5</sup> *East Texas Motor Freight*, 262 NLRB 868, 871 (1982) (finding union violated Section 8(b)(1)(A) where it condoned shop steward's assaulting and preventing dissident member from attending monthly union meeting).

<sup>6</sup> *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1424 (2000) (quoting Section 7 and noting that the right of employees to concertedly oppose the policies of union officials must bear “some relation to the employees' interests as employees”); *see also Nu-Car Carriers, Inc.*, 88 NLRB 75, 76-77 (1950) (recognizing the Section 7 right of union members to protest union actions and attempt to persuade fellow union members), *enfd.* 189 F.2d 756 (3d Cir. 1951), *cert. denied* 342 U.S. 919 (1952).

On the other hand, the Board will not find a Section 8(b)(1)(A) violation where a union disciplines a member for “wholly intraunion conduct,” such as internal political disagreements, and the discipline does not affect either the member’s terms and conditions of employment or other policies imbedded in the Act.<sup>8</sup> That is because the Section 7 right of employees to challenge their bargaining representative is balanced against a union’s legitimate interest in maintaining its effectiveness as a bargaining representative by setting membership rules.<sup>9</sup> Thus, a union is “free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.”<sup>10</sup>

It is not always clear, however, whether discipline involves wholly intraunion affairs that are not within the scope of Section 8(b)(1)(A), or involves activities affecting the employment relationship that are within the section’s scope. In *Operating Engineers Local 400 (Hilde Construction Co.)*, the Board concluded that the union violated Section 8(b)(1)(A) when it fined members for holding a meeting, without union approval, to discuss contract negotiations and determine if members wanted to reconsider the recent strike authorization vote.<sup>11</sup> The Board found the

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<sup>7</sup> *East Texas Motor Freight*, 262 NLRB at 871; see also *Distillery Workers Local 186 (E & J Gallo Winery)*, 296 NLRB 519, 523 (1989) (recognizing union “members’ right to voice a dissenting view of union policy”).

<sup>8</sup> *Textile Processors Local 311 (Mission Uniform)*, 332 NLRB 1352, 1354 (2000) (union did not violate Section 8(b)(1)(A) when it expelled member following [REDACTED] wholly intraunion dissident activities); *Teamsters Local 170 (Leaseway Motor Car Transport Co.)*, 333 NLRB 1290, 1291 (2001) (union did not violate Section 8(b)(1)(A) when it disciplined member for improperly receiving strike benefits).

<sup>9</sup> See *Steelworkers Local 9292 (Allied Signal Tech. Servs. Corp.)*, 336 NLRB 52, 55 (2001) (noting that by including the proviso to Section 8(b)(1)(A), “Congress thus recognized that unions had legitimate interests in deciding how to regulate their internal affairs so as to forestall erosion of their status”).

<sup>10</sup> *Scofield v. NLRB*, 394 U.S. 423, 430 (1969); see also *NLRB v. Boeing Co.*, 412 U.S. 67, 71 (1973) (Section “8(b)(1)(A) was not intended to give the Board power to regulate internal union affairs, including the imposition of disciplinary fines, with their consequent court enforcement, against members who violate the unions’ constitutions and bylaws”).

employees were exercising their Section 7 right to question the union’s strategy as their collective-bargaining representative, which directly related to the process by which their employment terms would be settled.<sup>12</sup> Further, the Board concluded that union fines are an “inherently coercive” form of punishment.<sup>13</sup> Under such circumstances, “where a labor organization fines a member for questioning its wisdom and for attempting to redirect its policies, such conduct violates Section 8(b)(1)(A) of the Act.”<sup>14</sup>

Subsequently, in *Office Employees Local 251 (Sandia National Laboratories)*, the Board held that a union did not violate Section 8(b)(1)(A) when it suspended and expelled union officers who were unsuccessful in their attempt to impeach the union’s president for (b)(6), (b)(7) perceived questionable handling of the union’s finances.<sup>15</sup> The Board reasoned that the matter was a wholly internal union political conflict that did not affect collective bargaining or other mutual aid or protection. The Board stated it would not find a Section 8(b)(1)(A) violation for internal union discipline unless the discipline: “[1] impacts on the employment relationship, [2] impairs access to the Board’s processes, [3] pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or [4] otherwise impairs policies imbedded in the Act.”<sup>16</sup> The Board stated that the discipline imposed on the dissident union officers, including suspension or expulsion from membership, implicated none of these four categories because it did not affect either their employment relationship or policies imbedded in the Act.<sup>17</sup> The Board then distinguished *Hilde* by noting that there the union members were attempting to change the union’s bargaining strategy, which directly

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<sup>11</sup> 225 NLRB 596 (1976), enfd. mem. 561 F.2d 1021 (D.C. Cir. 1977).

<sup>12</sup> *Id.* at 601. See also *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1124 (2000) (interpreting *Hilde*).

<sup>13</sup> *Hilde*, 225 NLRB at 601.

<sup>14</sup> *Id.* Notwithstanding the coercive nature of union fines, it is clear that fines are not *per se* unlawful. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193 (1967) (finding union did not violate Section 8(b)(1)(A) by imposing “reasonable fines” on union members who crossed a picket line during a strike).

<sup>15</sup> 331 NLRB 1417 (2000).

<sup>16</sup> *Id.* at 1418-19.

<sup>17</sup> *Id.* at 1418.

related to their employment relationship because they were attempting to influence how their terms and conditions of employment were set.<sup>18</sup> By contrast, the union officers in *Sandia* had engaged in wholly intraunion political activity bearing little relation to their terms and conditions of employment or any other policies imbedded in the Act.<sup>19</sup> Thus, their conduct did not fall within the scope of activity regulated by Section 8(b)(1)(A).

In *Service Employees Local 254 (Brandeis University)*, the Board further refined its test for determining when internal union discipline violates Section 8(b)(1)(A). In that case, the Board considered the union's removal of a member from (b) (6), (b) shop steward and union committee positions after (b) (6), (b) attempted to reopen a grievance settlement that the union already had finalized.<sup>20</sup> The Board relied on *Sandia* and found that the discipline did not violate the Act. It clarified that even if the union discipline satisfied one or more of the four *Sandia* categories, the Board must further balance "the employees' Section 7 rights against the legitimacy of the union interest at stake in the particular case" to determine if the union had violated Section 8(b)(1)(A).<sup>21</sup> Turning to the facts in *Brandeis*, the Board assumed, without deciding, that the union discipline impaired the union member's relationship with (b) (6), (b) employer. It then concluded that the union's arguable restraint on (b) (6), (b) Section 7 right to, among other things, question the adequacy of the union's representation of the bargaining unit was "more than counterbalanced by the [u]nion's legitimate interest in speaking with one voice, through trusted representatives, in dealing with the [e]mployer about the bargaining unit employee's terms and conditions of employment."<sup>22</sup> The Board went on to again distinguish *Hilde*, holding that there "the employee members were not acting as the union's representative," but instead acting on their own behalf when they protested the union's collective bargaining

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<sup>18</sup> *Id.* at 1424. See also *Teamsters Local 610 (Browning-Ferris Industries)*, 264 NLRB 886, 887, 905 (1982) (finding union violated Section 8(b)(1)(A) by fining a member for asking picket captain, during an economic strike, to persuade coworkers to accept employer's last contract offer), cited with approval in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB at 1425, n.14.

<sup>19</sup> *Id.* at 1425.

<sup>20</sup> 332 NLRB 1118, 1122 (2000).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

strategy.<sup>23</sup> In contrast, the member in *Brandeis* was both a shop steward and union committee representative, and in those capacities spoke for the union. Thus, the Board held that the union was justified in removing [REDACTED] from [REDACTED] shop steward and union committee positions because such discipline, unlike that in *Hilde*, promoted its interest in maintaining the “undivided loyalty” of its representatives.<sup>24</sup>

Consistent with the preceding rationale, the Board in *Brandeis* further distinguished *Hilde* by noting that the union’s discipline in that case was not “narrowly tailored” to serve the union’s legitimate interest.<sup>25</sup> In contrast to the “inherently coercive” fines at issue in *Hilde*,<sup>26</sup> the union in *Brandeis* had tailored its discipline (removing the member from [REDACTED] union position) to remedy the harm to its status as a bargaining representative that the dissident member had caused (the union member would no longer be in a position to speak on behalf of the union). Thus, the discipline protected the union’s interest without unduly infringing on the Section 7 rights of the member, who remained free to pursue [REDACTED] goal of changing how the union represented the bargaining unit.<sup>27</sup>

Applying the above principles, we conclude that the Union’s fine of the Charging Party pursuant to the (b) (6), (b) (7)(C) [REDACTED] internal charge

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<sup>23</sup> *Id.* at 1124.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 225 NLRB at 600-02.

<sup>27</sup> *Brandeis*, 332 NLRB at 1124. While accepting *Hilde*’s holding, the *Brandeis* Board criticized its reasoning in dicta. The Board noted that *Hilde* was in “considerable tension” with its then-recent holding in *Sandia*. *Id.* Specifically, the Board stated that *Sandia* “casts doubt on *Hilde*’s assumption that Congress intended Section 8(b)(1)(A) to be the vehicle for resolving internal union disputes involving the formulation of a union’s negotiating strategy unless . . . those disputes involve either union violence or a union’s causing or attempting to cause the employer to alter the dissident employee’s job status.” *Id.* The Board went on to note its discomfort with “becoming the regulator of a wide variety of internal union political controversies that Congress anticipated would be resolved within the framework of the [Labor-Management Reporting and Disclosure Act (LMRDA)].” *Id.* Despite this criticism, the Board declined to overrule *Hilde*.

is controlled by *Hilde* and violated Section 8(b)(1)(A) because it did not concern wholly intraunion conduct and discipline. However, we conclude that the Union's fine pursuant to the (b) (6), (b) (7)(C) charge did concern wholly intraunion conduct and discipline that fell outside the scope of Section 8(b)(1)(A).

**B. The Union Violated Section 8(b)(1)(A) by Fining the Charging Party Pursuant to the (b) (6), (b) (7)(C) Internal Charge.**

Relying on *Hilde*, we conclude the Charging Party's conduct from late (b) (6), (b) (7)(C) to late (b) (6), (b) (7)(C), which was the cause of the (b) (6), (b) (7)(C) internal Union charge against (b) (6), (b) (7)(C), did not involve wholly intraunion matters, but rather involved protected concerted activity to alter the Union's collective bargaining strategy.<sup>28</sup> The Board's central holding in *Hilde*, i.e., that employees have a right to question their union's bargaining strategy and attempt to change that strategy by persuading other members to adopt their view, remains controlling. As with the dissident members in *Hilde*, the Charging Party attempted to persuade (b) (6), (b) (7)(C) fellow employees that the Union's bargaining strategy was not in their best interest, and that they should collectively reject the Union's proposed agreement. In so doing, the Charging Party exercised (b) (6), (b) (7)(C) Section 7 right to question (b) (6), (b) (7)(C) collective-bargaining representative and attempt to alter (b) (6), (b) (7)(C) terms and conditions of employment.<sup>29</sup>

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<sup>28</sup> 225 NLRB at 600-02. The Union attempts to distinguish *Hilde* on the basis that there the union president filed the internal charges, whereas here fellow members filed the internal charges against the Charging Party. We find this reasoning unpersuasive. In *Hilde*, the Board did not rely on the fact that the union president had filed the charge, but instead relied on how the union's discipline interfered with the dissident members' protected conduct and employment relationship. Further, while in the current case the internal charges were brought by other members, it was the Union that conducted the trial and ultimately imposed the fine against the Charging Party. It would defeat Section 8(b)(1)(A)'s purpose to allow a union to punish a member who engages in protected concerted activity so long as the initial internal union charge was filed by another member and not union leadership.

<sup>29</sup> *Teamsters Local 823 (Roadway Express, Inc.)*, 108 NLRB 874, 875 (1954) (recognizing employees' "privilege to question the wisdom of their [u]nion as their representative"), *enfd.* 227 F.2d 439 (10th Cir. 1955); *Teamsters Local 610 (Browning-Ferris Industries)*, 264 NLRB at 905 (holding union violated Section 8(b)(1)(A) when it disciplined member who attempted to persuade coworkers to accept employer's contract offer).

In light of the fact that the Charging Party engaged in protected concerted activity affecting the collective bargaining process, we next determine whether the Union's discipline falls into one of the four *Sandia* categories for finding that Section 8(b)(1)(A) applies. Because *Hilde* predates *Sandia*, it is not clear which of the four *Sandia* categories is implicated when a union disciplines members for questioning its bargaining strategy. We conclude that the Union's discipline here should be found to implicate both the first factor (impacting the employment relationship) and fourth factor (impairing other policies imbedded in the Act).

Regarding the first *Sandia* factor, the Union's discipline pursuant to the (b) (6), (b) (7)(C) charge impacted the Charging Party's employment relationship because it inhibited (b) (6), (b) ability to persuade fellow union members to share (b) (6), (b) priorities for the new contract and, in turn, to collectively change workplace conditions through collective bargaining. Alternatively, regarding the fourth *Sandia* factor, we conclude that the Union's discipline impaired a policy imbedded in the Act because the Union retaliated against a member for internal dissident activity aimed at challenging external Union strategy and policy.<sup>30</sup> As noted above, the Act has long protected the right of employees to challenge the position taken by their union where they do so for purposes of collective bargaining or other mutual aid or protection.<sup>31</sup>

Finally, having concluded that neither the Charging Party's conduct nor the Union's discipline was wholly internal, we balance "the employees' Section 7 rights against the legitimacy of the union interest at stake in the particular case."<sup>32</sup> We conclude that the Charging Party's Section 7 rights substantially outweigh the Union's interest in preventing the Charging Party's conduct.<sup>33</sup> The Charging Party

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<sup>30</sup> Cf. *Teamsters Local 992 (UPS Ground Freight, Inc.)*, 362 NLRB No. 64, slip op. at 1 n.1 (Apr. 6, 2015) (recognizing that Section 8(b)(1)(A) may prohibit union discipline, or threat thereof, even where it does not impact the employment relationship; union business agent unlawfully threatened member with internal union charges if he testified for the employer at an arbitration proceeding).

<sup>31</sup> See the cases cited at footnote 6, *supra*. See also *Roadway Express*, 108 NLRB at 877-78 (holding local union violated Section 8(b)(1)(A) when it threatened and had members discharged because they complained about the local's practices to the international union).

<sup>32</sup> *Service Employees Local 254 (Brandeis University)*, 332 NLRB at 1122; see also *Steelworkers Local 9292 (Allied Signal Tech. Servs. Corp.)*, 336 NLRB at 54.

exercised (b) (6), (b) right to question the Union’s bargaining strategy through purely member-to-member speech. (b) (6), (b) did not attempt to directly bargain with the CELE or otherwise usurp the Union’s role as exclusive bargaining representative.<sup>34</sup> There is no evidence that the Charging Party ever made CELE representatives aware of (b) (6), (b) internal dissident activities. Indeed, CELE representatives at the July 21 bargaining session state that the Charging Party verbally supported the third tentative agreement. Unlike cases where employees tried to appropriate their union’s bargaining authority<sup>35</sup> or diminish its bargaining power by refusing to join union-led strikes,<sup>36</sup> the Charging Party exercised (b) (6), (b) right to challenge Union bargaining strategy in a manner that did not interfere with the Union’s interest in exclusive representation.<sup>37</sup> In these circumstances, the Union’s interests must give way to the right of its members to influence its bargaining objectives.<sup>38</sup>

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<sup>33</sup> See *Steelworkers Local 9292 (Allied Signal Tech. Servs. Corp.)*, 336 NLRB at 54 & n.5 (discussing balancing analysis and noting member’s right to question bargaining representatives).

<sup>34</sup> See *Operating Engineers Local 400 (Hilde Construction Co.)*, 225 NLRB at 604 (rejecting the union’s defense that its internal discipline of dissident members was justified to protect its bargaining status because “[t]here is no evidence that any of the [c]harging [p]arties intended to use the [unofficial union] meeting as a vehicle for usurping the functions of [the union] or as a basis for dealing directly” with the employer); see also *Coca Cola Puerto Rico Bottlers*, 362 NLRB No. 125, slip op. at 3 (June 18, 2015) (finding union violated Section 8(b)(1)(A) where it disciplined members who protested employment practices but did not attempt to bargain directly with the employer or take positions inconsistent with the union), incorporating by reference 358 NLRB 1233, 1236-37, 1253-54 (2012).

<sup>35</sup> *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 70 (1975) (employees’ attempt to directly bargain with the employer without union approval was not protected by Section 7).

<sup>36</sup> *Allis-Chalmers Mfg. Co.*, 388 U.S. at 195 (union did not violate Section 8(b)(1)(A) when it fined members who crossed a picket line during an authorized strike).

<sup>37</sup> See *United Cable Television Corp.*, 299 NLRB 138, 143 (1990) (holding employee’s letters to fellow union members was protected, and distinguishing cases where employees attempted to circumvent union bargaining authority by bargaining directly with employer).

<sup>38</sup> Cf. *Teamsters Local 896 (Anheuser-Busch)*, 339 NLRB 769, 769-70 (2003) (in balancing the competing interests, the union’s interest in solidarity “must give way

Further, the fine that the Union imposed on the Charging Party for (b) (6), (b) internal dissident activities was not narrowly tailored to serve the Union's legitimate interest in preserving its status. Both *Hilde* and *Brandeis* establish that where a union's actions implicate Section 8(b)(1)(A), the union's discipline must be calculated to remedy the harm inflicted on it. The Board noted in both cases that union fines are viewed with suspicion because of their "inherently coercive" nature.<sup>39</sup> Here, the Union imposed a coercive monetary fine on the Charging Party despite alternative remedies at its disposal. For instance, the Union could have removed the Charging Party from the contract negotiation committee, removed (b) (6), (b) (7) from (b) (6), (b) steward position, and/or expelled (b) (6), (b) (7) from membership.<sup>40</sup> Those disciplinary options would have eliminated the Charging Party from any position of authority on contract matters and the threat (b) (6), (b) posed to undermining the Union's efficacy at the bargaining table.<sup>41</sup> Instead, the Union permitted the Charging Party to remain in a position of power within the Union, and fined (b) (6), (b) (7) after contract negotiations had concluded. That discipline did little to protect the Union's interest in maintaining its solidarity to preserve its bargaining status.<sup>42</sup>

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to the strong public policy favoring collective bargaining"; union violated Section 8(b)(1)(A) by threatening members with internal discipline if they adhered to a contract term requiring them to report their coworkers' unsafe practices).

<sup>39</sup> *Hilde*, 225 NLRB at 601; *Brandeis*, 332 NLRB at 1124.

<sup>40</sup> See *Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208, 209 (1969) (holding union may defend itself by expelling members who attempt to decertify the union, but may not punitively fine members who do so), *enfd.* 442 F.2d 92 (7th Cir. 1971).

<sup>41</sup> See *Shenango, Inc.*, 237 NLRB 1355, 1355 (1978) (finding no 8(b)(1)(A) violation where union removed member from union safety committee, noting "[t]he union is legitimately entitled to hostility or displeasure toward dissidence in such [union] positions where teamwork, loyalty, and cooperation are necessary to enable the union to administer the contract and carry out its side of the relationship with the employer").

<sup>42</sup> See *Blackhawk Tanning Co.*, 178 NLRB at 209 (finding that a union violated Section 8(b)(1)(A) by fining, rather than expelling, a member for filing a decertification petition because "the union is not one whit better able to defend itself against decertification as a result of the fine. The dissident member could still campaign against the union while remaining a member and therefore be privy to its strategy and tactics.").

Accordingly, we conclude the Union violated Section 8(b)(1)(A) when it fined the Charging Party for the (b) (6), (b) (7)(C) internal union charge.<sup>43</sup>

**C. The Union Did Not Violate Section 8(b)(1)(A) by Fining the Charging Party Pursuant to the (b) (6), (b) (7)(C) Internal Charge.**

Unlike with the (b) (6), (b) (7)(C) internal charge, the Charging Party's conduct that formed the basis of the (b) (6), (b) (7)(C) internal charge had little, if anything, to do with either (b) (6), (b) (7)(C) employment terms or the Union's bargaining strategy. The Charging Party did not protest the new contract's inclusion of the apprenticeship program in general, or the increased funding that the new contract provided the program. Instead, (b) (6), (b) (7)(C) attacked the (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) personally, stating they supported the new contract because the increased funding to the apprenticeship program would provide them with a "slush fund." Giving (b) (6), (b) (7)(C) the benefit of the doubt, the Charging Party's comments could be construed as protesting the level of funding for the apprenticeship program or how it was run. However, (b) (6), (b) (7)(C) comments were not phrased from that perspective, and (b) (6), (b) (7)(C) conceded that (b) (6), (b) (7)(C) had no real evidence of impropriety on the part of the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) or (b) (6), (b) (7)(C). It is also worth noting that the email responding to the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) was disseminated to only a few individuals—not the larger member list previously used by the Charging Party in challenging the Union's contract

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<sup>43</sup> We note that in *Coca Cola Puerto Rico Bottlers*, the Board found that the union violated Section 8(b)(1)(A) when it fined and expelled three shop stewards, which also affected their employment seniority. 362 NLRB No. 125, slip op. at 3. In the remedy section, the Board stated, "[c]ontrary to the judge, we do not order Respondent Union to reinstate [the discriminatees] to full membership and their shop steward positions *or to rescind the fines levied against them*. Those remedies are beyond the scope of Section 8(b)(1)(A)." *Id.* The Board cited no authority to support the proposition that the Act prohibited ordering rescission of unlawful union fines. Indeed, in *Hilde* the Board ordered the offending union to "[r]evoke and rescind the fines levied upon" the employees in that case. *Hilde*, 225 NLRB at 607; *see also Teamsters Local 610 (Browning-Ferris Industries)*, 264 NLRB at 905 (same). Without an affirmative rescission order, Section 8(b)(1)(A)'s prohibition against fines for protected activity would lack meaning—as a union could violate the law and continue to impose unlawful fines with impunity. Accordingly, because the Board did not provide any reasoning for its statement in *Coca Cola*, or indicate that it was overruling prior cases that found such a rescission remedy appropriate, the Region should seek rescission of the fine levied against the Charging Party.

proposals. Thus, it is unlikely that the Charging Party's message was intended to influence Union bargaining given its speculative nature and limited audience. Most important, the message was also sent after the membership had voted to ratify the new contract, further limiting any effect on collective bargaining. The Charging Party's statements therefore had little to do with bargaining, and instead involved a wholly intraunion personal disagreement between members not protected by Section 7.<sup>44</sup>

Even assuming the Charging Party engaged in Section 7 activity by criticizing the (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), and even further assuming that the Union's discipline impacted the Charging Party's employment relationship by inhibiting (b) (6), (b) (7)(C) ability to question the Union's bargaining strategy, we conclude that the Union's interest in enforcing internal rules against harassment to promote solidarity outweigh any right the Charging Party may have had in expressing (b) (6), (b) (7)(C) beliefs. The Charging Party concedes that (b) (6), (b) (7)(C) had no evidence that the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) or (b) (6), (b) (7)(C) used the funds from the apprenticeship program improperly. (b) (6), (b) (7)(C) before had little, if any, interest under Section 7 in making those statements, whereas the Union had a significant interest in protecting its members against unfounded allegations.<sup>45</sup>

Accordingly, the Region should issue complaint, absent settlement, based on the analysis set forth above.

/s/  
B.J.K.

H://ADV.32-CB-167632.Response.OperatingEngineersLocal3. (b) (6), (b) (7)(C)

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<sup>44</sup> See *Painters Local 466 (Skidmore College)*, 332 NLRB 445, 446 (2000) (no 8(b)(1)(A) violation when union imposed internal union fines on and expelled two dissident members for, among other things, slander because the dispute involved wholly intraunion matters and the discipline did not affect their employment relationship or impair policies imbedded in the Act).

<sup>45</sup> We note, as the Board has on several occasions, that the LMRDA provides for a separate forum to resolve purely intraunion disputes. Accordingly, although we conclude the Act does not provide a remedy in these circumstances, the Charging Party may have another forum for recourse. See, e.g., *Steelworkers Local 9292 (Allied Signal Tech. Servs. Corp.)*, 336 NLRB at 55, n.9.