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

Advice Memorandum

DATE: April 3, 2017

TO: Leonard J. Perez, Regional Director
Region 14

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

SUBJECT: Teamsters Local 610 (Schnuck Markets, Inc.)
Case 14-CB-182139

506-6090-1300
506-6090-1400
536-2530
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712-5042-6767-5000
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This case was submitted for advice as to whether Teamsters Local 610 ("the Union"), through its (b)(6), (b)(7)(C) violated Section 8(b)(1)(A) when it created a "secret" Facebook group in response to the Charging Party's protected concerted activity, made disparaging remarks about the Charging Party in the group's discussion forum, and denied the Charging Party and others access to the group. The case was also submitted for advice as to an appropriate remedy for the Union's alleged unlawful conduct. We conclude that the Union violated the Act because the Facebook group had a tendency to restrain and coerce the Charging Party and others in the exercise of protected Section 7 activities by excluding, ostracizing, and humiliating them. We conclude that the Union should be required to remove from the Facebook page all posts mentioning the Charging Party or the group's intentions to exclude anyone affiliated with the Charging Party and/or because of their Section 7 activity, make the Facebook group available to all Union members who wish to join, and post an electronic notice to the group as a "pinned post" so that it will remain prominently placed for all group members to see during the notice posting period.

FACTS

The Charging Party has been employed as a driver by Schnuck Markets, Inc. ("the Employer") since approximately (b)(6), (b)(7)(C). (b)(6), (b) is a member of the Union, which represents approximately 120 unit employees. Prior to the start of the Charging Party's employment, the Employer and Union established a two-tier wage and benefits system for the drivers. At the time the tier system was conceived, the parties decided that all then-current drivers would be considered "Tier I" and any subsequently hired drivers would be "Tier II." The Tier II drivers have separate

health, welfare, and pension plans, and their maximum pay is approximately $5 an hour less pay than the Tier I drivers. At the Employer's facility where the Charging Party worked, there are approximately sixty Tier I drivers and forty-four Tier II drivers. The Union's (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) are all Tier I drivers. The Charging Party is a Tier II driver.

In February 2016[1] the Union and Employer were in the midst of contract renewal negotiations. Although the two-tier wage system was a top priority for the Union and its membership, the Union's bargaining committee was comprised of only Tier I employees. In late February, the Charging Party approached the (b)(6), (b)(7)(C) with concerns about the fact that there were no Tier II employees on the Union's bargaining committee, that (b)(6), (b) was concerned about the Union's bargaining proposals regarding the tier wage system, and that (b)(6), (b) started a petition to have (b)(6), (b)(7)(C) appointed to the bargaining committee to provide representation for Tier II employees. The (b)(6), (b)(7)(C) responded by telling the Charging Party that if any driver attempted to bring up alternate contract demands for the current negotiations, that driver would be brought up on internal Union charges. The Union's (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) while not making the same specific threats of internal charges, agreed that the Charging Party should cease (b)(6), (b) attempts to provide tier wage proposal alternatives or have (b)(6), (b)(7)(C) placed on the bargaining committee.

The Union's (b)(6), (b)(7)(C) is an elected position who typically runs for election on the same slate as the Union's (b)(6), (b)(7)(C). The current (b)(6), (b)(7)(C) has been in that position for approximately (b)(6), (b)(7)(C) years. Around the end of February, the (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) created, and were administrators of, a "secret" Facebook group page called the "Wolf Pack."[2] The (b)(6), (b)(7)(C) testified that the group was created in response to the Charging Party's protestations about the bargaining committee's lack of Tier II employee representation and the Union's proposals concerning the existing tier wage system. The (b)(6), (b)(7)(C) believed the Charging Party was creating division among unit members and created the Wolf Pack

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[1] All dates hereinafter are in 2016 unless otherwise stated.

[2] Group pages on Facebook have three levels of privacy settings that may be set and changed by the group's administrators: (1) "public," which can be seen by anyone on Facebook who searches the group's name and to which anyone may join or be added by a member of the group; (2) "closed," which can be found by anyone on Facebook who searches the group's name, but to which individuals may not join without a page administrator's approval or invite by a current member; and (3) "secret," which is visible only to members and former members of the group, does not show up on any non-member's search of Facebook, and to which membership is by invite only. *See "What are the privacy settings for groups?"*, https://www.facebook.com/help/220336891328465 (last visited Mar. 24, 2017).

group to foster unity among the membership. However, of the 120 unit employees, only about thirty-seven are members of the Wolf Pack group. The Charging Party has been excluded from the group since its inception and employees sympathetic to (b)(6), (b) views were either excluded from the start or subsequently removed.[3] Indeed, a Wolf Pack post by the (b)(6), (b)(7)(C) warned group members to be careful about who they let into the group, noting that a member was removed from the group because (b)(6), (b) was seen having lunch with the Charging Party. The (b)(6), (b)(7)(C) followed up (b)(6), (b)(7) post by encouraging members to inform (b)(6), (b)(7) of others who should be removed from the group because of their association with the Charging Party. On another occasion, the (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) posted that (b)(6), ("REMOVED SEVERAL PEOPLE WHO SEEM TO LISTEN TO [the Charging Party's] BULLSHIT," (emphasis in original). Other group members refer to individuals sympathetic to the Charging Party as "rats" who should be hung up "by their cahones [*sic*]."

Many of the posts on the Wolf Pack Facebook group are directed at the Charging Party. Indeed, at one point the group's primary photo was of a wolf with the words, "We're Watching You [Charging Party]!!!" The (b)(6), (b)(7)(C) authored several posts referencing the Charging Party, such as, "Wolf Pack . . . just thinking, I might have to run this contract by [the Charging Party] first . . . just saying . . . LMFAO,[4]" "[the Charging Party] started something, maybe (b)(6), (wishes now (b)(6), (would not have, but I am thankful. We will stay united in spite of (b)(6), (b)(7)," and "[the Charging Party] is a special kind of stupid." Other members posted obscene and violent messages to the group about the Charging Party. In addition to derogatory comments about the Charging Party, members of the group also posted about the Employer, contract negotiations, terms and conditions of employment, and non-work related social events.

Although the Union's (b)(6), (b)(7)(C) is aware of the Wolf Pack Facebook group, (b)(6), (b) claims (b)(6), (has nothing to do with it nor does (b)(6), (b) want anything to do with it. Nevertheless, soon after the Wolf Pack Facebook group was created, the Union began selling "Wolf Pack" t-shirts that display a picture of a wolf and say, "610 Wolf Pack[,] Run With the Pack," or "Sleep Well Tonight My Wolves." The shirts also display the Union's emblem.

The Charging Party was ultimately terminated for an incident not directly related to the Facebook group, and which is the subject of additional unfair labor

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[3] Despite the Charging Party's exclusion from the group, a co-worker informed (b)(6), (b)(7) of the group's existence and provided the Charging Party with several screen captures of various posts about (b)(6), (b)(7) by the chief steward and other group members.

[4] "LMFAO" in online chat parlance is an initialism for "laughing my fucking ass off."

practice allegations against the Union and Employer that were not submitted for advice.

ACTION

We conclude that the Union violated Section 8(b)(1)(A) of the Act because the Union's "secret" Wolf Pack Facebook group restrained and coerced the Charging Party and others in retaliation for their protected Section 7 activities by excluding, ostracizing, and humiliating them. Because the unlawful conduct centers around the Facebook group, the appropriate remedy is to require the Union to remove all posts mentioning the Charging Party or the group's intentions to exclude anyone affiliated with the Charging Party, make group membership available to all unit employees who wish to have access, and post an electronic notice to the group as a "pinned post" so that it will be prominently visible to all group members for the duration of the notice posting period.

A. The Facebook Group

It is well settled that employees have a Section 7 right to question the wisdom of their bargaining representative.[5] A union's conduct unlawfully restrains and coerces employees where there is a clear nexus between the Union's conduct and an employee's exercise of that Section 7 right.[6] For example, in *Laborers Local 806*, the ALJ, as affirmed by the Board, found that the union agent violated Section 8(b)(1)(A) when he purposefully "bumped" into a union member who opposed the union's policies, as the member stood waiting at the union's facility.[7] There, the ALJ found a clear nexus between the union agent's act of physically "bumping" into the union member and the agent's intent to coerce the dissident employee in exercising his Section 7 rights; specifically, the ALJ explained that although the union agent's conduct appeared trivial or of slight significance, the bumping was a deliberate and

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[5] *See Operating Engineers Local 400*, 225 NLRB 596, 601 (1976) (charging parties had Section 7 right to question union's conduct as bargaining representative and union violated 8(b)(1)(A) by restraining and coercing charging parties in exercise of that right), *affd.*, 561 F.2d 1021 (D.C. Cir. 1977).

[6] *See Boilermakers, Local 686*, 267 NLRB 1056, 1057 (1983) (union violated 8(b)(1)(A) where "unmistakable nexus" between union president's threats of physical confrontation and ongoing dispute with charging party's protected concerted activities against union).

[7] 295 NLRB 941, 959-60 (1989), *enforced mem.*, 974 F.2d 1343 (9th Cir. 1992).

otherwise unprovoked act against a dissident employee in retaliation for his Section 7 activity.[8]

Here, the Union violated Section 8(b)(1)(A) by creating and using the Wolf Pack Facebook group to restrain and coerce the Charging Party and others. There is no doubt that the Charging Party was engaged in protected Section 7 activity when (b)(6), (sought to influence the Union's position and tactics in negotiations concerning the tiered wage system; indeed the tiered system was one of the top issues for the Union and Employer. The Charging Party, as a Tier II employee, questioned the Union's Tier II-related proposals and created a petition to have (b)(6), (b)(7)(C) placed on the Union's bargaining committee as it was comprised of only Tier I employees.

Additionally, there is a clear nexus between the creation of the Wolf Pack group and the Charging Party's Section 7 conduct. The chief steward[9] admits that the group's genesis was in direct response to the Charging Party's disagreement with the Union's bargaining positions regarding the tier wage system and (b)(6), (b)(7 attempt to seek a place as a Tier II employee on the bargaining committee. While the creation, maintenance, and posts to the group may seem trivial and immature, as did the physical "bumping" in *Laborers Local 806*, the Wolf Pack group and its contents were

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[8] *Id.*

[9] We note that the (b)(6), (b)(7)(C) is an agent of the Union as an (b)(6), (b)(7)(C). *See Mine Workers Local 1058 (Beth Energy)*, 299 NLRB 389, 389–90 (1990) (elected union officials not agents per se, but fact that position is elected is persuasive and substantial evidence of agency that is decisive in absence of compelling contrary evidence), *enforcement denied*, 957 F.2d 149 (4th Cir. 1992). There is no contrary evidence suggesting that the (b)(6), (b)(7)(C) is not an agent of the Union. In addition, (b)(6), (would be perceived as a person of authority within the Union, since (b)(6), (b) typically appears on the same (b)(6), (b)(7)(C) *See Electrical Workers Local 45*, 345 NLRB 7, 7 (2005) (union steward was agent of union where union "cloaked" steward with sufficient authority to create perception among rank and file employees that steward acted on union's behalf). In any event, even if the (b)(6), (b)(7)(C (b)(6), (b)(7)(C) were not a Union agent by virtue of (b)(6), (b)(7)(C), the Union conferred apparent authority on (b)(6), (b)(7) and the Wolf Pack Facebook group because it sold "Wolf Pack" t-shirts that contain the Union's emblem. *See Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988) (although no specific evidence union responsible for unauthorized picketing, picketers had apparent authority to act on behalf of union because they used pre-printed picket signs containing union's emblem and union took no steps to effectively disassociate itself from picketing).

nonetheless deliberate and otherwise unprovoked acts made in direct response to the Charging Party's protected activity.[10]

The Union further violated Section 8(b)(1)(A) by denying the Charging Party, and those perceived to be sympathetic to (b)(6), (b)(7), access to the Wolf Pack group because of the Charging Party's Section 7 activity.[11] In *Ryan-Walsh*, the ALJ, as affirmed by the Board, found that the Union violated Section 8(b)(1)(A) when it created a new rule that all bulletin board posts must first be approved by the union, in response to the charging party's Section 7 activity, and then denied the charging party access to the bulletin board when he wished to post items critical of the union.[12] The ALJ stated that it was "clear" that the union sought to silence the charging party's efforts to promote free discussion of a controversial wage concession issue and that the union's action in denying access to the charging party was an unlawful restriction on his Section 7 rights.[13]

Similarly here, the Union discriminatorily and unlawfully denied the Charging Party and others access to the Facebook group based solely on their disagreement with the Union's position in negotiations on the tier wage system. Indeed, at least one employee whose sympathies were unknown was removed from the group because of the Union's perception that (b)(6), (b) agreed with the Charging Party simply because (b)(6), (was seen eating lunch with (b)(6), (b)(7)(C) The Union's denial of access thus belies the (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) suggestion that the group was created to foster "unity" among the membership. Moreover, the coercive nature of the Union's conduct here is stronger than the union's bulletin board violation in *Ryan-Walsh* because the Wolf Pack group did not exist previously and was created in direct retaliation for the Charging Party's protected activity.[14]

Finally, the Union used the Wolf Pack group to disparage and ostracize the Charging Party in retaliation for (b)(6), (b)(7 Section 7 activities, which the Board has stated

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[10] *See Laborers Local 806*, 295 NLRB at 960.

[11] *See Longshoremen ILA Local 20 (Ryan-Walsh Stevedoring Co.)*, 323 NLRB 1115 (1997).

[12] *Id.* at 1122–23.

[13] *Id.*

[14] *See id.* at 1122 (union restricted and removed bulletin board posts by charging party in response to his Section 7 activities where bulletin board was previously open to all).

unlawfully restrains and coerces employees.[15] In *Kalamazoo Typographical Union*, the union violated Section 8(b)(1)(A) when it instructed its members to shun and ostracize the charging party in retaliation for her Section 7 activity; indeed, employees who initially ignored the union's dictate and continued to talk to the charging party were then pressured by the union and coworkers to cease speaking with her or face ostracization themselves.[16] Similarly, here, although the Charging Party has been excluded from the group since its inception, (b)(6), (b) is aware of the group's existence, many of the disparaging and obscene comments centered on (b)(6), (b)(7)(C and that the (b)(6), (b)(7)(C) instructed group members to alert (b)(6), (b)(7)(C of other members who appeared sympathetic to the Charging Party so they could be removed from the group. The Union's actions send a clear message to unit employees: if you disagree with the Union's bargaining positions then you will be excluded, humiliated, and ostracized.

Accordingly, for the foregoing reasons, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) by creating its Wolf Pack Facebook group to retaliate against the Charging Party, denying the Charging Party and others access to the group, and authoring disparaging posts about the Charging Party meant to restrain and coerce (b)(6), (b)(7 from engaging in his Section 7 right to question the Union's bargaining positions.

B. <u>Remedies</u>

We conclude that it is not appropriate or necessary to require the Union to remove its entire Wolf Pack Facebook page. Although the Union's Wolf Pack group was created for an unlawful purpose, not all of the group's posts have the tendency to restrain and coerce the Charging Party and others. Moreover, requiring the Union to remove the Facebook group would unnecessarily implicate First Amendment concerns. In *Amalgamated Transit Local 14333 (Veolia Transportation Services)*[17] the ALJ, as affirmed by the Board, rejected the General Counsel's theory that the union should be required to disavow opinions made by members of the union's

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[15] *See Kalamazoo Typographical Union*, 193 NLRB 1065, 1065, (1971) (union violated Section 8(b)(1)(A) by instructing and causing its members to ostracize charging party for her non-union status). *See also Auto Workers Local 235 (General Motors Corp.)*, 313 NLRB 36, 41 (1993) (violation found where union publically humiliated charging party at membership meeting in retaliation for exercising Section 7 rights).

[16] *Kalamazoo*, 193 NLRB at 1072–73.

[17] 360 NLRB 261 (2014), *review denied sub nom.*, *Weigand v. NLRB*, 783 F.3d 889 (D.C. Cir. 2015).

Facebook group because doing so would impose a substantial burden on free speech.[18] Here, especially where only certain posts are alleged to be unlawful, requiring the wholesale removal of the Facebook group would invoke even more burdensome and similarly inappropriate speech limitations. Indeed, the Union could use the group, once it becomes open to all members, as a valuable forum for free discussion. Accordingly, it would be inappropriate and unnecessary to require the Union to remove the Facebook page. Rather, we conclude that the appropriate remedy here is to require the Union to remove the unlawful posts.

We would also require the Union to post an electronic notice on the Wolf Pack Facebook group itself as a "pinned post." "Pinned posts" are posts to Facebook group pages that remain at the "top" of the group's page and ahead of all posts, including new posts; they remain at the "top" of the page until removed or "unpinned."[19] The Region should urge that the Union be required to post the electronic notice on its Facebook page as a "pinned post" for the entire posting period.

Finally, in order to remedy its unlawful denial of access to the group, the Union should be required to open access to the Wolf Pack Facebook group to all unit employees either by "inviting" them to the secret Facebook group or by changing the privacy settings on the group from "secret" to "closed," which would allow any interested unit employees to request and be granted access to the group.[20]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) and seek the remedies described above.

/s/
B.J.K.

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[18] *Id.* at 265.

[19] *See "How do I pin a post to the top of a group I'm admin of?"*, https://www.facebook.com/help/399494523452700 (last visited Mar. 24, 2017).

[20] *See Ryan-Walsh*, 323 NLRB at 1117 (ordering union to make bulletin board available to all unit members without advance approval).