

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

Advice Memorandum

DATE: July 22, 2016

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: International Longshore and Warehouse Union 536-2545-1200
Case 19-CB-169296 536-2581-3314
536-2581-3360

This case was submitted for advice as to whether the International Longshore and Warehouse Union, (“the Union” or “the ILWU”) violated 8(b)(1)(A) and (2) of the Act by unlawfully refusing to reinstate in its hiring hall a longshoreman who had been permanently deregistered because of a “technically failed” drug test, i.e., an inability to produce a urine sample under DOT procedures for a “shy bladder.” The request for reinstatement came from the multi-employer association that uses the hiring hall, as the result of the settlement of a wrongful discharge suit filed by the longshoreman against the association, alleging, inter alia, that it had failed to accommodate the longshoreman’s disability during the testing. We conclude that the Union violated Section 8(b)(1)(A) and (2) by refusing to grant the longshoreman another opportunity to take the drug test and thereby preventing his reinstatement in the hiring hall and future employment in the industry, where its refusal was not necessary to the effective performance of its representative function or to the efficient and orderly operation of its dispatch hall.

FACTS

Background

The Pacific Maritime Association (“PMA”) is a multi-employer association representing shipping companies and terminal operators in ports across the West Coast. The PMA and the ILWU are parties to a collective-bargaining agreement called the Pacific Coast Longshore Contract Document (“PCLCD”). The PCLCD is administered at various West Coast ports including Seattle, Washington, by a Joint Port Labor Relations Committee (“JPLRC”), on which local employers and the ILWU have equal representation. Grievances denied by a JPLRC can be appealed to the Joint Coast Labor Relations Committee (“CLRC”) in San Francisco. Again, employers and the ILWU have equal representation on this Committee, and either party may request arbitration before a neutral if no consensus is reached.

The discriminatee became an ID casual longshoreman with IWLU Local 19 in 2007. In July 2007, the discriminatee tested positive in a random drug test and had his dispatch privileges suspended. Because he was a trainee at the time, the discriminatee was able to retest 30 days later. Upon retesting, he passed and was reinstated as an ID casual. He remained an ID casual until he was deregistered in 2010.

On August 7, 2010, the discriminatee and 44 other ID casuals submitted to a physical and drug test in preparation for elevation to B level status in Local 19's exclusive hiring hall. PMA supervised the drug testing and physicals, which were administered by a third-party provider, US Health Works. Prior to the testing, the discriminatee was informed that he must urinate in front of a lab clinician.

Initially, the discriminatee produced one urine sample when the clinician was not in the room, and because the clinician had not observed the discriminatee that sample was discarded. The discriminatee then attempted to provide a second sample; the second sample was also discarded because the clinician was unable to adequately observe the discriminatee providing the specimen. The discriminatee then stated he was unable to urinate. Consequently, the clinician subjected the discriminatee to the Department of Transportation ("DOT") "shy bladder" protocol, whereby he was given 40 ounces of liquid over three hours. After three hours, the discriminatee was still unable to provide a urine sample. The clinician labeled the discriminatee's attempts at producing urine a technical "refusal" in accordance with the DOT protocol.

Later that evening, the discriminatee called a nurse at his doctor's office and complained that he was having trouble urinating. The nurse recommended that the discriminatee take a hot shower and then stand over the toilet, attempt to relax and urinate; she told him that if that didn't work, then he should go to the emergency room. At 11:30 p.m. that evening, for the first time since 8:00 a.m., the discriminatee was able to urinate. On August 9, the discriminatee saw his doctor, who diagnosed him with urinary hesitancy due to an acute anxiety attack when forced to urinate before a male observer.¹ The doctor prescribed anxiety medication and suggested the discriminatee retake the test after taking the medication or without a male observer. The discriminatee gave the doctor's handwritten note diagnosing his condition to both the PMA and Local 19.

A week later, Local 19 told the discriminatee that PMA would not accept his doctor's note because it considered the note a fake. On August 18, PMA demanded that Local 19 deregister the discriminatee from its exclusive hiring hall, thereby effectively permanently removing him from employment in the longshore industry. On approximately that same date, the discriminatee provided Local 19 with a

¹ The discriminatee had never experienced this type of anxiety prior to August 7, 2010.

typewritten version of the doctor's earlier handwritten note, on medical center stationary, describing the discriminatee's disability and suggested treatment. Shortly thereafter, the discriminatee provided Local 19 with another typewritten doctor's note, again on medical center stationary, dated August 24, where the doctor agreed to testify about the discriminatee's medical condition.

The discriminatee filed a grievance over his deregistration, which was heard by the Seattle JPLRC in September. The JPLRC noted they had received the note from the discriminatee's doctor, but nonetheless denied the grievance on September 23. Local 19 then appealed the discriminatee's grievance to the CLRC.

At some point in 2011, Local 19 offered to reinstate the discriminatee if he would agree to participate in a drug treatment program. The discriminatee rejected the offer because he maintained he had not failed the test and was not in need of treatment.²

On February 27, 2012, the CLRC denied the discriminatee's grievance, thereby finalizing his deregistration. The CLRC referenced an August 7, 2010 letter from the clinician who attempted to collect the discriminatee's urine sample and noted that the usual drug testing protocols were followed. The notes from the CLRC meeting state that the discriminatee's failure to complete his drug/alcohol test was properly denoted as a refusal.

The Discriminatee's Wrongful Termination Lawsuit against PMA

In 2013, the discriminatee filed a wrongful termination lawsuit against the PMA and Local 19 in state court, which was subsequently removed to the Federal District Court for the Western District of Washington. On February 19, 2014, the discriminatee and Local 19 entered into a stipulation that dismissed all claims against Local 19.

The PMA later moved for summary judgment. On March 27, 2015, the Court granted summary judgment in favor of the PMA on four of the discriminatee's claims, but set a fifth claim, failure to accommodate the discriminatee's disability under the Revised Code of Washington State 49.60, for trial before a jury.

Thereafter, mediation of the discriminatee's accommodation claim resulted in a settlement offer from the PMA on September 24, 2015. The offer stated that the PMA would:

² Two longshoremen who were also deregistered pursuant to the August 7, 2010 drug test entered the program and were subsequently reinstated.

- 1) Pay the discriminatee \$80,000 and advise the ILWU that it supported the discriminatee's request for reinstatement to the B List contingent on his passing a drug and alcohol test; or
- 2) In the event that the ILWU refused to reinstate the discriminatee to the B List, PMA would pay the discriminatee \$100,000 and advise the ILWU that it supported the discriminatee's reinstatement as an ID casual with 4,000 plus credit hours; or
- 3) In the event that the ILWU did not agree to offer the discriminatee any reinstatement opportunity or did not respond, then PMA would pay the discriminatee \$155,000.

Although the discriminatee's attorney asserts that Local 19 also supported PMA's request to reinstate the discriminatee, the Region has been unable to independently corroborate this assertion.

Pursuant the settlement agreement, the PMA contacted the ILWU and requested that it reinstate the discriminatee, but the ILWU refused to do so. On October 20, the PMA's attorney informed the discriminatee's attorney that the ILWU had denied reinstatement to the discriminatee, but no reasons for the ILWU's decision were communicated to the discriminatee's attorney.

On December 8, the discriminatee's attorney sent the ILWU President a letter asking him to personally reconsider the rejection of the PMA's reinstatement request. At this point, neither the President, nor anyone else with the ILWU, responded to this request.

The Instant Charge

On February 5, 2016, the discriminatee filed a charge against ILWU Local 19, alleging that the Local had breached its obligation to fairly represent him, in violation of Section 8(b)(1)(A), by denying him work opportunities that had been agreed to by the PMA. On March 24, the discriminatee amended the charge to replace Local 19 with the ILWU as the charged party.

Following a communication from the Region to the ILWU's attorney, on May 20 the Union's attorney sent a letter to the discriminatee's attorney asserting that the Union rejected the PMA's request to reinstate the discriminatee because the CLRC's decision of 2012 was "final and binding," the discriminatee was properly found to have "failed" the drug test because of his technical "refusal" to provide a sample, no evidence was presented that would change that decision, and it would be an unfair labor practice to depart from the hiring hall rules in this regard. Lastly, ILWU counsel stated that the Union "owes a duty of fair representation to incumbent longshore workers not to increase the competition for jobs with the admission or

reinstatement of people who, based on the evidence, do not qualify under the established rules.”

ACTION

We conclude complaint should issue, absent settlement, based on the Union’s failure to allow the discriminatee to take another drug test because the Union failed to show that its action was necessary to the effective performance of its representative function or the effective and orderly operation of its hiring hall.

A union owes a duty of fair representation to all applicants using its exclusive hiring hall³ and may not operate it in an arbitrary, discriminatory, or unfair manner.⁴ A union generally acts arbitrarily only where “in light of the factual and legal landscape at the time, the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.”⁵ However, when a union operating an exclusive hiring hall prevents an employee from being hired or causes an employee’s discharge, the Board presumes that the effect of the union’s action is to unlawfully encourage union membership because the union has displayed to all users of the hiring hall its power over their livelihoods.⁶ That presumption is only rebutted by showing that the union’s action was necessary to the effective performance of its representative function, e.g., where the employee’s conduct interfered with the mechanics of the

³ See *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 87-88 (1989).

⁴ See *Miranda Fuel Co.*, 140 NLRB 181, 184 (1962). Two circuit courts of appeals have held that a union owes a "heightened duty" of fair dealing toward employees in the hiring hall context that requires it to act by reference to objective criteria. See *Jacoby v. NLRB*, 233 F.3d 611, 615-617 (D.C. Cir. 2000), *reversing and remanding*, 329 NLRB 688 (1999); and *Lucas v. NLRB*, 333 F.3d 927, 934-935 (9th Cir. 2003), *reversing and remanding* 332 NLRB 1 (2000). The Board has not, however, adopted the "heightened duty" standard. See *Teamsters Local 631 (Vosburg Equipment, Inc.)*, 340 NLRB 881, 881 n.4 (2003).

⁵ *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

⁶ *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 2 (2000), *revd. on other grounds*, 333 F.3d 927 (9th Cir. 2003); *Stage Employees IATSE Local 412 (Various Employers)*, 312 NLRB 123, 127 (1993); *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681, 681 (1973), *enf. denied on other grounds and remanded per curiam*, 496 F.2d 1308 (6th Cir. 1974), *reaff'd*, 220 NLRB 147 (1975), *enf. denied*, 555 F.2d 552 (6th Cir. 1977).

referral process;⁷ the employee's conduct harmed the union's reputation and relationship with employers to which it supplied labor,⁸ or the employee's conduct was of a nature that continued referrals could endanger employees or union agents or expose the union to liability for future misconduct.⁹ In these circumstances, it would not be reasonable to infer that the union's action would unlawfully encourage union membership.¹⁰

In the instant case, we conclude that the Union acted arbitrarily in refusing to offer the discriminatee another opportunity to take a drug test for the purposes of reinstating his eligibility for hiring hall referrals, after the PMA, which had demanded his deregistration in the first instance, dropped that demand and requested that he be given the opportunity to retest. The ILWU's refusal to permit

⁷ *Carpenters Local 522 (Caudle-Hyatt)*, 269 NLRB 574, 576 (1984) (union lawfully caused discharge of employees who had circumvented hiring hall and obtained work directly from employer); *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983) (union lawfully denied employee referral after employee had circumvented hiring hall by applying for work directly from employer).

⁸ *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1295-96 (1984) (union lawfully refused to refer employee with history of misconduct and incompetence on various jobs to which he had been referred); *Longshoremen ILA Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334, 337 (1981) (union lawfully refused to refer employee who had engaged in wildcat strike in violation of contractual no-strike clause).

⁹ *See Plumbers, Local 521 (Williams Plumbing)*, Case 9-CB-10077, Advice Memorandum, dated September 3, 1999 at 3 (union lawfully refused to refer member who had violent history after he threatened union President in union hall; union could well believe that continued referral of this employee with knowledge of his violent tendencies could subject it to liability); *IBT and its Local 714 (McCormick Place and Other Employers)*, Case 13-CB-10629, Advice Memorandum, dated November 2, 1999 at 8 (former officer of a local now in trusteeship because of "pervasive and on-going corruption" disqualified himself from referral when he threatened a resort to "bodily harm" at a union business meeting because the trusteeship was extended).

¹⁰ *See Philadelphia Typographical Union No. 2 (Triangle Publications)*, 189 NLRB 829, 830 (1971) (union lawfully caused employee's layoff because employee, while serving as union treasurer, embezzled substantial union funds, threatening the union's financial survival; in these circumstances, union's actions would not be "construed as having a foreseeable consequence of encouraging union membership.").

the discriminatee to qualify for reinstatement in the hiring hall was not necessary to the effective performance of its representational function. The discriminatee's ouster from the hiring hall was arguably precipitated by a failure to accommodate a disability recognized under Washington state law,¹¹ but in any case presenting him with an opportunity to take a retest would not interfere with the mechanics of the referral process.¹² Nor is there any evidence that merely affording him another opportunity to take the test would endanger other employees or Union agents or otherwise subject the Union to liability.¹³ And a successful retest and any subsequent reinstatement certainly would not impugn the Union's reputation with the PMA, which has requested both.¹⁴ Thus, the facts of this case do not meet the accepted precedents permitting a union to lawfully prevent an employee's hire for the purpose of serving its representational function.

Further, we reject the Union's assertion that it would violate its duty of fair representation to other incumbent longshoreman because allowing the discriminatee to take another drug test in order to be reinstated would be a departure from its established hiring hall rules. While the Board has consistently found that a union may violate Section 8(b)(1)(A) and (2) by departing from established hiring hall procedures, those departures typically involve arbitrary actions taken to either favor or disfavor individuals for reasons unrelated to the effective operation of the hiring hall.¹⁵ Here, departing from any established rule precluding retesting of individuals who have failed a drug test would not be arbitrary.

¹¹ In this regard, the CLRC's failure, without explanation, to consider any accommodation when presented with letters from the discriminatee's doctor describing his condition-- one in which the doctor volunteered to testify-- renders the ILWU's reliance on that decision, when even the Employer has requested the discriminatee's reinstatement, unfathomable. *See Lucas v. NLRB*, 333 F. 3d 927, 936 (9th Cir. 2002) (reversing dismissal of complaint where, *inter alia*, Union's failure to re-register employee because of a history of misconduct was not guided by any objective criteria, and Union offered no explanation as to why it disregarded a doctor's opinion that attested to employee's "psychological well-being and his ability to work productively"; "[i]n sum, just why the [u]nion's continued refusal to readmit Lucas was necessary to the effective operation of the hiring hall is a mystery.").

¹² *See* fn. 7, *supra*.

¹³ *See* fn. 9, *supra*.

¹⁴ *See* fn. 8, *supra*.

¹⁵ *See, e.g., Plumbers Local 521 (Huntington Plumbing)*, 301 NLRB 27, 27 n.1 & 29-30 (1991) (union violated Section 8(b)(1)(A) and (2) by departing from established hiring

In this regard, the district court found that there was a genuine issue of fact that needed to be tried before a jury with regard to whether the PMA had lawfully refused to accommodate the discriminatee's condition.¹⁶ Although PMA had relied on federal cases that do not recognize the discriminatee's "shy bladder" condition as a disability under the ADA, the district court held that "Washington [state] law defines 'disability' in much broader terms and provides Washington residents with additional protections."¹⁷ Given that the district court's summary judgment decision seriously undercuts the lawfulness of the CLRC decision under state law, and the PMA's request that the discriminatee be reinstated all but eliminates the force of the CLRC decision, it would not be arbitrary for the Union to depart from a rule that generally prohibits retesting in order to offer the discriminatee an accommodation for a medically documented condition.

Accordingly, we conclude that complaint should issue, absent settlement.¹⁸

/s/

B.J.K.

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hall procedures to favor union officers and relatives of the union business agent and assistant business agent), *enforced*, 958 F.2d 368 (4th Cir. 1992); *Cell-Crete Corp.*, 288 NLRB 262, 264 (1988) (union's demand that employer discharge a particular individual was arbitrary departure from established procedure of allowing specific by-name requests for referrals by employers); *Operating Engineers Local 406*, 262 NLRB 50, 50 (1982) (union unlawfully retaliated against charging party for refusing business agent's unreasonable request that he relinquish a job, by thereafter referring individuals below him on the out-of-work list), *enforced*, 701 F.2d 504 (5th Cir. 1983).

¹⁶ See *Oberti v. Pac. Mar. Ass'n*, No. C13-1580 RAJ, 2015 WL 1424067, at **3-5 (W.D. Wash. Mar. 27, 2015) ("Here, PMA fails to show that it was bound by DOT regulations and that it could not provide any other type of accommodation.")

¹⁷ *Id.* at *3.

¹⁸ We agree with the Region that the instant charge is not barred by Section 10(b). In this regard, the Union asserts that the charge is time-barred because any unlawful conduct occurred either in August 2010, when the discriminatee was terminated or in February 2012, when his grievance was denied by the CLRC. However, the conduct complained of here is the ILWU's refusal to reinstate the discriminatee pursuant to the PMA's request in October 2015, which was well within the Section 10(b) period.