

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

DATE: September 11, 2018

TO: Kathy Drew King, Regional Director
Region 29

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Electchester Management, LLC and Service 512-5072-2400-0000
Employees International Union Local 32BJ 512-5072-2700-0000
Cases 29-CA-216829, 29-CB-219679 536-2581-0180-0000
536-2581-3301-0000
536-2581-6700-0000
625-8817-3200-0000

The Region submitted this case for advice as to whether Electchester Management (“the Employer”) violated Section 8(a)(1) of the Act by denying the Charging Party a *Weingarten*¹ representative at an investigatory interview, and whether Service Employees International Union Local 32BJ (“the Union”) violated Section 8(b)(1)(A) of the Act by refusing to provide the Charging Party with a representative for that interview. We conclude that the Employer did not violate Section 8(a)(1) because it did not deny the Charging Party a *Weingarten* representative, but that the Union violated Section 8(b)(1)(A) because its refusal to provide the Charging Party with a representative was made in bad faith. Accordingly, the Region should dismiss the allegation against the Employer, absent withdrawal, and issue complaint against the Union, absent settlement.

FACTS

The Employer manages a large, multi-building housing complex in Queens, New York, and employs porters and maintenance workers in a bargaining unit represented by the Union. Employees are assigned to specific groups of buildings referred to as First through Fifth Housing. The Charging Party has worked for the Employer for about (b) (6), (b) (7)(C) years and was working as (b) (6), (b) (7)(C) in Third Housing during the period leading up to the current charges. In 2016 and 2017, the Charging Party filed charges against the Union alleging that it had failed to adequately represent (b) (6), (b) (7) during the processing of grievances over discipline (b) (6), (b) (7) had received. The Region dismissed both charges.

¹ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

On January 26, 2017, the Charging Party and a coworker were walking through Second Housing as a cut-through to buy lunch from a restaurant on the other side of the complex and ran into a Second Housing porter who is also (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) for the entire bargaining unit. The Charging Party and (b) (6), (b) (7)(C) do not like each other, and they got into an argument. On (b) (6), (b) (7)(C), 2017, which is outside the Section 10(b) period, the Employer issued the Charging Party a final written warning directing (b) (6), (b) (7) (b) (6), (b) (7) co-workers, to stay away from (b) (6), (b) (7)(C) during working hours, and not to enter “the confines of the Second Housing property for any reason or at any time whatsoever. . . .” The document stated that a breach of its terms would result in termination. There is no evidence that (b) (6), (b) (7)(C) was involved in the Employer’s decision to discipline the Charging Party for the January 2017 incident. The Charging Party filed a grievance, which the Union investigated and declined to pursue after concluding that it lacked merit.²

Despite the final written warning, the Charging Party continued to walk across Second Housing property as a shortcut to get to the shops on the far side of that complex. In addition, (b) (6), (b) (7) also entered Second Housing on occasion to visit a coworker who lived in an apartment there. On March 2, 2018,³ the Charging Party was walking across Second Housing and noticed (b) (6), (b) (7)(C) walking behind (b) (6), (b) (7). The two did not interact. (b) (6), (b) (7)(C) and another employee reported the Charging Party’s presence on Second Housing to the Employer.

On March 5, the Charging Party had a separate confrontation with a painter who wanted to use the Third Housing bathroom. The Charging Party believed the bathroom was for Union members only and refused to unlock the door, telling the painter to talk to the foreman about it. The foreman unlocked the door and told the Charging Party that painters could use the bathroom.

On March 8, (b) (6), (b) (7)(C) called (b) (6), (b) (7)(C) and explained that management was scheduling an interview with the Charging Party over the recent incident on Second Housing. (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) to send a Union representative for the Charging Party to the meeting. (b) (6), (b) (7)(C) said (b) (6), (b) (7) would get back to the Employer but did not. On March 14, (b) (6), (b) (7)(C) called the Union again about the same issue, and (b) (6), (b) (7)(C) said that the Union was engaged in contract negotiations and would not be available until April 29. The Employer stated it could

² The Charging Party did not file any charges with the Region related to this incident.

³ All subsequent dates are in 2018 unless otherwise noted.

not wait that long to have the meeting, to which (b) (6), (b) (7)(C) responded that neither (b) (6), (b) (7)(C) nor any other Union representative would attend, but that the Employer could meet with the Charging Party anyway. The Employer asked if it could advise the Charging Party to bring a Union member of (b) (6), (b) (7)(C) choosing to the meeting, and (b) (6), (b) (7)(C) said that was fine with (b) (6), (b) (7)(C).

On March 15, a supervisor told the Charging Party that management wanted to meet with (b) (6), (b) (7)(C) the next day.⁴ The supervisor did not say what the meeting was about, but the Charging Party assumed it was related to the bathroom incident with the painter on Third Housing. The Charging Party called (b) (6), (b) (7)(C) and requested that either (b) (6), (b) (7)(C) or another Union representative attend the meeting with (b) (6), (b) (7)(C) the next day. (b) (6), (b) (7)(C) said that no one from the Union would be able to come and suggested that (b) (6), (b) (7)(C) take a specific coworker with (b) (6), (b) (7)(C).⁵ The Charging Party said that the coworker was not a steward or Union representative, and that (b) (6), (b) (7)(C) wanted a representative there. (b) (6), (b) (7)(C) reiterated that (b) (6), (b) (7)(C) was not sending a Union representative to the meeting and did not provide (b) (6), (b) (7)(C) with any additional information on (b) (6), (b) (7)(C) legal rights or otherwise advise (b) (6), (b) (7)(C) on how to conduct (b) (6), (b) (7)(C) at the meeting.

On March 16, the meeting took place with (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) interviewing the Charging Party, who showed up alone. (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) said (b) (6), (b) (7)(C) was making an audio recording of the interview. Both the Charging Party and the Employer state that the issue of Union representation was discussed prior to (b) (6), (b) (7)(C) turning on the recorder. The Employer asserts that it told the Charging Party that (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) could not make it, and the Charging Party said that it was fine to continue without anyone from the Union being present. The Charging Party asserts that (b) (6), (b) (7)(C) told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) had called the Union and no one came to represent (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) replied that they would record the meeting for the Union to review later.

(b) (6), (b) (7)(C) then turned on the audio recorder. The recording itself begins with (b) (6), (b) (7)(C) stating that the Employer had asked the Charging Party to come to the meeting to ask (b) (6), (b) (7)(C) some questions, that (b) (6), (b) (7)(C) had the

⁴ According to the Employer, this supervisor also informed the Charging Party that (b) (6), (b) (7)(C) was not available to attend, but that (b) (6), (b) (7)(C) was free to bring another Union member to represent (b) (6), (b) (7)(C) at the meeting.

⁵ The coworker that (b) (6), (b) (7)(C) named is the same individual who had been with the Charging Party in late January 2017 during (b) (6), (b) (7)(C) confrontation with (b) (6), (b) (7)(C) that led to (b) (6), (b) (7)(C) receiving the final written warning.

right to Union representation, and that (b) (6), (b) (7)(C) had called (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) earlier in the week to schedule a time for (b) (6), (b) (7)(C) to be present, but that (b) (6), (b) (7)(C) would not be available until April 29. The Charging Party replied, (b) (6), (b) (7)(C) told me.” (b) (6), (b) (7)(C) then began the investigatory interview. The Charging Party admitted to walking across Second Housing property on numerous occasions to either visit a coworker, get lunch, or go to the pharmacy, adding that having to walk around the property would be time-consuming and that (b) (6), (b) (7)(C) had (b) (6), (b) (7)(C) that would have been aggravated by walking the extra distance. The Employer brought up the (b) (6), (b) (7)(C) 2017 final written warning that explicitly barred (b) (6), (b) (7)(C) from entering Second Housing for any reason whatsoever. The Charging Party stated that (b) (6), (b) (7)(C) believed the Employer intended for (b) (6), (b) (7)(C) only to avoid going on the property to engage (b) (6), (b) (7)(C) and to avoid all contact with (b) (6), (b) (7)(C) and that any time (b) (6), (b) (7)(C) went on Second Housing, (b) (6), (b) (7)(C) made it a point to ensure (b) (6), (b) (7)(C) was not around. The Charging Party stated that (b) (6), (b) (7)(C) never interpreted the document to mean that (b) (6), (b) (7)(C) was physically barred from entering Second Housing under all circumstances, only that (b) (6), (b) (7)(C) should avoid (b) (6), (b) (7)(C) at all costs.

The Charging Party then stated that every time (b) (6), (b) (7)(C) went through Second Housing, (b) (6), (b) (7)(C) kept a recording device on to ensure that if (b) (6), (b) (7)(C) did have a run-in with (b) (6), (b) (7)(C) or anyone else, (b) (6), (b) (7)(C) would be able to prove (b) (6), (b) (7)(C) did not do anything wrong.⁶ (b) (6), (b) (7)(C) then informed the Charging Party that (b) (6), (b) (7)(C) clearly breached the (b) (6), (b) (7)(C) 2017 final written warning and, although that document stated that a breach would result in termination, the Employer had decided to suspend (b) (6), (b) (7)(C) for two days for that conduct. The meeting ended, and the Charging Party returned to work for the day. Later that afternoon, (b) (6), (b) (7)(C) received a letter from the Employer stating that (b) (6), (b) (7)(C) admission of using a recording device while at work violated Employer rules, and it instructed (b) (6), (b) (7)(C) to cease and desist from recording (b) (6), (b) (7)(C) coworkers or face termination.

ACTION

We conclude that the Employer did not violate Section 8(a)(1) because the Employer reasonably believed that the Charging Party was aware of (b) (6), (b) (7)(C) rights and chose to continue the investigatory meeting without representation. We further

⁶ During the interview, the Employer also brought up the bathroom incident on Third Housing with the painter, who had alleged that the Charging Party was verbally abusive. The Charging Party denied the allegation and claimed that (b) (6), (b) (7)(C) had also recorded that exchange, which would prove (b) (6), (b) (7)(C) version of events. The Employer requested the tape, which the Charging Party said (b) (6), (b) (7)(C) would provide after (b) (6), (b) (7)(C) spoke with (b) (6), (b) (7)(C) lawyer.

conclude that the Union violated Section 8(b)(1)(A) because its decision to refuse to provide the Charging Party with a *Weingarten* representative was made in bad faith.

A. The Employer Did Not Violate Section 8(a)(1)

In *Weingarten*, the Supreme Court held that unionized employees may request the presence of a union representative at an investigatory interview that they reasonably believe could result in disciplinary action.⁷ An employee is entitled to a representative only when the meeting is investigatory, rather than where the employer is merely disclosing a previously made disciplinary decision.⁸ The principle underlying *Weingarten* is that employees have the right to meaningful representation during investigatory interviews.

Accordingly, *Weingarten* gives employees the right to a knowledgeable union representative who is able to provide advice and counsel during interviews.⁹ The permissible extent of a representative's participation in interviews "is seen to lie somewhere between mandatory silence and adversarial confrontation."¹⁰ The Board has found that employees are entitled to a qualified and experienced representative and an employer will violate the Act by denying a request for a skilled representative

⁷ 420 U.S. at 256.

⁸ See *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979) ("[U]nder the Supreme Court's decision in *Weingarten*, an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision.").

⁹ *Weingarten*, 420 U.S. at 260, 263 ("The representative is present to assist the employee and may attempt to clarify the facts or suggest other employees who may have knowledge of them."). See also *New Jersey Bell Telephone Co.*, 308 NLRB 277, 279 (1992).

¹⁰ *New Jersey Bell*, 308 NLRB at 279 (internal quotations omitted). See also *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980), *enforcement denied*, 667 F.2d 470 (5th Cir. 1982); *Talsol Corp.*, 317 NLRB 290, 331-32 (1995) (employer violated Section 8(a)(1) by telling union steward that she was there merely to observe the interview), *enforced*, 155 F.3d 785 (6th Cir. 1998); *Barnard College*, 340 NLRB 934, 935 (2003) (holding that employer's requirement that union representative sit silently during interview was "inconsistent with the Supreme Court's recognition that a union representative is present to *assist* the employee being interviewed").

and forcing an employee to be represented by an unqualified alternative, if the employee's choice is available.¹¹ At the same time, an employer has a right to pursue its legitimate prerogatives, including conducting timely investigations, without interference and obstruction.

The *Weingarten* right attaches only when the employee validly requests representation.¹² An employer has no duty to volunteer union representation or secure it without a valid request.¹³ Once a valid request is made, the employer is permitted only three courses of action: 1) it may grant the request, 2) end the interview, or 3) provide the employee the choice between continuing with no representative or having no meeting at all and forgoing any benefits that may be derived from having one (hereinafter "the *Postal Service* options").¹⁴ "Under no circumstances may the employer continue the interview without granting the employee union representation, *unless* the employee voluntarily agrees to remain unrepresented *after* having been presented by the employer with the choices

¹¹ *Consolidation Coal Co.*, 307 NLRB 976, 977, 978 (1992) (Board approving ALJ's finding that employer violated the Act by denying employee's request for a specific union representative with experience who was readily available and forcing him to choose among three committeemen who had never served as a *Weingarten* representative before).

¹² See *Weingarten*, 420 U.S. at 257; *Montgomery Ward & Co.*, 269 NLRB 904, 905 n.3 (1984) ("The Board does not require that the request be in a particular form, so long as it is sufficient to place the employer on notice that representation is desired. . . . This approach does not mean, however, that the protections of *Weingarten* can be invoked without *any* request.") (emphasis in original) (citing *Southwestern Bell Telephone Co.*, 227 NLRB 1223, 1223 (1977)). See also *Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas*, 366 NLRB No. 110, slip op. at 2 (June 15, 2018) ("[n]o magic or special words are required [to trigger a *Weingarten* request]. . . . It is enough if the language used by the employee is reasonably calculated to apprise the [e]mployer that the employee is seeking such assistance"); *New Jersey Bell Telephone Co.*, 300 NLRB 42, 42 n.3, 48-49 (1990), *enforced*, 936 F.2d 144 (3d Cir. 1991).

¹³ See, e.g., *Montgomery Ward*, 269 NLRB at 905 ("An employer has no obligation under the Act to provide a representative absent a valid request by the employee.").

¹⁴ *United States Postal Service*, 241 NLRB 141, 141 (1979). See also *Weingarten*, 420 U.S. at 258-59; *Circus Circus*, 366 NLRB No. 110 slip op. at 2, n.10; *New Jersey Bell*, 300 NLRB at 49; *Consolidated Freightways Cop.*, 264 NLRB 541, 542 (1982).

mentioned in option (3) above or if the employee is otherwise aware of those choices.”¹⁵

Here, the circumstances indicate that the Charging Party made a valid request for representation such that the Employer was, or should have been, on notice that the Charging Party wanted union representation.¹⁶ Both parties knew before the meeting that the Union had refused to send a representative. Moreover, the Charging Party’s statement to the Employer on the recording that (b) (6), (b) (7)(C) had told (b) (6), (b) (7) that the Union would not send a representative conveyed to the Employer that the Charging Party had requested one. In short, the Employer understood that the Charging Party wanted a Union representative at the meeting, but none was present.

However, the circumstances here support the conclusion that the Employer had a sufficiently reasonable basis to believe that the Charging Party was aware of (b) (6), (b) (7) rights under *Postal Service* because (b) (6), (b) (7) had spoken with the Union prior to showing up at the meeting. *Postal Service* imposes an obligation on employers to ensure that employees are aware of their options *if they do not otherwise know them*.¹⁷ Here, the

¹⁵ *Postal Service*, 241 NLRB at 141 (emphasis in original). *See also New Jersey Bell*, 300 NLRB at 49 (employer violated Section 8(a)(1) after failing to affirmatively offer the choice to continue or stop the interview once valid request was made).

¹⁶ See the cases cited in note 12, *supra*. *See also Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984) (holding employee’s request for his “work supervisor” was sufficient to put employer on notice employee had requested representative, and employer’s response that no one could be present preemptively precluded the employee from exercising right to request an alternate after first his request was lawfully refused), *enforced mem.*, 785 F.2d 316 (9th Cir. 1986); *Bodolay Packaging Machinery*, 263 NLRB 320, 320 & n.3, 325 (1982) (employer unlawfully violated employee’s *Weingarten* rights where he asked his supervisor whether “he needed a witness” and his supervisor responded “no”); *Illinois Bell Telephone Co.*, 251 NLRB 932, 937-38 (1980) (finding following question sufficiently requested representative, “Should I have someone in here with me, someone from the union?”), *enforced in relevant part*, 674 F.2d 618 (7th Cir. 1982); *Southwestern Bell*, 227 NLRB at 1223 (“I would like someone there that could explain to me what was happening.”).

¹⁷ *See Postal Service*, 241 NLRB at 141 (employer cannot continue interview unless employee voluntarily agrees to continue without a representative after *either* being informed of “the choices mentioned in option (3) above *or if the employee is otherwise aware of those choices*”) (emphasis added).

Employer reasonably construed the Charging Party's statement as representing that (b) (6), (b) (7)(C) had spoken with (b) (6), (b) (7)(C) Union about the meeting, had been informed that it was not sending a representative, and was prepared to continue with the meeting anyway. In other words, the Employer reasonably inferred that the Union had made the Charging Party aware of (b) (6), (b) (7)(C) rights, including (b) (6), (b) (7)(C) right to forego an interview in the absence of a Union representative. There was no reason for the Employer to know that the Union would allow one of its members to attend an investigatory interview without representation *and* without providing (b) (6), (b) (7)(C) any advice or counsel on (b) (6), (b) (7)(C) legal rights. This situation is therefore distinguishable from circumstances where the Board has found a violation for failure to provide the *Postal Service* options.¹⁸ Indeed, it would elevate form over substance to require the Employer to comply with the technical obligations under *Postal Service* where the Charging Party revealed that (b) (6), (b) (7)(C) had spoken with the Union about the meeting prior to showing up and the Employer reasonably inferred that (b) (6), (b) (7)(C) understood (b) (6), (b) (7)(C) rights and was electing to continue the meeting without a representative.

B. The Union Violated Section 8(b)(1)(A)

We conclude that the Union violated Section 8(b)(1)(A) because its refusal to provide the Charging Party with a representative for a *Weingarten* interview violated the “bad faith” prong of its duty of fair representation. While the Board has not analyzed a union’s duty of fair representation under *Weingarten*, that duty applies to all representational activities and prohibits union conduct that is “arbitrary, discriminatory or in bad faith.”¹⁹ The duty of fair representation does not impose an absolute and unconditional obligation on a union to expend resources representing its

¹⁸ See, e.g., *Circus Circus*, 366 NLRB No. 110, slip op. at 2 & n.10, 13 (finding employer violated Section 8(a)(1) by continuing with the investigatory interview and not providing the charging party with his *Postal Service* options where the facts showed the charging party had not been able to contact his union and he informed his employer of the same and that he had shown up for the meeting without representation); *New Jersey Bell*, 300 NLRB at 49 (employer violated Section 8(a)(1) by not providing employee with *Postal Service* options after she had requested union representation in response to security investigators interrogating her about improperly accessing a customer’s account).

¹⁹ *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 77 (1991); *Glass Bottle Blowers Local 106*, 240 NLRB 324, 328 (1979) (“A union’s power must be exercised fairly, impartially, and in good faith, which gives an employee the right to be free from unfair or irrelevant or invidious treatment by his exclusive bargaining agent”).

members in all situations.²⁰ Nevertheless, a union will violate the duty if its failure to represent a member was “motivated by ill will or other invidious considerations.”²¹

To find a breach of the bad faith prong of the duty of fair representation standard, there must be evidence of “fraud, or deceitful or dishonest action.”²² The Board considers the totality of the circumstances and the context in which the events occurred in determining whether a union acted in bad faith.²³

In *Roadway Express*, the Board held that a union business agent violated the bad faith prong of the duty of fair representation by deliberately misleading an arbitration committee about material events surrounding a worker’s compensation claim that resulted in the committee upholding the charging party-shop steward’s discharge for allegedly assisting with the reporting of a false claim.²⁴ The Board noted that charging party was the business agent’s political rival in the union and that the agent’s “longstanding hostility towards [the charging party]” was a matter of record.²⁵

²⁰ *Vaca*, 386 U.S. at 191 (“[T]hough we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration”); *Boilermakers Local 132*, 220 NLRB 119, 122 (1975) (holding union’s decision to not arbitrate a grievance did not violate Section 8(b)(1)(A) because the decision was not so preposterous or void of factual support as to imply the decision was discriminatory).

²¹ See, e.g., *Vaca*, 386 U.S. at 177 (duty requires unions to exercise discretion with “complete good faith and honesty. . .”); *Glass Bottle Blowers Local 106*, 240 NLRB at 324; *Union De Obreros De Cemento Mezclado (Betteroads Asphalt Corp.)*, 336 NLRB 972, 973 (2001).

²² *Steel Workers (Cequent Towing Products)*, 357 NLRB 516, 517 n.6 (2011) (citing *Electrical Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994)), *affirmed sub nom.*, *Richards v. NLRB*, 702 F.3d 1010 (7th Cir. 2012); *Machinists District 70 (Spirit Aerosystems)*, 363 NLRB No. 165, slip op. at 10 (April 25, 2016).

²³ *Roadway Express*, 355 NLRB 197, 202 (2010) (“We analyze [the union representative’s] conduct in the context of his relationship with [the charging party] . . .”).

²⁴ *Id.*

²⁵ *Id.*

While making clear that it was not holding that the union had breached its duty by allowing the business agent to represent the charging party despite their “adversarial relationship,” the Board explained that the history between the two individuals shed light on the business agent’s conduct at the arbitration hearing and strongly suggested that he had “seized an opportunity to eliminate a political rival from the workplace, while failing to disclose exculpatory information that would have aided” the charging party.²⁶ While the business agent’s representation may have satisfied the duty in a different situation, the Board made clear that the business agent’s conduct had to be viewed in the context of the relationship between the two individuals. By analyzing the totality of the circumstances, the Board was able to draw a legally sufficient inference that bad faith considerations drove the business agent’s conduct.

As in *Roadway Express*, the facts and surrounding circumstances here strongly support the inference that the Union’s refusal to provide the Charging Party a *Weingarten* representative was in bad faith and violated its duty of fair representation. Like *Roadway Express*, this case involves an acrimonious relationship between the Charging Party and a Union official, specifically, (b) (6), (b) (7)(C), who was the (b) (6), (b) (7)(C). In late (b) (6), (b) (7)(C) 2017, an argument between the Charging Party and (b) (6), (b) (7)(C) resulted in the Charging Party receiving the final written warning from the Employer that authorized (b) (6), (b) (7)(C) immediate termination if (b) (6), (b) (7)(C) entered Second Housing again. The Union knew about that final warning because after the Charging Party filed a grievance over it, the Union determined it lacked merit and did not process the grievance. Slightly over a year later, on March 2, 2018, (b) (6), (b) (7)(C) notified the Employer that (b) (6), (b) (7)(C) had witnessed the Charging Party on Second Housing, which led to the March 16 investigatory interview where the Charging Party was denied a *Weingarten* representative and then received further discipline.

Given the underlying animosity between the Charging Party and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) the Union’s failure to send an alternate representative to an investigatory interview that it knew could result in the Charging Party being terminated constituted an egregious dereliction of duty. The Union’s claim that it had no other representative available for over six weeks due to contract negotiations is implausible, particularly given the size of the Union..²⁷ In light of this

²⁶ *Id.*

²⁷ See, e.g., *Pressroom Cleaners*, 361 NLRB 643, 658 (2014) (quoting a 2011 press release from the Union stating, “[w]ith more than 120,000 members in eight states and Washington, D.C., . . . [the Union] is the largest union of property service workers in the country”

background, a strong inference may be drawn that the Union falsely informed the Employer that another Union representative was not available for the March 16 meeting to avoid representing a member feuding with its (b) (6), (b) (7)(C). Further, the Union's instruction to the Charging Party that (b) (6), (b) (7)(C) should take a coworker to the meeting who had no apparent experience handling grievances or investigatory interviews further evidences its bad faith. The Union knew that the Charging Party had been working under a final written warning and that this investigatory interview could have resulted in (b) (6), (b) (7)(C) termination, yet it did nothing to represent (b) (6), (b) (7)(C). While the Union's refusal to send a representative on request was not a *per se* violation of the duty of fair representation, the totality of the circumstances here lead to an almost inescapable inferential conclusion that the Union chose sides in the dispute between its (b) (6), (b) (7)(C) and the Charging Party, and then refused to assist the Charging Party in bad faith.

Accordingly, the Region should issue a Section 8(b)(1)(A) complaint, absent settlement, and should dismiss the Section 8(a)(1) allegation, absent withdrawal.

/s/
J.L.S.

ADV.29-CA-216829.Response.ElectchesterManagement.(b) (6), (b) (7)(C)