

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

DATE: November 26, 2018

TO: Paula S. Sawyer, Regional Director  
Region 27

FROM: Jayme Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Security Officers Specialists Association 506-6050-2500  
(Batelle Energy Alliance) 536-5050-3385  
: Case 27-CB-205350 536-2509-2500  
536-2509-9300  
536-5050-6708  
536-5050-6783  
536-5075-5017  
542-3367-0100  
542-3367-5000  
542-3367-6717  
554-1467-7500

This case was submitted for advice as to whether the Union violated the Act by: (1) seeking to curtail employee participation in voluntary supervisory assignments during a strike at a third-party employer; (2) banning such voluntary upgrades in a manner that restricted contractual benefits; or (3) threatening to grieve a temporary supervisor's contract interpretation in favor of accepting upgrades. We conclude that the Union: (1) violated Section 8(b)(3) because it sought to curtail upgrades during a strike in violation of the parties' contractual no-strike clause; (2) violated Section 8(b)(1)(A) because it restricted employees' contractual right to accept voluntary upgrades; and (3) did not violate Section 8(b)(1)(B) because threatening to use the parties' dispute-resolution mechanism to challenge a contract interpretation does not coerce the Employer in its choice of representative.

## FACTS

The Employer, Battelle Energy Alliance, is the managing and operating contractor at the Department of Energy's (DOE) Idaho National Laboratory (INL), a nuclear facility. The Union, Security Officers Specialists Association (SOSA), represents the Employer's non-supervisory security forces at those facilities, and its representation of these employees predates the Employer's contract with the INL. The most recent collective-bargaining agreement between the Union and the Employer runs from October 30, 2015 through April 30, 2020.

The Employer's contract with DOE requires it to always maintain sufficient security coverage under highly-specialized supervision. Security officers must qualify on military-grade weaponry and receive elite tactical training specific to the facility and crew to which they are assigned. Acting as a supervising lieutenant requires months of additional training, a rigorous qualification program, and site-specific security clearances.

For national security reasons, DOE also requires the Employer to participate in strike-contingency plans where they pledge to train and send some of their own protective forces to maintain continuity of operations in the event of work stoppages at other DOE facilities. Accordingly, the Employer has often sent its supervisory personnel as strike-contingency support forces to either train or work during strikes at other sites over the years.

To facilitate and ensure sufficient security coverage and continuity of operations, the CBA between the Employer and the Union provides that non-supervisory security employees (unit employees) may volunteer as temporary supervisory lieutenants ("upgrades") under the Employer's voluntary upgrades program. Upgraded employees fill in when permanent supervisory lieutenants are unavailable, including when they are deployed elsewhere for strike-contingency purposes. Once trained and qualified, upgrades are placed on a volunteer list. Upgrade assignments may last a single shift or weeks. Specifically, as to the upgrades program, the agreement provides:

### Article 31, Section 1

Management will administer a Leadership Mentoring Program/Upgrade to assist employees seeking upward mobility. Employees must volunteer and be selected by management. When performing leadership responsibilities as directed by management they will receive an additional two dollars (\$2.00) per hour.

Beyond providing that employees must volunteer and be selected, the agreement mandates no particular procedure for the upgrade process.

According to the Employer's practice, employees can only upgrade if someone else "buys" their regular shift, usually as overtime, which is also voluntary. Upgrade volunteers are qualified to work as supervisors only in their specific facilities, so they cannot be upgraded to other areas. There are only one or two employees trained as upgrades on any given crew. If no eligible employee volunteers to upgrade, or to buy overtime for someone else to upgrade, then a regular lieutenant or captain must work the open shift.

Upgrades, like regular lieutenants, may adjust grievances. Upgrades have resolved disputes involving overtime or scheduling that arise on their shifts with their crew. Some other issues (e.g. relieving someone from duty) require two supervisors or higher-level management.

The parties' collective-bargaining agreement also contains management-rights and no-strike clauses to ensure the continuity of the Employer's operations. Specifically, the agreement provides:

#### ARTICLE 5

Management of the business and direction of the security forces are exclusively the right of management. These rights include the right to... (c) direct the forces and manage the business; (d) assign work;... (f) promote, demote, transfer... (g) maintain order and efficiency of operations ... (k) determine the size of the work force ... number of employees assigned to any particular shift ....

#### ARTICLE 35

##### NO STRIKES—NO LOCKOUTS CONTINUITY OF OPERATIONS

#### Section 1

The parties recognize the sensitive nature of the services provided by the [Employer] to the U.S. Government and, therefore, agree that all operations of the [Employer] shall, during the term of the CBA, continue without interruption.

#### Section 2

The [Union] collectively and each employee individually, agree they will not during the term of this CBA call, engage in or sanction in any way any strike, sympathy strike, work stoppage, slowdown, picketing, sitdown, sit-in, boycott, or any other interference with or interruption of the [Employer's] operations for any reason whatsoever.

Section 3

The [Employer] agrees, during the term of this CBA, that no lockout against any or all of the employees shall take place.

Section 4

In the event that a breach of the no strike clause occurs, the officers of the [Union] will immediately upon request and/or notice from the [Employer], make reasonable, earnest good-faith efforts to affirmatively bring about a prompt termination of the strike or other job action and shall continue such efforts until employees return to work. These good faith efforts on the part of the [Union] officers shall include, but not be limited to, continuing to do their jobs.

The Union asserts that using unit employees as upgrades to fill supervisory positions during the deployment of strike-contingency forces amounts to assisting the Employer's strike-breaking efforts at other locations. It contends that the parties have long had a practice, pursuant to a handshake agreement, of suspending upgrades during deployments of contingency forces during third-party strikes and strike preparation. The Employer denies any such bilateral understanding. The parties agree, however, that the Employer used upgrades during past strike deployments and the Union regularly complained about and sought to curtail that practice.<sup>1</sup>

In June of 2017, the Employer was asked to deploy strike-contingency personnel to DOE's Savannah River site to train in preparation for a looming strike there. According to the Employer's (b) (6), (b) (7)(C), the Union (b) (6), (b) (7)(C) said that (b) (6), (b) (7)(C) was going to write unit employees to not accept upgrades. The (b) (6), (b) (7)(C) questioned the necessity of doing so when there was no active strike. The Union (b) (6), (b) (7)(C) agreed, and took the (b) (6), (b) (7)(C) statement as tacit acknowledgement of the parties' agreement to suspend upgrades during labor disputes. The Employer proceeded to use voluntary upgrades to backfill supervisory vacancies, consistent with the terms of the CBA, during strike-contingency training at Savannah River.

In early August, the Employer received the Savannah River union's strike notice and deployed lieutenants and captains to that facility. On August 14, the Union (b) (6), (b) (7)(C) emailed Employer management that given the "situation" at Savannah River, the Union would "curtail" upgrades until the strike-contingency force returned.

On August 15, the strike commenced at Savannah River, and the Employer used voluntary upgrades to fill the resulting supervisory gaps at INL. That day, the (b) (6), (b) (7)(C) emailed the Employer's (b) (6), (b) (7)(C) about a unit employee working as an

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<sup>1</sup> The Employer noted that it has executed multiple written MOUs with the Union over the years, but that no written MOU exists regarding limits on upgrades during strikes.

upgrade. The Union (b) (6), (b) (7)(C) reiterated that the Union could not support individuals who “crossed the line” during a sister union’s strike by accepting upgrades, which, in the Union’s view, assisted the Employer’s strike-breaking efforts at another facility. (b) (6) further asserted that the Employer’s continued use of upgrades during strikes “will cause a hostile working environment at MFC,” the on-site Materials and Fuels Complex.

On about August 17, the Employer’s (b) (6), (b) (7)(C) responded by email, demanding that the Union rescind its position regarding upgrades by August 22. (b) (6) asserted that the Union’s attempt to curtail upgrades violated the CBA—in particular the management rights, no-strike, and upgrade provisions quoted above—and Sections 8(b)(1)(A), 8(b)(1)(B), and 8(b)(3) of the Act.

On August 22, the Union (b) (6), (b) (7)(C) replied by email that the Union’s actions were consistent with the parties’ past practice wherein unit employees were not required to volunteer for upgrades when supervisors were dispatched to support struck employers. (b) (6) referred to past stoppages where this practice was purportedly followed, as well as (b) (6) June conversation with the Employer’s (b) (6), (b) (7)(C) when (b) (6) had agreed not to curtail upgrades because supervisors were merely training, not yet crossing a strike line. The Union (b) (6), (b) (7)(C) claimed that the Employer’s “new position” on upgrades violated this practice and understanding.

The Employer’s (b) (6), (b) (7)(C) responded by filing a grievance, which the parties met to discuss on September 5. The Employer insisted on its contractual right to offer temporary upgrades even during strikes, and the Union again claimed so doing violated the parties’ agreement and past practice. The grievance was not resolved, and the Employer opted not to take it to arbitration.

Unit employee (b) (6), (b) (7), who was not a member of the Union, worked as an upgrade lieutenant during the Savannah River strike. (b) (6), (b) (7)(C) heard nothing directly from the Union about upgrades, only rumors that the Union’s (b) (6), (b) (7)(C) might be upset if employees accepted upgrades during the strike. (b) (6), (b) (7)(C) continued to volunteer for upgrades as before. When other employees asked if (b) (6), (b) (7)(C) was supposed to do so, (b) (6), (b) (7)(C) explained that upgrades were still allowed. The Employer’s (b) (6), (b) (7)(C) likewise responded to similar questions from (b) (6), (b) (7) team that upgrades were voluntary.

On or about September 22, the Union’s (b) (6), (b) (7)(C) asked (b) (6), (b) (7) if (b) (6), (b) (7) was upgrading. (b) (6), (b) (7) replied in the affirmative and the (b) (6), (b) (7)(C) responded that (b) (6), (b) (7) was not supposed to upgrade. (b) (6), (b) (7) asked: “Do you mean I am not supposed to be, or you don’t want me to? Because there’s a difference.” The Union’s (b) (6), (b) (7)(C) said, “I guess I’ll have to put a grievance in.” (b) (6), (b) (7) responded, “I guess you should.”

Later that shift, a regular (b) (6), (b) (7)(C) overheard a “commotion” between the Union (b) (6), (b) (7)(C) and another unit employee, who had “bought” (b) (6), (b) (7) overtime

shift so that (b) (6), (b) (7)(C) could upgrade. The Union's (b) (6), (b) (7)(C) told the unit employee that the overtime should not have been sold. The (b) (6), (b) (7)(C) asked the unit employee if the overtime had been forced, and the employee confirmed that (b) (6), (b) (7)(C) had volunteered. The (b) (6), (b) (7)(C) then reiterated to the Union (b) (6), (b) (7)(C) that Union members could turn down overtime and the Employer was not forcing the unit employee to accept it. The Union (b) (6), (b) (7)(C) maintained that the shift should not have been offered. (b) (6), (b) (7)(C) and the unit employee who "bought" (b) (6), (b) (7)(C) shift worked the shift without further incident.

On September 25, the Union's (b) (6), (b) (7)(C) emailed all upgrade-eligible employees at the Materials and Fuels Complex, asking them not to accept upgrades during the Savannah River strike. (b) (6), (b) (7)(C) explained that this request was in support of the sister union's strike at that location.

The Savannah River strike ended on or about October 8. The Union neither filed grievances against employees who accepted upgrades, nor cited any members for internal union discipline because they accepted upgrades.

The Employer reports that 15 of the 35 unit employees trained to upgrade were not accepting upgrades during the Savannah River strike, although there is no evidence as to how many upgrade-eligible employees ordinarily accept upgrade opportunities. Two facilities reported no employees accepting upgrades. No employees who accepted upgrades walked out mid-shift. Even so, given the number of employees declining upgrades, some supervisors had to work consecutive days of 12-hour shifts to ensure sufficient staffing for continuing operations. Given the lengthy time required to hire, train, and get security clearances for replacements for such specialized positions, the Employer could not hire temporary replacements in lieu of voluntary upgrades. This strain worsened when strike-contingency forces were called back for routine certifications and others had to be deployed in their stead, taking additional security workers out of rotation. No shifts went uncovered because DOE requirements do not allow that. As a result, the Employer asserts safety concerns tied to staff working up to 70-80 hour work weeks without days off at a nuclear facility, handling military-grade firearms and explosives.

### ACTION

We conclude that the Union violated Section 8(b)(3) because it sought to curtail upgrades during a strike in violation of the parties' contractual no-strike clause and violated Section 8(b)(1)(A) because it restricted employees' contractual right to accept voluntary upgrades. We further conclude that the Union did not violate Section 8(b)(1)(B) because threatening to use the parties' dispute-resolution mechanism to challenge a contract interpretation did not coerce the Employer in its choice of representative.

## 1. The Union Violated Section 8(b)(3)

A union violates Section 8(b)(3) when it repudiates or effects unilateral changes to an agreement reached through collective bargaining.<sup>2</sup> In particular, this duty may be violated when a union engages in, or sanctions, a strike or work slowdown in violation of a contractual no-strike clause, even if the work in question is voluntary.<sup>3</sup> The Board generally finds that a strike occurs where *the union* encourages employees to concertedly refuse to perform voluntary work.<sup>4</sup> In contrast, where employees refuse to perform voluntary work on their own, the Board has often found no strike occurred.<sup>5</sup>

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<sup>2</sup> *Plumbers Local 420*, 254 NLRB 445, 448-49 (1981) (union engaged in strike to pressure employer into substituting the local agreement for the national agreement that the parties had previously agreed to); *Painters Westgate*, 186 NLRB 964, 966 (1970) (union unilaterally implemented and enforced a 10-room production quota through strikes, threats, and fines, after failing to come to agreement with the employer on a reduction from the 11.5 room average).

<sup>3</sup> See generally *Elevator Mfrs. Ass'n v. Elevator Contractors Local 1*, 689 F.2d 382, 386 (2d Cir. 1982) (union's direction of concerted refusal to work voluntary overtime may violate no-strike clause).

<sup>4</sup> See, e.g. *Randall Bearings*, 213 NLRB 824, 827 (1974) (emphasizing this distinction in finding union engaged in strike by encouraging employees to refuse to perform voluntary overtime), *enforced sub. nom. NLRB v. Local 742, Int'l Union of Elec., Radio, and Mach. Workers*, 519 F.2d 815 (6<sup>th</sup> Cir. 1975); *Iowa Beef Packers*, 188 NLRB 5, 5-6 (finding violation where union encouraged employees to refuse overtime in protest; "That the overtime was designated as voluntary in the contract does not . . . render the concerted refusal to perform it any the less a strike . . ."). Cf. *Time Warner Cable New York City, LLC*, 366 NLRB No. 116, slip op. at 3-4 (June 22, 2018) (employer did not violate the Act by suspending employees for participating in union "safety meeting" where union orchestrated a work stoppage and impeded employer operations; Board reasoned that the meeting was an unprotected demonstration because it violated a no-strike clause and the employees participated after the nature of the demonstration should have been clear); *New York State Nurses Assoc.*, 334 NLRB 798, 800-801 (2001) (nurses' concerted refusal of overtime constituted strike subject to notice requirements of Section 8(g)).

<sup>5</sup> See, e.g., *Imperia Foods*, 287 NLRB 1200, 1203-1204 (1988) (employees' concerted refusal to work overtime not a partial strike because refusal of voluntary assignment does not impose conditions on employer); *Dow Chemical Co.*, 152 NLRB 1150, 1152 (1965) (same).

There have been exceptions to the general rule that a union-led refusal to accept voluntary assignments constitutes a strike, most notably *Paperworkers Local 5*.<sup>6</sup> There, the Board held that a union did not violate Section 8(b)(1)(A), or a broad no-strike clause, by prohibiting members from performing non-unit work under threat of union discipline, and by fining members who failed to comply with its directives, because the non-unit assignments in question were voluntary.<sup>7</sup> We note, however, that the Board in *Paperworkers* did not address a Section 8(b)(3) allegation, and there was no collectively-bargained right for employees to volunteer. Moreover, the General Counsel (b) (5)

Here, the Union acted contrary to the terms of both the contractual upgrades program and the no-strike clause, and thus violated Section 8(b)(3), when it encouraged employees to concertedly refuse to accept voluntary upgrade positions that were critical to the Employer's continuity of operations. The parties' CBA contains a no-strike clause that broadly prohibits the Union from engaging in or sanctioning any strike, slowdown, or other activity that would interrupt the Employer's operations. The clause recites the parties' agreement that, given the "sensitive nature" of the services provided by the Employer to the U.S. Government—security at national nuclear facilities—"all operations of the [Employer] shall, during the term of the CBA, continue without

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<sup>6</sup> 294 NLRB 1168, 1170-72 (1989).

<sup>7</sup> *Id.*

<sup>8</sup> *See supra* nn. 3-4.

<sup>9</sup> Three subsequent Board cases that held, without citing *Paperworkers*, that a union may lawfully threaten and discipline members who refused to participate in a concerted refusal to perform voluntary work should also be overruled to the extent that they would bar finding a Section 8(b)(3) violation here. *See IBEW 15*, 341 NLRB 336, 336, 338, 341-44 (2004) (union did not violate Section 8(b)(3) or 8(b)(1)(A) by threatening to discipline and disciplining members who participated in voluntary overtime program despite union ban); *CWA 13000*, 343 NLRB 134, 136-37 (2004) (union did not violate Section 8(b)(1)(A) by threatening and bringing internal union charges against members who continued to voluntarily participate in employer's "remote garaging" program despite union's non-participation policy); *IBEW 2321*, 348 NLRB 869, 869 (2006) (union did not violate Section 8(b)(1)(A) by fining member for accepting voluntary overtime in spite of union ban).

interruption.” Indeed, the CBA expressly provides that employees have a right to volunteer for the upgrade program and the Employer has a right to select and deploy such volunteers as needed. The CBA provides the Union with no role in that process. Moreover, even after the Employer brought the breach to the Union’s attention, the Union continued to encourage employees not to volunteer, thereby violating its express contractual obligation to “immediately” make “good-faith efforts” to terminate any job action that would breach the clause. The Union encouraged employees to engage in strike activity (and certainly an interruption of operations) in violation of the no-strike clause when it pressured employees as a group to refuse to accept voluntary upgrade positions. Its conduct unilaterally negated the agreed-upon purpose of the clause—namely, ensuring continuity-of-operations for national-security purposes—and the facts show the strain of the Union’s conduct on the Employer’s operations and the potential to cause serious disruptions.<sup>10</sup> Finally, there is insufficient evidence to support the Union’s past practice argument; while the Union claims that the parties shared an informal agreement to suspend upgrade assignments during strikes, the Employer denies any such bilateral agreement and both parties recall the Employer using the upgrades program to backfill during previous strikes. Under these circumstances, we conclude that the Union violated Section 8(b)(3) by unilaterally breaching the no-strike clause and the contractual upgrades program.

## **2. The Union Violated Section 8(b)(1)(A)**

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to “restrain or coerce ... employees in the exercise of the rights guaranteed” by the Act. A union engages in coercive conduct in violation of Section 8(b)(1)(A) when it interferes with employees’ enjoyment of rights and benefits granted to them in a CBA or seeks to enmesh them in a violation of the CBA’s terms, including a no-strike clause.<sup>11</sup>

Here, the Union signed a CBA that explicitly gave employees a contractual right to volunteer for upgrade work, and with it an increase in pay, training, and potential for

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<sup>10</sup> Cf. *Elevator Mfrs. Ass’n*, 689 F.2d at 386 (CBA imposed “special obligation” on union not to interrupt acceptance and performance of voluntary emergency elevator repair work that was essential to fundamental safety); *New York Nurses*, 334 NLRB at 799 (union encouraged refusal to perform voluntary nursing services critical to hospital operations).

<sup>11</sup> See, e.g., *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777, 779 (1984) (union violated Section 8(b)(1)(A) by bringing internal charges and assessing fines against members who refused to engage in a strike that would have violated a valid no-strike clause).

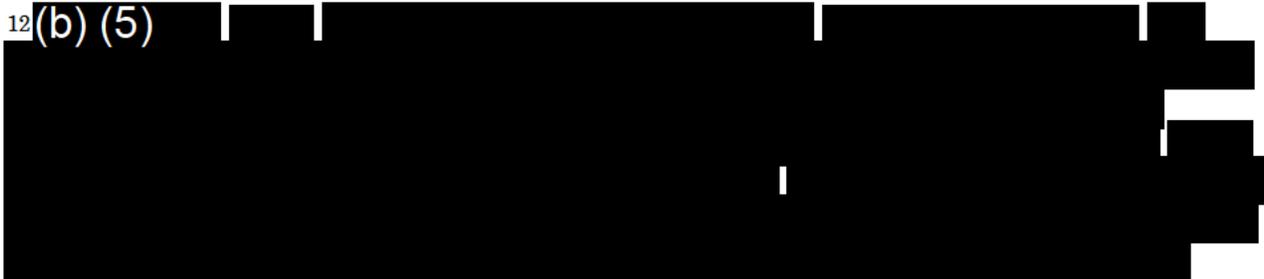
promotion. It then made a series of statements indicating that it did not want them to exercise that collectively-bargained right. Viewed as a whole, the Union's repeated requests that employees not volunteer, its statement that the Employer's continued use of upgrades would create a hostile work environment, and its threat to grieve an employee's decision to accept an upgrade assignment would likely deter, and may have in fact deterred, employees from volunteering, or led them to infer that they would face union reprisal for volunteering.<sup>12</sup> This is true even if the Union did not explicitly threaten them with union discipline or impose discipline in support of its curtailment. Employees should not have to choose between exercising their contractual rights and risking the ire of their union. Moreover, as discussed regarding the 8(b)(3) violation, the Union effectively encouraged employees to violate the CBA's no-strike clause, which required both the Union *and employees* to refrain from any work stoppage or disruption of operations. This, too, was coercive. Employees should not be pressured by their Union to assist in violating the CBA. Pulling employees into that dispute impacts their terms and conditions of employment in violation of Section 8(b)(1)(A).<sup>13</sup>

### 3. The Union Did Not Violate Section 8(b)(1)(B)

We conclude that the Union's conduct did not coerce the Employer in its selection of bargaining representative. When an employer has established that a particular employee is its representative for the purposes of collective bargaining or adjustment of grievances, a union violates Section 8(b)(1)(B) if it disciplines that employee for the manner in which he performs representational or contract-interpretation duties on behalf of the employer.<sup>14</sup> Here, however, even assuming that

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<sup>12</sup> (b) (5)



<sup>13</sup> As the Board in *Paperworkers* observed, if the union's "conduct amounted to an attempt to cause the employees to violate the contractual no-strike clause, that conduct would have violated Section 8(b)(1)(A)." *Id.* at 1171. That is exactly what the Union did here.

<sup>14</sup> See, e.g., *IBEW Local 77 (Bruce Cadet)*, 289 NLRB 516, 519 (finding 8(b)(1)(B) violation where union fined foremen because of their interpretation of a jurisdictional agreement on behalf of employer), *enforced* 895 F.2d 1570 (9<sup>th</sup> Cir. 1990).

upgrade employees have grievance-adjustment authority, there is no evidence that the Union employed discipline or other coercive tactics to punish or interfere with an upgrade employee's exercise of that authority. The Union (b) (6), (b) (7)(C) threat to grieve an upgrade employee's interpretation of the contractual upgrade program was not coercive, as contractual grievance processes are precisely the method of dispute resolution sanctioned by Board law, labor policy, and the parties in this case. Indeed, the Employer itself chose to address the underlying dispute in this case through the parties' grievance process.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(3) and 8(b)(1)(A), but should dismiss the allegation, absent withdrawal, that it violated Section 8(b)(1)(B).

J.L.S.

ADV.27-CB-205350.Response.Security Officers (Battelle Energy) (b) (6)