

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**INTERNATIONAL ASSOCIATION OF
HEAT AND FROST INSULATORS
AND ASBESTOS WORKERS, AFL-CIO
(HFIA), LOCAL UNION NO. 50**

and

ALLOYD INSULATION CO., INC.

and

**ADVANCED ENERGY PROTECTION,
LLC**

And

PEDERSEN INSULATION CO.

**CASE NO.: 09-CB-239346
25-CB-239416
09-CB-240443**

**INTERNATIONAL ASSOCIATION
OF HEAT AND FROST
INSULATORS AND ASBESTOS
WORKERS, AFL-CIO (HFIA),
LOCAL UNION NO. 50'S REPLY TO
COUNSEL FOR THE GENERAL
COUNSEL'S RESPONSE TO THE
BOARD'S NOTICE TO SHOW
CAUSE ORDER**

Respondent International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO (HFIA), Local Union No. 50 ("Local 50" or the "Union"), by and through undersigned counsel, hereby submits its Reply to Counsel for the General Counsel's Response to the Board's Notice to Show Cause Order ("Response"). Respectfully, the Board should dismiss the Consolidated Complaint against Local 50 because 1) Section 8(b)(1)(B) does not prohibit the enforcement of rules; 2) Section 8(b)(1)(B) does not apply because the alleged discriminatees were not union members or disciplined in any way; 3) the duties Counsel for General Counsel ("Counsel") relies upon do not rise to the level of Section 8(b)(1)(B) duties; and 4) Counsel admits that essential elements of its claim are not present for at least three of the alleged discriminatees.

I. Section 8(b)(1)(B) Is Not Meant As a Blanket Protection Against Enforcement of Uniform Rules.

As an initial matter, Counsel is urging for a result that is not what Section 8(b)(1)(B) stands for. It is undisputed that the ERISA-governed pension plan at issue here unequivocally states a retiree is ineligible to collect pension benefits while continuing to work in Prohibited Employment. There is also no dispute as to the underlying requirements for obtaining an exception to that prohibition or the dire financial status of the Pension Fund immediately prior to and at the time of the decision to deny the retirees an exception to the uniform rule. The enforcement of the rule within the ERISA-governed plan documents is not what Section 8(b)(1)(B) is meant to prevent.

Ignoring for the sake of argument that none of the elements of a Section 8(b)(1)(B) violation are met here, requiring the alleged discriminatees to make a decision where to receive income certainly does not coerce their *employer*. Section 8(b)(1)(B) was enacted to prevent coercion on an employer, not an employee. “Congress did not design §8(b)(1)(B) to guarantee employers the undivided loyalty of Section 8(b)(1)(B) representative.” *NLRB v. Electrical Workers*, 481 U.S. 573, 583 (1987). The U.S. Supreme Court in *Electrical Workers* continued, “It is difficult to maintain that an *employer* is restrained or coerced because a *union member* must accept union expulsion or other discipline to continue in a supervisory position. The employer’s problem – that the supervisor-member might decline to serve as a representative or align with the union...and deprive the employer of services – is of its own making.” *Id.* at 594.

Citing a dissenting member’s decision in *New York Typographical Union No. 6*, 216 NLRB 896 (1975), the Court went on to say an employer has the ability to provide additional incentives to an employee so the employee would forfeit certain union benefits in order to take a supervisory position. Accordingly, “union rules or discipline that merely diminish an employer representative’s willingness to serve no longer restrain or coerce the *employer* in its selection of a § 8(b)(1)(B)

representative.” *Id.* at 595. If the choice between resigning from the union (and by extension, no longer receiving union benefits) or receiving discipline for working nonunion or during a strike does not rise to the level of a Section 8(b)(1)(B) violation, the acts alleged by Counsel certainly do not either. Here, the alleged discriminatees are not giving up any retirement benefits to continue working for the Charging Parties. They are able to collect said benefits when they fully retire and cease working in Prohibited Employment.

Because Local 50 was fulfilling its obligation under the Pension Plan documents and enforcing a uniform rule prohibiting double dipping (*i.e.*, collect retirement benefits while still working full time), there is no Section 8(b)(1)(B) violation, and the Consolidated Complaint must be dismissed.

II. Dismissal Is Warranted Because None of the Alleged Discriminatees Were Union Members Nor Were They Disciplined.

As noted by the Board in its Notice to Show Cause Order, Section 8(b)(1)(B) is violated only where a union disciplines a supervisor-member “for behavior that occurs *while he or she is engaged in 8(b)(1)(B) duties.*” *NLRB v. Electrical Workers, supra* at 582 (emphasis in the original) (*citing Florida Power & Light Co. v. Electrical Workers, 417 U.S. 790 (1974)*). Here, it is undisputed that Local 50 did not discipline any of the alleged discriminatees. Counsel appears to be arguing for a finding that Local 50’s uniform decision, in fulfilling its obligation under an ERISA-governed plan, somehow qualifies as “discipline”. That finding is simply unsupported by applicable precedent. Counsel has not cited a single case where actions other than disciplinary fines pursuant to a union constitution have formed the basis for a Section 8(b)(1)(B) violation. Because there has been no imposition of any disciplinary fine, nor any attempt to bring the alleged discriminatee up on internal union charges, the “discipline” element of a Section 8(b)(1)(B) violation cannot be met, and the Consolidated Complaint must be dismissed.

In addition to the “discipline” element not being met, the undisputed evidence shows that the alleged discriminatees are not even union members. They are retirees against whom internal union charges cannot be brought. Counsel does not dispute this fact. For this reason alone, the Consolidated Complaint must be dismissed.

III. Counsel Inappropriately Seeks to Expand the Interpretation of Section 8(b)(1)(B) Duties Which Is Already At Its “Outer Limits”.

The U.S. Supreme Court has explicitly rejected the Board’s prior attempts to read and apply Section 8(b)(1)(B) very broadly. *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790 (1974); *NLRB v. Electrical Workers*, 481 U.S. 573 (1987). “Both the language and the legislative history of §8(b)(1)(B) reflect a clearly focused congressional concern with protection of employers in the selection of representatives to engage in *two particular and explicitly stated* activities, namely collective bargaining and the adjustment of grievances.” *Florida Power*, 417 U.S. at 803 (emphasis added). The Court went on to state that the Board’s *Oakland Mailers* decision, finding that collective bargaining can include contract interpretation, falls “within the *outer limits* of” the adverse-effect test. *Id.* at 805. Accordingly, the Supreme Court retreated from the Board’s attempt to convert every supervisory duty into a Section 8(b)(1)(B) duty.

Here, Counsel is inappropriately attempting to expand Section 8(b)(1)(B) duties. For instance, in claiming that David Hines (“Hines”) engaged in Section 8(b)(1)(B) duties, Counsel generically refers to Hines’ discussions related to a “workplace dispute” or “workplace grievances”. For facts supporting this claim, Counsel relies on the affidavit Local 50’s Business Manager Dan Poteet (“Poteet”) provided in the underlying investigation of these allegations. As outlined in his affidavit, the “dispute” Poteet discussed with Hines was the quality of the work bargaining unit members were being told to perform on a certain job. Members were concerned that the materials they were being told to use were not up to standards. As Hines was the individual

responsible for assigning work, Poteet contacted him to ask if there were any issues. In other words, Poteet was simply questioning a witness about a potential issue that members brought to his attention. This does not mean that Hines was engaged in Section 8(b)(1)(B) duties. After the discussion with Hines, Poteet went to the jobsite and determined that the jobsite was fine, and that is where it ended. There were no grievances filed over this “issue”.¹

Two other “issues” that were mentioned in Poteet’s affidavit, which Counsel appears to be relying on, were not issues where Hines was involved in the resolution: there was a question 1) about mileage pay to the members and 2) assignment of apprentices. Even if Hines was involved in the decisions about the underlying payment of mileage and the assignment of apprentices, that is insufficient to rise to the level of Section 8(b)(1)(B) duties. In *NLRB v. Sheet Metal Workers*, 64 F.3d 465 (1995), the union fined a supervisor-member for 1) directing employees to work under the wrong union work rules; 2) assigning work to individuals whose job classifications were prohibited by the work rules; and 3) failing to ensure correct travel pay. The Court found that these duties do not qualify under the narrow interpretation of Section 8(b)(1)(B) duties. These were simply supervisory duties, not contract interpretation issues. Additionally, as to grievance adjustment, the Court rejected the argument that the correction to the travel pay issue by the discriminatee himself constituted grievance adjustment.

Likewise, in *Comfort Conditioning Co., Inc.*, 340 NLRB No. 149 (2003), the Board itself found that resolution of work-related complaints on the jobsite does not rise to the level of Section 8(b)(1)(B) duties. The Board explained that resolution of such disputes “in the absence of

¹ Counsel makes much to do about Poteet’s simple statement that Local 50 would contest any termination that resulted because of quality of work or refusal to perform inferior work. First, there were no such terminations, and if there had been, the grievances would have gone to Tom Wolfe, not Hines. Second, simply making the statement that Local 50 would enforce its contract through the grievance and arbitration procedure does not convert Hines from a supervisor-witness to a Section 8(b)(1)(B) representative. Hines would have had to actually engage in the grievance adjustment itself, which he did not do.

participation in any formal grievance procedure” does not confer Section 8(b)(1)(B) representative status. Here, Hines was not involved in the resolution of any of these alleged issues. Accordingly, the fact that Hines may have assigned the work and failed to ensure members were given the correct mileage pay does not convert him from a run of the mill supervisor to a Section 8(b)(1)(B) representative.

Similarly, the “dispute” over portability Counsel references in regard to James Petrides (“Petrides”) again was a question of assignment of work that cannot, on its own, convert Petrides into a Section 8(b)(1)(B) supervisor. This portability issue is a red herring anyway. For the reasons stated below, the allegations relating to Petrides must be dismissed simply because there is no collective bargaining relationship between Local 50 and Petrides’ employer, Advanced Energy Protection, LLC. However, to the extent the portability question is examined, the portability assignment of work “issue” does not rise to the level of Section 8(b)(1)(B) duties as noted in *Sheet Metal Workers*, 64 F.3d 465.

Counsel is simply attempting to expand Section 8(b)(1)(B) duties to include normal supervisory functions. This is inappropriate under *Florida Power and Electrical Workers*; thus, the Consolidated Complaint must be dismissed.

IV. Counsel Admits That It Cannot Prove The Basic Elements of Section 8(b)(1)(B) Violation.

Even if it were appropriate to expand the law in this case to find that Section 8(b)(1)(B) applies to 1) nonmembers, 2) who receive no discipline, and 3) perform only ordinary supervisory duties, which it is not, the Consolidated Complaint should still be dismissed. Counsel acknowledges that the fundamental requirements of a Section 8(b)(1)(B) violation are not present here with respect to, at least, three of the four alleged discriminatees.

A. Counsel for General Counsel Admits Darrell Gleadell Does Not Participate in Any Section 8(b)(1)(B) Duties.

In its Response, Counsel admits that Darrell Gleadell (“Gleadell”) did not possess or engage in any Section 8(b)(1)(B) related duties. (Response, p. 3 fn. 3). Rather, it argues that there can be a violation found because “in other contexts”, the Board has found a violation where “otherwise uninvolved discriminatees...get swept up as collateral damage”. In so arguing, Counsel relies on *Advanced Masonry Associates, LLC*, 366 NLRB No. 57 (2018). However, *Advanced Masonry* is inapplicable to the case at hand.

First, *Advanced Masonry* is not a Section 8(b)(1) case; it dealt with employer discipline of employees under the *Wright Line* standard. Undersigned counsel could not find a single case where “collateral damage” argument was applied in the context of a Section 8(b)(1)(B) violation. Second, it is inappropriate to apply *Advanced Masonry*’s “collateral damage” reasoning here. In evaluating whether the employer violated Section 8(a)(3) when it discharged the work partner of a known union supporter, the Board cited *Adam Wholesalers*, 322 NLRB 313 (1996). In both *Advanced Masonry* and *Adam Wholesalers*, the “collateral damage” was intimately associated with a known union supporter. Accordingly, union animus could be implied in those situations, thus, supporting a Section 8(a)(3) violation. A similar scenario is not present here. Gleadell was not working alongside any employee engaging in Section 8(b)(1)(B) duties where any alleged animus can be implied towards him.

The “other contexts” that Counsel relies upon to urge finding a violation based on collateral damage simply does not translate to the case at hand. Accordingly, as Counsel concedes that Gleadell does not engage in any Section 8(b)(1)(B) duties, there can be no finding that Local 50’s actions were taken “while [he] is engaged in §8(b)(1)(B) duties” and thus, the Consolidated Complaint as it pertains to Gleadell should be dismissed.

B. Counsel Admits Advanced Energy Protection is Not Signatory with Local 50, Which is Necessary Before a Violation Can Be Found.

Similarly, the absence of a collective bargaining relationship between Local 50 and Charging Party Advanced Energy Protection (“Advanced”) destroys any allegation by Charging Party Advanced. *N.L.R.B. v. Int’l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 589, 107 S. Ct. 2002, 2004, 95 L. Ed. 2d 557 (1987).

Counsel concedes that there is no collective bargaining relationship between Local 50 and Advanced. (Response p. 3). Further, Counsel has not, and cannot, dispute that Advanced performed work in Local 50’s jurisdiction just once. When it did, it did so pursuant to provisions of the collective bargaining agreement between Advanced and Local 18 out of Indianapolis. “Section 8(b)(1)(B) was primarily intended to prevent a union engaged in a *long-term relationship* with an employer from dictating the latter’s choice of representation...” *Id.* at 591 (emphasis added). Here, there is no collective bargaining relationship, let alone a long-term one, between Local 50 and Advanced. Thus, there can be no violation.

The Board has previously rejected finding a bargaining relationship in a similar situation, where an employer worked pursuant to a different agreement but within the local’s jurisdiction. In *Songer Corporation*, 308 NLRB No. 101 (1992), the Board found no Section 8(b)(1)(B) violation because there was no collective bargaining agreement even where the employer performed work in the local union’s jurisdiction on various occasions under a National Maintenance Agreement.

As there is no collective bargaining relationship, Advanced cannot claim Petrides had any collective bargaining or grievance adjustment duties *vis a vis* Local 50, and the Consolidated Complaint as to Charging Party Advanced must be dismissed.

C. Counsel Concedes There Was No Labor Dispute with Charging Party Pedersen.

Counsel urges finding a violation as to Jim Perrault (“Perrault”), like Gleadell, as “collateral damage”. For the reasons stated above, the theory does not apply in this context. Although Counsel references the fact that Perrault participated in negotiations on behalf of the Contractors’ Association earlier in 2018, it admits that there were no labor disputes between Pedersen and Local 50.² In fact, Counsel explained that its allegations are only related to Hines and Petrides, alleging Local 50’s decision to no longer allow retirees to double dip was because of “labor disputes between Poteet and Hines and Petrides” only. (Response p. 4). Discipline of a supervisor-member is coercive, and thus violates Section 8(b)(1)(B), only if it is because of behavior that occurred “*while he or she is engaged in 8(b)(1)(B) duties.*” *Electrical Workers*, 481 U.S. 582.

There was no dispute that occurred during negotiations of the collective bargaining agreement, let alone, issues on Perrault’s part. The contract was ratified in June 2018, and no issues have arisen under the collective bargaining agreement with Pedersen. As Counsel concedes, that there was no dispute for which Perrault could have been disciplined. Accordingly, there can be no Section 8(b)(1)(B) violation with regard to Charging Party Pederson Insulation Co.

V. Conclusion

The U.S. Supreme Court mandates that Section 8(b)(1)(B) must be read narrowly. It cannot, and should not, be expanded to cover mundane supervisory functions, which is all that is even alleged here. More importantly, however, Counsel concedes that it is unable to prove the elements

² Counsel claims that Perrault’s participation in the termination of bargaining unit members conveys Section 8(b)(1)(B) representative status on him. That is simply not the case. As with Hines, simply because he may be a witness to a grievance as the decisionmaker does not mean that he adjusts grievances. In any event, the vague and conclusory allegations by Counsel that Perrault has been involved in any grievance adjustment is of no consequence, as there was no dispute between Local 50 and Perrault’s employer, Pedersen.

of a Section 8(b)(1)(B) violation. For all of the foregoing reasons, the Consolidated Complaint must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO (HFIA), Local Union No. 50's Reply to Counsel for the General Counsel's Response to the Board's Notice to Show Cause Order on November 6, 2019 on the following parties via email:

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