

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Administrative Law Judge Arthur Amchan

UNITED STEEL, PAPER AND)	
FORESTRY, RUBBER,)	
MANUFACTURING, ENERGY, ALLIED)	
INDUSTRIAL AND SERVICE WORKERS)	Case No. 08-CB-238577
INTERNATIONAL UNION, LOCAL 1-912)	
)	
)	
and)	
)	
JOHN BROWN, An Individual)	
)	
)	
)	
)	

RESPONDENT'S POST-HEARING BRIEF

SCHWARZWALD McNAIR & FUSCO LLP

Timothy Gallagher
1215 Superior Avenue East
Suite 225
Cleveland, Ohio 44114-3257
(216) 566-1600 (Telephone)
(216) 566-1814 (Facsimile)
tgallagher@smcnlaw.com

Attorneys for Respondent

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I. INTRODUCTION.

The Complaint in this matter makes two substantive allegations against Respondent United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-912 (the “Union” or “Respondent”). First, the Complaint alleges that:

About March 1, 2019, Respondent, in an email from Joseph Sauerwein, coercively warned and/or threatened Charging Party [John Brown] that the Employer could discipline him for criticizing Respondent.

The second allegation states that:

About the first week of March 2019, Respondent, by its Process Safety Coordinator Joel Steingraber, coercively harassed and/or intimidated Charging Party.

General Counsel Exhibit (“GC Ex.”) 1(e) at Paragraphs 7-8.

As detailed below, both the facts adduced at the hearing and the applicable law preclude a finding that the Union violated Section 8(b)(1)(A) of the National Labor Relations Act (the “Act”). The facts demonstrate that the Union took no action toward Charging Party John Brown (“Brown”) based on his criticizing the Union or its leadership. Rather, the Union reacted to an anonymous complaint lodged against Brown which objected to his use of offensive language in two letters he authored and distributed. The Union’s reaction to this anonymous complaint consisted of: (i) advising the Union membership that the Union does not condone the use of offensive language and that the Union was a resource available to members who felt offended by objectionable language; and (ii) advising Brown that his use of offensive language could result in discipline from his employer, the Toledo Refining Company, LLC (the “Company”), as the anonymous complaint posited, and as had actually occurred to Brown in 2016 for his use of offensive language. As to the law, the governing principles of *Office and Professional*

Employees Local 251 (Sandia National Laboratories), 331 NLRB 1417 (2000) and the free speech protections of Section 8(c) of the Act preclude the finding of a Section 8(b)(1)(A) violation. Accordingly, the Complaint should be dismissed in its entirety.

II. STATEMENT OF FACTS.

In February 2019, the Union was in the midst of negotiations for a successor collective bargaining agreement (“CBA”) with the Company. Hearing Transcript (“TR”) at 66. The then existing CBA was set to expire on February 8, 2019. TR at 21. During February 2019, the Union held two information meetings/ratification votes for its membership on contract offers from the Company. TR at 67. Ultimately, a successor collective bargaining agreement was reached. TR at 21.

A. Charging Party Distributes Letters Critical Of The Union And Its Leadership During Contract Negotiations.

At all times material to this matter, Brown was not a member of the Union having resigned his membership in July 2017. TR at 20. During the February 2019 negotiations, Brown distributed two letters throughout the Company’s facility to the Union membership that were critical of the Union’s leadership and its conduct of the negotiations. TR at 26-27. According to Brown’s testimony, he distributed his first letter on February 20, 2019. TR at 27. Brown placed his name on this letter so there is no question of his authorship. GC Ex. 3. In relevant part, Brown’s first letter stated that during a contract information meeting the Union’s leadership advised the Union membership that by voting “no” on the Company’s contract offer, the membership would “get to tell the company uck you.” GC Ex. 3. Brown acknowledged that he omitted the letter “f” from “uck” and that the word he intended to convey was “fuck”. TR at 45-46.

Brown testified that he distributed his second letter on February 22, 2019. TR at 27. GC Ex. 4. Brown again placed his name on this letter, so again there is no question as to his authorship. GC Ex. 4 at second page. Brown's second letter included the following sentence: "Because the company took this impasse and turned it sideways and shoved it up your ass." *Id.*

Brown included the above-quoted language in his letters against the background of his having been suspended in June 2016 for using offensive language. TR at 37, 47. As Brown testified, in June 2016 he was involved in a workplace incident wherein a fellow employee was running his mouth. TR at 37. At one point, Brown had enough and told the employee "Hey, shut the fuck up". *Id.* For his use of this "speech, [his] language", Brown was suspended for three days by the Company. TR at 37, 47.

Despite pleas and inquiries from its upset membership, it is undisputed that the Union made no response of any sort to Brown's letters. TR at 68-70.

B. An Anonymous Complaint Is Lodged With Company And Union Officials Regarding Language Used By Brown In His Letters.

On February 26, 2019, four days after Brown distributed his second letter, Company and Union officials received an anonymous complaint emailed to them regarding Brown's letters, his distribution of them, and most significantly his use of what the complainant described as "references [which] were sexual in nature", "very offensive", "offensive" and, "otherwise inappropriate". Union Exhibit ("U Ex.") 1 and TR at 70-73.¹ The anonymous complainant

¹ At the hearing, Counsel for the General Counsel objected to the relevance of U Ex. 1, the February 26, 2019 anonymous complaint. TR at 73-74. The document is relevant because the fact that it was sent to Union officials, including Joseph Sauerwein, Chair of the Union's Civil and Human Rights Committee, and complained about Brown's use of offensive language, is what prompted the Union to take action regarding Brown's letters and not the fact that Brown's letters criticized the Union as alleged by General Counsel. In short, U Ex. 1 rebuts the General Counsel's theory that the Union acted in response to Brown's criticisms.

specifically noted his or her opinion that the “worst” of the language used by Brown was his use of the phrase “[b]ecause the company took this impasse and turned it sideways and shoved it up your ass.” U Ex. 1. The anonymous complaint also set forth six violations of the Company’s Employee Handbook (U Ex. 2) its author believed Brown committed based on the language he used in his letters and his methods of distributing them. U Ex. 1.

As testified to by Union witness Joseph Sauerwein, the violations of the Employee Handbook that Brown committed in the eyes of the complainant consisted of the following:

Class A: A violation of any of the following Rules of Conduct by an employee is considered inexcusable and can result in discharge.

12. Immoral, obscene, or indecent conduct.
14. Leaving the job or work area where relief is required without permission or relief.

Class B: A violation of any of the following Rules of Conduct by an employee is considered serious misconduct. The first violation of any of these can be cause for 24 hours off without pay. A second violation of the same or any other Rule of Conduct can result in discharge.

1. Failure to wear required personal protective equipment.
2. Harassing; threatening or coercing others; using abusive or threatening language.

Class C: A violation of any of the following Rules of Conduct by employee is considered misconduct and is not to be tolerated. The first violation can result in a written warning notice. The second violation of this or any other "C" Rule of Conduct can be cause for 24 hours off without pay. Any further violation may be cause of discharge.

5. Selling, soliciting, canvassing, or distributing articles or literature without Company permission.
7. Failure to adhere to reasonable standards of courtesy and failure to be considerate of the rights of others including fellow employees.

TR at 77-81, 84-88, U Ex. 1 at second and third pages and U Ex. 2 at 58-60.

The Company's Employee Handbook applies to all of its employees at the Toledo refinery including Brown and violations of the Handbook can lead to discipline including discharge. TR at 77-79 and U Ex. 2 at 58-60.

The anonymous complaint was sent to officials in high authority within the Company including the Toledo Refinery Manager Michael Gudgeon (the number one person in the Company's Toledo refinery hierarchy), the Toledo Refinery Human Resources Representative Deithra Glaze, Corporate Human Resources Representative Jane Jacobs and Corporate Vice President of Refining Herman Seedorf, the number two person in the Company's corporate hierarchy. TR at 72-73 and U Ex. 1 at first page.

The anonymous complaint was also simultaneously sent to Union President Justin Donley, Union Vice President Matt Velker and Union Treasurer Sauerwein. TR at 71-73 and U Ex. 1 at first page. Because Sauerwein also serves as Chair of the Union's Civil and Human Rights Committee ("Committee"), and because of the complaint's references to "sexual preferences" and "offensive language", the Union decided that the complaint raised issues properly addressed by the Committee. TR at 64-65, 75-76. In addition to Sauerwein as Chairman, the Committee has six additional members, including Keith Krygielski. TR at 66. The Committee aims to ensure that the human and civil rights of the Union membership are protected. TR at 65-66, 106. The Company plays no role in the Committee's conduct. TR at 65.

Upon receipt and review of the anonymous complaint, Sauerwein understood the civil and human rights based nature of the complaint being lodged given the author's references to "sexual preferences" and certain of Brown's language, particularly use of the phrase "[b]ecause the company took this impasse and turned it sideways and shoved it up your ass." TR at 76.

Sauerwein concluded that certain language in Brown's letters were offensive to the anonymous complainant. TR at 77. Accordingly, Sauerwein and Union Vice President Velker contacted the Union's parent body and spoke to its top Civil and Human Rights affairs person in the State of Ohio. TR at 75-76.

As a result of this consultation, the Union and Committee decided on a two pronged approach. The first prong was to address the entire union membership advising it that concerns had been raised about letters distributed in the refinery and to reiterate that all employees had the right to report to work in an atmosphere free from harassing and offensive language and conduct, and that the Union was an available resource for those who felt such conduct had occurred. TR at 88-89 and Joint Exhibit ("Jt. Ex.") 1. The Union and Committee's second prong of response was to reach out to Brown directly, given the Union's duty to represent Brown, and advise him that a complaint had been received regarding the letters he had distributed, that some of the language he used in the letters was offensive and that such conduct could lead to his being disciplined by the Company. TR at 77, 89. The Union took this two pronged approach in order to satisfy its legal obligation to fairly represent all bargaining unit members: both those potentially offended by Brown's language or similar language that could be used in the future; and Brown himself whom the Union believed could be disciplined by the Company for his conduct. TR at 77, 88-89, 91-92, 94.

C. The Union's Civil And Human Rights Committee Communicates With The Union Membership.

On March 1, 2019, Sauerwein caused an email with attached letter to be sent to the entire Union membership. Jt. Ex. 1. In its entirety, the email stated:

Brothers and Sisters,

Your Civil and Human Rights Committee has received concerns from the membership. Please see attached letter.

In Solidarity and Kinship,

USW Local 912 Civil and Human Rights Committee

Jt. Ex. 1 at second page.

The Committee's letter stated as follows:

Brothers and Sisters,

Your Civil and Human Rights Committee has received concerns from the membership regarding offensive and threatening language that has been used in the Refinery over the last few weeks.

We want to be very clear that the Union does not consider this type of language to be acceptable and we want to continue to ask that all members of the workforce are treated with dignity and respect. We fully support every employee's desire to come to work without being subjected to offensive language and material, harassment, or threats.

We stand by the principles and provisions of Title VII of the Civil and Human Rights Act, and encourage all employees to bring any concerns forward to the *Union* if they feel that their Civil or Human rights have been infringed upon.

In Solidarity and Kinship,

USW Local 912 Civil and Human Rights Committee

Contact Information:

Joseph Sauerwein; 419.944.3902

Richard Avalos; Plant 6

Keith Krygielski; Plant 3

Robert Deboe; Plant 4

Jt. Ex. 1 at third page.

The letter is notable for three things it does not do. One, the letter does not mention Brown by name or make any reference to his authorship of the letters at issue. TR at 44-45 and Jt. Ex. 1. Second, the letter does not reference Brown's criticisms of the Union or its leadership. Jt. Ex. 1. Third, the Committee's letter does not even mention the subject matter of the letters at issue. Jt. Ex. 1. Rather, the Committee's letter focuses exclusively on the "offensive and threatening language that has been used". Jt. Ex. 1 at third page.

D. The Union's Civil And Human Rights Committee Communicates With Brown.

On March 1, 2019, sometime after sending his email and letter to the Union membership, Sauerwein went to communicate the Committee's concerns that Brown could potentially face discipline for his use of offensive language in the letters he distributed personally to Brown. TR at 89-92. Sauerwein had fellow Committee member Keith Krygielski accompany him to observe Sauerwein's conversation with Brown. TR at 89-90, 106-107. Sauerwein and Krygielski entered the Plant 5 Operator Control Room where Brown and other Company employees were engaged in conversation. TR at 90-91, 109-110. Sauerwein waited a while before stating to Brown that he and Krygielski were present on behalf of the Committee to discuss a matter with Brown. *Id.* Brown replied that he was in a meeting. *Id.* Sauerwein waited a few additional minutes before again stating to Brown that he would like to speak with him. *Id.* Brown replied that he was busy at which point Sauerwein and Krygielski left the Control Room. *Id.* The demeanor of both Sauerwein and Krygielski was calm and business like. TR at 110. Krygielski said nothing the entire time. TR at 91, 110-111

Later that day, still desiring to communicate the Committee's concerns to Brown about potential discipline for his use of offensive language, Sauerwein sent Brown the following email:

John,

The Civil and Human Rights Committee has received concerns from the membership regarding letters distributed recently.

Language in said letters could be considered offensive. The language in the letters could lead to company disciplinary involvement.

Due to the offensive nature and the disciplinary possibilities we want to advise you that is not advisable.

When we stopped in you [sic] plant to counsel you on this matter you advised us you were busy at the time. This is an attempt to ensure you are aware of the situation.

Joseph Sauerwein
USW Local 1-912
6465 office

GC Ex. 5 and TR at 92-93.

As with the Committee's letter to the Union membership, Sauerwein's email to Brown is most notable for what it does not do. The email makes no mention of Brown's criticisms of the Union or its leadership. TR at 93 and GC Ex. 5. Instead, the email merely cautions Brown that the "[**I**]language in said letters could be considered offensive" and that "[t]he **language** in the letters could lead to company disciplinary involvement." GC Ex. 5 (emphasis added). In sum, the email advises Brown to be careful of the language he uses in any letters he distributes and says nothing about subject matters he should or should not address. Sauerwein's testimony confirmed that Brown's criticism of the Union and its leadership played no role in the actions taken by him, the Union or the Committee towards Brown. TR at 93.

In response to Sauerwein's email, Brown sent his own email to Company Plant Human Resources Manager Deithra Glaze in which he blatantly misstated the nature of Sauerwein's email by wrongly claiming that Sauerwein's email informed Brown that he "should no longer publish letters that contained opposite view points [sic] and or criticism of Union Leadership, or

that i [sic] could be subject to Company discipline.” GC Ex. 6. Plainly, Sauerwein’s email said nothing of the sort thus demonstrating that Brown’s perspective on the matters at issue is distorted and untethered to the facts.²

E. Brown Suffers No Adverse Consequences Of Any Sort As A Result Of His Letters Or The Union’s Conduct.

The record is completely bereft of any evidence that Brown suffered any adverse consequences as a result of anything alleged in the Complaint or otherwise. By dint of being a non-member of the Union, Brown is immune from any form of discipline or punishment from the Union. Brown testified that while he was interviewed by Company corporate attorneys in March 2019 as a result of the February 26 anonymous complaint, he admitted he received no discipline from the Company as a result. TR at 41-43. Brown further admitted that the interview by these Company attorneys focused on the language he used in his letters and whether that language violated any provisions of the Employee Handbook. TR at 50.

F. Union Agent Steingraber Engaged In No Coercively Harassing Or Intimidating Conduct Towards Brown.

The second factual allegation against the Union is that its agent Joel Steingraber “coercively harassed and/or intimidated” Brown. GC Ex. 1(e), Complaint at Paragraph 8. The facts demonstrate that Steingraber did no such thing.

Brown testified that during the second week of March, Company employees were conducting a safety audit in the Plant 5 Operator Control Room where Brown works and that

² Equally untethered to the facts is Brown’s description in that same email regarding Sauerwein and Krygielski’s attempt to speak to him in the Plant 5 Operator Control Room earlier on March 1, 2019 which he describes as “an attempt to harass and intimidate myself.” GC Ex. 6. Brown’s own testimony at the hearing demonstrated that no such attempt occurred (TR at 30-31) as did the testimony of Sauerwein and Krygielski. TR at 90-91, 109-111. There is simply no objective evidentiary support for Brown’s gross exaggerations.

Steingraber participated in the audit. TR at 36. According to Brown, later that same day, Steingraber came into the Plant 5 Operator Control Room again, stood over him and stared at him, saying nothing. TR at 36. Even accepting Brown's testimony, it fails to establish any coercive, intimidating or harassing conduct. But one need not accept Brown's testimony because Steingraber convincingly testified that no such incident ever occurred.

Steingraber testified that during the first two weeks of March 2019, he and Brown were only in the refinery at the same time on one work day, a midnight shift. TR at 119. Steingraber testified that Company logs confirmed his testimony. TR at 122. Steingraber further testified that on this one occasion he was performing maintenance work as a pipe fitter in Plant 8 and that he never ventured to Plant 5 where Brown works. TR at 119. Finally, Steingraber testified that at no time in 2019 while in the refinery did he ever engage in coercive, harassing or intimidating behavior toward Brown or did he stand over or near Brown, hover over him or simply stare at Brown. TR at 117-118, 120, 127. Accordingly, this Complaint allegation fails as a matter of fact.

III. ARGUMENT.

A. The Union's Conduct Does Not Violate Section 8(b)(1)(A).

In relevant part, Section 8(b)(1)(A) of the Act provides that “[i]t shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7”. As an initial matter, the Union notes that Section 8(b)(1)(A) is significantly narrower in scope than Section 8(a)(1) because 8(b)(1)(A) does not make illegal conduct that merely “interferes” with the exercise of Section 7 rights but only prohibits conduct that restrains or coerces employees in the exercise of such rights. *N. L. R. B. v. Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Brothers)*, 362 U.S. 274, 285 (1960).

In *Office and Professional Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000), the National Labor Relations Board (the “Board”) set forth the parameters of what constitutes a Section 8(b)(1)(A) violation. In *Sandia*, the Board restricted violations of Section 8(b)(1)(A) of the Act to union conduct that:

- (i) impacts the employment relationship;
- (ii) impairs access to the National Labor Relations Board’s processes;
- (iii) pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts; or
- (iv) otherwise impairs policies imbedded in the Act.

331 NLRB at 1418-1419.

“[I]n determining whether Section 8(b)(1)(A) ha[s] been violated ... [i]t is well settled that the appropriate test is an objective one. A finding of a violation under this test turns ... on whether [the union’s] conduct would have a reasonable tendency to restrain or coerce employees in the exercise of statutory rights.” *In Re Metro. Reg’l Council of Philadelphia & Vicinity, United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 335 NLRB 814, 815 (2001).

In addition, “a proper application of Sec. 8(b)(1)(A) requires balancing the employees’ Sec. 7 right to engage in or refrain from concerted activity against the legitimacy of the union interest at stake”. *Local 254, Service Employees International Union, AFL-CIO (Brandeis University)*, 332 NLRB 1118, 1122 fn.11 (2000).

Here, the Union engaged in no conduct having a reasonable tendency to restrain or coerce Brown in the exercise of his Section 7 rights within the parameters of *Sandia*. Moreover, the Union’s conduct only served the legitimate interest of both its membership by advising them of their right to be free from offensive language in the workplace and of Brown by advising him of

the potential consequences of using offensive language. Accordingly, there can be no finding of a Section 8(b)(1)(A) violation and the Complaint should be dismissed.

1. The Union's Conduct Had No Impact On Brown's Employment.

As Brown admitted, he received no discipline from the Company as a result of the letters he authored and distributed in February 2019. TR at 43. No evidence of any sort was introduced showing that Brown's employment was impacted or affected in any way as a result of the Union's conduct.³ No Union conduct had any impact on Brown's employment relationship. Accordingly, there can be no Section 8(b)(1)(A) violation premised on *Sandia's* first factor.

2. The Union's Conduct Did Not Impair Brown's Access To The Board's Processes.

Similarly, there is no evidence that the Union took any action which impaired Brown's access to the Board's processes. Indeed, Brown's filing of unfair labor practice charges against the Union, and Counsel for the General Counsel's prosecution of the Complaint demonstrates no such impairment occurred. Accordingly, there can be no Section 8(b)(1)(A) violation premised on *Sandia's* second factor.

³ The only evidence of any Company action towards Brown was his being interviewed by Company attorneys based on language Brown used in his letters. TR at 40-42, 50. The Union submits that this Company action was prompted by the February 26, 2019 anonymous complaint which was sent to several high level Company representatives as there is no evidence the Union communicated with the Company at all regarding Brown's letters. Moreover, there is no evidence that Brown was economically harmed in any way by being interviewed such as loss of pay. Finally, the Board's 8(b)(1)(A) cases require a tangible impact on the employment relationship such as loss of hiring hall referral opportunities. *Laborers' International Union Of North America, Local Union No. 91 (Scrufari Construction Co., Inc.)*, 368 NLRB No. 40 (2019). There is no such evidence here.

3. The Union Engaged In No Coercive Behavior Towards Brown.

The third *Sandia* factor addresses unacceptable methods of union coercion such as physical violence or threats of physical violence. *Sandia*, 331 NLRB at 1418 and *United Food and Commercial Workers, Local 7R*, 347 NLRB 1016 (2006)(verbal threat of physical violence by union agent to employee constitutes unlawful coercive conduct). Here, the Union engaged in no such conduct.

The only evidence offered by Brown of any physical conduct towards him by a Union agent was his testimony that on one occasion Joel Steingraber “walked up to me within 2 to 3 feet and just stood over me, towering over me.” TR at 36. The Union initially questions how Steingraber could have towered over Brown from two to three feet away. “Towering over” someone can only take place when one individual invades the personal space of another and such invasion cannot take place from two to three feet away. Steingraber said nothing to Brown during this supposed event. TR at 36. For several additional reasons, this evidence is insufficient to constitute a Section 8(b)(1)(A) violation.

First, the Union submits that Steingraber’s denial of any such event ever occurring should be credited. TR at 117-118, 120, 127. Second, assuming *arguendo* that Brown’s testimony is to be credited it nonetheless fails to rise to the level of coercion sufficient to violate Section 8(b)(1)(A). See *Graphic Communications Conference/International Bhd. of Teamsters Local Union No. 735-s, & Bemis Co., Inc.*, Case No. 04-CB-215127, 2019 WL 561351 (NLRB Div. of Judges) at 5, 7 and 15 at fn. 12 (Feb. 1, 2019)(“... wagging a finger in someone's face is always objectionable in terms of manners-- but neither finger-wagging nor angry confrontation is actionable under the Act” and act of staring at someone from two parking spaces away cannot reasonably be construed as “intimidation”). Brown’s testimony falls far short of demonstrating

even an “angry confrontation” with Steingraber, much less something actionable under the Act. Brown offered no testimony that Steingraber made gestures of any sort towards him and admitted that Steingraber said nothing to him thereby ruling out the possibility that Steingraber made any verbal threats of physical violence to Brown.

Third, Brown’s own testimony establishes that he suffered no coercive effect from Steingraber given Brown’s testimony that the only reason he did not say anything to Steingraber was that he “was afraid to get into any other type of confrontation” for fear of termination given the 2016 three day suspension on his record. TR at 38. The Union submits this testimony from Brown establishes that he felt no fear or intimidation from Steingraber’s alleged conduct and that neither would any objective person.

For all the above reasons, the Union engaged in no conduct which violates *Sandia*’s third parameter.

4. The Union Engaged In No Conduct Impairing Policies Imbedded In The Act.

The Board has interpreted the fourth *Sandia* factor, impairment of policies imbedded in the Act, to encompass such matters as a union threatening an employee with internal charges if he testified for the employer at arbitration hearing because grievance and arbitration procedures are a fundamental component of national labor policy (*Int’l Bhd. of Teamsters, Local 992 (Ups Ground Freight, Inc.) & Ronald Wharton*, 362 NLRB 543, 543 (2015)) and a union rule restricting member resignations during a strike (*Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330, 1333 (1984)). Here, the Union engaged in no conduct that impaired any policy imbedded in the Act. Rather, the Union simply responded to an anonymous complaint expressing offense at certain language used in Brown’s letters, advised the entire Union membership of their right to report to work free from offensive language and that the Union was

a resource if a member believed his or her civil or human rights had been infringed upon, and neutrally advised Brown that the Civil and Human Rights Committee received concerns regarding language used in Brown's letters and advised him that use of offensive language could lead to Company discipline. The Union took all this action without any consequence to Brown. Accordingly, the Union's conduct impaired no policies imbedded in the Act.

B. Section 8(c) Of The Act Prohibits The Finding Of A Violation Of The Act Based On The Union's March 1, 2019 Email To Brown.

The Complaint alleges that the Union restrained and coerced Brown in his exercise of Section 7 rights when Union Committee Chairman Sauerwein emailed Brown on March 1, 2019. GC. Ex. 1(e), Complaint, at Paragraph 7 and 9.⁴ Section 8 (c) of the Act precludes the finding of a violation based on Sauerwein's email given it contains no threat of reprisal or force or promise of benefits.

In its entirety, Sauerwein's email to Brown stated as follows:

John,

The Civil and Human Rights Committee has received concerns from the membership regarding letters distributed recently.

Language in said letters could be considered offensive. The language in the letters could lead to company disciplinary involvement.

Due to the offensive nature and the disciplinary possibilities we want to advise you that is not advisable.

When we stopped in you plant [sic] to counsel you on this matter you advised us you were busy at the time. This is an attempt to ensure you are aware of the situation.

⁴ Paragraph 7 specifically asserts that Sauerwein's email "coercively warned and/or threatened [Brown] that the Employer could discipline him for criticizing Respondent." As the email itself makes abundantly clear, Sauerwein's email makes no mention of Brown's criticisms of the Union (GC Ex. 5) and Sauerwein testified that the criticisms played no role in the Union's conduct and Counsel for the General Counsel produced no credible evidence to the contrary.

Joseph Sauerwein
USW Local 1-912
6465 office

GC Ex. 5 and TR at 92-93.

Section 8 (c) of the Act states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

As stated by the United States Supreme Court, “[t]he remedial function of [Section] 8(c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object.” *International Broth. of Elec. Workers, Local 501, A.F. of L. v. NLRB*, 341 U.S. 694, 704 (1951).

As is evident from its text, Sauerwein’s email “contains no threat of reprisal or force or promise of benefit”. Rather, it is “noncoercive speech” by the agent of a labor organization “in furtherance of a lawful object”, i.e., advising a Union represented employee that he potentially faces discipline for the use of offensive language. The legitimacy of the Union’s concern in this regard is detailed below in Section III (D).

Sauerwein’s conduct in sending the March 1, 2019 email to Brown simply pointed out to Brown that he potentially faced discipline from the Company for the use of offensive language. As such, the Union’s speech here is akin to that of the union in *Retail Clerks (AFL-CIO) Local 1222 (Mayfair Markets)*, 133 NLRB 1458 (1961) which was found protected by Section 8 (c).

In *Retail Clerks*, the respondent union represented grocery store employees and claimed its contract with the grocery stores gave its members jurisdiction over the shelving of goods delivered to the store by employees of a third party represented by another union which claimed

such work for its own members. 133 NLRB at 1459. In protesting the shelving work being done by non-grocery store employees, the respondent union:

was merely attempting to persuade the market Employers to conform voluntarily to what Respondent considered their contractual commitments to be. Respondent's conversations with the Employers in each case were totally devoid of either threats or actual coercive measures or any directions or instructions or other demands to Employer agents that went beyond mere requests and efforts at persuasion. When, as happened in most instances, the Employers after a brief period of compliance reverted to their previous practice of permitting driver-salesmen to shelve the disputed merchandise, no further action was taken by Respondent.

Id. at 1460.

As stated by the Trial Examiner, the respondent union "simply brought to the Employers' attention the fact that it felt there was a violation of contract in respect to work tasks and brought to the attention of the Employers the specific provision in the contract which it claimed was being violated." *Id.* at 1467. In agreement with the Trial Examiner, the Board found the union's conduct protected by Section 8(c) and dismissed the complaint. *Id.* at 1460, 1466-67.

Here too, Sauerwein's March 1, 2019 email simply brought to Brown's attention the possible disciplinary action he faced from the Company for use of offensive language, was "totally devoid of either threats or actual coercive measures or any directions or instructions or other demands", and the Union took no further action towards Brown. Accordingly, Sauerwein's email is protected by Section 8(c) and cannot form the basis of a Section 8(b)(1)(A) violation.

Finally, Section 8(c) immunizes the Union from liability even if it was erroneous in advising Brown that he potentially faced discipline from the Company for issuing his letters. In essence, Sauerwein's email to Brown was a statement of the Union's legal opinion that Brown could be disciplined for his letters. The communication of a "legal opinion is no less protected by Section 8(c) if it proves to be erroneous." *Velox Express, Inc.*, 368 NLRB No. 61, slip

opinion at 6 (2019). In *Velox*, the Board cites *North Star Steel Co.*, 347 NLRB 1364, 1367 fn. 13 for the proposition that ““Sec. 8(c) does not require fairness or accuracy”” and *Children’s Center for Behavioral Development*, 347 NLRB 35, 36 (2006) for the proposition that “[t]here is nothing unlawful in stating a legal position, even if it is later rejected.” *Id.* Here too, Section 8(c) immunizes the Union from liability even if it was incorrect in advising Brown that he potentially faced Company discipline for the language he used in his letters.

C. The Union Took No Action In Response to Brown’s Critical Letters Until The Anonymous Complaint Was Lodged Because Brown’s Criticisms Of The Union Played No Role In The Union’s Conduct.

Counsel for the General Counsel’s theory of the case is that the Union’s actions towards Brown was motivated by his critical comments of the Union and its leadership as set forth in the two letters he distributed. TR at 9. There is simply no evidence to support this theory. Indeed, the record evidence convincingly demonstrates that the Union responded only to the anonymous complaint lodged on February 26, 2019.

Union witness Sauerwein testified that the Union, despite pressure from its membership, took no action of any sort in response to Brown’s two letters. TR at 68-70. The factual chain of events shows that the Union took no action of any sort involving Brown’s letters until its receipt of the anonymous complaint at which point the Union: (i) contacted the International Union’s civil and human rights affair liaison; (ii) sent an email and letter to the membership; (iii) attempted to speak to Brown about possible discipline for use of offensive language; and (iv) followed up with an email to Brown when he refused to talk to the Union’s Civil and Human Rights Committee representatives. Sauerwein testified that Brown’s critical comments of the Union and its leadership played no role in the actions taken by the Union’s Civil and Human Rights Committee. TR at 93.

Even the testimony of Daniel Smith fails to establish that the Union's desire to communicate with Brown had anything to do with Brown's criticisms of the Union. Smith testified that "Joe [Sauerwein] had come down because he was interested in the possibility of people being offended by language in letters, and the sum and substance is that we [i.e., the Union] don't want anybody getting in trouble, we definitely don't want to spend a bunch of union money on John if we don't have to. The easiest way for John to not get in trouble is to not write letters." TR at 57. Indeed, Smith's testimony actually further demonstrates that the Union was: (i) focused on the language Brown used and not the subject matter of his letters; and (ii) concerned that Brown could be disciplined as a result. In sum, the evidence demonstrates that the Union's actions here were not based in any way on Brown's criticisms of the Union. Rather, the Union responded to the anonymous complaint and addressed the language Brown used.

D. The Facts Demonstrate The Legitimacy Of The Union's Concern That Brown Could Be Disciplined For Offensive Language In His Letters.

The hearing evidence demonstrated in at least three ways that the Union had legitimate concerns that Brown could be disciplined by the Company for use of offensive language in his letters. First, Brown received a three day suspension in 2016 for use of offensive language in the workplace. Second, the Company's Employee Handbook prohibits the use of such language in the workplace. Third, the Company's investigation of Brown triggered by the February 26, 2019 anonymous complaint focused on the language used by Brown.

1. Brown's 2016 Three Day Suspension For Using Offensive Language In The Workplace Demonstrates The Legitimacy Of The Union's Concerns That Brown Could Be Disciplined For Offensive Language In His Letters.

Brown testified that in 2016 he received a three day disciplinary suspension from the Company for saying the following to a fellow employee in the workplace: "Hey, shut the fuck

up”. TR at 37, 47. Brown confirmed that he was suspended for the language he used. TR at 37, 47. Obviously, it was Brown’s use of the word “fuck” that earned him his suspension. Significantly, the first letter Brown distributed by Brown effectively included the word “fuck” which Brown readily admitted was the word he meant to convey when using the phrase “uck you” but simply omitted the “f”. GC Ex. 3 and TR at 45-46. This 2016 episode convincingly demonstrates that the Company does not tolerate the use of offensive language in the workplace and thereby further demonstrates the legitimacy of the Union’s concerns that Brown could potentially face discipline for use of offensive language in his two February 2019 letters. This episode also belies Brown’s incredible testimony that no one in the workplace takes offense to use of the word “fuck”. TR at 46-47.

2. The Company’s Employee Handbook Demonstrates Brown Potentially Faced Discipline For Offensive Language Used In His Letters.

In addition to Brown’s effective use of the word “fuck” in his first letter, Brown’s second letter used the phrase “the company took this impasse and turned it sideways and shoved it up your ass.” GC Ex. 4. The Company’s Employee Handbook, applicable to Brown and all employees, arguably prohibits the use of such language thereby demonstrating the legitimacy of the Union’s concerns that Brown potentially faced discipline for language contained in his letters.

The Employee Handbook states that employees are not to engage in “immoral, obscene, or indecent conduct”, are not to use “abusive or threatening language”, and that the “[f]ailure to adhere to reasonable standards of courtesy and failure to be considerate of the rights of others including fellow employees” may lead to discipline. U Ex. 2 at 58-60. The Union reasonably believed that Brown potentially faced discipline for certain language he used in his letters as

complained about on February 26, 2019 (TR at 77-78, 89, 92-93 and 109) and reached out to Brown to advise him of this possibility as part of its duty to fairly represent Brown. TR at 77, 89. Doing so does not violate the Act.⁵

3. The Company's Investigation Of Brown Prompted By The Anonymous Complaint Focused On The Language Brown Used In His Letters.

As Brown testified, he was interviewed by Company attorneys as a result of the February 26, 2019 anonymous complaint and that the interview focused on the language that he used in his letters and whether said language constituted grounds for discipline under the Employee Handbook. TR at 50. These admitted facts further demonstrate the legitimacy of the Union's concerns that Brown potentially faced discipline as a result of language in his letters and justify the Union's conduct in advising Brown that such was the case.

IV. CONCLUSION.

For all the foregoing reasons, Respondent did not violate Section 8(b)(1)(A) and the Complaint should be dismissed.

Respectfully submitted,

SCHWARZWALD McNAIR & FUSCO LLP

/s/ Timothy Gallagher

Timothy Gallagher

1215 Superior Avenue East

Suite 225

Cleveland, Ohio 44114-3257

(216) 566-1600

(216) 566-1814 (Facsimile)

tgallagher@smcnlaw.com

Attorneys for Respondent

⁵ As noted at the hearing, the Union is not taking the position that Brown committed any violations of the Employee Handbook or could properly be disciplined for language he used in his letters. TR 81, 85-86.

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2019 the foregoing Respondent's Post-Hearing Brief was filed electronically and a copy was served via electronic mail on the following:

John Brown
631 County Road 10
Helena, Ohio 43435
John.Brown@pbfenergy.com (email)
bobbridgez@yahoo.com (email)

Deithra Glaze, HR Manager
Toledo Refining Company LLC/PBF Energy
1819 Woodville Road
Oregon, Ohio 43616
Deithra.Glaze@pbfenergy.com (email)

and

LerVal Elva, Esq.
National Labor Relations Board
Region Eight
1240 East Ninth St., Rm. 1695
Cleveland, Ohio 44199-2086
LerVal.Elva@nlrb.gov

Counsel for General Counsel

/s/ Timothy Gallagher
Attorney for Respondent