

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

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS – THE
BROADCASTING AND CABLE TELEVISION
WORKERS SECTOR OF THE COMMUNICATION
WORKERS OF AMERICA, AFL-CIO, LOCAL 51
(American Broadcasting Companies, Inc.)**

and

Cases 19–CB–244528
19–CB–247119

Jeremy Brown, an Individual

Sarah C. Ingebritsen, Esq.,
for the NLRB General Counsel.

David A. Rosenfeld, Esq. and Anne I. Yen, Esq.
(*Weinberg, Roger & Rosenfeld*),
for the Respondent Union.

Aaron B. Solem, Esq. & Glen M. Taubman, Esq.
(*National Right to Work Legal Defense Foundation, Inc.*),
for the Charging Party.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In mid-2019, Jeremy Brown, a camera operator for ABC in Oregon, notified NABET-CWA Local 51, which had a union security agreement with ABC, that he was asserting his rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), i.e., that he objected to paying for any of the Union’s non-representational activities and was requesting a corresponding reduction in his dues and fees. Brown’s *Beck* objection was misdirected, however; the Union requires that such objections be filed with the national union in Washington, D.C. Local 51 therefore did not respond to Brown’s objection or reduce his dues and fees.

The present litigation followed. Brown filed unfair labor practice (ULP) charges with the NLRB’s regional office, and the Regional Director issued a complaint against Local 51. The complaint alleges that Local 51 violated Section 8(b)(1)(A) of the National Labor Relations Act by failing to notify Brown that he had misdirected his *Beck* objection, to otherwise respond to or honor his objection, and to reduce his dues. In addition, it alleges that, after Brown filed his initial charge, Local 51 further violated Section 8(b)(1)(A) by sending overbroad and false or misleading evidence-preservation letters to or through Brown’s legal counsel.

A hearing to litigate these disputed allegations was held on September 30, 2020.¹ Each of the parties—the General Counsel, Charging Party Brown, and Respondent Local 51—thereafter filed briefs on November 5. As discussed below, the GC established under extant law that Local 51 unlawfully failed to properly respond to or honor Brown’s *Beck* objection. However, the GC failed to establish that Local 51’s post-charge evidence-preservation letters were unlawful.²

I. THE BECK OBJECTION

A. *The Relevant Facts*

NABET-CWA has had collective-bargaining agreements with ABC for many years. Among other things, the agreements have contained union security provisions requiring employees hired on a daily basis to become and remain union members after 20 days of employment in a calendar year or 30 days in two consecutive calendar years (Jt. Exh. 1, Art. III).

Brown has worked as a daily hire camera operator for ABC on and off since 1999. However, he did not join or pay dues and fees to the Union. Although Local 51 sent him a “welcome” letter in late 2008 informing him of the union security provisions and inviting him to become a union member, he did not do so or otherwise respond to the letter.³

In August 2016, Brown again resumed working for ABC as a daily hire camera operator after a 2-year hiatus. And, according to Local 51’s records, he reached the 20-day threshold to become covered by the union security agreement by the end of November of that year. Nevertheless, Local 51 did not send him another letter advising him of the union security provisions or inviting him to join at that time. And he did not join or pay dues or fees to the Union.

However, approximately 2 years later, in November 2018, Local 51 acquired a new president, Carrie Biggs-Adams. Shortly after being elected, Biggs-Adams discovered that

¹ Without objection, the hearing was conducted remotely via Zoom due to the COVID-19 pandemic. The Board’s jurisdiction and Local 51’s status as a labor organization under the Act as currently defined are undisputed and established by the admitted factual allegations. Local 51 also admits that the identified individuals allegedly involved in the alleged unfair labor practices (Local 51 President Carrie Biggs-Adams, Office Manager DeeDee Morua, and Attorney David Rosenfeld) were its agents at all material times under the Act as currently defined.

² Citations to the record are included to aid review and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 623 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert. denied* 522 U.S. 948 (1997).

³ See R. Exh. 1; and Tr. 71–72. There is conflicting evidence whether Local 51 at that time notified Brown of his *Beck* rights and how to file an objection to paying for non-representational activities. However, it is unnecessary to resolve the conflict given the long passage of time and the more recent events described *infra*.

Brown (and several other workers) had reached the threshold under the union security provisions. Accordingly, on February 7, 2019, she sent Brown another welcome letter that again informed him of the provisions. The letter advised him that he was required, as a condition of employment, to pay either union dues and initiation fees or agency fees equal to those dues and fees. It also advised him how much he would have to pay for the initiation fee (3 weeks base pay totaling \$6456, which he could pay in installments) and dues (2.25 percent of biweekly earnings).

The February 7 welcome letter also included several enclosures, which it listed at the end. These included a Membership Application, Payroll Authorization Form, and a Brochure titled “*Your Rights with Respect to Union Representation, Union Security Agreements and Agency Fee Objections.*” Among other things, the enclosed brochure explained that covered employees could elect to become an agency-fee payer rather than a full union member, and if they did so, they had the right under the *Beck* decision to object to paying any amounts for non-collective bargaining purposes and request a proportional reduction in their agency fees. The brochure stated that any such objections must be sent to the Agency Fee Administrator of CWA in Washington, D.C., and provided the address. (R. Exh. 2.)⁴

Brown did not respond to the February 7 letter. On April 1, therefore, Biggs-Adams sent him another letter. The letter reiterated that he was required, as a condition of employment, to pay union dues and initiation fees or agency fees in the amounts indicated in the prior letter. In addition, it advised that he also owed “back agency dues” since December 2016 totaling \$3429. The letter stated that if he did not comply with his financial obligations, Local 51 would notify ABC that he was no longer eligible for employment.

The April 1 letter also again included the same three enclosures, including the “Your Rights” brochure. The brochure was referenced at the beginning of the letter after describing the union security clause (“The legal significance of this clause is explained more fully in the enclosed document.”). As with the February 7 letter, the brochure was also listed with the other enclosures at the end. (R. Exh. 4.)⁵

⁴ About a month later, on March 14, Local 51’s office manager, Deedee Morua, sent Brown another letter notifying him that the February 7 letter had contained the wrong dues percentage and enclosed a corrected check-off authorization form. See GC Exh. 3.

⁵ The “Your Rights” brochure is not included with the other enclosures the General Counsel introduced into the record with the February 7 and April 1 letters. See GC Exhs. 2, 4. However, as mentioned above, the letters themselves indicate that the brochure was enclosed. And Biggs-Adams testified that Local 51’s practice is to enclose the brochure and that a copy of it was included with the copy of the letters to Brown and other listed enclosures in Local 51’s files (Tr. 71, 76–77). Further, Brown admitted on cross-examination that he could not recall if the brochure was enclosed with the letters (Tr. 56–60), and there is no evidence he ever asked for a copy of the brochure. Finally, the General Counsel appears to concede that there is insufficient evidence that the brochure was not enclosed with the letter. The complaint does not allege, and the GC’s posthearing brief does not argue, that Local 51 failed to notify Brown of his *Beck* rights when it sought to obligate him to pay dues. See *California Saw and Knife Works*, 320 NLRB 224, 233 (19956) (holding that a union unlawfully breaches of its duty of fair representation by failing to do so).

After receiving the April 1 letter, Brown called Local 51 and spoke to its office manager, Deedee Morua. He asked Morua why he was being asked to pay an initiation fee and back dues as he had been working for ABC for years and the Union was only now informing him that he had to pay them. Morua responded that he had to pay them or he couldn't work for ABC. She told him that if he had any more questions, he should contact Biggs-Adams. (Tr. 27–29.)

Brown emailed Biggs-Adams on April 4. He said he was “willing to join NABET and pay the dues that are 2.5% from every check” but needed “clarification” regarding the initiation fee and back dues. He said he objected to paying “any type of back dues” because he was not aware he was represented by NABET at the time. He also said that “we need to reevaluate the amount owed” for the initiation fee. He said he objected “to the collection and expenditure by the union of a fee for any purpose other than my pro rata share of the union’s costs of collective bargaining, contract administration, and grievance adjustment,” citing *Beck*. He asked Local 51 to provide him with his “procedural rights,” including a reduction of his fees to include only lawfully chargeable costs, notice of the calculation of that amount verified by an independent certified public accountant, and notice of the procedure adopted to hold his fees in an interest-bearing escrow account and afford him an opportunity to challenge the calculation and have it reviewed by an impartial decision maker. He requested a response “as soon as possible.” (GC Exh. 5.)

Brown also sent a follow-up email to Biggs-Adams early the following morning. He told her that he did sign and fill out the application to join NABET but did so under “durest” [sic] so he could continue to work until the matter got “cleared up on the exact amount needed to pay.” (GC Exh. 6.)

Biggs-Adams emailed Brown back about a half-hour later. She said she was working out of town most of that week but would head back to the office that afternoon. She said she needed to look at his file before giving him a “full answer” to his previous questions. (GC Exh. 7.)

Local 51 received Brown’s signed and dated Membership Application and Check-Off Authorization Form a couple days later, on April 9.⁶ In the meantime, on April 8, Brown sent another email to Biggs-Adams asking her to “please respond” to his initial email so they could “go forward with [f]iguring out the next step.”⁷ He also sent her three more emails, on April 11, 17, and 18. The April 11 and 17 emails stated that he was “still waiting for a response,” asked her to “please respond” so he could tell the company that “everything is resolved” and he could “continue to work.” His April 18 email again asked her to “please respond soon to help in this matter,” and included the full text of his April 4 email “just in case you lost [it].” (GC Exhs. 9–11.)

⁶ See R. Exh. 5. Brown dated his signed membership application “March 2019.” He also indicated on the form that he was a current member of another union, “IATSE 793.”

⁷ GC Exh. 8. Brown’s April 8 email to Biggs-Adams stated that he had “just” received her April 1 letter, which was sent before their latest email exchange. However, Brown testified at the hearing that he had received the April 1 letter before he called Morua and that they discussed the amount of back dues he owed (Tr. 27–28).

Receiving no response to any of these emails, approximately 6 weeks later, on June 4, Brown emailed Biggs-Adams one last time. He said he had advised her in his April 4 email that he “wanted to be considered a non-member and object to the collection and expenditure by the union of a fee for any purpose other than my pro rata share of the union’s costs of collective bargaining.” He said he signed “a dues deduction card” to have dues deducted from his paycheck “only . . . on the basis that I believed I was about to be fired.” He reiterated, “just in case I was not clear in my April 4 email,” that he was asserting and requesting his *Beck* rights. He also stated that he was “hereby notify[ing]” her that he authorized “only the deduction of representation fees from my wages.” Finally, he requested that his objection be considered “permanent and continuing in nature,” and that she “reply promptly” to his request. (GC Exh. 12.)

Biggs-Adams never did respond to Brown. She believed Local 51 had no obligation to do so because *Beck* objections must be filed directly with the national union rather than Local 51, the national union administers and responds to the objections, and Local 51 has no involvement in the process other than sending rebate checks to the objectors. She also never told Brown that his *Beck* objection was misdirected and should be filed with the national union. Nor did the Union reduce his dues and fees or provide him with any of the related “procedural rights” he requested. Pursuant to Brown’s executed check-off authorization, the amounts due for his initiation fee and periodic dues were regularly deducted from his paychecks as set forth in Biggs-Adams’ previous February 7 and April 1 letters. However, the Union did not collect any back dues from Brown or request ABC to terminate him for failing to pay them. (Tr. 78–79, 84–87; GC Exhs. 15, 16.)

B. Analysis

All parties agree that the core issue is whether Local 51 had an obligation, pursuant to its duty of fair representation under Section 8(b)(1)(A) of the Act, to inform Brown that he had misdirected his *Beck* objection.⁸ The General Counsel and Brown contend that Local 51 had such an obligation and that its failure to do so was arbitrary and unlawful. Local 51, on the other hand, argues that it had no such obligation for two reasons: (1) because its previous letters to Brown enclosed the “Your Rights” brochure specifically stating that such objections had to be filed with the national union in Washington, D.C., and thus the Union had already provided him with sufficient notice where to file his objection; and (2) because Brown simultaneously stated

⁸ Under Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), it is an unfair labor practice for a union to “restrain or coerce” employees in the exercise of their rights under Section 7 of the Act. See, for example, *Teamsters Local 385 (Walt Disney World Co.)*, 366 NLRB No. 96, slip op. at 1 and n. 4 (2018) (holding that the union restrained and coerced employees in violation of Section 8(b)(1)(A) by failing to respond in any manner to employees’ communications indicating that they wished to revoke their dues checkoff authorizations). It is also well established that a union violates Section 8(b)(1)(A) if it acts in an arbitrary, discriminatory, or bad faith manner inconsistent with its duty to fairly represent all unit employees. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Here, the complaint on its face asserts a restraint and coercion theory. See GC Exh. 1(j), par. 11. However, the General Counsel, the Charging Party, and the Respondent all argue in their posthearing briefs that the complaint’s *Beck* allegations are properly analyzed under the duty of fair representation.

that he was willing to join the Union and he signed and returned the union membership application, and thus his true intent was unclear.

5 As indicated by the General Counsel and the Charging Party, Local 51’s first argument is
 10 contrary to Board precedent, specifically *California Saw and Knife Works*, 320 NLRB 224
 (1995). The Board in that case addressed similar allegations that various machinist local and
 15 district unions had failed to timely notify objecting employees at various employers that their
Beck objections were misdirected to them rather than the international union (IAM). The Board
 held that the local and district unions’ failure to inform the objectors of their error and the proper
 20 procedure for filing their objections violated their duty of fair representation. See 320 NLRB at
 248 n. 107 (“Fairness plainly dictates that a union notify employees who have made clear their
 desires to become dues objectors of the proper manner for effectuating those desires. Failure to
 so notify such employees constitutes arbitrary action.”) Moreover, it found such a violation even
 where the IAM had previously given employees adequate notice of the proper procedure for
 filing a *Beck* objection. See 320 NLRB at 252 (finding that the district union violated its duty of
 fair representation by failing to specifically advise Boeing employees where to properly file their
 misdirected objections, notwithstanding that (1) the IAM had satisfactorily notified the
 employees of the proper procedure a month before their objections by publishing it in its
 magazine; and (2) the district lodge referred them to the magazine when it promptly informed
 them that their objections had been misdirected).⁹

As for Local 51’s second argument, Brown’s April 4 email was certainly inconsistent.
 As indicated in both *Beck* (which Brown cited in his email), and the “Your Rights” brochure
 (which Biggs-Adams enclosed with her previous February 7 and April 1 letters to Brown), only
 25 nonmembers have a right to object to paying for the union’s costs of non-collective bargaining
 activities. Thus, it was incongruous for Brown to both join the Union and submit a *Beck*
 objection. However, Biggs-Adams testified that she decided not to respond to Brown’s *Beck*
 objection solely because it was misdirected, not because she was confused about what he wanted
 (Tr. 84–86).

Moreover, Brown’s follow-up email on April 5 clarified that he had joined the Union
 under duress, so he could continue working for ABC. Although this was likewise an
 incongruous statement—both *Beck* and the “Your Rights” brochure indicate that employees
 covered by a union security agreement have the right not to join the Union and to be a
 35 nonmember agency fee payer instead—it indicated that Brown did not really want to be a
 member and only joined because he thought he had to. Further, his subsequent June 4 email
 specifically stated that he “wanted to be considered a non-member,” which clearly constituted an
 effective resignation from union membership under Board precedent. See *Graphic*
Communications Intl. Union Local 735-S (Quebecor Printing Hazleton, Inc.), 330 NLRB 32 n. 1
 40 (1999), *enfd. sub nom. Quick v. NLRB*, 245 F.3d 231, 250 (3d Cir. 2001)

⁹ See also 320 NLRB at 250 (noting that, if the complaint had adequately alleged it, the Board “doubtlessly” would have found a similar violation with respect to another district lodge’s failure to timely notify an objecting employee at General Dynamics that his objection was misdirected, notwithstanding that the employee had received the IAM magazine containing the proper procedure the previous month)

Accordingly, Local 51 has unlawfully failed to inform Brown since about April 5 that his *Beck* objection was misdirected and advise him of the correct place and manner to file such objections, as alleged. Local 51 therefore also unlawfully failed, since April 19, to timely provide him with the related “procedural rights” he requested, specifically a good faith determination of the amount of reduced dues and fees objectors must pay, a detailed and independently verified apportionment of the expenditures for representational and non-representational activities, notice of the procedure used, an opportunity to challenge the calculation and have it reviewed, and a reduction of his dues and fees to include only the costs of representational activities. See *California Saw*, 320 NLRB at 248–249 (presuming that the misdirected objections would have been perfected 2 weeks after they were made if the union had not unlawfully failed to inform the objectors of the correct place to file them). See also *United Nurses and Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (2019).¹⁰

II. THE EVIDENCE-PRESERVATION LETTERS

A. *The Relevant Facts*

On July 16, 2019, approximately a week after Brown filed his initial ULP charge with the regional office (19–CB–244528), Local 51’s attorney, David Rosenfeld, sent a letter to Brown’s attorney, Aaron Solem, regarding the charge. The letter was titled “Demand for Preservation of Evidence and Electronically Stored Information” and began as follows:

Dear Mr. Solem:

We have reason to believe that relevant information to this litigation matter is contained in electronic files, including emails, text messages, personnel paperwork, and other documents which you or your client may have. To that end, we feel compelled to issue the following notice regarding the maintenance of electronically stored evidence, and non-electronically stored evidence.

¹⁰ Neither the General Counsel nor the Charging Party introduced any evidence that Local 51 and/or CWA used a portion of deducted dues and fees for non-representational activities during the relevant period as alleged the complaint. See GC Exh. 1(j), par. 8(b) (“Since around late April 2019 to present, Respondent has deducted fees for representational and non-representational activities from Charging Party’s paychecks.”). Local 51’s answer denied this allegation. See GC Exh. 1(l), p. 2. Further, Biggs-Adams testified on direct examination by Respondent that Local 51 does not conduct any non-representational activities (Tr. 66). However, on further direct, she implicitly admitted that a portion of the dues and fees are used by CWA for non-representational activities. See Tr. 81 (testifying that Local 51 sends rebate checks to objectors twice a year based on the information provided by CWA). Further, Local 51 does not contend that any of the allegations must be dismissed because the GC failed to make such a showing. Compare also *Teamsters Local 738 (E.J. Brach Corp.)*, 324 NLRB 1193, 1194 (1997) (holding that the GC need not prove that union dues and fees are used for non-representational activities to prove that the union unlawfully failed to provide initial notice to unit employees of their *Beck* rights at the time it sought to obligate them to pay dues and fees under a union security clause).

5 Formal notice is hereby given that any and all correspondence, emails and/or recordings, including audio and video recordings, involving you and your agents that are within your or your client’s possession, custody or control must be maintained for this litigation. Failure to do so may create consequences in this or other litigation.

10 To that end, we write to notify you and your client that any and all items, records and information, notwithstanding its source or location of storage, must be preserved and maintained since it will be subject to production in this litigation. This letter is not limited to electronically stored data, but covers all information, paper, documents, items, things or compositions which relate, or could relate, in any manner whatsoever to the factual allegations of the complaint filed in the above matter, and our client's defenses thereto.

15 If you or your client have not already done so, we hereby demand that you and your client, and each of you, preserve all documents, tangible things and electronically stored information which could potentially be relevant to the issues raised by the facts above.

20 The letter went on for another four pages to describe the obligation to preserve evidence in more detail. Among other things, it addressed when the obligation to preserve potentially relevant electronically stored information (ESI) and other information begins (“immediately”), what the obligation requires (“more than simply refraining from efforts to destroy or dispose of such evidence,” but “also interven[ing] to prevent loss due to routine operations and employ[ing] proper techniques and protocols suited to protection of [it]”), what constitutes ESI (it “should be afforded the broadest possible definition,” includes “potentially relevant data” on “home or portable systems . . . such as laptops, smart phones, vehicle GPS, voice mailbox, Gmail/Yahoo Mail/AOL/Outlook emails, pedometers, etc.,” and also includes “system metadata”), and the form in which ESI must be preserved (“in the form or forms in which it is ordinarily
30 maintained”).

35 The letter also stated that the obligation included, not only preserving ESI “in your or your client’s care, possession or custody,” but also “in the custody of others, or those subject to its control or access.” It stated that “you and your client must notify any current or former agent, attorney, employee, custodian or contractor in possession of potentially relevant ESI to preserve such ESI to the full extent of its obligation to do so,” and “take reasonable steps to secure their compliance.” The letter stated that “we expect that a copy of this letter will be disseminated to all custodians of records and others, without limitation,” and requested confirmation within 15 days “that you and your client have taken the steps outlined” in it.

40 The letter also addressed the consequences of failing to preserve potentially relevant evidence, stating

45 We are available to discuss reasonable preservation steps; however, you and your client should not defer preservation steps pending such discussion if ESI may be lost or corrupted as a consequence of delay. Should you or your client fail to preserve potentially relevant evidence result [sic] in the corruption, loss or delay in production of evidence to which we are entitled, such failure would constitute

spoliation of evidence, and we will not hesitate to seek damages, sanctions and other remedies under the law.

Finally, at the very end, the letter stated

Nothing in this request should be construed as a threat of retaliation in any form. Nothing in this request should be considered as any coercion about filing or processing NLRB charges or any other legal process. Nothing in this request should be construed to interfere with your client's rights under Section 7 of the Act. That is your client's right under the law but the Union has a right to protect itself whenever there is the possibility of litigation. This request should be construed in compliance with all legal requirements.

(GC Exh. 13.)

On August 23, 2019, Brown filed another ULP charge against Local 51, alleging that the July 16 letter violated Section 8(b)(1)(A) of the Act (GC Exh. 1(h)). In response, on August 26, Rosenfeld sent another evidence-preservation letter to Solem. The letter was identical to the July 16 letter except that it was addressed to Brown “c/o” Solem, listed the new charge number (19–CB–247119), and added the following statement at the end:

Your attorney may advise you that this violates the National Labor Relations Act again. If so, you are certainly free to file another charge. We can keep doing this forever.

(GC Exh. 14.)

The Regional Director issued the complaints regarding Brown’s *Beck* objection and both evidence-preservation letters the following year, in April and September 2020.

B. *Analysis*

The General Counsel and the Charging Party assert different reasons why Local 51’s evidence-preservation letters should be found unlawful. The GC concedes that requesting an opponent to hold or preserve relevant evidence “is not unlawful per se” (Br. 17). The GC also does not contend that a charging party has no obligation to begin preserving relevant evidence until the regional director issues a complaint.¹¹ Nor does the GC contend that the Board would never impose evidentiary sanctions, including adverse inferences, if a charging party destroyed

¹¹ The duty to preserve evidence arises when a potential claim is identified which the litigant knows or reasonably should know is relevant to the action. See Ashworth et al., *Duty to preserve evidence for production and inspection*, 10A Fed. Proc., L. Ed. § 26:553 (Nov. 2020 Update); and Grenig & Kinsler, *Handbook Fed. Civ. Disc. & Disclosure* § 16:3 (4th ed. July 2020 Update). See also *The Sedona Conference Commentary on Legal Holds, 2d Ed.: The Trigger and the Process*, 20 Sedona Conf. J. 341, 347 (2019) (hereafter “*Sedona*”).

or otherwise failed to preserve relevant evidence without justification.¹² Rather, the GC argues that Local 51’s letters went too far by (1) imposing overbroad evidence-preservation requirements, and (2) threatening “consequences in this and other litigation,” including “damages,” for failing to properly preserve evidence. The GC argues that sending such
 5 overbroad and threatening evidence-preservation letters to employees who have filed charges to protect their rights under Section 7 of the Act would reasonably tend to restrain them from doing so, and that the letters are therefore unlawful under Section 8(b)(1)(A) of the Act. The Charging Party, however, goes further than the General Counsel and argues that evidence-preservation
 10 letters “should be a *per se* illegal response to the filing of a ULP charge under the Act because any reasonable employee would understand the letter as a threat for invoking the Board’s process” (Br. 14).

1. Whether the letters are unlawfully overbroad

15 As indicated above, the letters are long and detailed and reference certain types of data sources (e.g. vehicle GPS and pedometers) that would not likely contain evidence relevant to Brown’s charges. However, contrary to the General Counsel, they do not appear unlawfully overbroad when read as a whole. First, they are obviously in the nature of form letters, intended
 20 for use in all cases, and employees would reasonably construe them as such.¹³ Second, while certain statements in the letters appear overbroad in isolation, they are clarified or narrowed by other statements in the letters. For example, the first sentence of both the second and third paragraphs of the letters are clearly overbroad to the extent they demand, without limitation, that
 25 “any and all correspondence, emails and/or recordings, including audio and video recordings, involving you and your agents that are within your or your client’s possession, custody or control must be maintained for this litigation,” and that “any and all items, records and information, notwithstanding its source or location of storage, must be preserved and maintained since it will

¹² Cf. *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (ALJs may draw adverse inferences against a charging party that refuses to comply with a respondent subpoena). A possible example where this might occur would be if a charging party employee destroyed a tape recording of the conversation where the respondent employer’s supervisor allegedly made an unlawful threat. Assuming there was no legitimate reason for destroying the recording, the Board might well infer that it would not have supported the employee’s testimony about the conversation. Cf. *Bricklayers, Local 2 (Weidman Metal Masters)*, 166 NLRB 117, 121 (1967) (drawing an adverse inference that a tape recording which was destroyed by the respondent union without a legitimate explanation would have supported the disciplined members’ testimony). See also FRCP 37(e)(2) (a party’s failure to preserve ESI with the intent to deprive another of the information’s use in litigation may warrant a presumption that the information was unfavorable to the party).

¹³ The letters are, in fact, very similar in many respects to published exemplars. See Eykel & Underwood, *Spoilation of Electronic Evidence: A Primer with Sample Spoilation Letter to Opposing Counsel*, 41-WTR Fam. Advoc. 26 (Winter 2019) and sources cited there. See also Grenig & Kinsler, *Handbook Fed. Civ. eDisc. & Records* § 5:11 (4th ed. July 2020 Update) (discussing the contents of preservation letters).

be subject to production in this litigation.”¹⁴ However, the letters thereafter repeatedly and properly indicate that only potentially relevant information must be preserved. Cf. *Bemis Co.*, 370 NLRB No. 7, slip op. at 3 (2020) (finding that the first paragraph of an employer’s work rule would not unlawfully restrain or coerce employees under Section 8(a)(1) of the Act because “an objectively reasonable employee would understand that the first paragraph of the rule sets out a general expectation that is more fully defined by the explanatory language that follows.”).

2. Whether the letters unlawfully threaten potential “damages” for noncompliance

As indicated by the GC, the Board has never imposed monetary sanctions against a party for spoliation. Indeed, it is doubtful that the Board has the authority to do so. See *HTH Corp. v. NLRB*, 823 F.3d 688 (D.C. Cir. 2016), and *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1089 (D.C. Cir. 2016) (holding that the Board lacks authority to order a respondent to pay the GC’s and charging party’s litigation expenses in the unfair labor practice proceeding). See also *Chino Valley Medical Center v. NLRB*, 895 F.13d 69, 86 (D.C. Cir. 2018) (noting that “the Board agrees that its award of litigation costs and expenses was incorrect and ‘does not seek enforcement of those portions of its [2015] Order, citing our decisions in [*HTH* and *Camelot Terrace*]”). However, the federal courts have held that they have the authority to order monetary sanctions, including costs and attorney’s fees, for spoliation.¹⁵ And a charging party’s spoliation of evidence relevant to an unfair labor practice proceeding could potentially be raised before a federal court in the context of an NLRB subpoena enforcement action against a charging party on behalf of a respondent.¹⁶ Thus, there are circumstances where, as indicated in Local 51’s letters, monetary sanctions could be imposed on a charging party that destroyed or failed to preserve potentially relevant information in an unfair labor practice proceeding.

¹⁴ Courts have held there is no broad requirement to preserve *all* information. *Sedona* at 356. See, for example, *Jones v. Jackson State Univ.*, 2008 WL 11506566, at *2 (S.D. Miss. Feb. 21, 2008) (plaintiff’s letter instructing defendant to preserve all electronic data within its computer systems without limitation was overbroad).

¹⁵ See, e.g., *Spencer v. Lunada Bay Boys*, 2018 WL 839862, *1 (C.D. Cal. Feb. 12, 2018), *affd.* in part 806 Fed. Appx. 564 (9th Cir. 2020); and *Charlestown Capital Advisors, LLC v. Acero Junction, Inc.*, 2020 WL 5849096, *10 (S.D. N.Y. Sept. 30, 2020).

¹⁶ Cf. *U.S. v. Montgomery Global Advisors V LLC*, 2006 WL 950102, * (N.D. Cal. 2006) (court admonished the respondent in a contempt proceeding, which was initiated by the government for respondent’s failure to fully comply with administrative subpoenas issued by the IRS, that he remained obligated to refrain from spoliation of evidence). See also *In re Gorsoan Ltd.*, 2020 WL 3172777 (S.D. N.Y. June 15, 2020) (court in discovery proceeding brought by plaintiff in connection with a foreign proceeding issued monetary sanctions against the defendant for spoliating evidence and otherwise contumaciously failing to fully comply with the court’s discovery orders). Under Section 11(2) of the Act and Section 102.31(d) of the Board’s Rules, a respondent may not itself institute the subpoena enforcement proceeding against the charging party but must request the General Counsel to do so on its behalf. See also *Station Casinos, LLC*, 28–CA–22918, unpub. Board order issued March 3, 2011 (2011 WL 828422). However, once the application has been filed with the court, the respondent will normally take control and prosecute the enforcement proceeding. See NLRB Casehandling Manual (ULP), Sec. 11790.1.

Further, the General Counsel cites no cases where the Board has found similar warnings unlawful. The primary case cited by the General Counsel, *DHL Express, Inc.*, 355 NLRB 680 (2010), is clearly distinguishable. In that case, the employer’s labor consultant threatened to sue an employee for defamation based on his comments in a union newsletter article. The Board majority found that the threat violated the Act because the employee’s comments in the newsletter were not maliciously untrue and therefore constituted protected activity. Here, in contrast, the letters warned that Local 51 would seek monetary and other sanctions for spoliation of evidence, which is obviously not conduct protected by the Act. Cf. *Preferred Building Services, Inc.*, 366 NLRB No. 159 (2018) (employer’s threat to sue an employee in reaction to the employees’ picketing activity was not unlawful because the picketing was unprotected).

Cases finding unlawful threats to sue employees for providing testimony or evidence in a Board proceeding are also distinguishable. See, e.g., *Wolverine World Wide, Inc.*, 243 NLRB 425, 432 (1979) (employer unlawfully told employee that it had heard from others that he had lied at a recent Board hearing and that it was going to contact a lawyer and “try to get” him for perjury); and *Paymaster Corp.*, 165 NLRB 381, 384 (1967) (employer unlawfully told employee that it intended to sue him and prove that he had lied at a recent Board hearing). But cf. *Tri-County Tube, Inc.*, 194 NLRB 103 (1971) (finding that employer’s statement that he could have employee prosecuted for perjury because of her testimony at a Board representation hearing was not unlawful because it appeared to be “nothing more than [the employer’s] opinion that [the employee], in giving testimony contrary to his own at the representation hearing, had lied under oath.”). Here, Local 51’s letters to or through Brown’s attorney did not threaten to sue Brown for providing testimony or evidence relevant to his charges but warned that he could be sanctioned for failing to preserve evidence relevant to the charges.

3. Whether respondent evidence-preservation letters to charging party employees should be per se unlawful

As indicated above, the Charging Party goes further than the General Counsel and argues that respondent evidence-preservation letters to charging party employees should be per se unlawful. However, the General Counsel controls the theory of the case. See, e.g., *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. at 1 n. 2 (2016) (“It is well settled that a charging party cannot enlarge upon or change the General Counsel’s theory of a case.”); and *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999) (judge properly refused to consider charging party’s theory that respondent’s hiring policy was unlawful on its face, as the GC argued only that it was unlawfully applied). See also *Weigand v. NLRB*, 783 F.3d 889, 895 (D.C. Cir. 2015); and *Operating Engineers Local 150 v. NLRB*, 325 F.3d 818, 830 (7th Cir. 2003). In any event, whether respondent unions and employers should be barred from sending any type of evidence-preservation letters to charging party employees or their attorneys is an issue that would best be addressed by the Board after a fuller briefing than has been provided to date here. See Grenig & Kinsler, *Handbook Fed. Civ. eDisc. & Records* § 5:9 (4th ed. July 2020 Update) (evidence-preservation letters are “very important tools” for putting other parties on notice of their duties to avoid spoliation and serve as an “excellent basis” for seeking sanctions if it is later discovered that spoliation occurred).

Accordingly, the allegation will be dismissed.

CONCLUSIONS OF LAW

1. Local 51 has violated Section 8(b)(1)(A) of the Act by:

5 a. Failing, since about April 5, 2019, to respond to Brown’s misdirected attempts to become a dues objector by providing him with the correct place and manner to file his objection.

10 b. Failing, since April 19, 2019, to otherwise respond to Brown’s objection by providing him with a good faith determination of the amount of reduced dues and fees objectors must pay, a detailed and independently verified apportionment of the expenditures for representational and non-representational activities, notice of the procedure used, an opportunity to challenge the calculation and have it reviewed, and a reduction of his dues and fees to include only the costs of representational activities.

15 2. Local 51’s unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

20 3. Local 51 did not violate the Act by sending evidence-preservation letters to or through Brown’s attorney on July 16 and August 26, 2019, after Brown filed his unfair labor practice charges.

REMEDY

25 The appropriate remedy for the violations found is an order requiring Local 51 to cease and desist from its unlawful conduct and to take certain affirmative action. The latter includes reimbursing Brown for all dues and fees collected for nonrepresentational activities since April 19, 2019, with interest compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). It also includes providing him with the other procedural rights he requested in the manner required by Board law.¹⁷

30 Respondent will also be required to post a notice to employees and members and provide sufficient copies of the notice for posting by American Broadcasting Company, Inc., if willing. If Respondent’s offices and meeting places are open to members and employees, the notices must be posted by the Respondent and delivered to the Regional Director for posting by
35 American Broadcasting Company, Inc., if it wishes, within 14 days after service by the Region. If the offices and meeting places are closed due to the COVID-19 pandemic, the notices must be posted and delivered within 14 days after the offices and meeting places reopen and a substantial complement of members and employees have returned to accessing them. Any delay in physical

¹⁷ The proposed order attached to the General Counsel’s posthearing brief includes broader affirmative remedies that extend to other unit employees who may be similarly situated to Brown. However, this is inconsistent with the affirmative remedies requested in the GC’s brief itself (p. 21–22), which are limited to Brown. More importantly, such broader affirmative remedies are not supported by the evidence presented at the hearing. The GC only presented evidence of unlawful conduct against Brown, not against all dues objectors as a class as in *California Saw* and *United Nurses*, above. Accordingly, the broader affirmative remedies set forth in the GC’s proposed order are denied.

posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its members by electronic means.

ORDER¹⁸

5

The National Labor Relations Board orders that the Respondent, NABET-CWA Local 51, its officers, agents, and representatives, shall

1. Cease and desist from

10

(a) Failing and refusing to respond to unit employees' misdirected attempts to become dues objectors by providing them with the correct place and manner to file their objections.

15

(b) Failing and refusing to otherwise respond to employees' dues objections by providing them with a good faith determination of the amount of reduced dues and fees objectors must pay, a detailed and independently verified apportionment of the expenditures for representational and non-representational activities, notice of the procedure used, an opportunity to challenge the calculation and have it reviewed, and a reduction of their dues and fees to include only the costs of representational activities.

20

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

25

2. Take the following affirmative action necessary to effectuate the policies of the Act.

30

(a) Provide Jeremy Brown with a good faith determination of the amount of reduced dues and fees objectors must pay, a detailed and independently verified apportionment of the expenditures for representational and non-representational activities, notice of the procedure used, and an opportunity to challenge the calculation and have it reviewed.

35

(b) Reimburse Brown for all dues and fees collected from him for nonrepresentational activities since April 19, 2019, with interest as set forth in the Remedy section of this decision

40

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 19 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of the refund due under the terms of this Order.

¹⁸ If no exceptions are filed as provided by Section 102.46 of the Board's Rules, the findings, conclusions, and recommended Order will be adopted by the Board and all objections to them will be deemed waived for all purposes as provided by Section 102.48 of the Board's Rules.

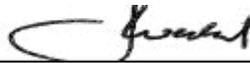
(d) Post at its business offices and meeting places copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with members by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director for Region 19 sufficient copies of the notice for posting by American Broadcasting Company, Inc., if willing, at all places where its notices to employees are customarily posted within Respondent's jurisdiction.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., December 3, 2020



Jeffrey D. Wedekind
Administrative Law Judge

¹⁹ If this Order is enforced by a judgement of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to respond to misdirected attempts to become dues objectors by providing the correct place and manner to file such objections.

WE WILL NOT fail or refuse to otherwise respond to your dues objections by providing you with a good faith determination of the amount of reduced dues and fees objectors must pay, a detailed and independently verified apportionment of the expenditures for representational and non-representational activities, notice of the procedure used, an opportunity to challenge the calculation and have it reviewed, and a reduction of your dues and fees to include only the costs of representational activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL provide Jeremy Brown with a good faith determination of the amount of reduced dues and fees objectors must pay, a detailed and independently verified apportionment of the expenditures for representational and non-representational activities, notice of the procedure used, and an opportunity to challenge the calculation and have it reviewed.

WE WILL reimburse Brown for all dues and fees collected from him for nonrepresentational activities since April 19, 2019, with interest.

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS–THE
BROADCASTING AND CABLE TELEVISION
WORKERS SECTOR OF THE
COMMUNICATION WORKERS OF AMERICA,
AFL-CIO, LOCAL 51

(Union)

Dated _____ By _____
(Representative) (Title)

The Administrative Law Judge's decision can be found at www.nlr.gov/case/19-CB-244528 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.



The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1220 SW 3 rd Avenue, Suite 605, Portland, OR 97204-2170
(503) 326-3085, Hours: 8:00 a.m. to 4:30 p.m.