

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

DATE: July 5, 2017

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: United Brotherhood of Carpenters 506-2017-2500
Cases 19-CA-190626 & 19-CB-190627 506-4033-9100
536-0150-0100
536-2530-0000
536-2595-0000
536-5075-5033
536-5075-5033-6700

The Region submitted this case for advice as to whether the Union-Employer unlawfully terminated a staff representative for his actions in criticizing the majority's opinion while serving on an internal Union disciplinary panel. We conclude that the staff representative was engaged in protected concerted activities when he dissented from the Union's unlawful discipline of a member, and that his subsequent termination for his dissenting opinion was unlawful.

FACTS

The staff representative ("Charging Party") was employed by the United Brotherhood of Carpenters (the "Union-Employer") from July 1, 2013 until his termination on November 7, 2016.¹ He was also a member of the Union-Employer. As part of his duties as a staff representative, the Charging Party was regularly assigned to sit on trial committees to hear disciplinary charges lodged against members of the Union-Employer. Although in theory the Union's President could designate any Union member to sit on these trial committees, as a practical matter they generally were comprised of Union employees who, like the Charging Party, were also members. On September 27, the Charging Party was assigned to the trial committee in the case of *Capelli v. Limon*. In that case, a vice-president of the Union-Employer had charged the chief steward of a local union, Electronic and Space Technicians Local 1553 ("Local 1553"), with violating the Union-Employer's constitution by, *inter alia*, giving

¹ All dates hereinafter are in 2016 unless otherwise stated.

allegedly false testimony before an Administrative Law Judge (“ALJ”) in a Board hearing.²

In the ULP case at issue in that Board hearing, the chief steward, along with two other Local 1533 officials, had chosen to distribute the proceeds from the successful settlement of a grievance by giving the money to members who had helped process the grievance. Members who were left out filed Board charges, and the three Local 1533 officials testified at the ALJ hearing as to how they came to their decision. All three officials testified that it was the two business managers, and not the chief steward, who had decided to distribute the money in that way. In her decision, the ALJ determined that rewarding members for their participation in the Local 1533-controlled grievance process was a violation of Section 8(b)(1)(A) of the Act.³ In consequence, the Southwest Regional Council of Carpenters (“SWRCC”) complied with the ALJD, one business manager retired, and the other was discharged by the Union-Employer.

In July, in an apparent attempt to save the job of one of the business managers, the chief steward emailed several of the Union-Employer’s officials to take the blame for the decision on how to apportion the settlement money. As noted above, officials of the Union-Employer then brought internal charges against the chief steward, arguing that the chief steward had committed perjury before the ALJ, which violated the Union-Employer’s constitution in various ways, and that he had also misled the SWRCC by “failing to explain truthfully to the union what happened before he testified falsely.”

The Charging Party was assigned to the trial committee, which was headed by a vice-president of the Union-Employer. On October 24, after a hearing at which the chief steward did not appear, the trial committee issued its decision that the chief steward had violated the Union-Employer’s constitution, and consequently expelled him from membership. Specifically, a majority of the trial committee determined that the chief steward had committed perjury at the Board hearing because his later email contradicted some of what he said before the ALJ. The committee’s decision noted that the chief steward “is being prosecuted and punished for giving false testimony that he knew was false.”⁴

² Cases 31-CB-152342, -158356, & -152970.

³ JD(SF)-23-16, May 10, 2016.

⁴ In addition, the trial committee’s majority found various other violations, including that the chief steward had also lied to the Board during its investigation, and to the SWRCC in its own internal investigation. The trial committee majority also found

The Charging Party dissented, arguing that the chief steward was being punished for his testimony to the Board and that such punishment would have a chilling effect on the protected concerted activity of union members, putting them in fear of punishment for testifying before the Board. The Charging Party also argued that such a punishment would be bad for the Union-Employer by dissuading people from taking steward positions, that no definition of fraud could encompass how the settlement was distributed, that the punishment was a violation of the LMRDA and the chief steward's right to internal due process, that the law firm advising the trial committee was the same one that had helped draft the charges against the chief steward, that the Charging Party had not been given documents crucial to the case, and finally that the original decision on how to award the settlement money was not obviously unreasonable, though it was found unlawful by the ALJ.

Two weeks later, on November 7, the Union-Employer discharged the Charging Party for "ambivalence to, or condoning of, perjury by a senior steward/union representative to a Federal agency." The Union-Employer made clear that the Charging Party was not being discharged for his work performance or his participation on the trial committee per se, but rather because of his dissent, specifically that it revealed that the Charging Party did not "get it" about perjury. The present charge was filed on December 29, 2017.

ACTION

We conclude that the Charging Party's actions in dissenting from the decision to expel the chief steward were protected by the Act, because the Union-Employer's motivation in expelling the chief steward from membership was improper under the principles of Section 8(b)(1)(A). Accordingly, the Union-Employer violated Section 8(a)(1) of the Act by discharging the Charging Party.

I. It is Unlawful for a Union to Expel a Union Member for Giving Perceived False Testimony

Although there are no Board charges alleging the chief steward's expulsion as a violation of the Act, and any such charge would now be time-barred under Section 10(b), the lawfulness of that internal union discipline is relevant to determining the lawfulness of the Charging Party's discharge. In regards to this preliminary matter, the Charging Party argues that by expelling the chief steward for his testimony before the ALJ, the Union-Employer impaired access to the Board's processes, and therefore

that the chief steward had both defrauded the Union-Employer and caused dissension by his disbursement of the settlement money at issue in the original ULP case.

violated Section 8(b)(1)(A). The Charging Party further argues that it is not for the Union-Employer to decide whether the chief steward committed perjury. We agree.

As a general matter, expulsion from union membership, on its own, does not give rise to a violation of the Act because it is a matter of internal union concern and thus protected under the proviso to Section 8(b)(1)(A).⁵ In *Office Employees Local 21 (Sandia National Laboratories)*,⁶ the Board clarified the scope of Section 8(b)(1)(A) by finding that internal union discipline may give rise to a violation of the Act only if the union's conduct: (1) affects the employment relationship, (2) impairs access to the Board's processes, (3) pertains to unacceptable methods of union coercion, such as physical violence, or (4) otherwise impairs policies imbedded in the Act.⁷ If the union's discipline is found to be within the scope of Section 8(b)(1)(A), the Board then weighs the Section 7 rights of the union member against the legitimate interests of the union to determine whether the discipline violates the Act.⁸

Union discipline of members for testifying at a Board proceeding clearly implicates the second prong of the *Sandia* test.⁹ While the Board has not yet directly addressed union discipline because of a member's Board testimony under *Sandia*, the Board has addressed numerous cases of union discipline over testimony at arbitration hearings. In those cases, the Board found that union discipline of a member for testifying before an arbitrator implicates Section 8(b)(1)(A) under the fourth prong of *Sandia*, by impairing grievance and arbitration procedures that "are a fundamental

⁵ See, e.g., *Teamsters Local 122*, 203 NLRB 1041, 1042 (1973) ("Expulsion from membership in a labor organization is a matter of internal union concern, and does not in and of itself give rise to a violation of the Act.").

⁶ 331 NLRB 1417, 1418–19 (2000).

⁷ See, e.g., *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors, Inc. and Various Other Employers)*, 365 NLRB No. 28, slip op. at 1 (Feb. 7, 2017) (setting out the *Sandia National Laboratories* test).

⁸ *Id. Accord Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1122 (2000) (applying the balancing test to find that a union had not violated Section 8(b)(1)(A) by removing a steward who opposed the union's handling of grievances).

⁹ *Cf. Paperworkers Local 710 (Stone Container)*, 308 NLRB 95, 99 (1992) (finding subtle threat by union official about testifying at ALJ hearing was violation of Section 8(b)(1)(A)).

component of national labor policy.”¹⁰ In explanation, the Board notes that “it is essential to the existence of the arbitration process that witnesses testify before the arbitrator without fear of reprisal from either the employer or the union.”¹¹

This protection of testimony applies even when the union believes the testimony was perjurious or false. In *Graphic Communications Local 388 (Georgia Pacific)*,¹² the Board was confronted with a case where the union had disciplined a member for giving false testimony to an arbitrator. In that case, while the union acknowledged that disciplining members for their testimony was generally unlawful, it argued that because a properly constituted internal union trial committee found the member had lied to the arbitrator, its discipline of the member did not impair the arbitration process.¹³ The Board disagreed, finding that a union may only discipline a member for giving false testimony where actual perjury has been established by a forum other than the internal union procedure.¹⁴ In so finding, the Board noted that “the right of an employee to give testimony at arbitration proceedings without fear of reprisal would be a precarious one if a union were free to determine unilaterally whether the testimony was false and to impose discipline.”¹⁵

Finally, if the union’s discipline has multiple motivations, one of which is unlawful under *Sandia*, the Board applies a *Wright Line* analysis, shifting the burden to the union to prove that the discipline would have occurred even absent the unlawful motivation.¹⁶

¹⁰ *Teamsters Local 992 (UPS Ground Freight)*, 362 NLRB No. 64, slip op. at 1 n.1 (Apr. 6, 2015).

¹¹ *Id.* (quoting *Teamsters Local 788 (San Juan Islands Cannery)*, 190 NLRB 24, 27 (1971)).

¹² 300 NLRB 1071 (1990).

¹³ *Id.* at 1072.

¹⁴ *Id.* at 1072–73 (citing *Teamsters Local 557 (Liberty Transfer)*, 218 NLRB 1117, 1121 (1975) and *Teamsters Local 788*, 190 NLRB at 27).

¹⁵ *Id.*

¹⁶ *See Auto Workers Local 2017 (Federal Mogul)*, 283 NLRB 799, 799 n.1 (1987) (citing *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)).

Here, the Union-Employer's expulsion of the chief steward clearly implicates Section 8(b)(1)(A) under the second prong of the *Sandia* test. As noted both by the Board in *Graphic Communications Local 388* and by the Charging Party in his dissent, union members will be chilled and access to the Board's processes will be impaired if the union is allowed to unilaterally determine whether members committed perjury.

In addition, the chief steward's Section 7 rights outweigh the Union-Employer's interests. In neither *Graphic Communications Local 388* nor *Teamsters Local 992*, where the union brought charges against a member because of his testimony at an arbitration hearing, did the Board even bother to apply the traditional Section 8(b)(1)(A) balancing test, suggesting that a union can have no legitimate interest in punishing members for their testimony absent a finding of perjury by an independent tribunal.¹⁷ Because the right to participate in a Board proceeding is even more deeply embedded in the Act than the protection of grievance and arbitration procedures, union discipline for a member's testimony at a Board proceeding is similarly illegitimate.¹⁸

While the Union-Employer also included reasons other than perjury for its expulsion of the chief steward, perjury before the ALJ was the main violation cited in the initial charges, and took up the bulk of both the hearing and the eventual trial-committee decisions. It is unlikely the Union-Employer would be able to carry its *Wright Line* burden to show that the chief steward would have been expelled even absent the Union-Employer's focus on his alleged perjury. Thus, the expulsion of the chief steward violated Section 8(b)(1)(A).

II. The Union-Employer's Discharge of the Charging Party Violated Section 8(a)(1)

It is well-settled that when a union is acting as an employer, its employees have the same rights as any other employees under Section 8(a)(1).¹⁹ Section 8(a)(1)

¹⁷ See *Graphic Communications Local 388*, 300 NLRB 1071, 1072–73; *Teamsters Local 992*, 362 NLRB No. 64, slip op. at 1 n.1.

¹⁸ See generally Section 8(a)(4). Cf. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967) (noting that “Congress adopted Section 8(a)(4) to insure that “all persons with information about [unfair labor practices] be completely free from coercion against reporting them to the Board.”).

¹⁹ See, e.g., *Butchers Union Local 115*, 209 NLRB 806, 809 (1974).

prohibits interference with the Section 7 guarantee that employees have the right “to engage in . . . concerted activities for the purpose of mutual aid and protection.” Employers may not interfere with employee activity inspired by concerns within the range of interests to which Section 7 is addressed, i.e., “legitimate activity that could improve [the employees] lot as employees.”²⁰

When a union-employer takes adverse action against its own employees for engaging in activities that are protected by Section 7, the Board applies the same balancing test used in the Section 8(b)(1)(A) context to determine whether the union-employer violated the Act.²¹ First, the Board determines whether the employee engaged in Section 7 activity. If so, the Board then determines whether the union-employer had a legitimate countervailing interest that outweighed the Section-7 right.²²

Normally, when an employee of a union engages in protected concerted activity directed at the union for the benefit of another employer’s employees, the Board considers the employee to have a relatively weak Section 7 interest for balancing-test purposes.²³ However, as discussed above, access to the Board’s processes are of paramount Section 7 concern. Even supervisors not otherwise protected by the Act may not be discharged for giving testimony to the Board.²⁴ Thus, union employees

²⁰ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978).

²¹ See *Service Employees Local 1*, 344 NLRB 1104, 1105 (2005); *Operating Engineers Local 370*, 341 NLRB 822, 824 n.7 (2004) (noting the balancing tests in the Section 8(b)(1)(A) and 8(a)(1) contexts are the same when the employer in question is a union).

²² *Service Employees Local 1*, 344 NLRB at 1106.

²³ See *Operating Engineers Local 370*, 341 NLRB at 824–25 (finding union organizer’s criticism of union’s agreement with employer a weak Section 7 interest as he was making common cause with employees of another employer against his employer, their bargaining representative).

²⁴ See *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 402 (1982) (citing *Better Monkey Grip Company*, 115 NLRB 1190 (1956), *enforced*, 243 F.2d 836 (5th Cir. 1957)), *enforced sub nom. Automobile Salesmen’s Union Local 1095*, 711 F.2d 383 (D.C. Cir. 1983).

assisting the employees of another employer to access the Board's processes have a relatively strong Section 7 interest.²⁵

On the other side of the balancing test, as noted above, the Board has not recognized any legitimate interest a union-employer might have in disciplining members for perceived false testimony.

Thus we conclude that the Section 7 concerns implicated by the Charging Party's conduct outweigh the Union-Employer's interests. The Charging Party was dismissed due to his opposition to the Union-Employer's unlawful expulsion of the chief steward. Because the Charging Party's activity was protected by Section 7, and it was not outweighed by any legitimate interest of the Union-Employer's, the Charging Party's discharge violated Section 8(a)(1).

Alternatively, discharging the Charging Party for refusing to participate in an unfair labor practice violated Section 8(a)(1). Thus, under *Parker-Robb Chevrolet*, an employer cannot lawfully discharge a supervisor for having refused to commit or participate in an unfair labor practice.²⁶ A fortiori, an employer cannot discharge an employee covered by the Act for refusing to participate in an unfair labor practice.²⁷

²⁵ Cf. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–65 (1978) (finding that “employee” as used in the Act encompasses employees’ concerted activities in support of employees of employers other than their own).

²⁶ 262 NLRB at 403.

²⁷ (b) (5)



Accordingly, for the foregoing reasons, complaint should issue, absent settlement.

/s/
J.L.S.

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