From: (b) (6), (b) (7)(C)
To: Hooks, Ronald K.; Pomerantz, Anne; Dietz, Jessica; Fawley, John; Simone, Barbara T.
Cc: Bock, Richard; Compton, Kayce R.; Dodds, Amy L.; Belin, Jeremy S.; Shorter, LaDonna
Subject: United Brotherhood of Carpenters Fifth Submission, 19-CA-190626 (case-closing email)
Date: Tuesday, December 22, 2020 9:26:20 AM

The Region resubmitted this case for advice as to whether a Federal District Judge's negative credibility determinations about key witnesses in a related LMRDA case renders this case unfit for prosecution. We conclude that this case can proceed despite those credibility findings via a change of focus in the theory of complaint.

Briefly, the Union/Employer here discharged an employee staffer who, as a member of a Union tribunal, dissented to the Union's expulsion of a chief steward for allegedly falsely testifying to an NLRB ALJ. In his dissent, the employee staffer argued, *inter alia*, that punishing workers for their testimony at a Board proceeding 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 Union/Employer then discharged the staffer for "ambivalence to, or condoning of, perjury by a senior steward/union representative to a Federal Agency."

In our original memorandum, *United Brotherhood of Carpenters*, Cases 19-CA-190626 & 19-CB-190627, Advice Memorandum dated July 5, 2017, we concluded that since the expulsion of the chief steward was likely unlawful under *Graphic Communications Local 388 (Georgia Pacific)*, 300 NLRB 1071 (1990), the discharge of the staffer violated Section 8(a)(1) for two reasons. First, the staffer was engaged in protected concerted activity by making common cause with the chief steward in his right to testify before the Board without fear of reprisal, and second, the staffer was discharged for refusing to take part in the commission of an unfair labor practice.

However, we now conclude that proving that the chief steward's expulsion was unlawful is unnecessary to find a violation here. The staffer's dissent was not just focused on the rights of the chief steward, but on the chilling effect the expulsion would have on all members' ability to testify before the Board and access Board processes. Using a formal dissent to beseech the other tribunal members (and members and employees of the Union generally) in a good-faith attempt to support members' Section 7 right to testify before the Board is clearly protected concerted activity. *See Wolverine World Wide, Inc.*, 243 NLRB 425, 432 (1979) (finding discussion of Board testimony with other employees protected). *Cf. Cadbury Beverages*, 324 NLRB 1213, 1214, 1222 (1997) (holding employee's attempt to attend arbitration hearing in support of coworker was protected, even though he was not a witness or otherwise involved in the case), *enforced*, 160 F.3d 24 (D.C. Cir. 1998); *Oil Workers Local 4-23 (Gulf Oil)*, 274 NLRB 475, 475-76 (1985) (holding that expulsion of supervisor-member for his arbitration testimony was unlawful because it would have negative effect "on other employee-members who might be restrained in exercising their Section 7 rights to testify").

While the staffer may have taken some questionable actions in preparing his dissent and following his discharge, there is insufficient evidence that his protests were made in bad faith. *See Wagner-Smith Co.*, 262 NLRB 999, 999 n.2 (1982) ("[I]t is well settled that the merit of a complaint or grievance is irrelevant to the determination of whether an employee's conduct is protected under

the Act, so long as the complaint was not made in bad faith.") (citing *OMC Stern Drive, A Division of Outboard Marine Corp.*, 253 NLRB 486, 486 n.2 (1980), *enforced*, 676 F.2d 698 (7th Cir. 1982)). It is also irrelevant that no other employees or members of the Union joined him in his dissent or in support of his cause. *See Meyers Industries*, 281 NLRB 882, 887 (1986) (finding concerted activity encompasses circumstances where individual employees seek to initiate or induce or prepare for group action), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

As for balancing the staffer's Section 7 interest against the Union's legitimate interests, as discussed in greater detail in the original memorandum, to the extent the Union has any legitimate interest in regulating member testimony to the Board, such interest is outweighed by the staffer's very strong Section 7 interest in protecting employees' rights to testify to the Board without fear of punishment, even if those employees are those of another employer. *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).

Because we find that the staffer was engaged in Section 7 activity due to the protected objective of his dissent, it is unnecessary to prove that the expulsion of the chief steward was also unlawful. Accordingly, the Region should continue prosecuting this case (b) (5) [redacted]

Please let us know if you have any questions. This email closes this case in Advice.

(b) (6), (b) (7)(C) [redacted]