The Region submitted this case for advice on whether the Union breached its duty of fair representation by causing the Charging Party’s discharge when a Union agent, unbeknownst to the Charging Party, pursued a grievance on behalf which disclosed to the Employer that the Charging Party had violated the Employer’s policy against moonlighting. We conclude that the Union did not violate Section 8(b)(2) or 8(b)(1)(A) of the Act, and accordingly the Region should dismiss the allegations, absent withdrawal.

A union violates Section 8(b)(2) and 8(b)(1)(A) of the Act when it causes or attempts to cause an employer to discriminate against an employee in violation of Section 8(a)(3) for reasons other than failure to pay uniform dues or initiation fees. United Paperworkers International Union (Jefferson Smurfit Corp.), 323 NLRB 1042, 1043-44 (1997) (union violated Section 8(b)(2) and 8(b)(1)(A) by attempting to cause employer to discipline employee because of his dissident union activities and his protected concerted activities). An employer violates Section 8(a)(3) when it takes an adverse action against an employee because the employee engaged in union activity or refrained from doing so. Retail Clerks, Loc. 1357 (Lit Bros.), 192 NLRB 1171, 1175 (1971). Thus, the essential element of a Section 8(b)(2) violation is that the action the union caused (or attempted to cause) the employer to take against the employee must violate Section 8(a)(3). Id.

However, here, there is no evidence that the Charging Party engaged in protected activities of any sort under Section 8(a)(3).[1] The fact that the Employer happened to learn of the Charging Party’s admitted moon-lighting activities from the Union’s grievance does not alone establish that the Employer’s actions were unlawful, nor does it establish that the Union’s actions were unlawfully motivated. Cf. United Paperworkers International Union, 323 NLRB at 1044 (the union reported an unsubstantiated allegation to the employer that an employee had violated its rules knowing full well the employer’s practice of strongly disciplining such violations; and although the employer did not ultimately discipline the employee after conducting its own investigation, the union’s actions still proved to be unlawful because they were motivated by the employee’s dissident union activity of seeking to correct abuses by the local, as well as the employee’s protected concerted activity of joining with others against racial harassment in the workplace). Absent any protected activity there can be no 8(a)(3) violation, and absent the implication of an 8(a)(3) violation there can be no 8(b)(2) violation.[2]

Based on the preceding analysis, the Region should dismiss the Section 8(b)(2) and 8(b)(1)(A) allegations, absent withdrawal. This email closes this case in Advice.
[1] We considered the theory that the Charging Party engaged in protected activity under *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 41-42, (1954). We note, however, that *Radio Officers* does not apply here as the Charging Party remained in good standing with the Union at all relevant times.

[2] We also considered whether the Union independently violated Section 8(b)(1)(A) but concluded there was insufficient evidence of a violation. The fact that the Union agent filed the grievance without first informing the Charging Party is largely irrelevant. A union is permitted a wide range of discretion in determining whether and how to handle grievances and may bind employees even absent their consent. See generally, *Groves-Granite*, 229 NLRB 56, 62 (1977); *Catalytic, Inc.*, 301 NLRB 380, 383 (1991). A union’s actions are not unlawful if they relate to its legitimate interest in representing its constituency as a whole and enforcing the terms of its collective-bargaining agreement. See generally *Amalgamated Transit Union Local 1498 (Jefferson Partners L.P.)*, 360 NLRB 777, 778, 786 (2014). Here, the Union agent, by filing the grievance, sought to carry out the Union’s obligation to represent the interests of the entire unit, not just the interests of the Charging Party, by enforcing contractual overtime wages. Moreover, the evidence is insufficient to establish that the Union agent knew the Employer had a no-moonlighting policy such that the grievance would effectively serve as a vehicle to put the Employer on notice of this breach, or that it would lead to an adverse action against the Charging Party. Without evidence establishing the Union agent’s knowledge of the no-moonlighting rule, any suspicions as to motives in filing the grievance remain just that – suspicions.

Please do not hesitate to contact us with any questions or concerns.
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