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Can a Supervisor be Disciplined for Working Without a Collective Bargaining Agreement with the Union?

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by Jay E. Grenig

National Labor Relations Board
v.
International Brotherhood of Electrical Workers, Local 340
(Docket No. 85-1924)

To Be Argued February 24, 1987

In the building and construction industry, a worker, such as an electrician or plumber, may serve as a supervisor on one jobsite and as a journeyman on another. Consequently, many craftworkers maintain their union membership while working as supervisors. When these union members work as supervisors for nonunion contractors, the union may attempt to discipline them for violating provisions of the union constitution which prohibit members from working for nonunion employers.

Section 8(b)(1)(B) of the National Labor Relations Act provides that it is an unfair labor practice for a labor organization to restrain an employer in selecting its representatives for the purpose of collective bargaining or the adjustment of grievances.

ISSUES

This case raises the question of whether it is a violation of section 8(b)(1)(B) of the National Labor Relations Act for a union to discipline a union member who is a supervisor for a nonunion employer, where the supervisor's responsibilities include representing management in resolving grievances.

FACTS

Two supervisors employed by nonunion electrical contractors were members of the International Brotherhood of Electrical Workers, Local 340. One of the supervisors was vice-president and estimator for his employer. Another person with the specific responsibility of adjusting employee grievances reported directly to this vice-president. The second supervisor was a jobsite superintendent for his employer. His duties included hiring and firing employees, as well as handling employees' job-related requests and personal problems.

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In 1982, the Union ruled the two supervisors had violated the Union's constitution by working for employers who did not have a collective bargaining agreement with the Union. The vice-president was fined $6,000 and the jobsite superintendent was fined $8,200.

The two supervisors filed unfair labor practice charges with the National Labor Relations Board (NLRB). Adopting the findings and conclusions of the administrative law judge, the NLRB concluded the Union had violated section 8(b)(1)(B) of the National Labor Relations Act. The board found that both men were supervisors who acted as grievance adjustment or collective bargaining representatives for their employers and that by fining them because they had worked for nonunion employers, the Union had restrained and coerced the employers in selecting and retaining their representatives in violation of section 8(b)(1)(B).

The United States Court of Appeals for the Ninth Circuit denied enforcement of that order (780 F.2d 1489 (1986)). The court acknowledged tha the vice-president and the jobsite superintendent were supervisors and representatives of their employers for the purpose of grievance adjudgment or collective bargaining and recognized that fines imposed on representatives may constitute prohibited coercion because the effect of the discipline may be to deprive an employer of the services of its representative.

However, the court found that its prior decision in *NLRB v. IBEW, Local Union No. 73 (Chewelah)* (714 F.2d 870 (9th Cir. 1980)), was controlling. In *Chewelah*, the court had ruled a union had not violated section 8(b)(1)(B) of the Act by fining a member-supervisor with grievance-handling responsibility for working for a nonunion employer, because the union neither represented nor sought to represent the employer's employees and therefore "had no incentive to either influence the employer's choice of bargaining representative or affect the disciplined supervisor's loyalty to the employer." Applying these principles to this case, the court held that "when a union does not represent or intend to represent the complaining company's employees, there can be no section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives."

BACKGROUND AND SIGNIFICANCE

Originally, the NLRB found violations of section 8(b)(1)(B) only if the union's disciplinary action clearly

affected the conduct of the supervisor in performing grievance-adjusting or collective bargaining duties.

In 1968, the NLRB departed from this practice, holding that a union's disciplining of three union-member foremen for assigning work, allegedly in violation of the collective bargaining agreement, violated section 8(b) (1) (B) because it sought to influence how the foremen interpreted the contract (*San Francisco-Oakland Mailers Union Local 18*, 172 NLRB 2173 (1968)).

Since then, the board has found violations of section 8(b) (1) (B) where the affect of union discipline of supervisor-members has been to interfere with employers' selection of their collective bargaining representatives or where the discipline has interfered with the manner in which employers' collective bargaining representatives perform their duties.

In *Florida Power & Light Co. v. IBEW* (417 U.S. 790 (1974)), the Supreme Court held that a union's discipline of a supervisor-member can constitute a violation of section 8(b) (1) (B) "only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer."

The Court rejected the board's argument that the statutory language encompasses "any situation in which the union's actions are likely to deprive the employer of the undivided loyalty of his supervisory employees." According to the Court, the question of divided loyalty was addressed, not by section 8(b) (1) (B), but by other provisions of the Act which permit an employer to refuse to hire union members as supervisors, to discharge supervisors because of union activities or membership and to refuse to engage in collective bargaining with them.

While the board limited the application of *Florida Power* to supervisors who performed rank-and-file work during a strike, the federal courts of appeals divided over applying *Florida Power* to supervisors who were fined for exercising both supervisory and rank-and-file work during a strike. In *American Broadcasting Co. v. Writers Guild* (437 U.S. 411 (1978)), the Supreme Court addressed this issue and, in a five-to-four decision, held the board had correctly understood *Florida Power* to mean that the board must "inquire whether the [discipline] may adversely affect the supervisor's performance of his collective bargaining or grievance adjustment tasks and thereby coerece or restrain the employer contrary to section 8(b) (1) (B)."

Since then, two federal courts of appeals have disagreed over whether it is a violation of section 8(b) (1) (B) for a union to discipline supervisor-members for accepting employment with a nonunion employer. (*Compare, NLRB v. IBEW Local 323*, 703 F.2d 501 (11th Cir. 1983) (violation); *with NLRB v. IBEW Local 173 (Chewelah)*, 621 F.2d 1035 (9th Cir. 1980) (no violation)). The Supreme Court's decision in this case will resolve this split of authority.

Should the Supreme Court rule in favor of the union, supervisors who are also union members may have to choose between their supervisory status or continued union membership in some situations. If the Court rules in favor of the NLRB, this will be the second decision by the Supreme Court within the last two years limiting the power of unions to discipline members to maintain solidarity.

ARGUMENTS

***For the National Labor Relations Board** (Counsel, Louis R. Cohen, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)*

1. Section 8(b)(1)(B) prohibits union discipline of supervisor-members that may adversely affect their willingness to serve as grievance adjusters or collective bargainers on behalf of an employer.
2. The Ninth Circuit's view that union discipline of a supervisor-member violates section 8(b)(1)(B) only when the union represents or demonstrates a specific intent to represent the affected employer's employees is inconsistent with a prior decision of the Supreme Court and is an unwarranted limitation on the protection Congress afforded to employers.
3. The board's decision is a reasonable construction of the statutory language and is entitled to deference.

***For International Brotherhood of Electrical Workers, Local 340** (Counsel of Record, Laurence Gold, 815 16th Street, NW, Washington, DC 20006; telephone (202) 637-5390)*

1. Section 8(b)(1)(B) does not prohibit a union from disciplining a union member for taking a supervisory position in violation of the union's constitution.
2. Section 8(b)(1)(B) was enacted to prohibit union actions forcing employers into multi-employer bargaining units or forcing employers to hire or fire a particular individual as a supervisor.

AMICUS ARGUMENTS

In Support of National Labor Relations Board

The Sacramento Valley Chapter of the National Electrical Contractors Assocation, Inc. and the two electrical contractors and the two supervisors involved in this case filed a brief, arguing that the Ninth Circuit's approach to section 8(b)(1)(B) is not rationally derived from the statutory language or the congressional intent.

In Support of International Brotherhood of Electrical Workers, Local 340

The AFL-CIO filed a brief, arguing that only conduct which directly pressures an employer with respect to the employer's choice of bargaining or grievance-adjusting representative is prohibited by section 8(b)(1)(B). Noting that divided loyalties are inevitable when union members hold supervisory posts, the AFL-CIO contends that the proper solution is to free employers to require supervisors to surrender any union membership.