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

Advice Memorandum

DATE: April 19, 2018

TO: Jennifer A. Hadsall, Regional Director
Region 18

FROM: Jayme Sophir, Associate General Counsel
Division of Advice

SUBJECT: Menards
Cases 18-CA-205432 and 18-CA-209068

506-6080-1700
506-6090-4900
506-6090-5700

This case was submitted for advice as to whether independent contractors are protected from retaliation for their testimony in Board proceedings. We conclude that complaint should issue, absent settlement, alleging that the Employer violated Sections 8(a)(4) and (1) by retaliating against the Charging Party because of [redacted] testimony in a Board proceeding, even though [redacted] is an independent contractor and not an employee under Section 2(3).

FACTS

On December 22, 2016, the General Counsel issued complaint against Menards (the "Employer") for, among other alleged violations, misclassifying delivery drivers as independent contractors.[1] On May 31, 2017,[2] the Charging Party, one of the roughly 700 delivery drivers whose status was at issue, testified in an administrative hearing in furtherance of the General Counsel's case. [redacted] was one of two lead witnesses for the General Counsel and, of the two, [redacted] was the only one employed by the Employer at the time of the hearing.

Following [redacted] testimony, the Charging Party started hearing remarks from coworkers and even a manager that [redacted] was going to be terminated. At the end of July, the Employer hired a second delivery driver to do the same work as the Charging Party—effectively cutting the Charging Party's hours in half. Shortly thereafter, at the end of August, the Employer gave the Charging Party a sixty-day notice of termination. The Employer ultimately terminated the Charging Party's employment near the end of October. On November 17, the ALJ issued a decision

[1] Case 18-CA-181821.

[2] All remaining dates are in 2017 unless otherwise indicated.

concluding that the Charging Party and the rest of the delivery drivers were independent contractors and not employees under Section 2(3).[3] The Region did not file exceptions.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Sections 8(a)(4) and (1) by retaliating against the Charging Party because of [redacted] testimony in a Board proceeding, despite the fact that independent contractors are not statutory employees afforded protection under the Act.

The Board has never considered whether an employer violates Section 8(a)(4) by discharging an independent contractor for participating in Board proceedings; however, Supreme Court and Board precedent, as well as the policy considerations buttressing those decisions, suggest that discharging an independent contractor for testifying adversely to an employer in a Board proceeding should violate the Act. The Supreme Court has emphasized that by including Section 8(a)(4) in the Act, "Congress . . . made it clear that it wishes *all persons* with information about [unfair labor practices] to be completely free from coercion against reporting them to the Board."[4] This protection is particularly important because the Board cannot initiate its own proceedings. "Implementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge."[5] As such, the complete freedom to file or participate in Board proceedings "is necessary . . . to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses."[6]

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[3] *Menard, Inc.*, Case 18-CA-181821, JD-92-17, ALJD slip op. at pp. 4–19, 2017 WL 5564295 (2017).

[4] *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967) (emphasis added) (concluding that Florida statute frustrated purposes of the Act by discriminating against individuals who filed a claim with the Board); *see also NLRB v. Scrivener*, 405 U.S. 117, 123 (1972) (noting that Section 8(a)(4) was intended to be read broadly; use of the words "otherwise discriminate" reveals Congress' intent to afford broad rather than narrow protection under this provision—an interpretation supported by the underlying objectives discussed in *Nash*).

[5] *Nash*, 389 U.S. at 238.

[6] *Scrivener*, 405 U.S. at 122 (quoting *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)).

In keeping with the Supreme Court's concerns, the Board has applied Section 8(a)(4) expansively to anyone who initiates or assists the Board to assure an effective administration of the Act.[7] Thus, the Board has found that employers violated 8(a)(4) by discharging statutory employees outside of the immediate employer-employee relationship—such as job applicants[8] and employees of other employers[9]—as well as supervisors[10]—who are statutorily excluded from the Act's protections—for their participation in Board proceedings. Even in *Parker-Robb Chevrolet, Inc.*,[11] in which the Board overruled precedent so as to limit the applicability of Section 8(a)(1)'s

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[7] *See General Services, Inc.*, 229 NLRB 940, 941–43 (1977) (analyzing legislative history, as well as Supreme Court and Board precedent, and concluding that all three sources emphasize that Section 8(a)(4) must be applied expansively in order for the Board to satisfy its statutory function of remedying unfair labor practices), *enforcement denied mem.* 575 F.2d 298 (5th Cir. 1978).

[8] *Briggs Mfg. Co.*, 75 NLRB 569, 570–72 (1947) ("Because Section 8(4) does not explicitly limit the term "employee" to those standing in the proximate employer-employee relationship, the broad definition contained in Section 2(3) must prevail under the express provisions of Section 2(3). . . . Unless the purpose of Section 8(4) is to be frustrated, the term must be interpreted to include members of the working class generally, as well as persons standing in the proximate employer-employee relationship. . . . To limit protection against discrimination only to employees of a particular employer, would permit employers to discriminate with impunity against other members of the working class, and would serve as a powerful deterrent against free recourse to Board processes."); *Cf. Clark & Hinojosa*, 247 NLRB 710, 716 (1980) (clarifying that subsequent amendments to the Act did not modify the Board's analysis in *Briggs*).

[9] *Lamar Creamery Co.*, 115 NLRB 1113, 1121 (1956) (Respondent violated Section 8(a)(4) when it refused to hire individual due to his participation in an NLRB proceeding against former employer), *enforced* 246 F.2d 8 (5th Cir. 1957).

[10] *General Services, Inc.*, 229 NLRB at 941–43 (noting that nothing in legislative history of 1947 Taft-Hartley amendments indicates that Congress intended coverage of Section 8(a)(4) to be applied restrictively and exclude supervisors; indeed, broad application is necessary in order to fully effectuate Section 8(a)(4)'s remedial purpose); *General Nutrition Center*, 221 NLRB 850, 850, 858 (1975) (acknowledging that Section 7 does not extend to supervisors, but emphasizing that Section 8(a)(4) forbids an employer from punishing a supervisor for participating in Board proceedings so that employees are able to vindicate their own Section 7 rights).

[11] 262 NLRB 402 (1982).

protection for supervisors, the Board carved out an exception for supervisors who testify or participate in Board proceedings to "ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board proceedings."[12] The Board further stated that an employer violates the Act under these circumstances regardless of whether any Section 2(3) employees are aware that the supervisor was discharged for his or her testimony, "since it is the act itself and not just the fear that it may create among the employees that interferes with their Sec. 7 rights."[13] Thus, *Parker-Robb* is entirely consistent with the Section 8(a)(4) cases finding that a liberal approach to Section 8(a)(4) is essential to effectuating the purposes of the Act, because to hold otherwise would permit a respondent to retaliate against claimants, witnesses, or other participants in Board proceedings, and effectively control access to the Board's processes.[14] Indeed, if the Board were to ignore the extensive precedent calling for the extension of Section 8(a)(4) to *all persons,* and were to exclude independent contractors, employers would be able to overtly discriminate against independent contractors whenever they sought clarification of their status under Section 2(3); in other words, if an independent contractor reasonably believed that [redacted] had been misclassified and should be considered an employee, and an ALJ or the Board disagreed, the employer could lawfully cancel [redacted] contract in retaliation for [redacted] effort to have [redacted] status resolved by the Board.

Based on the forgoing, we conclude that the Employer violated Sections 8(a)(4) and (1) by discharging the Charging Party, an independent contractor, under the particular circumstances of this case. Accordingly, the Region should issue complaint,

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[12] *Id.* at 404.

[13] *Id.* at 404 & n.18.

[14] *General Services, Inc.*, 229 NLRB at 941. *See also Turner Transfer*, Case 05-CA-025703, Advice Memorandum dated April 11, 1996 (concluding that Section 8(a)(4)'s protections should extend to independent contractors).

absent settlement, alleging that the Charging Party's termination violated Sections 8(a)(4) and (1).[15]

/s/
J.L.S.

ADV.18-CA-205432.Response.Menards.(b) (6), (b) (7)

[15] We note that applying Section 8(a)(4) to independent contractors may present some remedial anomalies. Unlike supervisors, as to whom the standard remedy of reinstatement and backpay would clearly be applicable, a comparable remedy for independent contractors would in effect require the employer to do business with another independent "business." However, even if a "reinstatement" remedy is inappropriate, a notice-posting and other remedies might be appropriate. The correct remedy can be determined in compliance proceedings, if necessary. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (noting that compliance proceedings offer the "appropriate forum" for any necessary modification to the standard remedy of reinstatement with backpay and recognizing the courts' longstanding approval of the Board's policy of tailoring the remedy in compliance proceedings).