

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

Advice Memorandum

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DATE: June 26, 2008

TO : Joseph Norelli, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: National Right to Work Legal Defense
and Education Fund
Case 20-CA-33673

This case was submitted for advice on whether the National Right to Work Legal Defense and Education Fund (the Foundation) violated Section 8(a)(1) by filing an attorney misconduct complaint against a union attorney pursuant to Section 102.177 of the Board's Rules and Regulations, in which it also requested the General Counsel to refer the attorney to the Department of Justice for criminal prosecution.

We conclude that the request for referral did not violate the Act, as it was reasonably based under the test set forth by the Board in BE & K Construction Co. on remand.¹

FACTS

Early Background

In a letter dated February 17, 1998, the Board, through its Executive Secretary, admonished union attorney David Rosenfeld for "continuously referring to the National Right to Work Legal Defense Foundation as the 'Right to Freeload Committee,' 'The National Right to Shirk Legal Defense Foundation' or variations thereon, and to the employees of this organization including [its] Attorney as 'Shirkers.'" Rosenfeld's remarks referenced by the Board were contained in certificates of service and other Board filings. The Board indicated it found such offensive epithets inappropriate and a manifest disrespect for the Board's processes as well as opposing counsel. Rosenfeld was admonished that "any future filings in any matter in which he addresses the [Foundation] or its counsel or any party in this or a similar inappropriate manner risk rejection pursuant to Section 102.114(a) of the Board's

¹ 351 NLRB No. 29 (September 29, 2007).

the Board refer Rosenfeld's conduct to the Department of Justice for possible prosecution under the False Statements Act and open its own disciplinary proceedings under Sections 102.114(a) and 102.177 of the Board's Rules and Regulations. The Foundation sent a copy of this letter to the Department of Justice.

On February 8, 2008, Associate General Counsel Richard Siegel responded to the Foundation's complaint. This letter referenced two California Bar Rules that the Foundation alleged Rosenfeld had violated. Siegel concluded that these two rules had not been violated since, under California law, "statements of rhetorical hyperbole" were not sanctionable nor was language used in a "loose, figurative sense." Siegel wrote: "Mr. Rosenfeld's inclusion of inaccurate, mocking or pejorative statements in the charge form did not mislead the Agency in a material way or impede our investigation of the Charged Party's defense of the charge." Siegel concluded the evidence was insufficient to warrant further proceedings under the Board's rules and regulations. No further response has been forthcoming from the Department of Justice.

The Foundation asserts that it filed the complaint with the Board and requested the criminal referral "to challenge Rosenfeld's willful false statements to the Board on the Charge Form, being well aware of Rosenfeld's history of misconduct with the Board, and believing that someone needed to challenge him on his untruthfulness as an attorney filing charges with the Board."

In light of the Board's earlier admonition to Rosenfeld by the Board, the Region has determined that the Foundation had a reasonable basis for complaining about Rosenfeld referring to the Foundation as the "National Right to Shirk Legal Defense Fund and Committee." Accordingly, the issue submitted for advice is whether the request for a criminal referral to the Department of Justice had a reasonable basis in fact or law.

ACTION

We conclude that the Foundation's request that the Board refer attorney Rosenfeld to the Department of Justice did not violate the Act, as it was reasonably based under the test set forth by the Board in BE & K Construction Co. on remand.² Therefore, the Region should dismiss the charge, absent withdrawal.

² 351 NLRB No. 29 (September 29, 2007).