

**Teamsters Local Union No. 741, Line Drivers, Pickup and Delivery, affiliated with International Brotherhood of Teamsters, AFL-CIO and Joint Council of Teamsters No. 28, affiliated with International Brotherhood of Teamsters, AFL-CIO and International Brotherhood of Teamsters, AFL-CIO (A.B.F. Freight System) and Larry Hathaway.** Cases 19-CB-7025 and 19-CB-7170

September 13, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On March 4, 1993, Administrative Law Judge Joan Wieder issued the attached decision. Respondents Teamsters Local 741 and Joint Council of Teamsters No. 28 filed exceptions and a supporting brief, the Charging Party filed exceptions, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondents violated Section 8(b)(1)(A) of the Act by, inter alia, instituting charges against and fining Larry Hathaway, a member-employee, because Hathaway inquired of the Employer when a rebid would be scheduled, conduct that the judge found was concerted activity protected under Section 7 of the Act.<sup>1</sup> Although recognizing that the Board does not regulate a union's conduct in imposing and enforcing fines in the administration of internal union rules when that conduct falls within the proviso to Section 8(b)(1)(A) of the Act,<sup>2</sup> the judge found that Section 9(a)'s guarantee of an employee's Section 7 right to present grievances to his employer was an "overriding labor policy" that constituted an exception

<sup>1</sup>The Respondents are collectively alleged to have violated the Act by entering internal charges against Hathaway, subjecting him to internal union disciplinary proceedings, finding him guilty of violating Local 741's bylaws and the International's constitution, imposing a \$300 fine on him, and affirming these findings. Because no party argues that either Local 741's bylaws or the International's constitution are unlawful or that the Respondents' review process denied Hathaway due process or was otherwise improper, we limit the issue here to whether Local 741 violated the Act by instituting charges against and fining Hathaway.

<sup>2</sup>Sec. 8(b)(1)(A) provides that:

It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . . . *Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.* [Emphasis added.]

to that rule.<sup>3</sup> Accordingly, the judge concluded that "[t]he Respondents' rights under the proviso to Section 8(b)(1)(A) [were] clearly circumscribed by Section 9(a)" and found the violation. For the reasons set out below, we reverse.

The facts are fully set out in the judge's decision. In brief, A.B.F. Freight System (A.B.F.) is a trucking company engaged in the transportation of dry goods throughout North America. Rick Porter is the manager of its Kent, Washington facility, the only facility at issue here. A.B.F. and Local 741 are parties to a collective-bargaining agreement covering the drivers at the Kent facility. The contract incorporates by reference the Western States Supplemental Agreement and the National Master Freight Agreement. Under the contract, A.B.F. is required to post regular runs for bid on a seniority basis. The contract also requires A.B.F. to offer at least 80 percent of its employees on the seniority roster a guaranteed 40-hour workweek (the "80 percent rule"). The remaining 20 percent of the employees on the seniority list work as "floaters" on an as needed basis. The contract requires A.B.F. to have a complete rebid once a year. In addition, in order to ensure compliance with the 80-percent rule, A.B.F. makes general adjustments to the bid when additional employees are added to the list or laid off. Porter discusses such adjustments with the Union prior to their posting.

In January 1991,<sup>4</sup> Porter contacted Union Stewards Pennington and Dibble regarding a pending bid adjustment required by the contemplated layoff of several employees. They, in turn, notified the Union. Local 741 Business Agent Rockas then contacted Porter and negotiated a "work sharing agreement" whereby drivers with seniority could take a week off without risk of discipline while "floaters" filled in as needed. Under this arrangement "floaters" could work the 40 hours a month required for eligibility for health and welfare benefits under the contract. As a result of this oral agreement, A.B.F. did not lay off any employees in January.

In mid-March, Local 741 members received copies of the tentative new National Master Freight Agreement effective April 1, 1991. During his review of the Western States Supplement to the new agreement, Union Steward Pennington noted that there was a change in the bidding provisions. Under the new agreement, multiple bids, which were permitted under the old contract, were restricted.<sup>5</sup> A.B.F. regularly

<sup>3</sup>If a union's "rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating Section 8(b)(1)." *Scofield v. NLRB*, 394 U.S. 423, 429 (1969).

<sup>4</sup>All dates are in 1991 unless otherwise noted.

<sup>5</sup>"Multiple bids" were positions posted by an employer that included multiple job duties. Under the new agreement, employers

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posted such multiple bids. Pennington informed Porter of the change and noted that it would preclude A.B.F. from using the multiple bid system in the future. Pennington testified without contradiction that Porter replied that there was no way that that was going to happen as it would put the Company out of business and that "the only way we'd get singular bids is if [Pennington] grieved it and won." On April 1, Pennington filed a grievance in an attempt to get A.B.F. to use single bids. Local 741 would not agree to a total rebid until the grievance was resolved.

Meanwhile, at the end of March or the beginning of April, Charging Party Hathaway stopped by Porter's office and asked Porter when there would be a rebid. Hathaway added that some employees wondered if A.B.F. was going to rebid.<sup>6</sup> At the time, Hathaway held no office in the Union. Porter told Hathaway that he would check into it and get back to him. Porter then informed Pennington and Dibble of Hathaway's inquiry. The next day Pennington and Dibble told Porter not to rebid and that the employees did not want a rebid. Porter did not rebid.

On Thursday, April 18, Porter scheduled three employees for layoff. Because the 80-percent rule would require an adjustment to the bids, Porter decided to have a general rebid of the board at the same time. The bid was posted on April 19. Porter laid off the employees and rebid the board without consulting the Union. As a result of the rebid, Pennington was one of two employees who lost his bid. Porter rescinded the layoffs and removed the rebid after protests from the Union.

On April 25, Pennington wrote Local 741 to request that formal charges be brought against Hathaway because "Hathaway took it upon himself to attempt to personally force A.B.F. to layoff other brother teamsters to benefit himself." Pennington also charged that Hathaway, "without union representation or sanction," went to Porter "to cause harm to other union members and undermining [sic] an agreement that Steward[s] Dibble and [Pennington] had made with Dick Porter to keep our Teamster Brothers from being laid off." Pennington concluded by asserting that Hathaway's actions had "caused considerable financial hardship to our brothers on the bottom of the board," and that

could do this only if the combination of duties was essential to provide a full day's work to the successful bidder or was otherwise agreed to by the employer and the Union. If those conditions were not met, the assignment was to be posted as a single position. It appears that the new restrictions on multiple bids would tend to increase the number of available full-time positions.

<sup>6</sup>In setting out the facts, we find it unnecessary to resolve the discrepancies between Hathaway's and Porter's testimony. As the judge found, Hathaway's words, as corroborated by Porter, were "an inquiry concerning when there would be a total re-bid because several employees were interested."

Hathaway "need[ed] to call for a stewards election or stay out of [Porter's] office."

After a hearing at which Hathaway chose not to appear, Local 741 found that Hathaway had violated article II, section 16 of its bylaws,<sup>7</sup> article XIX, section 6(b), paragraphs (2) and (5) of the International's constitution,<sup>8</sup> and Local 741's oath, which provides "I . . . will never from self motives wrong a brother, or see him wronged if in my power to prevent it." Local 741 fined Hathaway \$300. Hathaway paid the fine under protest and appealed the decision. In November 1991, Joint Council 28 affirmed Local 741's imposition of the fine and in May 1992 the International's general executive board upheld Joint Council 28's denial of Hathaway's appeal.

As an initial matter, we agree with the judge that Hathaway was engaged in concerted activity protected under Section 7 of the Act when he inquired of Porter when a rebid would occur. Thus, the issue here is whether the Respondents violated Section 8(b)(1)(A) by filing charges against and disciplining Hathaway for engaging in activity protected under Section 7. As the judge found, the outcome depends on whether the Union's action was protected under the proviso to Section 8(b)(1)(A). In analyzing the interplay between Section 8(b)(1)(A) and its proviso, we observe that the Supreme Court in *Scofield v. NLRB*, 394 U.S. 423, 428 (1969), noted in its analysis of the same section of the Act that:

the Court in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967), distinguished between internal and external enforcement of union rules and held that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status."

The *Scofield* Court went on to observe, however, that "it has become clear that if the [union's] rule invades or frustrates an overriding policy of the labor laws, the rule may not be enforced, even by fine or expulsion, without violating Section 8(b)(1)." *Id.* at 429. In concluding its analysis of this section of the Act, the Court stated:

<sup>7</sup>Sec. 16, *Duties of Members*, provides, inter alia, that "[n]o member shall interfere with the elected officers or business agents of this organization in the performance of their duties, and each member shall, when requested, render such assistance and support in the performance of such duties as may be required by them, provided this does not interfere with the individual rights of the members."

<sup>8</sup>These sections set out the grounds on which charges can be brought against members. These include, inter alia, "(2) Violation of oath of office or oath of loyalty to the Local Union and the International Union" and "(5) Conduct which is disruptive of, interferes with, or induces others to disrupt or interfere with, the performance of any union's legal or contractual obligations . . ."

Under this dual approach, § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. [Id. at 430.]

Applying this analysis here, we turn first to whether the Respondents “enforce[d] a properly adopted rule which reflects a legitimate union interest” as *Scofield* requires. In finding that they did, we emphasize initially that “the mere fact that the discipline is in reprisal for a Section 7 right is not sufficient to condemn the discipline.” *Boilermakers (Kaiser Cement)*, 312 NLRB 218, 220 (1993). Thus, in *NLRB v. Allis-Chalmers, Mfg. Co.*, 388 U.S. 175 (1967), the Supreme Court held that a union could fine employee-members for exercising the Section 7 right to cross a picket line during a strike. As the Board explained in *Meat Cutters Local 593 (S & M Grocers)*, 237 NLRB 1159, 1160 (1978):

The Supreme Court in *Allis-Chalmers* recognized that the right of collective bargaining is a paramount policy of national labor law, and that in order for a union to fulfill this obligation it must be able to promulgate its own rules and have the right to impose reasonable discipline on members who do not obey such rules. The Court further found that integral to this policy is the union’s right to protect itself against the erosion of its status of collective-bargaining representative by reasonably disciplining members for violating internal regulations.

Here the Respondents sought to enforce rules that required members not to interfere with their elected officers in the performance of their duties and not to wrong their fellow members “from self[ish] motives.” We find that such rules were reasonably designed to prevent “the erosion of [the Respondents’] status of collective-bargaining representative.” When the Employer posted the April 19 bid and laid off several employees, Local 741 officials believed that Hathaway’s rebid inquiry occasioned the bid and caused the Employer to break the work-sharing agreement with the consequent layoff of several employees. In addition, Hathaway’s inquiry—which suggested by its reference to other employees that he represented unit employee sentiment—undermined Pennington’s tactical decision to withhold agreement for any rebid until the grievance over the Employer’s use of multiple bids was resolved. Thus, Local 741 reasonably believed that Hathaway’s conduct undermined its efforts on behalf of the bargaining unit employees and was “inimical to the union

as an entity and collective-bargaining mechanism.”<sup>9</sup> In sum, we find that Hathaway engaged in conduct for which Local 741 could lawfully discipline its own members provided that that conduct was not protected by some “overriding policy of the labor laws.”

Under the second prong of the *Scofield* analysis, a union rule “impairs . . . a policy Congress has imbedded in the labor laws” where the rule conflicts with an *overriding* public policy and seeks to coerce or discourage conduct that is beyond the legitimate interest of the union. Thus, in *NLRB v. Marine Workers*, 391 U.S. 418, 424 (1968), the Court found that the respondent union violated Section 8(b)(1)(A) by expelling a member for filing charges with the Board before he had exhausted internal union appeal procedures. In reaching this conclusion, the Court found that unimpeded access to the Board was “an overriding public interest” and that “[a]ny coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization.”<sup>10</sup> Similarly, in *Pattern Makers League v. NLRB*, 473 U.S. 95, 104–107 (1985), the Court upheld the Board’s finding of an 8(b)(1)(A) violation where a union rule prohibiting resignation during a strike resulted in fines being levied against strike-breaking members who resigned from the union prior to returning to work. The Court agreed with the Board that restrictions on the right of a member to resign from the union at any time violated “the policy of voluntary unionism” embodied in Section 8(a)(3). Thus, employee-members must have the right to resign from the union and thus escape the application of its rules.

Although we agree with the judge that Hathaway’s conduct in inquiring of Porter when a rebid would occur was protected by Section 7 of the Act, as explained above under *Scofield* the fact that an employee-member engages in conduct protected by Section 7 does not necessarily immunize the employee-member from internal union discipline.<sup>11</sup> Contrary to

<sup>9</sup> *Distillery Workers Local 186 (E & J Gallo Winery)*, 296 NLRB 519 (1989) (Chairman Stephens concurring).

<sup>10</sup> As the Board explained in *Boilermakers*, supra at 220 fn. 7: “The Sec. 7 right of seeking access to the Board is fundamental in the sense that all others are dependent on it. If the employee cannot come to the Board, he cannot vindicate any of his rights.”

<sup>11</sup> In this regard, we disagree with the judge’s finding, set out above, that the proviso to Sec. 9(a) inevitably elevates an employee’s right to present grievances to his employer into an “overriding labor policy.” As the Board has found, Sec. 9(a) establishes no protected right. See *Colonial Stores*, 248 NLRB 1187, 1188 fn. 7 (1980), where the Board stated “that Sec. 9(a) of the Act does not confer on employees a protected right to present grievances individually to an employer. . . . The right is conferred by Sec. 7 and protected by Sec. 8(a)(1).” See also *Black-Clawson Co. v. Machinists*, 313 F.2d 179, 185 (2d Cir. 1962), where the court explained that by the proviso to Sec. 9(a) Congress meant to confer on employees not a protected right, but the “privilege” to approach employers on personal grievances. As the court went on to explain, the proviso’s

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the judge, we find that Hathaway's right to inquire when a rebid would occur was not grounded in such an "overriding policy of the labor laws" that no countervailing rights or policies may be balanced against it to limit its application. Indeed, because protection of an employee's right to cross a picket line is not an "overriding policy" (*Allis-Chalmers*), it is difficult to understand how protection of an employee's mere inquiry into rebidding would somehow be elevated into an "overriding policy." Rather, in both situations, the Union is free to defend itself against employee-members who act to undermine its authority. In these circumstances, there exists "a legitimate union interest in preventing the erosion of its status as collective-bargaining representative." *Boilermakers*, supra at 219. Accordingly, we distinguish the Section 7 right at issue here from the other rights discussed above and conclude that the Respondents' disciplining of Hathaway did not unlawfully contravene any public policy "imbedded in the labor laws."

Finally, we note that, as *Scofield* requires, Hathaway was free to resign from Local 741 at any time and then request a rebid or take other action after he had given up the benefits and obligations of union membership.<sup>12</sup> Moreover, the Union's action of fining Hathaway did not affect the latter's employment status. For all these reasons, we find that the Respondents did not violate Section 8(b)(1)(A) as alleged and shall order that the complaint be dismissed.

## ORDER

The complaint is dismissed.

purpose is to protect an employer from 8(a)(5) charges when it voluntarily processes an employee grievance at the behest of the individual employee.

<sup>12</sup> As explained above, employee-members have a right to resign from the union and escape its rules. "If they resign prior to engaging in the Section 7 conduct deemed offensive by the union . . . the union cannot discipline them. If they have opted for continued membership, they cannot be heard to complain if the union enforces the rules of membership." *Boilermakers*, supra at 220.

*Michael Hurtado, Esq.*, for the General Counsel.  
*Ken Pedersen, Esq.*, of Seattle, Washington, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on July 9, 1992,<sup>1</sup> at Seattle, Washington. The charge was filed in Case 19-CB-7025 by Larry Hathaway, an individual (the Charging Party or Hathaway), on October 10, 1991, and amended on December 5, 1991, against Teamsters Local Union No. 741, Line Drivers, Pickup and Delivery, affiliated with International Brotherhood of Teamsters, AFL-

<sup>1</sup> All dates are in 1991 unless otherwise indicated.

CIO (Local 741) and Joint Council of Teamsters No. 28, affiliated with International Brotherhood of Teamsters, AFL-CIO (Joint Council 28). The charge in Case 19-CB-7170 was filed by Hathaway on May 27, against the International Brotherhood of Teamsters, AFL-CIO (International). The International, Joint Council 28, and Local 741, are collectively and respectively referred to as Respondents. On April 14, 1992, the Regional Director for Region 19 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Local 741 and Joint Council 28 alleging they violated Section 8(b)(1)(A) of the Act. On June 10, 1992, an amended complaint was issued alleging the International, as well as Local 741 and Joint Council 28 violated Section 8(b)(1)(A) of the Act.

Respondents' timely filed answers to the complaint, as amended, admit certain allegations, deny others, and deny any wrongdoing.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

### FINDINGS OF FACT AND CONCLUSIONS

#### I. JURISDICTION

Respondents' answers to the complaint, as amended, and stipulations entered by the parties admit, and I find, A.B.F Freight System meets one of the Board's jurisdictional standards and that Local 741, Joint Council 28,<sup>2</sup> and the International are statutory labor organizations.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

Much of the evidence is undisputed. A.B.F. is a trucking company engaged in the transportation of dry goods throughout the United States, Canada, and Mexico with a facility in Kent, Washington. The Kent facility is engaged solely in the local pickup and delivery of freight and is managed by Rick Porter. A.B.F. has a collective-bargaining agreement with Local 741, which is included in the Western States Supplemental Agreements and National Master Freight Agreement, effective for the period of April 1, 1991, through March 31 1994.<sup>3</sup>

Respondents admitted at all material times, Larry Weldon held the position of secretary-treasurer for Respondent Local 741 and was an agent of Local 741, Tom Sever was general secretary-treasurer of Respondent International, and Arnie Weinmeister was the president of Respondent Joint Council No. 28 and was Joint Council 28's agent under the Act. Respondents deny the Local 741 shop stewards at A.B.F., Robert Pennington and Mike Dibble, acted on Respondents' be-

<sup>2</sup> Respondents admitted, for purposes of this case only, the allegation that Respondent Joint Council 28 is a labor organization under the Act.

<sup>3</sup> As here pertinent, the predecessor collective-bargaining agreement, including the National Master Freight Agreement and Western States Area Supplemental Agreements, effective April 1, 1988, through March 31, 1991, contain similar provisions.

half and are agents within the meaning of Section 2(13) of the Act.

The Western States Area Supplemental Agreement contains the following job bidding procedure:

Regular runs and positions, except "House" accounts of "contract" accounts, shall be posted for bid on a seniority basis. Such posting shall be at a conspicuous place so that all eligible employees may receive notice. In the case of multiple bids, the primary bid will be the first listed. There shall be at least one general bid each year within each Local Union's jurisdiction and there may be additional bids, where business or operating conditions warrant. Disputes as to bidding may be submitted to the grievance procedure. All temporary positions of twenty-eight (28) days or longer duration will be posted for bid purposes.

In November 1990, A.B.F. conducted its annual job bidding among the drivers. Bidding order is principally based on seniority, considering classification. The collective-bargaining agreement also contains an "eighty percent (80%) rule" which requires the employer to offer at least 80 percent of its employees on the seniority roster a guaranteed 40-hour workweek. The remaining 20 percent of the employees on the seniority list (called "twenty percenters" and/or "floaters")<sup>4</sup> do not have a 40-hour workweek guarantee, do not have regularly assigned jobs but work on an as needed basis, including as "fill-ins" for the regularly assigned employees.<sup>5</sup> The employer sets the start times for the jobs listed on the bidding sheet.<sup>6</sup>

Prior to November 1990, A.B.F. conducted a job bidding in July 1990. According to Porter, an employee, Jerry Crain,<sup>7</sup>

<sup>4</sup>The employees who are in the top 80 percent in seniority, can elect to be floaters, they are not required to bid for a job that has the 40-hour guarantee.

<sup>5</sup>Porter gave his understanding of the bidding procedure as follows:

We're required to bid a certain amount of positions based on the number of people we have on our seniority roster annually, one time per year which, for our facility, it falls in November. If there is any change to our seniority board, or with mutual agreement between the company and the local, we can re-bid or make adjustments to the bid throughout the year. . . .

JUDGE WIEDER: That's based only if there are changes in the seniority roster?

THE WITNESS: It's based on changes to the seniority roster or by mutual agreement. In other words, either the company or the union can request that a re-bid be done. It's got to be mutually agreed upon.

JUDGE WIEDER: And is there any limit to the adjustments based on changes in the seniority roster?

THE WITNESS: To my knowledge, no. You know, we're required by the contract to bid one time per year. So there is a minimum requirement. But maximum, I don't believe there is.

<sup>6</sup>The bidding sheet is referred to as the board, and when a senior employee chooses not to bid for a particular job, it is called "pegging the board" and/or "shooting the board."

<sup>7</sup>In addition to requesting rebids, employees have talked to management about safety matters, which the Company has acted upon without consultation or approval from the Union. Shortly before the hearing in this proceeding, Respondent Local 741 and A.B.F. agreed to the formation of a safety committee. The safety committee was formed 1 to 2 weeks before the hearing. Employees have also come to Porter to adjust pay without seeking the assistance or prior ap-

proval of the Local 741 stewards. There is no claim the collective-bargaining agreement requires such prior approval.

requested the bid because A.B.F. had worked some floaters 5 consecutive days and A.B.F. needed "to add a bid." Porter replied no. Then Steward Pennington and Local 741 Business Agent Spero Rockas talked to Porter. Pennington informed him "we had worked unassigned people on a set start time for five consecutive days. And by terms of the contract, we were required to add an additional start time at that time." Porter did not initiate the job bidding after this conversation, only after Rockas informed him A.B.F. "was not within the terms of the contract" did Porter post another bid sheet." Another bid was requested by Rockas and posted by A.B.F. in July to comply with the 80-percent rule. This second July bidding was called an adjustment to the bid. These bids were posted with copies sent to Local 741. Thus, in 1990, A.B.F. conducted at least three bids, two of which were partial rebids and the third, in August, was a complete rebid of the seniority list.

According to Porter's uncontroverted testimony, A.B.F. and Local 741 always discussed bidding prior to any A.B.F. posting of bids. Generally, Porter discussed the addition or deletion of a bid with the union stewards prior to any posting. After the annual November bidding, A.B.F. had an adjustment to the bid because the Employer added two employees and needed to comply with the 80-percent rule. In January 1991, A.B.F. had another adjustment to the bid. After the Christmas holiday, business is usually slow. Porter contacted the Local 741 stewards prior to posting this bid. Adjustments to the bid are usually necessitated by layoffs and additions to the staff covered by the collective-bargaining agreement.<sup>8</sup>

The seasonal lull in business and the loss of "a couple of large accounts," prompted Porter to inform the Local 741 shop stewards he may be forced to lay off employees. Apparently the stewards informed the Union, for according to Rockas:

We had an agreement, verbal agreement in January when the company called us and said that things were getting slow and they were going to have to lay some people off. So I went down to the company and got with the stewards, Mr. Pennington and Dibble, and went in and talked to Mr. Porter. And we mentioned the fact that we have a lot of senior people that would like to have some time off without being disciplined under the contract, and if they would be willing to take time off a week at a time, two days, one day, whatever it is, and they could use these junior people to work to fill in. And he said that he would go for that. And it worked real fine. There were guys that were taking up to two weeks or better off.

<sup>8</sup>Porter understood layoffs to require a total rebid. Rockas testified the employer could just drop one bid from the board and let the affected senior employees adjust their bids accordingly; resulting in what he described as a "bump and roll process" which did not require a bidding sheet. There is no refutation of Porter's testimony that he acted in good faith based on his understanding of the bidding process requiring rebidding when he laid off three employees. Respondents did not file a grievance when he laid off three employees in April, as discussed in greater detail below.

It is uncontroverted that the Local 741 stewards were part of these negotiations for this “work sharing” program. It is also uncontroverted that Hathaway was aware of the “work sharing arrangement.”

A.B.F. and Local 741 implemented this proposal which protected the less senior employees who needed to work 40 hours a month to be eligible for health and welfare benefits paid by the employer. Under this verbal agreement, Rockas admitted, A.B.F. could still elect to lay off employees and “then the agreement would kind of be down the drain.” There is no claim a decision by A.B.F. to lay off employees would violate the Act.

In mid-March 1991, members of Local 741 received copies of the tentative new National Master Freight Agreement which was to become effective on April 1, 1991. Pennington noted during his review of the Western States Supplement to the tentative agreement that there was change in the bidding provisions. In the then current agreement, “multiple bids” were permitted, thus the employer could post for a bid position which included multiple job duties. The tentative agreement restricted multiple bids.<sup>9</sup> Many of the positions historically posted by A.B.F. were “multiple bid” jobs; all the positions posted at A.B.F. for the November 1990 rebid were “multiple bid” jobs.

Pennington informed Porter of the new bidding provisions and opined it would preclude A.B.F. from posting “multiple bid” jobs in the future. Porter disagreed and Pennington understood A.B.F. would continue the practice of posting “multiple bid” jobs. Local 741 subsequently conducted meetings of its members on March 23, 24, and 25, 1991, to explain the changes in the provisions of the National Master Freight Agreement. According to Hathaway, he probably attended the March 23 meeting. Pennington claims he raised the “multiple bid–single bid” matter at this meeting. The nature of this discussion was not detailed on the record. Pennington only testified “[i]t was a subject that I brought up.” On the effective date of the new collective-bargaining agreement, April 1, 1991, Pennington filed a grievance in an attempt to “get singular bids.”

#### B. Events Involving Larry Hathaway

Hathaway is a pickup and delivery driver for A.B.F. and has been employed by the Company for about 3 years. From May 1976 until January 1980, Hathaway was elected as a trustee for Local 741 and he was a business agent with Local 741 for about 4 years. Since 1980, Hathaway has not held any office with Local 741. During the November 1990 bidding, Hathaway, although eligible to bid on a position which guaranteed him 40 hours’ work per week, elected to become a casual employee, being called for work only when needed by A.B.F. Hathaway also worked for United Parcel Service on weekends.

<sup>9</sup>The provision in the tentative agreement provided:

There shall be no multiple bids unless such bids are for the exclusive purpose of providing a full day’s work, or unless such bids are otherwise mutually agreed to. However, where there is normally sufficient work to justify a single classification bid, that bid may not be posted as a multiple bid.

#### 1. Hathaway’s talk with Porter

In late December 1991 or early January 1992, Hathaway discussed with Everett Penfold and Terry Cannata their respective wishes to change their bids. Penfold wondered why there were no bids for a long period and he “wondered why one hadn’t been posted.” Penfold and Hathaway “discussed talking to the supervisors about it.” Penfold wanted to change shifts. Penfold said he would try to talk to Porter about posting bids. According to Penfold, he and Hathaway “had kind of mutually agreed that we would ask Mr. Porter to post the bids. . . . Individually.” Since Penfold was working an evening shift, he does not believe he had an opportunity to ask Porter about posting bids. Porter works during the day and Penfold rarely sees him.

After the conversations with Penfold and Cannata, Hathaway went to Porter’s office and “asked him are we going to re-bid soon, or when are we going to re-bid, because several employees had asked me, that they wanted to change shifts. And I was asking not for myself, but for them, really. . . . I said something to the effect that yes, other drivers want to change shifts or want to change their bids too, you know, and I was just asking for when we might re-bid.” In reply, according to Hathaway:

Porter said something about he might have to layoff, or something to that effect, or that he had pressure to be laid off. And so, you know, I don’t know. He says, “If I have to layoff, I will have to re-bid,” or something like that, you know.

At the time of this conversation, Hathaway did not necessarily want to stop being a “floater,” his opting to select a bid depended on what was available when it was his turn to select a start time, he did not want to work the swing or graveyard shifts. Respondent avers Hathaway should not be believed for he wrote the Joint Council 28 on May 14, 1991:

Free speech is protected by federal law, including the LMRDA, as well as our union constitution and the consent order in *USA v. IBT*.

For your information, my conversation with management was limited to pointing out that since the return of two employees from long term disability, the work opportunity had diminished and a re-bid was called for. Beside myself, Everett Penfold, Terry Cannata, Chuck Socha and possibly others wanted to re-bid, however, Robert Pennington chose not to represent out interests. At that point, the manager informed me that he was under pressure from his boss to layoff the bottom drivers. *I at no time asked him to lay off anyone.* Nor did I at anytime offer any information that could lead to disciplinary action against anyone. My conversation with the manager occurred two to three weeks prior to the layoff. I was a steward for over twelve years and tried to represent all drivers not just my friends and ignore the others as Mr. Pennington chooses to do.

Hathaway explained the apparent inconsistency between his testimony and this letter by stating he did not mention the return of employees from disability during his conversation with Porter, “but that was my justification for it, for the re-bid, in my own mind.” Hathaway’s testimony is credibly

corroborated by Porter. According to Porter, Hathaway did not mention the return of two employees from long-term disability during their conversation nor did he say “the work opportunity had diminished and a re-bid was called for.”

Further, Porter testified he would normally see and converse with Hathaway daily, and during one of these conversations at the end of March or beginning of April:

To the best of my recollection, I was at my desk and Mr. Hathaway had come in in the morning or afternoon and stuck his head in the door and he said, “Boss, when are we going to re-bid?” And I looked at him and I said—I can’t remember if I said why do you ask. I remember that Larry had said some people were wondering if we were going to re-bid. And I told him that I would check it out and I would get back with him.

Q. Was that the only conversation you had with Mr. Hathaway about the re-bid?

A. Yes.<sup>10</sup>

Porter further testified Hathaway did not say why he or any other employee wanted a rebid. Porter did not know why Hathaway or any other employee specifically wanted a rebid.<sup>11</sup> There is no evidence or claim Hathaway indicated he wanted to accept a bid rather than remain a floater. Hathaway was number 17 in seniority, which, at the time, placed him almost at the bottom of the seniority list as one of the last employees with an opportunity to bid on a job with a 40-hour-a-week guarantee. As indicated above, Hathaway testified he would not accept all bids, only a daytime bid. There is no evidence of record to contradict him. Porter also testified Hathaway did not ask him to post a bid, he merely inquired when A.B.F. was going to rebid the board.

According to Hathaway’s uncontroverted testimony, two employees with sufficient seniority to hold bid positions, Jerry Crain and Henry Spellman, had returned to work after several months or more absences for disabilities. Crain had a bid position and Spellman “was slotted in,” resulting in less work for the floaters. There was no evidence concerning when employees on long-term disability are afforded the opportunity to bid. Hathaway said he did not talk with the Local 741 stewards before talking with Porter about a rebid, admitting candidly that he did not “get along with Mr. Pennington. We don’t talk.” Hathaway also admitted knowing

<sup>10</sup>On cross-examination, Porter recalled Hathaway inquiring:

Hey, boss, when are you going to re-bid? Some guys are talking about it.

Q. And I think you said that you asked him—correct me if I’m wrong—but did you testify that you asked him, “Well, why do you want a re-bid?”

A. Yes.

Q. And what did he say to that?

A. Some of the guys were wondering when we were going to re, wanted a rebid. . . .

Q. Did he identify the guys?

A. I can’t be for certain. He had mentioned Everett Penfold’s name.

<sup>11</sup>In his affidavit, which Porter opined was probably correct, he recalled the conversation as follows: “Hathaway came into my office and said words to the effect, ‘A couple of the guys are not happy with the current bid system. It’s slow’ (meaning work). ‘When are we going to re-bid?’”

about the work-sharing agreement at the time of his conversation with Porter.

Hathaway recalled Porter informed him, during this conversation “I may have to layoff and re-bid because of that . . . he was under pressure from his boss to layoff the bottom drivers.”<sup>12</sup> Porter could not recall making this comment but corroborated the remainder of Hathaway’s testimony concerning this conversation, particularly Hathaway’s words, which were merely an inquiry concerning when there would be a total rebid because several employees were interested. Further, Porter admitted he was under pressure from his boss to layoff employees.

I credit Hathaway’s testimony as credibly corroborated by Porter. Hathaway’s recitation of events was accomplished with considerably persuasive detail, he gave the strong impression he was making an honest attempt to accurately recall the facts. His testimonial demeanor was good, he appeared plausible and convincing. While Porter admitted to lapses in memory, he appeared to be honest and forthright. Porter has no interest in the outcome of these proceedings and he testified prior to Hathaway. Based on his open demeanor, I credit his testimony.

Porter informed Hathaway he would “check it out and I would get back with him.” Porter never discussed a rebid with Hathaway again. Porter then informed the Local 741 stewards some of the employees wanted a rebid. The stewards asked “Well, where did you hear that from?” Porter replied, “Well, I heard from Larry Hathaway,” and the stewards said, “Well, we’ll check into it and we’ll get back with you.” The following day the stewards informed Porter “not to re-bid,” that the employees did not want a rebid. This conversation with the Local 741 stewards occurred in late March or early April, according to Porter.

About 10 days after speaking to Porter, Hathaway was approached by Pennington, who said: “By the way, there isn’t going to be any re-bid.” Hathaway did not reply to this comment. About 1 week after Pennington’s comment to Hathaway, Dibble told Hathaway “that I should—of all people, I should know that I had no right to go to the terminal manager. I should stay out of the terminal manager’s office.” There was no evidence Hathaway or any other employee of A.B.F. was informed by either A.B.F. or Respondents, that there is any restriction against employees talking to management about terms and conditions of employment. I conclude Hathaway’s conversation with Porter did not have any influence on the decision to rebid the board for Porter went to Pennington and Dibble and it was determined not to have a total rebid at that time.

On or about April 18, Porter decided to rebid the board. He was preparing to take off a few days. Porter testified:

Q. Did you post General Counsel’s Number 18 because of your conversation with Mr. Hathaway?

A. No. I posted the bid. I mean, I did it on my own accord.

<sup>12</sup>If A.B.F. laid off three employees, it only had to have 16 bid positions and Hathaway was number 17 in seniority. When Porter posted the rebid in April, he posted 17 positions, 1 more than required by the contract. There was no evidence the additional position was added to favor Hathaway or any other employee. Further, there was no evidence Hathaway knew he would be eligible to bid for a position in the event of a layoff.

On April 18, Porter was in a rush; preparing to leave work for a few days off, when he telephoned A.B.F.'s dispatcher and said: "Let's post this bid. Let's just totally re-bid the whole thing." Porter determined to rebid the board because "I had to lay off employees";<sup>13</sup> he was instructed by his superiors to lay off employees. The three employees were laid off on or about April 18. Porter did not recall informing anyone from Local 741 about the layoffs. Pennington and Dibble had arranged with A.B.F. to be absent on April 19 under the "work sharing" agreement and did not know of the posting of the rebid until they returned to work on April 22.

This was the first time Porter had to lay off employees at the Kent facility and he did not believe he had an obligation to inform the Union about his instruction to lay off employees. He did try, unsuccessfully to contact the Local 741 stewards about this total rebid. Porter did not intend for the bid sheet to be posted, but the dispatcher posted it. Two positions were cut from the bid sheet, which eliminated two 9 a.m. start times. The two employees who lost their bids as a result of the rebid were Cannata and Pennington. This was the first and only time Porter posted a rebid without first consulting Local 741. Porter did not consider it to be a mistake to post the rebid without informing the Local 741 stewards and in their absence, and he did not instruct the dispatcher to take the rebid down when he learned it was posted on April 19.

Porter also testified:

Q. And this was the first time Mr. Hathaway had come to you and talked to you about a re-bid. Right?

A. That's correct.

Q. And what your testimony is, though, is that Mr. Hathaway coming to you about this re-bid deal had no influence in your decision.

A. Yes.

Q. You knew he wanted a re-bid. Right?

A. Yes.

Q. You knew he was floating. Right?

A. That's correct.

Q. You knew that he wanted a bid for his personal reasons. Right?

A. Yes.

Q. But his asking you this earlier, two or three weeks earlier, had no influence on your decision. Is that your testimony?

A. Yes.

The first day Porter worked after the total rebid was posted, the dispatcher informed him several employees were upset about it.<sup>14</sup> Porter talked with Pennington and the Local 741 Business Agent Rockas. Rockas told him the bid was illegal and he had to take it down. Next, Porter went to speak with Pennington and asked him why the rebid was being protested. Pennington informed Porter "it was an illegal bid, I didn't follow the terms of contract, I just arbitrarily posted the bid." Porter replied "I felt like I could do that. Pennington said, "No, you can't . . . you know, that that bid was not a proper bid." Pennington then told Porter: "that he

<sup>13</sup>The three unit members with the least seniority, Gary Gilge, Tony Valdez, and Jerry Crosby, were laid off.

<sup>14</sup>Several employees signed for bids, Hathaway did not and Hathaway did not tell anyone he was going to sign for a bid.

had talked to Local 741, and I did not have to repost the entire—to drop a bid or—I did not have to totally repost the entire board. All I had to do was talk to the employees that were affected by the bid, in other words, where I was going to drop a start time." Porter rejoined that was why he had the total rebid. Pennington informed him that according to Rockas "we did not have to do that. All you had to do was basically go to the employees that were affected by seniority order and you could post it that way."<sup>15</sup>

On or about April 25, Rockas went to A.B.F. and met with Porter with Pennington and Dibble were also present. Rockas asked Porter:

Why he didn't get with us before he laid people off and put up a new bid as he stated. And I told him that he'd have to get with us so we can go over this bidding process because we bid once a year. And he just said, "Well, I laid some people off, so I have to re-bid it."

Q. What did you say to that?

A. I told him, you don't have to re-bid the whole board because you layoff. All you do is eliminate some positions on bids and the 80 percent changes.

Porter agreed to rescind the layoffs and not to totally rebid the board at that time. After discussions with Rockas and the Local 741 stewards, Porter partially rebid the board, limited to the two 9 a.m. start times that he wanted to eliminate. There was no mention of Hathaway during this conversation. There was no mention of the Respondents filing a grievance concerning A.B.F.'s failure to inform Local 741 about the rebid and the layoffs, even though Local 741 understood the collective-bargaining agreement and past practice to require such notification. Rockas explained there was no grievance filed by Local 741 because Porter's action resolved the violation of the collective-bargaining agreement by removing the rebid. There was no violation of the collective-bargaining agreement, according to Rockas, when Porter laid off three employees without first informing Local 741.

## 2. Pennington filing charge with Union against Hathaway

Pennington has worked for A.B.F. about 5 years, including casual time. He has been a member of Local 741 for about 14 years. He is currently one of the two Local 741 shop stewards, which is an elected position; the unit members elect the stewards. Pennington has been a steward for about 3-1/2 years. When Porter informed him Hathaway had asked about a rebid and mentioned some other employees were interested in when there would be a rebid, Pennington went to Socha, Cannata, and Penfold, employees Porter mentioned,

<sup>15</sup>Pennington also claimed Porter told him he was under a lot of pressure from Hathaway to rebid the board, however Porter did not corroborate this testimony. Pennington was not a credible witness. Pennington appeared evasive; his testimony was self-serving and exaggerated. Pennington appeared to be more interested in supporting a litigation theory than in testifying candidly about the events herein. At times, his testimony was equivocal, inconsistent and/or hostile or evasive and defensive. Rockas did not aver Porter made a similar statement to him. The credible evidence establishes Porter was under pressure from his superior to lay off employees. He laid off three employees and understood, incorrectly, that he then had to totally rebid the board, and so he did.

and inquired if they asked Hathaway to represent them for a rebid. They replied they did not. However, Cannata informed Pennington he did not like his current bids and would welcome a total rebid and Penfold testified, as indicated previously, that he also wanted to talk to Porter, for he too wanted a total rebid. Pennington informed Penfold there would be a rebid once his grievance concerning the new collective-bargaining agreements "single bid" language was resolved.

The Local 741 stewards then attempted to talk with Hathaway. According to Pennington:

I asked him what he was doing representing other people when he wasn't a steward, and why did we need a re-bid, and he told me, "Mind your own business."

Q. Was there anything else said by either you or Mr. Hathaway?

A. No, he just walked into the lunch room. Mike said something, but I didn't catch it. I just, you know, I already started to get mad.

Q. By the way, before any of this happened, had Mr. Hathaway ever come to you and asked you about the necessity for a re-bid?

A. No, he had not.

Cannata and Penfold had not approached Pennington indicating they wanted a total rebid. Socha had indicated to Pennington he wanted to drop his bid, which he could do on any Friday.

When Pennington returned to work on April 22, 1991, and learned of the posting of the total rebid, he immediately talked to Porter and: "I just asked him what he thought he was doing, and he says, 'I laid three guys off.' And I said, 'What about the agreement?'"<sup>16</sup> And then I just walked out of the room and left.

There was no mention of Hathaway. Pennington admitted he was "pretty upset" Porter "[s]tabbed us in the back" by posting the total rebid when the Local 741 stewards were gone. Pennington then called Weldon to see if Local 741 knew of the posting and approved it. Weldon said he would check with Rockas. Rockas went to A.B.F.

Pennington then went to the dock to proceed with his work for A.B.F. when he met Hathaway and "asked him if he was happy now that three guys were laid off." According to Pennington. Hathaway replied: "that they were better off because now they didn't have to sit by the phone and be on call."<sup>17</sup> Hathaway did not admit responsibility for the rebid or the layoffs; Pennington admitted they did not discuss what led to or who was responsible for the layoffs. Pennington asserts the 20 percenters do not have to sit by the telephone all day long, "[o]ur 20 percenters only have to call in at seven in the morning and ask if they are working that day, or they need to tell the company, I am working somewhere else or I have plans, I won't be available today." Shortly

<sup>16</sup> Pennington was referring to the work-sharing agreement where there would be no layoffs.

<sup>17</sup> One of the least senior employees, Gilge, told Hathaway prior to the layoff that he would be better off if he was laid off because he would not have to sit by the phone and wait for a call to come into work and then could draw unemployment.

thereafter, Porter informed Pennington he "pulled the rebid."<sup>18</sup>

Pennington had a discussion with Weldon<sup>19</sup> as follows:

A. Actually, I asked him if Larry Hathaway had the right to go into the manager's office, representing other people, for a re-bid when he wasn't a steward and he had not contacted the local union.

Q. So, what did Mr. Weldon tell you?

A. He told me that he did not have the right to do that.

Q. Did you communicate those instructions from Mr. Weldon to Mr. Hathaway?

A. No, Mr. Hathaway won't talk to me.

Q. I know he won't talk to you, but did you tell Mr. Hathaway what Mr. Weldon told you?

A. No, I did not.

Pennington filed a charge against Hathaway as follows:

I am writing to request that formal charges be brought against Larry Hathaway for the following reasons:

Brother Hathaway took it upon himself to attempt to personally force ABF to layoff other brother teamsters to benefit himself. At no time did Mr. Hathaway discuss with his shop stewards, myself or Brother Mike Dibble, his intentions. He went personally to Rick Porter without union representation or sanction to cause harm to other union members and undermining an agreement that Steward Dibble and myself had made with Rick Porter to keep our Teamster Brothers from being laid off.

This is not the first time that Brother Hathaway has been in the office "advising, discussing, encouraging" management on what actions to take or which direction to go regarding contractual matters.

Mike Dibble and myself are in total agreement either Mr. Hathaway needs to call for a stewards election or stay out of the office. This time his actions have caused considerable financial hardship to our brothers on the bottom of the board. . . .

### 3. Hearing before Local 741 and Joint Council 28

In lieu of appearing at the hearing conducted by Local 741 on Pennington's complaint, Hathaway wrote the previously quoted May 14, 1991 letter.<sup>20</sup> This letter denied any viola-

<sup>18</sup> Pennington also claims Porter said he posted the total rebid because he was under pressure from Hathaway. I do not credit this testimony based on the previously stated demeanor considerations. Further, the uncontested testimony does not support this claim. Porter never testified Hathaway asked for a rebid no less pressured him for one. I also note, at times Pennington was not responsive in answering questions; he appeared to be tailoring his testimony to justify his actions. Pennington also occasionally volunteered information.

<sup>19</sup> Weldon is on Local 741's executive board.

<sup>20</sup> Hathaway noted in his testimony to Joint Council 28 that the Local 741 hearing was scheduled "during my work time, and with no discussion prior to notice of this hearing, obviously Mr. Weldon nor Mr. Pennington were interested in my side of the argument, anyway." Hathaway did not inform Local 741 that the hearing was

tions of the Respondents' bylaws, constitution, or oaths and indicated he was acting in concert with other employees and in a manner privileged by article II, section 16 of the bylaws to speak with A.B.F.'s management. Local 741 determined Hathaway violated article II, section 16 of its bylaws,<sup>21</sup> article XIX, section 6(b), paragraphs (2) and (5) of the International's constitution,<sup>22</sup> and Local 741's oath, which provides, in part, "I . . . will never from self motives wrong a brother, or see him wronged if in my power to prevent it." Local 741 fined Hathaway \$300.

Hathaway paid the fine, under protest, and appealed the Local 741 decision to Joint Council 28, which affirmed the fine by letter dated November 24, 1991, based on a hearing held August 8, 1991. A transcript was made of the Joint Council 28 hearing. Counsel for Local 741, the only counsel appearing at the Board hearing, admitted: "Mr. Hurtado and I have discussed at various times General Counsel's Exhibit Number 14 which is a transcript. We both agree that there are problems with the transcript and that the court reporter had not been completely accurate in setting down particularly the parties who were speaking at various times."

The Joint Council 28 proceeding was conducted informally without the administration of oaths to the witnesses.

In Hathaway's statements, he informed the Joint Council 28 "Apparently Mr. Pennington believes that a driver cannot talk to a Terminal Manager by himself or without a shop steward present. I know that Mr. Twomey also believes that, and Mr. Dibble spoke to

scheduled during his work hours. Pennington denied Hathaway's allegations.

<sup>21</sup> This section, entitled "Duties of Members," provides:

It shall be the duty of all members of this Union to assist [sic] its officers in the discharge of their duties, and to serve on committees when appointed. Every member by virtue of his membership in this Local Union is obligated to abide by these By-Laws and the International Constitution with respect to his rights, duties, privileges and immunities offered by them. Each member shall faithfully carry out such duties and obligations and shall not interfere with the rights of fellow members. No member shall interfere with the elected officers or business agents of this organization in the performance of their duties, and each member shall, when requested, render such assistance and support in the performance of such duties as may be required by them, *provided this does not interfere with the individual rights of the members*. Each member and officer shall adhere to the terms and conditions of pertinent collective-bargaining agreements and shall refrain from any conduct that would interfere with the performance by this Local Union of its legal or contractual obligations. [Emphasis added.]

<sup>22</sup> These sections, entitled "Trials and Appeals, Grounds for Charges Against Members, Officers and Subordinate Bodies," provide:

The basis for charges against members, officers elected Business Agents Local Unions, Joint Councils or other subordinate bodies for which he or it shall stand trial shall consist of, but not be limited to, the following:

(2) Violation of oath of office or oath of loyalty to the Local Union and the International Union.

(5) Conduct which is disruptive of, interferes with, or induces others to disrupt or interfere with, the performance of any union's legal or contractual obligations. Causing or participating in an unauthorized strike or work stoppage.

me, that I had no business talking to the Terminal Manager. I think that there are enough facts to the contrary and case law to the contrary that will speak to that."

Hathaway also discussed his support of candidates for office at the International convention which were different than those candidates supported by Local 741. The candidates supported by Hathaway prevailed in February and March, about 1 month before Pennington filed the charges against him. Hathaway was affiliated with a group called Teamsters for a Democratic Union. Further, he was a candidate for trustee in the most recent Local 741 election and he initiated a petition requesting a 30-year-and-out pension option in January 1991. During the Joint Council 28 hearing, Hathaway said:

As a driver I have no authority to layoff anyone. . . . That is a management decision. It would not be in my best interests to prefer anyone be laid off. In fact, as the letter states, the Terminal Manager is the one who mentioned it to me, that he was under pressure to layoff because the bottom of the board wasn't working. . . . There are three people who did eventually get laid off some weeks later, but my conversation with the manager occurred in later March. The layoffs occurred in the middle of April. And it was a one only—only one conversation with him. Others also talked to him about re-bidding the board. The purpose of my conversation was to re-bid, not to layoff, and we can chase this around the room all day long but that is the reason for my visit with the Terminal Manager, to re-bid the seniority board.

One of the laid-off employees, Gilge, testified before Joint Council 28, Porter informed him the decision to lay him off came from, "Arkansas," indicating it was made by Porter's superiors.

By letter dated May 8, 1992, Joint Council 28 informed Hathaway they affirmed the Local 741 decision, including the imposition of a \$300 fine.

#### 4. Action by the International

Hathaway appealed the Joint Council 28 decision to the International. On May 8, 1992, the International's general secretary-treasurer informed Hathaway by letter "that the General Executive Board, at its meeting held April 28, 1992, upheld the decision of Joint Council 28 denying your appeal from the decision of Local 741 . . . ."

In part, the decision of the International provided:

The evidence established that in the past job bidding at ABF occurred semi-annually, pursuant to the contract. However, as of August 1991, no re-bid had occurred pending the outcome of a grievance over the bidding language contained in the recently ratified contract. In addition, there was evidence to establish the existence of a verbal agreement between Local 741 and ABF providing that junior drivers fill in for senior drivers who requested time off, thus avoiding the layoff of junior drivers. . . . While a union member is entitled to discuss matters with management without the presence of a union official, the member is not entitled to attempt to enforce compliance with the collective-bar-

gaining agreement through direct negotiation with management. That is the union's role and responsibility. Brother Hathaway's error was in not relying on the Union to advance his claim that a re-bid was necessary or by circumventing the decision of the Union by engaging in direct negotiation.

*It is not necessary to establish that Brother Hathaway's conversation caused the re-bid or the subsequent layoff. The conversation, involving the subject of a re-bid, interfered with Local 741's contractual obligations. The interference is particularly clear, where, as here, a grievance was pending on the issue of a re-bidding. In addition, the fact that at least one junior driver and brother member lost a full-time bid as a result of the unilateral re-bid (although subsequently reinstated) provides additional evidence of brother Hathaway's interference with Local 741's contractual obligations. [Emphasis added.]*

It is undisputed the Joint Council 28 and International had information employees other than Hathaway were interested in when the next total rebid of the board would occur and that they wanted such a rebid. It is also clear the International and Joint Council 28 determined Hathaway's mention of several employees' interest in having a rebid was the basis for their affirming the decision of Local 741.

### C. Analysis and Conclusions

The decision in this case rests on three sections of the Act. Section 8(b)(1) makes it an unfair labor practice to "restrain or coerce (A) employees in the exercise of the rights guaranteed in [Section 7]: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Section 7 of the Act gives employees:

the right to self-organization, to inform, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 9(a) of the Act provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective-bargaining contract or agreement

then in effect: *Provided further*, that the bargaining representative has been given an opportunity to be present at such adjustment.

### Position of the Parties

General Counsel argues Stewards Pennington and Dibble are agents of Local 741; that these agents as well as Local 741, Joint Council 28 and the International violated Section 8(b)(1)(a) of the Act by contravening a basic policy of labor law as provided in Section 9(a). General Counsel, in support of this argument, claims Hathaway's conduct was protected by Section 7 of the Act and was concerted protected activity. Respondent Local 741 argues the fine was enforcement of internal union rules that had no effect on the employer-employee relation and therefore was legal under Section 8(b)(1)(A). Local 741 asserts the Local 741 executive board had "a sufficient basis upon which to conclude that L interfered in the Union's contractual responsibilities; Hathaway is not entitled to yet another trial in this case."

### Agency status of Pennington and Dibble

Section 2(13) of the Act provides:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question is of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The principal is responsible under the law of agency if it is made to appear Pennington and Dibble were acting in their capacity as shop stewards. *Electrical Workers IBEW Local 760 (Roane-Anderson Co.)*, 82 NLRB 696, 712 (1949). The common law rules of agency apply in Board proceedings and authority may be implied, apparent or express. *NLRB v. Electrical Workers IBEW Local 3 (New York Telephone)*, 467 F.2d 1158 (2d Cir. 1972). Pennington admitted he and Dibble have the same authority under Local 741's bylaws<sup>23</sup> and the pertinent collective-bargaining agreements. The record clearly establishes Porter communicates frequently with Pennington and Dibble as Local 741's representatives. Porter informed them of Hathaway's comments concerning when there would be a rebid. Pennington admitted instructing Porter to "stick to the [collective-bargaining] agreements." Further, Pennington admits "I tell Mr. Porter he's wrong all the time." According to Pennington:

A. Everything that Mr. Porter does affects bargaining unit employees.

Q. And so some of those occasions where you tell Mr. Porter to change and he does change, that's an adjustment of a condition that affects bargaining unit employees. Correct?

A. Most of the time when I tell him to change, I contact the union first.

Q. Not necessarily all the time.

A. If it's a minor matter, no.

<sup>23</sup> The bylaws charge the shop stewards to "Act as spokesman for his fellow workers within the confines of Local Union policies and in general to carry out the policies of the Local Union."

Q. What do you classify as a minor matter?

A. If there's a runaround for a half hour overtime or if there's a claim for heavy duty pay, which is only nine cents an hour, I usually know if we're right or we're wrong on those.

Q. If it's a minor matter, you have the authority to adjust or make a correction with Mr. Porter right away on the spot?

A. Well, I am supposed to be the first line, myself and Mike Dibble, according to the contract.

Q. Well, from your occasion and from your experience as a shop steward, have you had those abilities to make those on-site adjustments with Mr. Porter without contacting the Union first?

A. For very minor things, yes.

Pennington described the stewards' authority as including negotiating questions concerning employees' entitlement to overtime pay and extra compensation for driving four-axle trucks, and performing other "heavy duty" jobs, such as hostleing. Pennington also admitted he was involved in the negotiations with Porter for the resolution of the problems occasioned by A.B.F. posting the rebid on April 18. Rockas described part of the shop stewards' duties concerning the bidding process as follows:

Q. And then what function would the shop stewards have in reporting to you about the change in bids?

A. Usually they would—the terminal manager would tell the shop steward, Mr. Pennington, that he's thinking of changing the bids. He wants to change start times, or he wants to move—readjust the shifts because of the inflow of freight. The shop steward would call me up, tell me that they're planning to re-bid. I said okay, I'll be down there tomorrow morning or the next morning and we'll talk it over with them and make sure that they're doing it within the contract, the start times and the percentages.

Q. And do the shop stewards have any input in your negotiations with the employer about the reason?

A. They're sitting in there and giving their input too, yeah.

Pennington also admitted the stewards have the authority to transmit messages and information from Local 741 to members. Further, under the bylaws and collective-bargaining agreements, the stewards, while they cannot refuse a grievance, can investigate and express their opinions on its merits.

Porter discussed the potential of rebidding with the shop stewards routinely prior to posting. He informed the shop stewards of Hathaway's inquiry concerning a rebid. The shop stewards were part of the negotiations for the "work sharing" program. Pennington informed Porter of the new provisions for bidding under the new collective-bargaining agreement and that there would be a grievance if he continued the practice of having "multiple bids." The shop stewards attended the meeting with Porter concerning the April rebidding and were part of Local 741's team that negotiated the removal of the rebid and reinstatement of the three laid-off employees. The record clearly demonstrates Pennington and Dibble talked to the employees mentioned by Hathaway in his conversation with Porter and Hathaway; informing Hatch-

way and others that Local 741 is their sole collective-bargaining representative and they could not individually or collectively have another representative with management. The shop stewards routinely accompanied Local 741 officials to meetings with the Employer and they asked questions of the Employer on behalf of the represented employees.

The record clearly establishes that when the Local 741 shop stewards informed Hathaway that he could not ask A.B.F. management when there would be a rebid, they were acting within the actual and/or apparent scope of their authority and as agents of Local 741.<sup>24</sup> Compare *United Builders Supply Co.*, 287 NLRB 1364 (1988).

#### Was Hathaway's conduct protected under Section 7

The credible evidence clearly established Hathaway merely asked Porter when there would be a rebid. The inquiry was caused by the return of two employees from long-term disability absences. The bidding procedure is contained in the collective-bargaining agreements.

As determined by the Court in *NLRB v. City Disposal Systems*, 465 U.S. 822, 830, 831 (1984):

an employee's invocation of a right derived from a collective-bargaining agreement meets Section 7's requirement that an employee's action be taken "for purposes of collective bargaining or other mutual aid or protection." As the Board first explained in the *Interboro* case [157 NLRB 1295 (1966)], a single employee's invocation of such rights affects all the employees that are covered by the collective-bargaining agreement. *Interboro Contractors, Inc.*, supra, at 1298. This type of generalized effect, as our cases have demonstrated, is sufficient to bring the actions of an individual employee within the "mutual aid or protection standard, regardless of whether the employee has his own interests most immediately in mind. See, e.g., *NLRB v. J. Weingarten*, 420 U.S. 251, 260-261 (1975).

The invocation of a right rooted in a collective-bargaining agreement is unquestionable an integral part of the process that gave rise to the agreement. . . . Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. . . . A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

Moreover, Hathaway clearly informed Porter other employees were interested in having a rebid. Thus, there is no claim Hathaway's actions were dubious or unrelated to the concerns and interests of fellow employees. The Court further interpreted the *Interboro* doctrine to require "even if an individual's invocation of rights provided for in a collective-bargaining agreement, for some reason were not concerted activity, the discharge of that individual would still be an unfair labor practice if the result were to restrain or interfere

<sup>24</sup> Pennington admitted he was informed by Larry Weldon that no individual had the right to go in representing other employees except the bargaining agent and related this conversation to Dibble. It is uncontroverted Dibble told Hathaway he "had no right to go to the terminal manager."

with the concerted activity of negotiating or enforcing a collective-bargaining agreement.”

Hathaway’s action in talking to Porter did not lose the protection of the Act because his understanding the return of the two employees who had been on disability leave required a rebid was arguably incorrect under the operative collective-bargaining agreements. As the Board held in *Anaconda Aluminum Co.*, 160 NLRB 35, 40–41 (1966): “But absent unusual circumstances not here present, the protections accorded employees under the Act are not dependent upon the merit, or lack of merit, of concerted activity in which they engage. Nor are these rights defensible by the ‘unwisdom’ of the action taken, or limited by the maturity of the judgment displayed.” Citing *NLRB v. Solo Cup Co.*, 237 F.2d 521, 526 (8th Cir. 1956), and cases cited therein at fn. 2; *Tomar Products*, 151 NLRB 57, 63 (1965). I find Hathaway’s expression of interest to his supervisor in having a rebid was protected activity.

Furthermore, I conclude Hathaway acted in concert with other employees with whom he talked, including Penfold. Penfold, as well as Cannata and Socha, were mentioned to Porter. Penfold admitted he and Hathaway discussed each would seek the opportunity to discuss with A.B.F. management their desires to have a rebid, and approved of Hathaway’s action. It is without dispute Cannata and Socha also spoke with Hathaway concerning their desires to have a rebid. It is clear a rebid had the potential of altering employees terms and conditions of employment including routes hours, vehicles assigned, wages and other terms and conditions of employment and the conversation reflected the wishes of several employees. Porter informed Pennington Hathaway’s conversation reflected the wishes of more than one employee. Thus, Hathaway’s discussion with Porter relating the interest of several employees in having a rebid is clearly concerted protected activity under both the *Interboro* doctrine and *Myers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 944 (1985); reaffid. *Myers II*, 281 NLRB 822 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987). See also *Oakes Machine Corp.*, 288 NLRB 456 (1988). In sum, Hathaway was engaged in activity protected by Section 7 of the Act when he asked Porter when there would be a rebid and Pennington knew of the concerted nature of this action. *Combustion Engineering*, 177 NLRB 521, 526 (1969).

Were Respondents’ actions protected under Section 8(b)(1)(A)?

Respondents argue Section 8(b)(1)(A) does not regulate the conduct of unions when they impose and enforce fines in the administration of internal union rules which have no effect on employer-employee relations. This argument is only partially correct. As the Court held in *Scofield v. NLRB*, 394 U.S. 423, 429 (1969); “it has become clear that if the [union’s] rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating Section 8(b)(1).” See also *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), which determined union restrictions on a member’s right to resign was inconsistent with the policy of voluntary unionism implied in the Act. In this case, Congress has explicitly established a policy of guaranteeing employees the freedom to

present their complaints to their employers without any intercession from the bargaining representative.<sup>25</sup>

Thus, the Respondents’ rights under Section 8(b)(1)(A), are with limits, and Respondents exceeded those limits in this case. It is without question Hathaway went to Porter and requested information concerning the proper operation of a provision of the collective-bargaining agreements; the rebidding procedures and indicated he thought the contracts required a rebid. This action, on his own behalf and in the stated interest of other named employees,<sup>26</sup> was clearly the presentation of a grievance or problem of the character protected by Section 9(a). To hold otherwise would make Section 9(a) a nullity. I find Hathaway was privileged to present his position to Porter and the shop stewards informing him he did not have this right and to refrain from presenting grievances to his employer in the future is violative of Section 8(a)(1)(A) of the Act.

That the fine was an internal action is also not an exculpatory factor in this case. “The fact that the discipline imposed was an internal one no longer served as an inexorable basis of immunity against liability under Section 8(b)(1)(A), and where the reason for the discipline contravened public policy so as to overcome the immunity based on the internal character of the discipline, the union was found liable under Section 8(b)(1)(A).” *International Union of District 50, Mine Workers Local 12419 (National Grinding Wheel)*, 176 NLRB 628, 631 (1961). The Respondent’s action of fining Hathaway for presenting a problem or grievance to Porter where Pennington was informed of the protected nature of the activity,<sup>27</sup> has the effect of coercing Hathaway by inhibiting his access to his employer and impairing his rights as

<sup>25</sup> In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179–180, (1966); the Court noted legislative history is an important decisional tool in deciding cases under the NLRA and “we have applied that principal to the construction of Section 8(b)(1)(A) itself in holding that the section must be construed in light of the fact that it ‘is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor Policy.’ *NLRB v. Teamsters Local 362*, 362 U.S. 274, 292.”

<sup>26</sup> It is not necessary to meet the protections of Section 9(a) that the employee represent other employees. The Report of the House Committee on Education and Labor described the objective of Section 9(a) as follows:

The bill further adds to the freedom of workers by permitting them not only to present grievances to their employers, as the old Board heretofore has permitted them to do, but also to settle the grievances when doing so does not violate the terms of a collective-bargaining agreement, which the Board has not allowed. H. Rep. No. 245, 80th Cong., 1st Sess. 7 (1947).

The Conference Committee reported:

Both the House bill and the Senate amendment amended section 9(a) of the existing law to specifically authorize employers to settle grievances presented by individual employees or groups of employees, so long as the settlement is not inconsistent with any collective-bargaining contract in effect. H. Rep. No. 510, 80th Cong., 1st Sess. 46 (1947), p. 1152.

<sup>27</sup> Porter told Pennington Hathaway was inquiring on behalf of other employees. Hathaway informed all Respondents he was exercising his rights to talk to management. Further, Porter informed Pennington he posted the bid on his own, believing it was his right based on the decision of his managers to have a layoff which required an alteration in bidding. Pennington admitted he had to explain to Porter the reduction in staff did not necessitate a complete rebid, he could conduct a “bump and roll” partial rebid.

provided in Section 9(a). *Machinists Local 504 (Arrow Development)*, 185 NLRB 365 (1970). *Cement Workers Local D-357 (Southwestern Portland Cement)*, 288 NLRB 1156 (1988).

Any claim that Hathaway's actions were not protected because his discussion with Porter was not in the presence of other employees or was primarily motivated by Hathaway's interest in obtaining a bid position is without merit. The Board has consistently found "an activity may be concerted although it involves only a speaker and a listener." *Salt River Valley Water Users' Assn.*, 99 NLRB 849, 853 (1952), *enfd.* 206 F.2d 325, 328 (9th Cir. 1953). The record does not establish Hathaway was primarily motivated to obtain a bid position. The layoff could have removed him from being eligible to bid. He previously waived his right to a bid position because he wanted to retain his other part-time job. Assuming he was motivated, at least in part, by his own interests, this does not remove his actions from the protection of the Act for they "involve the promotion and advancement of employee interests affecting wages, hours, and terms and conditions of employment. . . . The law does not require that activities, otherwise sheltered, spring from exalted motives." *Mushroom Transportation Co.*, 142 NLRB 1150, 1158 (1963), citing *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949).

The merits of the employees complaint under the collective-bargaining agreement is not a consideration. As found in *Eastern Illinois Gas & Securities Co.*, 175 NLRB 639, 640 (1969):

We find no merit in Respondent's argument. It is true that under Section 9(a), the collective-bargaining agreement defines the permissible area within which an employer may adjust directly with employees grievances presented by them. Thus, if a grievance poses demands which are in conflict with the contract, an employer may lawfully refuse to resolve the matter without the presence of a union representative. However, it does not follow that Section 9(a) thereby confers on the employer the right to discharge an employee for the act of grieving. Respondent's view of the proviso would lead to the incongruous result of, on the one hand, granting an employee freedom to present his complaints to his employer without the intervention of the bargaining representative and on the other, subjecting the employee to the peril of discharge should his complaint contradict the terms of the contract. Such a construction of the statute is at variance with Board precedent holding that the protections of the Act are not dependent upon a correct interpretation of the contract or on the merit or lack of merit of the concerted activity.

Citing *Bonded Armored Carrier*, 147 NLRB 100 (1964); *Douds v. Retail Wholesale Union*, 173 F.2d 764 (2d Cir. 1949).

Further, internal union proceedings cannot fully explore and preserve an employees rights under Section 9(a). The union is not privileged to police which complaints involving terms and conditions of employment a member may bring to the employer. Compare *NLRB v. Shipbuilders*, 391 U.S. 418 (1968). The Respondents' actions were clearly based on Hathaway's exercising his privilege to bring a problem or

grievance to his employer on behalf of himself and other members/employees. Hathaway's questionable interpretation of the collective-bargaining agreements does not grant Respondents the liberty to entertain internal union charges, conduct a hearing, find Hathaway guilty of violating the bylaws and International constitution and fine him for his action. Moreover, if an employer uses an employee's exercise of his privilege to present a grievance directly to the Employer as a means of terminating a provision or engaging in unlawful unilateral action, the employers actions do not change the privileged character of the employee's conduct.

The Respondents are not at liberty to circumscribe an employee's access to an employer to present a problem or grievance by having the freedom to entertain internal union charges, conduct a hearing, find Hathaway guilty of violating the bylaws and International constitution, and fine the employee if the employee's complaint or interpretation of the contract is incorrect. The Respondents' rights under the proviso to Section 8(b)(1)(A) are clearly circumscribed by Section 9(a). Respondents' reliance on the Court's decision in *Emporium Capwell v. Western Addition Community Organization*, 420 U.S. 50 (1975), is unpersuasive. Unlike the employees in the *Emporium Capwell* case, Hathaway did not insist A.B.F. bargain with him to the exclusion of the collective-bargaining representative or to otherwise improperly exclude the Respondents. Here, the employee did merely present a grievance and there was no attempt to undermine or improperly circumvent the statutory scheme of bargaining through elected representatives. *Eastern Illinois Gas & Securities Co.*, *supra*, 175 NLRB 639.

I conclude that Hathaway was subjected to internal union charges, hearings and fined because of his protected concerted activity of presenting a grievance or problem to a representative of his employer in violation of Section 8(b)(1)(A) and, as found above, Local 741 violated Section 8(b)(1)(A) by its agent informing Hathaway he does not have the right to directly present problems and grievances to representatives of his employer if the matter is contained in the collective-bargaining agreements.

#### CONCLUSIONS OF LAW

1. A.B.F Freight System is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents, Teamsters Local Union No. 741, Line Drivers, Pickup and Delivery, affiliated with International Brotherhood of Teamsters, AFL-CIO, Joint Council of Teamsters No. 28, affiliated with International Brotherhood of Teamsters, AFL-CIO, and the International Brotherhood of Teamsters, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents, by entering internal charges against Larry Hathaway, subjecting him to internal union disciplinary proceedings, finding him guilty of violating Local 741's bylaws and the International's constitution, imposing a \$300 fine and affirming these findings, restrained and coerced him in the exercise of the rights guaranteed him by Sections 7 and 9(a) of the Act, and thereby engaged in an unfair labor practice within the meaning of Section 8(b)(1)(A) of the Act.

4. Respondent Local 741, by its agents informing Hathaway he does not have the right to directly present problems and grievances to a management representative of his em-

ployer concerning matters contained in the collective-bargaining agreement between Respondent Local 741 and the Employer, violated Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find it necessary to order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondents Local 741 violated Section 8(b)(1)(A) of the Act by informing Hathaway he does not have the right to directly bring problems and grievances to a representative of his employer if the matter is contained in a collective-bargaining agreement between Local 741 and the Employer. I further found Respondents Local 741, Joint Council 28, and the International violated Section 8(b)(1)(A) of the Act by bringing internal union charges, conducting hearings, finding Hathaway violated Local 741's bylaws and the International constitution, imposing a \$300 fine, and affirming the fine because Hathaway presented a problem or grievance to a representative of his employer. Accordingly,

I recommend, among other things, that Respondents cease and desist from bringing internal union charges, conducting hearings, finding Hathaway violated Local 741's bylaws and the International constitution, imposing a \$300 fine, affirming the fine or otherwise disciplining Hathaway or other members for engaging in the protected concerted activity of presenting grievances directly to a representative of his employer, rescind the fine imposed on Hathaway and give him written notice of such rescission, with any interest on the fine he paid to be computed in the manner prescribed in *New Horizons for the Retarded*.<sup>28</sup>

I shall also recommend that any reference to the Respondents' charging, conducting hearings, fining, and affirming the fine of Hathaway be expunged from Respondents' records.

[Recommended Order omitted from publication.]

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<sup>28</sup>In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).