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

Advice Memorandum

DATE: December 23, 2013

TO: M. Kathleen McKinney, Regional Director
Region 15

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

SUBJECT: Varsity Brands, Inc.
Case 15-CA-110683

506-2017-4000
506-6070-2550
506-6080-0800

The Region submitted this case for advice as to whether cheerleading competition judges are employees under the Act and, if so, whether Varsity Brands, Inc. ("Varsity") violated Section 8(a)(1) by discharging the two Charging Party judges for publishing to third parties a judges' survey that was critical of Varsity. We conclude that, even if the Charging Parties were employees under the Act,[1] they were discharged for publishing an allegation against Varsity that was unrelated to their terms and conditions of employment and, thus, unprotected by Section 7. The Region should therefore dismiss the charge, absent withdrawal.

FACTS

Varsity promotes and markets cheerleading educational camps, clinics, and competitions across the country. The two Charging Parties have extensive experience judging cheerleading competitions, including for Varsity. The Charging Parties composed and, on June 11, 2013,[2] distributed an online survey to judges and judges' groups relating to their opinions about pay, working hours, and training.[3] The survey contained several categories of questions generally involving training, scoring rubric, compensation, hours spent working, perception of judges' qualifications and skills, and overall judging experience. The end of the survey contained space for "additional comments about your judging experience for the 2012-2013 judging season." In that space, an anonymous participant complained that, "big gyms are granted extra [leniency] because of how many teams they bring. NCA/ [National Cheerleading

[1] We need not address this issue regarding employee status.

[2] All dates are in 2013 unless noted.

[3] Twenty-one individual judges, and five cheer-related groups with a total of some 2,366 Facebook members, received the survey link.

Association] Varsity will change scores of judges and not tell judges until the next day…. I complained about this to NCA and no one listened. [The] Varsity [Vice-President] [led] the[] way in this change."

The Varsity Vice President heard about, and took, the survey. Because the Charging Parties' names were listed on the survey, the Vice President emailed one of them ("Charging Party A") asking whether the Charging Parties intended to start a new judges' association. Charging Party A informed the Vice President that the survey was for informational purposes only and that the survey results would be shared with Varsity after they were analyzed. The survey closed on June 19.

On July 23, after analyzing the survey's raw data, the Charging Parties sent the finalized survey document, including participants' comments, to the Vice President and to Varsity's main competitor. The Vice President texted Charging Party A later that day, stating that he "need[ed] to talk to [her] about survey results." He further complained that survey participants were allowed to post about "individuals … and you sent it on without verifying or giving me a chance to defend myself." The Vice President noted that, "[i]f someone emailed me a letter that [Charging Party A] had fixed scores, I would never forward it on under the guise that someone else said it, not me. Completely irresponsible." When the Charging Parties offered to remove his name from the survey comment, he responded that the deletion would be insufficient, since Varsity would still be named and he would still be implicated. Charging Party A then texted that the survey was intended to "fix issues" and not as a personal attack, and the Vice President responded:

> This isn't the same as poor working conditions. This is slander. This is my ethics and my livelihood. Don't equate it to you not getting paid in a timely manner.
> …
> I took the survey. And I agree with all your points. There are plenty of things that need to be addressed. We are working to address them. If the issue isn't about one company, you shouldn't have sent out a survey with questions regarding our company. We will be working with judges to improve the environment at events. But I can't condone the route you took to gather and share information.

The next day, July 24, the Charging Parties publicized the survey and its results, including on Facebook, to two smaller cheer companies, various individuals, and six different cheerleading media outlets. In the meantime, the second Charging Party ("Charging Party B") responded by email to the Vice President's text complaints from the previous day. Charging Party B wrote that the survey was not intended to discredit anyone but rather to allow judges to express their opinions and concerns. She accused Varsity of attempting to sabotage and discredit the survey instead of addressing judges' concerns. Charging Party B concluded that she would continue to disseminate the survey data. The Vice President responded by email a few hours

later, in which he admitted taking the survey, but denied attempting to sabotage it or skew its results. He acknowledged that the survey's responses and data held some validity, but complained, in part, that:

> there was LITERALLY falsified info in the survey … But what you shared wasn't just overall stats about the industry ... it was stats about MY COMPANY and MY INTEGRITY. It included quotes that were flat out fabricated. Quotes that could literally ruin our company. We don't FIX scores at NCA Nationals…. There are ways for you to disseminate survey results without dragging our name through the mud.
>
> I told [Charging Party A] yesterday that the comment made about me and NCA Nationals was a flat out lie and you posted it anyway. That fact combined with the idea that you didn't even give us the courtesy of a heads up that the survey was created screams to me that you aren't trying to HELP in the situation.

Charging Party B sent another email to the Vice President continuing to accuse him of attempting to discredit the survey, while admonishing him for taking the survey instead of asking the Charging Parties to simply provide him with the survey's questions. On July 25, the Vice President responded to both Charging Parties that while he could have asked for the survey questions, they, in turn, "could have disclosed with us that [they] were even conducting a survey." Finally, on July 26, the Vice President informed both Charging Parties by email that Varsity would no longer use them as judges for the season, "for all the reasons we've discussed via email and text message," and that their profiles had been deleted from the National Cheerleading Association database.

ACTION

We conclude that even if the Charging Parties were employees under the Act, they were not discharged for engaging in Section 7 activity. As such, Varsity's terminations of the Charging Parties were lawful, and the Region should dismiss the charge, absent withdrawal.

Section 7 protects employee communications to third parties trying to gain their support where "the communication indicate[s] it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection."[4] The threshold inquiry

[4] *MasTec Advanced Tech.*, 357 NLRB No. 17, slip op. at 5 (2011) (citation omitted). *See also generally NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 475-77 (1953) (disparaging handbills unprotected where they failed to reference employees' terms and conditions or labor dispute).

in assessing whether such a communication is protected is whether the communication relates to the employees' ongoing labor dispute.[5] In determining whether employees' communications to third parties have a sufficient nexus to a labor dispute, the Board looks to the subject matter of the communication and the context in which it was made.[6] For example, in *Five Star Transportation*, the Board held that certain letters written by school bus drivers to a local school board were unprotected by Section 7 because they raised generalized safety concerns but did not refer to drivers' terms and conditions of employment, including the drivers' own safety.[7] The Board also found that the unprotected content of the drivers' letters, and not the act of sending them, caused the drivers' discharges.[8]

We conclude that the survey's score fixing comment is unprotected by Section 7 because it fails to satisfy the Board's threshold inquiry of relating to the judges' terms and conditions of employment. Most of the survey relates to judges' employment terms and conditions such as pay and training, but the anonymous accusation that Varsity engages in score tampering lacks a nexus with those common issues. Significantly, there is no evidence that judges who have had their scores changed, due to Varsity's alleged tampering or otherwise, have suffered any adverse impact. For example, there is no evidence that judges who have had their scores changed were subsequently, e.g., precluded from judging future competitions, forbidden from traveling to certain venues, subjected to remedial training, or had their per diem expenses curtailed. Indeed, the survey comment itself fails to mention how Varsity's

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[5] *See MasTec*, 357 NLRB No. 17, slip op. at 5 (first prong of test was whether employees' communications were related to their pay dispute). *See also Five Star Transp.*, 349 NLRB 42, 44-45 (2007), *enfd.* 522 F.3d 46 (1st Cir. 2008) (first inquiry is whether employee communications was attempt to improve terms and conditions; employees' letters to third party unprotected where limited to generalized safety terms, and not their common concerns).

[6] *See, e.g., Five Star Transp.*, 349 NLRB at 45 (employees' letters to school board lacked sufficient nexus and were unprotected where they failed to reference drivers' terms and conditions of employment). *Compare Emarco, Inc.*, 284 NLRB 832, 833-34 (1987) (employees' responses to general contractor's inquiry about employee strike, including that their employer did not pay its bills, was "no damn good," and could not "finish the job," were made in context of, and expressly related to, labor dispute).

[7] *See Five Star Transp.*, 349 NLRB at 44-45. *See also Orchard Park Health Care Ctr.*, 341 NLRB 642, 644 (2004) (nurses' complaint to state-run patient-care hotline about excessive heat in nursing home unprotected where related to patient care but not nurses' working conditions). *Compare Valley Med. Hosp. Ctr.*, 351 NLRB 1250, 1253-54 (2007), *enforced sub nom. Nevada Serv. Emps. Union, Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009) (nurses' third-party statements regarding staffing levels and workloads protected where they were connected to ongoing bargaining over staffing ratios).

[8] *See Five Star Transp.*, 349 NLRB at 45.

alleged score tampering affects judges' work assignments or other terms and conditions; the comment's author simply notes that when he/she complained about the score tampering, "no one listened."

We conclude also that the comment's negative impact on judges' reputations is speculative. Thus, while the survey comment impugns Varsity's integrity, it does not imply that judges themselves are being asked to engage in score tampering. Rather, the survey comment alleges that when Varsity changes judges' scores, it does so after the scoring is complete and without the judges' knowledge or consent. Thus, although the score tampering accusation may injure Varsity's reputation, there is no evidence that judges' individual or collective reputations have been, or will be, similarly harmed by the accusation. Because the survey comment lacks the requisite nexus with the judges' terms and conditions as identified by the survey, it is unprotected by Section 7.

We further conclude that the Charging Parties were discharged for their publication of the survey's unprotected score fixing comment rather than the survey itself.[9] The Vice President's July 23 text messages first establish that he was angry and concerned about the score fixing accusation. In this regard, his texts to Charging Party A conveyed his frustration with having not been given an opportunity to defend himself against the "slander" and attack on his "ethics and livelihood" prior to the survey's publication. He also told Charging Party A that he would never publish an accusation that she had "fixed scores." In this context, we conclude that Carrier's subsequent text message stating that he "c[ould]n't condone the route you took to gather and share information," and the Charging Parties "shouldn't have sent out a survey with questions regarding our company," related to his anger over being accused of score fixing rather than over the survey itself.

The Vice President's July 24 email exchange with Charging Party B bolsters the argument that he was frustrated by the survey's score tampering allegation. Thus, when responding to Charging Party B's accusation that he had attempted to sabotage the survey, the Vice President again referenced the survey's score fixing comment, asserting that the survey included "LITERALLY falsified info[rmation] … [q]uotes that could literally ruin our company" and "[w]e don't FIX scores." Even the Vice President's complaint that the Charging Parties failed to give Varsity a "heads up" about the survey evinces Carrier's frustration over the anonymous scoring allegation when coupled with his acknowledgement, in the same email, that "[t]here are ways for you to disseminate survey results without dragging our name through the mud."

Finally, the timing of the Charging Parties' discharges on July 25, over a month after Vice President knew of and read the survey, but only a few days after he read

[9] *See id.* (evidence established that school bus drivers were discharged for content of their unprotected letters to school board, not for the act of sending the letters).

the survey's score fixing accusation, further establishes that the Charging Parties were discharged "for all the reasons we've discussed via email and text message," i.e., publishing the survey's unprotected score fixing allegation.

Accordingly, because the Charging Parties were discharged for engaging in unprotected conduct, Varsity did not violate Section 8(a)(1). The Region should therefore dismiss the charge, absent withdrawal.

/s/
B.J.K.