

July 29, 2020

MEMORANDUM

TO: Chapter Presidents

RE: Private Sector Limitations on Speech During Union Activity

SUMMARY: The National Labor Relations Board has limited speech protections for private sector employees engaged in protected union activity.

The National Labor Relations Board (NLRB) issued a decision on July 21, 2020, which will limit when employee outbursts or speech made during union activity, such as collective bargaining or grievance meetings, remain protected. Although the NLRB governs only private sector labor law, the Federal Labor Relations Authority (FLRA) often considers relevant NLRB precedent in deciding federal sector challenges to discipline for speech made during union activity. For that reason, NTEU submitted an *amicus* brief on this issue urging the NLRB to retain its previously well-established protections for union speech.

For many decades, the NLRB had applied a multi-part test when evaluating whether an employer's attempt to discipline an employee for speech during union activity is proper. NTEU urged the NLRB to keep that test which appropriately considered factors such as the subject matter of the discussion and whether the employer provoked the outburst. NTEU, of course, does not condone offensive speech of any type. In fact, NTEU has vigorously fought to protect our own members when they have been subjected to inappropriate speech. But, as NTEU explained in our brief, we strongly oppose any attempt by the NLRB to weaken the test for when union activity remains protected. Any such weakening could chill union representatives as they carry out their statutorily mandated duties of collective bargaining and fair representation.

The NLRB's new test imposes a heavy burden on its General Counsel (on behalf of employees) to show, as initial matter, that protected speech or conduct was a motivating factor in an employer's decision to impose discipline. Only if the General Counsel makes this showing will the burden shift to the employer to prove it would have taken the same disciplinary action even in the absence of protected activity.

NTEU anticipates that the end result of this new test will be that employees will have fewer safeguards when they engage in otherwise protected union activity. Although NTEU is disappointed in the NLRB ruling, it applies only to the private

sector. NTEU will closely monitor whether the FLRA considers changing speech protections for federal employees.

Anthony M. Reardon
National President

Attachment