



Pennsylvania Conference of Teamsters

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LEGISLATIVE ACTION ALERT

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This article is supplied by the PA Conference's Legal Advisor, Tom Kohn, Esq.

NLRB DISCARDS TRUMP-BOARD STANDARDS FOR EVALUATING EMPLOYEE MISCONDUCT

On May 1, the NLRB discarded yet another Trump-Board doctrine and restored the prior standards for evaluating employee misconduct that occurs during the course of protected concerted activity. In *Lion Elastomers LLC II*, it overruled a Trump-Board decision in *General Motors LLC* that had rejected traditional standards of evaluating under what circumstances employees may be disciplined or discharged for misconduct that occurs during activity otherwise protected by the National Labor Relations Act, such as heated disputes between stewards or union officials and employer representatives.

Rather than evaluating alleged misconduct on the basis of various setting-specific standards, the Trump-Board held that, regardless of the setting involved, the fundamental issue in cases involving “abusive conduct” in the course of Section 7 activity was not the nature of the employee’s conduct, but rather the motive of the employer in taking adverse action against the employee. By overruling *General Motors*, the Board restored the four-part test that governed employees’ conduct towards management in the workplace. Under that standard, the Board considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. It also restored the totality-of-the-circumstances test, which governed

social-media posts and most cases involving conversations among employees in the workplace, and the former standard which governed picket-line conduct, where the Board considers whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the picket-line conduct.

Not shockingly, the Trump-Board’s *General Motors* decision had made it much easier for employers to discipline or terminate employees who were zealous in their exercise of protected activity. While such employees may still be subject to discipline if they go too far, an employer will be under far more scrutiny than under the *General Motors* approach.

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