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

Advice Memorandum

DATE: September 23, 2008

TO : Joseph Norelli, Regional Director
Region 20

Alan Reichard, Regional Director
Region 32

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

SUBJECT: Inter-Con Security Services, Inc.
Cases 20-CA-33904; 32-CA-23820, et al.

506-6050-0167
506-6050-7565
512-5030-4080-5000
578-4093-5000
578-8075-5050

The Regions submitted these cases for advice as to whether a strike in support of a demand for recognition by a mixed-guard union is protected activity.

We conclude that a strike for recognition of a mixed-guard union is not protected, because the Board is precluded from certifying such a union under Section 9(b)(3) and the Employer may lawfully decline to recognize such a union under Wells Fargo Corp.[1]

FACTS

Inter-Con Security Services, Inc. ("the Employer") provides guard services to Kaiser Foundation Health Plan, Inc. ("Kaiser") facilities throughout California, pursuant to a contract that is effective until September or October 2008. The Employer has no collective-bargaining relationship with any union.

Service Employees International Union ("SEIU") Local 24/7 ("the Union") is an independently chartered SEIU local comprised of security guards in northern and central California. Because the SEIU represents nonguard employees, the Union is a mixed-guard union.

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[1] 270 NLRB 787 (1984), affd. 755 F.2d 5 (2d Cir.), cert. denied 474 U.S. 901 (1985).

From the summer of 2006 through August 2007, the Union negotiated a neutrality/card check agreement with the Employer, in an attempt to obtain voluntary recognition. The Employer agreed to sign the agreement if Kaiser renewed its contract. In the meantime, however, Kaiser put the guard services contract out for competitive bid.

In March 2008,[2] the Union began a campaign to have Kaiser include a neutrality/card check requirement in its request for bid proposals. On March 21 and 25, the Union sent Section 8(g) notices to Kaiser stating that security guards assigned to various facilities would picket on April 1 and 2 and strike for 24 hours, beginning at 8:00 a.m. on April 4. In the charges filed with Region 32, the Union alleges that, on March 28, April 2, and April 3, the Employer interrogated various employees about their intention to strike on April 4.

The Union sent another set of Section 8(g) notices to Kaiser on April 25, with copies to the Employer, stating that security guards assigned to 25 different Kaiser facilities would picket and strike from 6:00 a.m. on May 6 through 6:00 a.m. on May 9. On May 5, a security guard at Santa Rosa was interrogated by one of the Employer's supervisors and by another of the Employer's employees whose supervisory status is disputed. The security guard was asked by each of them if she was staying at work or striking. Later that same day, another supervisor telephoned her to ask if she was going to work on her scheduled shift and advised her to answer yes or no. He then asked if she would resume work on May 9. When she responded positively, he informed her which shift she was scheduled to work.

On May 1, the Employer filed four identical Section 8(b)(7)(C) charges alleging that the Union threatened to picket and picketed the Employer with a recognitional object. These charges were consolidated in Region 32. Region 32 decided to issue complaint but ultimately dismissed the charges after entering into an informal settlement agreement with the Union over the Employer's

[2] All dates are in 2008 unless otherwise indicated.

objections. The Employer's appeal of that dismissal is now pending.

Meanwhile, the Union filed charges in Regions 20 and 32 alleging, *inter alia*, that the Employer violated Section 8(a)(1) by interrogating employees about whether they intended to participate in strike activities. Region 32 preliminarily concluded that the strike was not protected activity. Region 20, however, preliminarily concluded that the strike was protected activity and issued an investigative subpoena to take evidence to determine the supervisory status of the one of the interrogators. The Employer filed a petition to revoke the subpoena on the grounds that the strike was unprotected. These cases were submitted to Advice to resolve this conflict among the Regions.

ACTION

We conclude that, absent withdrawal, the Regions should dismiss these Section 8(a)(1) allegations because a strike in support of a mixed-guard union's demand for recognition is not protected activity.

As a threshold matter, an employer violates Section 8(a)(1) by interrogating employees about their intention to participate in a protected strike, if the employer fails to give assurances against reprisals.[3] On the other hand, it is not unlawful to question employees about unprotected conduct.[4] Therefore, resolution of the Section 8(a)(1) allegations in these cases turns on whether the subject of the interrogations -- the employees' participation in the Union's strike – was protected activity.

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[3] E.g., Roosevelt Memorial Medical Center, 348 NLRB No. 64, slip op. at 1 (2006) (interrogation regarding participation in economic strike); Can-Tex Industries, 256 NLRB 863, 877 (1981) (interrogation about unfair labor practice strike).

[4] Correctional Medical Services, 349 NLRB No. 111, slip op. at 6 (2007) (interrogation about picketing violative of Section 8(g)).

The Board has not faced the precise question at issue here, but the Board's decisions on related questions strongly indicate that a strike for recognition of a mixed-guard union is not protected. First, the Board consistently has held that a union violates Section 8(b)(7)(C) by picketing or threatening to picket an employer to force the employer to recognize and bargain with a mixed-guard union, because such a union cannot be certified under Section 9(b)(3).[5] And an employer does not violate the Act by refusing to reinstate employees who engage in this unprotected conduct.[6]

Second, in Wells Fargo Corp., the Board held that, although an employer may voluntary recognize and bargain with a mixed-guard union, an employer may withdraw recognition without violating Section 8(a)(5).[7] The Board reasoned that a union should not be able to obtain with a bargaining order what it could not obtain by certification.[8] "[S]addling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid."[9]

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[5] E.g., Northwest Protective Service, 342 NLRB 1201, 1203-1204 (2004) (mixed-guard union threatened to picket employer unless it recognized the union); Wackenhut Corp., 287 NLRB 374, 374 (1987) (same); General Service Employees Union Local No. 73, 224 NLRB 434, 436 (1976), enfd. 578 F.2d 661 (D.C. Cir. 1978) (same).

[6] Rapid Armored Truck Corp., 281 NLRB 371, 371, n.1 (1986) (employer did not violate Section 8(a)(3) and (1) by refusing to reinstate or discharging striking employees who engaged in unlawful picketing to obtain recognition for a mixed-guard union). See also Local 707, Motor Freight Drivers, 196 NLRB 613, 614 (1972) (employees who picketed in violation of Section 8(b)(7)(B) were not entitled to reinstatement and backpay).

[7] 270 NLRB at 787-788.

[8] Id. at 787.

[9] Id. at 789 (footnote omitted).

Third, employees and their unions may not use economic weapons to compel employers to take action on permissive subjects.[10] Thus, a union may not strike to pressure an employer to bargain over nonmandatory subjects of bargaining.[11] Consistent with these cases, the Board noted in dicta in Wackenhut Corp. that, if an employer refuses to recognize a mixed-guard union, that union "cannot resort to economic weapons to obtain what the employer chooses not to grant."[12]

Similarly, in Rapid Armored Truck Corp., the Board stated that "by engaging in a strike to compel" an employer to recognize and bargain with a mixed-guard union "which under Wells Fargo the Respondent could lawfully refrain from doing, the employees ... engaged in unprotected conduct."[13] In that case, all of the striking employees had also engaged in unlawful recognitional picketing. The Board concluded that the employer did not violate the Act by "refusing to reinstate or by discharging its striking employees who engaged in the unlawful picketing[.]"[14]

Accordingly, we conclude that a strike to pressure an employer to recognize a mixed-guard union is unprotected. We recognize that the Board's statement in Rapid Armored Truck Corp. that the strike was unprotected is arguably

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[10] Nassau Insurance Co., 280 NLRB 878, 878, n.3 (1986) (strike in support of union's demand that the employer's final offer be transcribed is unprotected and unlawful), citing International Longshoremen's Association, 118 NLRB 1481, 1483 (1957), enf. denied on other grounds 277 F.2d 681 (D.C. Cir. 1960) (union violated Section 8(b)(3) by insisting to impasse on and striking in support of its demand for coastwide bargaining unit).

[11] Ibid.

[12] 287 NLRB at 376.

[13] 281 NLRB at 371, n.1.

[14] Id.

dicta. But the statement is consistent with Board law prohibiting strikes on nonmandatory subjects of bargaining and with the Board's emphasis on the voluntary nature of employer recognition of mixed-guard unions.[15]

The Board's decision in Local 707, Motor Freight Drivers is not necessarily to the contrary. There the Board held that employees in a non-guard unit who struck but did not picket for a recognitional object where an election had been held within the prior year were entitled to reinstatement.[16] However, as the Board noted in that case, Section 13 does not confer an absolute right to strike.[17] Instead, Section 13 protects the right to strike "except as specifically provided for" elsewhere in the Act. In light of the restrictions "specifically provided for" in Section 9(b)(3), Section 13 does not protect the right to strike for recognition of a mixed-guard union.

Therefore, the Employer's interrogation of employees regarding their participation in such a strike did not violate Section 8(a)(1).

B.J.K.

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[15] Wells Fargo Corp., 270 NLRB at 787-788; Wackenhut Corp., 287 NLRB at 376.

[16] 196 NLRB at 614.

[17] Id. at 615.