

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

Advice Memorandum

DATE: September 20, 2000

TO : Gary T. Kendellen, Regional Director
Region 22

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

SUBJECT: Costco Wholesale
Case 22-CA-23960

501-2887-0800

501-2887-7500

This case was submitted for advice as to whether the Employer (1) unlawfully promised employees better terms and conditions of employment should they vote to decertify the Union; and (2) disparately permitted employees to use company e-mail to assist the decertification campaign.

FACTS

Costco Wholesale ("Costco" or "Employer") operates a chain of grocery and consumer goods stores throughout the world, including 16 Eastern Division stores located in New York, New Jersey, Maryland and Virginia. Since 1987, three Teamsters locals (collectively, "the Union") have jointly represented approximately 3000 Eastern Division employees in one multi-location bargaining unit. Some of Costco's west coast employees also are represented by other unions in a separate bargaining unit. Costco's remaining 46,000 employees are not organized.

The non-union employees' terms and conditions are specified in the "Costco Employee Agreement" (CEA). Pursuant to the CEA, Costco pays its unrepresented employees who are at the top of their wage scale between 73 cents and 95 cents per hour more than their organized counterparts on the east coast, and provides them with more generous bonuses as well.

The parties have been bargaining for a successor contract since September 1999, but are still separated by economics. In November 1999, disaffected members of the Union's negotiating committee formed a rival union, the Costco Employees' Alliance ("Alliance"), which filed a representation petition shortly thereafter. The Region scheduled an election for April 29 and 30, 2000.¹

¹ All dates are in 2000 unless specified otherwise.

The parties continued bargaining throughout the pre-election period. By April, Costco had offered to partially close the wage gap between its organized and unorganized workforce. However, pursuant to Costco's offer, organized employees at the top of their pay scale would still receive between 33 cents/hour and 55 cents/hour less than their unorganized counterparts, as well as lower bonuses. The Union, which had initially demanded that Costco apply its higher west coast wage scale to its members, did not agree to Costco's proposal.

In a pre-election letter to all employees, Joseph Portera, Costco's chief operating officer for its Eastern Division, stated his belief that employees do not need a union. Noting that approximately 10,000 east coast employees are unrepresented, Portera stated that:

The Costco Employee Agreement has been in existence since 1983 and is always applied to employees at Costco who are not represented by a Union. In the event that you become an unrepresented Costco employee, the Company will apply the Costco Employee Agreement to you just as it does to all other unrepresented employees. This is not a promise but a simply statement of fact.

Although employees working at different stores do not interact much, represented employees generally were aware that their non-Union counterparts received higher wages and better benefits. However, prior to receipt of this letter, many employees did not realize that the Employer intended to follow its customary practice and apply the Costco Employee Agreement to them if they vote to decertify the Union.

Costco management held a series of mandatory meetings with employees prior to the scheduled election. During these meetings, Portera reiterated his belief that employees do not need a union. He displayed a series of overhead transparencies which clearly portrayed the disparity in wages and bonuses between the represented and unrepresented employees. Portera again told the assembled employees that if they vote to decertify, Costco will apply its Employee Agreement to them as it "always" does for unrepresented employees. As in his earlier letter, Portera added that "[t]his is not a promise but a statement of fact." Portera followed up these meetings by again promising employees in an April 14 letter that they will be

covered by the Costco Employee Agreement should they vote the Union out.²

Pursuant to the Alliance's request, the RC petition was withdrawn prior to the election. A group of employees filed a decertification petition two days later and on June 21, Costco filed an RM petition. Both petitions are blocked by the instant charge.

A few anti-Union employees used Costco's e-mail system to solicit employee support for the decertification campaign. Some employees contend that these messages violated Costco's asserted prohibition on the personal use of e-mail. The employees, however, were unable to point to a written rule stating as much. The Employer asserts, on the other hand, that it does not regulate the personal use of e-mail, and indicates that it even supports computer bulletin boards which employees freely use to sell personal items. The Employer states that it monitors e-mail only in order to prevent unlawful discrimination or harassment of its employees.³

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by implicitly promising to grant employees better wages and benefits if they vote to decertify the Union. We further conclude, however, that the evidence is insufficient to establish that the Employer disparately permitted its non-Union employees to use company e-mail to campaign in favor of the decertification drive.

It is clear that during a pre-election campaign, an employer has the right under Section 8(c) to show its employees an accurate comparison of the wages and benefits it applies to its organized and unorganized workforce. Thus, "[a] comparison of wages is not *per se* objectionable; the question is, was there a promise, either express or implied from the surrounding circumstances, that wages

² The Unions further allege that Costco management promised that if employees vote to decertify the Union, they would receive the CEA's higher wages and bonuses retroactive to the expiration of the contract in February. This allegation has not yet been fully investigated.

³ Costco management automatically received copies of these e-mails, just as it does for all others.

would be adjusted if the Union were voted out."⁴ Absent an outright promise of improved benefits, "surrounding circumstances" can thus indicate whether an employer stepped over the line from mere description of fact to an implicit promise. Factors include whether the employer explicitly disclaimed an intention to apply non-union terms and conditions to organized employees after the election;⁵ whether the employer raised the issue itself, or merely responded to questions from the bargaining unit;⁶ whether the employer focused exclusively on the wage comparison, or merely discussed the topic as one of many;⁷ whether the employer went to extraordinary lengths to individually tailor wage comparisons to individual employees;⁸ or whether the employer engaged in other unlawful or objectionable conduct.⁹

The distinction between lawful and unlawful behavior becomes blurred when a description of fact incorporates a promise of benefits. Thus, an employer may truthfully tell employees of its custom or past practice of always applying its more generous non-union wages and benefits to its entire unorganized workforce, even though this factual assertion contains within it an implied promise to grant them higher wages if they vote the union out.¹⁰ Thus, in

⁴ Viacom Cablevision, 267 NLRB 1141 (1983) (emphasis in original).

⁵ Viacom, 267 NLRB at 1142; Duo-Fast Corp., 278 NLRB 52 (1986); Best Western Executive Inn, 272 NLRB 1315 (1984); KCRA-TV, 271 NLRB 1288 (1984).

⁶ Viacom, 257 NLRB at 1141; KCRA-TV, 271 NLRB at 1288.

⁷ Viacom, 267 NLRB at 1142; Duo-Fast, 278 NLRB at 53.

⁸ Viacom, 267 NLRB at 1141 n.3 (distinguishing Etna Equipment & Supply Co., 243 NLRB 596 (1979), where the Board found that the employer's "extraordinary efforts" of preparing individually tailored comparisons of pensions benefits for each of its 40 employees raised the implication that the employer was doing more than just comparing benefits); Duo-Fast, 278 NLRB at 53; Best Western Executive Inn, 272 NLRB at 1316.

⁹ Duo-Fast, 278 NLRB at 53.

¹⁰ See, e.g., Noral Color Corp., 276 NLRB 567, 575 (1985) (employer lawfully promised employees that if they voted

TCI Cablevision of Washington,¹¹ the Board held that the employer was within its Section 8(c) right to accurately apprise employees that its unrepresented employees received a lucrative 401(k) plan which was not available to its organized employees. Although there was conflicting evidence as to whether the employer explicitly promised to allow employees to opt into the 401(k) plan if they voted the union out, it was "critical" to the Board's conclusion that the employer never explicitly told employees that the only way to receive the 401(k) plan was to oust the union.¹²

However, in McCarty Processors,¹³ the Board held that the employer impliedly promised to improve employees' wages should they vote to decertify the union. In bargaining for a successor contract, the union had been unable to convince the employer to apply its more generous non-union wage scale to its organized employees. The employer had only offered the union a 10-cent wage increase, despite the fact that it had recently granted two 20-cent wage increases to its unorganized workforce. Nonetheless, the employer told unit employees that if they voted out the union, they would receive the higher, non-unit wages that it customarily applied to all unorganized employees. The judge acknowledged that "an employer during a union election campaign may point out those employee benefits which it has by custom or practice uniformly extended to unrepresented employees or is otherwise naturally or obviously available to them."¹⁴ Nonetheless, the ALJ held with Board approval that the employer made an unlawful implied promise of higher wages contingent on rejecting the union. Thus, it was concluded that by withholding in bargaining the wage

the union out they would be eligible for its ESOP plan, an existing benefit which is automatically available to all unrepresented employees). Cf. Coca-Cola Bottling Co., 318 NLRB 814, 815 n.7 (1995) (promise to extend 401(k) plan to employees upon union's decertification, objectionable absent evidence that the plan was "automatically available to non-unit employees without the necessity of some decision by the Employer to extend it to employees who were no longer in a collective-bargaining unit").

¹¹ 329 NLRB No. 66 (September 30, 1999).

¹² Id., slip op. at 2.

¹³ 292 NLRB 359 (1989), remanded on other grounds sub nom. NLRB v. McCarty Farms, Inc., 24 F.3d 725 (5th Cir. 1994).

¹⁴ McCarty Processing, 292 NLRB at 364, citing Noral Color Corp., supra.

increases which it had long since extended to its unrepresented workforce, the employer necessarily implied that it would extend these benefits to unit employees only if they rejected union representation.¹⁵

In the instant matter, like McCarthy Processing, Costco explicitly told its employees that they would automatically receive the higher non-Union wages if they voted to decertify the Union at the same time it withheld these same improved wages and benefits from unit employees during negotiations for a successor agreement. The Board's decision in McCarty Processing argues that by promising employees better wages under the CEA while withholding them in bargaining with the Union, the Employer implied to employees that the Union's decertification was a necessary condition to receiving the unrepresented employees' improved wage scale. Costco's promise to apply the CEA to newly unrepresented employees thus arguably exceeded its Section 8(c) rights. Thus, we conclude that complaint should issue, absent settlement, to bring this theory, and the resulting tension in the caselaw, before the Board for clarification.¹⁶

However, there is no evidence that the Employer allowed non-Union employees to use its corporate e-mail system to campaign against the Union, while at the same time prohibiting use of e-mail for other, non-work purposes. Although given an opportunity to do so, the Unions have been unable to come forward with a written prohibition against personal e-mail use or with evidence that Costco has disciplined employees for violating such a rule. In contrast, the evidence establishes that Costco allows its employees to use a company-maintained electronic bulletin board for personal use. Thus, in the absence of evidence of disparate treatment, the Employer's condonation

¹⁵ Ibid. The judge distinguished Noral Color Corp. because, in that case, the employer did not imply that decertifying the union was the only way employees would receive the ESOP plan in circumstances where the union had already rejected the plan in prior bargaining with the employer.

¹⁶ [FOIA Exemptions 2 and 5

of the use of its e-mail system in the decertification campaign is not unlawful.¹⁷

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by implicitly promising to grant employees better wages and benefits should they vote to decertify the Union. However, the allegation that the Employer disparately treated its unionized employees by permitting non-Union employees to use company e-mail to campaign in favor of the decertification drive should be dismissed, absent withdrawal, for lack of evidence.

B.J.K.

¹⁷ See, e.g., Manhattan Hospital, 280 NLRB 113 (1986), enfd. mem. 814 F.2d 653 (2d. Cir. 1987), cert. den. 483 U.S. 1021 (1987) (absent evidence of disparate treatment, no violation where employer permitted employees to attend anti-union meeting on company time).