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

Advice Memorandum

DATE: May 30, 1997

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
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SUBJECT: Hearst Corporation and its WTAE Division
Case 6-CA-28845

This case was submitted for advice on whether the Employer violated Section 8(a)(1), or otherwise engaged in objectionable conduct preceding a decertification election, when it advised employees that they would lose no benefits and instead would become eligible for the Employer's contributory 401(k) plan if they were no longer represented by the Union.

We conclude that it would be inappropriate for the Office of the General Counsel to address the decertification election objection issue, but that the Employer's statements otherwise violated Section 8(a)(1).

We first note the background circumstances surrounding the impact of the Employer's contributory 401(k) plan (contributory plan) in a prior case involving a companion unit represented by the same Union.[1] On December 27, the Union received a decertification petition in this separate unit and held a meeting with the RD petitioner. According to the Union, the employee-petitioner stated that employee dissatisfaction with the Union stemmed from high Union dues, which the Union was at that time proposing to increase, and also from unit employee exclusion from the contributory plan. The Union also held two unit employee meetings on January 29 and February 2 concerning the pending decertification vote. The contributory plan was the predominant issue of discussion, and the tenor of these meetings involved argument over whether receiving the

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[1] In WTAE-AM, Case 6-CA-28488, Advice Memorandum dated February 19, 1997, we found that the Employer unlawfully denied the Union information about its contributory plan, but that the Employer otherwise arguably had not discriminatorily or in bad faith bargained over that plan.

contributory plan was worth abandoning the Union and the bargaining agreement.

On February 10, the Employer provided unit employees with a letter purporting to respond to alleged rumors that unit employees might lose benefits if they voted to decertify the Union. That letter stated in part:

> [A]ll employees at [the Employer] who are not represented by a union receive a number of benefits including vacation, group insurance, the Hearst Corporation retirement plan, and the 401(k) employee savings plan with a Company contribution [contributory plan]. Those benefit programs automatically include [the Employer's] employees not covered by any union contract. While federal labor law strictly forbids the union, the Company or anyone else from promising you any better benefits as the result of the election's outcome, it will continue to be our policy to . . . apply our benefit plans as written. . . .

Two days later on February 12, the Employer held a unit employee meeting and began by stating: "[c]aveat: I cannot and will not make any promises because it is (1) not my style and (2) the National Labor Relations Act as interpreted by the National Labor Relations Board and the courts will not permit it." Nevertheless, the Employer continued by asking rhetorically, "If the Union is voted out, will the employees lose all of their benefits and favorable working conditions?" Replying that they absolutely would not, the Employer said that to do that would be "stupid" and not good business, and referred to that rhetorical question as a Union scare tactic. Referring to Hearst's TV stations in Milwaukee and Dayton, the Employer stated that six or seven years ago, they decertified their unions with no untoward results, i.e., working conditions did not change and benefits in fact improved. The Employer stated that employees there enjoy better benefits today than they had received while represented by the union. Once the union was voted out, the Employer stated, the employees automatically became eligible to participate in the Hearst pension plan and contributory plan, and the same thing would happen to the employees here.

Following the Employer's remarks, one employee asked why Union members did not have the contributory plan. The Employer replied that it was a matter of negotiations; that the Employer placed great value on the contributory plan; and that the Union was not willing to give enough in return at the bargaining table. The Employer outlined the Union's pension plan benefits, and then compared them to the Hearst salaried pension plan, using as a typical example an employee making $40,000 per year. The Employer also addressed benefits enjoyed by Union represented employees which were superior to benefits offered to non-bargaining unit employees. The Employer specifically mentioned the Union benefits of overtime, severance, and vacation pay.

The election was held on eight days later, February 20, and the Union lost by a vote of 14-12.

We note that the language of the contributory plan is not per se unlawful.[2] However, the Employer in its February 12 speech made clear that, if the employees voted to decertify the Union, they (1) would not lose all their benefits; and instead (2) would automatically receive the contributory plan. In our view, the first of these statements amounted to a clearly implied promise of benefit for voting against the Union, viz., not losing all Union benefits.

We recognize that the Employer's reference to automatic eligibility for the contributory plan upon decertification arguably may have fallen within the Employer's privilege to inform unit employees of wages and

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[2] The contributory plan makes ineligible "any employee covered by a collective bargaining agreement . . . where retirement benefits were the subject of good-faith bargaining . . ." The Board has found substantially the same language to have been both lawful and insufficient to taint an employee petition, because such language merely anticipates that retirement benefits will be determined through the normal process of collective bargaining. See KEZI, Inc., 300 NLRB 594 (1990).

benefits then being provided to non-union employees.[3] However, the Employer did not merely describe its contributory plan, but further effectively promised that employees would not lose all benefits if the Union were decertified.[4] The Employer in fact made specific reference to the overtime, severance, and vacation pay benefits of the Union represented employees. Union represented employees could not fail to understand that the Employer was impliedly promising to continue those benefits if they voted to decertify the Union. Thus, the employees would receive the added benefits that the Employer's nonunion employees receive while, at the same time, retaining the benefits received through collective bargaining which the nonunion employees do not receive. Therefore, the Employer was promising employees with union and nonunion benefit packages if they decertify at the same time it was telling the Union that in order to get the nonunion pension plan it would mean a reduction in other benefits.

Finally, the Employer's Section 10(b) and nonunit consideration defenses are without merit. We note that the offending speech was made to unit employees within the 10(b) period.

B.J.K.

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[3] See, e.g., Viacom Cablevision of Dayton, Inc., 267 NLRB 1141 (1983).

[4] See, e.g., Automated Business Systems, 205 NLRB 532, 545-6 (1973) (employer preelection memo found an 8(a)(1) implied promise of benefits by stating that employer had no intention of taking benefits away; that benefits had increased at sister plant after union voted out; that new benefits would be added in future as needed; and that employees would suffer no loss benefits if union were voted out); Zero Corp., 262 NLRB 495, 509-10 (1982)(unlawful implied promise by asking employees to rely upon employer's record of fair treatment at other location, where employees received benefits after rejecting union).