

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

Advice Memorandum

DATE: October 3, 2000

TO : Peter B. Hoffman, Regional Director
Region 34

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

SUBJECT: Projections, Inc.	512-0125-1600
Case 34-CA-9217	712-5014
	712-5028-2537
TCI Cablevision	712-5028-5000
Case 34-CA-9147	712-5042-6742

These cases were submitted for advice as to whether a company which made and sold a videotape containing Section 8(a)(1) threats violated the Act, when that company did not show the video to employees but where another company that bought the video showed the video to its employees.

FACTS

In September 1999, TCI Cablevision (TCI) showed its employees a videotape during a union organizing campaign. The Region has determined in Case 34-CA-9147 that certain statements made in that video, depicting a union organizing campaign in a generic workplace, constituted unlawful Section 8(a)(1) threats of plant closure and loss of employment and a solicitation that employees report other employees' union activities, and that TCI violated Section 8(a)(1) by showing the video. The video, entitled "Little Card, Big Trouble," was manufactured and sold by Projections, Inc. (Projections). According to Projections' "web site" on the computer Internet, Projections offers for sale a variety of "labor relations" videos. The web site states:

Projections has helped thousands of companies give their employees a company to vote for rather than a union to vote against. We specialize in custom work as well as offering a complete "Off-the-Shelf" series.

CUSTOM LABOR RELATIONS VIDEO

Preventive

If your company doesn't have a union, and doesn't want one, don't wait until there's a union organizer at the door. Tell your employees now why they don't need an outside third party to speak for them.

. . . .

OFF-THE-SHELF LABOR RELATIONS VIDEO

The most powerful, most flexible, most right-on-target communications tools available today. We've dealt with every weapon unions have. Discover what the leader in campaign videos can do for you.

. . . .

"Little Card . . . Big Trouble" TM

Designed to be shown after unions come calling, but before there is a petition filed, this program answers questions about what an authorization card is and the implications of signing one. It is also available for the healthcare industry as well as in Spanish.

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On March 20, 2000, the Union filed the Section 8(a)(1) charge in Case 34-CA-9217 against Projections, alleging that it threatened employees of TCI by making the statements in the video. Videos produced by Projections have been implicated in several other Board proceedings, including apparently "custom" videos found to constitute objectionable conduct in Dominion Engineered Textiles, 314 NLRB 571 (1993), as well as an earlier version of the "Little Card Big Trouble" video introduced into evidence (but not alleged as a ULP) in a Region 4 case. There are several Projections videos at issue in a pending Region 11 matter, Smithfield Foods, Case 11-CA-18316 et al., alleged to include Section 8(a)(1) threats of plant closure.

The sales agreement¹ form between Projections and TCI provides that:

The information communicated in the video program(s) which are provided by Projections, Inc. to the purchasing company identified herein is intended for general information purposes only and does not constitute legal advice to the purchasing company or anyone who may view and/or hear the video program(s). The purchasing company should consult an attorney to obtain legal advice regarding the information communicated in the video program(s) identified above.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, alleging Projections as an agent of TCI and as such, liable as a named respondent. Further, assuming Projections meets the appropriate jurisdictional standard to be considered an employer within the meaning of the Act,² it can alternatively be named in the complaint as an employer and held liable for the threats set forth in the video even though the threats were made to the employees of another employer. [FOIA Exemption 5

¹ Projections produced copies of its sales agreements with TCI pursuant to an investigative subpoena, after Projections' petition to revoke the subpoena was denied by the Board. Projections, Inc., 331 NLRB No. 135 (August 23, 2000).

² [FOIA Exemption 5

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I. Projections Liable as an Agent of TCI

It is well established that in determining whether a person is acting as an agent of another, the Board applies common law principles of agency.³ In this regard, however, the Board has specifically noted that "[w]hen applied to labor relations . . . , agency principles must be broadly construed in light of the legislative policies embedded in the Act," which ". . . necessarily requires sensitivity to the particular circumstances of industrial labor relations."⁴ According to the Restatement 2nd of Agency, "agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."⁵ It further states that "the one for whom action is to be taken is the principal," and "the one who is to act is the agent."⁶

It is well-established that a labor consultant hired by an employer to communicate on its behalf is the employer's agent and that unfair labor practices committed by the agent in that capacity will be imputed to the employer.⁷ Section 2(2) of the Act includes within the definition of employer "any person acting as an agent of an employer, directly or indirectly" Thus, labor consultants may be held liable as separate respondent employers for their unfair labor practices as agents of the

³ See Allegany Aggregates, Inc., 311 NLRB 1165 (1993), citing Dentech Corp., 294 NLRB 924 (1989) and Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82 (1988).

⁴ Longshoremen ILA (Coastal Stevedoring Co.), 313 NLRB 412, 415 (1993), *enf. denied*, 56 F.3d 205 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996), quoting Longshoremen Local 1814 v. NLRB, 735 F.2d 1384, 1394 (D.C. Cir. 1984), *cert. denied* 469 U.S. 1072 (1984).

⁵ Restatement 2d, Agency § 1 (1958).

⁶ Id.

⁷ See Coronet Foods, Inc., 305 NLRB 79 (1991), *enf'd.* 981 F.2d 1284 (D.C. Cir. 1993).

employers employing them.⁸ Had Projections sent an individual to personally threaten TCI's employees instead of making the threats via videotape, there is no question that it would be deemed the agent of TCI. Here, instead of sending an individual to convey unlawful threats to TCI's employees, Projections sent a videotape message. It would be an artificial distinction to hold that Projections is not TCI's agent solely because the threats were made through a video instead of in person. Accordingly, the Board has found that parties unaffiliated with an employer, who made threats via videotape or other media instead of in person to the employer's employees, were agents of the employer.⁹ Granted, TCI and Projections entered into a sales transaction, which alone is arguably insufficient to create an agency relationship.¹⁰ The product provided by Projections, however, is not as much a manufactured good as

⁸ See, e.g., Wire Products Mfg. Corp., 326 NLRB No. 62 (1998); Blankenship and Associates, Inc., 306 NLRB 994 (1992), enf. 999 F.2d 248 (7th Cir. 1993); Chalk Metal Co., Inc., 197 NLRB 1133, 1152-54 (1972); Alliance Rubber Co., 286 NLRB 645, 645-46, 668-69 (1987) (polygraph company, acting as agent of employer, itself violated the Act). Cf. Blankenship and Associates, Inc. (Diamond Printing Co.), 290 NLRB 557, 558 (1988) (labor consultant not liable as respondent for merely advising employer to commit 8(a)(1) violation where consultant did not actually commit violation himself); St. Francis Hospital, 263 NLRB at 847-50 (labor consultant, not alleged as agent of hospital, not liable for conduct of hospital's supervisors; even assuming that consultant instructed those supervisors to commit ULPs, question of whether such advice "subjects a labor consultant to the Act's remedial process is a question which has not been resolved by the Board").

⁹ Wallace International de Puerto Rico, Inc., 328 NLRB No. 3, slip op. 1 at n. 2 (1999) (local mayor deemed agent where employer showed employees videotape of mayor threatening plant closure). See also, Fieldcrest Cannon, Inc., 318 NLRB 470, 472 (1995) (public relations firm hired by employer to produce and circulate posters and newspaper advertisements predicting plant closure and loss of jobs deemed agent of employer), enf. granted in pertinent part, 97 F.3d 65 (4th Cir. 1996).

¹⁰ See generally, Restatement 2d, Agency §§ 14J, 14K (1958).

it is a "communication."¹¹ In the labor consultant cases, what the employers essentially were purchasing from the labor consultants was a service: the effective communication of a desired message. Similarly, what TCI has purchased from Projections is an effective means of conveying a desired message to its employees. When viewed through the lens of "economic reality," it is clear that the video is the equivalent of a labor consultant.¹²

Another factor which must be addressed, but which does not preclude a finding of agency, is that "Little Card Big Trouble" is an off-the-shelf video as opposed to a custom video. Granted, TCI did not direct Projections regarding the content of its communications in the video, nor was the video produced specifically on behalf of TCI.¹³ However, the Board has based agency determinations on apparent authority as well as actual authority.¹⁴ Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question.¹⁵ Projections' "act" is

¹¹ The videotape's value to TCI comes from the message it conveys - its "intellectual property" - not its physical components.

¹² The rationale for an employer to hire a labor consultant to convey a desired message and TCI's rationale for hiring Projections to convey a desired message both comport with the economic justifications behind the law of agency: if a party can more efficiently effectuate its ends by procuring another party to act on its behalf - either because the other party has more time or expertise - then it is in its economic interest to do so. Ostensibly, the employers in the labor consultant cases, as well as TCI in the instant case, determined that their goal of dissuading employees from unionizing would be better served by procuring the services of others more skilled than they in the art of conveying unlawful threats.

¹³ We note the purchase orders produced by TCI and Projections show that TCI did choose to purchase separate versions of the video narrated by "Blk. Male," "Wh. Male," and "Span. Male" narrators.

¹⁴ See, e.g., Allegany Aggregates, Inc., 311 at 1165.

¹⁵ Id.; Restatement 2d., Agency § 27 (1958).

not the *production* of the video, but *the sounds and pictures emanating* from the screen and directed towards TCI's employees. Because TCI showed the video to its employees, a reasonable employee would believe that TCI had authorized Projections' *message*.

In addition to applying common law apparent authority, the Board has held that individuals unaffiliated with an employer who, on their own initiative, restrain or interfere with employees' exercise of Section 7 rights, were agents of the employer as long as the employer had knowledge of the activity, reaped the benefits of the activity, and failed to disavow the activity.¹⁶ In the recent Board decision In re Southern Pride Catfish,¹⁷ a local pastor who approached an employer about speaking to employees who were his parishioners, and subsequently gave anti-union speeches on company premises, was deemed the employer's agent where the employer failed to disavow his message and was in a "cooperative effort" to oppose the

¹⁶ See, e.g., Colson Corp., 148 NLRB 827, 828-29 (1964), *enfd.* 347 F.2d 128, 137 (8th. Cir.), *cert. denied*, 382 U.S. 904 (1965); Hamburg Shirt Corp., 156 NLRB 511, 522-23 (1965), *enfd.* 371 F.2d 740 (D.C. Cir. 1966); Dean Industries, Inc., 162 NLRB 1078, 1088, 1092-94 (1967); Star Kist Samoa, Inc. 237 NLRB 238 (1978) (independent citizens group that distributed anti-union literature deemed "agent" despite employer's public disclaimer and communication to group to stay away from property, where employer had provided some information to group, made threats similar to those made by group, and failed to keep group off property). Cf. Raytheon Co., 179 NLRB 678 (1968) (radio station not agent of employer where newscast cited "informed sources" for proposition that plant would shut down if unionized, despite employer's failure to disavow, where no evidence of employer cooperation or participation); Deringer Mfg. Co., 201 NLRB 622, 625-626 (1973) (employee's coercive conduct toward co-worker not attributable to employer, because no evidence that employee was acting on account of employer or that employer knew of employee's conduct; "[l]ike beauty, agency in this case was only in the eye of the beholder, and the beholder was the General Counsel").

¹⁷ 331 NLRB No. 81, slip op. 2-3 (2000).

union. Further, in Henry I. Siegel Co.,¹⁸ a mayor who used his influence to ensure that an anti-union editorial was published in the local newspaper, personally mailed a copy of the editorial to the employees, and personally paid for a large anti-union newspaper advertisement, was deemed an agent of the employer despite a lack of direct evidence that the employer requested this activity. In his decision, adopted by the Board, the Trial Examiner stated:

Under the Act, no beribboned instrument of attornment is required to affix liability for violation upon actor or beneficiary. The Act expressly provides (Sec. 2(13)) and it has repeatedly been pointed out that common law tests of agency need not be fulfilled in these cases. It may nevertheless be observed that, even under technical common law rules, agency through ratification, knowledgeable acceptance or retention of the fruits of the alleged agent's act, or through failure to disavow are firmly recognized.¹⁹

Such unaffiliated persons have not only been found to have been agents, but have been found individually liable as respondents for such acts.²⁰

Thus, although Projections produced the video independent of any relationship with TCI, and TCI had no control over the contents of the video prior to production, it may still be deemed TCI's agent with respect to the message contained in the video shown by TCI to its employees. Absent any evidence that TCI made an effective disavowal of Projections' threatening communications, Projections should be alleged as TCI's agent and individually liable with respect to the threats made.

II. Projections Liable as an Employer by Threatening Employees of Another Employer

¹⁸ 172 NLRB 825 (1968), enfd. 417 F.2d 1206 (6th Cir. 1969), cert. denied 398 U.S. 959 (1970).

¹⁹ Id. at 839, citations omitted.

²⁰ See, e.g., Henry I. Siegel Co., 172 NLRB at 825; Dean Industries, 162 NLRB at 1101 (mayor found liable "as an agent, and in the interests of the Company and as an employer within the meaning of the Act").

In addition to the agency theory, the complaint should also allege that Projections is an employer within the meaning of the Act that itself threatened employees, albeit not its own employees. It is clear that an employer can violate Section 8(a)(1) by directly threatening employees of another employer. In Fabric Services,²¹ a Southern Bell telephone repairman (Smoak) servicing the Fabric Services plant was told that he must remove his union insignia while in the plant. Upon returning to Southern Bell, Smoak's supervisor subsequently informed him that he was to follow Fabric Services' directions and complete his work without wearing the union insignia. The Board upheld the ALJ's conclusion that by virtue of its ownership of the property and power to evict the repairman, Fabric Services "was in a position of sufficient control effectively to enforce its direction" to the repairman.²² Although Fabric Services was not the repairman's employer, Fabric Services was in a position to force him to choose between the exercise of his Section 7 right and his ability to carry out his employment duties. In Steigerwald,²³ a credit union which maintained a bylaw limiting its membership to unrepresented employees and sent letters to employees of a separate employer informing them that if they voted to unionize they could no longer be credit union members violated Section 8(a)(1). The credit union had some connection to the employment relationship, although not as direct as in Fabric Services, because the employees who belonged to the credit union were entitled to their membership by virtue of their employment with Steigerwald.

The common thread in Fabric Services and Steigerwald is that "to impose 8(a)(1) liability for unlawful threats or promises, the respondent must have the power to effectuate those alleged threats or promises."²⁴ Without such power, the actual coercive effect of the threats could be too minimal to justify 8(a)(1) liability. For example, in Glendale Associates,²⁵ we concluded a mall owner's

²¹ Fabric Services, Inc., 190 NLRB 540, 542 (1971).

²² Id.

²³ A.M. Steigerwald Co., 236 NLRB 1512, 1515 (1978), affd. 605 F.2d 560 (7th Cir. 1979) (table).

²⁴ St. Francis Hospital, 263 NLRB at 849.

²⁵ Glendale Associates, Ltd., et al., Case 31-CA-23189, Advice Memorandum dated May 21, 1998.

videotape surveillance of handbilling employees of a company (ABC) owned by a mall tenant (Walt Disney Company) did not violate the Act where the mall had no business relationship with ABC, no power to directly interfere with the handbilling employees' terms and conditions of employment, and employee fears that the mall would turn over the videotape to ABC were purely speculative. In that case, we stated that the "employees' concerns about the videotaping ha[d] such an attenuated effect on their ability to exercise their Section 7 rights that no interference" existed.²⁶ On the other hand, in Matanuska,²⁷ we followed Fabric Services and Steigerwald in arguing that an electrical cooperative violated the Act by adopting a rule that prohibited all members of a union that represented certain of the cooperative's employees from serving on the coop's board of directors, where all ratepayers within the coop's jurisdiction could otherwise serve as directors. In Matanuska, the impact on employees' employment situation was less direct than in Fabric Services and Steigerwald, but more direct than in Glendale.

In the instant case, there is no evidence that Projections has any power to affect the terms and conditions of TCI employees' employment. Although the Board focused on "control" in Fabric Services and Steigerwald, the underlying issue was the level of coercion, interference or restraint that their conduct engendered. Thus, where there is no control, but other factors make the conduct sufficiently coercive, Fabric Services and Steigerwald arguably do not preclude the finding of an 8(a)(1) violation. In the instant case, several factors compensate for Projections' lack of power or control over the TCI employees, making its communication sufficiently coercive to constitute an 8(a)(1) violation. For one, the content of the communication itself - threatening plant closure and loss of employment - is particularly potent.²⁸ Furthermore, when transmitted to the employees through their employer TCI, Projections' threats are necessarily coupled with the employer's inherent power

²⁶ Id.

²⁷ Matanuska Electric Association, Case 19-CA-25303, Advice Memorandum dated November 21, 1997.

²⁸ For example, such threats are considered "hallmark" violations in the Gissel bargaining order context. See NLRB v. Gissel Packing Co., 395 U.S. 575, 611 n. 31 (1969); NLRB v. Jamaica Towing, 632 F.2d 208, 213 (2d. Cir. 1980).

to act on those threats, significantly enhancing the threats' coercive effect. There is a direct connection²⁹ between Projections' activity and this increased level of coercion. Projections explicitly and intentionally markets its videos, including the precise video in question here, to employers to show to employees in situations where a union is attempting to organize employees. Thus, it is clearly foreseeable that a purchaser of one of Projections' videos would put the video to its advertised use, i.e., the purchaser would show the video with the unlawful threats to its employees.³⁰ Thus, in showing the video to its employees and giving its imprimatur, TCI was acting as the foreseeable facilitator or mechanism through which Projections' threats were conveyed to employees. Although

²⁹ Clearly, the connection between Projections' conduct and TCI is closer than that between the mall and ABC (the handbilling employees' employer) in Glendale Associates and between the coop and the union members, whose employer(s) did not matter, in Matanuska. Unlike Glendale Associates, where employees' fears that videotapes chronicling their protected activity would be shown to their employer were deemed too attenuated to warrant an 8(a)(1) violation, in the instant case, Projections has already inextricably linked itself with TCI. And unlike Matanuska, where the connection between the bylaw and the employees' terms and conditions of employment was indirect, Projections' threats went to the very core of the TCI employees' employment situation.

³⁰ In this respect, an analogy can be made to the tort defamation theory of liability that a publisher of a libel is liable for the republication of the libel by a third party if that republication was reasonably foreseeable. See Restatement 2d, Torts § 576(c) (1977) (liability if "the repetition was reasonably to be expected"), cited in Tavoulareas v. Piro, 759 F.2d 90, 136 n. 56 (D.C. Cir. 1985), cert. denied 484 U.S. 870 (liability for repetition of slander by newspaper reporters, where it was reasonably foreseeable that reporters might republish the statements in a story); compare Reuber v. Food Chemical News, Inc., 899 F.2d 271, 2889-90 (4th Cir. 1990), rev'd. on other grounds 925 F.2d 703 (4th Cir. 1991) (en banc) (company that placed defamatory letter in file not liable on theory of republication for leak of letter, where the leak was not reasonably foreseeable).

Projections does not have any independent control over the terms and conditions of employment of TCI's employees, the inherent coerciveness of the particular threats it made plus the direct connection between its activity and the probability that TCI would affix its power as employer to the threats, results in sufficient interference and restraint to justify the issuance of an 8(a)(1) complaint against Projections as a separate respondent not based on an agency theory.

III. [FOIA Exemption 5]

[FOIA Exemption 5

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IV. [FOIA Exemption 5]

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³¹ [FOIA Exemption 5

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