

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

Advice Memorandum

DATE: June 25, 1999

TO: James J. McDermott, Regional Director
Region 31

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

SUBJECT: Nestle USA
Cases 31-CA-23778 and 31-CA-23846

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This case was submitted for advice as to three issues: (1) whether the Employer's anti-union "Human Resources Philosophy" in its employee handbook unlawfully coerces employees; (2) whether a handbook rule mandating employees' withdrawal from outside activities or interests deemed contrary to the Employer's own interests violates the Act; and (3) whether the Employer violated the Act by including with employee paychecks a memo setting forth the employees' right to revoke Union authorization cards, as well as form letters and stamped, addressed envelopes with which to do so.

FACTS

Nestle USA (the "Employer") revised its employee handbook in January, 1999, during the course of an organizing campaign amongst its employees conducted by Local 1036, United Food and Commercial Workers Union (the "Union"). The revised handbook contains on page 2 a section entitled "Human Relations Philosophy,"¹ which reads as follows:

Every company has Human Resources policies and procedures. At Nestle Ice Cream, our Human Resources policies and procedures are aimed at

¹ This "philosophy" is listed as one of the Employer's "Policy's [sic] and Practices" in the table of contents to the handbook.

one objective. The objective is to treat each individual with respect for his or her rights, and thereby create a quality working environment.

Nestle Ice Cream is built on the principles of equal treatment and dealing directly with individuals rather than through third parties such as labor unions. We believe in the right of team members to be union free and we believe that Nestle Ice Cream's union-free status is one reason we have continued to grow and provide new jobs while many union companies have declined.

People have the right to engage in union activity, but they also have an equal right NOT to join or assist in union activity. It is good to know that if anyone ever asks you to sign a union authorization card or membership card, you have the right to refuse to sign the card regardless of what you may be told, a union card is a legal document. Signing a union card is like signing a blank check or power of attorney. It means that you as an individual are no longer interested in dealing directly with other Nestle people, but want to authorize someone else to do your talking for you. We believe Nestle people want to think, speak and act for themselves.

We recognize that, like any organization, we have problems from time to time, but we do not believe that interference by outsiders will work to anyone's benefit. We believe in treating people as individuals, and believe that we can work out problems among ourselves. If you ever have questions about this commitment to work out our own problems among ourselves, or if you have any personal problems or questions, we urge you to bring these matters to your supervisor, the human resources manager, or plant manager. We hope that before you decide to go outside with any questions or problems, you will give us a fair chance to deal with your questions or problems personally.

The Team Members of Nestle have enjoyed good wages and benefits and steady employment without paying dues to a union. Nestle Team Members have never missed the chance to earn a paycheck because of a strike. We do not need a union here and we will use every legal means to keep our plant union-free. We believe that a union-free

organization is in the best interest of all Nestle people - and more importantly - Nestle people believe this.

When these handbooks were distributed, employees were required to sign an acknowledgement form for receipt of the handbook. The acknowledgement contains the statement that "I understand that my failure to comply with the Company's policies may result in corrective action up to and including termination of my employment."²

The new handbook also retains the following Employee Rule of Conduct number 17, from the previous handbook:

17. An acceptable employee will withdraw from outside activities or interest [sic] which adversely affect the interests of the Company.

On February 19, 1999, also during the organizing campaign, the Employer included a memo to employees in their payroll check envelopes, signed by the General Manager. The memo stated:

If you signed a union card and wish to cancel it, you may do so by signing, dating and mailing the enclosed letters to the UFCW union and the National Labor Relations Board.

By providing you with this information, I am not asking if you signed a union card, nor am I asking or encouraging you to cancel a union card if in fact you signed one. The sole purpose in providing this information is to assist those of you who may have signed a union card in exercising your legal right to cancel the card if you elect to do so. It is entirely your choice.

A form letter was provided with the memo, along with addressed, stamped envelopes to the Region and the Union. The letter reads as follows:

I am employed at the Nestle Company in Bakersfield, California. I am writing to advise

² The Employer's previous edition of its employee handbook contained no discussion of the Employer's position regarding unions, nor any acknowledgment of receipt of the handbook with concomitant agreement by employees that they will comply with company policies, or risk discipline.

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you that I am hereby cancelling and revoking the union authorization card I signed and requesting that you return the card to me.

Thank you for your cooperation.

There is apparently no evidence that employees have been disciplined under the policies expressed in the "Human Resources Philosophy" or Rule 17. It appears that several employees utilized the Employer-provided materials to revoke authorization cards.

ACTION

For the reasons stated below, we agree with the Region that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by maintaining in its employee handbook provisions: (1) stating the Employer's anti-union "Human Relations Philosophy" under apparent threat of discipline, up to and including termination; and (2) requiring employees to withdraw from outside activities or interests which the Employer deems adversely affect the interests of the Company. We further conclude that the allegations regarding the Employer's provision of card revocation information and form letters should be dismissed, absent withdrawal.

1. The "Human Resources Philosophy."

In La Quinta Motor Inns, Inc., 293 NLRB 57, 61 (1989), the Board found an employer's requirement that its employees promise in writing to abide by the employer's non-union policy, promulgated in an employee handbook, to violate Section 8(a)(1). The handbook did not contain any statement regarding employees' right to engage in or refrain from engaging in union activities. Employees were required to sign a receipt stub for the handbook which stated, "I agree to abide by the policies and procedures contained herein. I understand that the continuance of my employment is contingent on my so abiding by these rules." Similarly, in Heck's, Inc., 293 NLRB 1111, 1120 (1989), the Board found that an employer violated Section 8(a)(1) by requesting its employees to promise in writing to be bound by an anti-union policy contained in an employee handbook, which also did not mention employees' Section 7 rights. In so finding, the Board emphasized that the employer acted unlawfully not in publishing its anti-union policy in the employee handbook, but in extracting employees' promises to adhere to the policy under threat of discipline if they did not comply.

In contrast to La Quinta and Heck's, in Noah's New York Bagels, Inc., 324 NLRB 266, 272 (1997), the Board did not find a violation of Section 8(a)(1) where an employee handbook, while expressing employer anti-union sentiments, stated that "the federal government gives employees the right to organize and join unions," and had attached a receipt form, to be placed in the employees' personnel files, which stated only that the employees had read, understood and would follow the contents of the handbook. The receipt form contained no provision for imposition of discipline if employees failed to adhere to the employer's policies, including its anti-union policy.

In the instant case, the Employer's handbook's anti-union policy, promulgated during an organizing campaign,³ together with the requirement that employees sign acknowledgments of receipt of the handbook that contain a promise to comply with company policies under threat of discipline likewise violate Section 8(a)(1).⁴ Thus, like La Quinta and Heck's, the essence of the violation lies in compelling employees to promise to comply with the Employer's policies, including its anti-union policy, or face potential discipline for exercising Section 7 rights. That acknowledgment of possible discipline was absent in Noah's New York Bagels, supra.

³ In Matheson Fast Freight, 297 NLRB 63 (1989), the Board, in adopting the ALJ's decision, notes in its footnote 1 that "we disavow any reliance on the timing of the handbook's distribution" during an organizing campaign. It is worthy of note, however, that unlike the situation presented by Lafayette Park Hotel, 326 NLRB No. 69 (August 27, 1998), in which certain handbook rules not specifically addressing union activity, promulgated in the absence of a union organizing campaign or evidence of union activities by employees, were found by the Board not to violate the Act, the Nestle employees here would be hard pressed not to note the timing of the appearance in a new employee handbook of a strong statement of their Employer's anti-union convictions where no such statement had previously existed.

⁴ We would not view this violation of the Act as a "Yellow Dog Contract" of adhesion, rather it is our view that the violation is more accurately described as a coercive threat of discipline if employees choose to exercise their right to engage in protected concerted activity.

2. Employee Rule of Conduct 17

In Lafayette Park Hotel, supra, the Board found the mere maintenance of employee handbook provisions against "engaging in conduct that does not support [the employer's] goals and objectives,"⁵ and against "unlawful or improper conduct off the hotel's premises or during non-working hours,"⁶ would not reasonably chill employees' exercise of Section 7 rights in violation of Section 8(a)(1). The Board noted that the handbook containing the rules was promulgated in the absence of a union organizing campaign, and contained no reference to unions, 326 NLRB No. 69, slip op. at 3. The Board reasoned in Lafayette Park that reading a prohibition on Section 7 activities into the above-cited handbook provisions would be a "strained construction" of their language, slip op. at 3.

In BET Services, Inc., Case 33-CA-12769 et al., Advice Memorandum dated January 14, 1999, we considered an employer's handbook provision regarding employee conflicts of interest which enumerated specific examples of conduct the employer deemed to constitute conflicts of interest which employees should avoid. None of the examples of conflicts either specifically or by implication involved any Section 7 activity. We found that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights, since employees would understand that the rule was designed to protect the employer from employee graft or conflict of interest, and was not meant to implicate Section 7 rights.

In the instant case, the Employer does not define or give specific examples of conduct which it deems its Rule 17 to encompass. This case is thus distinguishable from BET. Moreover, unlike Lafayette Park, in which the Board noted that the employer's handbook did not define its

⁵ Standard of Conduct #6 stated that "unacceptable conduct" included "being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives."

⁶ Standard of Conduct #31 continued: "which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community."

"goals and objectives," here the Employer makes it abundantly clear in its statement of its "Human Relations Philosophy" that it is vehemently opposed to having a union represent its employees, that unionization would be against "the best interest of all Nestle people" [emphasis added], and that it expects its employees, under threat of disciplinary action, to comply with company policies and procedures. Rule 17 specifically refers to the "interests" of the Employer. We therefore conclude that the maintenance of the handbook's anti-union policy, under which Rule 17 must necessarily be read, makes the maintenance of Rule 17 a violation of Section 8(a)(1).

3. The Payroll Stuffers

The Union alleges that the memorandum, form letters, and postage-paid envelopes sent to employees along with their paychecks setting forth the procedure for employees to revoke their union authorization cards violate Section 8(a)(1) of the Act. We conclude that the Employer did not violate Section 8(a)(1) by that conduct.

In Mariposa Press, 273 NLRB 528, 529 (1984), the Board, reversing the ALJ, held that:⁷

an employer may lawfully inform employees of their right to revoke their authorization cards even if employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from such revocation.

In Mariposa Press, 273 NLRB at 536, the employer distributed a letter informing employees of how to withdraw their union cards and a sample withdrawal statement with the employees' paychecks. The employer did not, however, attempt to monitor whether employees actually revoked their cards, and did not request that employees revoke their cards, interrogate employees about their sentiments, or threaten or coerce them to revoke their cards in any way.

⁷ The Board cites R.L. White Co., 262 NLRB 575 (1982). See also Nordstrom, Inc., 229 NLRB 601, 604-05 (1977), which sets out a framework for assessing what constitutes undue influence by employers regarding employee revocation of union authorization cards.

These facts are distinguishable from those present in cases such as Cumberland Shoe Company, 160 NLRB 1256 (1966), in which the employer provided employees with sample letters requesting withdrawal of their union cards, watched them sign the letters, placed copies of the letters in their personnel files, and stamped and mailed some of the letters.⁸

In the instant case, the Employer's memorandum clearly states that it is not asking employees if they had signed union cards, nor asking or encouraging them to cancel such cards. The memo also assures the employees that it is entirely their choice whether or not to engage in union activities.⁹ The Employer's provision of stamped envelopes, although constituting "assistance" by increasing the ease by which employees might seek revocation of their authorization cards, also appears to ensure that the Employer would have no knowledge of whether or not employees mailed the revocations, and would not provide an opportunity to monitor which employees in fact had either signed and/or revoked cards.¹⁰ Thus, in these circumstances the Employer did not violate the Act.

⁸ See also Adair Standish Corp., 290 NLRB 317, 317-18 (1988), enf'd. in rel. part 912 F.2d 854 (6th Cir. 1990) (Board found the employer violated Section 8(a)(1) by soliciting employees to revoke their union cards by making requests to their supervisors; such a procedure coerced employees by "putting them in the limelight"); Uniontown Hospital Association, 277 NLRB 1298, 1307 (1985) (the employer "did more than advise employees that they could revoke signed union cards, they pressured the employees to do so").

⁹ See, e.g., Cooking Good Division of Perdue Farms, Inc., 323 NLRB 345, 347-48 (1997), enfd. in rel. part 144 F.3d 830 (D.C. Cir. 1998). The case law does not appear to attach particular significance to the fact that authorization card revocation materials may be distributed with employee paychecks; several cases finding no violation mention this fact without comment. See, for example, Mariposa Press, 273 NLRB at 536; Towne Plaza Hotel, 258 NLRB 69, 73-4 (1981).

¹⁰ Such monitoring of who accepted forms for card revocation, along with their distribution after unlawful

In sum, complaint should issue alleging the Employer violated Section 8(a)(1) of the Act by promulgating and/or maintaining handbook provisions setting forth the Employer's anti-union "philosophy" and Rule 17, under the threat of discipline set forth in the receipt for the employee handbook. The allegation with respect to the distribution of the authorization card withdrawal materials to employees should be dismissed, absent withdrawal.

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threats, was found to be the vice instead of the distribution "primarily [to] employees who had not requested such assistance" in Mini-Togs, Inc., 304 NLRB 644, n. 3 (1991). In Cooking Good Division of Perdue Farms, Inc., 323 NLRB at 347-48, the Board found no violation of Section 8(a)(1), even in light of the fact that approximately 10 employer-provided letters from employees, revoking their union authorization cards, were mailed using the company's mail meter, after the employees asked the employer to do the mailing.