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

Advice Memorandum

DATE: April 15, 1996

TO : John D. Nelson, Regional Director
Region 19

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

SUBJECT: Okanogan County Senior Citizens Association
Case 19-CA-24090

378-2878
512-5072-0100
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625-8817-2000

This Section 8(a)(1) case was submitted for Advice as to whether the Employer should be required to provide the Union, upon request, with a list of employee names and addresses since the Union has no alternative means of communicating its organizing message to the Employer's employees.

FACTS

Okanogan County Senior Citizens Association (the Employer) is a non-profit corporation which provides homecare services for the elderly and disabled. The Employer's service area extends over 6 counties in rural Eastern Washington (Okanogan, Chelan, Douglas, Lincoln, Grant and Adams) with 5 office sites (Wenatchee, Omak, Wilbur, Ephrata and Moses Lake). The Employer employs approximately 300 employees who are dispatched by telephone to their work at the clients' homes.

Since May, 1994, the Office and Professional Employees International Union, Local 8, (the Union) has made a number of attempts to get information about the Employer's employees in order to organize. These efforts include having members apply for work at several of the Employer's office sites to obtain basic information on wages and benefits, and to find out about opportunities for

handbilling or making contact with other workers.[1] In each instance, the supervisor reported that workers had their checks mailed from the Omak office, that they rarely came into the office, and that there were no other opportunities for workers to talk with each other. During those visits, no homecare workers were seen entering or leaving any of the offices. In each instance, the Union's supporters declined to accept employment since it was apparent there would be no opportunities for communication with coworkers.

In mid-October 1994, the Union ran public service announcements on three radio stations which broadcast in a portion of the Employer's service area. The 15 to 30 second spots ran one to three times each day for a week. The announcements gave general information about homecare worker rights and listed a special toll-free number. The announcements were not available for general Union information or to encourage concerted activity. The Union received little response in general and no response from homecare workers.

Between mid-October and early November 1994, the Union ran 2 1/2 inch display ads aimed at homecare workers for one to four weeks in newspapers in Omak, Wenatchee, and Ephrata. The papers had a limited circulation, most were weeklies and they did not reach all of the Employer's service area. Each add cost the Union approximately thirty-five dollars. The Union's toll-free number was listed. It received little response in general and no response from homecare workers. According to the Union, the cost of further advertising would be prohibitive and

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[1] Specifically, in May 1994, a volunteer organizer called the Employer to obtain general information. On June 15 and 16, 1994, a homecare worker and Union organizer visited four of the five Employer offices and the homecare worker applied for a job at three of the sites. On July 26, 1995, a homecare worker applied for a job and met with a supervisor for approximately 1-1/2 hours. On this occasion, the Employer gave the homecare worker the name of one of its employees who he could contact for further information about the Employer. The Union decided that, given the context of how the name was received, it would be inappropriate to contact this person for organizing purposes.

would not be a viable way in which to facilitate communication among workers.

On February 21, 1995, the Union sent a letter to the Employer requesting a list of employee names and addresses. The Union received no response. On May 22, 1995, three homecare workers working for other employers wrote a letter on behalf of the Union to the Employer requesting a list of employee names and addresses. The Employer provided no response.

On July 26, the Union met with agency Director, Emma Scott, at the Employer's main office in Omak. Scott told the Union that a couple of workers had asked her about the Union which they apparently heard about because the Employer had been required to implement travel pay in response to the Union's complaint and legislative efforts.[2] Scott did not provide them with any information about the Union. Scott stated that the Employer does not provide the names and addresses of its employees to anyone and that it would not provide them to the Union. She confirmed that workers rarely, if ever, come into the office or meet in any central location. Scott said that some of the workers knew each other because they live in a small community.

The Union proposed two alternatives to Scott: (1) allow the Union to send a mailing out through the Employer's office, where the content could be approved by the Employer prior to the mailing; or (2) ask employees who wish to receive information about the Union to sign a form giving the Employer permission to release their names, addresses and phone numbers to the Union. Scott agreed to ask the Employer's Board of Directors for a decision on these two suggestions. According to Scott, at a meeting of the Board of Directors on August 11, the proposals were tabled.

The Union has successfully organized the employees at two other agencies which provide homecare services in Washington. According to the Union, it was able to organize one of those agencies because it obtained a list

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[2] Apparently, the Union successfully lobbied the state legislature to obtain funding to pay homecare workers for their time traveling between clients.

of employee names and addresses from an employee. The other agency held monthly employee meetings at which the Union was able to handbill.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer's refusal to provide the Union with a list of employee names and addresses violated Section 8(a)(1) of the Act.

It is well settled that the rights granted under Section 7 of the Act include the right of employees to be informed about the advantages and disadvantages of self-organization.[3] The Supreme Court has stated that the Section 7 right includes "both the right of union officials to discuss organization with employees and the right of employees to discuss organization among themselves."[4] The Court has further recognized that "the right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."[5] It is axiomatic, then, that in order for employees to be fully informed, unions need to be able to reach unorganized employees with their message about unionization. This important employee Section 7 right is frustrated if a union does not have reasonable means available to communicate its organizing message to employees.

Thus, in some circumstances the inherent nature of an employer's workplace or workforce might defeat all reasonable efforts by a union to reach employees. For instance, if an employer's employees reside throughout a wide geographic area and never report to a central location, but receive their assignments over the telephone or other communications device, then a union cannot

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[3] Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).

[4] Id. at 542 (emphasis added), citing Thomas v. Collins, 323 U.S. 516, 533-534 (1945).

[5] Id. at 543; NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

reasonably be expected to reach those employees by using the traditional means of union organizing.[6]

It may be anticipated that recent economic, technological and demographic trends will dictate an increase in the number of situations where unions can no longer rely on the traditional means of organizing to reach employees with their message. For instance, the past several decades have seen a change from an industrial, manufacturing-based economy to a more service-oriented economy.[7] As a result, a growing number of employees in the workforce no longer file in and out of the traditional factory gate for rigidly pre-determined shifts. Instead, many employees work at varied locations or worksites for the same employer, or travel from customer to customer to deliver their employer's services. In addition, the growing traffic problems faced in urban and densely suburban settings has lead to an increase in "flextime" -- where employees report to and depart from work at varying times. Finally, due to the increase in the use of personal computers, many employees now work from their homes and communicate with their workplace by telephone or computer modem.[8] Thus, a union's reliance on the predictability of reaching most employees at their workplace by handbilling at the workplace entrance or exit during "shiftchange" is disminished.

In addition, commentators have noted that changes in demographics effect a union's ability to organize. For instance, Chairman Gould has stated that one cannot "seriously speak of adequate or effective communication where the union must go to the workers, through any means,

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[6] The traditional means of union organizing include handbilling, picketing, advertising, home visits, etc.

[7] See, e.g. Stone, The Future of Collective Bargaining: A Review Essay, 58 U. Cin. L. Rev. 477 (1989).

[8] A 1993 report by the U.S. Department of Transportation estimates that 11 million workers will be telecommuting by the year 2000. See, also Sockell, The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality? 30 B.C. L. Rev. 987, 1000 (1989).

who are spread out in the cities, suburbs or rural areas."[9] In addition, Professor Bierman has noted that it has become "increasingly difficult" for unions to call on employees in their homes in recent years "with the growing tendency of employees to live, and many companies to locate, in the sprawling suburbs."[10] He further explained that "[e]mployees generally do not live in company towns or otherwise live together in close proximity to their workplaces. This makes home visits difficult for unions under any circumstances."[11]

These workplace trends, which make it inherently difficult for a union to communicate with employees, impede the ability of employees to learn about self-organization and therefore deprives them of their Section 7 rights. Clearly, the more an employer's employees are individually dispersed over a wide geographic area, the more likely it is that a union will have no reasonable means of communicating with those employees. Therefore, the Board should require an employer to disclose employee names and addresses upon the request of a union where the union has no reasonable means of reaching employees with its message of self-organization. Unions possessing such a list will then be in a better position to communicate their message to employees through telephone calls, mailings of literature, or home visits, where applicable. The Section 7 rights of employees to learn about unionization would then be fully realized.

In this case, the evidence demonstrates that, without a list of employee names and addresses, the Union has no means of communicating its organizing message to the approximately 300 employees who are dispatched by phone from five Employer offices to a service area which extends over six rural counties in eastern Washington. The

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[9] Gould, Union Activity on Company Property, 18 Vand. L. Rev. 73, 102 (1964).

[10] Bierman, Toward a New Model for Union Organizing: The Home Visits Doctrine and Beyond, 27 B.C. L. Rev. 1, 10 (1985).

[11] Bierman, Extending Excelsior, 69 Ind. L. Jrnl. 521, 530 (1994).

employees rarely, if ever, appear in the Employer's offices: paychecks are mailed from the office and there have been no training sessions or Employer-wide meetings in two years. The employees are not registered or bonded with the state, excluding the possibility of contacting them through state records. Any resort to mass media would be prohibitive considering the employees reside in a large geographic area. Finally, contrary to the Employer's argument, the fact that the Union successfully organized two other home care agencies in the Washington area has no bearing on this situation. The Union was able to organize one of those agencies because that employer held regular employee meetings which provided the Union with opportunities for traditional handbilling. The Union organized the second agency by first obtaining a list of employee names and addresses from an employee.

Further, it is clear that the Union made a serious effort to reach the Employer's employees. The Union visited many of the Employer's offices, met with the Employer's director, and even enlisted the help of other homecare workers to apply for jobs with the Employer in an attempt to gain further information or perhaps meet employees at the worksite. However, these efforts only demonstrated to the Union that the Employer's employees would be impossible to reach through traditional means. In addition, the Union sponsored several public service announcements on the radio, and ran costly newspaper ads. These media efforts covered only a portion of the Employer's geographic area and met with little response.

It is clear that the workplace situation here is such that the Union has no means of reaching the employees. Thus, this case presents similar circumstances to the "classic" examples where, in another context, the Board and Supreme Court recognized the need to grant unions access to employer private property.[12] Without a Board remedy

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[12] See Lechmere, 502 U.S. 527, 539 (1992), citing NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); Alaska Barite Co., 197 NLRB 1023 (1972), enfd. mem. 83 LRRM 2992 (9th Cir.), cert. denied 414 U.S. 1025 (1973); NLRB v. S & H Grossinger's Inc., 372 F.2d 26 (2d Cir. 1967). See, also G.W. Gladders Towing Co., 287 NLRB 186 (1987); North Star Drilling Co., 290 NLRB 826 (1988).

requiring the Employer to provide employee names and addresses, the Union will never be able to contact the employees with its organizing message, and the employees will be deprived of their Section 7 right to learn about unionization.[13] For this reason, the Employer should be required to disclose employee names and addresses to the Union. Further, since the Employer has not asserted a legitimate countervailing interest in keeping the names and addresses secret, the failure to disclose the names and addresses interferes with employee Section 7 rights and is a violation of Section 8(a)(1) of the Act.

This case raises an issue of first impression. The Board has never before squarely addressed whether an employer commits an unfair labor practice by failing to disclose names and addresses to a union prior to the scheduling of an election. However, the Board's analysis in the seminal case of Excelsior Underwear Inc.[14] may be instructive. In that case, the Board considered, inter alia, whether "a fair and free election [can] be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefor?"[15] In that case, the Board held that in a representation proceeding an employer must provide a petitioning union with a list of employee names and addresses "within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties" or after "the Regional Director or the Board has

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[13] Although the inaccessibility of the employees in the instant cases is analogous to those cited in the preceding footnote, the principles espoused in those cases are not applicable. Those cases resolve the problem presented when a union seeks access to an employer's real property. Here, the Union does not seek entry onto the Employer's property. The Union merely seeks *information* which is in the possession of the Employer.

[14] 156 NLRB 1236 (1966).

[15] Id. at 1238. The Excelsior case was consolidated and heard with K. L. Kellogg & Sons.

directed an election . . . ."[16] The Board primarily based its decision on its view that,

> As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and as a result, employees are often completely unaware of that point of view.[17]

It is significant that in Excelsior the Board considered and rejected numerous arguments from the employers and amici curiae against disclosure of employee names and addresses. In this regard, the Board found that "no substantial infringement of employer interests would flow from such a requirement."[18] Specifically, "the Board found that a list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret . . . ."[19] In addition, the disclosure of employee names and addresses does not infringe on employees' Section 7 rights, or subject employees to "the dangers of harassment and coercion in

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[16] Id. at 1239.

[17] Id. at 1240-41 (citations omitted). In addition, the Board relied upon its belief that "[p]rompt disclosure of employee names as well as addresses will . . . eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity." Id. at 1243.

[18] 156 NLRB at 1243.

[19] Ibid.

their homes."[20] Finally, since it found no "significant employer interest," the Board also rejected the argument that disclosure of employee names and addresses should be governed by the analysis applicable to grant or deny unions access to private property. In this regard, the Board stated that "[the Babcock analysis] is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest -- such as the employer's interest in controlling the use of property owned by him." [21]

The Board's reasoning in Excelsior in response to the employer arguments raised therein is no less applicable here. In the instant case, the disclosure would be required at a much earlier stage in the organizing process than that required by Excelsior. However the information to be disclosed, and therefore the employer interests involved, are identical.[22]

In addition to the employer arguments addressed by the Board in Excelsior, there is no evidence that the Employer has a commercial interest in its list of employee names and

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[20] Id. at 1244.

[21] Id. at 1245.

[22] In Excelsior, the Board did address the potential for "misuse of the Board's processes" if "a union might petition for an election with no real intention of participating therein, but solely to obtain employee names and addresses, intending, on receipt thereof, to withdraw the election petition and utilize its newly acquired information as a basis for further organizational efforts." 156 NLRB 1244, fn. 20. In our view, the "misuse" the Board sought to avoid is not union efforts to obtain employee names and addresses for the purpose of organizing. Instead, it appears that the Board was concerned with the improper and untimely invocation of the Board's election machinery, and the concomitant waste of Board resources, under the auspices of a petition for an election when the genuine goal is to obtain a list of employee names and addresses.

addresses.[23] And, as further resolved in Excelsior, an employer does not possess a significant secrecy interest in its employees' names and addresses.[24] In this case, the Employer has not presented evidence to demonstrate that its employee list warrants special confidentiality considerations.

Moreover, it does not appear that the employees have any particular interest in keeping the list of names and addresses secret. The Board has already held that intrusion into employee privacy resulting from disclosure of names and addresses is minimal, if any.[25] Further, even assuming arguendo that the Employer considers the names and addresses confidential because they are not otherwise available to anyone but the Employer, we would argue that,

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[23] See People Care, 299 NLRB 875 (1990), where the Board rejects the argument that a list of employee names and addresses should be withheld from a Section 9(a) representative as a confidential trade secret. Cf. Feist Publications Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 338 (1991) (compilation of names and addresses for use in telephone directory is not copyrightable); R&R Associates of Pinellas County v. Armendinger, 119 Bankruptcy Reporter 302, 304 (U.S. Bankruptcy Ct., M.D. Fla. 1990) (in order for a customer list to be considered a trade secret it must reflect considerable effort, knowledge, time and expense on the part of the employer) and Defiance Button Machine Co. v. C&C Metal Products, 759 F.2d 1053, 1063 (2d Cir. 1985)(citing, inter alia, Restatement of Torts, Section 757, comment b).

[24] Excelsior, 156 NLRB at 1245.

[25] Marlene Industries, 166 NLRB 703, 705 (Board, ordering employer to provide union with names and addresses to remedy flagrant unfair labor practices committed during organizing campaign finds "any resultant intrusion into the right of privacy of employees will be minimal since such employees are free to refuse home visits or telephone calls by union organizers"); Armstrong World Industries, Inc., 254 NLRB 1239, 1245 (Board rejects any employee right of privacy claim in light of interest in Section 9(a) representative in receiving information).

on balance, the asserted confidentiality interest would not outweigh the strong Section 7 considerations in favor of disclosure, especially since there is no articulated business justification for keeping the names and addresses secret.[26]

Although the Board has never addressed whether an Employer should be required to disclose employee names and addresses during an organizing drive,[27] we are aware that

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[26] The Board has vast experience in balancing the legitimate but competing interests of the parties whom it serves. See, e.g., Retail Associates, 120 NLRB 388 (1958) (Board balances right of unions and employers to associate freely with others in bargaining relationships, or to refrain from or withdraw from such associations, against fundamental purpose of Act of fostering and maintaining stability in bargaining relationships); Detroit Newspaper Agency and Detroit Free Press, 317 NLRB 1071 (June 30, 1995) (Board balances Section 9(a) union's need for relevant information against employer's asserted confidentiality interest); Yellow Freight Systems, Inc., 317 NLRB 115 (1995) (Weingarten requires Board to balance right of employer to investigate conduct of an employee and the right of the employee to have union representation during investigation); Aroostook County Regional Ophthalmology Center, 317 NLRB 218 (1995) (Board balances employer right to provide uninterrupted patient care against rights of employees to discuss or solicit union representation); and Holyoke Water Power Co., 273 NLRB 1369, enfd. 778 F.2d 49 (1st Cir. 1985) (Board must balance right of Section 9(a) union to have access to employer property in order to obtain health and safety information against the employer's property right).

[27] This precise issue was raised and addressed in Metro Care Services, Inc., et al., Case 2-CA-24003, et al., Advice Memoranda dated September 4 and October 31, 1990. In those cases, involving home health care workers similar to those at issue here in Okanogan, Advice authorized dismissal of the charges based on the conclusion that the employers had no obligation to provide names and addresses to the union. Advice approached the Metro Care cases applying established Board law. For instance, Advice concluded that the employers need not provide employee names and addresses

the Board has, in dicta, indicated that there presently exists no such requirement. For instance, in Pike Co.,[28] the Board was presented with the issue of when, in the construction industry, it should determine the number of employees in a unit for purposes of demonstrating a sufficiency of interest. In its discussion, the Board noted that "an employer is under no obligation prior to issuance of the Regional Director's decision directing compliance with Excelsior Underwear to supply a petitioner with a list of eligible employees."[29] In Gray Flooring,[30] the Board, finding that an employer violated Section 8(a)(3) by discharging an employee for copying employee names and addresses, stated that an employer has no obligation to provide a union with names and addresses for organizing.[31] Finally, in Monogram Models, Inc.,[32] where a majority of the Board found lawful an employer's refusal to allow union organizers on its property, the Board rejected a dissenting member's suggestion that the employer's refusal to disclose employee names and addresses contributed to the union's difficulties in reaching

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since the requesting unions were not Section 9(a) representatives of the employees (citing, inter alia, Standard Oil Co. of California, 166 NLRB 343 (1967), enfd. 399 F.2d 639 (9th Cir. 1968)); the Board need not order the employers to provide names and addresses where the employers had not engaged in a pattern of unfair labor practices (citing, inter alia, J.P. Stevens and Co., Inc., 157 NLRB 869, 878 (1966)), and the evidence in Metrocare demonstrated that the unions had alternative means of communicating with the employees (citing, Jean Country, 291 NLRB 11 (1988)). Apparently, Advice did not consider whether the cases raised a novel issue which should be put to the Board.

[28] 314 NLRB 691 (1994).

[29] Id. at 691.

[30] 212 NLRB 668 (1974).

[31] Id. at 669.

[32] 192 NLRB 705 (1971).

employees. In response to dissenting member Brown, the Board majority stated that "the principles established by the Excelsior case were designed by this Board to provide assurances of access to employees at what was deemed an appropriate point in our election processes."[33] This statement might suggest that the Monogram Models Board may have considered any earlier disclosure of employee names and addresses an improper requirement. However, despite their dicta, neither Pike Co., Gray Flooring, nor Monogram Models actually raised the question of *whether* the Board should require an employer to provide a union with names and addresses for organizing. In each case, the Board was merely stating the current state of the law. Clearly, there is no such obligation until the Board so holds.[34]

In addition, the Board has considered whether an employer's failure to provide an Excelsior list pursuant to a decision and direction of election is an unfair labor practice. In Shop Rite Foods,[35] the Board affirmed the administrative law judge's decision rejecting the argument that the failure to provide an Excelsior list is an unfair labor practice. In that case, the ALJ relied primarily upon the Board's adoption of the Excelsior rule as a pre-election tool. Non-compliance with the rule, therefore, was remedied by setting aside the election and ordering a

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[33] Id. at 706-707 (citation omitted).

[34] In Pepsi-Cola Co., 307 NLRB 1378 (1992), the charging party union did file a charge protesting the employer's refusal to provide employee names and addresses to aid the union in organizing the employer's employees. Id. at 1384. However, that claim was apparently not alleged in the complaint. Ibid. Nevertheless, the ALJ, acknowledging that the allegation regarding the employer's refusal to provide a list was not before it, did state that "[t]here is no requirement that it do so." Id. at 1385. Again, this statement in dicta is not controlling since the issue was neither argued nor briefed. Moreover, in that case, the Board granted the General Counsel's motion to subsequently withdraw the charge containing the pertinent allegation. See, Id. at 1378, fn. 2.

[35] 216 NLRB 256 (1975).

re-run election. The ALJ saw no use for an unfair labor practice remedy in that setting.[36] Thus, the ALJ did not consider -- as it was not before him -- the utility of an unfair labor practice remedy to disclose the list of employee names and addresses to a union in an initial organizing posture. Moreover, to the extent the judge considered whether the Board should presume that a failure to provide a list would interfere with employees' Section 7 rights,[37] he failed to appreciate the Supreme Court's reliance on such presumptions.[38]

Given the particular circumstances presented in this case, it is not necessary to present to the Board the novel, yet broader question of whether the Union would be entitled to employee names and addresses even if there were other means of communicating with the employees and the Employer presented no legitimate countervailing interests.[39]

In the instant case, the Employer refused the request of the Union for disclosure of employee names and addresses, even though the Union had no other reasonable means of communicating with the employees. In these circumstances, the Employer's refusal interfered with the employees' right to learn about self-organization. In light of these considerations, and in the absence of any contrary authority, the Region should issue complaint in this case to put before the Board the novel issue of whether the Employer violated Section 8(a)(1) by refusing to provide the Union with a list of employee names and addresses, upon request, when the Union has no reasonable

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[36] Id. at 259.

[37] Id. at 260.

[38] See, e.g. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945) (An administrative agency . . . may infer . . . such conclusions as reasonably may be based upon the facts proven).

[39] This paragraph should be included in the Region's briefs to the ALJ and the Board in this case.

alternative means of communicating its organizing message to the employees.

B.J.K.