

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

Advice Memorandum

DATE: July 16, 2010

TO : James Small, Regional Director
Region 21

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

SUBJECT: SEIU-UHW-West (Kaiser Foundation Hospitals)
Case 21-CB-14867

500-2800
500-2875
500-8481
378-0100
378-8460

The National Union of Healthcare Workers (NUHW) alleges that the Service Employees International Union-United Healthcare Workers West ("UHW") made false and/or misleading statements to bargaining unit members regarding the impact on their terms and conditions of employment if the employees voted to decertify the UHW and certify the NUHW. The Region submitted this case for advice as to: (1) whether the statements were false or misleading and (2) if so, whether they violated the Act. We conclude that, although some of the statements omitted information about the Employer's obligation to maintain existing terms and conditions of employment, and at least one of the seven statements is a misstatement of Board law, the UHW did not violate the Act because the statements cannot reasonably be construed as threats. Accordingly, the Region should dismiss the charge, absent withdrawal.

BACKGROUND

The UHW represented three bargaining units of employees employed at Southern Permanente Medical Group/Kaiser Foundation Hospital ("Employer"). The employees in the units were covered by contracts, the duration of which was each, arguably, longer than the three year contract bar for elections.¹ Accordingly, when, on February 27, 2009,² NUHW filed a petition for an election to represent the three units, the Regional Director directed elections giving the employees the option to vote for the UHW, NUHW, or no union.

¹ The duration of the contracts was a disputed issue in the representation proceedings.

² All dates are in 2009 unless otherwise indicated.

The UHW distributed campaign literature during the election campaign. Specifically, on December 3, the UHW distributed two information packets to employees, which it also posted on its intranet website. On December 15, the UHW emailed bargaining unit members a document entitled "Election Update." In each of these documents, the UHW purported to convey information regarding the parties' legal rights and obligations under Board law if the bargaining unit members were to decertify the UHW and replace it with NUHW as their collective-bargaining representative.

On December 29, the NUHW filed this charge alleging that seven specific statements in the UHW campaign literature (quoted below) violated Section 8(b)(1)(A). It asserted that certain statements were unlawful because they intentionally omitted information about the Employer's obligation to bargain and refrain from making unilateral changes in the event the NUHW won the elections; it asserted that others were unlawful because they expressly misstated the law.³

In response to employees' questions about what would happen to their contract if they decertified the UHW and certified the NUHW, the three UHW documents described above contained the following statements, with case citations as noted:

- 1) If NUHW wins the election, your current UHW collective bargaining agreement will become null and void as of the date that the results are tallied and show that UHW lost the election. (If there are objections to the election, your current collective bargaining agreement will become null and void as of the date that the election results are certified.)⁴ **[FAQ on Your Contract & a Decertification Election]**
- 2) If NUHW wins the election, your current UHW contract will automatically terminate, and your Employer will have a legal obligation to bargain with NUHW. But even though your Employer and NUHW have a legal obligation to bargain, nothing can guarantee that their bargaining will successfully reach a contract. So, it is possible that you may have no contract at all - or that it may take some time to get one. Also, nothing can guarantee what the terms of a contract

³ The Region conducted the three elections in early January 2010, and the NUHW won all of them. No objections were filed, and the NUHW was certified as the collective-bargaining representative of each of the three units on February 3, 2010.

⁴ Citing Wayne County Neighborhood Legal Services, Inc., 333 NLRB 146, 148 n. 10 (2001).

with NUHW would be: they could be worse than your current contract, better than your current contract, or identical to your current contract. It all depends on how successfully NUHW can bargain. **[FAQ on Your Contract & a Decertification Election]**

- 3) If NUHW wins the election, your UHW contract would terminate, so whatever future wage increases were scheduled in that contract would no longer be contractually guaranteed. And since the Employer would then have a duty to bargain with the NUHW, the Employer can't just go ahead and give you those wage increases on its own, even if you would have received them under your UHW contract. Any future changes in wages would have to come through bargaining with the NUHW.⁵ **[FAQ on Your Contract & a Decertification Election]**
- 4) If you vote to change unions, your current SEIU-UHW collective bargaining agreement becomes null and void as of the date that the results are tallied. If there are objections to the election, your current collective bargaining agreement will become null and void as of the date that the election results are certified.⁶ **[FAQ Concerning Decertification Elections]**
- 5) If you change unions, your contract automatically terminates. While the employer would have a legal obligation to bargain with NUHW, there is no guarantee that this bargaining would result in a contract any time soon. In fact, you may not get a contract at all (on average, first-contract negotiations fail 44% of the time and only 38% succeed within one year). Also, nothing can guarantee what the terms of the new contract would be. Given the ongoing economic crisis and takeaways Kaiser is imposing on non-union and management employees, if you give up guaranteed pay raises, healthcare and pensions by switching to NUHW, it is very possible you will not achieve the same level of wages and benefits.⁷ **[FAQ Concerning Decertification Elections]**
- 6) **The National Labor Relations Board has made it Clear: If We Lose Our Union, We Lose Our Contract. . .**

⁵ Citing Koenig Iron Works, Inc., 276 NLRB 811 (1985).

⁶ Citing Wayne County Neighborhood Legal Services, Inc., supra.

⁷ Citation omitted from original.

"If the incumbent union prevails in the election held, any contract executed with the employer will be valid and binding; but if the union loses, the contract will be null and void."

. . . and Start All Over. . .

"[I]n the bargaining process wages and benefits can go up, down, or stay the same."⁸ [December 15 Election Update]

7) If We Lose Our Contract, We Could Lose Up to \$15,000 Each:

- **Guaranteed Raises:** Under our contract, all SEIU-UHW Kaiser members will receive a 2% wage increase next April, increasing our pay up to \$2,000 annually, with more raises expected in coming years.
- **Job Protections:** When Management decided to cut back earlier this year, non-union employees (including managers) were given two weeks notice and terminated. Our National Agreement protected all our jobs and continues to protect our jobs and our wages for at least 12 months.
- **Free Healthcare:** Our family healthcare is free and protected by our contract. If we bargain alone, we could face what non-union workers face. Managers already have to pay more: They either pay a monthly premium to maintain their current benefits or accept increased co-pays for doctor's visits, prescriptions, emergency care, etc.
- **Performance Sharing Plan:** Our average payout ranges anywhere from \$2,000 to \$4,000 depending on where we work. Without our contract, we could lose our March 2011 payout (and the April 2012 payout for the AFN unit).
- **National Bargaining:** Next year, all 100,000 members of the Coalition of Kaiser Permanente Unions will bargain together for future wage increases. If we chose NUHW, we will be left out on our own to bargain our own separate contract from a position of weakness.⁹ [December 15 Election Update]

DISCUSSION

⁸ Citations omitted, emphasis in original.

⁹ Emphasis in original.

In the context of an election campaign, a party that makes a truthful statement regarding employee rights does not have an affirmative obligation to fully inform employees of all the protections Board law affords.¹⁰ "Unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats,¹¹ it is protected by Section 8(c) of the Act."¹² The Board has also held that a party does not violate the Act by simply misstating the law, so long as it cannot reasonably be interpreted, in context, as a threat.¹³ And, in determining whether a statement is a threat, the Board will consider whether the person delivering the statement has the power to take the alleged threatening action.¹⁴

¹⁰ John W. Galbreath & Co., 288 NLRB 876, 877 (1988) (employer's conduct not sufficient to set aside election where it made an incomplete statement of employees' Laidlaw rights in the weeks immediately preceding the election); Eagle Comtronics, Inc., 263 NLRB 515, 516 (1982) (employer's conduct not unlawful where it told employees they could be permanently replaced in the event of a strike, even though employer did not fully inform employees of their right to be placed on a preferential hiring list; the Act does not require a party to "explicate all the possible consequences" of an action).

¹¹ Bay Cities Metal Trades Council, 306 NLRB 983, 983 n.1, 986 (1992) (Board emphasized that its conclusion that union unlawfully threatened employees with the loss of health, welfare, and pension benefits if they resigned from union membership, was in the context of two other threats—to fine union members for crossing the picket line and require those who crossed the picket line to pay additional initiation fees).

¹² Gelita USA, Inc., 352 NLRB 406, 409 (2008), citing Eagle Comtronics, Inc., 263 NLRB 515. Section 8(c) applies to unions as well as employers. See NLRB v. IBEW Local 3, 828 F.2d 936 (2d Cir. 1987).

¹³ Woodbridge Foam Fabricating, Inc., 329 NLRB 841, 841-842 (1999); Air La Carte, Inc., 284 NLRB 471, 473-474 (1987), citing Midland National Life Insurance Co., 263 NLRB 127 (1982). Accord: Service Employees International Union, Local 121RN (Pomona Valley Hospital Medical Center), 355 NLRB No. 40, slip. op 2-3 (June 8, 2010) (it is the Board's "responsibility to evaluate the entirety of the flyer's message in its overall context, to determine if such a threat has been made.").

¹⁴ Air La Carte, Inc., 284 NLRB at 473-474.

A. The UHW's Accurate, Albeit Incomplete Statements of the Law

NUHW notes that statements (1), (2), (4), (5), and (6) fail to explain the Employer's legal obligation to maintain the status quo during bargaining for a new labor agreement if NUHW wins the election. Accordingly, NUHW argues that UHW violated Section 8(b)(1)(A) by creating the false impression that employees would receive their wage increase only if the UHW won the election.

We conclude that, because statements (1), (2), (4), (5), and (6) are truthful statements, they are not unlawful by themselves, even though, as NUHW correctly points out, they omitted information about the Employer's obligation to maintain existing terms and conditions of employment. In the context of an election campaign, a party who makes a truthful but incomplete statement regarding employee rights does not have an affirmative obligation to fully inform employees of all the protections Board law affords.¹⁵

Here, statements (1), (2), and (4) generally state that if the employees replace UHW with the NUHW, then the contract between the UHW and the Employer is "null and void." This is an accurate statement of current Board law and therefore does not, by itself, violate the Act.¹⁶

Statements (2), (5), and (6) generally indicate that, if the NUHW were to win the election, employees could lose their benefits in the post-election collective bargaining process. This is also an accurate statement of the law and the Board has found that similar statements do not violate the Act. For example, in Wild Oats Markets, Inc.,¹⁷ the employer posted a flyer entitled "Would you sign a blank check?" that displayed a rendering of a union authorization card. The flyer also contained other comments with arrows pointing to different parts of the card. One arrow pointed to the words "collective

¹⁵ John W. Galbreath & Co., 288 NLRB at 877; Eagle Comtronics, Inc., 263 NLRB at 516.

¹⁶ More Truck Lines, 336 NLRB 772, 772 (2001). See also Wayne County Neighborhood Legal Services, Inc., 333 NLRB at 148 n. 10; City Markets, Inc., 273 NLRB 469, 470-471 (1984) ("If the incumbent union prevails in the election held, any contract executed with the employer will be valid and binding; but if the union loses, the contract will be null and void."); RCA Del Caribe, Inc., 262 NLRB 963 (1982).

¹⁷ 344 NLRB 717, 740 (2005).

bargaining" and commented "in collective bargaining, you could lose what you have now."¹⁸ The Board concluded that, despite the employer's other unlawful statements to employees, "[c]onsidered by itself, the statement was a factually accurate observation regarding a possible negative outcome of collective bargaining, which is protected speech under Section 8(c)."¹⁹ Here, as in Wild Oats, statements (2), (5), and (6) are factually accurate observations regarding a possible negative outcome of collective bargaining. If the employees were to decertify the UHW and elect the NUHW, their current collective-bargaining agreement would become null and void and they did risk the possibility that, in collective bargaining "wages and benefits can go up, down, or stay the same," and employees might end up with no contract at all.

We recognize that the sentence in statement (6) "The National Labor Relations Board has made it Clear: If We Lose Our Union, We Lose Our Contract. . .and Start all Over," by itself, could arguably be a misstatement of the law, insofar as it portrays as a certainty that the new union would have to "start all over" in bargaining. However, as in Wild Oats, the statement is clarified in its context by the reference to collective-bargaining and the additional explanation that, during the bargaining process, employees' "wages and benefits can go up, down, or stay the same." Therefore, in context, this sentence is true.

B. The UHW's Misstatements of the Law

We conclude that statement (3) is a misstatement of the employer's obligations under the Act to maintain existing terms and conditions of employment, and statement (7) is arguably a misstatement.²⁰ The sentence in UHW's statement (3) that "the Employer can't just go ahead and give you those wage increases

¹⁸ Id. at 717.

¹⁹ Ibid., citing UARCO, Inc., 286 NLRB 55, 58 (1987), petition for review denied 865 F.2d 258 (6th Cir. 1988).

²⁰ Statement (7) is a misstatement to the extent it implies that the employees could lose up to \$15,000 each simply because they elected the NUHW. On the other hand, the statement appears on the same page that states that wages could up, down, or remain the same through the process of collective bargaining. To the extent it implies that employees could end up with fewer benefits after bargaining than the current contract provided, the statement is not wrong. We need not resolve whether (7) is a misstatement of the law in light of our conclusion, below, that it is not an unlawful threat.

on its own, even if you would have received them under your UHW contract," is incorrect. Under Board law, "if the challenging union is certified, then the contract between the employer and the incumbent union becomes void, but, as usual, the employer must abide by the then existing terms and conditions of employment until such time as it reaches agreement with the new union or a lawful impasse occurs."²¹ Therefore, the Employer here would be required to grant the contractual wage increases as an established term and condition of employment. And, for the same reason, the statement that "If We Lose Our Contract, We Could Lose Up to \$15,000 Each," is arguably also incorrect.

C. UHW's Statements Do Not Violate the Act Because they Cannot Reasonably Be Construed as Threats and are not Otherwise Coupled with Threats

In the absence of the union's indication to employees that the union possessed the power to bring about a given result, the Board will not find that a union's statements regarding the impact on bargaining unit employees' terms and conditions of employment if the employees were to certify a rival union and decertify the incumbent union constitute unlawful threats. For example, in Air La Carte, a supporter of the incumbent union told fellow employees that if the employees voted in the rival or went nonunion, "the employees would lose the benefits of the contract that they had and that, during the interim period of no contract, the employees could lose their health benefits and suffer a reduction in pay."²² The Board held that, to the extent that the supporter stated that the employees would lose their contract if the incumbent union did not win the election, that statement was an accurate one.²³ Additionally, the Board held that the statements "could not constitute threats by [the incumbent union], for it had no control over what action [the employer] might take if the [incumbent union] lost the election," and that the statements, "at most, constituted misrepresentations."²⁴ Likewise, we conclude, as in Air La Carte, that these statements are not threats, because the UHW had no control over what action the Employer might take if UHW

²¹ More Truck Lines, 336 NLRB at 773 (emphasis in original), citing R.E.C Corp., 296 NLRB 1293 (1989) and NLRB v. Katz, 369 U.S. 736 (1962).

²² 284 NLRB at 473.

²³ Id. at 473-474.

²⁴ Id. at 474. Although Air La Carte addressed the statement in the context of election objections rather than an unfair labor practice, the Board did find that statement was not a threat.

lost the election, and the UHW did not indicate that it had the control to cause the employees to lose the benefits.²⁵

For that reason, we reject the NUHW's argument that the Board's decision in More Truck Lines²⁶ commands a different result. In that case, the Board found an unlawful threat where the employer informed employees that if they voted out the incumbent union and replaced it with another, the existing collective-bargaining agreement would be "null and void," and the law would require the employer to freeze their wages. In that case, the statement was in fact not only a misstatement of the law, but it was also a threat.²⁷ Unlike the employer in More that informed employees that it would not give them their contractually scheduled wage increases if they certified the rival union, the UHW neither stated nor implied that it would deprive the employees of any benefit if they decertified UHW and certified NUHW. Instead, their statement was more in the nature of a prediction of what the Employer might do. Accordingly, because the UHW's statements cannot reasonably be interpreted as threats to employees, it cannot be said that More requires the conclusion that the UHW's statements violated the Act.

Similarly, the Board's decisions in Condiotti Enterprises²⁸ and Sands Point Nursing Home²⁹ do not require a contrary result. In those cases, the Board found that the unions unlawfully threatened employees with the loss of benefits. However, in both those cases, the unions' statements conveyed to employees that the unions had some control over whether the employees

²⁵ Contrast SEIU Local 121RN (Pomona Valley Hospital Medical Center), 355 NLRB No. 40, slip. op. at 3-4 (union's incorrect statements that nonmembers had a continuing obligation to pay dues and fees during contract hiatus were unlawful because union clearly implied that it would seek to enforce those obligations retroactively in a lump sum); Bay Cities Metal Trades Council, 306 NLRB at 983 n.1 and 986 (union's statement that employees would lose employer-provided benefits if they crossed the picket line were unlawful because they were made in the context of other clearly unlawful threats).

²⁶ 336 NLRB at 773.

²⁷ Ibid.

²⁸ Carpenters Union Local 180 (Condiotti Enterprises, Inc), 328 NLRB 947 (1999).

²⁹ Local 144, Hotel, Hospital, Nursing Home and Allied Services Union (Sands Point Nursing Home), 321 NLRB 399 (1996).

would receive their benefits. For example, in Condiotti, the union told employees that "We can lock up your pension. We can lock up your annuity."³⁰ In Sands Point, where the incumbent union's agent had also threatened to break employees' legs and slash their tires, the union stated that it would find out who signed the union authorization cards and "get even" with those employees.³¹ The union also stated that it would sue employees, and when they "got done" with those employees, they would have no medical insurance and "possibly" no job.³² In both those cases, the employees had firm reason to believe that their unions had control over their potential loss of benefits. Both those cases are distinguishable from here because, in those statements, the unions' threats were more than mere misstatements of the law, but rather indicated in no uncertain terms that they had the power, in one way or another, to deprive the employees of their benefits. Here, because the UHW would not have the power to affect the employees' benefits if it was decertified, and the statements did not suggest otherwise, the statements could not reasonably be interpreted as threats and therefore the UHW did not violate Section 8(b)(1)(A) of the Act.

CONCLUSION

The Region should dismiss the charge, absent withdrawal, since neither the UHW's accurate but incomplete statements, nor its misstatements of the law, can reasonably be construed as threats.

B.J.K.

³⁰ 328 NLRB at 949.

³¹ 321 NLRB at 401.

³² Ibid.