

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

Advice Memorandum

DATE: November 17, 2006

TO : Rosemary Pye, Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 506-2017-0800
506-4033-9500

SUBJECT: Garelick Farms/Dean Foods 512-5024-3700
Case 1-CA-43187 512-7550-3700
524-8387-1500
524-8387-1550
524-8387-9500
524-8387-9550

The Region submitted this case to Advice as to whether the Employer violated: Section 8(a)(1) when it instructed an employee to remove from a pro-Union employee-maintained website a photograph of another employee holding two guns under the words "Set Your Sights on the Union - I AM"; and Section 8(a)(3) when it issued a written warning to the employee appearing in the photograph. We agree that the Region should issue complaint, absent settlement, on both allegations because the employees' actions were protected, as the photograph was not a threat of violence or physical harm. The Region should not allege that the Employer violated Section 8(a)(1) by creating the impression that it surveilled union activities because the website was public and actively publicized to employees, including management.

ACTION

The issues of whether the Employer unlawfully instructed an employee (the webmaster) who maintained a pro-Union employee-maintained website¹ to remove from the website a photograph of another employee (the photographed employee) posing with two guns, and unlawfully disciplined the photographed employee for appearing in and approving the posting of that photo, turn on whether the photograph conveyed an unprotected threat of violence or physical harm. We conclude that the photograph was not such a threat and the employees' actions were protected.

¹ The website was maintained by the webmaster on non-work property during non-work hours.

Employee efforts to garner support for a union are Section 7 protected activity.² However, an employee's otherwise protected activity may become unprotected if it is sufficiently egregious or offensive.³ Consequently, even if made during otherwise protected activity, threats of bodily harm or threats to destroy property are not protected under the Act.⁴ However, ambiguous statements⁵ and idiomatic expressions that do not connote violence,⁶ without more,⁷ generally do not constitute unprotected conduct. In determining whether an ambiguous statement is actually an unprotected threat of violence or physical

² See Twilight Haven, Inc., 235 NLRB 1337, 1342 (1978). See also E.R. Carpenter Co., 284 NLRB 273, 273 n.1 (1987) (employee distribution of union literature on employee car windshields protected).

³ See United Parcel Service, 311 NLRB 974, 974 (1993).

⁴ See AAR Technical Service Center, 249 NLRB 1201, 1203 (1980) (threat of plant sabotage). See also General Films, 307 NLRB 465, 468-49 (1992) (threat to burn plant down); Christie Electric Corp., 284 NLRB 740, 745 (1987) (threat to bomb plant and of bodily harm).

⁵ See Kingsport Press, 269 NLRB 1150, 1150, 1157 (1984) (statement by employee being escorted from the plant, "that when he came back in on Tuesday for his meeting, that ... if he was fired, that he wouldn't have to be walked out of the plant ... that he would have to be carried out" too ambiguous to constitute a threat).

⁶ See AT&T Broadband, 335 NLRB 63, 69 (2001) ("marked man" an idiomatic expression suggesting that individual would be subject to the "loathing" of fellow workers for disloyalty and not a threat of death or bodily harm).

⁷ See Town & Country Supermarkets, 340 NLRB 1410, 1413 (2004) (distinguishing the circumstances of a threat to "kick [another employee's] ass" from a general assessment that a threat to "kick ass" is a protected colloquialism; statement unprotected because was followed with a physical challenge and made in the context of an angry dispute between rival unions). The Board in Town & Country asserted that even if the statement was ambiguous, "an employer does not have to wait to see whether it was a real challenge." *Id.*

harm, the Board considers several factors, including whether: the employee making the alleged statement has a record of violence or threats of violence;⁸ the alleged statement is consistent with language used at the facility and the plant culture;⁹ and the alleged statement is linked to or accompanied by a reference to or act of violence.¹⁰ Finally, in determining whether an ambiguous statement is a threat, the Board does not consider other peoples' subjective reactions to the statement.¹¹

⁸ See Contempora Fabrics, Inc., 344 NLRB No. 106, slip. op. at 2 (2005) (prior history of violence in and out of the plant "accentuated" employee statement to another employee that she "better not vote no for the union," which was unprotected as a threat that unspecified consequences might result). Compare AT&T Broadband, 335 NLRB at 63 n.1, 68 (employee's warning that another was a "marked man" should have been accorded a more innocuous meaning than a threat of death or physical harm, particularly because employee making statement was a longtime employee and employer would have no reason to believe he would engage in violent behavior).

⁹ See Twilight Haven, Inc., 235 NLRB at 1342 (employee did not engage in misconduct while speaking in support of the union by, among other things, sitting on another employee's lap because lap-sitting was a common practice among employees). Cf. Duralam, Inc., 284 NLRB 1419, 1420 (1987) (in a representation case, no basis to set aside election because there was no objective ground to consider phrase "dead meat" a threat of physical harm, as that was consistent with plant banter).

¹⁰ See Seville Flexpack Corp., 288 NLRB 518, 525-26 (1988) ("watch out" not a threat of physical harm but rather a statement that the employee would gain revenge on an anti-union employee for reporting to the employer which employees were on the organizing committee; statement not accompanied by violence or physical contact).

¹¹ See Consolidated Diesel Co., 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001) (an employer may not discourage the free exercise of Section 7 right by subjecting employees to investigation and possible discipline on the basis of subjective reactions of others to their protected activity).

Here, the webmaster's posting and the photographed employee's appearance in the photograph were protected as efforts to garner support for the Union, and did not lose the protection of the Act as threatening misconduct. First, the photographed employee's image was not explicitly threatening. His stance, holding two guns, did not include any accompanying menacing conduct. The guns were each pointed out from his sides, rather than forward as if aimed at someone. This is quite unlike statements conveying an explicit threat, such as to burn down an employer's plant or to detonate a bomb.¹² We also reject the Employer's argument that the photographed employee's appearance in the photo was unprotected because of the purportedly menacing look on his face. That look is serious, but does not suggest he is threatening, and other photographs in evidence where he is not holding guns show that he typically poses with the same look on his face.

Moreover, to the extent the photograph is ambiguous as a threat of violence, the surrounding circumstances show that the photo was not in fact such a threat. First, the photographed employee has no prior history or record of violence or threats of violence that might objectively indicate that his posing in the photograph was a threat of physical harm. There is no evidence of prior discipline for alleged violence, and employees describe the photographed employee as easy-going and as neither threatening nor aggressive. The Employer argues that it was legitimately concerned about the photograph because it was posted just a few days after the photographed employee's purportedly threatening behavior at a captive audience meeting, where the Employer claims he voiced concerns while in an "aggressive stance." However, the Employer presented no evidence to show what behavior the employee engaged in at the meeting that could reasonably be construed as threatening, so we would not rely on this claim to convert the ambiguous photographic message into a threat of violence.

¹² See *supra*, note 4. Also, despite the broad statement of law in Town & Country Supermarkets, above, that an employer need not wait to see whether an ambiguous statement is a threat of violence before taking action, the facts there are distinguishable because the threat to kick another employee's ass followed by a physical challenge was far more explicit than the "Set Your Sights on the U" statement here, and was made during an angry dispute between rival unions.

Second, according to employees, discussions about guns and hunting are quite open at the Employer's facility. Indeed, employees knew that the photographed employee was an avid gun collector and hunter. Given this plant culture and "shop talk" about guns, there is no reason for the Employer to objectively consider the posting of the photograph to be a threat of violence or anything out of the ordinary.

Third, the photograph was not accompanied by or linked to an act or reference to violence. As noted above, the photographed employee's holding of guns and his stance in the photograph were not menacing and did not threaten violence. The statement superimposed on the photograph - "Set your sights on the Union - I AM" - mitigated any arguable threatening connotation because it was a metaphor that simply appealed to employees to support the Union. The words themselves are not a threat of any action directed at anyone. Even assuming that it was an ambiguous statement, it is far less threatening than the phrase "marked man" found protected in AT&T Broadband, above, or use of the colloquialism "I'll kick your ass."¹³

Finally, the Employer's actions cannot be justified by the reactions of an Employer plant manager, who the Employer claims was sensitive to workplace violence due to past experience, or the human resources department manager and employees to whom the Employer showed the photograph. The Board does not consider these subjective reactions to determine whether a statement is objectively a threat of violence.

Thus, the photograph was not so egregious or threatening as to lose the protection of the Act. In accordance, the Employer's instruction to the webmaster to remove the photograph violated Section 8(a)(1) of the Act. In reaching this conclusion, we note that the Employer did not merely request that the webmaster remove the photograph. Rather, it issued the webmaster an implicit threat of discipline by citing the workplace violence policy, which threatens discipline up to termination. Likewise, it follows that the Employer violated Section 8(a)(3) by warning the photographed employee in retaliation for his protected Union activity of posing in and approving the posting of the photograph on the website.

¹³ See Leasco, Inc., 289 NLRB 549, 549 n.1 (1988) (statement is a colloquialism that, standing alone, does not convey a threat of physical harm).

Even assuming the photographed employee's conduct was unprotected, we agree with the Region that the Employer has not satisfied its burden under Wright Line¹⁴ to prove that it would have warned him even absent his union activity. The photographed employee was an open and active Union supporter, as the Employer acknowledged by referring to his outspoken comments at a captive audience meeting. The Employer's animus towards his Union activities is evidenced by the Region's determination that prior warnings the Employer issued the photographed employee were unlawful. And, the Employer has not shown that it would have warned the photographed employee even absent his Union activity. It failed to discipline the webmaster, a less vocal Union adherent, who posted the photograph, and there is no evidence that the Employer ever disciplined any other employee for discussing guns or hunting. Indeed, it is clear that these discussions were tolerated as part of the plant culture.

The Employer's departure from past practice further demonstrates that it issued the warning in retaliation for protected conduct. Historically, the Employer either suspended or terminated employees who violated its workplace violence policy. The fact that the Employer merely warned the photographed employee suggests that it was not truly concerned about any threat of violence, but that the warning was a pretext to discipline him for his protected Union activity.

Finally, we conclude that the Employer did not create an unlawful impression of surveillance by informing the employees that it had visited the pro-Union website. The issue is whether a reasonable employee in these circumstances would assume that his or her union activities had been placed under surveillance.¹⁵ Under this standard, the Board is unlikely to find a violation where an employer comments about "open and well-known" employee organizing activity.¹⁶ Here, the website was completely public, and

¹⁴ Wright Line, 251 NLRB 1083, 1088 n.12 (1980), enforced on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393, 399-403 (1983).

¹⁵ See Flexsteel Industries, 311 NLRB 257, 257 (1993).

¹⁶ See North Star Steel Co., 347 NLRB No. 119, slip. op. at 31 (2006) (employer statement about union activity in plain view would not give employees an impression that their activities were being surveilled); Waste Management of Arizona, 345 NLRB No. 114, slip. op. at 2 (2005) (no

the webmaster actively promoted the website by passing out cards with the internet address not only to employees, but also to management. Consequently, employees would not feel surveilled by Employer comments about the website.¹⁷

In accordance with the above, the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by instructing the webmaster to remove the photograph of the photographed employee from the website, and Section 8(a)(3) by issuing the photographed employee a warning for appearing in and approving the posting of the photograph.

B.J.K.

violation where employer representative told an employee that he was aware that employees held a union meeting; no evidence that the meeting was held in secret and employer's statement alone would not imply that it monitored employee activity). Compare Dallas & Mavis Specialized Carrier Co., 346 NLRB No. 27, slip. op. at 2 (2006) (unlawful impression of surveillance where employer informed an employee it was aware of a union effort, the employee had not informed the employer about the activity, and no activity was open).

¹⁷ See Frontier Telephone of Rochester, Inc., 344 NLRB No. 153, slip. op. at 6-7 (2005) (no unlawful creation of impression of surveillance where employer representative told employees that he knew about a private internet web page that an employee created to facilitate discussion among employees on union and employment issues, and about what an employee had posted; representative had previously been shown the website by another employee and thus he simply made "an observation about the ... union activity which another tech had chosen to make public").