

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

# Advice Memorandum

DATE: April 22, 2009

TO : Martha Kinard, Regional Director  
Region 16

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

SUBJECT: IAM, Local 2181, et. al (Asarco)  
Case 16-CB-7504, et al.

518-4040-7567  
536-2563-0100  
536-2570

These charges were submitted for advice on whether the Union violated Section 8(b)(1)(A) by agreeing to a collective bargaining agreement containing certain neutrality provisions regarding organizing new facilities, affiliates, and ventures of the Employer.<sup>1</sup> We conclude that the charges should be dismissed, absent withdrawal, because the neutrality provisions do not provide the Union with unlawful assistance.

## **FACTS**

Asarco, LLC (Asarco or the Employer) is engaged in the mining, processing, and selling of copper at five plants in Arizona and Texas. Asarco is a wholly-owned subsidiary of Asarco Inc. (Charging Party), which lost control of the company in a 2005 bankruptcy reorganization. Approximately 1600 employees at the Employer's seven Arizona and Texas facilities are represented by a number of different unions<sup>2</sup> (collectively, "the Union") in separate bargaining units.

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<sup>1</sup> These charges are related to pending Section 8(e) charges arising out of the same collective bargaining agreement (United Association of Journeymen, et al (Asarco, LLC), Case 16-CE-34, et al.), which were previously submitted for advice. The charges in Case 16-CE-34, et al., will be addressed in a separate memorandum.

<sup>2</sup> The unions include: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Steelworkers); International Brotherhood of Electrical Workers, Locals 518, 570 and 602 (IBEW); International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith, Forgers and Helpers, Local 627 (IBB); International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and

In January 2007, the Union and Asarco entered into a collective bargaining agreement ("Agreement") covering all of the units, which contains a neutrality provision in which the Employer agreed to adopt a position of neutrality with respect to the unionization of any "hourly-paid production and maintenance employees." The provision establishes organizing procedures, including card-check recognition procedures, verification by a neutral third-party of the signed authorization cards, and arbitration of disputes. The neutrality provision applies to the Employer, as well as any affiliates or ventures.

The neutrality provision provides that, upon written notification that the Union is organizing, the Employer will post a notice stating, amongst other things, that it "does not oppose collective bargaining or the unionization of our employees," and will provide the Union with a complete list of all employees eligible for union representation in the proposed unit, with their names, home addresses, job titles, and work locations. The list of employees is to be updated monthly for the duration of the campaign. The neutrality provision further provides that, upon written request, the Employer "shall grant continuous access to well-traveled areas of its facilities" to distribute literature and meet with employees during an organizing campaign. The distribution of literature shall not compromise safety or disrupt normal business and shall "be limited to non-work areas during non-work time."

In determining the appropriate unit, the agreement provides that the parties will meet as soon as practical after written notification of organizing to agree on the appropriate bargaining unit. If they cannot agree, either party may refer the matter to the Dispute Resolution Procedure contained in the agreement, which culminates in binding arbitration. In any dispute regarding the scope of the unit, the arbitrator shall apply U.S. labor law principles.

Under another provision of the collective bargaining agreement, the Employer must "provide the Union and its advisors with [] the earliest practicable notification and continuing updates of any contemplated material corporate transactions, including mergers, acquisitions, joint

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Helpers of America, Local 104 (IBT); and Millwrights, Local 1914 (Millwrights) and/or United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 741 (UA).

ventures and new facilities to be constructed or established."

Finally, a provision of the collective bargaining agreement provides that upon the commencement of an organizing campaign, the Employer will hold a new employee orientation presentation, at which the "Union will be allotted a portion of the program to address" the new employees at the facility, and that the Employer shall bear the costs of the program.

### **ACTION**

We conclude that the charges should be dismissed, absent withdrawal, because the neutrality provisions do not provide the Union with unlawful assistance.

The right of unions and employers to agree to limit their conduct during organizing campaigns is well accepted.<sup>3</sup> Further, an employer and a union may agree in advance to a card count to recognize the union based on a majority of authorization cards.<sup>4</sup> Indeed, voluntary recognition based upon a card majority has long been considered a favored element of national labor policy.<sup>5</sup>

The Charging Party argues that the neutrality provision and other provisions in the collective bargaining agreement are nevertheless unlawful because they give the union a deceptive cloak of authority and thereby inhibit employee free choice in selecting a representative. Specifically, the Employer claims that the following provisions violate Section 8(b)(1)(A):

(1) the requirement that the Employer provide the Union with notice and updates on contemplated corporate transactions;

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<sup>3</sup> See Kroger Co., 219 NLRB 288, 289 (1975); Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1470 (9th Cir. 1992). See also Cellco Partnership d/b/a Verizon Wireless, Cases 4-CA-30729 and 4-CB-8747, Advice Memorandum dated January 7, 2002; United Steelworkers of America, Bethlehem Steel Corp., Case 4-CA-28847-1, Advice Memorandum dated June 26, 2002.

<sup>4</sup> Hotel & Restaurant Employees Union, Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566 (2d Cir. 1993); Kroger, 219 NLRB at 389 .

<sup>5</sup> See, e.g., Kroger, 219 NLRB at 389.

(2) the provisions for union access to the facilities, including a joint orientation program and the Employer's grant of "continuous" union access to the facilities during the campaign;

(3) the statement that the Employer does not oppose unionization;

(4) the Employer's duty to provide the union with a list of employees and to update that list monthly;

(5) the requirement that the Employer and the Union attempt to agree on a bargaining unit before majority status is achieved; and

(6) the exclusion of the NLRB from the deciding representation questions.

**1. Requirement that the Employer provide the Union with Notice and Updates on Contemplated Corporate Transactions.**

While the Board has noted that an employer may violate the Act by providing one union with notice of its intended ownership of new stores while concealing this information to a rival union, along with other unlawful assistance to the favored union,<sup>6</sup> no authority stands for the proposition that an employer cannot inform its employees' bargaining representative of contemplated corporate transactions in the absence of other unlawful assistance. Here, the Employer has merely agreed in a collective bargaining agreement to inform the incumbent unions of contemplated business transactions. There is no indication that similar requests for information from other unions would be denied and, as discussed below, there is no other unlawful assistance to the Union. Thus, these cases do not implicate the Board's concerns in Duane Reade about an employer favoring one union over another with a campaign of unlawful assistance. We conclude that the Employer's provision to the Union of notice of contemplated corporate transactions is not unlawful.

**2. The Joint New Orientation Program with Union and Grant of Continuous Access to the Facilities.**

The Board has long held that the use of company time and property by an otherwise independent union does not in itself do not amount to unlawful assistance within the

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<sup>6</sup> Duane Reade, 338 NLRB 943, 943-44 (2003), enfd. 99 Fed. Appx. 240 (D.C. Cir. 2004) (unpublished).

meaning of Section 8(a)(2).<sup>7</sup> Rather, the Board considers whether the quantum of "indirect pressure," such as directing and paying employees to attend union meeting during work time, and "direct pressure," such as permitting the union to solicit authorization cards in front of management representatives, would "reasonably tend[] to coerce employees in the exercise of their free choice in selecting a bargaining representative."<sup>8</sup> Where both kinds of pressure exist, the Board may find unlawful assistance in violation of Section 8(a)(2).<sup>9</sup> On the other hand, the Board has dismissed complaints that presented something less than this combination of coercive factors.<sup>10</sup>

Here, neither the provision for union access nor the joint orientation program shows unlawful 8(a)(2) assistance. Indeed, union access here to distribute literature here is limited to nonwork times and nonwork areas, and there is no evidence that this provision has been or would be applied in a manner such as to provide the union with unlawful assistance. Further, unlike in cases where violations have been found, there is no showing here that rival unions would be denied similar access,<sup>11</sup> or that the employer would be present at the meeting or witness the

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<sup>7</sup> Tecumseh Corrugated Box Co., 333 NLRB 1, 1 fn. 2, 9 (2001), citing Jolog Sportswear, 128 NLRB 886, 888-89 (1960), affd. sub no., Kimbrell v. NLRB, 290 F.2d 799 (4th Cir. 1961); Longchamps, 205 NLRB 1025, 1031 (1973).

<sup>8</sup> Vernitron Electrical Components, 221 NLRB 464, 465 (1975), enfd. 548 F.2d 24 (1st Cir. 1977) (8(a)(2) violation where supervisors present and observed solicitation and execution of authorizations cards).

<sup>9</sup> Id.

<sup>10</sup> See Longchamps, 205 NLRB at 1031; 99 cent Stores, 320 NLRB 878, 878 (1996).

<sup>11</sup> see Duane Reade, 338 NLRB at 944 (company allowed union to meet with employees in violation of its own no-solicitation policy while denying equal access to rival union representatives); Regal Recycling, 329 NLRB 355, 367 (1999) (company favored one union over another), Ella Industries, 295 NLRB 976, 979 (1989) (company sponsored meeting for one union and denied another equal access).

signing of cards.<sup>12</sup> Thus, the provisions for union access do not provide the union with unlawful assistance.

### **3. The Statement that the Company Does not Oppose Unionization.**

An employer may voluntarily agree to express a position of neutrality towards a union.<sup>13</sup> An employer may even state its preference for a union, or for one union over another, as long as such statements are not accompanied by promises of benefits or threats of reprisal.<sup>14</sup>

Here, there is no distinction between the Employer stating that it is neutral towards unions and stating that it does not oppose unions.<sup>15</sup> Even if there were, the Employer could lawfully state its preference for the unions or unionization generally. Therefore, we conclude that this allegation is meritless.

### **4. The Duty to Provide the Union with a List of Employees.**

Employers may lawfully agree to provide unions with employee names and addresses pursuant to neutrality agreements.<sup>16</sup> Thus, while Excelsior Underwear<sup>17</sup> holds that

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<sup>12</sup> See P.C. Foods, 249 NLRB 433, 439 (8(a)(2) (1980) (violation found where employer present at paid meeting and witnessed employees signing cards).

<sup>13</sup> See Hotel & Restaurant Employees Union, Local 217 v. J.P. Morgan Hotel, 996 F.2d at 563 (employer agreed not to mount campaign with employees opposing union).

<sup>14</sup> See Tecumseh, 333 NLRB at 7 (no violation found where employer told employees that while the employer liked to work with unions, it was their choice whether they wanted to be represented by a union); Alley Constr., 210 NLRB 999, 1004 (1974) (no violation found where employer stated its preference for one union over another and the advantages of that union where statements were unaccompanied by promises of benefits or threats of reprisal).

<sup>15</sup> See J.P. Morgan, 996 F.2d at 563.

<sup>16</sup> Cellco Partnership d/b/a Verizon Wireless, 4-CA-30729, et al., Advice Memorandum dated January 7, 2002).

<sup>17</sup> 156 NLRB 1236 (1966).

the Board will require the employer to furnish an employee list only after a union has demonstrated a thirty-percent showing of interest in a Board representation proceeding, it does not prohibit an employer from voluntarily furnishing employees names and addresses without such a showing of interest. Thus, the Employer's claim that the duty to provide employee names and addresses during an organizing campaign, and to update those lists monthly, constitutes unlawful assistance also lacks merit.

**5. The Requirement that the Employer Negotiate with the Union Concerning the Appropriate Bargaining Unit before Majority Status is Achieved.**

When an employer negotiates a collective-bargaining agreement regarding terms and conditions of employment with a union that has not achieved majority status among the employer's employees, the employer violates Section 8(a)(2), and the union violates Section 8(b)(1)(A).<sup>18</sup> In Majestic Weaving,<sup>19</sup> the Board held that such conduct violates the Act even where the recognition and contract are conditioned upon the union's obtaining majority support from the employees. This is because premature contract negotiation affords the minority union "a deceptive cloak of authority with which to persuasively elicit additional employees support," thereby tainting any employee support the union subsequently obtains.<sup>20</sup> Under these principles, neutrality agreements in which the employer and the union agree to terms and conditions of employment that would apply to employees if the union obtained majority status would violate Section 8(a)(2) and 8(b)(1)(A). Thus, the General Counsel has issued complaint where neutrality agreements contained substantive terms and conditions of employment that would have been incorporated into the collective bargaining agreement.<sup>21</sup>

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<sup>18</sup> Int'l Ladies Garment Workers Union (Bernhard-Altman Texas Corp.) v. NLRB, 366 U.S. 731, 737-38 (1961).

<sup>19</sup> 147 NLRB 859, 860-61 (1964), enf. denied on other grounds 335 F.2d 854 (2d Cir. 1966).

<sup>20</sup> Bernhard-Altman, 366 U.S. at 736.

<sup>21</sup> See Plastech Engineered Products, Case 10-CA-35554 et al., Advice Memorandum dated June 27, 2005 (parties to neutrality agreement unlawfully agreed to minimal job classifications, contract duration, no-strike/arbitration clause, and "flexible" work rules); Thomas Built Buses, 11-CA-20038, Advice Memorandum dated September 17, 2004 (parties to neutrality agreement unlawfully agreed to preconditions regarding transfer rights, severance, no-

Unlike the provisions found unlawful, however, the neutrality provisions here do not address terms and conditions of employment that will be incorporated in future agreements. Rather, they address only procedural issues. The Charging Party's argument that the scope of the unit constitutes a substantive issue and that the agreement therefore provides for pre-recognition bargaining on terms and conditions of employment lacks merit. Indeed, employers and unions routinely and historically have agreed on which employees are within and outside of the bargaining unit in consent elections.<sup>22</sup> Having a procedure for agreeing on the scope of the unit codified in a collective bargaining agreement does not render it unlawful.

#### **6. The Exclusion of the NLRB from Deciding Representation Questions.**

In Verizon Information Systems,<sup>23</sup> the Board held that a provision in a neutrality agreement providing for the arbitration of disputes on the scope of the bargaining unit barred a union's representation petition.<sup>24</sup> There, after the parties could not agree on a bargaining unit, the union filed a representation petition.<sup>25</sup> The Regional Director granted the employer's petition to dismiss the petition

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strikes, subcontracting prohibitions, no overtime restrictions, and certain wage issues).

<sup>22</sup> We also note that the Board has made it clear that the scope of the bargaining unit is not a mandatory subject of bargaining or "wages, hours, and other terms and conditions of employment" covered by Section 8(d) of the Act. See, e.g., SFX Target Center Arena Management, LLC, 342 NLRB 725, 735 (2004) ("Unit scope is not a mandatory bargaining subject," nor is "the composition of the bargaining unit," quoting Bozzuto's, Inc., 277 NLRB 977 (1985) and Newspaper Printing Corp. v. NLRB, 625 F.2d 956, 964-965 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981)).

<sup>23</sup> See 335 NLRB 558, 560-61 (2001) (dismissing representations petition where parties agreed to arbitrate scope of unit issues).

<sup>24</sup> But see Shaw's Supermarkets, 343 NLRB 963, 963-64, fn. 1 (2004) (Board accepts review to consider whether Regional Director appropriately dismissed employer's RM petition based on after-acquired clause, noting that unit and eligibility matters are for the Board to determine).

<sup>25</sup> Id. at 559.

based on the parties' agreement on a procedure to resolve unit scope issues, and the Board upheld, reasoning that the policies of the Act were best effectuated by holding the parties to their bargain.<sup>26</sup> The Board left open whether, and to what extent, the Board should defer to an arbitrator's determination of an appropriate unit.<sup>27</sup>

By dismissing the representation petition, the Board in Verizon clearly indicated that provisions to arbitrate scope of unit questions do not unlawfully exclude the NLRB from deciding questions of representation. Therefore, the provision to arbitrate disputes on the scope of the agreement is not unlawful.

The Charging Party also asserts that the neutrality agreement somehow bars employees from filing ULP charges regarding any disputes concerning the neutrality agreement. The neutrality agreement, however, clearly binds only the Employer and the Union. The agreement contains no language barring employees from filing charges or otherwise seeking to use using the Agency's processes.

In sum, the neutrality provisions of the collective bargaining agreement do not violate Section 8(b)(1)(A). Accordingly, the charges should be dismissed, absent withdrawal.

B.J.K.

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<sup>26</sup> Id. at 569-61.

<sup>27</sup> Id. at 561 (Member Liebman, concurrence).