

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

DATE: March 13, 2012

TO: Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Sands Casino Resort Bethlehem 512-5036-0850
Case 04-CA-064792 524-6710-5000

This case was submitted for Advice as to whether the Employer, Sands Casino Resort Bethlehem, violated Sections 8(a)(3) and (1) by implementing improvements to its overtime policies for non-unit employees to forestall their interest in unionization while withholding the improvements from its newly-organized security guards. We conclude that the Employer did not violate the Act by announcing and implanting this policy change.

During a 2011 organizing campaign amongst the Employer's security guards, the Employer learned that its employees were unhappy with some of its overtime policies. A few days after the election for the guards' unit, which the Union won, the Employer announced several changes to its overtime policy that would address many of the employees' complaints. The new policy applied to all of the Employer's employees except the newly-organized guards. The Employer admits that this change in benefits was a response to the Union's election victory and maintains it was intended to dissuade its non-unit employees from initiating a union campaign of their own. As of the investigation, there was no such organizing activity amongst the non-guard workforce.

When the Employer announced the new overtime policy, its President told the guards that the change did not apply to them because the Board's rules prohibit the Employer from changing terms and conditions of employment without bargaining with the Union. The parties have not bargained over this or any other issue, at least in part because the Employer filed election objections which were still pending when the Union filed the instant charge. On February 10, 2012, the Board adopted the Hearing Officer's recommendation to dispose of all objections and certified the Union as the exclusive collective-bargaining representative for the Employer's security guard unit.

We agree with the Region that the Employer did not violate the Act by improving its overtime policy for its non-union employees while withholding the change from its union employees. In *Hampton Inn NY—JFK Airport*, the Board held that an employer is free to improve non-union employees' wages, hours, and other terms and conditions of employment in order to diminish the appeal of unionization, provided the employer has no knowledge of any union activity amongst the non-union employees.¹ The granting of benefits to unorganized employees but not to union-represented employees is lawful unless there is independent evidence of anti-union motive.²

Indeed, an employer is precluded from unilaterally changing the wages or benefits of union-represented employees unless the change is a regular or recurring benefit that has been established as a term or condition of employment.³ Even when the results of a union election are not yet certified,

¹ *Hampton Inn NY—JFK Airport*, 348 NLRB 16, 17–18 (2006) (finding no violation where employer gave wage increases and improved benefits to unrepresented employees because employer had no knowledge of unrepresented employees' union activity). *See also, e.g., Norfolk Livestock Sales Company*, 158 NLRB 1595, 1595 (1966) (finding no violation where employer was not aware of employees' union activity when it instituted a new vacation policy).

² *See Shell Oil Company, Incorporated*, 77 NLRB 1306, 1310 (1948) (“Absent an unlawful motive, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative”); *Sun Transport, Inc.*, 340 NLRB 70, 72 (finding no anti-union animus and therefore no violation where employer offered lower severance pay to its union-represented employees than to its unrepresented employees). *Cf. Kurdziel Iron of Wauseon*, 327 NLRB 155, 155 (1998) (finding 8(a)(3) violation where employer told bargaining unit members that they would receive routine increase granted to non-union employees if they voted to decertify the union in pending election); *Phelps Dodge Mining*, 308 NLRB 985, 995–96 (1992) (finding unlawful motive where employer granted special bonuses to its “union-free” employees a short time before unit employees were eligible to petition for decertification), *enforcement denied*, 22 F.3d 1493 (10th Cir. 1994); *Peabody Coal Company*, 265 NLRB 93, 99–100 (1982) (finding 8(a)(3) violation where Employer with a history of 8(a)(1) conduct told unit employees that new benefits were withheld because they were “trying to get into the Union”), *enforcement denied in part*, 725 F.2d 357 (6th Cir. 1984).

³ *See, e.g., Flying Foods*, 345 NLRB 101, 104 (2005) (finding violation where employer unilaterally granted a wage increase and instituted an employee-management group for union-represented employees), *enforced*, 471 F.3d 178 (D.C. Cir. 2006); *Palm Court Nursing Home N.H., LLC*, 341 NLRB 813, 820

as in this case, “an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made.”⁴

Here, as in *Hampton Inn*, the Employer was free to grant new benefits to its unrepresented employees, even though it was motivated by a desire to discourage potential future union activity among those employees, as it had no reason to believe that they had engaged in any union activity.⁵ And there is no independent evidence of anti-union motive. Moreover, had the Employer applied the new overtime policy to the guards without providing the Union notice and an opportunity to bargain, it would have violated Section 8(a)(5).⁶

In sum, we conclude that the Employer did not violate the Act by implementing its new overtime policy for its non-union employees. The Region should dismiss the charge, absent withdrawal.

/s/

B.J.K.

(2004) (finding violation where employer unilaterally changed, *inter alia*, its overtime policy).

⁴ *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), *enforcement denied on other grounds*, 512 F.2d 684 (8th Cir. 1975). *See also, e.g., Sprain Brook Manor Nursing Home LLC*, 351 NLRB 1150, 1205 (2007) (employer violated the Act by unilaterally changing terms and conditions of employment after the election but before union certification).

⁵ *See Hampton Inn NY—JFK Airport*, 358 NLRB at 17–18; *Norfolk Livestock Sales Company*, 158 NLRB at 1595.

⁶ *See, e.g., Sprain Brook Manor Nursing Home LLC*, 351 NLRB at 1205.