

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

DATE: August 7, 2012

TO: Olivia Garcia, Regional Director
Region 21

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

SUBJECT: International Association of Machinists, 536-2509-0100
Aerospace Workers, District Lodge 947 (DirecTV 536-2512
U.S. DirecTV Holdings, LLC) 536-2530
Case 21-CB-79098 536-2501-8000

The Region submitted this case for advice as to whether the Union restrained or coerced employees in violation of Section 8(b)(1)(A) by videotaping employees during a Union visit to the Employer's facility.

We conclude, in the circumstances presented here, that the Union's videotaping of its visit to the Employer's facility did not have a reasonable tendency to restrain or coerce employees in violation of Section 8(b)(1)(A) because the unit employees were not engaged, or asked to engage in, Section 7 activity when they were incidentally videotaped by the Union during the Union's attempt to assert its rights as the unit employees' certified bargaining representative. The Region should therefore dismiss the charge, absent withdrawal.

FACTS

DirecTV U.S. DirecTV Holdings, LLC (the Employer) provides digital television services to residential and commercial customers. The International Association of Machinists, District Lodge 947 (the Union) represents a unit of field technicians, warehouse employees, and dispatchers at the Employer's Rancho Dominguez facility. Although the Union was certified in December 2011, the Employer has consistently refused to bargain or furnish relevant information to the Union. The Employer's challenge to the Board's order affirming the Union's certification is currently pending before the Sixth and Ninth Circuits.¹

¹ See *DirecTV U.S. DirecTV Holdings LLC and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 947*, 358 NLRB No. 33 (2012).

On April 12, 2012,² about 40 unit employee technicians were watching a training video at the Employer's facility when a group of 10-15 Union agents arrived at the Employer's facility and entered the training room. The Union agents were wearing clothes with Union insignias but they were not carrying any signs or leaflets. A Union agent had a videotape and recorded the Union's visit to the training room. One of the Union agents repeatedly asked the manager present in the training room who was in charge of the facility. After the Employer's Service Manager and Senior Manager identified themselves as in charge, the Union agents said that they wanted to provide the Employer with certain documents and discuss some issues with them.

The Union agents agreed to follow the Employer's managers to a second training room to talk. The managers led the Union agents to the second room, after which the Union agents handed them documents and said they wanted to discuss them. The Employer's Service Manager told the Union to direct its concerns to the Employer's attorney and then asked the Union agents to leave. The Union representatives insisted on passing through the first training room again on their way out of the building.

On their way back through the first training room, the Union agents shook hands with some of the unit technicians and patted some on their backs.³ The Union agents said, "[s]í, se puede" and one Union agent clapped his hands. A Union representative told employees he would get their money back and told them, "[w]e'll be back for you." The Union agents then left the training room and exited the Employer's facility.

ACTION

We conclude that the Union's videotaping did not reasonably restrain or coerce employees in violation of Section 8(b)(1)(A) because the employees were not engaged, or asked to engage in, Section 7 activity when the Union videotaped its attempt to assert its Section 9(a) status and speak with Employer officials during its visit to the Employer's facility. The Region should therefore dismiss the charge, absent withdrawal.

A union violates Section 8(b)(1)(A) if its conduct reasonably tends to restrain or coerce employees in the exercise of their Section 7 right to engage in certain conduct

² All dates are in 2012 unless noted.

³ It is unclear if the Union continued to videotape on its way back through the first training room; although an Employer manager saw a Union agent videotaping, employees did not see any videotaping at that time.

or to refrain from engaging in certain conduct.⁴ The Board has consistently held that a union's videotaping or photographing employees is unlawful when it is accompanied by other conduct indicating that the union would react adversely to employees exercising their Section 7 right to refrain from union activity.⁵ In this regard, a union's photographing or videotaping employees who are exercising their Section 7 right to refrain from supporting the union will violate Section 8(b)(1)(A) when the union's recording is "coupled with abusive remarks or other conduct having a reasonable tendency to instill fear of retribution" in the minds of the targeted employees.⁶ Thus, although a union's videotaping or photographing employees, without justification, could constitute objectionable election conduct, it does not, by itself, violate Section 8(b)(1)(A).⁷

⁴ *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 815 (2001), *enfd.* 50 F. App'x 88 (3d Cir. 2002) (union violated Section 8(b)(1)(A) by videotaping and photographing nonunion employees in a provocative and confrontational manner); *Service Employees (GMG Janitorial)*, 322 NLRB 402, 413-14 (1996) (union violated Section 8(b)(1)(A) through threats of retribution if employees did not sign authorization cards).

⁵ *See, e.g., Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 740 & n.4, 753 (2004), *enfd.* 251 F. App'x 101 (3d Cir. 2007) (union organizer photographed and videotaped employees while contemporaneously threatening employees as they entered and exited the jobsite and circling an employee's vehicle); *Carpenters*, 335 NLRB at 815 (union pickets confrontationally videotaped and photographed nonunion employees entering the jobsite); *Teamsters Local 890 (Basic Vegetable Products)*, 335 NLRB 686, 686-87 (2001) (union pickets videotaped replacement employees, their vehicles, and their license plates as they entered and exited the struck employer's facility while uttering abusive remarks and against a backdrop of unlawful mass picketing); *Interstate Cigar Co., Inc.*, 256 NLRB 496, 500-501 (1981) (photographing of employees not violative where not accompanied by other conduct indicating the union would react adversely to employees who cross a picket line).

⁶ *Teamsters Local 890*, 335 NLRB at 687.

⁷ *See Randell Warehouse of Arizona*, 347 NLRB 591, 598 (2006) (union took photographs of employees being offered union literature prior to an election and did not provide an explanation; Board required that there be a legitimate justification for the photographing and that the justification be communicated to employees in a timely manner); *Pepsi-Cola Bottling Co.*, 289 NLRB 736, 736-37 (1988) (union did not provide a legitimate justification for videotaping employees accepting or rejecting union leaflets the day before the election; absent any legitimate explanation from the union, employees could reasonably believe that the union was contemplating some future reprisals against them).

We conclude that the Union's videotaping of its April 12 visit to the Employer did not violate Section 8(b)(1)(A) because it did not have a reasonable tendency to restrain or coerce the unit employees.⁸ First, the Union's videotaping was not directed toward the unit employees but was rather aimed at the Employer's managers. Thus, when the Union first entered the training room, it demanded to know which Employer official was in charge, thereby indicating to the employees that it was there to meet with the Employer. Thereafter, the Union agents told the Employer officials that they wanted to discuss issues with them and provide them with certain documents. As such, the Union visited the Employer's facility and interrupted the training video in an attempt to assert its Section 9(a) status despite the Employer's refusal to recognize it. Notably, the employees were not the intended subjects of the Union's videotaping and any recording of employees was merely incidental due to their presence in the training room during the Union's confrontation with the Employer.

Indeed, the unit technicians were not engaged in Section 7 activity during the Union's videotaping, nor did the Union ask them to stop watching the training video, cease working, or engage in any other Section 7 activity on April 12. The employees were thus not presented with a choice as to whether to participate in, or refrain from, Section 7 activity.⁹ Moreover, there is no evidence that the Union's April 12 visit was related to any previous Union visits or prior protected activity at the Employer's facility. As such, there is no demonstrated nexus between the Union's April 12 visit and any employee Section 7 activity that occurred during or after the Union's election campaign.¹⁰ In these circumstances, the employees would not have reasonably believed that the Union would use the videotaping to subsequently punish them.¹¹

⁸ See *Electrical Workers Local 98*, 342 NLRB at 740 n.4 (Section 8(b)(1)(A) violations determined by objective standard); *Carpenters*, 335 NLRB at 814-15.

⁹ See *Carpenters Local 2012 (Forcine Concrete and Construction Co., Inc.)*, 358 NLRB 1, 2 (2012) (union's videotaping did not violate Section 8(b)(1)(A) because employees were not "confronted with a choice between engaging in protected activity or not").

¹⁰ See, e.g., *id.* at 3 (comparing *Electrical Workers Local 98*, 342 NLRB at 752-53 wherein employee would have reasonably connected union's videotaping and photographing and other coercive conduct to its earlier solicitation of his support).

¹¹ See, e.g., *Interstate Cigar Co., Inc.*, 256 NLRB at 501 (union's recording of license plate numbers was not by itself violative of Section 8(b)(1)(A); only when such conduct takes place in conjunction with other actions indicating a union might react adversely to employees does it exceed the boundaries of permissive action).

Finally, the Union did not threaten employees or engage in any other coercive conduct. Thus, the Union did not make abusive remarks or harass employees while it videotaped its visit to the Employer's facility. On the contrary, the Union assured employees that it had not forgotten about them during the Employer's lengthy test of certification challenge. Indeed, the Union agents only addressed the employees at the end of the visit when they shook employees' hands and indicated they were looking out for their interests. The Union's handshaking and patting employees on the back were supportive gestures to the employees, and not threatening or coercive. In these circumstances, the Union's videotaping did not violate Section 8(b)(1)(A).

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.