

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

PORTOLA PACKAGING, INC.,

and

MARTA MAGALLON CORONA, an Individual,

and

JORGE GARCIA, an Individual,

and

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 99**

PORTOLA PACKAGING, INC.,

Employer,

and

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 99,**

Petitioner.

**Case Nos. 28-CA-067274
28-CA-067345
28-CA-070621**

Case No. 28-RC-067973

**PORTOLA PACKAGING, INC.'S BRIEF IN OPPOSITION TO
CROSS EXCEPTIONS**

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I. INTRODUCTION

The Decision dated September 13, 2012 (“ALJD”) by Administrative Law Judge Gregory Meyerson (the “ALJ”) recommends the dismissal of 14 paragraphs of the administrative Complaint. *See* ALJD p. 43 (Summary of Conclusions). As a preliminary matter, no Exceptions have been filed to the ALJ’s recommendations to dismiss Complaint paragraphs 5(c), 5(h)(3), 5(k) and 5(m)(1). The Board should adopt the ALJ’s Decision in pertinent part and dismiss those paragraphs of the Complaint.

Counsel for the Acting General Counsel (“AGC”) filed Exceptions to some portions of the ALJ’s Decision, and Portola timely filed a Brief in Opposition (“Opposition”). Subsequently, United Food and Commercial Workers Union Local No. 99 (“Local 99” or the “Union”) filed Cross Exceptions, the first three of which duplicate AGC’s Exceptions. In particular, Cross Exceptions 1-3 dispute the ALJ’s recommendation to dismiss Complaint paragraph 5(b)(1), concerning the claim an employee, Jorge Garcia, was subjected to retaliation for allegedly translating a coworker’s conversation with her supervisor. The Cross Exceptions should be denied for the reasons described in Portola’s Opposition. Neither AGC nor the Union has demonstrated why the Board should adopt the novel rule that the mechanical and non-concerted act of translating conversation in which the translator is not directly interested somehow is protected by Section 7 of the Act.

The Union’s Cross-Exceptions also challenge the ALJ’s Decision overruling its Objections 2 and 4 related to the conduct of the December 1, 2011, representation election. Objection 2 involved a letter from Plant Manager Tim Tyler providing factual information to employees about the bargaining process. The Union falsely asserts that the letter threatened decreases in wages and benefits as a result of a Union victory in the election. The Complaint did

not allege that the letter contained an unlawful threat, and the ALJ correctly overruled the Union's baseless Objection. Objection 4 involved the presentation of certain videos for employees that the Union claimed created an impression that a strike would be inevitable if the Union won the election. Once again, the Complaint did not allege and the ALJ rejected the Union's claim that the videos unlawfully created the impression that a strike would occur after the election.¹ The Board should deny the Cross Exceptions, adopt the ALJ's Decision in pertinent part, and certify the results of the election for the reasons previously described.

II. THE ALJ CORRECTLY CONCLUDED THAT TIM TYLER'S NOVEMBER 18, 2011 LETTER TO EMPLOYEES PROVIDED FACTUAL INFORMATION TO EMPLOYEES CONCERNING THE BARGAINING PROCESS

Tim Tyler, Portola's General Manager at its Tolleson, Arizona based plant (the "Tolleson Plant"), has considerable experience in labor relations. He managed plants at which employees were represented by labor organizations for more than 15 years, and he negotiated collective bargaining agreements on behalf of his employer with representatives of one of those labor organizations. Transcript of the Hearing ("Tr.") 511. Unsurprisingly, Mr. Tyler desired to provide information to employees about his experience in connection with the representation election at the Tolleson Plant. He did so in several written communications between the time Portola received notice of the Union's petition and the date the election was held, including a letter that was distributed to employees on November 18, 2011.

In the letter, Mr. Tyler provided information to employees about the collective bargaining process. Tr. 66, 73, 521. He stated that "If the Union is elected as your exclusive representative, Portola will fulfill its obligation to bargain in good faith." Employer Exhibit ("ER") 5. He also

¹ The Union argues in its Brief in Support of the Cross Exceptions that the videos also unlawfully threatened violence in a manner that is duplicative of AGC's Exception to the ALJ's Decision dismissing paragraph 5(o) of the amended Complaint. Both should be denied for the reasons described in Portola's Opposition.

informed employees that good faith bargaining can be inherently unpredictable, and there are no guarantees in the process. *Id.* Consequently, “as a result of good faith bargaining, wages and benefits might improve, they might stay the same, or they might get worse.” *Id.*

The Union’s election Objection 2 took issue with one of six bullet points in Mr. Tyler’s November 18 letter. The bullet points all relate to Mr. Tyler’s statement that if the Union is certified as a result of the election, Portola will bargain in good faith with the Union to reach an agreement. *Id.* Each of the bullet points illustrates the Company’s commitment. As described above, AGC did not contend that any of the points violated the Act.

The final bullet point in Mr. Tyler’s letter stated as follows:

Don’t believe that wages and benefits must stay the same or improve as a result of bargaining. The law specifically allows an employer to unilaterally implement its final offer to the union if an impasse in bargaining is reached. *Id.*

At the hearing, an expert interpreter provided two translations of that bullet point as it appeared in the Spanish translation of Mr. Tyler’s letter, a copy of which was distributed simultaneously to employees with the original English version. The first translation follows:

Don’t think that the salaries and benefits will remain the same or improve as one result of the negotiations. Your law specifically allows the Company to withhold its last offer of negotiations to the union if the union and the company cannot come to an agreement. Tr. 307.

The second, corrected translation was provided during the following colloquy:

INTERPRETER: “Do not think that the salaries and benefits remain the same or improve,” I’m gonna say sic, “as a result of the negotiations.”...

ALJ: Sic meaning, sic meaning there is something grammatically incorrect –

INTERPRETER: Correct, incorrect the way it’s written here, yes....

MS. HINCKLE: Will the translator proceed with the second sentence?....

INTERPRETER: “The law specifically allows the company to maintain its last offer to the union if the union and the company cannot comes [sic] to an agreement.” Tr. 307-08.

Both the original English and corrected Spanish translation of Mr. Tyler's letter contain factual statements regarding the duty to bargain under the Act. In particular, it is very well settled that wage and benefits are not required to remain the same or improve as a result of bargaining, and they can go down as a result. *See, e.g., Oxford Pickles*, 190 NLRB 109, 109 (1971) ("There is no requirement in the Act that an employer accede to all union demands or, after bargaining, retain all current benefits"); *Midwestern Instruments*, 133 NLRB 1132, 1138 (1961) ("There is, of course, no obligation on the part of the employer to contract to continue all existing benefits, nor is it an unfair labor practice to offer reduced benefits"); *La-Z-Boy*, 281 NLRB 338, 340 (1986) ("...in the give and take of bargaining, [a] union might give up insurance, holidays, or vacation time to obtain dues check off from employer"); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 877 (9th Cir. 1978) ("The right to union representation under the Act does not imply the right to a better deal. The proper role of the Board is to watch over the process, not guarantee the results, of collective bargaining").

Likewise, it is well established that the law allows management to implement its final offer upon reaching an impasse in bargaining. Recently the Board reiterated the very well established principle that:

An employer generally can implement some or all of the terms or conditions of employment that are reasonably comprehended by the employer's pre-impasse proposals if the parties have reached an overall impasse:

Comau, Inc., 356 NLRB 1, 9 (2010) (see also at page 11, holding that "at impasse an employer is entitled to choose to implement some aspects of its prior proposal, even while it chooses not to implement others...."). This principle has been cited and relied upon in a long list of Board decisions including, among many others: *Lihli Fashions Corp.*, 317 NLRB 163, 165 (1995) ("a company may unilaterally implement some or all of its last contract offer"); *Presto Casting Co.*,

262 NLRB 346, 354 (1982) (employer lawfully implemented wage packet proposal without implementing a separate benefit package); *Eddie's Chop House, Inc.*, 165 NLRB 861, 862-863 (1967) (implementing Christmas bonus but not other provisions after impasse); *Financial Institution Employees of America, Local No. 1182 v. NLRB*, 738 F.2d 1038, 1042-43) (9th Cir. 1984) (enforcing Board order finding lawful post-impasse implementation of portion of economic proposal while bargaining continued on non-economic items).

Mr. Tyler's right to communicate facts relating to the bargaining process is indisputable. His letter does not threaten that Portola will not bargain in good faith; to the contrary, as described above, it specifically states that "If the Union is elected as your exclusive representative, Portola will fulfill its obligation to bargain in good faith." ER5. Nor does the letter suggest that bargaining will prove futile. It does, however, inform employees of the unpredictable nature of bargaining while assuring employees that the Company will bargain in good faith. Given that the language at issue in Objection 2 contains no threat of reprisal or force or promise of benefit, Mr. Tyler's letter does not constitute or even evidence any alleged unfair labor practice. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Union's Objection 2 was correctly overruled. The Board should deny the Union's Cross Exceptions.

III. LRI'S WORK STABILITY VIDEO DOES NOT THREATEN OR IMPLY THAT STRIKES ARE INEVITABLE

The Union's Objection 4 alleged that prior to the election, Portola played a video in an employee break room that "gave the impression of the inevitability of a strike or strikes should the Union be voted in." That is false, and the ALJ correctly overruled the Objection.

Prior to the election, Portola made four videos available in the Plant for employees to view. Tr. 168. LRI prepared the videos to educate employees about facts related to union representation, including among many other subjects, facts concerning union strikes. Tr. 170.

Each video was available in Spanish and in English. One of the videos was set up on a monitor in the employee breakroom and was in Spanish; the other played on a monitor outside the breakroom and was in English. Tr. 169. The videos lasted slightly over 20 minutes, and they were set up to play on a continuous loop. Tr. 168. Portola played the videos on four consecutive days, with each of the videos playing for one 24-hour period, ending on November 29. Tr. 169-170. No employee was required to watch any of the videos; the videos were available for employees to view during their breaks if they desired.

Only one of the English / Spanish pairs of videos is at issue. The English version is titled “Your Job On The Line,” and the Spanish version is “Work Stability and Strikes.” Tr. 409, 419, 438; Union Exhibit (“UE”) 8. The videos are not identical translations, but involve different individuals speaking in their native languages and, in many cases, reciting their own personal experiences. Tr. 734-35, 740. In summary, each of the videos describes facts presented by a narrator; and a male and a female “anchor” present information in a news reporting style. Tr. 735. The videos also include the testimonials of former union organizers and represented employees describing their personal experiences. Tr. 735-36. The individuals who gave testimonials did not receive any compensation from LRI for participating in the video. Tr. 737. They were individuals who volunteered to share their personal stories. Tr. 737.

The videos provide information about union negotiations and confrontations with management. In “Your Job On The Line,” four employees describe a union boycott campaign against Whirlpool in support of their union’s bargaining demands. The campaign concerned the employees and seemed self-defeating because of its obvious tendency to threaten the jobs of the employees the union represented. The individuals state:

“I’ve been there for over 17 years and I was a dues paying member for 17 years and I don’t go along with what they’re doing. I don’t go along with the boycott.

It's going to cost us our jobs.”

“I don't really believe the union gives much thought to the fact that the product they're boycotting is the same product that brings them a good livelihood, as well as many others in this area.”

“Well, if it worked it could cost us our jobs, that's what it could do.”

“By condoning this boycott they're trying to give our jobs away, the ones they're supposed to be protecting.” UE8, p. 2.

Similarly, in “Work Stability and Strikes” the video describes the impact of union boycotts and provides a long list of employers who have been targeted by such campaigns. Tr.

424-25. The interpreter translated the video on the record as follows:

The employees from such as a campus of Whirlpool in Arkansas. During the negotiations for a union [sic], the union did not obtain one of the elements that they wanted to negotiate.... [T]he union then proceeded to put pressure upon then created a campaign in order to have people not purchase products from Whirlpool. Many of the employees saw this action on behalf of the union as a direct threat to their job stability.

[Employee testimonial] I've been there for 17 years – 17 years as a member paying my quotas....

[Employee testimonial] And I don't agree with what they're doing. I do not agree with the boycott. It's going to cost us our jobs....

I don't agree with the boycott. It's going to cost us our jobs....

[Employee testimonial] The union at this time is not protecting our jobs. By supporting this boycott they're tossing out our jobs, the ones that they should be in fact protecting. Tr. 425-26.

The videos do not predict that a boycott will occur if employees select the Union in the representation election. No part of the videos mention Portola and there is no visual or graphic image connecting Portola to any of the facts presented about labor disputes involving other, unrelated employers. The videos do not predict a boycott at Portola or anywhere else, they do not refer to the Union, and they do not predict a loss of employment opportunities if employees

choose the Union as their representative. The Union, in its Objections, did not contend that the videos' presentation of factual information about boycotts, and the impact of the boycotts, interfered with the election.

In the same vein, the videos present facts concerning strikes. "Your Job On The Line" describes the history of a Teamster led strike at Basic Vegetable Products in King City, California, starting in 1999. UE8 p. 3-7. The video describes a long and constructive bargaining history between management and the Teamsters. After management proposed concessions due to competitive economic conditions, a strike ensued. About 12 employees who participated in the strike, or who crossed picket lines to return to work, provide testimonials describing the impact on their community, and their families, of living through a strike that union representatives predicted would last two weeks, but eventually lasted 25 months. *Id.*

The video also describes the resolution of the strike. Eventually the plant was sold, and employees returned to work. According to the new contract between the employer and the Teamsters, returning strikers received the same pay they earned before the strike, and pay rates were frozen for five years. Benefits were the same as before the strike. *Id.* The video concludes that the sacrifices made by striking workers did not gain them any material advantages in a new agreement. In this respect, the video does not suggest that the same outcome is guaranteed in negotiations, and it does not predict that strikes will occur wherever unions are selected to represent employees. It points out that employees can avoid the risks associated with strikes in the first place by choosing to decline union representation:

By working union-free, you keep the power to deal directly with management about your job and future. You aren't forced to work under inefficient, counterproductive union rules that could undermine the health of this organization and its ability to provide employment. You aren't controlled by one-sided provisions in labor contracts meant to give security to only the union and its special friends. And you'll never be put in danger of sacrificing your pay,

benefits, or future during a union strike. UE8 p. 7.

The labor dispute described in “Work Stability and Strikes” involved Caterpillar and the United Auto Workers (UAW). There, 8,700 employees were on strike for 17 months. Tr. 430. The narration explains that even though the employees rejected Caterpillar’s proposal for a new agreement, the UAW called an end to the strike and returned members to work. *Id.*

Many of them had been brought to the brink of economic ruin and they thought that they hadn’t really achieved anything in those 17 months of strike. Notwithstanding, the contract did have something for the union, the United Auto Workers. It was a clause for union security.

During this time [the strike], Caterpillar continued to produce products with a smaller workforce that was a substitute workforce and from strikers that crossed the picket line. Even though there was a strike, the profit margin and the production had actually increased during the time that the strike was in place. And as a result of that many of the strikers when they returned back to work and to undergo new training and new assignments to jobs that were less desirable than those that they had had prior to the existing strike. Tr. 430-31.

The video concludes with the words of a “Commentator” regarding the impact of strikes:

There is only one way in which you can guarantee that your future does not fall apart because of strikes and this is never, ever giving control of your workforce future to a union. Never place yourself in the position between having to support the union and your job in order to be able to support and sustain your family.... Tr. 436-37.

“Your Job On The Line” and “Work Stability and Strikes” make no predictions about the possibility of a strike at Portola. They simply do not refer to Portola or the Union. They do not anticipate or predict a strike anywhere. Certainly they do not portray the inevitability of a strike; the statistics both videos furnish regarding the prevalence of strikes precludes the implication that all workplaces where unions are certified face them. For instance, “Your Job On The Line” quotes statistics showing that from 2004 – 2009 hundreds of thousands of employees were affected by strikes, the average duration of which was over a month. UE8, p. 3. “Work Stability and Strikes” similarly explains that “during a recent period of time [1996 to 2005], there was

more than 3,000 strikes and more than 1.5 million union members were affected,” tr. 431, and provides a reference to the “FMCS” as source for the statistics. Tr. 432. The videos also are quite clear that the results of strikes are not predetermined or even predictable. In that respect, they are entirely consistent with the written LRI communication that was placed into evidence by AGC concerning the question “What would happen if there was ever a strike?” AGCX25. While the question itself refutes the claim that LRI’s materials present strikes as inevitable, it also refutes the claim that their outcome is certain. In fact, LRI’s communication begins: “No one knows the outcome of a strike.” *Id.*

Simply, the videos record facts regarding individuals’ experiences with unions, including their experiences being affected by strikes. They present information in a manner that would be familiar to any viewer of a television news program, through the use of anchors describing facts, a commentator providing opinions, and individuals providing testimonials. As a general matter, the videos advocate employees vote against Union representation to protect themselves and their workplace from the effects described in the accounts they described.

The videos that were played in Portola’s Plant were protected by Section 8(c) of the Act and did not threaten strikes are inevitable following an election. The Board has rejected similar claims under circumstances where the connection between arguments about labor disputes and the parties to an election were explicit. *See, e.g., Stanadyne Automotive Corp.*, 345 NLRB 85, 89-90 (2005), *enfd. in pertinent part* 520 F.2d 192 (2d Cir. 2008) (display of sign showing plants closed where union represented employees, coupled with statements by officials of the employer such as “where unions exist, strikes occur,” and that the particular union is “strike happy” were held not to convey inevitability of a strike); *Blue Grass Indus.*, 287 NLRB 274, 275 (1987) (slideshow depicting strikes did not convey message that strikes were inevitable since it did not

amount to a prediction that strikes would occur at the employer). Here, there is no connection between the facts presented in the videos and the Union, or Portola. There were no predictions of strikes, and no implication regarding the inevitability of strikes reasonably can be inferred.

In *Flamingo Hilton-Laughlin*, 324 NLRB 72 (1997), no exceptions were filed to the Administrative Law Judge's (ALJ) conclusion that earlier versions of the LRI videos involved here were lawful. Rather than describing the events at Basic Vegetable or Caterpillar they focused on a violent strike at Liberty Glass. The Judge described the videos, which also were presented in English and Spanish, as follows:

The fifth video was devoted to the subject of strikes. In the first moments of his remarks the narrator stated that strikes by unions are known for "the violence that often accompanies them." Strikes were also presented as occurring more frequently than commonly believed, and the narrator preceded this "very real and increasingly likely possibility" by stating:

Also, consider the number of times you've recently heard or read about strikes and related violence. The Greyhound strikers, for example, who fired shots into busses loaded with innocent passengers or the Pittston Mine Workers whose Union was fined hundreds of thousands of dollars for sponsoring strike related violence against the Company.

Strike action was claimed to often require a majority vote of members, but nevertheless be binding on all employees connected to a particular negotiation. Viewers of this video were reminded that pay and fringe benefits were stopped during a strike, that strike benefits from their union would likely be skimpy, that unemployment compensation is ordinarily not paid to strikers, and that companies can hire permanent replacements in a process that means "a chance there might not be a job for you to return to when the strike is settled."

The strike video narration concluded with extensive treatment of a 21-month strike situation at an Oklahoma company named Liberty Glass. The narrator preceded such treatment by disclaiming that if the Union were to win an election "there will automatically be a strike", or that strikers would lose their jobs. The narrator's point, however, was highlighted by the display again from *Oxford Pickles* reading "an employer may permanently replace economic strikers." As usual the narrator read this quoted passage in background audio as it appeared in display on the screen. Numerous acts of civil disobedience and violence were described as having occurred during the course of the Liberty Glass strike, including mass picketing, fire bombings, assault, gunfire, arson and a near riot causing personal injury. The narrator's final remarks of the fifth video were:

Whenever a strike occurs, there's always a possibility it can turn ugly, even disastrous. And with a Union, there is always that possibility of a strike.

But, there's one sure way to make certain you never have to go through the same kind of things the employees of Liberty Glass suffered. Never put yourself in the position where a Union can call you out on strike.

And how do you do that? Simple, vote no. Don't let an outside third party, with goals of its own control your working lives. Vote to stay union free. Just vote no. *Id.* at 83-84.

The ALJ concluded that none of the allegations claiming that the LRI videos somehow violated the Act or interfered with the election process had any merit. Specifically, the ALJ rejected the allegations that the videos, even combined with management statements about union plans to strike – none of which are even alleged here – unlawfully predicted that strikes would be inevitable if the union succeeded in its election campaign. The ALJ concluded:

The total evidence on this issue . . . is nothing more than [the employer] warning employees could be called to strike if the parties failed to reach a contract through their negotiations. This is only a partisan claim as to which tactic the other side would perhaps undertake to win desired concessions, and not an indicator that the failure itself of reaching a contract would be preordained by Respondent's refusal to give good faith consideration to the proposals it faced from the Union....

Thus the prospect of employees going out on strike was presented more as an employer claim of what the Union would selfishly seek, rather than resulting from employer intransigence in bargaining. The instances of strike violence depicted during the videos, including the then-recent episode from area television broadcasting of outstate tourists being beaten by striking casino hotel workers in Las Vegas, were similarly within the capacity of employees themselves to reasonably evaluate as obvious and admitted employer propaganda. This point is made even more explicitly in *Liquitane Corp.*, 298 NLRB 292, 297 (1990), where an employer stating that resort by a union to strike action if it were "unhappy with bargaining" was not unlawful, particularly when no assertion that it was futile for employees to select a union was incorporated in the message. *See Sangamo Weston, Inc.*, 273 NLRB 256 (1984).

Thus the evidence on this issue devolved only to campaign rhetoric by Respondent, without the expression of inevitability that a strike, violent or otherwise, would be forced upon employees by an employer failing to negotiate in good faith in contrast to exploiting any superior bargaining power it might possess in the situation. I hold that General Counsel has not achieved substantial

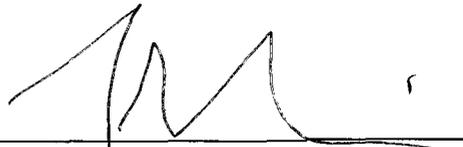
evidence to support complaint paragraph 9(b).

The videos at issue here point out the risks of strikes and highlight the impact of strikes on employees. They do not forecast strikes but rather use history to argue that internal goals and political needs of a union can become paramount during a labor dispute, creating a powerful tension with union claims of security during an organizing campaign. The videos, in short, are protected by Section 8(c) and did not interfere with a free and fair election. The Union's Objection 4 was properly overruled. The Board should deny the Cross Exceptions, and sustain the ALJ's Decision in pertinent part.

IV. CONCLUSION

The Union's Cross Exceptions have no merit. The ALJ's Decision dismissing pertinent paragraphs of the Complaint, and overruling the Union's Objections, was correct. It should be adopted in pertinent part.

Dated this 8th day of November, 2012



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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of November, 2012 caused an original of the foregoing **Brief in Opposition to Cross Exceptions**, in .pdf format, to be filed electronically with the NLRB. I further certify that I have caused copies of the foregoing **Brief**, in .pdf format, to be served via electronic mail on the following:

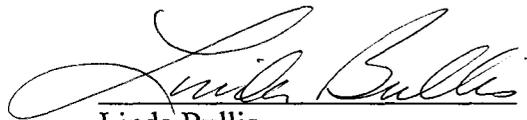
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