

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

DHSC, LLC, d/b/a AFFINITY)	
MEDICAL CENTER,)	
)	Case No. 08-CA-093035
and,)	
)	
NATIONAL NURSES ORGANIZING)	Offer of Proof in Support of
COMMITTEE,)	Motion to Intervene
)	

Susan Kelley and Cinda Keener (“Employee Intervenors”) hereby proffer this Offer of Proof that details what they will establish on the merits of this action if permitted to intervene.¹ In short, they will establish that a bargaining order requiring that DHSC, LLC, d/b/a Affinity Medical Center (“Affinity”) recognize and bargain with the Nurses Organizing Committee (“NNOC”) as their exclusive representative is inappropriate and should not be issued because there is no valid proof that NNOC enjoys majority employee support. *See, e.g., Conair Corp. v. NLRB*, 721 F.2d 1355, 1383-84 (D.C. Cir. 1983) (bargaining orders inappropriate absent proof of majority employee support); *cf. Ladies Garment Workers (Bernhard-Altman Corp.) v. NLRB*, 366 U.S. 731, 737-38 (1961). The election of 29 August 2012, which the General Counsel relies upon as evidence of support for the union, is invalid, and does not reflect employee free choice, because it was tainted by objectionable conduct jointly conducted by Affinity and NNOC, namely: (1) their

¹ The Employee Intervenors reserve the right to raise other arguments and rely upon other facts if their intervention is granted.

joint refusal to disclose their secret pact to employees; and (2) their joint surveillance of employees who campaigned against NNOC.

I. The Election Results Are Invalid Because Affinity and NNOC Refused to Disclose Their Secret Agreement to Employees upon Their Request

A. The Facts

In July 2012, Affinity and NNOC jointly announced to employees that they were parties to an “election procedures agreement” or “neutrality agreement.” Keener Decl., ¶ 2 (Ex. C). Thereafter, the union conducted an organizing campaign within the workplace. *Id.* Prior to the election, employees asked both Affinity and NNOC for copies of any agreement(s) between them. *Id.* at ¶¶ 4-5; Kelley Decl., ¶ 4 (Ex. C). The employer and union both rebuffed these requests. *Id.*

Among other things, the Employee Intervenors feared that Affinity and NNOC may have pre-negotiated bargaining concessions at employee expense. On or around 17 November 2012—after the election was over—their fears were confirmed. An NNOC proposal for a collective bargaining agreement was leaked to members of the bargaining unit. *See* Email of 17 Nov. 2012, with attached NNOC Bargaining Proposal (Ex. D). NNOC’s proposal states that the “Health Plan and Dental Plan” is “pre-negotiated, language to follow,” *id.* at Art. 17, that “Life Insurance” is “pre-negotiated, language to follow,” *id.* at Art. 18, that the “Retirement Plan” is “pre-negotiated language to follow,” *id.* at Art. 19, and that “Substance Abuse” is pre-negotiated [with] language to follow,” *id.* at Art. 34. It is thereby readily apparent that, prior to the election, Affinity and NNOC had reached a backroom deal

governing some of the most important aspects of the employees' terms of employment, and then concealed this pact from Affinity employees.

B. The Employer and Union's Refusal to Disclose Their Secret Pact Interfered with Employee Free Choice in the Election

Affinity and NNOC's refusal to disclose their secret pact to employees upon their request tainted the election results because it rendered it impossible for employees to make an informed choice as to whether they wanted NNOC representation. Courts have long recognized the "grave dangers posed by a backroom deal that is secretly negotiated by union officials and management," *Merk v. Jewel Food Stores*, 945 F.2d 889, 899 (7th Cir. 1991), and that such deals are "certainly in derogation of national labor policy." *Id.* at 896; *see also Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993) (secret deal between employer and union unlawful); *Lewis v. Tuscan Dairy Farms*, 25 F.3d 1138 (2d Cir. 1994) (same).

Indeed, the Board has consistently held that a union violates § 8(b)(1)(A) of the Act when it refuses to provide employees with information regarding contract terms that affect their employment. This includes failing to provide employees with copies of a collective-bargaining agreement and a health and welfare plan, *Law Enforcement & Security Officers Local 40B*, 260 NLRB 419 (1982), information regarding grievances filed under a contract, *Branch 529, National Ass'n of Letter Carriers*, 319 NLRB 879 (1995); information regarding union referral procedures required under a contract, *Carpenters Local 370 (Eastern Contractors Ass'n)*, 332 NLRB 174 (2000); and information about an employees' rights and obligations under an agency shop clause, *Teamsters Local 579 (Chambers & Owens)*, 350 NLRB

1166, (2007); *Production Workers Union, Local 707*, 322 NLRB 35 (1996). Given that NNOC's agreement with Affinity apparently contains terms that will govern employees' terms of employment—namely their health, dental, life insurance, and retirement benefits—the Union has violated § 8(b)(1)(A) by refusing to disclose this agreement to the employees upon their request.

The Board's recent decision in *Dana Corp.*, 356 NLRB No. 49 (2010) is also instructive. The Board majority held that whether pre-negotiated terms of employment evidence premature employer recognition of a union will, in "each case . . . depend upon its own facts," including "the context in which [the agreement] was adopted or the conduct that accompanies it." *Id.* at 11. In upholding the agreement at issue, the Board majority relied on employee knowledge of the agreement's terms, stating that "such an agreement tends to promote an informed choice by employees. They presumably will reject the union if they conclude (or suspect) that it has agreed to a bad deal or that it is otherwise compromised by the agreement from representing them effectively." *Id.* at 12. Here, Affinity and NNOC's refusal to disclose to employees their backroom deal governing employees' benefits rendered it impossible for the employees to know if NNOC "has agreed to a bad deal or . . . is otherwise compromised by the agreement from representing them effectively," thereby precluding "an informed choice by employees." *Id.*²

² The Board in *Dana* did also "*not* address two theories asserted by the Charging Parties, but not argued by the General Counsel: (1) that the [pre-recognition agreement] violates Sec. 8(a)(1) because it promises benefits to employees if they choose the UAW as their representative; and (2) that the UAW violated its duty of fair representation under Sec. 8(b)(1)(A) by agreeing to concessions on substantive

Of course, it need not be established that Affinity and NNOC's concealment of their pact amounted to an unfair labor practice to render the election results invalid. Conduct that "renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Here, Affinity and NNOC's concealment of their secret arrangement made it impossible for employees to make an informed choice regarding whether they wanted NNOC representation, as this deprived employees of material information regarding what that NNOC representation would entail (i.e., a particular deal on health, dental, life insurance, and retirement benefits). The concealment also deprived Affinity employees of their ability to accurately gauge the union's independence from their employer.

In short, employees who are deliberately kept in the dark about a pre-negotiated deal between their employer and a union regarding their health, dental, life insurance, and retirement benefits cannot make a free and informed choice if they want that union to be their exclusive representative. Affinity and the NNOC's refusal to provide copies of their agreement(s) to employees, upon their request, clearly interfered with employee free choice and tainted the results of the election.

terms and conditions of employment in exchange for organizing assistance from Dana." *Id.* at 4 n.6 (emphasis added). The terms of the agreement(s) between NNOC and Affinity may be unlawful on these grounds.

II. The Employer and Union Jointly Engaged in Unlawful Surveillance and Interrogation of Employees Opposed to Unionization

A. The Facts

During the campaign leading up to the election, Affinity permitted non-employee NNOC organizers to operate in its workplace pursuant to its agreement with the union. Keener Decl., ¶ 2. These organizers monitored the activities of employees campaigning against NNOC, reported their activities to Affinity, and demanded that Affinity take action against these employees pursuant to the agreement. *Id.* at ¶ 7; Kelley Decl., ¶ 6. Members of management informed employees that their conduct was being monitored and took action against employees in response to the Union are demanded. *Id.* Overall, Affinity and NNOC's action created a strong impression amongst employees campaigning against the Union that their protected activities were under their joint surveillance. *See* Keener Decl., ¶ 17; Kelley Decl., ¶ 10.

More specifically, Cinda Keener and/or Susan Kelley were informed by members of management that NNOC organizers reported to them that: (1) employees were campaigning against the union in the hospital cafeteria for too long or near the doors and should be removed, Keener Decl., ¶ 11; (2) an employee opposed to the union was rude to an organizer and should be reprimanded, *id.* at ¶ 12; (3) employees campaigning against the union set up a table outside of a hospital entrance and demanded that Affinity prohibit this activity (which it did), *id.* at ¶ 14; Kelley Decl., ¶ 8; (4) employees placed campaign materials on

windowsills in the cafeteria and demanded that Affinity prohibit this activity (which it did), Keener Decl., ¶ 15.

Affinity also permitted an NNOC organizer to operate out of a manager's office in the department where Cinda Keener, Susan Kelley, and other nurses actively opposed to the union worked. *Id.* at ¶ 16. The union organizer, Donna Kennedy, was observed taking pictures of the nurses' work schedules and shifts that were posted in and around this office. *Id.*

Finally, and most egregious of all, Affinity and NNOC compelled and attempted to compel an employee leader of the anti-union campaign—Cinda Keener—to report her own protected activities and those of her co-workers. On or around 9 August 2012, the union demanded that Affinity provide it with a timeline of the activities of several nurses who were campaigning against the union, based on the false pretext that they were campaigning on work time. *Id.* at ¶ 8. At the direction of a supervisor, Employee Intervenor Cinda Keener participated in the creation of a timeline of her activities and those of several of her co-workers. *Id.* This timeline was submitted both to the employer's attorney and to the union. *Id.*; *see also* Kelly Decl., ¶ 7.

On or around 23 August 2012, NNOC again demanded that Affinity provide it with a timeline of the activities of Mrs. Keener and other nurses who opposed the union. Keener Decl., ¶ 10. Once again, a supervisor directed Mrs. Keener to create a timeline of her activities and those of several of her co-workers, and informed her

that this timeline would be given to the union. *Id.* This time, Mrs. Keener refused to participate in the creation of such a timeline. *Id.*

B. The Election Results Are Tainted Because Affinity and NNOC's Joint Surveillance of Employees and Interrogation of Cinda Keener Interfered With Employee Free Choice

“Since the earliest days of the Act, surveillance of employees by an employer, whether with supervisors, rank-and-file employees, or outsiders, has consistently been held to violate Section 8(a)(1).” J. Higgins, *The Developing Labor Law*, 178-79 (ABA 5th ed.). “The law is equally clear that an employer violates Section 8(a)(1) if it creates the impression among employees that it is engaging in surveillance.” *Id.* at 179. Union surveillance of employees similarly can violate § 8(b)(1)(A). *See, e.g., Randell Warehouse*, 347 NLRB 591, 594 (2006). For at least three reasons, Affinity and the NNOC's joint surveillance and interrogation of employees' opposed to the Union interfered with employee free choice in the election.

First, NNOC and Affinity jointly engaged in *actual surveillance* of employees engaged in protected activity. As detailed above, Affinity permitted NNOC organizers to operate within the employees' workplace pursuant to an agreement with the union. These individuals then followed and monitored employees who were campaigning against the union and reported their activities to management. This tracking and reporting easily constitutes unlawful surveillance of employees engaged in protected activities. *See, e.g., Quickway Transp., Inc.*, 354 NLRB No. 80, n.5 & 20 (2009) (following employees, monitoring their activity, and reporting it

back to management constitutes unlawful surveillance); *Fieldcrest Cannon, Inc.* 318 NLRB 470, 503-04 (1995) (same).

A recent case involving NNOC itself is instructive. In *Saint John's Medical Center (NNOC)*, JD(SF)-23-10, 2010 WL 3285396 (N.L.R.B. Div. of Judge 2010), an administrative law judge found merit to the General Counsel and NNOC's claim that a security guard following two pro-union nurses around a hospital created an unlawful impression of surveillance. The ALJ found that the nurses "were engaged in union activity and the guards' continued presence immediately outside the nurses' lounge would have led them to reasonably assume their protected activities were under surveillance." Here, NNOC engaged in conduct similar to the misconduct about which it complained in *Saint John's Medical Center*.

Affinity and NNOC's surveillance is particularly egregious because the Union demanded that management take action against the employees being monitored pursuant to their secret agreement. Surveillance is held to interfere with employee choice is because it communicates an *implicit* threat of reprisal to employees and chills their protected activity. *See, e.g., Higgins, supra*, 179-80. Thus, the mere possibility that a union could have an employer retaliate against employees upon becoming their representative is sufficient to render surveillance coercive.

Once elected, a union has a voice in determining when employees will work, what they shall do, how much they will be paid, and how grievances will be handled. Just as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them.

Randell Warehouse, 347 NLRB at 594.

Here, the threat of employer reprisal for engaging in protected activities was express. NNOC possessed the “influence and authority to retaliate against employees who displease” it based on its pre-recognition agreement with Affinity. *Id.* Pursuant to this agreement, the Union demanded that Affinity stop employees from engaging in protected activities that the Union monitored and reported to management. This includes demanding that employees to take down their table of campaign materials, Keener Decl., ¶ 14, remove their materials from the window sill, *id.* at ¶ 15, and document their whereabouts both to management and to the Union, *id.* at ¶¶ 8,9,11. The Employer generally enforced these Union’s demands. Employees thereby had actual reason to fear that the Union’s monitoring and reporting of their campaign activities to their Employer would lead to management taking action against them, because it actually did.

Second, and at the very least, Affinity and NNOC’s conduct created an *impression of surveillance*. “The Board test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from an employer statement (or conduct) in question that her union activities had been placed under surveillance.” *Promedia Health Sys.*, 343 NLRB 1351, 1363 (2004) (citing *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999)). “Said another way, the issue is whether the employer’s behavior would reasonably suggest to the employee that there was close monitoring of the degree and extent of his organizational efforts and activities.” *Id.*; see also *United Charter Serv.*, 306 NLRB 150 (1992).

Any employee subject to the monitoring at issue here would reasonably believe that their protected activities were under close employer-union surveillance (because it was). Nurses campaigning against NNOC were tracked by individuals operating in their workplace pursuant to an agreement with their employer. These individuals tracked the nurses' activities; reported them to management, and demanded that management take action against the employees pursuant to an agreement. Susan Kelley, Cinda Keener, and their co-workers could only conclude that their protected campaign activities were being closely monitored.

Employees would also reasonably view Affinity, and only NNOC, as being partially responsible for this surveillance. "The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management."

Albertsons, Inc., 344 NLRB 1172 (2005) (quoting *In Pan-Oston Co.*, 336 NLRB 305, 306 (2001)). Here, employees could only believe that NNOC organizers were acting pursuant to company policy because: (1) NNOC is a party to an agreement with Affinity; (2) the organizers were operating in the hospital with Affinity's permission; (3) the organizers reported employees' activities to Affinity management; and (4) Affinity acted on the complaints lodged by organizers against employees pursuant to their agreement. Employees in this circumstance would reasonably (and correctly) believe that union organizers were effectively acting as management's eyes and ears in the facility during the organizing campaign.

Indeed, Affinity managers directly informed employees on several occasions that their activities were being reported to them by NNOC organizers. These statements alone create an unlawful impression of surveillance. *See Promedia Health*, 343 NLRB at 1363 (impression of surveillance created when employer told employee that she heard that employee was soliciting for a union); *Sam's Club*, 342 NLRB No. 57 (2004) (impression of surveillance created when employer told employees that he knew that they were circulating a petition); *State Foods Corp.*, 340 NLRB No. 56 (2003) (impression of surveillance created when employer told employee that he was being watched); *United Charter Serv.*, 306 NLRB at 151 (impression of surveillance created when employer told employees that he knew of their organizing activities).³

Third, Affinity and NNOC jointly compelled and attempted to compel Cinda Keener to create a timeline of her activities and those of co-workers opposed to unionization. This egregious behavior itself warrants setting aside the results of the election. Employees cannot be interrogated about their own protected activities or compelled to report upon their co-workers protected activities. *See Super Thrift Markets, Inc.* 233 NLRB 409 (1977) (setting aside election because manager asked two employees about their and other employees' union sentiments); *National*

³ It is irrelevant whether or not Affinity affirmatively intended to monitor employees' protected activities. What matters is that Affinity's conduct, in conjunction with that of the union, certainly created an impression of surveillance. And that alone is sufficient to warrant overturning the results of the election. *Cf. Albertsons*, 344 NLRB at 1185-86 (employer created unlawful impression of surveillance notwithstanding that it actually "did not keep the protected activities under surveillance or intend to chill employee protected activities").

Garment Co., 241 NLRB 703 (1979), *affirmed* 614 F.2d 623 (8th Cir. 1980) (employer engaged in unfair labor practice by having employee monitor and report events at union meeting and setting aside results of an election based, in part, on this conduct); *Saginaw Furniture Shops, Inc.*, 146 NLRB 587, 591 (1964), *affirmed* 343 F.2d 515 (7th Cir. 1965) (unfair labor practice for employer to request that employee learn and report back the union sympathies of employees).

Certainly, the Board would not hesitate to set aside the results of an election if an employer twice directed the employee leader of a *pro-union* campaign to create timelines of her activities and those of other pro-union employees at the behest of an anti-union consulting group. What Affinity and NNOC did to Cinda Keener is indistinguishable, and tainted the results of the election.

CONCLUSION

For the foregoing reasons, if they are permitted to intervene, Employee Intervenors will establish that the issuance of a bargaining order that requires that Affinity recognize and bargain with NNOC as their exclusive representation is inappropriate because the election of 20 August 2012 was tainted and does not establish that NNOC enjoys majority employee support.

Submitted this 2nd day of April 2013.

/s/ William L. Messenger

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