

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 25**

In The Matter Of:)	
)	
EXECUTIVE MANAGEMENT SERVICES, INC.,)	
)	
Employer,)	
)	
and)	Case no. 25-RC-093670
)	
INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE AND)	
AGRICULTURAL IMPLEMENT WORKERS)	
OF AMERICA (UAW),)	
)	
Union.)	

UAW’S BRIEF IN OPPOSITION TO EMPLOYER’S EXCEPTIONS

I. INTRODUCTION

After an election in which its employees chose the UAW as their representative, Executive Management Services, Inc., raised four objections. First, EMS argued that representatives of the UAW negotiated terms and conditions of employment with General Motors on behalf of the bargaining unit employees even though the UAW was not the employees’ exclusive collective bargaining representative at the time. Second, EMS alleged that UAW representatives “made material misrepresentations to employees during the critical period regarding the terms of an agreement they had negotiated with General Motors.” Third, EMS alleged that, “during the critical period, representatives of the UAW failed to apprise employees of the contingent nature of its agreement with General Motors and/or of the implications of a billing rate increase if it occurred.” Finally, EMS alleged that, “during the critical period, agents of the UAW represented to employees that the UAW had the authority to negotiate wage

increases on behalf of the unit employees, even though the UAW does not represent them and General Motors does not employ them or otherwise control their terms and conditions of employment.”

After a hearing on these objections, the Hearing Officer recommended that the objections be overruled and the results of the election be certified. EMS has raised several exceptions to the Hearing Officer’s Report, focusing on a new twist: that the UAW made a material misrepresentation by claiming that GM would only ensure that its contractors would pay a living wage, *if its employees were unionized*. In doing so, EMS neglects to mention the crucial fact found by the Hearing Officer that EMS communicated on at least two occasions to its employees that it could not pay higher wages to its employees because of its contract with GM.

The Hearing Officer found that “in response to” EMS Management’s communications to employees about its inability to pay increased wages and benefits, the UAW Organizer contacted UAW representatives and GM representatives to confirm whether these communications were true. The UAW confirmed with GM that the communications were not true. The UAW then communicated that to the employees.

In so doing, the UAW specifically disputed the contention of EMS that, if the employees organized, there was no money available to EMS to pay additional wages and benefits. The UAW pointed out that the counter was true: if the employees organized, there *was* additional money available to EMS to pay additional wages and benefits. And, as the Hearing Officer explicitly found, the UAW guaranteed the employees nothing except a seat at the bargaining table.

As the Hearing Officer found, the UAW made no improper promises to the employees and made no material misrepresentation to the employees but only reported a historical fact. This

fact was indeed true and the Union communicated this fact to counteract misrepresentations from EMS. Accordingly, the Board should adopt the recommendations of the Hearing Officer.

II. RELEVANT FACTUAL FINDINGS OF THE HEARING OFFICER

Prior to 2011, the UAW represented the housekeeping employees at the facility in Kokomo, Indiana, that is at the center of the dispute. (Hearing Officer Report at 3.) GM and then Delphi had operated the facility and directly employed the housekeepers there. (*Id.*) During 2007, due to “financial exigencies,” the UAW allowed GM, nationwide, to outsource the housekeeping work at its facilities. (*Id.*) “In exchange for that agreement, General Motors committed that it would be a ‘responsible corporate citizen’ and pay the housekeeping contractors a sufficient amount to allow the subcontractors to pay their employees a living wage.” (*Id.*) This agreement was not memorialized, but was implemented across numerous GM facilities. (*Id.*) This agreement did not become applicable to the Kokomo facility until 2011, when GM resumed control over the plant through its subsidiary, GMCH. (*Id.*)

At this time, the GM purchasing department solicited bids for the Kokomo housekeeping work and awarded the contract to EMS. (*Id.*) In late 2012, the UAW began an organizing drive among the EMS employees in the housekeeping bargaining unit. (*Id.*) Lynee Walters, a UAW organizer was assigned lead organizer to coordinate the campaign. (*Id.* at 4) She received assistance from Rich Mince, an International Representative employed by the UAW and by representatives of UAW Local 292, including Committeeman Ian Beaty. (*Id.* at 5)

During the organizing campaign, “EMS had communicated to employees that the contract with GMCH did not allow for wage increases for all the employees, although a few employees apparently got small merit increases.” (*Id.* at 4) In a meeting, EMS Owner Dave Bego “told employees that EMS obtained the contract with GMCH by being competitive and that

General Motors wanted a competitive bid to keep costs down. Bego stated that based upon the bid there was not sufficient money for higher wages.” (*Id.* at 3)

The employer’s witness Tyler Kaufman testified that EMS supervisor Ben Heinz made “similar statements.” (*Id.* at 4) According to Kafuman, Heinz “drew a pie chart and explained how housekeeping subcontracts work and told Kaufman that there was insufficient money in the contract to support the raise that Kaufman was expecting.” (*Id.* at 4)

Employees reported to Lynee Walters that EMS was claiming that EMS did not have sufficient funds under its contract with General Motors to afford raises. (*Id.*) In response to this information, Walter contacted Jim Holton, a UAW representative in the UAW GM department, Russ Brewer, a GM purchasing department employee, and Carl Varen, a GM Labor Relations Representative. (*Id.*) Holton assured Walters that GM was still honoring its commitment to pay housekeeping contractors enough to pay their employees a living wage. (*Id.*)

On January 7, 2013, the day before the election, Walters was still hearing from employees that Ben Heinz “continued to tell employees that they could not receive any additional pay through collective bargaining because of the constraints of the contract with GMCH.” (*Id.*) Varen confirmed with Ms. Walters that General Motors would pay more to EMS to cover negotiated wage and benefit increases. (*Id.*) Ms. Walters asked Mr. Varen if she could advise EMS employees that General Motors would compensate EMS for any gains at the bargaining table, and he told her that she could. (*Id.*) With respect to her request that he contact EMS directly in order to stop Ben Heinz from making inaccurate statements to employees, Mr. Varen said that he would see what he could do. (*Id.*)

At a meeting at a local Pizza Hut on January 7, 2013, Ms. Walters told the EMS employees who attended that EMS’s claims that there was no more money to pay negotiated

raises were false. (*Id.* at 5) She told the employees that she had confirmation from General Motors that General Motors would compensate EMS for gains made at the bargaining table. (*Id.*) She also advised employees that she had received permission from General Motors representative Carl Varen to advise them of General Motors' willingness to compensate EMS for gains made in the collective bargaining process. (*Id.*)

International Representative Rich Mince spoke to the employees about General Motors' commitment to pay its contractors a contract price sufficient to permit the contractors to pay a fair wage. (*Id.*) Committeeman Ian Beaty told the EMS employees that any gains they made would have to be made at the bargaining table and that the UAW was not promising them any specific wage rate or benefits because any gains would have to be negotiated between the UAW and EMS. (*Id.*) UAW representatives from the housekeeping units at the General Motors plants in Fort Wayne and Marion also spoke to the EMS employees. (*Id.*) They described the organizing drives that they had been through and also described the gains that they had made through collective bargaining with their employers. (*Id.*) They explained that there were differences between their contracts because the contracts had been reached through the collective bargaining process. (*Id.*)

The election was held January 8, 2013. (*Id.* at 6) Shortly after 1:30 p.m., while the polls were still open, EMS Supervisor Heinz received a call from the General Motors purchasing department in Detroit who told him that General Motors was increasing EMS's all-in billing rate to \$25.64. (*Id.*) EMS Counsel Erik Bigelow contacted Varen at GM, who confirmed that the "all-in" rate had increased to \$25.64. (*Id.*) Varen explained to Bigelow that "General Motors had a policy of increasing the 'all-in rate' for housekeeping contractors whose employees

unionize.” (*Id.*) GM’s purchasing department determines the billing rates for GMCH’s subcontractors. (*Id.*)

Twenty employees voted to be represented by the UAW. (*Id.* at 1, n.1) Five employees voted against representation. (*Id.*)

III. PROCEDURAL HISTORY

A. Hearing Officer’s Report

EMS filed objections to the election. EMS contended that in the critical period leading up to the election (1) the UAW impermissibly negotiated wage increases for the employees with General Motors even though it was not the employees’ exclusive representative; (2) the UAW made material misrepresentations that it had negotiated with General Motors for a wage increase that would be incorporated in a collective bargaining agreement between the UAW and EMS; (3) the UAW failed to inform employees that its agreement with General Motors was contingent on local GMCH management requesting the increase, which it would not do, and any increased payment to EMS would lead to a reduction in the scope of services which would require a reduction in force or reduced work hours; and (4) the UAW impermissibly represented to employees that it had the authority to negotiate with GM on their behalf even though GM does not employ them or control their terms and conditions of employment.

After a hearing and subsequent briefing, the Hearing Officer recommended that the objections be overruled. In regards to the first objection, she found that “the evidence produced in the hearing in this matter does not establish that the UAW negotiated terms and conditions of employment for the bargaining unit employees with General Motors or any other entity. Instead, the UAW sought to hold General Motors to its long standing commitment to the UAW that it would pay housekeeping contractors at a rate that would enable those contractors to pay a living

wage to their employees if they negotiated higher wages and benefits. . . . The UAW expressly told employees that it could not promise [them] anything and that any increases in their wages and benefits would have to occur at the bargaining table.” (*Id.* at 7)

With regard to the second objection, the Hearing Officer found that “EMS failed to produce any evidence that the UAW made false statements regarding General Motors’ commitment to supplement the contract between GMCH and EMS in order to sway employees’ votes.” (*Id.* at 8) Instead, “the UAW told the employees a historical fact. General Motors has paid subcontractors of unionized housekeeping employees a rate that allows the subcontractors to pay their employees a ‘living wage’ in the \$14.88 range and some benefits.”

With regard to the third objection, the Hearing Officer found that “the evidence does not establish any contingent nature or implications of a billing rate if it occurred.” (*Id.* at 9) This was because any implications or contingencies were entirely speculative. “The UAW had no knowledge to impart on the employees and no duty to inform employees of such speculative outcomes.” (*Id.* at 10)

Finally, relying on findings supporting her decision to overrule Objections 1 and 2, the Hearing Officer rejected Objection 4 because “[t]he evidence does not establish that the UAW gave employees the impression that it had negotiated wage increases for them with General Motors.”

The Hearing Officer recommended that all the Employer’s objections be overruled and an appropriate certification issued. (*Id.* at 11)

B. EMS’s Exceptions

EMS submitted five exceptions to the findings and conclusions in the Hearing Officer’s Report. First, EMS excepted to the Hearing Officer’s finding and conclusion that “the UAW

sought to hold General Motors to its long standing commitment to the UAW that it would pay housekeeping contractors at a rate that would enable those contractors at a rate that would enable those contractors to pay a living wage to their employees if they negotiated higher wages and benefits.”

Second, EMS excepted to the Hearing Officer’s finding that “EMS failed to produce any evidence that the UAW made false statements regarding General Motors’ commitment to supplement the contract between GMCH and EMS in order to sway employees’ votes.” Included in that exception, according to EMS, is an exception to the Hearing Officer’s finding that “[t]he UAW’s message was that they had ‘verified’ that a long standing commitment was still applicable and would be applied to the GMHC [sic] facility and that commitment would make it possible for EMS to pay its employees more under its contract with GMCH.”

Third, EMS excepted to the Hearing Officer’s conclusion that “[i]nstead of resembling a case where a party makes false statements to unlawfully sway employees’ votes, this situation more resembles a case where employees are told a historical fact.”

Fourth, and finally, EMS excepted to the Hearing Officer’s finding that the UAW did not mislead “the employees to believe that General Motors only offered the higher contractual rate to subcontractors whose employees are organized” because “[f]rom the evidence in the record this appears to be an accurate statement.”

IV. ARGUMENT

EMS’s exceptions are based on two themes: whether the Union made a material misrepresentation that GM’s commitment to pay its contractors a living wage was only available to organized employees and whether the Union made last-minute promises that it was in the unique position to back up. EMS’s exceptions are in tension with each other: its argument about

the material misrepresentation assumes the existence of a long-term agreement while its argument about a last-minute promise assumes that there was a last-minute arrangement. But at bottom, EMS's exceptions assume that the UAW communicated to the employees that only the UAW could secure the existence of a wage and benefit increase that GM had already promised. This is a brand new argument by EMS for which there is no support in the evidence. Accordingly, it should be rejected and the certification should be issued.

A. The Union never Materially Misrepresented the Facts of GM's Commitment to Pay a Living Wage.

In the Post-Hearing Brief in this case, EMS argued that the "UAW misled the employees by misrepresenting the terms of the agreement that the UAW had negotiated with GM in at least three material respects." (EMS Post-Hearing Brief at 18) "First, and as set out more fully in Objection 3 [re: the contingent nature of the agreement], the Union failed to provide accurate information about the contingencies that remained before a billing rate increase could be enacted." (*Id.* at 19) "Second, by representing that GM would be funding the wage and benefit increases, EMS employees were left with the clear impression that it would have no adverse impact on their jobs." (*Id.*) "Third, the Union's statements misled the employees about the bargaining process itself." (*Id.*) "In other words, the employees expected GM to be a party to the negotiations, thereby securing their expected wage and benefit increases, which of course is patently false." (*Id.* 19-20).

But in its exceptions to the Hearing Officer's Report, EMS's makes an entirely new argument. EMS now excepts to the Hearing Officer's failure to make a finding that EMS never asked her to make: that the UAW materially misrepresented the terms of its prior agreement with GM by indicating to employees that only unionized employees could get an increased rate. This

argument was not part of a pending objection and the issue was not addressed in EMS's post-hearing briefs. It should be considered waived.

To support this brand new argument, EMS cherry-picks the communications from UAW representatives to EMS employees and ignores the Hearing Officer's explicit finding that the UAW was responding to EMS's communications to employees that no more money was available to increase their wages and benefits. The evidence before the hearing officer demonstrated that the UAW was counteracting EMS's communications by pointing out that EMS's characterization of historical facts was incorrect. It is disingenuous for EMS to now claim that the Union misled the Employees about GM's commitment to pay increased wages when, at the time, EMS was explicitly telling employees that *it could not pay an increase in wages at all*.

The Board has held that where the union communicates information to counter the employer's message, the employer has no standing to complain. For example, in *B.J. Titan Service Company*, 296 NLRB 668 (1989), the employer contended that the election should be set aside because a supervisor friendly to the union had advised employees that the Company manager would retaliate against them for organizing, but the union might be able to protect them. The Board concluded that the objection was not grounds for overturning the election, stating:

Under the Employer's theory, whenever an employer threatened employees with retaliation and a union promised to seek to protect them against such retaliation, an election victory by the union would have to be found tainted by the combination of employer threats and union promises. Such a proposition is contrary to the well-established principles that "a party to an election is ordinarily estopped from profiting from its own misconduct," *Republic Electronics*, 266 NLRB 852, 853 (1983), and that statements that stress the benefits of union representation in terms of job security constitute "permissible partisan appeal[s] for union support." *NLRB v. Superior Coatings*, 839 F.2d 1178, 1181 (6th cir. 1988); see *Smith Co.*, 192 NLRB 1098, 1101 (1971).

296 NLRB at 668.

This reasoning is fully applicable here. EMS's message to employees was that it was futile for them to select the UAW as a bargaining representative because there was no money available for increased wages or benefits. This was a powerful argument because an employee could reasonably conclude that there was no point in selecting the UAW when the UAW could not obtain any improvement in wages or benefits because there was no money from which increased wages or benefits could be paid. As it was EMS that made the availability of resources an issue, it should be estopped from complaining that the UAW demonstrated to employees that its claims were false.

Moreover, none of the evidence at the hearing showed that there was any discussion about whether or not an employee had to be in a Union to receive GM's promised benefits. Instead, all the evidence in the case concerned whether there was any possibility the rate would increase *at all*. EMS said that there was no possibility. So, when Organizer Lynee Walters communicated to employees that "GM purchasing has committed to the uaw inl union to compensate EMS for your wage and benefit increases if you guys form your union," she was specifically combating EMS's contention that if the employees "form your union," there will be no more money to pay them.

The UAW's message with respect to General Motors was tailored to refute the specific claim about the futility of bargaining that EMS was making. That claim assumed that the Company would bargain with the UAW in order to demonstrate to employees that the bargaining would not produce any increase in wages or benefits. EMS made a claim about what would happen in bargaining, and the UAW refuted that claim. EMS told employees that if the UAW won the election, it would not do them any good because bargaining could not yield wage and benefit increases because EMS did not have money to fund such increases and General Motors

could not afford to pay EMS any more than it was paying. Thus, the futility argument that EMS presented included the assumption that EMS and the UAW would engage in bargaining and attempted to persuade employees that such bargaining would not do them any good because no wage or benefit increases were possible. The UAW's response to this argument made *the same assumption*, i.e. that EMS and the UAW would engage in bargaining, and refuted the Company's claim of futility by truthfully advising employees that General Motors would pay EMS more to compensate EMS for any gains won by employees at the bargaining table.

EMS relies on the testimony of Rich Mince to establish that the "living wage" commitment made by GM was not contingent on UAW membership. Mince never indicated it was. Indeed, the context of Mince's testimony reveals that the issue he was addressing was EMS's ability to pay, not whether payment was contingent on whether the Company was organized.

I was informed at a later date that the employees of EMS were being told in some kind of a plant meeting that it would be of no avail for them to be union members because the company, EMS, was paying them, according to what I was told that they paid them as much as they could afford to pay them, and that GM was going broke and couldn't afford to pay any more than that. That just didn't strike true to me

(Tr. 193) The entire bulk of the evidence, as the Hearing Officer found, shows that the references to GM's commitment to pay the living wage were made to rebut EMS's own communications that the payment was impossible.

The UAW cannot be faulted for failing to explain what General Motors would do if the employees voted against representation when the message it communicated was designed to address EMS's claim about what would happen if the employees did select the UAW as their representative. *See B.J. Titan Service Company*, 296 NLRB 668 (1989), discussed, *infra*, at page 10-11.

It does not follow from the fact that the UAW told employees that it had been able to negotiate higher wages and benefits for other housekeeping employees at GM plants and, in the process, debunked a misrepresentation EMS was spreading about the availability of money to fund these wages and benefits, that the UAW communicated to the employees that such benefits were *only* available to UAW members.

EMS's exceptions numbered 1, 2, and 4 all rely on the proposition that the Union communicated to the employees that a raise in pay and benefits could only happen if the employees joined a union and the proposition that this communication was false. That communication was never made. Exceptions 1, 2, and 4, should therefore be overruled.

B. GM and the Union did not Strike a Last Minute Agreement

Again, as the Hearing Officer found, and EMS does not dispute, GM made a commitment to the UAW to pay its housekeeping subcontractors a living wage when it secured the UAW's agreement in 2007 to allow it to subcontract the work. When the UAW began an organizing campaign at the GMCH Kokomo facility that had contracted its housekeeping services to EMS, EMS claimed to its employees that because of its contract with GM, no money was available to pay any wage or benefit increases and employees should not vote for the Union.

In its argument supporting exceptions numbered 1, 2, and 4, EMS concedes that GM had made this commitment and concedes that EMS told its employees that it could not fund any pay increases. The evidence in the record seems to indicate that EMS was not aware that GM would be willing to fund wage and benefit increases for employees. The evidence in the record shows that the UAW was aware of this and repeatedly tried to get GM to communicate its position to EMS so that EMS would stop communicating contrary

information to the employees. The credited testimony of GMCH Plant Manager Kent Eaton confirms this as well as the testimony of EMS General Counsel Erik Bigelow, who testified that GM told him that it was willing to fund pay increases for plants “in the event of organization or unionization.” (Tr. 162)

Bigelow’s testimony shows a massive breakdown in communication between EMS and GMCH’s Kokomo Plant Management and between GMCH’s Kokomo Plant Management and GM’s purchasing department which was responsible for the EMS contract. From the record, it appears that GM did not notify EMS of its commitment to the UAW until the eleventh hour. Bigelow testified that Eaton told him that “he was essentially instructed to stand down, to not return my phone call at the time.” Bigelow further testified that after talking to Eaton, Bigelow “felt like a major curveball had been thrown [his] way and that they [GM] might’ve been responsible for it.” (Tr. 160)

Communications breakdowns between GM, GMCH, and EMS are not attributable to the UAW. It does not follow from the fact that GM did not communicate to EMS that it was willing to pay more for housekeeping services than it was, that no such arrangement existed in 2007 or that the arrangement was the result of an 11th hour deal, as EMS now seeks to characterize it. Indeed, as the Hearing Officer found, the record evidence shows profound puzzlement on the part of UAW representative Mince and Walters when they were told by EMS that they could not receive any more money from GM. The Hearing Officer credited the fact that Walters made repeated communications to GM to communicate to EMS the commitment that GM had previously made to the UAW about the living wage. (Hearing Officer’s Report at 4)

Confirming General Motors' willingness to honor its housekeeping commitment did not constitute an impermissible promise of benefit because the commitment was not new. It was established five years earlier and was simply being applied in Kokomo as it had been applied in more than fifty other General Motors' locations around the country.

Because it had been established years earlier and applied throughout the country, the announcement of General Motors' commitment to increase its payments to EMS is not grounds for overturning the election even assuming *arguendo* that it could be construed as a benefit. Although the announcement or grant of new benefits may serve as grounds for overturning an election, an announcement of established benefits is permissible and does not warrant setting aside the election even if the benefits were previously unknown to the employees. In *Huttig Sash and Door Company*, 300 NLRB 93, 96 (1990), the employer permissibly announced, on the day before the election, that employees would become eligible at a later date for a previously undisclosed pension. The announcement was permissible because the benefit pre-existed the union campaign even though at the time of the election the pension plan did not yet apply to the employees eligible to vote in the election. The company at which the election was taking place had recently been purchased by another company, and the parent company's pension would, upon ratification by the Board of Directors, become applicable to employees at the purchased company one year after the purchase. The Board concluded that the employer's announcement of the previously unknown benefit was permissible. *See, also Scotts IGA Foodliner*, 223 NLRB 394 fn. 1 (1976), *enfd. mem.* 549 F.2d 805 (7th Cir. 1977) (employer's announcement during union campaign of the availability of certain existing insurance benefits did not violate Section 8(a)(1)) and *Automated Products*, 242 NLRB 424 (1979).

Moreover, as the Hearing Officer found, the Union continually emphasized to EMS employees that any gains had to be negotiated at the bargaining table. The entire thrust of the Union's position was that, as discussed above, EMS's representations about the limitations of their contract with GM were inaccurate. Contra EMS, the UAW informed employees that it was possible for the employees to negotiate increased wages and benefits at the bargaining table. Accurately communicating that a wage increase was possible to counteract EMS statements that it was not cannot be the basis to set aside an election.

V. CONCLUSION

For the foregoing reasons, the Hearing Officer's Report should be adopted and the appropriate certification should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by e-mail, this 3rd day of May, 2013, upon the following counsel of record:

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