

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

## Advice Memorandum

DATE: June 18, 2013

TO: Cornele A. Overstreet, Regional Director  
Region 28

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

SUBJECT: Sub-Zero, Inc.  
Case 28-CA-096303

512-5006-0100-0000  
512-5006-5050-0000  
512-5006-5063-0000  
512-5006-5065-0000  
512-5006-6733-0000

This Section 8(a)(1) case was submitted for advice as to whether the Region should issue complaint alleging that the Employer violated the Act by making statements to employees regarding the effect that unionization would have upon communications between the Employer and employees, and use this case as a vehicle to take up Board Member Block's suggestion<sup>1</sup> that the Acting General Counsel urge the Board to overturn *Tri-Cast, Inc.*<sup>2</sup> While we conclude that under the Board's case law prior to *Tri-Cast*, the Employer's statement that one of the perks of being union-free is that employees could speak directly to the Employer and not have to go through the Union would be considered unlawful, this case is not a good vehicle to urge the Board to overturn *Tri-Cast*. Accordingly, the Region should dismiss the instant charge, absent withdrawal.

### FACTS

Sub-Zero, Inc. ("Employer") is a Wisconsin corporation, with business operations in Goodyear and Phoenix, Arizona, where it has been engaged in the manufacture and sale of built-in home refrigerators. The Sheet Metal Workers' International Association, Local Union #359, AFL-CIO ("Union") currently represents employees working at the Employer's Goodyear facility, but does not represent the Phoenix facility employees.

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<sup>1</sup> See *Dish Network Corp.*, 358 NLRB No. 29 (Apr. 11, 2012) slip op. at 1-4 (Block, concurring).

<sup>2</sup> *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

The Charging Party, a former employee at the Phoenix facility, filed the current charge alleging violations of Section 8(a)(1) and (3) of the Act. The Region did not find merit to the Charging Party's allegation that he was unlawfully discharged. However, the investigation revealed that during the Employer's July, August, and September monthly meetings with employees at the Phoenix facility, the Employer's Human Resources Manager stated that the Employer wanted to remain union-free and made other statements regarding the effect that unionization would have on the Employer's relationship with employees. The Charging Party testified that she stated:

- “we want to have open communication with you guys”;
- “one of the perks of being union-free” is that employees could speak directly to the Employer and not have to go through the Union; and
- the Employer “wanted the facility to remain union-free so that way there would be better communication between employees and the Employer.”

There were approximately 50-60 employees in attendance at these meetings.

### ACTION

While we conclude that under the Board's case law prior to *Tri-Cast*, the Employer's statement that one of the perks of being union-free is that employees could speak directly to the Employer and not have to go through the Union would be considered unlawful, this case is a not good vehicle for urging the Board to overturn *Tri-Cast*.

In *Tri-Cast*, the Board held that statements by employers to employees indicating that their relationship will change if employees select union representation are permissible if they are not coupled with a threat, either explicit or implied.<sup>3</sup> In that case, the employer wrote in a letter to the employees that if the union were to come in, the employer's policy of working with employees “on an informal and person-to-person basis” would change. The employer also informed employees that it would have to adhere to policies “by the book” with a stranger and would be unable “to handle personal requests as we have been doing.”<sup>4</sup> In overruling the petitioner's

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<sup>3</sup> 274 NLRB at 377.

<sup>4</sup> *Id.*

election objections, the Board found that these statements did not amount to unlawful threats.<sup>5</sup>

In *Dish Network*, the Board applied its holding in *Tri-Cast* to find that the employer did not violate Section 8(a)(1) of the Act by telling employees that if they selected the union “they would be limited in bringing concerns to management.”<sup>6</sup> In a concurring opinion, Board Member Block acknowledged that under current Board precedent the employer’s statements were lawful, but stated her belief that the Board should reexamine *Tri-Cast* in a future case.<sup>7</sup> She noted that *Tri-Cast* has come to stand for the proposition that any employer statement regarding the impact of unionization on employees’ ability to individually pursue grievances is permissible, resulting in tension with the rights accorded employees in Section 9(a) of the Act. She stated that such statements allowed the employer to “implicitly misstate” the law by telling employees that if they chose union representation they would lose the right to individually bring complaints directly to management, even though the proviso to Section 9(a) makes clear that the union’s exclusive status does not prevent employees from bringing grievances to management on their own.<sup>8</sup> Board Member Block cited cases decided prior to *Tri-Cast*, where the Board consistently held that statements that employees would lose the right to go directly to management if they chose union representation were unlawful.<sup>9</sup> The Board had typically viewed such statements as a threat to take away existing benefits.<sup>10</sup> She pointed out that in *Tri-Cast*, the Board

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<sup>5</sup> *Id.* See also *United Artists Theatre*, 277 NLRB 115 (1985) (statement informing employees that they would vote away their rights to deal directly with the management did not violate Section 8(a)(1)).

<sup>6</sup> *Dish Network*, 358 NLRB No. 29, slip op. at 1, n.1, *supplemental decision*, 359 NLRB No. 32 (Dec. 13, 2012) (finding Board had authority to revisit *Tri-Cast* in the instant case, but declining to do so).

<sup>7</sup> *Id.*, slip op. at 1.

<sup>8</sup> *Id.*, slip op at 1-2.

<sup>9</sup> *Id.*, slip op. at 2, n.3.

<sup>10</sup> *Id.* slip op. at 2. See, e.g., *Graber Mfg. Co.*, 158 NLRB 244, 247 (1966), *enforced*, 382 F.2d 990 (7th Cir. 1967) (“[T]he employees’ statutorily protected right to present their own grievances and thus speak for themselves is undoubtedly a right cherished by many employees and Respondent’s statement that if the Union became their representative it would talk to the employer about their own job affairs to their exclusion amounted to a threat that they would lose a substantial benefit.”). See also *Reidbord Bros. Co.*, 189 NLRB 158, 162 (1971) (employer violated Section 8(a)(1) by

had “departed from this principle, with minimal analysis.”<sup>11</sup> Board Member Block therefore stated that the Board should reexamine its *Tri-Cast* doctrine in another case where the issue is squarely presented.<sup>12</sup>

We first conclude that, in the instant case, the Employer’s statements are lawful under the Board’s *Tri-Cast* doctrine. Even under the Board’s pre-*Tri-Cast* analysis, the Employer’s statements that communication between employees and the Employer would be better if the facility remained union-free, and that it wants to have open communication with the employees are lawful because they simply represent the Employer’s opinion regarding unionization.<sup>13</sup> Employers may lawfully state their preference to remain nonunion, and are permitted to express their views on whether employees should choose a labor organization to represent them so long as their comments regarding unionization are unaccompanied by threats of reprisal, promise of benefits, or other coercion.<sup>14</sup> And, the most troubling statement -- that one of the benefits of being “union-free” is that employees could speak directly to the Employer and not have to go through the Union -- is clearly privileged under *Tri-Cast* and the majority opinion in *Dish Network*.

However, before *Tri-Cast*, the Board had held similar statements unlawful. In *Tipton Electric Co.*,<sup>15</sup> the Employer’s president, in a letter, stated:

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telling employees that they could not “go directly to the supervisor and register a complaint” once a union became employees’ representative); *Colony Printing & Labeling*, 249 NLRB 223, 224–225 (1980), *enforced*, 651 F.2d 502 (7th Cir. 1981) (violation of Section 8(a)(1) to tell employees “when you sign, you give away your right to talk to us about your pay, your benefits, the hours you work, and about your job”).

<sup>11</sup> 358 NLRB No. 29, slip op. at 2.

<sup>12</sup> *Id.*, slip op. at 1.

<sup>13</sup> See *Children’s Center for Behavioral Development*, 347 NLRB 35, 35-36 (2006) (Section 8(c) gives employers the right to express their opinions about unionization or the union’s actions, absent threats of reprisal or promises of benefits).

<sup>14</sup> See *Langdale Forest Products Co.*, 335 NLRB 602, 602 (2001) (“absent threats or promise of benefit, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees, in an effort to convince them that they would be better off without a union”). See generally *NLRB v. Gissel Packing Co.*, 395 US 575, 617-19 (1969).

<sup>15</sup> 242 NLRB 202 (1979).

[w]ith a union, you would lose your right to speak and act as an individual in matters that affect your job. You could no longer contact me directly or anyone else in the organization with your problems, but would have to speak and act through the union.<sup>16</sup>

The president and executive vice-president continued to relay that theme to unit personnel during prepared speeches read over the next couple of months.<sup>17</sup> Relying upon the Board's holding in *Reidbord Bros. Co.* that such misstatements of the law constituted a threat of a loss of benefits in reprisal for electing a union,<sup>18</sup> the Administrative Law Judge, affirmed by the Board, held that those statements violated Section 8(a)(1).<sup>19</sup>

Similarly, here the Employer's statement that "one of the perks of being union-free" was that employees could speak directly to the Employer and not have to go through the Union misstated the law to the extent that it implied that this would not be the case if the facility was unionized, and implicitly threatened the loss of this "perk" if the employees chose union representation. Therefore, we conclude that the statement is unlawful under Board law prior to *Tri-Cast*. Nevertheless, we conclude that this case is not a good vehicle to urge the Board to set aside the *Tri-Cast* doctrine for the following reasons.

First, we find the statement in the instant case to be weak due to its ambiguity. This single oral statement, delivered by the Employer's representative in the context of the Employer expressing its opinion about the advantages of remaining union-free, could be interpreted merely as an expression of the Employer's opinion of what the union might require. In this regard, the statement is a much weaker "threat" than the employer's conduct in *Tipton Electric Co.*, where the employer repeatedly and explicitly informed employees that they would categorically lose the right to contact management directly and would have to speak and act through the union. Likewise, in *Taylor Motor Inc.*, Case 10-CA-88433, a case in which the Acting General Counsel amended the complaint in order to place *Tri-Cast* before the Board, the violative language was more explicit. There, the employer provided employees with a handout that stated:

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<sup>16</sup> *Id.* at 205.

<sup>17</sup> *Id.*

<sup>18</sup> *Reidbord Bros. Co.*, 189 NLRB at 162.

<sup>19</sup> *Tipton Electric Co.*, 242 NLRB at 206.

[a]ll employees would lose their right to have individual discussions with management if the union wins an election here at the depot. No one would be able to go to the front office and discuss privately their own personal desires or opinions regarding hours, assignments, or working conditions. You could not talk to management about your job without having a union steward present.

This statement explicitly misstated the law and threatened a loss of benefit.<sup>20</sup>

Second, here there was no other unlawful conduct. The Region has determined that the other allegations should be dismissed, and that the charge would be amended to include only the allegation of this statement. In *Tipton Electric Co.*, the employer committed multiple other Section 8(a)(1) violations, which the Board found merited a remedial bargaining order, including creating the impression of and engaging in surveillance, promising improved pay and granting that pay after the election, telling employees if the union was voted in a strike was inevitable, and denying a transfer to an employee because of union activity.<sup>21</sup> Similarly, in *Taylor Motor*, the employer committed additional serious violations, such as illegally discharging two employees during the organizing campaign, promising benefits, soliciting grievances and promising to remedy the grievances, encouraging employees to revoke signed union authorization cards, and telling employees that it would be futile to select the union as their representative.

For these reasons, this case is not a good vehicle to urge the Board to overrule *Tri-Cast*. Accordingly, the Region should dismiss the instant charge, absent withdrawal.

/s/  
B.J.K.

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<sup>20</sup> That case has since settled and been closed on compliance.

<sup>21</sup> 242 NLRB at 202-03.