

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

Advice Memorandum

DATE: September 19, 1995

TO : Roy H. Garner, Regional Director
Region 28

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 518-4020-6700
518-4020-8300

SUBJECT: Levi Strauss & Co. 518-4040-5000
Case 28-CA-13155 518-4040-5050
518-4070

This case was submitted for advice as to whether the Employer violated Section 8(a)(2) by (1) permitting the Union, which represents employees at other Employer facilities, to work temporarily on a "redesign team" to improve operations at an unrepresented facility; (2) suggesting to the unrepresented employees that their permanent participation in such a partnership, through selection of the Union as their bargaining representative, would be good for the company and the employees; and/or (3) providing the Union with extensive organizational access to these employees, including permitting the holding of organizational meetings on paid time at the Employer's premises.

FACTS

ACTWU (the Union) is a large, national union, affiliated with the AFL-CIO, that represents thousands of employees nationwide.¹ It represents employees at 16 of the Employer's 43 plants, where it has engaged in hard bargaining with the Employer over the course of many years. The Employer's Albuquerque plant, the only facility involved in this charge, employs approximately 600 unrepresented employees.

The Employer and the Union entered into a national Partnership Agreement in April 1994. This Agreement provides that the Employer and Union will participate in a joint effort to improve quality, productivity and cost-

¹ Shortly after the events described herein, the ACTWU and the ILGWU merged to form a new union, UNITE.

efficiency at the Employer's plants in order to foster the Employer's competitiveness in the world market. The Agreement transforms the Employer-Union relationship from one of adversarial confrontation to one of collaboration, and contemplates the direct involvement of employees, through the Union, in a major redesign of facilities and production processes.

The Partnership Agreement specifically recognizes that "in order for ACTWU to continue to make its considerable investment in helping LS & Co. create high performance workplaces, it is imperative that ACTWU have the opportunity to expand its organization beyond currently represented facilities." The Agreement references the highly adversarial process involved in the Union's previous efforts to organize Employer facilities, which had been a "major source of conflict and disruption of operations," and states that "continuing this approach will threaten the Partnership." To this end, the Agreement provides that the Union's future efforts to organize unrepresented facilities will not be opposed. Furthermore, the Union will be permitted to participate in the redesign process at selected unrepresented facilities, thereby giving the employees there an opportunity to view the partnership at work, in furtherance of organizational activities there.² The Agreement provides that, during this process, the employees will be fully and non-coercively informed about the Union and will "freely choose whether to affiliate with ACTWU." Also, the Agreement stated that the Employer will recognize the Union if a majority of the employees sign authorization cards.

The Employer informed its employees about the Partnership Agreement in the September/October 1994 issue of its national newsletter. The newsletter listed the benefits of "banding together" with the Union, including "a stronger voice among employees in decisions that affect their work; increased plant productivity, cost efficiencies, production attainment; better solutions to

² The Agreement insures that, should another labor organization attempt to organize an unrepresented facility subject to the Agreement, the Union will "take affirmative steps with the AFL-CIO to assert jurisdiction over the unionization of the facility."

problems; a competitive advantage in the apparel industry; resources once put toward opposing the union will now be directed toward more productive projects; assistance in implementing changes that result from the CSSC engineering; and support for the improvements underway at our customer service centers." Most of these benefits were depicted as stemming from increased employee involvement in decisionmaking. In explaining the part of the Agreement relating to redesign efforts and organizational activity at unrepresented facilities, the newsletter stated that: "[t]his does not mean LS & CO is encouraging non-union locations to form ACTWU locals. It does mean that LS & CO recognizes that the union can be an effective way for employees to participate in making decisions." The newsletter stated in several places that employees at unrepresented plants would be given the free choice of whether or not to join the Union.

In February 1995³, the unrepresented Albuquerque plant was selected for an organizational campaign and partnership redesign, as described in the Partnership Agreement. A "redesign committee" was formed, consisting of Plant Manager Michael Barnes, Human Resources Manager Mack Munn, two employees selected by the plant's work teams, and Union representatives Vernon Bennett and Amanda Vesey. The committee was tasked with examining all aspects of the production process and developing ideas for improved efficiency.

From February through early June, the redesign committee, including Bennett and Vesey, had use of an office at the plant and full unsupervised access to the plant floor to observe operations and talk with employees about their jobs and the production process. During these discussions, Bennett and Vesey occasionally answered questions raised by employees regarding Union representation. Bennett and Vesey also attended several work team meetings and employee-management pay task force meetings⁴ as part of their redesign work, and on occasion

³ All dates hereafter are in 1995 unless otherwise noted.

⁴ The pay task force was a team of employees and managers that was created, before the Union's involvement in the plant, to make changes in the pay system. There is no

answered questions regarding the Union and operations at unionized plants. The focus of the Union's shop floor activities and participation in meetings was a redesign of operations; if an employee wanted to discuss the Union at length, Vesey or Bennett made an appointment with him to meet at break time or after work.

In March or April, Barnes and Bennett conducted briefings for the employees, in groups of 75-80, regarding "redesign" and the Union's involvement. All employees attended one of the briefings, which were held on paid time at the plant. Barnes told the employees that the Employer had entered into a partnership with the Union because both organizations shared the goal of employee participation to create a successful, competitive business. Barnes also told the employees that the Employer and Union had recognized that they could not fight one another and be successful. Barnes stated at least once at each meeting that, although the Employer would provide an environment where the employees could become educated about the Union, it was up to the employees to decide whether they wanted to be represented by the Union and he would support whatever decision they made. Bennett reiterated the common goals that had led to creation of the partnership, but also told the employees that the Union wanted to make sure the employees got a fair share of any gains made by the Employer.

On May 10, the Union began holding meetings every two weeks after work at a nearby church. Vesey leafleted outside the plant to inform the employees of these meetings. At these meetings and in the leaflets, Union representatives discussed the benefits of Union membership, including negotiation of a contract subject to employee vote that protected pay and benefits.

In late May, in response to employee questions about the Union during their work team meetings, the Employer and Union held several educational meetings, on paid time at the plant, regarding Union representation. These meetings were conducted in groups of 25 employees, segregated by

evidence that the Union participated in its meetings as anything other than an observer or that it became involved in negotiating pay issues with the Employer.

language preference. Bennett conducted the meetings in English, Vesey conducted the meetings in Spanish, and the Union paid for a Union member from a St. Louis plant to come and translate for the meetings in Vietnamese. Supervisors informed employees about these meetings, but told employees they were not required to attend. Assistant Human Rights Manager David Borrego, the only Employer representative present, started each meeting by reading from a prepared script. He stated that the Employer had decided it could no longer afford an adversarial relationship with the Union and had formed a partnership to work on common goals of employee participation in a successful business. He further stated that:

[A]s a result of the partnership, ACTWU negotiated the right to present their value to employees who were in non-union facilities and to educate and fully inform the employees so they could make a free choice for representation by ACTWU.

We believe ACTWU adds value to our facility by providing an avenue for employees to become fully involved in decision making for this factory.

Our role [as] managers is to be sure everyone is fully informed about ACTWU's organization and what it means to be represented by them and what their value is for you.

We are not here to influence your decision one way or the other, and we will fully support any decision that you reach.

After giving his statement, Borrego left the meetings. The Union representatives then spoke to the employees about the benefits of Union membership and participation in the Employer-Union partnership, including access to information, involvement in decision-making, and the opportunity to negotiate and vote on matters affecting their employment.

On June 6 and 7, the Employer and Union held another series of meetings, at the plant on paid time, to provide

employees an opportunity to sign authorization cards for the Union. Supervisors informed employees of the meetings, but told them that attendance was not mandatory. The Union leafleted outside the plant before the meetings, informing employees that they would have an opportunity to sign cards at the meetings and providing leaflets with slogans and photographs of employees who wanted the Union. Either Barnes or Munn attended each meeting as the sole management representative. Barnes or Munn opened each meeting, using the same script that Borrego had used in the May meetings. In addition, Barnes or Munn showed the employees the authorization cards, and told the employees that if they signed the cards they were indicating that they wanted to belong to the Union, and that management would support whatever decision they made. After answering questions from employees, Barnes or Munn left the meeting. Bennett or Vesey then talked to the employees about the Union and its negotiating power, answered questions, told the employees that a simple majority would determine whether to have Union representation, and said that Linda Jackson from United Way would verify whether there was a majority by counting the cards on June 19. Cards were distributed to those employees who wanted them. The employees sat in a semicircle and everyone could see who took and completed a card.⁵

On June 8 and 9, Charging Party John C. (Carlos) Rey began telling other employees about a meeting he was holding after work on June 12, in the park near the plant,

⁵ The cards state that the signer wants to be a member of ACTWU and authorizes it to be his or her collective bargaining representative. [FOIA Ex. 6, 7(C) and (D)]

to explain his opposition to the Union. He also attempted to post notices regarding the meeting and his opposition to the Union, but Munn took them down at Barnes' direction. Barnes [FOIA Ex. 6, 7(C) and (D)] had these materials, as well as any other materials regarding the Union,⁶ removed because the decision regarding representation had already been made at that point [FOIA Ex. 6, 7(C) and (D)].

On June 9, Vesey asked Barnes if the card check could be expedited to June 12 and he agreed. [FOIA Ex. 6, 7(C) and (D)] at the time of her request, she knew Rey was seeking to garner employee opposition to the Union. However, [FOIA Ex. 6, 7(C) and (D)], the primary reason for originally scheduling a full two week interval before the count was to enable the Union to secure cards from employees who had not been at work during the card-signing meetings. Vesey [FOIA Ex. 6, 7(C) and (D)]knew, from observations at the meetings, that the Union had already obtained a majority and that there was not much point in trying to contact other employees. Vesey gave no indication to Barnes that the count should be expedited because of Rey's activities in opposition to the Union.

Jackson counted the cards on June 12, and verified that 56% of the employees had signed cards. Barnes and Vesey signed a recognition agreement the same day. Only a handful of employees attended Rey's meeting that evening.

Pursuant to an agreement between the Employer and Union, the Albuquerque bargaining unit is included in the current negotiations for a national collective-bargaining agreement. As with all units, a local supplemental agreement will later be negotiated covering local issues.

At no time during the course of these events has any other union attempted to organize, or expressed any interest in organizing, the Albuquerque plant. After Rey filed the charge herein, he tried, without success, to interest several other unions in organizing the employees.

⁶ For some time prior to the card-signing meetings, there had been a sign in the cutting room stating "Vote No Against the Union." The Union did not post any signs around the plant.

ACTION

We conclude that the Employer did not unlawfully assist and support the Union by allowing it to participate in the partnership redesign process at the unrepresented Albuquerque plant, by expressing support for the Employer-Union partnership, or by permitting the holding of organizational meetings on paid time on the Employer's premises.

It is clear that an employer violates Section 8(a)(2) if it recognizes a union, or enters into a collective bargaining relationship, before a majority of the employees has designated that union as their bargaining representative.⁷ The use of the parties' partnership redesign process at an unrepresented facility, to enable the employees to observe Employer-Union cooperative efforts in action before deciding whether to join the Union, created an inherent danger that the parties would engage in a functional collective bargaining relationship before the Union had obtained majority support. Thus, the redesign of production processes, even when directed toward improvements in quality, cost and efficiency, often affects terms and conditions of employment.

Despite the potential for infringement of employee rights, however, there is no evidence here that the Employer and Union negotiated any terms and conditions of employment during the course of their cooperative efforts regarding redesign of production processes.⁸ Moreover, the

⁷ See Wickes Corp., 197 NLRB 860, n. 2 (1972). See also General Motors Corp., Saturn Corp., Case 7-CB-6582, Advice Memorandum dated June 2, 1986 (employer's pre-hire recognition of the union read lawfully as providing recognition upon attainment of majority status where employer and union had not entered into premature "functioning collective bargaining relationship").

⁸ [FOIA Ex. 5

parties did not reach any agreements, even as to production issues, before the Union was selected by the majority of employees as the bargaining representative. In these circumstances, we conclude that the Employer did not violate Section 8(a)(2) by engaging in this unusual procedure. Since the Employer's provision of office space and access to employees on the shop floor was pursuant to the partnership redesign process, and not for organizing purposes, and the Union did not utilize this access for organizing except in rare cases of answering brief employee questions, it too was lawful.

With regard to the Employer's expressions of support for the partnership and permission to hold Union meetings on company time, while it is clear that an employer may not render "unlawful assistance" to the formation of a union by its employees, it is also clear that a certain amount of employer "cooperation" with the efforts of a union to organize is lawful.⁹ The amount of employer cooperation which "surpasses the line and becomes unlawful support is not susceptible to precise measurement. Each case must stand or fall on its own particular facts."¹⁰ The Board and the courts evaluate the totality of the employer's conduct to determine whether its support would tend to inhibit employees in their free choice regarding a bargaining representative and/or interfere with the representative's maintenance of an arms-length relationship with the employer.¹¹

In undertaking this analysis, the Board considers that financial or other employer support for a union has greater adverse impact on employee rights where the employer supports one union in the face of competing organizational campaigns,¹² or supports an in-house committee or otherwise

⁹ Longchamps, Inc., 205 NLRB 1025, 1031 (1973).

¹⁰ 205 NLRB at 1031.

¹¹ See Kaiser Foundation Hospitals, 223 NLRB 322 (1976).

¹² See The Bassick Co., Spring Valley Division, 127 NLRB 1552 (1960).

non-independent entity.¹³ The Board also has held that a history of arms-length dealing between an employer and a union it has lawfully recognized mitigates the impact of employer support.¹⁴

The Board has held that the use of company time and property by an otherwise independent union does not in itself constitute unlawful employer support and assistance.¹⁵ Rather, the Board considers whether the quantum of "indirect pressure," such as directing and paying employees to attend union meetings during work time, and "direct pressure," such as permitting the union to solicit authorization cards in front of management representatives, would "reasonably tend[] to coerce employees in the exercise of their free choice in selecting a bargaining representative." Where both kinds of pressures existed, especially when coupled with a rapid and unverified grant of recognition by the employer, the Board finds unlawful assistance in violation of Section 8(a)(2).¹⁶ On the other hand, the Board has dismissed complaints that presented something less than this combination of coercive factors.

Thus, in Longchamps,¹⁷ a few days after the opening of its restaurant, the employer called a meeting to introduce the newly hired employees to the supervisory staff and explain the employer's policies. At the end of the employer's presentation, an employer official introduced union representatives, turned the meeting over to them, and - together with other supervisors - left the room. The union representatives then explained union benefits and distributed authorization cards, 10 of which were immediately signed and returned to the representatives.

¹³ See Homemaker Shops, Inc., 261 NLRB 441 (1982).

¹⁴ See BASF Wyandotte Corp., 274 NLRB 978 (1985).

¹⁵ See Jolog Sportwear, 128 NLRB 886, 888-889 (1960).

¹⁶ See Vernitron Electrical Components, Inc., 221 NLRB 464, 465 (1975).

¹⁷ 205 NLRB at 1025.

Later the same day, a supervisor directed four employees to leave their work stations and report to a room where the union representatives successfully solicited their authorization card signatures. About two and a half weeks later, after a card check by a local governmental agency had affirmed the union's card majority, the employer recognized it as the collective bargaining representative. On these facts, the ALJ, upheld by the Board, found that there was no violation of Section 8(a)(2). Based on the totality of the circumstances - including that the employer made no threats or promises, no management representative was present when the employees executed their cards, no other organization was seeking to organize the employees, and there was a check of the cards by an independent authority - the employer's support would not reasonably have tended to coerce the employees.¹⁸

On the other hand, in Vernitron, the employer assembled the employees for meetings with the union on paid time, supervisors told some employees that the employer wanted this union, supervisors were present during the card-signing and could observe which employees executed cards, and the employer, after inspecting the cards himself, granted recognition the same day. The ALJ, upheld by the Board, found that this conduct violated Section 8(a)(2). He acknowledged that, as in Longchamps, there were no employer threats or promises and no other labor organization involved. However, unlike in Longchamps, supervisors were present and observed the solicitation and execution of authorization cards, no neutral source was brought in to verify the card majority, and the employer's

¹⁸ See also Jolog Sportswear, 128 NLRB at 886 (Section 8(a)(2) complaint dismissed where employer permitted union to address employees on company time, management personnel were present during address but not when cards were signed, a card check was conducted by an independent authority, recognition was not granted until one month after the meeting on company premises, and the employer issued statements assuring employees of their free choice and its neutrality); Coamo Knitting Mills, Inc., 150 NLRB 579 (1964) (Section 8(a)(2) complaint dismissed where employer representatives were at card-signing session on company property (during work time for 5 of 170 employees), but were not able to see which employees executed cards).

instant recognition prevented employees who might have felt pressured by the presence of supervisors from having the opportunity to either revoke their authorizations or bring another union into the organizational campaign.¹⁹

The instant case is closer to Longchamps than to Vernitron. The Employer provided some "indirect" pressure on behalf of the Union by permitting organizational meetings on the Employer's premises on paid time. The Employer also spoke, in several contexts, on behalf of the "partnership," which certainly could have been interpreted by employees as a preference for Union representation. Indeed, the Employer's agreement to allow Union participation in redesign efforts at the facility probably led employees to believe that the Employer in some sense favored their selection of the Union as bargaining representative.

However, the Employer put no direct pressure whatsoever on employees - either in the form of requiring attendance at Union meetings; making threats, promises or strong statements encouraging selection of the Union;²⁰ or maintaining a presence at the solicitation or signing of authorization cards.²¹ In fact, the Employer repeatedly

¹⁹ See also The Bassick Co., 127 NLRB at 1552 (8(a)(2) violation found where employer advised union, which represented other facilities, of appropriate time to organize, indicated a willingness to agree to increased benefits prior to organizational activity, held meetings on company time for the union, spoke on behalf of the union, observed card signing, and granted recognition immediately after cards were signed, without independent verification).

²⁰ The Employer did not speak directly on behalf of Union representation, but rather in favor of ending its adversarial relationship with the Union and in favor of a partnership with its employees to involve them in improving productivity. The Employer indicated that representation by the Union was one "effective way" or "avenue" of involving employees in decision-making.

²¹ The fact that, after the Employer left the meetings, employees sat in a circle to sign cards, and could have been observed signing [or not signing] by the Union or

advised the employees that it would protect their right to evaluate all the information available and then freely choose whether to be represented by the Union.

Moreover, the Employer engaged in no other acts of "assistance," such as providing the Union with advice regarding its organizing campaign or agreeing in advance to changes in benefits if the Union were selected. The Employer did not interfere with anti-Union activities.²² Finally, the Employer did not immediately count the cards and recognize the Union, but waited one week before having the cards counted by an independent authority. Although the Union may have expedited the card count in order to preempt the Charging Party's planned opposition meeting, there is no evidence that the Employer agreed to the earlier date because of Rey's activities. In any event, the Union already had a majority at this time, and any circumvention of Rey's tardy opposition had no effect on the result.

On all of these facts, particularly when viewed in the more general context of this case - i.e., (1) no other union has expressed any interest in organizing these employees;²³ (2) the Union is a large national entity with its own financial resources, organizational methodology (which in this case included frequent meetings outside the plant and leafleting), and bargaining agenda, and is not easily susceptible to the ill effects of employer "assistance"; (3) the Union has had a long history of arms-

fellow employees, is not relevant to a Section 8(a)(2) determination.

²² [FOIA Ex. 6, 7(C) and (D)]

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²³ In the absence of any such interest, we do not consider the Partnership Agreement language regarding the use of AFL-CIO procedures in the event of competing claims to be significant in assessing the Employer's motivation for "cooperating" with the Union.

length bargaining and strong representation at other Employer facilities; and (4) the Partnership Agreement itself clearly reflects a balance of benefits and sacrifices for the Employer and Union, rather than a concession by the Union to the Employer's interests - the Employer's conduct would not reasonably have either inhibited employees in their free choice regarding a bargaining representative or interfered with the Union's maintenance of an arms-length relationship with the Employer.

Accordingly, the Region should dismiss the Section 8(a)(2) charge absent withdrawal.

B.J.K.