

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

Advice Memorandum

DATE: January 28, 2009

TO : Martha Kinard, Regional Director
Region 16

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

SUBJECT: Tenet Healthcare Corp. and
Park Plaza Medical Center 501-8434
16-CA-26363 512-5018-0100
512-5084-0100
Tenet Healthcare Corp. and 518-0120
Cypress Fairbanks Medical Center 518-4020-0100
16-CA-26364 518-4020-5000
518-4020-6700
California Nurses Assoc./National 518-4020-8333
Nurses Organizing Committee 536-2570
(Tenet Healthcare Corp. and
Park Plaza)
16-CB-7753

California Nurses Assoc./National
Nurses Organizing Committee
(Tenet Healthcare Corp. and
Cypress Fairbanks)
16-CB-7754

These cases were submitted for advice on the following issues arising from the parties' Election Procedure Agreement (EPA):

1. Whether the EPA unlawfully supplants or subverts the Board's role in the election process for certifying employees' bargaining representative. We conclude it does not because the parties may lawfully agree to limit their conduct during organizing campaigns and present their election disputes for resolution by an arbitrator.
2. Whether the EPA allows unlawful assistance by requiring the Employer to grant the Union access to its hospitals and provide information to the Union about its employees. We conclude the Employer did not provide unlawful assistance because its conduct would not tend to coerce employees.

3. Whether the EPA infringes on protected speech by limiting the Employer's communication with employees about the Union; specifically, by prohibiting supervisors from discussing the Union with employees. We conclude the EPA does not infringe on protected speech, particularly because the right of supervisors to express their views about the Union is not protected by the Act.
4. Whether the Employer unlawfully discriminated against antiunion employees by denying them access to its conference rooms. We conclude the Employer violated Section 8(a)(1) by denying antiunion employees the use of conference rooms because it had a policy of granting all other requests and discriminated on the basis of content.
5. Whether including the interest arbitration provision in the EPA amounted to unlawful pre-recognition bargaining. We conclude the provision does not amount to pre-recognition bargaining because it does not have the immediate effect of establishing terms and conditions of employment of the unrepresented employees.

Background

Tenet Healthcare Corporation (the Employer) owns or operates numerous acute care hospitals and related businesses in 14 states. The California Nurses Association (the Union) represents registered nurses at nine of the Employer's hospitals in California.

On or about August 18, 2007, the Employer and Union entered into an Election Procedure Agreement. The EPA regulates the parties' conduct during Union organizing campaigns at eight Employer facilities, including the two at issue here: Cypress Fairbanks Medical Center and Park Plaza Medical Center in Houston, Texas.¹ The EPA confines the Union to organizing particular facilities during a

¹ The other six facilities include Lake Point Medical Center in Rowlett, Texas; Houston Northwest Medical Center in Houston, Texas; Centennial Medical Center in Frisco, Texas; Doctors Hospital at White Rock Lake in Dallas, Texas; Hahnemann University Hospital in Philadelphia, Pennsylvania; and St. Christopher's Hospital for Children in Philadelphia, Pennsylvania.

specified calendar year; it is otherwise precluded from organizing those facilities until the EPA expires in 2011. The organizing period for a specific facility begins when the Union requests a list of employees at that facility. The Union has 30 days after receiving the information to submit to the Employer a Notice of Intent to Organize. If the Notice of Intent is not timely filed the Union is precluded from seeking representation at that facility until the EPA expires. Once the Union submits the Notice of Intent, it has 90 days to file a representation petition with the Board.

In January 2008,² the Union began organizing approximately 275 nurses at the Employer's Cypress Fairbanks Medical Center Hospital. It filed a petition in case 16-RC-10833 on March 4. On March 12, the parties entered into an agreement for a consent election which was approved by the Regional Director. On March 27 and 28 a secret ballot election was conducted and the Union won the election by a vote of 119-111.

On April 4, the Employer timely filed with the Board objections to conduct affecting the results of the election. The parties, pursuant to the EPA, also submitted the Employer's objections to an arbitrator. On May 6, the arbitrator overruled all the Employer's objections and the Employer withdrew its objections filed with the Board. On May 7, the Regional Director issued a Certification of Representative certifying the Union as the exclusive collective-bargaining representative of the unit employees at the Employer's Cypress Fairbanks facility. The parties are currently engaged in collective bargaining for an initial contract for that facility.

In the summer of 2008, the Union began organizing approximately 250 nurses at the Employer's Park Plaza Medical Center Hospital. On August 28, the Union filed a petition in Case 16-RC-10860 to represent the nurses at that facility.

On August 12, 2008, nurses at each of these two facilities, represented by the National Right to Work Foundation, filed these charges alleging that the Employer and Union violated Section 8(a)(1), (2) and (3) and Section 8(b)(1)(A) of the Act by entering into the EPA.

² All dates 2008 unless otherwise noted.

ACTION

1. The EPA and the Board's Role and Process in Selecting Bargaining Representatives

The Charging Parties contend that the EPA unlawfully supplants and subverts the Board's role and processes.

The EPA establishes a procedure for selecting a bargaining representative at the covered facilities. It provides that a Union's majority status at a particular facility will be determined by a Board consent election. The agreement establishes the appropriate unit for each facility and states that disputed eligibility will be resolved by an arbitrator. The EPA also provides that the Board will count ballots immediately following the conclusion of voting but an arbitrator will have authority to rule on objections to challenged ballots. If a party wishes to file objections to the election on allegations of significant violations of the Agreement, it may file them in writing with both an arbitrator and the Board within five business days of the elections. The arbitrator must resolve the issue within 14 days of receipt and the parties are required to ask the Board to hold such objections in abeyance pending the arbitrator's decision. Upon certification of the election results by the Board, the Employer is required to recognize the Union if a majority of voting employees selected the Union.

The EPA also includes the following provision, in pertinent part:

The parties agree that they will use this Agreement and where not otherwise modified, the guidelines of the National Labor Relations Act, to ensure that a fair and representative election occurs in an appropriate unit as defined above among properly eligible employees.

The EPA also provides that if the Board declares that a part of the agreement is illegal, invalid, or unenforceable, it shall be deemed not a part of the EPA.

We conclude, in agreement with the Region, that the EPA does not unlawfully supplant or subvert the Board's role and process for certifying employees' bargaining representatives. It is well established that unions and employers may enter into a contract to resolve representational issues even where those agreements might

bypass Board procedures.³ It is also well established that the use of arbitrators to resolve labor disputes between parties is strongly favored as a matter of U.S. labor policy.⁴

The EPA is an extension of these principles. The EPA is a private agreement between the parties which provides for resolving disputes in accordance with the favorable means of arbitration. It also provides that election disputes may still be subject to Board review. For instance, the parties have agreed that elections will be conducted pursuant to a Board consent election. The EPA requires that the Board count the ballots for any election and provides that objections may be filed with the Board if they allege significant violations of the EPA. As stated above, after the election at Cypress Fairbanks, the Employer actually filed objections with the Board and only withdrew them after the arbitrator's ruling. In addition, the EPA also provides for Board certification of any election results. Finally, the EPA clearly countenances Board review of its process and procedures by recognizing that the Board might "declare[] that a part of the agreement is illegal, invalid, or unenforceable"

We therefore conclude that the EPA does not "subvert or supplant" the Board's role in the certification process, but merely creates a mechanism and procedure for elections that is subject to arbitral and Board review. Accordingly,

³ See Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1468 (9th Cir. 1992); Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566 (2d Cir. 1993); Georgetown Hotel v. NLRB, 835 F.2d 1467, 1470-1471 (D.C.Cir. 1987); Mo-Kan Teamsters Pension Fund v. Creason, 716 F.2d 772, 775 (10th Cir. 1983). Also see Thomas Built Buses, 11-CA-20038, Advice Memorandum dated September 17, 2004.

⁴ AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986) where the Court recognized a presumption in favor of arbitration; Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964) stating that the fact that an arbitrator presents the possibility of conflict with the Board is no barrier to presenting the matter to the arbitrator rather than the Board; see also Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993) stating that private agreements are not precluded regarding representational matters simply because the Board has jurisdiction over such matters.

the Region should dismiss this allegation, absent withdrawal.

2. Employer Assistance to the Union

The Charging Parties allege that the Employer provided unlawful assistance to the Union pursuant to the EPA by providing it with employee lists, personal information, and access to the hospitals.

At the outset of the eligible organizing period for each facility, the EPA requires the Employer to provide the Union with an initial list of nurses at each facility, containing their names, job title/departments, hospitals, and home addresses.⁵ The Employer is required to provide an updated list within 48 hours of receiving the Union's intent to organize that facility. The EPA also requires the Employer to grant the Union access to exterior areas of the hospital and cafeteria when it receives the Notice of Intent to Organize. Thirty days after receiving such a notice, the Employer is required to grant the Union "full interior access" whereby Union representatives may enter the employee cafeteria and breakrooms of the facility, and the Union may also reserve conference rooms to hold meetings with eligible nurses.

We conclude, in agreement with the Region, that there is nothing unlawful about these provisions. An employer may not render "unlawful assistance" to the formation of a union by its employees; however, a certain amount of employer "cooperation" with the efforts of a union to organize is lawful.⁶ 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."⁷ Thus, the Board and courts evaluate the totality of the employer's conduct to determine whether it tends to inhibit employees in their free choice regarding a bargaining representative and/or to interfere with the representative's maintenance of an arms-length relationship with it.⁸

The use of company time and property by an otherwise independent union does not in itself constitute unlawful

⁵ A nurse may opt out of having its phone number released.

⁶ Longchamps, Inc., 205 NLRB 1025, 1031 (1973).

⁷ Id.

⁸ See Kaiser Foundation Hospitals, 223 NLRB 322, 322 (1976).

employer support and assistance.⁹ 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."¹⁰ Where both kinds of pressures exist, 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).¹¹ On the other hand, the Board has dismissed complaints that present something less than this combination of coercive factors.¹²

Here, there is no evidence that the Employer participated in or endorsed the Union's organizing efforts. On the contrary, the Employer posted notices to the employees stating its belief that it could operate better without the Union, but promising to remain neutral throughout the Union's organizing campaigns. The Employer has not required employees to attend any Union meetings nor threatened any employees for supporting or choosing not to support the Union. There is no evidence that the Employer nor any of its representatives made any statements that would reflect support for the Union. Again, on the contrary, as discussed below, some employees complained because the Employer would not allow its supervisors to discuss unionization with them. Furthermore, the EPA requires the Employer to expressly inform employees that they have a free choice to support or oppose the Union.¹³ Therefore, in light of the absence of any evidence of coercion, we conclude that the Employer did not provide unlawful assistance to the Union by providing it with employee lists, personal information, and access to the hospitals. The Region should therefore dismiss this allegation, absent withdrawal.

⁹ Coamo Knitting Mills, Inc., 150 NLRB 579, 582 (1964).

¹⁰ Vernitron Electrical Components, Inc., 221 NLRB 464, 465 (1975).

¹¹ Id.

¹² See Longchamps, Inc., 205 NLRB at 1031 (1973); 99¢ Stores, 320 NLRB 878, 878 (1996); Jolog Sportswear, Inc., 128 NLRB 886, 888-889 (1960); Coamo Knitting Mills, Inc., 150 NLRB at 581-582.

¹³ See Jolog Sportswear, 128 NLRB at 893.

3. Protected Speech Under the EPA

The Charging Parties also allege that the EPA infringes on protected speech by limiting the Employer's communication with employees about the Union, specifically, by prohibiting supervisors from discussing the Union with employees.

The EPA spells out the information and opinions the parties may provide to employees. It contains a precisely worded message that the Employer must use if it wants to express its opinions and belief that it can best work with its employees without the involvement of a union. The EPA also includes the following provision, in pertinent part:

The Employer's supervisors and managers shall not initiate one-on-one or informal group conversations or communication with the Registered Nurses regarding unionization. This shall not preclude a supervisor from responding to a Registered Nurses question: provided such response is consistent with the terms of the EPA . . .

As a result of this provision, the Employer and Union posted notices stating that supervisors would not initiate conversations and/or discuss the Union with employees. Thereafter, supervisors refused employee requests to discuss unionization.

We conclude, in agreement with the Region, that when the Employer agreed to limit its communications about the Union's campaign to the prescribed terms in the EPA it did not unlawfully restrict protected speech. Section 7 protects an employee's right to express an opinion about unionization, but supervisors are not protected as "employees" under the Act.¹⁴ Rather, as agents of their employers, statements of supervisors are viewed as statements of their employers. Therefore, since it is not unlawful for an employer to agree voluntarily to silence itself during union organizing campaigns,¹⁵ it cannot be

¹⁴ McDonnell Douglas Corp. v. NLRB, 655 F.2d 932, 934 (9th Cir. 1981).

¹⁵ UAW v. Dana Corp., 278 F.3d 548, 558 (6th Cir. 2002); (enforcing neutrality and card-check agreement, pursuant to LMRA §301), citing Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1470 (9th Cir. 1992).

unlawful for the Employer to agree that it's supervisors will remain silent during the campaign.

The Region should dismiss this allegation, absent withdrawal.

4. Denying Access Pursuant to the EPA

The Charging Parties allege that, pursuant to the EPA, the Employer has discriminatorily denied them access to conference rooms based solely on their antiunion message.

Until the parties entered the EPA, the Employer had freely allowed employees to use conference rooms located in its hospital facilities. At Park Plaza, the Employer maintained a written policy for reserving conference rooms, established prior to the EPA. The written policy placed no limitations on the use of the rooms by employees. Although the Employer does not have a written policy at Cypress Fairbanks, its past practice has been to freely grant employees access to the conference rooms. At both locations, employees used the conference rooms for personal celebrations such as birthdays and anniversaries, and for professional meetings among nursing, physician and patient groups. The Employer had also allowed some non-hospital related organizations such as book clubs and religious groups to use the conference rooms. The evidence shows that the Employer had never denied employees the use of a conference room for any reason other than scheduling conflicts.

The EPA provides that the Employer shall not conduct an antiunion campaign or provide assistance to any individual or group who may wish to pursue an antiunion campaign.

Once the Union began its organizing campaigns at the Park Plaza and Cypress Fairbanks locations, the Employer denied the Charging Party employees at both locations the use of a conference room for an antiunion meeting. At Cypress Fairbanks, the Employer explained that providing a conference room for an "informational" meeting would be assisting antiunion activity in violation of the EPA. At Park Plaza, the Employer initially granted use of a room. However, after the Union successfully obtained an arbitral ruling that such "assistance" to an antiunion campaign violated the EPA,¹⁶ the Employer posted a notice denying

¹⁶ Relying exclusively upon Tenet Healthcare Corporation d/b/a Los Gatos and the California Nurses Assoc., 32-CA-21266 and 31-CB-5769, Advice Memorandum dated February 23,

future access and there have been no more employee requests.

We conclude, in agreement with the Region, that the Employer unlawfully discriminated against the antiunion employees by denying them use of the conference rooms for antiunion meetings. The Employer's refusal to grant access here was admittedly based on the content of the employees' antiunion message. Since its longstanding practice at both facilities has been to allow use of the rooms for all other purposes, then the refusal was discrimination along protected Section 7 lines.¹⁷ The Region should therefore issue complaint alleging these violations of Section 8(a)(1), absent settlement.

5. The Interest Arbitration Provision in the EPA

The Charging Parties also argue that a provision of the EPA constitutes unlawful pre-recognition bargaining under Majestic Weaving Co.¹⁸ because it provides for interest arbitration in the event the parties are unable to reach a collective-bargaining agreement.

The EPA provides that the parties will establish bargaining dates within 15 days after the Employer recognizes the Union; they will commence bargaining within 30 days of recognition; and they agree to "exercise good

2005, the arbitrator found that it was lawful for the Employer to deny use of the conference rooms to antiunion employees. In Los Gatos, Advice found that the employer could lawfully deny the antiunion employees access to conference rooms while granting the privilege to the union because finding disparate treatment in violation of 8(a)(1) requires similarly situated groups being treated differently with respect to Section 7 rights. Advice noted that the antiunion employees were not an institution such as a labor organization and had different interests in the election agreement. In relying on Los Gatos, the arbitrator here failed to consider the longstanding practice of unrestricted use of conference rooms at Park Plaza, which differed substantially from the practice in Los Gatos.

¹⁷ See, e.g. D'Alessandro's, Inc., 292 NLRB 81 (1988)(unlawful to single out union for denial of access where employer allowed all other outside individuals and organizations to use property).

¹⁸ 147 NLRB 859 (1964).

faith efforts to reach agreement on a first contract within ninety (90) days of the first contract negotiations." The alleged offensive paragraph provides:

In the event an agreement on all issues has not been reached within this time period, the remaining issues in dispute shall be submitted to a Board of Inquiry (BOI). . . . However, the parties may extend bargaining by mutual agreement A BOI Report shall be submitted to the parties within thirty (30) days of the close of its hearings. If the Board of Inquiry Report is rejected by any party, in whole or in part, any unresolved matter will be subject to final and binding interest arbitration before the Neutral Chairperson

The Charging Parties contend that the parties' agreement to submit a first contract to binding interest arbitration constitutes unlawful pre-recognition bargaining.

In Majestic Weaving, the Board held that when an employer negotiates a collective-bargaining agreement with a union that has not achieved majority status among the employer's employees, the employer violates Section 8(a)(2) and the union violates Section 8(b)(1)(A), even when the recognition and contract are conditioned upon the union's obtaining majority support from the employees.¹⁹ Relying on Majestic Weaving, we have found neutrality agreements unlawful when they contain terms and conditions of employment that would apply to employees if the union obtained majority status.²⁰ In Plastech Engineered Products, Inc.,²¹ we found a neutrality agreement unlawful

¹⁹ Id. at 860, citing Int'l Ladies Garment Workers Union (Bernhard-Altman Texas Corp.) v. NLRB, 366 U.S. 731 (1961).

²⁰ See Thomas Built Buses, Case 11-CA-20038, Advice Memorandum dated September 17, 2004 (finding 8(b)(1)(A) and 8(a)(2) violation where, in neutrality agreement, union agreed to provisions concerning guaranteed transfer rights, severance in the event of layoff or plant closure, strikes and subcontracting prohibitions, and restrictions on overtime, should the union obtain majority status). But see, Guardsmark, Case 7-CA-49745, et al., Advice Memorandum dated February 26, 2007, distinguishing Thomas Built because evidence showed pre-negotiated terms vitally affected existing bargaining unit employees.

²¹ Cases 10-CA-35554 and 10-RD-1440, Advice Memorandum dated June 27, 2005.

where the parties, in advance of recognition, had agreed on many terms and conditions of employment, including binding interest arbitration. We noted that the parties' agreement to an interest arbitration provision in exchange for the union's no strike pledge indicated to employees that the employer had already ceded its authority unilaterally to determine working conditions, thus establishing the union as a representative prior to its receiving majority support.²²

We conclude that the parties here did not violate the Act by including the interest arbitration provision in their EPA. The interest arbitration provision here does not amount to a current agreement by the parties on any specific terms and conditions of employment,²³ but is limited to the procedural issues implicated in future bargaining. It merely requires the parties to submit their proposals to a neutral panel if they fail to reach agreement within a specific timeframe. In similar circumstances, the Board has held that provisions that attempt to resolve future disputes through interest arbitration are not mandatory subjects of bargaining because they do not address present terms and conditions of employment.²⁴ Similarly, the provision here is an attempt to resolve future disputes and neither dictates present terms and conditions of employment, nor suggest what they will be if the Union becomes the majority representative.

Because the interest arbitration provision here does not have an immediate effect, it does not establish terms and conditions of employment and is therefore unlike the one at issue in Plastech, which was part of an agreement that included specific pre-negotiated terms and conditions of employment. In addition, unlike Plastech, it was not a quid pro quo for other negotiated terms. Here, the interest arbitration provision is merely part of the process for resolving disputes if and when the parties bargain in the future. Therefore, since the parties have not agreed to any terms and conditions of employment in

²² Id. at 5.

²³ See Columbia University, 298 NLRB 941, 941 (1990) citing Tampa Sheet Metal, 288 NLRB 322, 326 n. 12 (1998).

²⁴ Tampa Sheet Metal, 288 NLRB at 326 n.12, where the Board found an interest arbitration clause was not a mandatory subject of bargaining because it applied to future contracts, distinguishing Sea Bay Manor Home, 253 NLRB 739 (1980), enfd. mem. 685 F.2d 425 (2d Cir. 1982), where the interest arbitration clause was a mandatory subject because it would apply to the contract then under dispute.

advance of the Union gaining majority support, we conclude that the Employer and Union did not engage in unlawful pre-recognition bargaining. The Region should dismiss this allegation of the charge, absent withdrawal.

Accordingly, the Region should issue complaint on the Section 8(a)(1) discriminatory denial of access allegation authorized above, absent settlement, and dismiss all other allegations, absent withdrawal.

B.J.K.