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

DATE: February 8, 2013

TO: Wayne R. Gold, Regional Director
Region 5

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

SUBJECT: Civista Medical Center
Case 05-CA-088258

512-5006-5067-0000
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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by informing all bargaining unit employees that their reinstatement following a pre-announced, one-day healthcare industry strike could be delayed for four days due to the Employer's contract with a temporary staffing agency, which required the Employer to guarantee a minimum of five days' pay for each temporary replacement. We conclude that the Employer violated Section 8(a)(1) because it misleadingly suggested that the reinstatement of <u>all</u> unit employees, as opposed to only those for whom temporary replacements had been hired, could be delayed. However, the Region should not allege that the statement also violated Section 8(a)(1) because the Employer could not have lawfully delayed the reinstatement of any nurses, including those for whom temporary replacements had been hired. [FOIA Ex. 5

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FACTS

1199 SEIU United Healthcare Workers East (the Union) represents approximately 225 nurses at Civista Medical Center (the Employer). The parties' collective-bargaining agreement expired on March 1, 2012. Soon thereafter, the Employer began seeking temporary staffing agencies capable of providing at least 60 replacement nurses (but not a full 225-member contingent) within 10 days of the Employer receiving a strike notice from the Union. The Employer first contacted Healthsource Global Staffing, which required a down payment on a nonrefundable contract and a minimum 60-hour guarantee for each replacement nurse. On March 27, the Employer contacted U.S. Nursing Corporation. The Employer explained that it

expected a strike, which could last one day, a few days, or an indefinite period. Although the Employer asked about hiring replacement nurses on a day-at-a-time basis, U.S. Nursing stated that it required a minimum guarantee of 60 hours of pay for each replacement because it was required to fly in nurses, credential them, orient them to the hospital, and provide them with lodging, transportation, and meals.

On April 27, the Union provided the Employer with a Section 8(g) notice that all unit nurses would conduct a one-day strike and picketing commencing at 6 a.m. on May 8 and ending at 6 a.m. on May 9. On May 1, the Employer signed a contract with U.S. Nursing for 60 temporary replacement nurses.

On May 2, the Employer issued a letter to all unit employees concerning the planned one-day strike. In that letter, the Employer stated:

> We are preparing for fill-in coverage of striking nurses and we will remain fully operational with no adverse effect to patient care. At this time, we plan to engage highly qualified, agency registered nurses. We are required to commit to a minimum of 5 days in order to contract with this Agency, which will cost the hospital approximately $500,000 dollars. This means that nurses who go on strike may not be reinstated until the agency nurse is released after five days, unless there is a need for an additional nurse on a unit.

The next day, the Union sent a letter to the Employer retracting its strike notice.[1] The parties eventually resolved the issues that led to the decision to strike and entered into a new collective-bargaining agreement.

ACTION

We conclude that the Employer violated Section 8(a)(1) because its statement misleadingly suggested that the reinstatement of all unit employees, as opposed to only those for whom temporary replacements had been hired, could be delayed due to the contract. However, the Region should not allege that the statement also violated Section 8(a)(1) because the Employer could not have lawfully delayed the reinstatement of any nurses, including those for whom temporary replacements had been hired. [FOIA Ex. 5].

[1] The Region has independently found that another portion of the Employer's May 2 letter contained an unlawful threat to permanently replace the nurses, and that the Employer engaged in a series of other violations of Section 8(a)(1), (3), and (5) around this time, including threats of retaliation against employees who chose to strike.

In *NLRB v. Gissel Packing Co.*, the Supreme Court distinguished employer speech protected by Section 8(c) from threats of reprisals violative of Section 8(a)(1).[2] The Court held that an employer may make a prediction regarding the effects of unionization on the company, but that prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at . . . ."[3] On the other hand, if an employer implies that it "may or may not take action solely on [its] own initiative," its statement is a "threat of retaliation based on misrepresentation and coercion" and violates Section 8(a)(1).[4] The Court explained that any assessment of an employer's statements "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[5] The Court concluded by noting that an employer "can easily make his views known without engaging in 'brinkmanship' . . . [and] can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees."[6] For example, in *Reeves Bros., Inc.*, an employer told employees that if they voted for union representation, two customers would no longer want to do business with the company and, as a result, the workweek would probably be cut to three days.[7] The Board found this statement unlawful because it impermissibly "went beyond the objective facts" of what the customers actually said—that they would

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[2] *See* 395 U.S. 575, 618 (1969).

[3] *Id.* (citing *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n.20 (1965) (explaining that it would be unlawful for an employer to interfere with employees' right to organize by threatening to close plant, while it would be lawful for an employer to announce a decision to close already reached by management)).

[4] *Id.* at 618–19.

[5] *Id.* at 617.

[6] *Id.* at 620 (citation omitted).

[7] 320 NLRB 1082, 1083 (1996).

"consider" not doing business with the employer in the event of unionization—and thereby became coercive.[8]

The Board has applied these principles to statements made by employers regarding strikes and the reinstatement rights of striking employees. In *Eagle Comtronics, Inc.*, the Board held that an employer "may address the subject of striker replacement . . . so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent" with the law.[9] In evaluating whether an employer's statement constitutes a permissible articulation of legal rights or an unlawful threat, the Board scrutinizes the language used and the context in which the assertion is made, resolving ambiguities against the employer where the statement would be fairly understood as an unlawful threat.[10]

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[8] *Id. See also NLRB v. St. Francis Healthcare Center*, 212 F.3d 945, 955 (6th Cir. 2000) (upholding Board's determination that employer's prediction that "no company" would affiliate with it if union won election was unlawful because, viewed from employees' perspective, that statement was a material "exaggeration of the objective evidence"; although evidence suggested certain companies were concerned about unionization, it "hardly support[ed] the prediction that *no* company would want to affiliate" with the employer).

[9] 263 NLRB 515, 516 (1982) (finding lawful employer's statement that employees could be replaced by applicants on file because statement was consistent with Board decision concerning permanent replacements). *Cf. Gelita USA Inc.*, 352 NLRB 406, 406–407 (2008) (finding unlawful employer's statement to employees that economic strikers would have no job protection if replaced since this was incorrect statement of law), *adopted by* 356 NLRB No. 70 (2011).

[10] *See L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000) (finding unlawful employer's statement that "employees could go ahead and bring in the [u]nion but when employees went out on strike, he would bring in temporary or replacement workers to replace them" since it conveyed to employees the inevitability of a strike and suggested that employer might welcome or encourage a strike so that it could hire replacements and discharge striking employees; any ambiguity must be resolved against employer), *enforced*, 282 F.3d 972 (7th Cir. 2002); *Rankin & Rankin, Inc.*, 330 NLRB 1026, 1026 (2000) (in light of coercive circumstances, including employer's threats and unlawful discharge of a union organizer, employer's statement that if the union demanded higher wages and the company disagreed, the union could call a strike and the employees could be replaced by new employees who would be hired for less money constituted an unlawful threat); *Santa Rosa Blueprint Service*, 288 NLRB 762, 763 (1988) (noting that although employer's statements initially appeared to simply apprise employees of the risk of engaging in an economic strike and were

Consequently, in analyzing whether the statement at issue here constituted a permissible articulation of legal rights or an unlawful threat, we must first determine when economic strikers have a right to immediate reinstatement. Generally, employees who engage in economic strikes are entitled to immediate reinstatement upon their unconditional offer to return to work unless the employer establishes a legitimate and substantial business justification for delaying their reinstatement.[11] In some circumstances, an employer's contractual commitment to retain temporary strike replacements for a specific period of time, where such a requirement is a condition of obtaining those replacements, constitutes a legitimate and substantial business justification for delaying the reinstatement of striking employees.[12] However, such a contractual provision is not a legitimate and substantial business justification if it was not necessary in order to obtain the temporary replacements.[13] Moreover, this type of provision does not justify delaying the reinstatement of strikers whose displacement was not necessitated by the arrangement.[14]

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couched in conditional terms such as "may" or "if,"" they conveyed to employees that they would lose their jobs and therefore were a threat of reprisal under 8(a)(1)).

[11] *Fairfield Tower Condominium Assn.*, 343 NLRB 923, 924–25 (2004). *See also Sutter Roseville Medical Center*, 348 NLRB 637, 637–38 (2006) (refusing to apply five-day grace period to reinstatement of one-day economic strikers and finding that employer failed to establish legitimate and substantial business justifications for delaying reinstatement of those striking employees who had been temporarily replaced by employer's own managers, supervisors, and non-unit employees). *Cf. NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378–79 (1967) (recognizing that permanent replacement of economic strikers constitutes legitimate and substantial business justification).

[12] *See Pacific Mutual Door Co.*, 278 NLRB 854, 856 & n.12 (1986) (employer lawfully delayed reinstating strikers for 30 days pursuant to contract with company providing strike replacements where 30-day cancellation provision was a necessary condition of employer getting temporary employees from the referring company).

[13] *Harvey Mfg.*, 309 NLRB 465, 469 (1992) (employer's contract with temporary replacement agency did not provide justification for delaying reinstatement of striking employees because there was no basis to find provisions allegedly requiring delay were necessary in order to induce agency to provide replacements and because provisions did not clearly require delay).

[14] *Sutter Roseville Medical Center*, 348 NLRB at 637, 645–47 (employer not justified in delaying reinstatement of striking employees who were replaced by employer's own non-unit employees rather than temporary replacements provided by agency). *Cf.*

Thus, in keeping with *Gissel* and *Eagle Comtronics*, the Board has found that employers violate Section 8(a)(1) by making pre-strike statements inconsistent with these rules.[15] For example, in *Sutter Roseville Medical Center*, the employer responded to the union's notice of a one-day strike by informing unit employees that if there were a strike, strikers would not be reinstated for the following four days due to a five-day temporary replacement contract.[16] Since it was unlawful for the Employer to delay immediate reinstatement of those unit employees who were not replaced by temporary employees obtained under the contract, the Employer's statement was also unlawful.[17]

Here, the portion of the Employer's May 2 letter to employees indicating that their reinstatement might be delayed was unlawful because it misleadingly suggested that the temporary replacement contract would justify delaying the reinstatement of all unit employees. Unit nurses reading the Employer's pronouncement—that it was "preparing for fill-in coverage of striking nurses and . . . [would] remain fully operational with no adverse effect to patient care" and that its "plan to engage highly qualified, agency registered nurses" meant that "nurses who go on strike may not be reinstated until the agency nurse is released after five days, unless there is a need for an additional nurse on a unit"—would have reasonably understood that, in all likelihood, they would all be out of work for four days post-strike due to the Employer's temporary replacement contract. But, under *Sutter Roseville*, the contract

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Roosevelt Memorial Medical Center, 348 NLRB 1016, 1020–21 (2006) (employer justified in minimally reducing scheduled hours of some employees who had planned to participate in cancelled strike given its contractual commitment to pay temporary replacements); *Encino-Tarzana Regional Medical Center*, 332 NLRB 914, 914 (2000) (given General Counsel's concession that temporary replacements had right to remain on the job in preference to strikers for three days following strike, employer not required to displace non-striking "crossover" employees in order to reinstate more senior strikers when there was insufficient work for both).

[15] *See Kingsbridge Heights Rehabilitation Care Center*, 352 NLRB 6, 6 n.1 (2008) (two-member Board decision) (employer's statement to potential strikers that their reinstatement would be delayed for three weeks if they engaged in a three-day strike was unlawful because there was no evidence that employer and temporary replacement agency had reached agreement at the time of the statement), *abrogated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

[16] 348 NLRB at 637.

[17] *Id.* at 637–38, 647.

clearly did not provide a legitimate and substantial business justification for delaying the reinstatement of the approximately 165 unit nurses for whom temporary replacements had not been hired. Thus, the Employer's statement violated Section 8(a)(1).

The Employer's statement that nurses "*may* not be reinstated until the agency nurse is released after five days, unless there is a need for an additional nurse on a unit" (emphasis supplied) was arguably phrased in contingent language and technically left open the possibility that non-replaced nurses would be reinstated immediately after the one-day strike ended. Nonetheless, any technical or grammatical ambiguities must be resolved against the Employer, given its misleading framing of the statement and its ability to "avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees."[18] The statement suggested that the Employer "may or may not take action solely on [its] own initiative," and therefore constituted an unlawful threat.[19]

The Union also argues that the Employer's statement violated Section 8(a)(1) independent of its unlawful overbreadth. First, the Union maintains that the Employer's contract with the replacement agency was not a legitimate and substantial business justification for delaying reinstatement. It emphasizes that since this was a pre-announced, one-day healthcare strike situation, the Employer knew at the time it entered into the replacement contract that the 60-hour minimum payment period would exceed the length of the strike by several days. The Union asserts that the Employer could have brought the strikers back after one day and treated the approximately $500,000 five-day minimum payment to the temporary agency as a very expensive one-day replacement fee; alternatively, the Employer could have totally avoided the replacement fee by accommodating the Union's bargaining demands on the issues leading to the decision to strike, which would have cost a fraction of that amount. Instead, the Employer chose to delay reinstatement post-strike even though that unnecessarily disrupted the continuity of patient care. Thus, in the Union's view, *Pacific Mutual Door Co.*, a non-healthcare industry case in which the employer agreed to a similar contractual provision after employees had

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[18] *Gissel*, 395 U.S. 575, 620.

[19] *See id.* at 618–19; *DHL Express*, 355 NLRB 1399, 1400 (2010) (holding that there is "no significant difference" whether employer stated it "would not" or "might not" retain flexibility not to make a record of minor tardiness if employees selected union; either way, statement constituted unlawful threat because it predicted potential negative actions the employer might take based on employees' unionization).

commenced an open-ended strike,[20] is distinguishable, and the Board's finding in that case that an employer's purely monetary interest was a legitimate and substantial business justification[21] does not apply here. Moreover, the Union likens the threatened delay in reinstatement to a lockout, which would have been unlawful here since the Employer did not inform employees or the Union of specific bargaining demands that they could accept in order to cut short the lockout and gain immediate reinstatement.[22] Finally, the Union argues that even if the contract constituted a legitimate and substantial business justification, threatening to delay the reinstatement of striking employees was "inherently destructive" of their right to engage in lawful, short-duration strikes and therefore violated the Act.[23]

We recognize that the Board has never addressed the issues that the Union raises, particularly the question of whether the rationale of *Pacific Mutual Door* appropriately applies to a short-term strike in the healthcare industry, where the Employer has advance notice of the strike under Section 8(g) and is also aware of its duration. But the Board's holding in *Pacific Mutual Door* was based on the fact that the employer's assent to the contractual provision was necessary for it to obtain the replacements and continue its operation during the strike, and that rationale arguably applies here as well. Moreover, it would be difficult to argue that the Employer's conduct was "inherently destructive" where the impact on employees of a four-day delay in reinstatement would have been no more severe than that occasioned by a lockout or the hiring of permanent replacements, both of which are lawful,[24] and

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[20] *See* 278 NLRB at 854, 856 (employer lawfully delayed reinstating strikers for 30 days pursuant to contract with company providing strike replacements where 30-day cancellation provision was a necessary condition of employer getting temporary employees from the referring company).

[21] *See id.* at 856 & n.12.

[22] *See, e.g., Dayton Newspapers*, 339 NLRB 650, 656–58 (2003) (for lockout to be lawful, employer must clearly and fully inform union and employees of the conditions necessary to gain reinstatement), *enforced in relevant part*, 402 F.3d 651 (6th Cir. 2005).

[23] *See NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (Board may find unfair labor practice where employer's conduct has "inherently destructive" effect on employee rights and that effect is not outweighed by business justification).

[24] *See Sociedad Española de Auxilio Mutuo y Beneficencia de P. R.*, 342 NLRB 458, 461 (2004) ("[A] lockout, standing alone, is not inherently destructive of employee rights[.]"), *enforced*, 414 F.3d 158 (1st Cir. 2005); *Harter Equipment*, 280 NLRB 597, 599–600 (1986) (not inherently destructive for employer to hire temporary

where the delay in reinstatement would not create persistent bargaining-unit cleavages or other long-term obstacles to the future exercise of employee rights.[25] In any event, there can be no violation of Section 8(a)(1) absent some cognizable nexus between the Employer's action and the chilling of Section 7 rights, and the mere making of a decision that is not implemented or communicated to employees would not provide the requisite nexus. The decision here was not implemented because the Union cancelled the strike. And although the decision was communicated to employees, and the Union's cancellation of the strike is evidence of that communication's chilling effect, it is not clear that this particular aspect of the communication, rather than the more clearly unlawful aspects of the Employer's letter (i.e., the permanent replacement threat and the statement's misleading overbreadth), is what led to the cancellation of the strike. Finally, the parties have resolved the issues that led to the decision to strike and entered into a new collective-bargaining agreement. [FOIA Ex. 5

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replacements to continue operations during otherwise lawful lockout), *affirmed sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987); *Hot Shoppes, Inc.*, 146 NLRB 802, 804–05 (1964) (employer may permanently replace economic strikers without any showing of business justification, as "motive for such replacements is immaterial, absent evidence of an independent unlawful purpose").

[25] *Compare Roosevelt Memorial Medical Center*, 348 NLRB at 1020 (finding impact of temporary schedule change that adversely affected some employees who planned to strike not "inherently destructive") *with NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231–32 (1963) (employer's grant of 20 years superseniority to strike replacements and crossovers inherently destructive because it would divide bargaining unit long after strike had ended). *See generally International Paper Co.*, 319 NLRB 1253, 1269–70 (laying out four guiding principles for determining whether an employer has engaged in inherently destructive conduct: (1) the "severity of the harm suffered by the employees for exercising their rights [and] the severity of the impact on the statutory right being exercised"; (2) the "temporal impact of the employer's conduct"; (3) whether the conduct exhibits "hostility to the process of collective bargaining"; and (4) whether the conduct discourages collective bargaining by making employees see it as a futile exercise), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by informing employees that its temporary replacement contract would delay the reinstatement of all striking unit employees.

/s/
B.J.K.