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

DATE: August 28, 2013

TO: Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: Southwest Regional Council of Carpenters and Carpenters Local 1506 (Arok, Inc.)
Case 28-CB-102769

536-2509-0100
536-2512
536-2501-8000
536-2519
536-2527

The Region submitted this case for advice as to whether the Union violated Section 8(b)(1)(A) of the Act by having its members follow employees of the Employer from its main office to various jobsites. We conclude that the Union did not violate the Act because its conduct did not have a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

Arok, Inc. ("Employer") is a metal frame and drywall contractor that has jobs in and around Phoenix, Arizona. Since 2009, Southwest Regional Council of Carpenters and Carpenters Local 1506 (collectively "Union") have been trying to organize the Employer's drywall workers. Over the years, the Union has attempted to pressure the Employer by sending letters to general contractors who hire the Employer. The letters state that the Union has a labor dispute with the Employer because it does not pay area standard wages. In early 2013, the Employer and Union filed charges against each other that arose from their area wage standards labor dispute.

In April 2013,[1] according to a Union special representative, the Union began having five to ten of its members monitor the Employer by following its nonstatutory employees from the Employer's main office to various jobsites around Phoenix. He stated that these members used several different types of cars, often Ford Crown Victorias, but none of the members wore any paraphernalia identifying them as Union agents nor did their cars display any Union insignia.

[1] All subsequent dates are in 2013.

At that time, several vehicles began parking outside the Employer's main office and following many of its employees to various job sites.[2] The employees who reported being followed appear to be managers or supervisors, rather than drywall workers. Approximately twenty nonstatutory employees reported being followed "aggressively" by these cars, claiming that the cars would tailgate them or run red lights to stay close to them. These cars often times were Ford Crown Victorias.[3] None of the individuals who were followed received verbal threats during these incidents. However, the Employer's FOIA Exs. 6, 7(C) & 7(D) states that he and others have been videotaped by the passenger in the vehicle that followed them.

In early April, two vehicles followed the Employer's purchasing manager, who needed to briefly return home to retrieve his phone after arriving for work at 6 a.m. The vehicles parked across the street from the driveway entrance to the purchasing manager's home. However, neither vehicles' occupants got out nor did they have any interaction with the purchasing manager. The vehicles then "aggressively" followed him to a jobsite. Around the same day, a Crown Victoria tailgated the Employer's field superintendent as he left the Employer's main office and proceeded to a jobsite. Some evidence suggests that the driver of this car was the Union's special representative.

In mid-April, the Employer's president voluntarily approached one of the vehicles parked outside the Employer's office, presented the occupants with his business card, and told the occupants to have their boss contact him. Also around this time, two vehicles followed the Employer's purchasing manager when he left the office and went to a Home Depot. The purchasing manager took pictures of the vehicles, including license plate numbers, but there were no Union symbols displayed.

In late April, two Crown Victorias followed the Employer's field superintendent to a jobsite. One of the cars' occupants spoke with the superintendent at the site. He asked the superintendent his name, what position he held with the Employer, and if he was in charge of the Employer's drywall workers.[4] The superintendent answered his questions. Another occupant then approached, and both men told the superintendent that "his guy" (presumably the Employer's president) should get in

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[2] The Employer's president, however, dates the conduct as starting in March 2013.

[3] Employees have provided only general descriptions either of the vehicles that followed them or of their occupants. Moreover, no Union symbols were visible and none of the occupants identified themselves as being with the Union.

[4] The Union denies that any of its members interacted with the Employer's employees.

touch with "their guy." Neither occupant identified himself as a Union member or specified what "their guy" meant. Shortly after this incident, two Crown Victorias followed the field superintendent and a project manager when they left the Employer's office and drove to a jobsite. After the superintendent and project manager left the site, the two Crown Victorias stayed behind.

ACTION

We conclude that the Union did not violate Section 8(b)(1)(A) because its conduct did not have a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights.[5]

The Board will find a violation of Section 8(b)(1)(A) if a union's conduct had a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights, which includes the right to refrain from engaging in union activity.[6] The test is an objective one, and a finding of a violation does not depend on evidence that a particular employee was actually restrained or coerced.[7] Thus, the Board has found union conduct such as the "throwing of rocks and sticks, assaulting employees and supervisors, damaging of trucks and cars, the effective preventing of entry of both people and vehicles onto company premises, tacks in the road, threats from the pickets, fights, beatings, the massing of pickets" to constitute activity that, when directed at employees, would unlawfully restrain or coerce them in the exercise of their statutory rights.[8] By contrast, it has found that lesser conduct directed at

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[5] The Union and the Employer have an ongoing labor dispute over the latter's alleged failure to pay area standard wages and benefits. The Union admits that in April, it began monitoring the Employer by having its members, who often times used Crown Victorias, follow the Employer's employees when they drove away from the Employer's main office. The evidence shows that several incidents involved Crown Victorias following the Employer's vehicles. Based on this evidence, we conclude that it is reasonable to infer that the Union was responsible for the conduct in this case. *See, e.g.*, *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 499, 503 (1993) (inferring from circumstances that local union had unlawfully requested that employer not recall discriminatees because of their internal union activities).

[6] *See, e.g.*, *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 159 (1997); *Boilermakers Local 686 (Boiler Tube Co.)*, 267 NLRB 1056, 1057 (1983) ("A union violates Section 8(b)(1)(A) of the Act by restraining or coercing an employee because of an employee's dissident union activities, decision not to support a strike, or nonmembership in a union").

[7] *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 815 (2001), *enforced*, 50 F. Appx. 88 (3d Cir. 2002).

[8] *Service Employees Local 50 (Evergreen Nursing Home)*, 198 NLRB 10, 12 (1972).

employees, where "[n]o one is injured, nothing was thrown, no one was prevented from going to work or leaving, and no vehicle was harmed or excluded from the premises," does not violate Section 8(b)(1)(A).[9] Moreover, although Section 8(b)(1)(A) only prohibits a union's restraint and coercion of statutory employees, threats or other acts of intimidation directed at non-employees may be unlawful if statutory employees witness or hear about them and "regard [that conduct] as an indication of what may befall them if they fail to support" the union.[10]

Here, the Union's conduct did not rise to the requisite level of unlawful restraint or coercion because its members only followed nonstatutory employees driving away from the Employer's office to various jobsites. Assuming that the Union members "aggressively" tailgated the employees' vehicles, they did not verbally threaten them or engage in any other intimidating conduct toward them. Indeed, in most instances there was no face-to-face interaction between the Union and nonstatutory employees. Moreover, the two instances where Employer managers interacted with the Union involved either an innocuous conversation between the field superintendent and the Union agent where "his guy" (i.e., the field superintendent's superior) was to talk to "their guy" or the Employer president approaching and offering his business card to

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[9] *Id.* at 12 (no unlawful restraint or coercion where union pickets briefly stood in front of employees reporting for work, grabbed one employee after he directed racial slur at picketer, placed folding chairs on sides of one of facility's two driveways, and briefly blocked ingress and egress of delivery trucks). *See also NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 290 (1960) (recognitional picketing by minority union did not violate Section 8(b)(1)(A) because conduct must involve more than "general pressures" on employees to be unlawful restraint or coercion); *Hendricks-Miller Typographical Co.*, 240 NLRB 1082, 1098-99 (1979) (no unlawful restraint or coercion where pickets briefly delayed two employees and foreman from entering parking lot, shoved and called employee racial slur, and picket jumped onto hood of one car); *New York Typographical Union Local No. 6 (Artintype, Inc.)*, 213 NLRB 925, 929-30 (1974) (no unlawful restraint or coercion where union agents tried to gain access to shop floor by pushing past plant manager and foreman; "no one was really injured, no employees were prevented from working, nor was any other employee denied access or interfered with" and conduct did not have "effect of imposing the [u]nion's will over the [e]mployer in the presence of its employees"); *Retail Store Employees Local 1001 (Levitz Furniture Co.)*, 203 NLRB 580, 581 (1973) (no unlawful restraint or coercion where union agents violated employer's no-solicitation rule and entered employer's luncheonette and parking lot for organizational purposes; union agents, in presence of employees, refused to leave, threatened litigation against employer, and engaged in hour-long verbal exchange with police over employer's right to eject them).

[10] *See, e.g.*, *Culinary Workers Local 226*, 323 NLRB at 159; *Teamsters Local 507 (Klein News)*, 306 NLRB 118, 121 (1992), *enforced*, 20 F.3d 1017 (9th Cir. 1994).

the Union agent. Neither instance involved any threats or violence by the Union. Similarly, although Union agents on one occasion followed the purchasing manager to his home, rather than a job site, it was only a coincidence that the manager was returning to his home to retrieve his phone after arriving at work.[11] More importantly, as with the other incidents, there were no accompanying threats or violence.[12] Thus, "[n]o one was injured, nothing was thrown, no one was prevented from going to work or leaving, and no vehicle was harmed or excluded from the premises."[13]

Moreover, the specific incidents from April that the Employer relies on involve only managers and supervisors, and the Employer did not provide evidence of incidents where the Union followed any statutory employees from the Employer's main office. Nevertheless, if statutory employees witnessed coercive conduct directed at managers or supervisors, or if it would likely come to their attention, the Union may have violated Section 8(b)(1)(A).[14] Indeed, here the Employer's FOIA Exs. 6, 7(C) & 7(D) stated that he had spoken with statutory employees in the field about the incidents of the Union following vehicles leaving the Employer's office. However, given that we find the conduct alleged did not rise to the level of restraint or coercion required for an 8(b)(1)(A) violation, it is immaterial that rank-and-file employees may be aware that the conduct occurred.

Similarly, the Union did not violate the Act by allegedly videotaping nonstatutory employees because there is no evidence of accompanying threats or other intimidating

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[11] *See Auto Workers Local 695 (T. B. Wood's)*, 311 NLRB 1328, 1336-37 (1993) (finding no 8(b)(1)(A) violation where employee claimed he was followed home by striker; employee simply recognized striker's vehicle at end of alley and it was coincidence striker was near employee's home).

[12] As the Region notes, there is also no evidence that the Union followed any statutory employees to their homes.

[13] *Service Employees Local 50*, 198 NLRB at 12. See the other cases cited at footnote 9, above.

[14] *See Culinary Workers Local 226*, 323 NLRB at 159-60 (finding picketers' statements to customer, manager, security guards, and spouse of employee did not violate Act, despite statements constituting threat of bodily injury, since no evidence employees witnessed or heard about incidents); *Teamsters Local 507 (Klein News)*, 306 NLRB at 121 (finding that union's harassment of general manager by following his car to his home did not violate Act because conduct did not occur in presence of employees nor were they likely to hear about it).

conduct.[15] The Board has consistently held that a union's videotaping or photographing employees is unlawful when it is accompanied by other conduct indicating that the union would react adversely to employees exercising their Section 7 right to refrain from union activity.[16] In this regard, a union's videotaping or photographing of employees who are exercising their Section 7 right to refrain from supporting the union will violate Section 8(b)(1)(A) when the union's recording is "coupled with abusive remarks or other conduct having a reasonable tendency to instill fear of retribution" in the minds of the targeted employees.[17] Although a union's videotaping or photographing employees, without justification, could constitute objectionable *election* conduct, it does not, by itself, violate Section 8(b)(1)(A).[18]

We conclude that the Union's alleged videotaping did not violate the Act because it did not have a reasonable tendency to restrain or coerce any statutory employees. Initially, as set forth above, the incidents the Employer relies on involve the Union following vehicles occupied by its managers or supervisors. If no drywall workers were aware of that conduct, any alleged videotaping would not violate

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[15] *See Teamsters Local 890 (Basic Vegetable Products)*, 335 NLRB 686, 686-87 (2001).

[16] *See, e.g.*, *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 740 n.4, 753 (2004), *enforced*, 251 F. Appx. 101 (3d Cir. 2007) (union organizer photographed and videotaped employees while contemporaneously threatening employees as they entered and exited the jobsite and circling employees' vehicles); *Carpenters*, 335 NLRB at 815 (union pickets confrontationally videotaped and photographed nonunion employees entering jobsite); *Teamsters Local 890*, 335 NLRB at 686-87 (union pickets videotaped replacement employees, their vehicles, and their license plates as they entered and exited struck employer's facility while uttering abusive remarks and against a backdrop of unlawful mass picketing); *Interstate Cigar Co.*, 256 NLRB 496, 500-01 (1981) (photographing of employees not violative where not accompanied by other conduct indicating the union would react adversely to employees who cross a picket line).

[17] *Teamsters Local 890*, 335 NLRB at 687.

[18] *See Randall Warehouse of Arizona*, 347 NLRB 591, 598 & n.27 (2006) (union took photographs of employees being offered union literature prior to an election and did not provide an explanation; Board required that there be legitimate justification for the photographing and that the justification be communicated to employees in a timely manner); *Pepsi-Cola Bottling Co.*, 289 NLRB 736, 736-37 (1988) (union did not provide legitimate justification for videotaping employees accepting or rejecting union leaflets the day before election; absent any legitimate explanation from the union, employees could reasonably believe that union was contemplating future reprisals).

Section 8(b)(1)(A). However, the Employer's FOIA Exs. 6, 7(C) & 7(D) states that the Union videotaped statutory employees that it has followed. But that alleged videotaping was not accompanied by any threats or abusive remarks. Indeed, the Employer's managers and supervisors all state that the Union has never threatened or otherwise engaged in intimidating conduct toward the individuals it has followed from the Employer's office. The Board has not found videotaping unaccompanied by other coercive conduct to violate Section 8(b)(1)(A).

Moreover, there is no evidence that the employees the Union is alleged to have videotaped were engaged in Section 7 activities at the time, so that the videotaping would restrain them from engaging in those activities.[19] Also, unlike in *Randell Warehouse*,[20] the Union and Employer are not in the midst of an election campaign, thus it was not necessary for the Union to provide a legitimate justification for any videotaping to the targeted employees. In light of these circumstances, the Union's alleged videotaping did not violate Section 8(b)(1)(A).

Accordingly, based on the preceding analysis, we conclude that the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

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[19] *See, e.g., Carpenters Local 2012 (Forcine Concrete & Construction Co.)*, 358 NLRB No. 39, slip op. at 2 (2012) (union videotaping employees while questioning them about their immigration status did not violate Section 8(b)(1)(A) because employees were not "confronted with a choice between engaging in protected activity or not").

[20] 347 NLRB at 598 (videotaping or photographing of employees interferes with their free choice during election unless targeted employees are given legitimate justification for recordings or justification is self-evident).