

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

Advice Memorandum

DATE: December 30, 2013

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: Teamsters Local 117 (Davis Wire Corp.)
Case 19-CB-108027

The Region submitted this case for advice on whether Teamsters Local 117 (“the Union”) violated Section 8(b)(3) of the National Labor Relations Act (“the Act”) by (1) negotiating a renewal of its collective bargaining agreement (“CBA”) with Davis Wire Corp. (“the Employer”) while misrepresenting its financial support for a state-court lawsuit challenging the CBA’s meal-period policy, and (2) financing the lawsuit for the purpose of unilaterally modifying the CBA by abrogating the meal-period provision. We conclude that the charge should be dismissed, absent withdrawal. First, we agree with the Region that the misrepresentation allegation is time-barred by Section 10(b). Second, we conclude based on settled law that the Union’s financial support for the lawsuit does not constitute an unfair labor practice because the suit seeks to bring the Employer’s meal-period policy into compliance with state law.

FACTS

The Employer operates a wire-manufacturing mill in Kent, Washington. In 2008, the Employer and the Union entered into a three-year CBA. Article 21.7 of the CBA provided that:

When the nature of a work assignment prevents an employee from being relieved of duty for a meal period, it is agreed that the employee shall have an on-duty meal period. The on-duty meal period shall be counted as time worked. Negotiations for a successor CBA occurred between September 2011 and August 2012. Neither party proposed any changes to Article 21.7. That provision appeared unchanged in the new four-year CBA that the parties signed on August 15, 2012.

On April 30, 2012, employee A, who was serving as the chief shop steward and a member of the Union’s negotiating committee, along with employee B, filed a putative class-action lawsuit in Washington state court alleging that the Employer failed to (1) pay employees for time worked before and after their shifts, (2) provide statutorily required meal and rest periods, and (3) pay overtime. Regarding meal

periods, the suit alleged that employees did not receive the thirty-minute meal periods that Washington law mandates, because the employees “were required to perform active work during the entirety of their shifts.” (Complaint ¶ 5.6.)

The attorney representing the Employer in contract negotiations first learned of the lawsuit from the Union’s attorney during a brief sidebar discussion at a May 3 bargaining session. The Employer’s attorney expressed surprise about the suit, noting that the Union had never filed a grievance related to meal periods and that the issue had not come up in negotiations. He asked the Union’s attorney why the Employer had not previously heard about the matter, given that the Union had not hesitated to complain to management when something was wrong. The Union’s attorney replied that the individual employees’ suit was not the Union’s case.¹

On December 20, 2012, pursuant to a discovery request in the state-court litigation, the Employer received copies of engagement letters between the individual state-court plaintiffs and their attorney. These letters were dated December 10 and stated that the Union “will be paying all costs associated with this case for the foreseeable future.” The letters explained further that the Union “expects to continue to pay the costs associated with the litigation, but has no obligation to do so,” and that “any costs recovered will be used to first reimburse [the Union] for costs expended in your suit against Davis Wire.” The Employer served the Union with a subpoena on February 22, 2013 seeking information regarding the Union’s involvement with the suit. In a March 21, 2013 letter in response, the Union’s lawyer provided documentation showing Union funds expended on the lawsuit.

On June 24, 2013, the Employer filed a charge alleging two types of conduct by the Union that it claims constituted Section 8(b)(3) bargaining violations: (1) during contract negotiations, the Union misrepresented its involvement with the wage-and-hour lawsuit, and (2) the Union financed the suit for the purpose of unilaterally modifying the CBA by abrogating the meal-period provisions in Article 21.7, and continues to finance the suit.

ACTION

We conclude that the charge should be dismissed, absent withdrawal. First, we agree with the Region that the Employer’s allegation of misrepresentation is time-

¹ The Union’s attorney disputes this version of events, and denies that he said that the suit was “not the Union’s case.” Because the misrepresentation allegation should be dismissed as untimely even if the Union’s attorney made the statement, this dispute of fact is not material.

barred under Section 10(b) of the Act, because the Employer was on notice of the Union's involvement in the suit more than six months before filing its unfair-labor-practice charge. Second, the allegation that the Union unlawfully unilaterally modified the collective-bargaining agreement fails to state a viable legal theory.

A. Misrepresentation

The Board has held that “intentional misrepresentation or concealment . . . during collective bargaining” is an unfair labor practice if “the misrepresentations are relevant to the issues during negotiations.”² The Union's failure to disclose its involvement in the wage-and-hour suit during collective bargaining was relevant to negotiations because the Employer agreed to the successor CBA with the expectation that meal periods would continue in the manner in which the parties had interpreted Article 21.7. The Employer might have amended its bargaining position if it had known of the possibility that it would have to change its meal-period policy as a result of the lawsuit. Had it known that the Union was supporting the suit, the Employer might have sought concessions from the Union on a different issue at the bargaining table. The Employer thus presents a compelling case that the Union's concealment constituted a material misrepresentation in violation of Section 8(b)(3). Nonetheless, because the Employer did not file this charge with the Board in a timely manner, it must be dismissed.

Under Section 10(b) of the Act, an unfair-labor-practice charge must be filed within six months of the allegedly unlawful conduct.³ The Board follows a “[s]trict adherence to the 10(b) limitation.”⁴ The six-month period begins when “the aggrieved party knows or should know that his statutory rights have been violated.”⁵ Notice of the violation must be “clear and unequivocal,” but it can be actual or constructive.⁶ A charging party has constructive knowledge of a violation when it is “on notice of facts that reasonably engendered suspicion that an unfair labor practice had

² *Waymouth Farms, Inc.*, 324 NLRB 960, 968 (1997), *enforced in relevant part*, 172 F.3d 598 (8th Cir. 1999).

³ 29 U.S.C. § 160(b).

⁴ *Chambersburg Cnty. Market*, 293 NLRB 654, 654 (1989); *see also Dun & Bradstreet Software Servs., Inc.*, 317 NLRB 84, 84-85 (1995) (dismissing under 10(b) a charge that was served six months and one day after the alleged unfair labor practice).

⁵ *John Morrell & Co.*, 304 NLRB 896, 899 (1991), *review denied*, 1993 WL 264414 (D.C. Cir. 1993); *see also United Kiser Servs., LLC*, 355 NLRB 319, 319 (2010); *St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1144 (2004).

⁶ *Univ. Moving & Storage Co.*, 350 NLRB 6, 18 (2007) (citation omitted).

occurred.”⁷ Knowledge of the violation is imputed to the charging party when it “would have discovered the conduct in question had it exercised reasonable or due diligence.”⁸

The engagement letters that the Employer received on December 20, 2012, state that the Union “will be paying all costs associated with this case for the foreseeable future” and “expects to continue to pay the costs associated with the litigation,” although it “has no obligation to do so.” These clear and unequivocal statements put the Employer on notice that the Union was lending direct financial assistance to the prosecution of the wage-and-hour suit. Thus, the Employer was, at a minimum, “on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred,”⁹ involving either the Union’s nondisclosure of its involvement with the suit or the Union attorney’s alleged statement that the suit was “not the Union’s case.” Accordingly, at that time, Section 10(b)’s six-month period began to run.

The Employer contends that the engagement letters were ambiguous as to whether the Union had actually paid the costs associated with the suit or had only promised to do so, and that it was not until March 21, 2013, that it had definitive confirmation that the Union was financing the suit. This claim of ambiguity is not

⁷ *Amalgamated Transit Union, Local 1433*, 335 NLRB 1263, 1263 n.2 (2001); *see also Vanguard Fire & Sec. Sys.*, 345 NLRB 1016, 1016 (2005), *enforced*, 468 F.3d 952 (6th Cir. 2006).

⁸ *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enforced sub nom. East Bay Auto. Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007); *see also CAB Assocs.*, 340 NLRB 1391, 1392 (2003) (same). The 10(b) cases that the Employer cites are distinguishable. Unlike in *CAB Associates*, the Union did not engage in inconsistent conduct regarding the lawsuit at any point after the Employer received the engagement letters. Cf. *CAB Assocs.*, 340 NLRB at 1391-92 (charging party not on notice of a contract-repudiation claim when employer refused to sign an independent agreement directly with the union after withdrawing from a multi-employer association, but also continued to comply with the multi-employer CBA). And the facts that put the Employer on notice of a violation consisted of more than the suspected “predisposition to commit an unfair labor practice” based on past conduct that the court in *Teamsters Local 43 v. NLRB*, 825 F.2d 608, 614-16 (1st Cir. 1987), rejected as insufficient to trigger the 10(b) period. Finally, this case does not present the specific issue at play in *A&L Underground*, 302 NLRB 467, 467-68 (1991), which addressed whether a contract-repudiation claim was timely under a “continuing violation” theory following a “clear and total” repudiation.

⁹ *Amalgamated Transit Union, Local 1433*, 335 NLRB at 1263 n.2.

based on a fair reading of the letters, however. Even if, by itself, the statement that the Union “will be paying all costs” could suggest future action, the statement that the Union “expects to continue to pay the costs” clarifies that the Union was already doing so.¹⁰ At most, the engagement letters were ambiguous as to whether the Union would continue financing the suit in the future (because it “has no obligation to do so”), but not as to whether the Union was currently financing the suit. In any event, definitive confirmation is not the standard for notice under Section 10(b).¹¹

In sum, for Section 10(b) purposes, the Employer was on notice on December 20, 2012, of any misrepresentation regarding the Union’s involvement in the lawsuit, either directly or by nondisclosure. Because the Employer did not file its charge with the Board until June 24, 2013—more than six months later—the charge was untimely as to that allegation.¹²

B. Unilateral Modification

The Employer contends that the Union financed the wage-and-hour lawsuit for the purpose of abrogating Article 21.7 of the CBA, and thus, that the suit constituted an attempted unilateral midterm modification of the CBA in violation of Section 8(b)(3). Regardless of whether this allegation is timely,¹³ we conclude that dismissal on the merits is appropriate.

¹⁰ The fact that the Employer also received a different letter—one addressed to the plaintiffs from their attorney that stated that the suit’s costs and fees “may also be paid” by the Union—does not alter the conclusion that the engagement letters put the Employer on notice of a potential unfair labor practice. The “may also be paid” letter was written eight months before the engagement letters and, in any event, the letters are not inconsistent. The first letter informed the plaintiffs that the Union may pay the costs of the suit, and the engagement letters confirmed that the Union was doing so. *Cf. CAB Assocs.*, 340 NLRB at 1391-92.

¹¹ *See, e.g., Amalgamated Transit Union, Local 1433*, 335 NLRB at 1263 n.2, 1271-72.

¹² Finally, we note that, even if this charge were timely and the Employer ultimately prevailed, the Employer could not receive the relief that it requests. The Employer seeks an injunction and recovery of the costs of the lawsuit, but these remedies could be relief only for a finding that the suit is an unlawful unilateral modification, rather than for a finding of unlawful misrepresentation. For the reasons discussed below, the unilateral-modification allegation is without merit.

¹³ The Board has suggested that maintenance and prosecution of an unlawful lawsuit within the 10(b) period makes an allegation timely, even if the suit was filed outside of the 10(b) period. *See J.A. Croson Co.*, 359 NLRB No. 2, 2012 WL 5246914, at *12-13 (Sept. 28, 2012); *Assoc. Builders & Contractors, Inc.*, 331 NLRB 132, 134 (2000).

A union's duty to bargain in good faith under Section 8(b)(3) parallels an employer's duty under Section 8(a)(5).¹⁴ Thus, a union violates Section 8(b)(3) by unilaterally modifying or attempting to modify a CBA.¹⁵

Under Section 8(a)(5), the corollary of Section 8(b)(3), however, an employer does not violate its duty to bargain in good faith by unilaterally implementing changes in terms or conditions of employment that are mandated by state or federal law. For example, an employer can unilaterally increase wages to comply with the Fair Labor Standards Act or adopt work-safety rules to comply with OSHA regulations.¹⁶

These principles apply equally to unions. In *UGSOA (Akal Security)*,¹⁷ for example, the union had initiated proceedings with the Department of Labor pursuant to the Service Contract Act for the purpose of attaining area prevailing wages for its members that were higher than the wages in the CBA.¹⁸ Advice concluded that the union's actions did not constitute a unilateral midterm modification in violation of Section 8(b)(3), because the union was seeking a change in the CBA's wage rates in a manner provided for by federal law.¹⁹ This action could not be an unfair labor practice because "lawful petitioning under an applicable provision of another federal

¹⁴ *Teamsters Local 612*, 215 NLRB 789, 791 (1974).

¹⁵ See, e.g., *NLRB v. Truck Drivers Local 449*, 728 F.2d 80, 85 (2d Cir. 1984) (union violates Section 8(b)(3) by coercing an employer to make a midterm modification expanding pension coverage); *NLRB v. Sys. Council T-6, IBEW*, 599 F.2d 5, 6, 8-9 (1st Cir. 1979) (union unilaterally adopted a rule prohibiting its members from accepting certain assignments that the CBA recognized that the employer could make); *United Marine Div. Local 333*, 226 NLRB 1214, 1214, 1220 (1976) (union instructed its members to stop tugging unmanned barges even though the CBA did not require that barges be manned).

¹⁶ See *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987) (OSHA); *Red Barn Sys., Inc.*, 224 NLRB 1586, 1597-98 (1976) (FLSA and state minimum-wage law), *enforced mem.*, 574 F.2d 315 (6th Cir. 1976); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) (FLSA); see also *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1100 & n.50 (D.C. Cir. 1984) (explaining that "the National Labor Relations Act's prohibition against an employer's unilateral change in wages under negotiation gives way to commands for an employer's compliance with other laws").

¹⁷ No. 8-CB-10233, Advice Memorandum dated Mar. 9, 2005.

¹⁸ *Id.* at *1-2.

¹⁹ *Id.* at *2.

statute should not constitute a violati[o]n of the Act.”²⁰ Moreover, Advice determined that the union’s initiation of such proceedings was protected Section 7 and First Amendment activity.²¹

Applying those principles here, the Union’s financial support for the wage-and-hour lawsuit did not violate Section 8(b)(3) because the suit seeks to bring the Employer’s meal-period policy into compliance with Washington law. Specifically, the suit alleges that the Employer “fail[ed] to provide . . . employees with thirty-minute meal periods as required by [state law]” because employees were “required to perform active work during the entirety of their shifts,” including when they were eating meals. (Complaint ¶ 5.6, ¶ 8.2.) Indeed, Washington law provides that employees must receive a thirty-minute meal period for every five hours worked.²² Further, it appears settled that this period must be free from work activity.²³

Like the wage-modification proceedings in *UGSOA*, the lawsuit seeks relief from a CBA provision pursuant to a law that provides for such relief.²⁴ And like

²⁰ *Id.* at *3.

²¹ *Id.*

²² Wash. Admin. Code § 296-126-092(1), (2); Administrative Policy ES.C.6, ¶ 5. Administrative Policy ES.C.6 is interpretive guidance from the Washington Department of Labor and Industries. Washington courts regularly defer to such agency interpretations of state law. *Pellino v. Brink’s, Inc.*, 267 P.3d 383, 395 (Wash. App. 2011).

²³ Administrative Policy ES.C.6, ¶ 7; *see also Pellino*, 267 P.3d at 396 (holding that employees who “were always engaged in work duties . . . did not receive lawful breaks that complied with [state law]”).

Washington law allows for “on-duty” meal periods that are subject to interruption by work activity if such periods are paid. Wash. Admin. Code § 296-126-092(1); *Pellino*, 267 P.3d at 395; Administrative Policy ES.C.6, ¶ 7. Even on-duty meal periods must consist of a total of thirty minutes without work activity, however. *Pellino*, 267 P.3d at 395-97. The computation of the thirty minutes is paused while the employee is working. Administrative Policy ES.C.6, ¶ 7; *see also Pellino*, 267 P.3d at 397 (“[W]hen the employee must engage in work activity, that time does not count towards the break.”).

²⁴ We further note that, despite the Employer’s contention, the lawsuit does not appear to be a facial challenge to Article 21.7. The plaintiffs state explicitly that their “claim is not that the on-duty meal breaks provided for in the CBA are invalid.” (Opp. to Motion to Deny Class Certification 16.) Indeed, if the phrase “on-duty” in Article 21.7 means “on call,” as it does under Washington law, the provision could be lawful. If so, a ruling by the state court in the plaintiffs’ favor would not necessitate a

unilaterally raising wages to comply with a minimum-wage requirement, any change to meal-period practice at the Employer if the suit is successful would be mandated by law. The Employer has not proffered any supporting authority for its proposition that a suit seeking compliance with a law governing employment conditions is unlawful under the Act, or that litigating rather than negotiating under such circumstances violates the duty to bargain in good faith.²⁵ We therefore conclude that this allegation has no support in law.

The Employer contends that the Union lawfully waived the employees' rights to the meal-period requirements of Washington law, and specifically their right to a meal period that is free from work activity, by agreeing to the terms of Article 21.7 for an "on-duty meal period." However, Washington law does not appear to permit such a waiver. Administrative Policy ES.C.6 states that the statutory meal-period requirement is a "minimum standard" and that CBA provisions regarding meal periods "must be [at] least equal to or more favorable than the provisions of [state law]."²⁶ Likewise, although Washington law explains that statutory provisions such as the meal- and rest-period requirements "shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing concerning wages or standards or conditions of employment,"²⁷ the Washington Supreme Court

modification of the CBA language; the Employer could continue requiring on-duty meal periods, so long as they are paid and contain a total of thirty minutes without work activity. A successful lawsuit would result at most in a change in practice, not a change in the CBA language itself.

²⁵ The Employer cites *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321 (9th Cir. 1988), but that case is not on point. *Rozay's Transfer* did not involve a lawsuit or an allegation of unilateral modification. The court noted in dicta that a union's failure to disclose material information during bargaining might be an unfair labor practice, *see id.* at 1323-26, but we have concluded that any allegation based on misrepresentation is time-barred.

²⁶ Administrative Policy ES.C.6, ¶ 15; *see also Wingert v. Yellow Freight Sys., Inc.*, 50 P.3d 256, 261-62 (Wash. 2002) (holding that CBA terms do not supersede statutory rest-period requirements). Moreover, the provision of Washington law cited by the Employer that allows for *individual* employees to waive the statutory meal-period requirement further suggests that a CBA cannot contain such a waiver. An employee who agrees to waive a meal period "may at any time request the meal period," and, if the employee does so, "any agreement would no longer be in effect." Administrative Policy ES.C.6, ¶ 8. An employee's right to revoke a waiver "at any time" would not exist if the waiver was embodied in a CBA.

²⁷ Wash. Rev. Code. § 49.12.187.

interpreted that language to mean that parties can bargain for terms that “enhance or exceed” the law’s “minimum standards.”²⁸ Parties cannot bargain for terms that fall below those standards, however; a CBA cannot “decrease the frequency of workers’ rest periods,” for example.²⁹ Because Washington law provides for a meal period free from work activity,³⁰ a CBA is not in compliance with state law if it requires employees to engage in work activity during their meal period.³¹

Finally, because the Employer seeks to enjoin a lawsuit as an unfair labor practice, we must consider *Bill Johnson’s Restaurants, Inc. v. NLRB*.³² Under *Bill Johnson’s Restaurants*, a lawsuit violates the Act only if it lacks a reasonable basis and is filed with a retaliatory motive or if it has an unlawful object.³³ These criteria are not met. A suit has a reasonable basis for *Bill Johnson’s Restaurants* purposes “if

²⁸ *Wingert*, 50 P.3d at 261-62.

²⁹ *Id.* at 262. In response to *Wingert*, the Washington legislature amended the law to allow for CBAs in the construction industry that contain meal- and rest-period provisions that differ from the provisions in Washington Administrative Code § 296-126-092. *See* Wash. Rev. Code. § 49.12.187; Senate Bill Report SSB 5995. The law makes no such allowance for CBAs in other industries, and the Employer is not engaged in the construction industry.

³⁰ *See Pellino*, 267 P.3d at 395-97; Administrative Policy ES.C.6, ¶ 7.

³¹ We note that the Supreme Court long ago settled that the Act does not preempt state laws that provide such minimum terms and conditions of employment, even if they otherwise would be mandatory subjects of bargaining. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19-22 (1987); *Mass. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-58 (1985). Such laws are not preempted even if they do not permit unions and employers to alter the minimum terms or waive them through collective bargaining. *See Fort Halifax*, 482 U.S. at 22. Indeed, “[i]t would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally.” *Mass. Life Ins. Co.*, 471 U.S. at 755. Further, “the fact that the NLRA requires employers to bargain [over certain terms and conditions of employment] in a CBA does not mean that a state . . . may not also grant employees independent, non-negotiable state law rights and forbid employers from bargaining those rights away.” *McKnight v. Dresser, Inc.*, 676 F.3d 426, 432 n.4 (5th Cir. 2012); *cf. Balcorta v. Twentieth Century Fox Film Corp.* 208 F.3d 1102, 1111-12 (9th Cir. 2000) (“§ 301 does not permit parties to waive, in a collective bargaining agreement, nonnegotiable state rights . . .”).

³² 461 U.S. 731 (1983).

³³ *Id.* at 737 n.5, 748-49.

there is any realistic chance that the plaintiff's legal theory might be adopted.”³⁴ The issue of whether the Employer's meal-period policy conforms with state law and whether the Union waived the protections of that law are at best unsettled under Washington law, and the plaintiffs' position in that suit clearly is reasonably based. Under such circumstances, the Board will not “deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary.”³⁵ Furthermore, since the lawsuit has the object of ensuring that the Employer's meal-period policy complies with state law, it does not have an unlawful object.³⁶

In sum, because the misrepresentation allegation is time-barred, and because the Union-financed lawsuit seeks to ensure compliance with state wage-and-hour law, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

Id. at 746-47.

³⁵ *Id.*

³⁶ *Cf. Local 32B-BJ, SEIU*, 313 NLRB 392, 401-02 (1993) (a suit or arbitration has an unlawful object if it has “no achievable legitimate purpose or goal”), *enforced in relevant part*, 68 F.3d 490 (D.C. Cir. 1995).