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

Advice Memorandum

DATE: April 30, 2014

TO: James G. Paulsen, Regional Director
Region 29

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

SUBJECT: Service Employees International Union, Local 32BJ (Allied Barton Security Services, LLC)
Case 29-CB-115645

536-2581-3307-5000
536-2581-3307-5010
548-6050-6767-0000
601-7590-8100-0000
712-5042-6701-2500
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712-5070-6000-0000

The Region submitted this case for advice as to whether the Union violated Section 8(b)(1)(A) and (2) of the Act when, in the context of a *Burns* successorship,[1] the successor employer's human resources manager ("HR manager") informed predecessor employees that they had to sign Union membership and dues-checkoff cards as a condition of employment and the Union failed to provide those employees with notice of their rights under *General Motors*[2] and *Beck*.[3] We conclude, initially, that the Union is liable for the HR manager's conduct because the Employer served as the Union's agent for the purposes of informing employees of their union-security obligation and presenting them with membership and dues-checkoff cards for their signature. We further conclude that the Union's attempt to repudiate the HR manager's statements was deficient under the Board's *Passavant*[4] standard, but that it would not effectuate the policies of the Act to find that the Union committed a violation based on those statements because the Union representative's response to the unlawful conduct was timely, specific in nature to the coercive conduct, and free from other illegal conduct and because the predecessor employees have been apprised

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[1] *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 280-81 (1972).

[2] *NLRB v. General Motors Corp.*, 373 U.S. 734, 742-43 (1963).

[3] *Communication Workers of America v. Beck*, 487 U.S. 735, 762-63 (1988).

[4] *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-39 (1978).

of their statutory rights due to a notice posting resulting from an informal settlement agreement that the Employer entered into with the Region. Finally, we conclude that since the Union had previously provided these employees with notice of their *General Motors* and *Beck* rights and the relationship between the Union and employees remained intact, it was not necessary for the Union to provide new notices.

FACTS

In September 2012, SEIU Local 32BJ ("the Union") and Allied Barton Security Services, Inc. ("the Employer") entered a multi-employer collective-bargaining agreement ("the multi-employer agreement") covering security employees working in the New York City area, effective from July 1, 2012 through April 30, 2016. The multi-employer agreement requires the Employer to offer employment to and hire, subject to the requirements of the law, the incumbent employees working at a facility where it becomes the new contractor and the Union represents the employees. It also requires the Employer to recognize the Union as the bargaining representative of those employees, inclusive of any job classifications recognized by the prior employer, and to maintain, to the extent permitted by law, those employees' existing terms and conditions of employment. In addition, the agreement contains a union-security clause that states:

> It shall be a condition of employment that all employees covered by this agreement shall become and remain members of the Union on the thirty-first (31st) day following the date this Article applies to their work location or their employment, whichever is later. The requirement of membership under this Article is satisfied by the payment of the financial obligations of the Union's initiation fee and periodic dues uniformly imposed. The Union shall not ask or require the Employer to discharge any employee except in compliance with the law.
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> The Employer shall make known to any new hire his or her obligations under this provision, and present such new hire at that time, union membership materials including a membership application and voluntary payroll deduction authorization.

Until September 2013,[5] FJC Security Services ("the predecessor employer") had a service contract with the Port Authority of New York and New Jersey to provide security guards at John F. Kennedy International Airport in New York City. For several years, the Union has represented the approximately 200 security employees working at the airport. The Union and the predecessor employer were parties to a

[5] Hereafter, all dates are in 2013 unless otherwise noted.

collective-bargaining agreement that included the same union-security clause quoted above.

In or around July, the Port Authority canceled its service contract with the predecessor employer and awarded the contract to the Employer, which was to begin providing security services on September 1. On August 7 and 8, the Employer scheduled a series of "Welcome Center" hiring sessions for the current security employees at JFK Airport where they were invited to pick up an application packet, complete application forms, meet with the Employer's representatives, and complete certain tests. The application packet contained a number of standard materials, including a disclosure form pertaining to Department of Motor Vehicle and criminal background checks, a form relating to security officer licenses, an IRS Form W-4 for tax withholding, an I-9 work authorization form, and one regarding drug testing authorization. It also included a Union membership card, which contained both a membership application form and a dues authorization check-off form. The Employer's HR manager was present and represented the Employer during both days of this event.

On August 8, the second day of the hiring session, two employees, at separate times, reported to a Union representative that the Employer's HR manager had informed them that they had to fill out Union membership cards or she could not complete their application process. The employees also asked him if they were obligated to fill out the Union membership card again. The Union representative informed them that they were not obligated to fill out the cards as a condition of employment with the Employer. Thereafter, when the HR manager reported to the Union representative that the two employees refused to sign new Union membership cards, he told her that she could not tell job applicants that they had to sign such cards as a condition of employment. After speaking with the Union's assistant general counsel, the Union representative told the HR manager that the Union was insisting that she stop making such statements to the employees, to which she agreed. The Union representative also made an announcement to about twenty employees filling out applications at the time that they were not obligated to sign Union membership cards as a condition of accepting employment with the Employer. However, neither the Union representative nor anyone else on behalf of the Union took any other action to inform the other employees who had attended the two-day event that they were not required to fill out Union membership cards as a condition of employment with the Employer. Shortly after the August hiring event, the Union again mailed all of the employees, members and nonmembers, a copy of its periodical, *Building Strength*, which included notice of their right to be objecting nonmembers under *General Motors* and *Beck*.

On September 1, the Employer began providing security services at JFK Airport with the same approximately 200 employees who had worked for the predecessor employer. On September 3, the Union and the Employer entered into a Rider

Agreement that applied the terms of the multi-employer agreement to the employees at JFK Airport, with certain modifications specific to the facility. Thereafter, the Employer provided the Union with signed membership cards it had obtained from 16 employees during the month of August. All 16 of those employees were Union members before August.

On October 10, the Charging Party, an employee who had worked for the predecessor employer and was hired by the Employer, filed the charge in the instant case alleging that the Union had violated §§ 8(b)(1)(A) and (2) by forcing him to join the Union again because during the August 8 hiring session he was told he had to complete a Union membership card in order to become employed by the Employer. The Charging Party provided the Region with a copy of a membership card he completed that was dated August 8. In mid-November, the Charging Party filed a charge against the Employer in Case 29-CA-118095 alleging that the HR manager's statements during the August 8 hiring session violated §§ 8(a)(1) and (2).

On January 31, 2014, the Employer reached an informal settlement agreement with the Region in Case 29-CA-118095. As part of the settlement, the Employer posted an official Board notice from mid-February to mid-April 2014 on the employee bulletin board at JFK Airport stating that it would not direct employees or job applicants to sign Union membership or dues-checkoff authorization forms as a condition of employment. That notice included assurances that the employees' exercise of their Section 7 rights would not be interfered with in the future.

ACTION

The Region should dismiss the charge, absent withdrawal. We conclude, initially, that the Union is liable for the HR manager's conduct because the Employer served as the Union's agent for purposes of informing employees of their union-security obligation and presenting them with membership and dues-checkoff cards for their signatures. We further conclude that the Union's attempt to repudiate the HR manager's statements was deficient under the Board's *Passavant* standard, but that it would not effectuate the policies of the Act to find that the Union committed a violation based on those statements because the predecessor the Union representative's response to the unlawful conduct was timely, specific in nature to the coercive conduct, and free from other illegal conduct and because employees have been apprised of their statutory rights due to a notice posting resulting from an informal settlement agreement that the Employer entered into with the Region. Finally, we conclude that since the Union had previously provided these employees with notice of their *General Motors* and *Beck* rights and the relationship between the Union and employees remained intact, it was not necessary for the Union to provide new notices.

In *California Saw & Knife Works*, the Board held that a union must inform employees of their right under *General Motors*[6] and *Beck*[7] to be objecting nonmembers when or before it seeks to obligate them under a contractual union-security clause, and that its failure to do so would violate § 8(b)(1)(A).[8] It is essential that an employee receive notice of these rights prior to or concurrent with any attempt to collect dues because, in the absence of such notice, "an employee may be misled into believing that the union-security provision requires full union membership or the payment of full dues."[9] Moreover, a union independently violates § 8(b)(1)(A) if it compels its members to execute dues-checkoff authorizations.[10] "The execution of a dues-checkoff authorization is entirely voluntary."[11] In the current case, before determining whether the Union violated the preceding principles, we must first address whether the Union was responsible for the HR manager's statements and whether the conduct of its representative at the August hiring sessions was sufficient to repudiate those statements. Finally, we address whether the Union violated § 8(b)(1)(A) by not providing the predecessor employees at the hiring sessions with new notice of their rights under *General Motors* and *Beck* when they were directed to sign Union membership cards.

1. The Union is Liable for the HR Manager's Unlawful Conduct.

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[6] *NLRB v. General Motors Corp.*, 373 U.S. at 742 (membership as required by union-security clause is whittled down to "financial core"; employees have right to decline full union membership but must pay fees and dues).

[7] *Communication Workers v. Beck*, 487 U.S. at 762–63 (unions may not require objecting nonmembers to pay for union activities not germane to collective bargaining).

[8] *California Saw & Knife Works*, 320 NLRB 224, 233 (1995), *enforced* 133 F.3d 1012 (7th Cir. 1998).

[9] *L.D. Kichler Co.*, 335 NLRB 1427, 1429 (2001) (union violated 8(b)(1)(A) by soliciting new employee's signature on union membership form without informing her of her *General Motors* and *Beck* rights). *See also, e.g.*, *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 350 (1995) (union must notify existing members of their *General Motors* and *Beck* rights to become nonmembers before they become subject to obligations under union-security clause).

[10] *See, e.g., Longshoremen (ILA) Local 1575 (Puerto Rico Marine Mgt.)*, 322 NLRB 727, 729-30 (1996).

[11] *Id.*

The Board applies common-law principles of agency in determining whether an individual is an agent,[12] and "agency principles must be expansively construed, including when questions of *union* responsibility are presented."[13] An agent has actual authority to take an action on behalf of his principal when the principal manifests such authority either expressly or impliedly.[14] It is not necessary that "the principal expressly authorize, actually desire, or even know of the action in question" in order for liability to attach.[15] Indeed, responsibility for an agent's actions attaches to the principal if the agent took the actions "in furtherance of the principal's interest" and the action falls "within the general scope of authority attributed to the agent."[16]

Here, the multi-employer agreement between the Union and the Employer includes a union-security clause that requires Union membership as a condition of employment. That agreement also includes a clause stating that the Employer "shall make known to any new hire his or her obligation under [the union-security clause] and present such new hire [with] union membership materials including a membership application and voluntary payroll deduction authorization." Thus, the Union explicitly had authorized the Employer to serve as its agent for the purposes of informing employees of their union-security obligation and presenting them with membership and dues-checkoff cards for their signature. In its efforts to carry out this contractual obligation, the Employer assigned the HR manager the task of providing these materials to the employees as part of the successorship transition.

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[12] *SAIA Motor Freight, Inc.*, 334 NLRB 979, 979 (2001).

[13] *Longshoremen (ILA) (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993) (emphasis in original), *reversed and remanded,* 56 F.3d 205, 213-15 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996).

[14] *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336 (2004) (quoting *Communication Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 446 n. 4 (1991)).

[15] *Walmart Stores, Inc.*, 350 NLRB 879, 884 (2007).

[16] *Id.* (citing *Tyson Fresh Meats, Inc.*, 343 NLRB at 1337). *See also Longshoremen (ILWU) Local 6 (Sunset Line & Twine Co.)*, 79 NLRB 1487, 1509 (1948) ("A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the 'scope of his employment' if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.").

The HR manager was acting within the general scope of her authority when she told the employees that they had to sign Union membership and dues-checkoff authorization cards as a condition of employment.[17] In other words, her statements were not inconsistent with the contract clause in which the Union made the Employer its agent for the purpose of assuring that all employees complied with the union-security obligation.[18] However, her statements unlawfully restrained and coerced the employees by requiring them to join the Union and execute dues-checkoff authorization forms as a condition of employment.[19] Thus, we conclude that the Union was liable for the HR manager's unlawful conduct.

2. The Union Did Not Adequately Repudiate the HR Manager's Unlawful Conduct, but Complaint is Not Warranted on Noneffectuation Grounds.

We conclude that the Union representative's actions on the second day of the August hiring sessions did not adequately repudiate the HR manager's unlawful conduct. To be effective under the Board's *Passavant* standard, a repudiation of prior unlawful conduct must be timely, unambiguous, specific in nature to the coercive conduct, and free from other illegal conduct.[20] In addition, the repudiation must be adequately published to the employees involved and the employees must receive assurances that in the future the respondent will not interfere with their exercise of Section 7 rights.[21]

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[17] See *Tyson Fresh Meats, Inc.*, 343 NLRB at 1336-1337 (citing *Bio-Medical Applications of Puerto Rico*, 269 NLRB 827, 828 (1984)("A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.")).

[18] *See, e.g., Walmart Stores, Inc.*, 350 NLRB at 884 (employer responsible for management trainee's unlawful seizure of union flyers from union supporter because, although conduct not explicitly authorized, employer had communicated to trainee its opposition to union activity and trainee would reasonably have believed that employer desired such conduct).

[19] *See, e.g., Assn. for Retarded Citizens Employees Union (Opportunities Unlimited of Niagara)*, 327 NLRB 463, 464 (1999); *Longshoremen (ILA) Local 1575 (Puerto Rico Marine Mgt.)*, 322 NLRB at 729-30.

[20] *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978) (citations omitted).

[21] *Id*. at 138-39.

Here, the Union representative's actions fail to satisfy certain of these elements. First, his statements were not sufficiently unambiguous because he did not admit that the Union had engaged in any wrongdoing. Although the Union representative informed a group of employees that they did not have to sign the Union membership and dues-checkoff cards as a condition of employment, he did not state that the Union (or Employer) had acted unlawfully in suggesting otherwise.[22] Moreover, he did not provide adequate publication to all of the employees involved. While he made a single statement on one occasion to a group of about twenty applicants, the hiring sessions were spread out over two days and resulted in the Employer hiring about 200 employees, of which about 16 completed the membership card as instructed during the month of August.[23] Finally, neither the Union representative nor any other Union official provided the employees with assurances that in the future the Union would not interfere with the exercise of their Section 7 rights.[24] Therefore,

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[22] *DIRECTV*, 359 NLRB No. 54, slip op. at 4 (2013) (employer's internet disclaimer, which it couched as "'clarify[ing] its 'intent' in 'enforcing the policies,'" did not constitute an effective repudiation because it did not admit any wrongdoing); *Fresh & Easy Neighborhood Market*, 356 NLRB No. 85, slip op. at 1 & n.1, 17 & n.23 (2011) (employer did not effectively disseminate its repudiation of unlawful handbook rule when it revised the rule to make it lawful, disseminated a handbook containing a new, lawful rule to employees, and held team huddles at its stores where its management explained to employees that there was a problem with the old rule and the new rule fixed the problem; the employer did not provide sufficient evidence to establish that these methods effectively communicated the message to employees that it had previously engaged in conduct that violated their Section 7 rights and that it would not do so in future), *modified on other grounds* 356 NLRB No. 145 (2011); *Passavant Memorial Area Hospital*, 237 NLRB at 139 (finding alleged repudiation deficient where employer's disavowal "was neither sufficiently clear nor sufficiently specific" because employer "did not admit any wrongdoing but merely informed employees that information given them was 'not correct'").

[23] *See, e.g., Passavant Memorial Area Hospital*, 237 NLRB at 139 (finding alleged repudiation deficient where employer published disavowal only once in employee newsletter, it was unclear how long employer posted newsletter, employer printed copies for only two-thirds of its employees, and no evidence employer attempted to communicate disavowal to employees who witnessed unlawful threats).

[24] *See, e.g., Community Action Commission of Fayette County*, 338 NLRB 664, 667 (2002) (employer's post-threat assurances did not disavow future employer interference with exercise of Section 7 rights).

given these deficiencies, the Union's effort to repudiate the HR manager's statement did not meet the Board's *Passavant* standards.

However, we conclude that it would not effectuate the purposes of the Act to issue a complaint against the Union based on the HR manager's statements in light of the the circumstances here.[25] We note that the Union representative's response to the unlawful conduct was timely, specific in nature to the coercive conduct, and free from other illegal conduct. When the two employees questioned him about the HR manager's statement that they had to sign membership cards as a condition of employment, he immediately assured them that they did not have to do so. He also immediately confronted the HR manager and instructed her to stop making these statements to the employees. Then, on his own initiative, he communicated to the twenty or so employees filling out job applications at the time that they did not have to sign membership cards as a condition of employment. We further note that out of the 200 employees hired by the Employer, only 16 of them signed membership cards as part of the August hiring sessions, and they were already members of the Union. Finally, we note that the affected employees have been informed of their statutory rights due to the notice posting that resulted from the informal settlement agreement the Employer entered in Case 29-CA-118095. That posting informed the employees that they were not required to sign membership and dues-checkoff cards as a condition of employment with the Employer, and it included assurances that there would not be any interference with the employees' future exercise of Section 7 rights. Thus, where subsequent conduct by both the Union and the Employer has substantially remedied any effects of the alleged unfair labor practice, it would not effectuate the purposes of the Act to issue a complaint on this allegation.

3. The Union Did Not Violate § 8(b)(1)(A) by Failing to Provide the Job Applicants at the August Hiring Sessions with Notice of Their Rights Under *General Motors* and *Beck*.

In cases applying *California Saw*, the Board has always held that a union violates its duty of fair representation by failing to inform employees of their *General Motors* and *Beck* rights before they become subject to financial obligations under a union-security clause.[26] Therefore, both these notice requirements apply "with no

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[25] *See generally American Federation of Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 620-21 (1973) (finding union's technical § 8(b)(1)(B) violation did not warrant Board involvement where, among other things, union's subsequent conduct had "substantially remedied" violation).

[26] *See, e.g., Laborers Local 265*, 322 NLRB 294, 296 (1996) (union violated its duty of fair representation by failing to notify nonmember unit employee, when it first

less force" to those employees who are full union members, but did not receive those notices before becoming members.[27] The purpose is "to be certain that they voluntarily accepted full membership" and that they contemporaneously relinquished their *Beck* rights.[28] At the same time, "[t]his notice requirement is satisfied by giving the unit employee notice once and is not a continuing requirement."[29] Moreover, the Board has held that once an employee has obtained actual knowledge of his rights under *General Motors* and *Beck*, and successfully has exercised those rights to become an objecting nonmember, "it would elevate form over substance to find that [a union] was thereafter obligated to inform him of the procedures associated with how to exercise his right to object."[30]

Based on the above principles, we conclude that the Union was not required to provide the employees with notice of their *General Motors* and *Beck* rights during the August hiring sessions because it previously had done so as part of its preexisting relationship with the employees as their exclusive bargaining representative. The issue in the current case is whether the relevant notice requirements arise anew in the context of a *Burns* successorship.[31] Prior to entering the Rider Agreement with the Employer, the Union had represented the employees at this site under a contract

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sought to obligate her to pay dues and fees under union-security clause, of her right to be and remain a nonmember, and of rights of nonmembers under *Beck*); *L.D. Kichler Co.*, 335 NLRB at 1429 (union must notify newly hired nonmember of *Beck* and *General Motors* rights when, or before, it attempts to obligate him to pay dues).

[27] *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB at 350.

[28] *Id.*

[29] *Id.* at 350. *See also California Saw*, 320 NLRB at 235.

[30] *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474, 474-75 (1999) (notice not required where employee was aware of and had exercised his *Beck* rights to become an objecting nonmember).

[31] Indeed, unlike many successor situations, the Employer and Union had a preexisting bargaining relationship. They already were parties to the multi-employer agreement, which obligates the Employer to hire predecessor employees at any facility, such as the one involved here, where it obtains a service contract and the Union already represents the employees. That agreement also requires the Employer to then recognize and bargain with the Union.

with the predecessor employer that included a union-security clause.[32] There is no evidence or allegation that the Union failed to provide the employees with proper *General Motors* and *Beck* notices at the time it obligated them to comply with the union-security clause in that prior contract, that the employees paid full Union dues under that contract without voluntarily doing so, or that they were denied the opportunity to become objecting nonmembers. After the Union provided the employees with the requisite notice once, it did not have a continuing requirement to do so.[33]

Moreover, nothing in the transition from the predecessor to the Employer altered the relationship between the Union and the employees that would require the Union to provide a new notice of rights. The employees remain part of the same bargaining unit that the Union had represented.[34] They continue to work at the same location, perform the same work, occupy the same job classifications, and have many of the same terms and conditions of employment.[35] Furthermore, shortly after the August hiring sessions, the Union again mailed all of the employees, members and nonmembers, a copy of its periodical, *Building Strength*, which included the required

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[32] The union-security clause in the multi-employer agreement, which now applies to the facility here, is the same as the union-security clause in the contract between the Union and predecessor employer.

[33] *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB at 349. *See also California Saw*, 320 NLRB at 231, 235 (once the pre-objection notice of *Beck* rights has been timely given, unions do not have to provide a "repeat" notice to employees who thereafter resign their union membership).

[34] *See, e.g., Trident Seafoods*, 318 NLRB 738, 738 (1995), *enfd. in relevant part*, 101 F.3d 111 (D.C. Cir. 1996)(quoting *Indianapolis Mack Sales*, 288 NLRB 1123, 1123 n.5 (1988))("[T]he Board's longstanding policy is that 'a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness.' "). Although we rely on the fact that the bargaining unit did not change, we do not find the makeup of the unit to be determinative here given the other evidence establishing that the Union-employee relationship did not change.

[35] The multi-employer agreement obligates the Employer to recognize the Union as the bargaining representative of "those employees inclusive of any job classifications as recognized by the prior employer at the location" and "to maintain, to the extent permitted by law, the existing terms and conditions of employment of those incumbent employees."

notice of rights.[36] Where the Union already has advised the employees of their rights under *General Motors* and *Beck* and the employees have had the opportunity to exercise the right to become objecting nonmembers, and remain free to do so, "it would elevate form over substance" to find that the Union is obligated to provide such notice again.[37]

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

/s/
B.J.K.

[36] Thus, the current case is distinguishable from *Weyerhaeuser Paper*, because the unit employees there never received their initial notice of rights. *See Paperworkers Local 1033 (Weyerhaeuser Paper Co.)* 320 NLRB at 350.

[37] *See Television Artists AFTRA (KGW Radio)*, 327 NLRB at 474-75.