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

DATE: June 12, 2014

TO: Terry Morgan, Regional Director
Region 7

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

SUBJECT: National Union of Healthcare Workers (Mercy Health Partners, Hackley Campus) Case 07-CB-115117	536-0150-7500 536-2509 536-2563 536-2565
District Lodge 60, International Association of Machinists and Aerospace Workers (Mercy Health Partners, Hackley Campus) Case 07-CB-115189	536-2581-0140 536-2581-3343 536-2581-6767-7500 536-5075-5083-2550 596-0420

The Region submitted this case for advice as to whether: (1) the NUHW unlawfully ceded its unit to the IAM in exchange for previous loans from the IAM; (2) the IAM unlawfully threatened employees with loss of membership for nonpayment of dues; (3) NUHW breached its duty of fair representation by failing to engage in its representational responsibilities; and (4) the IAM violated Section 8(b)(1)(A) and 8(b)(2) of the Act by improperly attempting to replace NUHW as the collective bargaining representative of unit employees. We conclude that the charges should be dismissed, absent withdrawal.

FACTS

On January 13, 2012, the National Union of Healthcare Workers ("NUHW") became the certified representative of a unit of approximately ninety-five technical employees at Mercy Health Partners, Hackley Campus ("MHP" or "Employer") in Muskegon, Michigan. Between January and September 2012, NUHW and its membership elected bargaining unit stewards, who also serve on the bargaining committee, and requested bargaining from MHP.

NUHW is based in California and has little infrastructure or ties to Michigan. On September 21, 2012, NUHW and District Lodge 60 of the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") executed a Servicing Agreement wherein IAM agreed, inter alia,

> [T]o provide collective bargaining and representation services to the NUHW bargaining unit members employed by [MHP], and to maintain the collective bargaining rights and undertake such action as is necessary to protect the employee's' [*sic*] rights under the terms and conditions of the existing status quo collective bargaining agreement currently in effect between [MHP] and NUHW.

The Servicing Agreement further stated that it did not change the status of NUHW as the legal representative of MHP employees, that NUHW remained responsible for all duties and responsibilities, including the duty of fair representation, and that IAM "assumes no liabilities or responsibilities, financial or otherwise as a result of the Servicing Agreement."

Some time in late September 2012, a joint NUHW-IAM unit newsletter was distributed to employees. The newsletter informed employees of the Servicing Agreement signed between NUHW and IAM and explained IAM's role as NUHW's agent. The newsletter reiterated that NUHW remained the legal collective bargaining representative. It also stated, as "official notification" to unit employees, that "NO ONE is required to pay any financial obligations to the NUHW or IAM until after the IAM has secured a collective bargaining agreement . . ." (emphasis in original).

On March 25, 2013[1], the IAM reported on its Department of Labor LM-2 form that it loaned the NUHW $2.3 million for the reporting period ending December 31, 2012. The existence of the loan was previously confirmed by the NUHW to the unit's chief steward in an email on August 12, 2012, wherein the NUHW indicated that the loan was for the Kaiser election in California at the time.

On May 7 the IAM sent letters to the stewards and members of the bargaining committee informing them of a mandatory meeting to be held on May 13. Only one member attended the meeting. On May 17, the IAM sent letters to those who did not attend informing them that they have been removed from their positions on the Stewards Council and from the bargaining committee. The NUHW Constitution and Bylaws outline the steps necessary to both appoint and remove a steward. As to the bargaining committee, the Bylaws state only that it is elected by the members in the unit, but is silent as to how a committee member may be removed. The letter implied that the action would not have been taken had the individuals informed the IAM prior to the meeting that they would not be able to attend. Copies of the letters were sent to NUHW's president.

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[1] All dates hereinafter are in 2013, unless otherwise stated.

The IAM conducted a membership meeting on May 20 to announce the removal of the stewards and bargaining committee and explained the IAM will appoint others to fill the vacancies. A unit employee asked the IAM representative why the bargaining committee and stewards were not removed according to the NUHW Constitution and Bylaws. The representative responded by asking that employee if she was a union member, which she responded "yes." He further asked whether the employee pays dues, which she responded, "no." The representative stated in response, "then you are not a member." The employee referred the representative to the NUHW-IAM newsletter stating that members are not required to pay dues until a collective bargaining agreement is signed. She then noted that few, if any, people in the room were paying dues. The employee challenged the IAM representative's assertion that no one present was a "member" by saying, "you have a servicing agreement with [NUHW] and we're not your members, so we're members of . . . what?" The IAM representative did not respond.

The employees removed from steward and bargaining committee positions attempted to contact the NUHW over the ensuing months to ask why it allowed the IAM to act outside the scope of NUHW's bylaws. Despite repeated emails, the NUHW did not respond to employee inquires.

On August 15, the NUHW and IAM signed a Change of Affiliation Agreement ("Affiliation Agreement") that purported to transfer the affiliation of the bargaining unit to the IAM as successor to NUHW for the MHP unit. However, the Affiliation Agreement's effectiveness was made contingent on MHP's acquiescence to the affiliation change. Furthermore, the Affiliation Agreement stipulated that upon MHP acceptance of IAM as successor to NUHW, the existing Servicing Agreement would become null and void.

On August 23, NUHW's president sent a letter to MHP with a copy of the recently signed Affiliation Agreement and noted that the change was contingent on MHP's acceptance of IAM as the successor. On September 11, MHP responded stating that it understood a change of affiliation to be a purely internal union matter and that "MHP's acceptance is neither necessary, appropriate nor required for a proper union affiliation." The letter further stated that MHP will continue to bargain with the NUHW through the IAM as its servicing representative. Some employees were aware that the Employer declined to acquiesce in the Affiliation Agreement.

Also on September 11, IAM held a membership meeting with unit employees where it announced that on August 15, NUHW "ceded" the unit to IAM. IAM representatives distributed a copy of the Affiliation Agreement to employees and claimed that NUHW "passe[d] the representation of [the] unit off to us." During the meeting an employee asked, "[a]re we NUHW or are we IAM right now[?]" The IAM representative responded, "you are IAM, they have ceded the unit to IAM."

NUHW, on September 19, represented to the Region that IAM is only the servicing agent of NUHW. On December 5, NUHW also confirmed to the Region that NUHW had not disclaimed interest in the unit.

On November 4, the IAM filed a petition seeking to represent the unit. The petition makes no mention of NUHW as the recognized or certified union. IAM submitted authorization cards from forty employees in support of its petition.

ACTION

We conclude: (1) that the allegation that NUHW ceded its unit to the IAM in return for its loan is time-barred under Section 10(b) of the Act; (2) IAM representatives did not unlawfully threaten employees with loss of membership because the statement did not rise to the level of a threat and, even if it had, the IAM had no power to enforce it; (3) NUHW did not breach its duty of fair representation because its pattern of conduct was neither coercive nor so egregious as to rise to the level of a duty of fair representation violation; and (4) the IAM did not violate Section 8(b)(1)(A) or 8(b)(2) because it did not engage in any of the recognized restraint and coercion tactics found unlawful by the Board, and its removal of stewards and bargaining committee members was an intraunion matter not unlawful under the Act.

A. IAM's Loan to NUHW and the Alleged Loss of Membership "Threat"

Section 10(b) of the Act precludes the issuance of a complaint based upon any unfair labor practice occurring more than six months prior to filing the charge.[2] This limitation period begins to run when a charging party has "clear and unequivocal notice of a violation."[3] Accordingly, the complaint allegations concerning the $2.3 million loan from IAM to NUHW in 2012 should be dismissed, absent withdrawal, because the charge was filed over a year after the time when the union steward received the email, on August 12, 2012, informing him of the loan; thus, the allegation is time-barred by Section 10(b).

As to the IAM's loss of membership "threats," the Board has held that union statements are not threats violative of Section 8(b)(1)(A) where the union does not have the actual power to follow through on the alleged threat.[4] At the May 20 meeting called by the IAM, the representative's statement to an employee that she is

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[2] *See generally Machinists Local 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960).

[3] *E.g.*, *Leach Corp.*, 312 NLRB 990, 991 (1993), *enforced*, 54 F.3d 802 (D.C. Cir. 1995).

[4] *See, e.g., Air La Carte*, 284 NLRB 471, 473-74 (1987).

"not a member" because she did not pay dues was not an actual threat and instead appears to simply be a misrepresentation or misunderstanding given that few unit employees were paying dues at the time. When the statement was made, IAM was operating under the Servicing Agreement as NUHW's agent at MHP. Furthermore, NUHW and IAM had, in a joint newsletter, specifically told members that no one would be required to pay dues until a collective bargaining agreement was signed. Moreover, even if the IAM representative's statement of loss of membership can be considered to be an actual overt threat, as only the NUHW's servicing agent, he did not have the power to follow through on such a threat; thus, IAM did not violate Section 8(b)(1)(A) by making the statement.[5]

B. NUHW and its Duty of Fair Representation

A union that is an exclusive bargaining representative is obligated to serve the interests of the employees it represents without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[6] However, this duty of fair representation is confined to matters of employment and its terms and conditions.[7] Moreover, for a union to violate its duty, the questionable conduct must be more than mere negligence or poor judgment.[8] In *Rainey Security*, the Board viewed a union, which was essentially absent because of its failure to communicate well with its membership, not to have violated its duty of fair representation.[9] The Board explained that they were not condoning the union's poor behavior, but that they did not find "a pattern of conduct so egregious as to warrant a finding of a failure of its duty of fair representation."[10] The Board further

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[5] *See id. Cf. Joint Council of Teamsters 3, 28, 37, 42 (Lanier Brugh Corp.)*, 339 NLRB 131, 132 (2003) (finding union violated 8(b)(1)(A) when it refused to represent employees and notified pension trust that employees were not in bargaining unit after employees exercised their right not to pay dues under state right to work law); *Iron Workers Local 45*, 320 NLRB 1079, 1080-81 (1996) (finding union unlawfully threatened employees with loss of membership in retaliation for filing Board charges).

[6] *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

[7] *Longshoremen ILA Local 1575 (Navieras, NPR)*, 332 NLRB 1336, 1336 (2000) (citing *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962)). *See, e.g.*, *Loc. 222, United Food and Commercial Workers (Iowa Beef Processors)*, 245 NLRB 1035, 1039 (1979) (finding union owed no duty of fair representation when it denied strike benefits).

[8] *E.g.*, *Rainey Security Agency*, 274 NLRB 269, 270 (1985).

[9] *Id.* at 269-70.

[10] *Id.* at 270.

stated that the union's "ineptitude" and "mismanagement" did not equate with actions that are "arbitrary," "irrelevant, invidious, or unfair."[11]

Additionally, absent coercion, a transfer of bargaining unit jurisdiction between two unions is a privileged internal union matter and does not, standing alone, violate a union's duty of fair representation.[12]

Here, although the NUHW seems to have ignored unit employees' inquires and has otherwise been generally absent in employees' daily lives, like in *Rainey Security,* NUHW's actions were at most merely negligent and not sufficiently egregious to rise to a duty of fair representation violation.[13]

Moreover, NUHW's attempt to transfer the unit to the IAM did not violate NUHW's duty of fair representation or otherwise violate Section 8(b)(1)(A) because it was not accompanied by any coercion. Although unit employees were told by an IAM representative at the September 11 meeting that "you are IAM," employees were also given copies of the Affiliation Agreement that contained the clause requiring Employer acquiescence to fully effectuate the agreement. Although IAM made the false and misleading statement, the investigation shows that at least some employees were soon made aware that the Employer did not acquiesce in the Affiliation Agreement and continued to treat IAM only as the servicing agent for NUHW. Thus, the employees would attribute the statement solely to IAM rather than NUHW.

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[11] *Id.* (quoting *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446 (1974)). *Cf. Roadway Express*, 355 NLRB 197, 202 (2010) (determining that union breached duty of fair representation when union official acted in bad faith by deliberately misleading grievance committee and virtually ensuring employee's grievance would be denied), *enforced*, 427 F.App'x 838 (11th Cir. 2011); *Postal Workers*, 328 NLRB 281, 282 (1999) (finding that a union breaches the duty of fair representation when it purposely keeps a grievant uninformed or misinformed concerning his or her grievance).

[12] *See Joint Council of Teamsters No. 42 (Grinnell Fire Protection Systems Co., Inc.)*, 235 NLRB 1168, 1169 (1978) (stating that absent evidence of coercion, transfer of jurisdiction over union members did not violate 8(b)(1)(A)), *enforced sub nom.*, *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980) ("We find no support . . . for the proposition that the attempt to substitute a new employee representative constitutes an unfair labor practice in the absence of coercive conduct aimed at compelling an employee to accept the new representative").

[13] *See* 274 NLRB at 270.

Therefore, there was no bad-faith or coercion on the part of NUHW because it did not attempt to intentionally mislead employees as to their certified representative.[14]

C. Alleged Violations by IAM

1. The IAM's Statements as to Who Represents the Employees Did Not Violate the Act

A union violates 8(b)(1)(A) when it restrains or coerces employees because of an employee's dissident union activities, decision not to support a strike, nonmembership in a union, or other activities encompassing employees' exercise of their Section 7 rights.[15] To be a violation, the conduct at issue must be coercive.[16]

Here, the IAM did not engage in any conduct that would rise to the level of restraining and coercing employees in violation of 8(b)(1)(A). Although IAM told employees that "you are IAM," the statement is merely a misrepresentation of the IAM's status as the servicing agent for NUHW. Although, given the IAM's filing of a representation petition, it is clear that it desires to eventually become the unit's certified representative, claiming that "you are IAM" does not rise to the level of threats or coercive statements found unlawful by the Board.[17]

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[14] *See Grinnell Fire Protection Systems*, 235 NLRB at 1169; *Roadway Express*, 355 NLRB at 202.

[15] *See, e.g.*, *Boilermakers, Local 686*, 267 NLRB 1056, 1057 (1983) (finding violation where union representative threatened employee with violence for resigning union membership); *Teamsters Local 391*, 357 NLRB No. 187, slip op. at 2 (Jan. 3, 2012) (finding violation where union representative's comment that an employee "needs to be stopped" from going to the Board with his complaints would be reasonably interpreted as a threat because employees would understand representative's comments to mean by any means necessary including unlawful ones).

[16] *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 290 (1960); *See, e.g. Service Employees Local 50 (Evergreen Nursing Home)*, 198 NLRB 10, 12 (1972) (listing examples of union violence directed at employees where 8(b)(1)(A) violation found).

[17] *Cf. Boilermakers, Local 686*, 267 NLRB at 1057 (threatening unit employee with violence for engaging in Section 7 activities); *Teamsters Local 391*, 357 NLRB at 2 (finding statement to employee would be reasonably understood as threatening violence for engaging in Section 7 activities).

2. The IAM Did Not Demand Recognition Nor Did the Employer Confer Recognition

A minority union violates Section 8(b)(1)(A) and 8(b)(2) if it accepts an employer's offer of exclusive bargaining representative status and then subsequently bargains with that employer and enters into a collective bargaining agreement that contains a union security clause.[18]

The IAM has not demanded recognition from the Employer, nor has the Employer recognized the IAM as the exclusive bargaining representative. Instead, NUHW presented the Affiliation Agreement to the Employer requesting that it accept IAM as NUHW's successor. The Employer expressly declined to agree to the Affiliation Agreement and stated that it would "continue to bargain with the NUHW through the NUHW's identified Servicing Representative, the IAM." Moreover, although the IAM is arguably acting outside the scope of the Servicing Agreement by making the unequivocal statement of "you are IAM," the Employer has not recognized the IAM and there is no collective bargaining agreement in place.[19] Thus, there is no mechanism available to IAM to force employees to accept its purported representation.[20]

3. The IAM Did Not Violate the Act When it Failed to Follow NUHW's Constitution and Bylaws

The Board avoids regulating the relationship between unions and their members and thus will not find a violation of Section 8(b)(1)(A) unless there is "some nexus with the employer-employee relationship and a violation of the rights and obligations of

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[18] *E.g., Dominick's Finer Foods*, 308 NLRB 935, 946-47 (1992) (finding union violated 8(b)(1)(A) and 8(b)(2) when it accepted recognition from employers in multi-employer group and further violated when it received benefits of union security clause and dues checkoffs provisions of collective bargaining agreements with same employers), *enforced*, 28 F.3d 678 (7th Cir. 1994); *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB No. 136, slip op. at 7 (Jun. 24, 2013) (same).

[19] Effective March 28, 2013, Michigan became a right to work state. Thus, even if there was a contract in place, it could not contain an enforceable union security clause.

[20] *See Grinnell Fire Protection Systems*, 235 NLRB at 1169 (finding no violation of 8(b)(1)(A) after transfer of jurisdiction from local who disclaimed to new local where new local made no attempt to force employees to accept representation).

employees under the Act."[21] Thus, a union's discipline of a member is within reach of 8(b)(1)(A) if it falls into any of the following categories: (1) it impacts on union members' relationships with their employer; (2) impairs access to the Board's processes; (3) pertains to unacceptable methods of union coercion such as violence; or (4) otherwise impairs policies embedded in the Act.[22] If the union's actions fall into one of the above four categories, the Board will then do a balancing test by measuring the affected employee's Section 7 rights against the legitimacy of the union interests at stake.[23]

The IAM did not violate the Act by failing to follow NUHW's bylaws and constitution when it removed the stewards and bargaining committee because their removal did not impact members' relationship with the Employer, impair access to Board processes, pertain to unacceptable methods of coercion such as violence, or otherwise impair policies embedded in the Act.[24] First, although the NUHW's bylaws provide specific steps on how stewards are to be removed, their removal did not impact their relationship with the Employer because the steward position is created by the NUHW and its bylaws, rather than any type of agreement with the

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[21] *Office Employees Local 251 (Sandia Natl. Laboratories)*, 331 NLRB 1417, 1424 (2000) (overruling previous decisions to the contrary). *See Scofield v. NLRB*, 394 U.S. 423, 430 (1969) ("a union [is] free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule"); *Teamsters Local 896 (Anheuser-Busch)*, 339 NLRB 769, 769 (2003) (noting it is well established that nothing in Act precludes a union from instituting its own rules for maintaining intraunion discipline and maintaining union solidarity so long as those rules do not impair any policy that Congress has imbedded in the Act and are reasonably enforced against union members who are free to resign from the Union and escape the rules).

[22] *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1120 (2000) (analyzing union's application of its internal rules under *Sandia* precedent); *Sandia Natl. Laboratories*, 331 NLRB at 1424.

[23] *See Steelworkers Local 9292 (Allied Signal Technical Services)*, 336 NLRB 52, 54 (2001) (highlighting Board's decisions in *Sandia* and *Brandeis* in delineating application of 8(b)(1)(A) to internal union rules and that use of balancing test is in accordance with "longstanding [Board] precedent").

[24] *See Brandeis University*, 332 NLRB at 1120; *Sandia Natl. Laboratories*, 331 NLRB at 1424.

Employer.[25] Second, there is no evidence that the IAM has impeded employee access to Board processes. Third, there is also no evidence that the IAM has engaged in any violence or other unacceptable methods of coercion. Finally, the IAM's unilateral removal of the bargaining committee was not unlawful. The NUHW's bylaws are silent as to the method for bargaining committee removal.[26] Further, the IAM's letter to the employee-members of the bargaining committee on May 17 makes clear the legitimacy of its interests as NUHW's servicing agent when it says that it is "fully committed to negotiating a fair and equitable Collective Bargaining Agreement to benefit *all* members[,]" (emphasis added) and that the offending committee members' "[b]latant disregard to an assignment letter without contacting [the IAM representative] for excusal from the meeting is in no way representing the best interest of the membership." Although employees have a right under Section 7 to bargain collectively through representatives of their own choosing, the union's legitimate interests in representing the membership as a whole outweighed any right by the former bargaining committee members to sit on the bargaining committee.[27] Therefore, the IAM did not violate 8(b)(1)(A) by removing the stewards and bargaining committee members for failing to attend the mandatory meeting.

Accordingly, for the foregoing reasons, the complaint allegations should, absent withdrawal, be dismissed.

/s/
B.J.K.

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[25] *Cf. Brandeis University*, 332 NLRB at 1121 (noting that employee who was removed from a committee created by the collective bargaining agreement may arguably have had his terms and conditions of employment adversely affected by union because committee position was not created by union).

[26] *See Brandeis University*, 332 NLRB at 1118 (noting that union's constitution and bylaws are silent on procedures for selecting shop stewards and that union filled position per past practice).

[27] *Cf. Anheuser-Busch*, 339 NLRB at 769-70 (finding violation where union's threat of discipline for employees' reporting safety violations as required by collective bargaining agreement was contrary to policies of Act and violated employees' Section 7 right to concertedly address employer about safety concerns).