

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 97-51

July 30, 1997

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Richard A. Siegel, Acting Associate General Counsel

SUBJECT: General Counsel's Position Regarding Videotaping Employees  
for Use in an Employer's Anti-Union Campaign Videotape

Based on a remand from the U.S. Court of Appeals for the D.C. Circuit in Allegheny Ludlum Corp. v. NLRB, 104 F.3d 1354 (1997), the Board is currently considering the issue of the appropriate standards to be applied for evaluating the lawfulness of an employer's involvement of its employees in an antiunion campaign video. Attached hereto is a copy of the General Counsel's Statement of Position to the Board in Allegheny Ludlum with respect to the remand from the Circuit Court, which sets forth the General Counsel's position regarding the guidelines for determining whether an employer's request that employees consent to the use of their photographic image in an employer's videotapes or campaign propaganda may violate Section 8(a)(1) of the Act. Therefore, until the Board resolves this issue, Regions should following the General Counsel's proposed guidelines in determining whether to issue complaint and, on behalf of the General Counsel, make the arguments set forth in the attached brief in litigating cases raising this issue.

If you have any questions regarding this memorandum, please contact the Division of Advice.

R.A.S.

cc: NLRBU

Attachment

MEMORANDUM OM 97-51

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLEGHENY LUDLUM CORPORATION

Case 6-CA-26862

UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, CLC

COUNSEL FOR THE GENERAL COUNSEL'S STATEMENT OF POSITION  
ON REMAND OF BOARD'S ORDER THAT RESPONDENT'S  
VIDEOTAPING OF EMPLOYEES CONSTITUTED UNLAWFUL  
POLLING IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

I. PRELIMINARY STATEMENT

On July 28, 1995, Administrative Law Judge Wallace Nations (the Judge) issued his decision, which upheld the Amended Consolidated Complaint. The Respondent filed Exceptions and a Supporting Brief. The General Counsel and the Charging Party filed an Answering Brief to Respondent's Exceptions and Respondent filed a reply brief.

On December 22, 1995, the Board issued a Decision and Order, which, affirmed the Judge's decision and adopted the Judge's recommended Order. *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995).

Respondent petitioned the United States Court of Appeal's for the District of Columbia Circuit for review and denial of enforcement of the Board's decision. With regard to the finding that Respondent's videotaping of employees for an anti-union campaign video unlawfully polled employees, and therefore violated Section 8(a)(1) of the Act, the Court concluded that the

Board's precedents dealing with "polling," videotaping, and free speech rights of employers created conflicting mandates and that the Board has yet to articulate a clear standard to guide employers, employees and administrative law judges in reconciling these mandates. Thus, the Court remanded this issue with instructions to the Board to develop a standard for evaluating employer communications during an organizing campaign.<sup>1</sup> Allegheny Ludlum Corp. v. NLRB, 104 F.3d 1354, 1358-64 (D.C. Cir. 1997).

On May 1, 1997, the Board gave notice that it decided to accept the remand from the Court and that all parties could file statements of position by May 15, 1997, with respect to the issues raised by the remand. Thereafter, the Board extended the time for filing Statements of Position until July 1, 1997. In response, Counsel for the General Counsel submits the following statement of position with respect to the issues raised by the Court's remand. Amplifying the views previously set forth in the General Counsel's Pre-Argument Brief In Support of Exceptions in Flamingo Hilton-Reno, Inc., Case 32-CA-14378, argued before the Board on August 7, 1996, we propose a five-part test, adapted from Struksnes Construction Co., 165 NLRB 1062, 1063 (1967), that endeavors to comply with the Court's requirement that clearer guidelines be provided to employers who wish to make campaign videos. We then apply those proposed guidelines in support of our position that Respondent's manner and means of videotaping its employees for its anti-union video was unlawful.

## II. FACTUAL SUMMARY

Respondent, a Pennsylvania corporation, with its principal offices located in Pittsburgh, Pennsylvania, is engaged in the manufacture and non-retail sale of specialty steel products, such as stainless steel and silicone electrical steel.

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<sup>1</sup> The Court enforced the Board's findings as to the threats of retaliation contained in the second edition of Respondent's "Your Choice" campaign newsletter and the unlawful termination of James Borgan.

Respondent operates eight facilities in and around the Pittsburgh area, including the Brackenridge plant, Natrona Plant, Leechburg plant, Bagdad plant, Vandergrift plant, Natrona Heights Tech Center, Leechburg main office and its headquarters office located in downtown Pittsburgh. (Tr. 28-30) .<sup>2</sup>

For many years, the Union has represented approximately 3500 production and maintenance employees employed by Respondent. In addition, the Union represents a small unit of office and technical employees at the Brackenridge and Leechburg facilities. The Union has never represented any employees at Respondent's headquarters office.

In the summer of 1994, following a strike by the production and maintenance employees, the Union initiated an organizing drive among Respondent's salaried employees and in October 1994, filed a petition with the Board to represent these employees. An election was held on December 2, 1994. The Union lost the election by a vote of 237 to 225. (ALJD, 320 NLRB at 486).

During the organizing campaign, Respondent utilized a variety of means to communicate with employees, one of which was the production, during working hours, of an anti-union campaign video entitled, "The 25<sup>th</sup> Hour." Respondent filmed footage of about 17 percent of the eligible voters for the video which Respondent then required employees to watch during working hours. Several of the employees spoke during the video and many others were shown smiling and waving at the camera.

Respondent filmed employees at their work stations on November 14, 15, and 16, 1994. The process used by Respondent placed employees in the position of having to make known their union preference. Respondent did not request employees to volunteer to be in its film. Rather, on the first day of filming then Supervisor, Communications Services Ziemanski and the

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<sup>2</sup> References to the official transcript are cited as "(Tr.)", references to General Counsel's, Respondent's, and the Union's Exhibits are cited as "(GC Exh.)", "(Resp. Exh.)" and "(Union Exh.)", respectively. References to the Board's and Judge's Decision are to the decision reprinted at 320 NLRB 484 (1995).

film crew approached individual employees without advance notice and requested that the employees allow the crew to film them.(ALJD, 320 NLRB at 489, Tr 208-209). On November 14 when Ziemanski and the film crew approached employees, Ziemanski simply handed them a written notice.<sup>3</sup> Employees who preferred to be cut from the footage were directed to advise one of two high level company officials, Director of Employer Relations Joyce Kurcina or Human Resources Counsel Stephen Spolar. After the first day, Ziemanski began handing out notices which instructed employees to communicate their desire not to be in the film to the video crew. However the initial notice directing employees to contact Kurcina or Spolar was never renounced.

On November 16, when filming took place at the Natrona Heights Tech Center, Respondent distributed the notices through the inter-office mail.

The record evidence established that certain employees did not have the benefit of reading the notice before they were filmed. On November 14, certain employees who were too surprised to do otherwise, allowed themselves to be filmed. One of these employees, James Goralka, questioned a member of the video crew as to whether the footage would be used in the "Aronson" film, but the crew member claimed he did not know the purpose of the film. After the filming was completed in his area, Goralka and a group of employees saw the notice indicating the steps to be taken to avoid filming. Consequently, Goralka called Joyce Kurcina to tell her that several employees wished to be edited out of the film. Kurcina told Goralka that the matter was out of her hands and that he should contact Ziemanski. Goralka then informed Ziemanski that several employees had discussed the filming and wished to be edited out. Ziemanski directed Goralka to put his request in writing and have the employees who wished to be edited from the film sign the request. Goralka drafted the request which nine other

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<sup>3</sup> The notice informed employees that the Employer would be, "filming footage for an upcoming video presentation that the Company will use to present facts about the current election campaign involving the steelworkers."

employees signed, and sent it via fax and inter office mail to Ziemanski. (GC Exh-8). No one from management assured Goralka that no action would be taken against him for refusing to be in the video nor was he told that there would be benefits given him if did appear. (ALJD, 320 NLRB at 490).

The record established that Respondent likewise recorded the names of at least 36 other employees who identified themselves in writing or orally as unwilling to be included in the anti-union film (GC Exh-30, Tr. 231).<sup>4</sup> In addition many other employees were put in the position of communicating their willingness or unwillingness directly to Ziemanski and the film crew after learning the purpose of the filming. Some employees waved off the crew; others responded to the poll by allowing their images to be used on the film. On the first day of the filming, Ziemanski filmed about 50 employees. Those unwilling to participate were required to inform Ziemanski even in cases where the employees had already made their preference known to one of the two high level Company officials. Inasmuch as Ziemanski was unable to identify all the employees at the various facilities who wished to avoid filming, Ziemanski did "nothing" to ensure that those who objected to participating in Respondent's film, were, in fact not filmed or not included in the video. At trial, Ziemanski offered differing reasons as to how employees who so requested were edited out of the film or were not filmed in the first place. According to Ziemanski, this occurred by coincidence or by having Joyce Kurcina identify them. (Tr. 213, 218, 223)

On the third day of filming when footage was taken at the Natrona Tech Center, employees were to have received through inter-office mail the notices indicating the nature of the video in which the footage would be used. Two employees, Loretta Tedeski and Kim Kowalski, had communicated their unwillingness to be filmed to Spolar. However, when the video crew arrived at the Tech Center and began filming employees the crew had no idea as to

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the actual identity of these two employees. With this type of disorganized "opt out" program employees may have again been asked to participate despite having communicated their desires to Spolar or Kurcina.

Many employees, thereafter, complained to Union Representative Peter Passarelli about the videotaping, and Passarelli in turn complained to Respondent's Vice President Bruce McGillivray, that the procedures surrounding the preparation of the videotape constituted unlawful "polling" of the employees regarding their union sentiments. Respondent neither discontinued nor altered the video taping procedure, despite Passarelli's complaints.(ALJD, 320 NLRB at 490). Respondent's video was ultimately shown to groups of employees in one of the campaign meetings which they were required to attend.

As stated previously, in considering this issue the Board affirmed the Judge's finding that Respondent's actions with respect to video taping of employees constituted unlawful polling of employees in violation of Section 8(a)(1) of the Act. The United States Circuit Court of Appeals for the District of Columbia remanded this issue to the Board based on its concern that based on the Board's decisions on polling, employers would question whether they could ever legally include visual images of employees in campaign material without running the risk of later being found in violation of the Act for illegally polling their employees. Allegheny Ludlum Corp. v. NLRB, 104 F.3d 1354, 1358-64 (D.C. Cir. 1997).

The court expressed concern over potentially conflicting standards arising after the Board's decision in Sony Corp. of America, 313 NLRB 420 (1993) and Section 8(c) of the Act. 104 F.3d at 1361-62. In Sony the Board affirmed the finding that the Employer had violated Section 8(a)(1) by videotaping its employees and using the footage in an anti-union presentation, without obtaining each employee's consent. The court considered this holding against Section 8(c) which protects an Employer's right to express an anti-union message to its

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<sup>4</sup> This number does not include 10 to 15 employee who orally advised Ziemanski that they did not want to be filmed (Tr. 231).

employees, subject to certain limitations described in Gissell. In remanding this case, the court noted that an employer concluding that it has the right to produce an anti-union video tape may be obligated under Sony to obtain employee consent before displaying the videotape to other employees. The "rub" according to the court is that the Board's polling cases suggest that by soliciting its employees consent to be included in an anti-union video tape, the employer may be in effect polling them as to their union sentiments in violation of Section 8(a)(1). The Court thus remanded for the Board to articulate guidelines as to the lawful methods that may be used by employers who wish to use the photographic images of their employees in campaign videos. Allegheny Ludlum Corp. v. NLRB, 104 F.3d at 1362-64.

### III. ARGUMENT

It is undisputed that in this case Respondent initially filmed employees without affording them any notice or opportunity to either consent to being filmed or reject such an option. Instead, Ziemanski handed employees a notice informing them of the steps to take if they did not wish to be included in the Employer's campaign video. During the next two days of filming employees received notice of the filming and the steps they could take to inform Respondent if they wished to decline to participate. In many cases, employees who orally informed Respondent officials of their desires were told they would have to put their requests in writing. Employees were not given assurances that no reprisals would be taken against them if they opted not to allow their photographic images be used in the employer's antiunion film. To the contrary, one week after the employees were put on film and then given the option to opt out, Respondent made threatening statements, in both small group meetings and in a newsletter sent to all employees, that suggested its willingness to retaliate against employees if they supported the Union.

We show below that when the foregoing facts are evaluated under an appropriate legal standard--a standard that both incorporates the sound principles elaborated in prior Board cases and complies with the terms of the remand from the Court of Appeals--the Board should

find that Respondent's methods of attempting to involve its employees in the making of an antiunion film violated Section 8(a)(1) of the Act.

#### A. Governing Principles

The starting point of this case is the statute. Section 7 guarantees employees the right not only to "join[] or assist labor organizations" and "to engage in other concerted activities for the purpose of . . . mutual aid or protection" but also to "refrain from any or all such activities . . . ." Section 7 thus affords employees freedom to decide for themselves the extent to which they will speak out or "disassociate themselves entirely from a labor-management dispute . . . ." Dawson Construction Co., 320 NLRB 116, 117 (1995). An employer who "interfere[s] with, restrain[s], or coerce[s] employees" in the exercise of that right violates Section 8(a)(1).

In evaluating whether an employer's conduct falls within Section 8(a)(1)'s proscription, "[i]t is a reasonable tendency under the circumstances which governs the inquiry in each case." *Sunbelt Mfg. Inc.*, 308 NLRB 780, 780 fn.3 (1992), *enfd. mem.*, 966 F.2d 305 (5th. Cir. 1993). It is the Board's responsibility "to strike the proper balance between [any] asserted business justification and the invasion of employee rights in light of the Act and its policy." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967).

In striking that balance, the Board has long held that an employer's conduct in systematically polling its employees to determine whether they are for or against union representation is ordinarily an interference with the employees' freedom of choice unless certain minimum safeguards are followed:

- (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

*Struksnes Construction Co.*, 165 NLRB 1062, 1063 (1967). That policy reflects the Board's experience that, without appropriate safeguards, polling "generally tends to cause fear of

reprisal in the mind of the employee if he replies in favor of unionism"--a fear grounded in the reality that an "employer cannot discriminate against union adherents without first determining who they are." *Id.* at 1062.<sup>5</sup>

For similar reasons, the Board has long been alert to the danger of campaign activities that are the functional equivalent of polls without the protections of a secret ballot and that effectively require employees to reveal their union sentiments to their employer. For example, "[i]t is undisputed that an employer may make antiunion paraphernalia available to employees at a central location unaccompanied by any coercive conduct." *Barton Nelson, Inc.*, 318 NLRB 712 (Aug. 25, 1995).<sup>6</sup> But where "Vote No" buttons or T shirts are proffered directly to employees by their supervisors--thereby placing employees under pressure to make an observable choice that reveals whether they are inclined to support or reject the union--the Board has found an impermissible coercion of Section 7 rights.<sup>7</sup>

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<sup>5</sup> Of course, since the earliest days of the Act, employees have also had to fear that they might be fired merely upon the suspicion that they were supporters of a union organizing campaign. E.g., *NLRB v. Link-Belt Corp.*, 311 U.S. 584, 589-590 (1941); *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, 98 (8th Cir. 1966); *Teamsters Local 633 v. NLRB*, 509 F.2d 490, 497 (D. C. Cir. 1974).  
<sup>6</sup> E.g., *Black Dot, Inc.*, 239 NLRB 929 (1978); *Schwartz Mfg. Co.*, 289 NLRB 874, 879 (1988); *Phillips Industries, Inc.*, 295 NLRB 717, 733 (1989) and *Holsum Bakers of Puerto Rico*, 320 NLRB 834, 839 (1996). The Board's specifying that only noncoercive means may be used in distributing antiunion paraphernalia respects the language and policy of Section 8(c) of the Act, which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

<sup>7</sup> *Barton Nelson, Inc.*, *supra*, 318 NLRB at 712; *A.O. Smith Automotive Products, Co.*, 315 NLRB 994 (1994); *Laidlaw Transit*, 310 NLRB 15, 17 (1993); *House of Raeford Farms*, 308 NLRB 568, 570 (1992), *enfd. mem.* 7 F.3d 223 (4th Cir. 1993), *cert. denied*, 114 S.Ct 1539 (1994). See also *Kerr-McGee Chemical Corp.*, 311 NLRB 447 (1993)([T]here are rather fine factual distinctions between cases in which offering employees vote no campaign material designed to be publicly displayed on the employees' clothing is deemed sufficiently close to polling employee sentiment to have a reasonable tendency to coerce and those in which offers of such material are deemed noncoercive."); *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1092-1093 (1984)(isolated and noncoercive distribution of an antiunion button did not constitute unlawful interrogation).

In safeguarding employee freedom to decide for themselves the extent to which they will participate in protected activity, the Board has likewise been sensitive to the dangers posed by activities that may lead employees to fear that special efforts are being made to monitor and record the degree of their involvement in Section 7 activity.<sup>8</sup> The Board has recognized, for example, that methods of distributing antiunion paraphernalia that prominently feature the employer's making and keeping of lists of employees appearing to favor the employer's viewpoint have a tendency to intimidate employees who harbor a different view.<sup>9</sup> So too do activities such as an employer sponsored "betting pool" that involves a supervisor's making of a list of those betting on the employer to win the election and those betting on the union.<sup>10</sup>

Filming employees who are engaged in protected activity may likewise chill Section 7 rights in a number of different ways.<sup>11</sup> In balancing the conflicting interests at stake, the Board is well aware that organizational activities (such as leafleting or wearing buttons or T Shirts supporting one side or the other) often take place in the open and thus are unavoidably subject to being noticed without incurring any liability thereby.<sup>12</sup> But the Board has also recognized that "[p]hotographing and videotaping clearly constitute more than 'mere observation' because such pictorial recordkeeping tends to create fear among employees of future reprisals." *F.W. Woolworth Co.*, 310 NLRB 1197 (1993).

#### B. A Proposed Policy on Employer Videotaping

The foregoing principles directly bear on the question presented in both *Sony* and the present case. The United States Court of Appeals has partially remanded this case for the for

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<sup>8</sup> *Fairfax Hospital*, 310 NLRB 299, 310 (1993), enfd. mem. 14 F.3d 594 (1993), cert. denied, 114 S. Ct. 2674 (1994). Compare *Red Lion*, 301 NLRB 33 (1991)(where the employer's maintaining a list of off-duty employees who reported to vote was consistent with past practice and had a valid business purpose that was known to employees).

<sup>9</sup> *House of Raeford Farms, supra*, 308 NLRB at 570-571 & fn. 12.

<sup>10</sup> *Wellstream Corp.*, 313 NLRB 698, 698 fn. 2, 704 (1994).

<sup>11</sup> *Dayton Hudson Corp.*, 316 NLRB 477, 477 fn 1, 488-489 (1995); *Rainbow Garment Contracting*, 314 NLRB 929, 936-937 (1994).

<sup>12</sup> *Roadway Package System*, 302 NLRB 961 (1991); *Three Sisters Sportswear Co.*, 312 NLRB 853, 866-867 (1993), enfd., on other grounds, 55 F.3d 684 (D.C. Cir. 1995).

Board to articulate a policy under which an employer may involve its employees in an antiunion campaign video consistent with the employees' Section 7 right to freely decide for themselves the extent to which they take sides in a union organizing campaign.

As the Court of Appeals recognized, Board regulation of employer efforts to involve employees in campaign videotapes requires the Board to balance conflicting legitimate interests. On the one hand, experience has shown that systematic attempts to secure the consent of employees to appear in an employer's campaign video--like similar attempts to involve employees in the display of employer slogans on buttons or T shirts or to poll employees concerning their union sentiments--have a reasonable tendency to coerce or restrain employees in the exercise of their Section 7 rights. Employees may reasonably be made apprehensive when their employer confronts them with consent form in a manner that requires them to reveal to a manager or supervisor whether or not they are disposed to cooperate in the employer's anti-union campaign.

On the other hand, employees have a right to cooperate in the making of a campaign video, if that is their free choice, and employers have a right under Section 8(c) to make campaign videos that express their views. Moreover, the Board's decision in Sony, as well as state and federal laws that protect employees against having their photographic image appropriated for commercial purposes,<sup>13</sup> presuppose that there must be some lawful means whereby employers may secure the consent of those employees who are willing to license the employer to use their photographic image.

To reconcile these conflicting legitimate interests, we propose that the Board adapt the polling guidelines of Struksnes Construction Co., 165 NLRB 1062, 1063 (1967), to the analogous situation considered here and propound the following rule:

Absent unusual circumstances, employer requests that employees consent to the use of their photographic image in employer videotapes or other campaign propaganda will violate Section 8(a)(1) of the Act unless the following safeguards are observed: (1) The

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<sup>13</sup> See, e.g., Prosser & Keeton, *The Law of Torts*, § 117 at 849-854 (5th ed. 1984).

purpose of the video is to express the employer's views concerning the organizing campaign; (2) that purpose is communicated to the employees in advance of filming; (3) assurances are given to employees that no reprisals will be taken against those who elect not to participate and no benefits will be given to those who do; (4) consent forms are made available to employees at a location and in a manner that allows self-selection by employees in advance of their being photographed and does not force them to make an observable choice in the presence of supervisors or managers; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.<sup>14</sup>

The first requirement--that the employer have a lawful purpose--is appropriate because only if the employer's campaign video is an expression of views, argument, or opinion within the meaning of Section 8(c) of the Act is there a conflicting legitimate interest to balance against the Section 7 right of employees to be free of all interference, restraint, or coercion. An employer's soliciting employees to participate in a campaign film inevitably has some tendency to pressure employees to reveal to the employer the extent to which they are willing to support the employer's position in the campaign. If the film at issue is an instrument for conveying threats of reprisal or promises of benefit to employees, the employer's request for employee participation in that film is simply unjustified.

Also appropriate are the second and third requirements--that the employer's lawful purpose be communicated to employees and that the employer assure employee that there are no "carrots" for participating in its film or "sticks" for declining to do so. Here, as in Struksnes, 165 NLRB at 1063, both requirements serve to allay the employee fears that are natural in the circumstances. In the present context, those fears are that the solicitation is an attempt to pressure employees to reveal the extent to which they are sympathetic to the employer's position and is a prelude to the employer's dispensing rewards or punishments in accordance with its perceptions of individual employee's views.

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<sup>14</sup> In the initial decision in this case, the Judge expressly rejected Respondent's argument that its solicitation of employees should be found lawful if union solicitation of employees would be found lawful in the same circumstances. The Judge noted that a union, unlike an employer, does not have immediate control over the employees' economic livelihood. 320 NLRB at 490, fn. 4. We believe that the distinction thus drawn is sound and should be adhered to in this and future cases.

The fourth requirement--that consent forms are made available to employees at a location and in a manner that allows self-selection by employees in advance of their being photographed and does not force them to make an observable choice in the presence of supervisors or managers--states the principle that has animated the prior Board decisions that are most analogous to the problem at hand. As shown, the Board has long proscribed methods of involving employees in the employer's campaign that put individual employees on the spot to declare whether or not they will manifest support for the employer's position.<sup>15</sup> But the Board has also long approved the technique of making antiunion paraphernalia available to employees at a central location, unaccompanied by any coercive conduct, in a manner permitting those employees who were true volunteers to take the initiative in deciding for themselves whether they wished to participate.<sup>16</sup>

Finally, the fifth requirement--that employers refrain from soliciting employee participation in campaign videos if the employer has created a coercive atmosphere--is comparable to the final requirement in Struksnes, 165 NLRB at 1063, and similarly reflects a reasonable balance of the conflicting legitimate interests. For if the employer has responded to the organizing campaign with unfair labor practices or other objectionable conduct that creates

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<sup>15</sup> E.g., Barton Nelson, Inc., 318 NLRB 712 (1995); A.O. Smith Automotive Products, Co., 315 NLRB 994 (1994); Farris Fashions, Inc., 312 NLRB 547, 558 (1993), enfd. 32 F.3d 373 (8th Cir. 1994); Laidlaw Transit, 310 NLRB 15, 17 (1993); House of Raeford Farms, 308 NLRB 568, 570 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied, 114 S.Ct 1539 (1994).

<sup>16</sup> E.g., Black Dot, Inc., 239 NLRB 929 (1978); Schwartz Mfg. Co., 289 NLRB 874, 879 (1988); Phillips Industries, Inc., 295 NLRB 717, 733 (1989); Holsum Bakers of Puerto Rico, 320 NLRB 834, 839 (1996). The Court of Appeals appears to have assumed that "employees who have on their own initiative clearly expressed opposition to union representation" could be approached directly by the employer without the need for any special precautions. Allegheny Ludlum Corp. v. NLRB, *supra*, 104 F.3d at 1363-64. That issue is not presented on the facts of this case. We would assume, however, that whether an employee's "clearly expressed opposition" was an unusual circumstance warranting an exception to the rule proposed here would require careful examination of the particular facts. We would not agree that the mere fact that an employee wore a "Vote No" button or T Shirt was a sufficient basis for the employer to approach that employee about participating in an antiunion video. Participation in a video escalates the employee's involvement because the immediate day-to-day control over whether the employee will appear in the workplace as a supporter of the employer passes from the employee's hands

a coercive atmosphere, the Board is entitled to presume that the employer's conduct exacerbated the tendency to coerce inherent in an employer request that employees "volunteer" to appear in the employer's antiunion film. Cf. Kurz-Kasch, Inc., 239 NLRB 1044 (1978), where in the context of an employer's unlawful promise of benefits, a general announcement that Vote No buttons could be obtained in the plant manager's office was found to constitute unlawful pressure on employees to report to that office.

The foregoing standard, we submit, reasonably balances the conflicting legitimate interests that are implicated when employers attempt to involve their employees in the making of a campaign video. The proposed test also complies with directive of the Court of Appeals, in remanding, that the Board provide clearer guidelines to the parties.<sup>17</sup> To demonstrate that proposition, we apply the proposed guidelines to facts presented in Sony and the instant case.

### C. Sony

As discussed above, in remanding this case, the District of Columbia Circuit expressed concern that the Board's Sony decision did not provide clear guidance to the parties. Allegheny Ludlum Corp. v. NLRB, 104 F.3d at 1362, discussing Sony Corp. of America, 313 NLRB 420 (1993). We submit that if the Sony decision is re-analyzed in light of the new standard that we propose, the requisite guidance is present.

Sony involved an employer's casting its employees in an antiunion campaign video without their informed consent. The employer arranged to have unit employees photographed

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to that of the employer. To allow employers to directly request such employees to make that additional commitment is an undue restraint on the employee's free choice.

<sup>17</sup> The above-statement is subject to an important qualification: the present case only addresses issues of employer coercion of employees in soliciting their consent to participation in an antiunion campaign film and to that extent affords the Board only a limited opportunity to provide the clearer guidelines that the Court demanded. As pointed out in the General Counsel's Pre-Argument Brief In Support of Exceptions in Flamingo Hilton-Reno, Inc., Case 32-CA-14378, at pp. 26-27, future cases may present other kinds of issues regarding the lawfulness of this kind of employer campaign activity. For example, if employees participating in the employer's film are paid for their participation or if the film is shown to employees on paid company time, issues of discrimination may arise if the use of paid company time is denied to

at their work stations on the pretext that the picture taking was merely routine. 313 NLRB at 422-424. The pictures were then incorporated in a 30 minute video that was shown to the unit employees a few days before a decertification election. In the first 27 minutes of that video, which consisted of a narration setting forth the employer's arguments that the union was not necessary, still pictures of unit employees were shown at various points. Id. at 425. At the point where the narrator said that the employees would be happy without a union, the photograph of a smiling employee that was shown was of a union member who had been told to smile by the photographer. Id. at 426. In the last three minutes of the video, there were some 85 still photographs of employees (most of them bargaining unit employees). The lyric "we won't lose if we decertify, and that's good enough for me" was played over some of the photographs. In the final 90 seconds, only music accompanied the photographs of employees. Id. at 425.

On these facts, the Board affirmed the Judge's finding that the employer violated Section 8(a)(1) by photographing employees and using their photos in an antiunion video without the employees' informed consent. Id. at 420. In part, the theory of the violation was that the employer had "expropriated" the images of the employees. Id. at 428. Compare Dawson Construction Co., 320 NLRB 116, 117 (1995) (Section 7 protects the free choice of employees to decide for themselves whether they wish to allow themselves to "become[ ] a visible instrument" of their employer's statement about a labor dispute). In Sony, the judge found that a viewer "could reasonably conclude that the laughing and smiling photographs of unit employees whose faces appear in the film, and especially during the final antiunion jingle, were meant to show support for the antiunion message of the film as a whole." 313 NLRB at 429. For that reason, the Judge concluded that the video "was the visual equivalent of placing the

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union supporters at the same time that it is being granted to employees who are union opponents.

employees' names on a written antiunion document and circulating it to all the other unit members." Id. at 428.<sup>18</sup>

In Sony, the harm of the employer's expropriating the employees' images to create a false picture of the employees' actual sentiments was particularly felt by union activists who were embarrassed at being portrayed as if their real views were the opposite of what they had publicly professed. Id. at 428-429 citing NLRB v. Savair Mfg. Co., 414 U.S. 270, 273 (1983). But the Judge recognized the further point--which in our view is ultimately the more fundamental one--that

including the employees' pictures in an antiunion video where they seemed to support the antiunion words of the film and the final jingle would impermissibly place *any* employee who wished to disassociate herself from the video message in the position of having to declare herself as to union sympathies.

Id. at 429 (emphasis supplied).

If the facts of Sony are assessed under the new guidelines we have proposed here, the illegality of the employer's mode of proceeding and the reasonable alternatives that were available to it are apparent. As a threshold matter, Sony's requirement that employer's secure employee consent before including their photographic image in a campaign video is reasonable and should be reaffirmed. Just as an employer may not require an employee to wear an antiunion T shirt,<sup>19</sup> or pressure employees to wear "happy badges"<sup>20</sup> or to hold Vote No signs in

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<sup>18</sup> In the Board's original decision in this case, Member Cohen expressed disagreement with Sony's fact finding on this point, arguing that "a viewer of the videotape would regard the tape as one side's campaign propaganda rather than an expression of employee support." Allegheny Ludlum Corp., supra, 320 NLRB at 485 (concurring opinion). We respectfully submit that, at a minimum, that view of the impression created by the Sony film does not adequately take account of the finding that the lyric "we won't lose if we decertify, and that's good enough for me" was played over some of the photographs (Sony, 313 NLRB at 425). Our more basic disagreement, however, is that we believe that Member Cohen has underestimated the extent to which the involuntary incorporation of an employee's image into an antiunion video interferes with the employee's right to remain silent about a labor dispute and to avoid having to participate in the employer's statements about that dispute. See Dawson Construction Co., supra, 320 NLRB at 117.

<sup>19</sup> Fieldcrest Cannon, Inc., 318 NLRB 470, 496 (1995), enfd. in relevant part, 97 F.3d 65, 72, 74 (4th Cir. 1996).

photographs that it will use in its antiunion campaign,<sup>21</sup> so it ought not to be allowed to make an employee a participant in an employer's videotaped statement about a labor dispute where the employee has not volunteered for that role. The involuntary incorporation of an employee's image into an antiunion video interferes with the employee's right to remain silent about that labor dispute and to avoid having to participate in the employer's statements about that dispute. Dawson Construction Co., *supra*, 320 NLRB at 117.

What the employer should have done to obtain the requisite employee consent is also clear under the guidelines proposed here. Instead of simply filming the employees without their consent, as it did, the employer should first have given them notice that it planned to make a campaign film for the purpose of communicating its views on the election campaign. It should have advised employees that their participation in the film was wholly voluntary and that there would be no benefits for participating and no reprisals for declining to do so. Most importantly, instead of involuntarily including employees in the film and placing the burden on employees to come forward to identify themselves to management as persons who did not want to associate themselves with the employer's campaign, the employer should have made consent forms available at some central location. Use of that technique, which allows employees who are true volunteers to take the initiative in manifesting consent to be included in the employer's campaign video, serves all the employer's legitimate interests without unduly encroaching on the right of employees to keep their union sentiments to themselves in advance of a duly conducted election in which they can express their views by secret ballot.

#### D. The Present Case

In this case, Respondent did not repeat Sony's error of using photographic images of employees in an antiunion video without even attempting to secure the employees' informed consent. But the means Respondent adopted to obtain employee consent illustrated the danger

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<sup>20</sup> Farah Mfg. Co., 204 NLRB 173, 175 (1973)(employee Reyes).

foreseen in Sony, 313 NLRB at 429, namely, that any procedure that places the burden on the employee to opt out of participating in an antiunion video impermissibly places employees who wish to disassociate themselves from the video message in the position of having to reveal their views concerning the organizing campaign.

Respondent filmed about 17 percent of the eligible voters at the workplace over three separate days. On the first day, a company supervisor and an outside film crew arrived without prior warning and requested employees to sit at their desks and on cue to turn around, smile, and wave at the camera. Some of the employees filmed on the first day later found a notice indicating that the purpose of the video was to present the employer's position regarding the union organizing campaign and that, if the employees did not want their images used for that purpose, they should contact either the employer's director of employee relations or its human relations counsel. They did so and were referred to the supervisor working with the film crew who advised them to put their "opt-out" requests in writing. Their requests to have their pictures removed from the video were honored but no assurances against reprisal were given.

On the succeeding two days, employees were given one of two written notices prior to being filmed, which advised them of the purpose of the film and of their right to opt out of they so desired. One version of the notice directed the employees to notify the director of human relations or the human relations counsel. The other version directed them to advise the film crew of their desires. The film crew was frequently accompanied by a company supervisor, who eventually compiled a list of the names of some 30 employees who indicated that they did not want to appear in the employer's antiunion video. The Company preserved that list long after it was needed for the videotaping, without explanation. In the week following the taping of the employees, Respondent made threatening statements, in both small group meetings and in a

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<sup>21</sup> Florida Steel Corp., 224 NLRB 587, 588-589, 594 (1976), enfd. mem. 95 LRRM 2627 (5th Cir. 1977).

newsletter sent to all employees, that suggested its willingness to retaliate against employees if they supported the Union.

On these facts, the Board, applying the clarified legal standard proposed here, should reaffirm its previous finding that Respondent solicited the consent of employees to participate in its campaign video in a manner that unduly restrained them in the exercise of their Section 7 rights.

We do not dispute that the purpose of the video was lawful and that the filmed employees were given notice of the purpose of the film--although, in some cases, only after the fact of being filmed. But Respondent did nothing to assure employees that they were free to decline to participate in the video without suffering reprisal or loss of some benefit. Furthermore, Respondent took no reasonable step to ensure that only true volunteers--those who affirmatively wanted to be filmed--would come forward to participate. Instead, employees were indiscriminately included in the film without their consent and, if they objected, were required to submit a request to be excluded. Respondent's "opt out" method of seeking consent involuntarily conscripted its employees to participate in the filming and then forced them to step forward and affirmatively disclose to management whether they declined to "become[ ] a visible instrument" (Dawson Construction Co., *supra*, 320 NLRB at 117) of their employer's statement about a labor dispute. Forcing reluctant employees to make an such an observable choice directly to management is an unnecessary restraint on the Section 7 right of employees "to remain silent." *Id.*, quoting Texaco, Inc. v. NLRB, 700 F.2d 1039, 1043 (5th Cir. 1983). That unjustified restraint was compounded here because the names of the employees who elected not to support the employer's cause were placed on a list that was retained after the filming was completed. Moreover, Respondent subsequently made threatening statements that reasonably tendency of which would be to cause employees whose names were on that list to fear retaliation of the sort that, after the election, was, in fact, visited upon union supporter James

Borgan, whom the Judge, with Board and Court approval, previously concluded was unlawfully discharged (320 NLRB at 494-507; 104 F.3d at 1367-68).

For the reasons stated, we submit that Respondent solicited the consent of employees to participate in its campaign video in a manner that unduly restrained them in the exercise of their Section 7 rights. Therefore, the Board should, upon reconsideration of the evidence in light of the legal standard proposed here, reaffirm the Judge's previous finding that Respondent's actions in this regard violated Section 8(a)(1) of the Act.

#### IV. CONCLUSION

Based on the foregoing and the record as a whole, it is respectfully submitted that the record establishes by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by soliciting the consent of employees to participate in its campaign video in a manner that unduly restrained employees in the exercise of their Section 7 rights. Accordingly, it is submitted that, based on the foregoing and the record as a whole, the Board should again affirm the Judge's conclusion with respect to these allegations and enter an appropriate decision and order finding Respondent in violation of the Act.

Dated at Pittsburgh, Pennsylvania, this 26th day of June 1997.

Respectfully submitted,

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