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

Advice Memorandum

DATE: August 29, 1996

TO : Richard L. Ahearn, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
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SUBJECT: Overnite Transportation Company
Case 9-CA-33793

This case was submitted for advice as to whether certain questions asked by the Employer's counsel during pre-trial interviews with employees violate Section 8(a)(1) of the Act even though the assurances required under Johnnie's Poultry[1] were provided.

FACTS

A Union[2] campaign was started sometime in late 1994 at the Employer's Louisville, Kentucky facility. The Union lost a Board representation election held on March 17, 1995. The Union filed various Section 8(a)(1) and (3) charges[3] on March 16, 1995, alleging that, from January to mid-March 1995, the Employer: (1) promised (explicitly or implicitly) benefits to employees and improperly gave a wage increase; (2) threatened employees with discharge, plant closure, reduced work and hours, diversion of work opportunities and reduction in benefits; (3) indicated that organizing would be futile; (4) brought in groups of employees and terminal managers from other facilities who engaged in unlawful interrogations, surveillance, threats, promises of benefits and solicitation of grievances; and (4) discriminatorily promulgated and enforced rules concerning solicitation and distribution of union literature. The Union also filed objections to the election which paralleled these allegations. Alleging that the unfair labor practices were so severe that the possibility of conducting a fair rerun election was slight, the General Counsel sought a Gissel

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[1] 146 NLRB 770 (1964).

[2] General Drivers, Warehousemen & Helpers Local No. 89.

[3] That case was originally assigned as Case 9-CA-32726 but was reassigned as part of Case 18-CA-13394, et al.

bargaining order. A hearing on the complaint was scheduled for April 1996.

To prepare its defense to the charges and bargaining order request, the Employer's counsel interviewed employees during December 1995 and January 1996. Each employee was given the appropriate Johnnie's Poultry assurances,[4] both orally and in writing, before his or her interview. The interviews were conducted outside the presence of management. Some employees declined to be interviewed and others refused to answer certain questions or terminated the interviews early, and there is no evidence of any retaliation for these refusals. The following questions were part of a lengthy questionnaire presented to the employees for completion during the interviews:[5]

1. Did anyone ask you to sign a Union card or petition? Who?

2. If you didn't sign the card or petition the first time you were asked, why did you sign it when you were asked to do so again?

3. Who did you give the card or petition to after you signed it?

4. Did management do or say anything that threatened you? If yes, what? If yes, did it affect the way you voted?

5. Did anyone in management ever promise you anything if you or others did not vote for the Union? Who, what, when and where? If yes, did it affect the way you voted?

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[4] Specifically, each employee was told the purpose of the interview, that participation was voluntary, and that no reprisals would be taken for refusing to answer questions or be interviewed.

[5] The Region has apparently determined that the other questions were lawful and appropriately concerned the Employer's defense to the unfair labor practice charges and bargaining order request. The lawfulness of these other questions was not submitted for advice.

6. What did "Give Jim a Chance" mean to you in March of last year?

7. Do you consider the Union responsible for getting a wage increase in March 1995?

8. Did the wage increase affect the way you voted?

9. Did anyone from the Union tell you it was important for you to report to the Union or any employee any problems you had with the Company since the Union needed unfair labor practice charges to help them overturn the election? If yes, who?

10. Have you given a statement to anyone else regarding the election or the Company's or the Union's conduct?

The Union filed the instant charge in Case 9-CA-33793 alleging that the Employer violated Section 8(a)(1) of the Act by requiring employees to attend the pre-trial interviews and failing to comply with Johnnie's Poultry restrictions.

ACTION

We conclude that a complaint should issue, absent settlement, alleging that questions 1, 2, 3, 9 and 10 violated Section 8(a)(1) because they exceeded the limited scope of inquiry allowed for such employee interrogations. We further conclude that the Section 8(a)(1) allegations concerning questions 4, 5, 6, 7 and 8 should be dismissed, absent withdrawal.

In Johnnie's Poultry,[6] the Board held that an employer may inquire into the Section 7 activities of employees where such inquiry is necessary for preparing its defense in unfair labor practice proceedings, provided that the employer gives certain assurances to the questioned employees and conducts the interviews under appropriate conditions. As explained by the Board:

> the employer must communicate to the employee the purpose of the questioning, assure him that no

[6] Supra, 146 NLRB at 774-775.

> reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.[7]

A. Questions involving the signing of Union card or petition

Two of the questions in this category were as follows:

#1: Did anyone ask you to sign a card or petition? Who?

#3: Who did you give the card or petition to after you signed it?

The Board has held that the circumstances surrounding the signing of union cards can sometimes be a valid area of inquiry. For example, in Osco Drug, Inc.,[8] the Board upheld an ALJ's finding that, under the circumstances of that case, the employer's question as to whether employees had signed a union authorization card was lawful. The ALJ determined that "in view of the bargaining demand and the request for a Gissel bargaining order," the employer was entitled to inquire, after providing proper assurances, as to "whether and under what circumstances" employees had executed union authorization cards. The Board limited this type of an inquiry in Salvation Army Residence,[9] where it held that an employer exceeded the legitimate purpose of preparing its defense by asking an employee "from whom" she had received her authorization card, "thereby inquiring into the union activities of other employees."

In the present case, as in Osco Drug, the General Counsel was seeking a Gissel bargaining order as a remedy,

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[7] Id.

[8] 237 NLRB 231, 235-236 (1978).

[9] 293 NLRB 944, 973 (1989).

relying in part on a showing of Union majority status based on signed authorization cards. Thus, the first part of question #1, "Did anyone ask you to sign a Union card or petition?," was a valid inquiry for purposes of the Employer's preparation of its defense. However, the part of question #1 concerning "who" asked the employee to sign a Union card or petition, and question #3, "Who did you give the card or petition to after you signed it?," exceeded the Employer's legitimate purpose by prying into Union matters and should be alleged as unlawful.[10]

The third question in this category -- #2: "If you didn't sign the card or petition the first time you were asked, why did you sign it when you were asked to do so again?" -- was not necessary for the preparation of the Employer's defense. This question had the potential to be interpreted in a way that could interfere with employees' statutory rights, for example by eliciting information about Union matters. Although this question may be relevant to whether the card signatures were coerced,[11] any legitimate substantive information it might have sought was already elicited by other questions pertaining to coercion in the Employer's questionnaire.[12] Therefore, question #2 is unnecessary to the Employer's preparation of its defense

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[10] In addition to Salvation Army Residence, supra, see Plastic Film Products Corp., 238 NLRB 135, 145 (1978) (unlawful questions, including "who asked you to sign a union card?," exceeded any legitimate purpose of weighing the union's claim to majority status by prying into union matters and the union activities of other employees).

[11] Such information could help the Employer defend against a Gissel order by challenging the Union's claim of majority support based on a card showing. See, e.g., Grismac Corp., 205 NLRB 1108 (1973), enfd. 492 F.2d 1247 (7th Cir. 1974).

[12] Other questions included "Did the person who asked you to sign the card or petition tell you that if you signed you would not have to pay initiation fees or dues, or did they make any other promise to you if you signed? (list promise)"; "Did the person who asked you to sign the card or petition tell you that nearly everyone else already had signed?"; and "Did the person who asked you to sign the card or petition warn you about what would happen if you didn't sign? (If yes, what were you told?)"

within the meaning of Johnnie's Poultry and could potentially interfere with employees' statutory rights.[13]

B. Questions involving alleged Employer misconduct and its impact on employees as potentially relevant to the need for Gissel order

Five of the Employer's questions asked about various unfair labor practices alleged in the complaint, including:

> #4: Did management do or say anything that threatened you? If yes, what? If yes, did it affect the way you voted?;
>
> #5: Did anyone in management ever promise you anything if you or others did not vote for the Union? Who, what, when and where? If yes, did it affect the way you voted?; and
>
> #8: Did the wage increase affect the way you voted?

The first parts of questions #4 and #5 were relevant to the Employer's defense to the Section 8(a)(1) charges involving management threats and promised benefits. The latter parts of these questions, as well as all of question #8, asking if the conduct affected the way the employees voted, were relevant to the propriety of a Gissel bargaining order.[14] These questions go directly to whether the Employer's conduct tainted the first election and whether a future fair election is possible. Also, asking whether the employees' votes were affected was not an inquiry into the employees' subjective state of mind. The questions asked about an objective result -- whether the conduct changed the employee's vote, not how the employee felt about the conduct.[15]

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[13] See 146 NLRB at 775.

[14] See Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1115 (7th Cir. 1973) (the ineffectiveness of the employer's activities is "pertinent to the propriety of a bargaining order"). See also NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 689 (7th Cir. 1982).

[15] The Board corrected an ALJ on this point in Superior Container, 276 NLRB 521, 522 (1985), where the employer asked whether the employees could vote freely in a future election. The ALJ found this question to be unlawful, because it attempted to elicit information concerning the

We conclude that questions #6 and #7 were also relevant to the propriety of a Gissel bargaining order and were not unlawful. Question #6 was: "What did 'Give Jim a Chance' mean to you in March of last year?" "Jim" refers to the Employer's chief operating officer who allegedly impliedly promised the employees better benefits if the employees did not select the Union. The complaint alleges that Jim and several managers asked the employees to "Give Jim a Chance" to "make things better."[16] If the Employer could show that the employees did not take "Give Jim a Chance" as a promise of a benefit, then it follows that such statements would not affect a future election and should not be a basis for issuance of a Gissel order. Question #7 was: "Do you consider the Union responsible for getting a wage increase in March 1995?" This question, which was followed by the question as to whether the wage increase affected the employee's vote, was potentially relevant to the Employer's defense. For example, if the employees answered yes to question #7, it might help prove that the employees were not prejudiced against the Union by the wage increase and that therefore the wage increase should not be a factor in support of a Gissel order.

Therefore, we conclude that questions #4 through #8 were necessary for the Employer to prepare its defense to the unfair labor practice charges or request for a Gissel bargaining order and should not be alleged as unlawful.

C. Question involving Union pressure to report problems with the Employer

Question #9 was: "Did anyone from the Union tell you it was important for you to report to the Union or any employee any problems you had with the Company since the Union needed unfair labor practice charges to help them overturn the election? If yes, who?" We conclude that this was an unlawful question. Whether the Union urged the reporting of problems with the Employer is irrelevant to the merits of

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employees' subjective state of mind. The Board held that the question was lawful as it did not "probe the employees' views concerning the union."

[16] The complaint also alleges that some management personnel wore T-shirts with the logo "Give Jim a Chance."

the charges.[17] This question thus exceeded the Employer's legitimate purpose of preparing for its defense. Moreover, the question is also unlawful under Johnnie's Poultry, because it pries into Union matters by inquiring directly into the most sensitive of Union-employee discussions and interferes with the rights of employees to act in concert for their mutual aid or protection.[18]

D. Question as to whether employees had given statements

Question #10 asked: "Have you given a statement to anyone else regarding the election or the Company's or the Union's conduct?" We conclude that this question was broader than necessary for the Employer's defense.

In Adair Standish Corporation,[19] the employer interviewed employees before a hearing on employer election objections, including an objection pertaining to alleged threats and violence by three named employees. The ALJ concluded that the employer had a legitimate purpose in inquiring into whether the three named employees had been agents of the union. A Board majority upheld the ALJ's finding that it was "unnecessary" for the employer to ask such questions as who the main employee-representative of the union was and who had brought the union in. The ALJ noted that the proper question would have specifically referred to the three named agents.[20] Thus, these questions violated Section 8(a)(1) because they were "overbroad" and "legally irrelevant" to the employer's defense.

In the present case, although the Employer may have had a legitimate need to inquire as to whether the employees had given statements to the Board,[21] the question asked if the

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[17] We note that the question does not ask about the fabrication of unfair labor practice charges, but merely the reporting of actual problems the employee may have had.

[18] See Johnnie's Poultry, 146 NLRB at 775.

[19] 290 NLRB 317 (1988), enfd. 912 F.2d 854 (6th Cir. 1990).

[20] Id. at 331.

[21] See Osco Drug, Inc., 237 NLRB at 236 (employer's question as to whether employees had given a statement to the Board was lawful because it would help identify individuals who might be used as witnesses for the General Counsel). But

employee had given a statement to "anyone" regarding "the election or the Company's or the Union's conduct." This could be interpreted as including, for example, statements unrelated to the upcoming hearing made to an employee's Union representative or even to his private counsel. Thus, this question was "overbroad" and should be alleged as violative of Section 8(a)(1).

E. Conclusion

We conclude that complaint should issue, absent settlement, alleging that questions 1, 2, 3, 9 and 10 violated Section 8(a)(1) because, for the reasons discussed above, they exceeded the limited scope of inquiry allowed for such employee interrogations. We further conclude that questions #4 through #8 were necessary for the Employer to prepare its defense to the unfair labor practice charges or Gissel request and should not be alleged as unlawful.

B.J.K.

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see Salvation Army Residence, 293 NLRB at 945 (employer violated Section 8(a)(1) by interrogating employees regarding the content of an employees' Board affidavit).