

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

Advice Memorandum

DATE: October 8, 2015

TO: Martha E. Kinard, Regional Director
Region 16

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

SUBJECT: Paragon Systems, Inc.
Case 16-CA-144279

518-2001-2500-0000

518-2017-1433-0000

518-2017-9600-0000

530-6050-0120-0000

530-6050-3300-0000

This case was submitted for advice as to whether the Employer (1) violated Section 8(a)(2) by providing contact information of its employees to a rival union; and (2) violated Section 8(a)(5) by refusing to bargain with the incumbent union about providing the information to the rival union. We conclude that providing the contact information did not amount to unlawful assistance in violation of Section 8(a)(2) because it did not occur in the context of other forms of assistance indicating the Employer's intent to unlawfully aid the rival union or discriminate against the incumbent union. We also conclude that the Employer did not violate Section 8(a)(5) because providing employee contact information to the rival union has an insufficient nexus to working conditions to be a mandatory subject of bargaining.

FACTS

In June 2011, Paragon Systems, Inc. (the Employer) acquired Security Consultant Group, which had held a contract with the Federal Government to provide guards at federal buildings in Dallas, Texas and surrounding areas. At the time of the acquisition, Security Consultant Group's contract with the government extended from March 17, 2011 through August 2015. Prior to the Employer taking over the contract, Security, Police, and Fire Professionals of America (SPFPA) represented a unit of guards that worked under the contract. Shortly after the acquisition and takeover of the federal contract, however, United Government Security Officers of America and its Local 368 (the Union) replaced SPFPA as the guards' bargaining representative. In June 2011, the Employer and the Union entered into a collective-bargaining agreement that was effective through March 1, 2014. The parties later agreed to extend the agreement through February 28, 2015.

On November 20, 2014,¹ the Employer contacted the Union requesting bargaining dates for a new contract. The parties met on December 16 and 17. Although they reached agreement on many issues, they remained apart on the issues of job bidding and attendance-related disciplinary procedures. Negotiations ended without the parties setting any future negotiation dates but with both expressing a desire to negotiate again soon.

On December 17, upon receiving an oral request from SPFPA, the Employer prepared a mailing list of the bargaining unit members and provided it to SPFPA.

On or about December 18, when the Union's vice president (a bargaining-unit guard) reported for duty at the Federal Building in Dallas, two SPFPA representatives were waiting for him. They introduced themselves and said that they wanted to talk to the guards about signing cards and switching to SPFPA. The Union's vice president told them that, as union officials, they should know that employees could not talk to them while they were on duty. One of the SPFPA representatives stated, "Well, that's been taken care of." When asked what that meant, the SPFPA representative would not provide more details. The Union's vice president later found out that the representatives from SPFPA had remained in the lobby area talking to the guards for approximately a half hour.

On December 22, SPFPA sent letters to the home addresses of all bargaining unit members. The letters contained promotional materials and membership cards.²

On December 30, by email, the Union contacted the Employer about scheduling bargaining. The email also questioned, among other things, the Employer's unavailability in light of SPFPA's campaign efforts, and whether the Employer provided SPFPA with a mailing list of unit members. On January 2, 2015, the Union sent the Employer a follow-up email after the Employer failed to respond. The follow-up email stated that the Employer had not answered, among other things, the Union's question regarding SPFPA and the mailing list and also asked whether the Employer had provided SPFPA with unit members' phone numbers. It also stated that the Union had been notified that SPFPA representatives were visiting guards at their posts during work time even after supervisors had been notified and asked whether

¹ Hereafter, all dates are in 2014 unless otherwise noted.

² The Union also asserts that SPFPA representatives visited at least four different buildings between December 17 and January 2, 2015, asked for Union-represented guards by name, and spoke with on-duty guards about joining SPFPA. Additionally, at least one Union-represented guard reported receiving a call on her cell phone from a SPFPA representative.

the Union would have the same opportunity to visit each post on the federal contract to solicit Union membership. The Union requested that, by the close of business, the Employer provide it with a list that included the mailing addresses and phone numbers of all guards on the contract and/or in training.

The Employer responded by email that same day, stating that it had no knowledge of SPFPA talking to on-duty guards at their posts, and that if it was happening, it was not sanctioned by the Employer. The email assured the Union that the Employer would take the necessary action to stop such conduct. The Employer also agreed to forward a mailing/telephone list to the Union and stated that providing such information is something the Employer would provide to any union requesting it.³

Later that day, the Employer sent the Union a spreadsheet containing the names, home addresses, mailing addresses, and phone numbers of the bargaining unit members. The Employer also instructed its supervisors to remind the guards that no solicitation of any kind was allowed while on post.

On January 5, 2015, the Union emailed the Employer and stated that it understood that the Employer had a policy to provide any requesting labor organization with a list of its employees' mailing addresses and phone numbers. The Union stated that, as the guards' bargaining representative, it was entitled to that information by law but that it was a violation of privacy laws for the Employer to provide that information to third parties. Therefore, it demanded that the Employer cease and desist from providing the private information of its members to third parties.

That same day, by email, the Employer responded by stating that it was unaware of any legal authority that prohibits an employer from giving an employee list to a requesting labor organization and invited the Union to provide any. The Employer further asserted that address and telephone information is generally held to be public information with no reasonable expectation of privacy in the data. Therefore, in the absence of contrary authority provided by the Union, the Employer stated that the issue was at most a permissive subject of bargaining and that the Employer respectfully declined to bargain over it.⁴

³ The Employer indicated that it has provided this type of information to other labor organizations, including the Union. Specifically, the Employer asserts that it provided the Union with such a list of employees assigned to a unit that SPFPA represented in Tyler, Texas.

⁴ The Union never provided the Employer with authority to support its position.

On February 3, 2015, the Union filed a first amended charged alleging, among other things, that the Employer gave unlawful assistance to SPFPA by providing it with contact information for bargaining unit employees and by allowing its representative to solicit employees while on post.⁵ On March 30, 2015, the Union filed a second amended charged, alleging that the Employer had failed to bargain collectively with the Union over the disclosure of unit members' contact information to a third party.

ACTION

We conclude that providing the contact information did not amount to unlawful assistance in violation of Section 8(a)(2) because it did not occur in the context of other forms of assistance indicating the Employer's intent to unlawfully aid SPFPA or discriminate against the Union. We also conclude that the Employer did not violate Section 8(a)(5) because providing employee contact information to SPFPA has an insufficient nexus to working conditions to be a mandatory subject of bargaining.

I. The Employer Did Not Render Unlawful Assistance By Providing SPFPA with Unit Members' Contact Information.

Under Section 8(a)(2), an employer may not render "unlawful assistance" to the formation of a union by its employees; however, a certain amount of employer "cooperation" with the efforts of a union to organize is lawful.⁶ The use of company time and property by an otherwise independent union does not in itself constitute unlawful employer support and assistance.⁷ In a situation where, as here, two unions are competing to represent a bargaining unit, Section 8(a)(2) requires that an employer treat similarly situated labor organizations the same.⁸ The Board and courts evaluate the totality of the employer's conduct to determine whether it tends to

⁵ The Region has determined that there is not enough evidence to find a Section 8(a)(2) violation based on the allegation that the Employer allowed SPFPA to solicit employees at their posts while on duty.

⁶ See *Longchamps, Inc.*, 205 NLRB 1025, 1031 (1973).

⁷ See *Coamo Knitting Mills, Inc.*, 150 NLRB 579, 582 (1964).

⁸ See *Raley's*, 348 NLRB 382, 384 (2006) (no Section 8(a)(2) violation where employer permitted employees who supported favored union to engage in union activity on worktime, where employer did not prohibit employees supporting disfavored union from engaging in similar activity).

inhibit employees in their free choice regarding a bargaining representative and/or to interfere with the representative's maintenance of an arms-length relationship with it.⁹

In *Crompton-Shenandoah Co.*,¹⁰ the Board determined that an employer had not violated Section 8(a)(2) by providing a non-incumbent union (the Fibre Workers Associated) with the names and addresses of the employees it was seeking to organize and allowing it to use the employer's equipment to address the envelopes containing pro-Fibre Workers literature.¹¹ Specifically, the employer, which had been dealing with an in-house employee committee that was not a labor organization, learned that Mine Workers District 50 was seeking to organize its employees.¹² Subsequently, a group of employees formed the Fibre Workers Associated labor organization and also sought to represent the employer's employees. Fibre Workers requested a list of the names and addresses of the employees in the bargaining unit, which the employer prepared from its addressograph plates and provided. Fibre Workers then requested the use of the employer's addressograph machine to put the employees' addresses on envelopes, which the employer allowed.¹³ The Board declined to find unlawful assistance based solely on the providing of the names and addresses, as this did not indicate that the employer favored one union over the other; indeed, there was no evidence that District 50 had requested and been denied the same privileges.¹⁴ The Board also concluded that the use of the addressograph, alone, was "trivial and isolated," and did not warrant finding a violation of Section 8(a)(2). The Board noted, however, that if the conduct had occurred in the context of other forms of assistance indicating an intent to aid Fibre Workers or to discriminate against another union, it might have been deemed unlawful as part of an overall pattern of conduct.¹⁵

Here, as in *Crompton-Shenandoah*, the Employer merely provided unit employees' names and addressed to SPFPA upon request. Like the assistance

⁹ See *Kaiser Foundation Hospitals*, 223 NLRB 322, 322 (1976).

¹⁰ *Crompton-Shenandoah Co.*, 135 NLRB 694 (1962).

¹¹ *Id.*

¹² *Id.* at 696.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 697.

provided in *Crompton-Shenandoah*, this was “trivial and isolated.”¹⁶ Moreover, the Employer did not treat SPFPA more favorably than the Union. It maintains a policy of providing employee contact information to any union that requests it and, in fact, provided the same contact information to the Union upon request.¹⁷ We recognize that under some circumstances where two or more unions are campaigning to represent the same unit of employees, an incumbent union may have an inherent advantage over a rival because it is party to a bargaining relationship or due to contract language.¹⁸ However, there would be no basis to treat the Union any differently than SPFPA in this situation because there is no evidence that the Employer’s conduct interfered with the Union’s ability to carry out its representational responsibilities or its responsibilities under the parties’ contract. Thus, standing alone, providing the employees’ contact information to SPFPA does not warrant finding a Section 8(a)(2) unlawful assistance violation.

Although SPFPA solicited some on-duty unit employees, the Region has determined that the Employer took the necessary steps to end SPFPA’s actions and any acquiescence by its supervisors. Thus, given the totality of the Employer’s conduct, we conclude that it did not inhibit the employees in their ability to freely choose a bargaining representative, and therefore there is no violation of Section 8(a)(2) of the Act.

II. The Employer Was Not Obligated to Bargain with the Union Over Disseminating Employee Contact Information.

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act when it refuses to bargain over matters that are mandatory subjects of bargaining.¹⁹ Mandatory subjects of bargaining include those delineated in Section 9(a) as “rates of pay, wages, hours of employment, or other conditions of employment” and in Section

¹⁶ *Id.* And, unlike in *Crompton-Shenandoah*, the Employer did not permit SPFPA to use its equipment.

¹⁷ The Employer even asserts that it had previously provided the Union with the contact information of employees who were represented by SPFPA at another location.

¹⁸ *West Lawrence Care Center*, 308 NLRB 1011, 1012 (1992) (“[S]trict neutrality is not the sole concern where an incumbent union is challenged by a rival labor organization[.]”) (citing *RCA Del Caribe*, 262 NLRB 963, 965 (1982)).

¹⁹ *LM Waste Service Corp.*, 360 NLRB No. 105, slip op. at 9 (May 12, 2014) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)).

8(d) as “wages, hours, and other terms or conditions of employment.”²⁰ In order to find a particular subject of bargaining a mandatory subject it must be “plainly germane to the ‘working environment’” of the employees.²¹ In other words, mandatory bargaining subjects are those that “settle an aspect of the relationship between the employer and employees.”²² The Board has held that an indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject.²³ Mandatory subjects include only those matters that “materially or significantly” affect unit employees’ terms and conditions of employment, not all subjects that may be of interest or concern to them.²⁴

Applying these principles, we conclude that the Employer providing its employees’ contact information to an outside union is not a mandatory subject of bargaining. The employees’ names, addresses, and phone numbers are not “plainly germane” to their terms and condition of employment. This information has no connection to the workplace; by its very nature, it concerns *non-work* aspects of the employees’ lives. Contact information is therefore unlike other matters affecting employee privacy that the Board has found to be mandatory subjects of bargaining, because in those cases, it was possible to draw a connection to workplace issues.²⁵

²⁰ *Id.*, slip op. at 9-10 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979)).

²¹ *Ford Motor Co.*, 441 U.S. at 498; *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring). *Cf. First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (employer decision to close part of business for economic reasons not a mandatory subject of bargaining, despite affecting working conditions, because it is a managerial decision at the core of entrepreneurial control).

²² *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 178 (1971). *See also International Union of Operating Engineers Local No. 12 (Associated General Contractors of America, Inc.)*, 187 NLRB 430, 432 (1970) (“The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.”).

²³ *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. at 180-82 (discontinuation of medical benefits for retirees did not “vitally affect” unit employees because “benefits that active workers may reap by including retired employees under the same health insurance contract” were “speculative and insubstantial at best”).

²⁴ *See, e.g., United Technologies Corp.*, 274 NLRB 1069, 1070 (1985) (citing *Seattle First National Bank v. NLRB*, 444 F.2d 30 (9th Cir. 1971)), *enforced*, 789 F.2d 121 (2d Cir. 1986).

²⁵ *Cf. Medicenter, Mid-South Hospital*, 221 NLRB 670, 677-78 (1975) (finding that polygraph examination requirement, instituted in response to worksite vandalism, was a mandatory subject of bargaining because it constituted introduction of a new

Indeed, SPFPA only used the contact information to send letters containing promotional materials and membership cards to the homes of the unit members—*away* from the workplace. And there is no evidence that receiving the information at their homes impacted or changed the employees’ work environment.²⁶ While the employees may be interested in which unions receive their contact information, there is an insufficient nexus to the workplace to make it a mandatory subject of bargaining.

Although there is some evidence that SPFPA officials also solicited some on-duty employees at the workplace (with the alleged acquiescence of Employer supervisors), which arguably affected the employees’ work environment, these incidents were unrelated to the release of the employees’ contact information. In any event, as discussed above, once the Union made the Employer aware of this conduct, the Employer instructed its supervisors that it was not to be tolerated or permitted. Therefore, even assuming that SPFPA used the list to identify employees at their worksite, this did not have a material and substantial impact on working conditions.

Thus, we conclude that providing unit members’ contact information to SPFPA is not a mandatory subject of bargaining because the conduct is not “plainly germane” to the unit members’ terms and condition of employment. Therefore, the Employer did not violate Section 8(a)(5) of the Act when it provided the information to SPFPA without first bargaining with the Union.

employment-related rule, “disobedience to which may result in forfeiture of employment”); *Johnson-Bateman Co.*, 295 NLRB 180, 183 (1989) (finding that drug/alcohol testing of current employees is a mandatory subject of bargaining because it had the “potential to affect the continued employment of employees who become subject to it”); *Colgate-Palmolive Co.*, 323 NLRB 515, 515-16, 519 (1997) (finding installation of hidden surveillance cameras to be mandatory subject of bargaining because it intruded upon employee privacy at work and had “serious implications for . . . employees’ job security”); *ARAMARK Educational Services*, 355 NLRB No. 11, slip op. at 1, 9-10 (Feb. 18, 2010) (finding Social Security “no match” policy to be mandatory subject because of potential impact on employees’ continued employment), abrogated by *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010) (two member Board).

²⁶ *Rust Craft Broadcasting of New York*, 225 NLRB 327, 327 (1976) (employer did not violate Act by changing system to record work time from employees marking timecards to using a mechanical procedure to record working time where only method, and not rule, was changed); *cf. Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 3 (Aug. 29, 2014) (employer violated Section 8(a)(5) when it unilaterally replaced onsite, instructor-led training with computerized training program because change was not inconsequential or insubstantial).

Accordingly, absent withdrawal, the Region should dismiss the charges.

/s/
B.J.K.