

IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MHA, LLC d/b/a MEADOWLANDS HOSPITAL MEDICAL CENTER, Respondent Employer, <i>and</i> HEALTH PROFESSIONALS & ALLIED EMPLOYEES, AFT/AFL-CIO, Charging Party Union	Case Nos. 22-CA-086823 089716 090437 091025 091521 092061 096650 097214 099492 100324 106694
--	--

REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION & RECOMMENDED ORDER OF THE ADMINISTRATIVE
LAW JUDGE ON BEHALF OF CHARGING PARTY HEALTH
PROFESSIONALS & ALLIED EMPLOYEES, AFT/AFL-CIO

Emma R. Rebhorn
General Counsel
HEALTH PROFESSIONALS & ALLIED
EMPLOYEES, AFT/AFL-CIO
110 Kinderkamack Road
Emerson, NJ 07630
T (201) 262 5005, ext. 137
F (201) 262 4335
erebhorn@hpae.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. Introduction	1
II. The ALJ Incorrectly Found that Lipsky’s Threat Not to Engage in Bargaining and Process Grievances Violated the Act.....	1
A. The Hospital Denies the Existence of Extensive Record Evidence that it “Actually Refused” to Engage in Bargaining.....	4
B. Even if the Record of the Hospital’s Refusal to Engage in Bargaining Were Less Extensive, the Analysis of Lipsky’s Threat Cannot Turn on Whether He Successfully Followed Through on It.....	5
III. The ALJ’s Omission of a Remedy Ordering the Hospital to Make Employees Whole for its Unlawful Changes to their Health Insurance Was, Contrary to the Hospital’s Protestation, Inadvertent—and the ALJ Agrees.....	6
IV. Conclusion	7

TABLE OF AUTHORITIES

Cases

<i>Emery Realty</i> , 286 N.L.R.B. 372 (1987)	3
<i>Hedstrom Co.</i> , 223 NLRB 1409 (1976).....	5
<i>L.C. Fulenwider, Inc.</i> , Case 27-CA-10164, 1987 WL 103445 (Nov. 23, 1987).....	3
<i>Medin Realty Corp.</i> , 307 NLRB 497 (1992)	2
<i>New Silver Palace Rest.</i> , 334 NLRB 290 (2001)	2
<i>Oswego St. Supermarkets</i> , 159 NLRB 1735 (1966)	2-3
<i>Textile Workers Union v. Darlington Mfg. Co.</i> , 380 U.S. 263 (1965).....	5-6
<i>Walgreen Co.</i> , 206 NLRB 124 (1973)	2

Statutes

National Labor Relations Act, 29 U.S.C. § 157	3
National Labor Relations Act, 29 U.S.C. § 158	5

I. Introduction

This is a case about serious, myriad violations of the National Labor Relations Act (“NLRA” or “Act”) perpetrated by Respondent MHA, LLC, d/b/a Meadowlands Hospital Medical Center (“Meadowlands,” or “Hospital”), which violated the Hospital employees’ rights to engage in concerted activity for mutual aid and protection. Administrative Law Judge (“ALJ”) Steven Davis issued a Decision that found merit to the majority of the General Counsel’s Complaint allegations. Charging Party Health Professionals & Allied Employees, AFT/AFL-CIO (“Union”) submitted limited Exceptions to the ALJ’s Decision, Conclusions of Law, Remedy, Recommended Order, and Appendix, and a Brief in Support of those Exceptions. The Hospital submitted an Answering Brief, to which the Union’s instant Brief replies.¹

II. The ALJ Incorrectly Found that Lipsky’s Threat Not to Engage in Bargaining and Process Grievances Violated the Act.

The threat not to engage in bargaining and process grievances is precisely the type of conduct inherently damaging to employee rights, so that the threats will violate the Act whether or not employees are aware of them. The Hospital maintains that Lipsky

¹ The Decision and Recommended Order of the ALJ is referenced as “ALJD [page]:[line].” The Hospital’s Answering Brief to the Union’s Exceptions is cited as “Resp. Ans. at [page].” Rulings on interlocutory appeals are referenced as “[Issuer] Order of [Date] at [page].”

did not violate the Act when he threatened not to process grievances or engage in bargaining, because he channeled this threat through the Union's elected officers and agents, rather than delivering it directly to the employees. (Resp. Ans. at 2).

The Board has often found threats channeled through third parties to violate the Act, and the ALJ incorrectly ignored that precedent in this case. In *New Silver Palace Restaurant*, for example, the Board found specifically that during a meeting involving only a union representative identified both as an "officer" and an "advisor," and no employees, "the restaurant employer's statements to [the officer/advisor] constitute unlawful implied threats that employees would not be hired unless they ceased their union activities and support of the Union." *New Silver Palace Rest.*, 334 NLRB 290, 291, 296 (2001) .

The standard for whether such threats violate the act is whether the employer agent making the threat could reasonably anticipate that the threat would be passed through the union's agent to employees. For example, threats made to a non-employee and non-union representative will violate the Act when the employer "could reasonably expect" the person to whom the threats are made—in the quoted case, an employee's spouse, who also had personal relationships with managers other employees—to serve as a "conduit," and "to influence his wife and other employees." *Walgreen Co.*, 206 NLRB 124, 124-25 (1973). *Also see Medin Realty Corp.*, 307 NLRB 497, 497 n.2 (1992) ("the existence of the spousal relationship is sufficient to warrant the inference that such statements would reasonably tend to influence the employee spouse").

The standard of whether an employer could “reasonably expect” that the person to whom the employer’s threat is made would act as a conduit is applied beyond spousal relationships. *Oswego St. Supermarkets*, 159 NLRB 1735, 1736-37 (1966) (two distinct threats, one unintentionally communicated to an employee and one communicated to another employee’s mother, violate the Act); *Niskayuna Consumers Cooperative, Inc.*, 155 NLRB 170, 176-78 (1965) (violation where employer’s attorney threatened union business agent that a union organizer would be reported to authorities for potentially committing a minor crime if the union did not withdraw ULP charges).

The Division of Advice has endorsed a broad application of this standard, reasoning that where an employer communicated to its former janitorial contractor that the employer “did not want to retain a union firm,” the employer violated the Act because it “could reasonably anticipate” that the statement would be repeated to the union. *L.C. Fulenwider, Inc.*, Case 27-CA-10164, 1987 WL 103445, at *2 (Nov. 23, 1987). The Division of Advice explained that because the former contractor maintained a bargaining relationship with the union, it was reasonable for the employer to anticipate that the former contractor “would fulfill its bargaining obligation to inform the Union of all relevant information in its possession.” *Id.*

Similarly, here, there would have been no utility in Lipsky’s threat if the Union agents to whom it was made retained that information for themselves and took no action affecting Union members’ Section 7 rights in response to the threat. It is undeniable that “union representatives have §7 rights that are derivative of the right of . . . employees to engage effectively in self-organization.” *Emery Realty*, 286 N.L.R.B. 372,

373 (1987). This national labor policy exists because employees have the right to both learn from and be led by labor organizations as the employees attempt to exercise Section 7 rights on their own. So, when an employer constrains the actions of those union representatives—whether by threatening to take action against them directly or to retaliate against the employees the union protects and represents—the employer is inducing the union itself to change its tactics so as to not put its members at risk.

The effect of Lipsky’s threat was no different whether it was communicated to and heeded by Twomey, the Union’s president who was active in the Union’s public campaign of support for Hospital employees, or whether it was communicated to and heeded by those employees themselves. Lipsky could reasonably anticipate that his threat would lead the Union to employ less assertive and effective public communications tactics, which is precisely the test for determining a Section 8(a)(1) violation: whether the threat would tend to interfere, restrain or coerce employees in the exercise of their rights to engage in protected concerted activity. The ALJ erred when he determined that such an adverse impact did not violate the Act, and the Board should find merit to the Union’s exception accordingly.

A. The Hospital Denies the Existence of Extensive Record Evidence that it “Actually Refused” to Engage in Bargaining.

The Hospital is incorrect when it claims that there is “no record evidence” in this matter that the Hospital “actually refused to process grievances or engage in bargaining.” (Resp. Ans. at 5). The record in this case is rife with examples of the Hospital’s refusal to bargain. For example, the ALJ found merit to the following

allegations: that the Hospital assigned bargaining unit work to per diems without bargaining; that the hospital implemented medical plans that were not substantially comparable to the contractual medical plans without bargaining; that the Hospital selected employees for layoff without bargaining; that the Hospital hired and failed to pay contractual wages to nominal “interns” without bargaining; that the Hospital eliminated 12-hour work shifts without bargaining; and that the Hospital refused to make a 401(k) contribution without bargaining. (ALJD at 4:5-5:20).

Moreover, the ALJ correctly found that the Hospital “rejected a fundamental element of the grievance process—the ability of the Union to investigate the grievances of employees” by eliminating the past practice of allowing the Union access to the Hospital cafeteria to conduct those investigations. (ALJD 116:10-11). The Hospital’s claims to the contrary must be rejected.

B. Even if the Record of the Hospital’s Refusal to Engage in Bargaining Were Less Extensive, the Analysis of Lipsky’s Threat Cannot Turn on Whether He Successfully Followed Through on It.

It is immaterial whether the Hospital followed through on its unlawful threat. The legally relevant inquiry is whether the threat was made and whether it had a reasonable likelihood of coercing employees and their representative in the exercise of rights protected by the Act. The Hospital proposes that “[t]he Union’s inability to point to any record evidence of adverse action in conjunction with Dr. Lipsky’s April 3, 2013 statement is fatal” to the argument that the threatening statement violated Section 8(a)(1). The Hospital’s argument fails, because the standard is not whether Lipsky made

good on his threat—thereby committing yet another serious unfair labor practice—but whether the threat had a reasonable tendency to coerce employees in their exercise of protected rights under the Act.

Even a friendly threat, when delivered by an “authority” who “was the president of the Company and an official who could clearly make good the threat” will violate Section 8(a)(1) of the Act, whether or not the threatened action ever materializes. *Hedstrom Co.*, 223 NLRB 1409, 1410 (1976). Lipsky clearly “occup[ied] a relationship” to the Hospital and thereby to the grievance process that made it “reasonably foreseeable” that his threat would or could be carried out. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 276 (1965). The coercive power of the threat would have been sufficient to silence the Union’s public advocacy, and Lipsky’s exercise of this power alone violates the Act.

III. The ALJ’s Omission of a Remedy Ordering the Hospital to Make Employees Whole for its Unlawful Changes to their Health Insurance Was, Contrary to the Hospital’s Protestation, Inadvertent—and the ALJ Agrees.

The ALJ, by his own admission, erred when he failed to order a remedy for the Hospital’s unlawful implementation of a health insurance plan not substantially comparable to the existing plan. The Union excepts to this failure, and requests that the Board remedy it. The Hospital’s Answering Brief asserts, puzzlingly, that the Union has merely “assume[d] . . . the ALJ’s inadvertence.” (Resp. Ans. at 7). The ALJ’s own words are sufficient to dispel this misapprehension:

The Union moves that I correct my Decision to include in the Conclusions of Law, Order, Remedy and Notice thereof appropriate conforming language consistent with my findings and conclusions that, as alleged in the complaint, the Respondent failed to continue in effect all the terms and conditions of the three contracts by implementing new employee medical plans which were not substantially comparable to its former medical plans.

The Union states and I agree that my failure to include in the Conclusions of Law, Order, Remedy and Notice in the Decision appropriate language concerning the finding of that violation was inadvertent and in error.

As the Board [has] stated . . . , "a party should seek correction of such errors either through exceptions to the judge's decision or by motion to the Board." The Union should pursue those courses of action if it seeks to correct the Decision.

(ALJ Order of Oct. 6, 2016 at 1, 2 (emphasis added)). For the reasons stated in the Union's exceptions, the Union reiterates its request that the Board conform the Recommended Order and Remedy in the instant case so that it is consistent with the ALJ's findings of fact and law, specifically regarding the Hospital's unilateral changes to its health insurance plans.

IV. Conclusion

For the reasons stated herein and in the Union's Exceptions, the Union respectfully requests that the Board modify the Decision, Conclusions of Law, Remedy, Recommended Order, and Appendix to conform to the Judge's findings of fact, including by remedying the Hospital's unlawful changes to employees' health insurance and reversing the ALJ's ruling that the threat not to process grievances did not violate the Act.

The Union also respectfully reiterates its request that the Board direct additional appropriate remedies, including but not limited to posting an appropriate notice, ceasing and desisting from future violations of the Act, and requiring the Hospital, upon union request, to rescind its unilateral changes, restore prior terms and conditions of employment as provided for in the parties' contracts, make affected employees whole for all of the losses they have suffered as a result of the Hospital's unlawful actions and their effects, and order all other relief that is just and proper.

Respectfully submitted,

Dated: February 24, 2017

s/ Emma R. Rebhorn

Emma R. Rebhorn

General Counsel

HEALTH PROFESSIONALS & ALLIED
EMPLOYEES, AFT/AFL-CIO

110 Kinderkamack Road

Emerson, NJ 07630

T (201) 262 5005, ext. 137

F (201) 262 4335

erebhorn@hpae.org

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Reply Brief in Support of Exceptions were e-filed, sent by U.S. mail, and/or served electronically on February 24, 2017, to the following:

David Leach, Esq.
Regional Director
NLRB Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102-3110

Saulo Santiago, Esq.
Senior Trial Attorney
NLRB Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102-3110

Jeffrey J. Coradino, Esq.
Jackson Lewis P.C.
220 Headquarters Plaza
East Tower, 7th Floor
Morristown, NJ 07960-6834

Robert L. Mulligan, Esq.
Hartmann Doherty Rosa Berman & Bulbulia, LLC
65 Route 4 East River Edge, NJ 07661

Dated: February 24, 2017

s/ Emma R. Rebhorn

Emma R. Rebhorn, Esq.