

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

DATE: May 4, 2017

TO: Peter Sung Ohr, Regional Director  
Region 13

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

SUBJECT: Savage Fueling Corporation 512-5024-0100  
Cases 13-CA-182757 and 13-CA-185688 512-5024-4167  
512-5024-6000  
512-5024-6300  
512-5024-6600  
512-5024-7100  
512-5006-5050  
512-5006-5063  
512-5006-5065

The Region submitted this case for advice as to 1) whether the Employer engaged in unlawful surveillance; and, 2) whether it is an appropriate vehicle to request that the Board reconsider the broad application of its decision in *Tri-Cast, Inc.*,<sup>1</sup> which concerns whether employer statements about the impact of unionization on employee direct access to management constitute unlawful threats of retaliation.<sup>2</sup>

We conclude that the Employer did not engage in unlawful surveillance in violation of Section 8(a)(1). We also conclude that the Employer did not misrepresent employees' Section 9(a) rights and, therefore, this case is not an appropriate vehicle to urge the Board to reconsider *Tri-Cast*. The Region should therefore dismiss both allegations, absent withdrawal.

---

<sup>1</sup> 274 NLRB 377 (1985).

<sup>2</sup> The Region has already determined that the Employer violated the Act in several other respects, including by: (1) soliciting grievances during the Union's organizing drive; (2) granting benefits to employees during the organizing drive; (3) issuing a discriminatory last-chance agreement to an employee organizer ("Employee"); (4) terminating Employee; and, (5) maintaining several unlawful handbook rules.

FACTS

Savage Fueling Corporation (the “Employer”) services commercial railway customers from seventy locations across the country. Services include performing maintenance and delivering fuel, sand, oil, and water directly to the customer. In August 2016<sup>3</sup> Employee, along with a coworker, began an organizing drive with Teamsters Local 777 (the “Union”) among fifteen employees at the Employer’s Chicago, Illinois location.

Employee helped schedule a meeting with Union officials at the L&G Restaurant to take place at 6:00 AM on August 23. L&G Restaurant is located about one mile from the Employer’s premises and it is the only restaurant within close proximity that serves breakfast. Employee, a (b) (6), (b) (7)(C)<sup>4</sup> did not invite one of (b) (6), (b) (7)(C) coworkers (“Colleague”) because (b) (6), (b) (7)(C) considers Colleague to be a member of management based upon Colleague’s dual roles as both a (b) (6), (b) (7)(C) and a (b) (6), (b) (7)(C).<sup>5</sup> Despite the lack of invite, Colleague learned about the date and time of the Union meeting from another employee. Although Colleague did not know the location of the meeting, (b) (6), (b) (7)(C) had a hunch that it would be held at L&G Restaurant because its proximity to the Employer’s facilities would be convenient for employees changing shifts.

On the morning of August 23, Colleague left the Employer’s premises, drove to L&G Restaurant, saw and waved to a coworker in the parking lot, and interpreted (b) (6), (b) (7)(C) presence as confirmation of the Union meeting’s location. (b) (6), (b) (7)(C) drove back to the Employer’s premises, called Supervisor, and invited (b) (6), (b) (7)(C) to join (b) (6), (b) (7)(C) for breakfast at L&G Restaurant as they had done several times in the past; (b) (6), (b) (7)(C) did not, however,

---

<sup>3</sup> All remaining dates are in 2016 unless otherwise indicated.

<sup>4</sup> Dispatchers serve as conduits between customers and the Employer’s drivers. The customer notifies the dispatcher of its needs and the dispatcher assigns the task to whichever driver is most proximate to the customer at the time. Sometimes, dispatchers take into account other factors in determining which driver should receive the task, such as age (if it is a more physical task) and whether the driver has sufficient materials at his disposal to complete the job. The evidence establishes that dispatchers do not have authority to hire, fire, or discipline employees and their assignment of work is clerical in nature.

<sup>5</sup> The Region concluded that Colleague is not a statutory supervisor or agent of the Employer. The duties of a (b) (6), (b) (7)(C) primarily consist of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and the evidence establishes that (b) (6), (b) (7)(C) do not have authority to hire, fire, or discipline anyone.

mention the Union meeting even though (b) (6), (b) (7) invited Supervisor for the explicit purpose of showing (b) (6), (b) (7) the Union meeting. Supervisor accepted the invitation.

The Union meeting, ultimately attended by four employees and two organizers, took place in the L&G Restaurant at a large table in the back. Approximately ten minutes after the start of the Union meeting, Colleague and Supervisor arrived at the restaurant and sat at a booth near the entrance. Upon taking their seats, which were located somewhere between fifteen and seventy-five feet away from the Union meeting, Colleague informed Supervisor that the reason (b) (6), (b) (7) asked (b) (6), (b) (7) to join (b) (6), (b) (7) for breakfast was because (b) (6), (b) (7) wanted to show (b) (6), (b) (7) the Union meeting. To demonstrate, Colleague approached the Union meeting, exchanged a few brief words with Employee, and then returned to the booth.<sup>6</sup> Supervisor, who did not get up from (b) (6), (b) (7) booth, did not interact with anyone at the Union meeting beyond informing two employees who passed (b) (6), (b) (7) booth on the way to the Union meeting that (b) (6), (b) (7) was just there to eat breakfast. Colleague and Supervisor ultimately sat at their booth and ate breakfast for approximately thirty-five minutes. The Union meeting ended shortly after Colleague and Supervisor left.

Starting approximately two weeks later, the Employer held a series of captive audience meetings during which a manager spoke from a prepared text. The first two meetings touched upon the impact unionization would have on the relationship between the Employer and its employees. The first speech, on September 8, included the following statements:

Most of you, because of your past experience with Unions, know how the negotiations game works. Most of you know that in order to try to justify the fact it takes money from employees, a Union has to play the “expectations” game or the “promise” game. It involves trying to get employees to believe that the Union will get whatever it is they want. . . . that all of their desires will be met. And those promises of what the Union will get are generally made without any mention of the ultimate reality . . . that reality being that anything and everything that ends up happening depends on negotiations between the Union and the Company. Nothing is automatic. Union promises are easy to make, but promises aren’t guarantees. When it comes down to actual give and take of negotiations, a Union’s promise means nothing . . . and nothing is guaranteed.

---

<sup>6</sup> There is no evidence that suggests Supervisor asked Colleague to engage in this behavior.

If the Union were to get in here, what would the outcome of negotiations be? You know the answer. The answer—the truthful answer—is, “nobody knows.” Would a contract be negotiated? If so, what would it say? Would a contract be negotiated which ended up with you being better off, or maybe with you losing some things you have now? Would there be a strike? If so, what would happen to your jobs and paychecks then? The answer—the truthful answer—to all of these and a whole lot of other real important questions again is—“anything is possible and nobody knows how it would end up for you.”

But there are some things that would be certain. One of course is that the Union—no matter how it turned out for you, good or bad—would expect to take dues and other money from you. Second . . . whether you wanted the union, didn’t want it, or didn’t care one way or another . . . the Union would still be your spokesman when it came to pay, benefits, work schedules and all other terms and conditions of your employment. As you probably know, when employees are unionized they give up the right—they surrender the right—to deal on an individual basis with the Company over these matters. In fact it is against the law for a Company to deal directly with employees about these matters. It all has to go through the Union, and it is illegal for the Company to bypass the Union.

One week later, the Employer’s second captive audience meeting included the following statements, along with PowerPoint slides,<sup>7</sup> about “exclusive representation”:

“Exclusive Representation” is a legal principal that very significantly impacts both employees and their Company. When employees vote a union in to become their representative or “spokesman,” it becomes their “exclusive” representative or spokesman when it comes to wages, benefits and all other terms and conditions of their jobs. It is against the law for the Company to “bypass” the union and deal directly with employees regarding these matters. And what’s more, there is the flipside, namely it even means that employees are excluded from individually dealing any longer with management regarding these matters even if they would rather do it that way.

What’s basically involved is a “surrender your rights” if you think about it. When a union comes in, the employees, by law, surrender or turn

---

<sup>7</sup> The language in the slides either directly quoted or closely paraphrased what was written in the script.

over to the union as their exclusive representative, their right to speak for themselves when it comes to the terms and conditions of their employment.

This is a fact that the . . . Union knows all too well. This concept of exclusive representation is embedded in all of their governing documents. . . . It seems that because of a law known as the Landrum Griffin Act, every local union must have its Bylaws on file with the United States Department of Labor in Washington, D.C. This is the copy [the Union] has on file there. These are Bylaws they adopted in 2011[:]

\*\*\*\*\*

“Every member, by virtue of his membership on the Local Union, authorizes his Local Union to act as his”—(and here’s the word!)—“exclusive bargaining representative with full and”—(here’s the word again!)—“exclusive power to execute agreements with his employer governing terms and conditions of employment and to act for him and have final authority in presenting, processing and adjusting any grievance, difficulty, or dispute arising under any collective bargaining agreement or out of his employment with such employer which in such manner as the Local Union or its officers deem to be in the best interest of the Local Union”—(notice it does not say “in the best interest of the individual employee”), “all subject to Article 12 and other applicable provisions of the International Constitution relating to such matter.” The section goes on to say—“The Local Union and its officers, business representatives and agents may decline to process any grievance, complaint, difficulty or dispute if in their reasonable judgment such grievance, complaint, difficulty or dispute lacks merit.”

This is this [the Union’s] own statement of what “exclusive representation” means. This is their own statement of the rights—your right to represent and speak for yourself—that they want you to turn over to them as a result of this upcoming vote.

The Union lost the election on September 23 by a result of 7-7.

### ACTION

The Region should dismiss both allegations, absent withdrawal, because the Employer did not engage in unlawful surveillance of the Union meeting at L&G Restaurant, nor did it misrepresent employees’ rights under Section 9(a) during the

captive audience meetings. As such, this case is not a good vehicle in which to urge the Board to overturn *Tri-Cast*.

### **I. The Employer did not Engage in Unlawful Surveillance**

Section 8(a)(1) prohibits an employer from “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7.” In determining whether an employer’s conduct violated Section 8(a)(1), “[t]he test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.”<sup>8</sup> In conformity with this foundational principle, an employer’s presence “at or in the vicinity of union activities” conducted by off-duty employees in a public setting does not axiomatically constitute unlawful surveillance in violation of Section 8(a)(1).<sup>9</sup> Rather, where an employer observes union activities in a public setting under fortuitous circumstances, the employer’s “mere presence, absent more specific evidence it was not for a legitimate purpose, or that it was for the purpose of observing the meeting,” will not constitute unlawful surveillance.<sup>10</sup>

---

<sup>8</sup> *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946)); see *Gossen Company*, 254 NLRB 339, 347 (1981) (internal citations omitted) (espousing same well-established principle) *modified on other grounds* 719 F.2d 1354 (7th Cir. 1983).

<sup>9</sup> *Gossen Company*, 254 NLRB at 353 (ALJ, affirmed by the Board, concluded that supervisor did not engage in surveillance where his presence was prompted by his employees inviting him to share a beer and he did not know about the union meeting until his arrival).

<sup>10</sup> *Id.* (quoting *Atlantic Gas Light Company*, 162 NLRB 436, 438 (1966) (finding insufficient evidence that employer engaged in unlawful surveillance where he bowled at the same bowling alley where a union meeting was held; employer was merely present in public place that he had the right to frequent)). Compare *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 404-05 (2006) (finding surveillance where two supervisors were not only at a bar across the street from a publicized union meeting, but they sat at a window facing the union hall and took notes as they observed employees exiting the meeting) and *Dayton Hudson Corp.*, 316 NLRB 85, 85-86 (1995) (finding surveillance, despite fact that both employees and managers frequented the nearby restaurant, where managers followed union organizers and off-duty employees from the employer’s premises to the restaurant and then watched them for the express purpose of “observ[ing] at close range the Section 7 activities” of employees) with *DMI Distribution of Delaware*, 334 NLRB 409, 409 n.5, 416-17 (2001) (dismissing surveillance claim where supervisors saw union meeting after they coincidentally

For example, in *King David Center*,<sup>11</sup> the Board overturned the ALJ's finding of unlawful surveillance because it found the presence of two supervisors at the same restaurant as a union meeting was "the result of 'purely fortuitous circumstances.'"<sup>12</sup> In that case, two supervisors visited a restaurant located about one mile from the Employer's premises during lunchtime.<sup>13</sup> Shortly after they arrived, three union officials and a unit employee appeared for a scheduled—but unpublicized—union meeting.<sup>14</sup> The supervisors, who admitted recognizing a union official as the one trying to organize the Employer's workforce, remained at the restaurant for ninety minutes, drinking beverages and smoking, but they were not served food.<sup>15</sup> The Board found that the supervisors' "presence on the same day as the union meeting was sheer coincidence" because "there [wa]s no evidence that [the supervisors] knew about the union meeting in advance," they had a legitimate reason for being at the restaurant on their lunch break, and, furthermore, there was "nothing in the law [that] required them to leave the premises" when the union officials and an employee later arrived to conduct a union meeting.<sup>16</sup>

In this case, Supervisor did not engage in unlawful surveillance of the Union meeting when [REDACTED] appeared with Colleague at the L&G Restaurant because there is no evidence to suggest that [REDACTED] knew about the meeting beforehand; both Supervisor and

---

stopped in for a drink at a restaurant that was located on the main highway between the employer's two facilities) *and Wal-Mart Stores*, 325 NLRB 124, 132-33 (1997) (noting that employer's agents had a right to patronize the one restaurant in the strip mall—despite the union official using the restaurant as his unofficial organizing headquarters—so long as they did not "conduct[] themselves in a manner which departed from their usual practices" and "their purpose was simply to savor the cuisine") *enforced in relevant part sub nom. Sam's Club v. NLRB*, 173 F.3d 233 (4th Cir. 1999).

<sup>11</sup> 328 NLRB 1141 (1999).

<sup>12</sup> *Id.* at 1142 (internal citation omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Colleague state that Supervisor knew nothing about the Union meeting until after [REDACTED] arrived at the restaurant. Furthermore, Supervisor's presence at the restaurant was not out of the ordinary because L&G Restaurant is the only restaurant within close proximity of the Employer's facilities that serves breakfast, and Supervisor and Colleague have eaten breakfast together at L&G Restaurant several times in the past. Considering all the circumstances, Supervisor's behavior did not suggest an ulterior motive beyond eating breakfast and [REDACTED] was not legally obligated to leave the restaurant upon discovery of the Union meeting at a nearby table.<sup>17</sup> Therefore, absent more specific evidence to the contrary, Supervisor's presence at L&G Restaurant on the same morning as the unpublicized Union meeting was purely fortuitous and, therefore, did not constitute unlawful surveillance.

## **II. This Case is not an Appropriate Vehicle to Urge the Board to Narrow its Broad Application of *Tri-Cast*<sup>18</sup>**

Section 9(a) provides that a union selected by a majority of unit employees is granted exclusive representative status for the purposes of collective bargaining regarding the terms and conditions of the unit employees. The proviso to Section 9(a) guarantees that employees represented by a collective-bargaining agent retain the ability to independently bring individual or group grievances to their employer, and that the employer may adjust such grievances, so long as the adjustment is consistent with any applicable collective-bargaining agreement and the union is given an opportunity to be present at the adjustment.<sup>19</sup>

---

<sup>17</sup> *King David Center*, 328 NLRB at 1142.

<sup>18</sup> The history of the *Tri-Cast* doctrine is explored in greater detail in several Advice memoranda, including: *Hendrickson USA, LLC*, Case 09-CA-159641, Advice Memorandum dated January 21, 2016; *FCi Federal*, Cases 01-CA-135247 and 01-CA-143853, Advice Memorandum dated June 10, 2015; and *Faurecia Interior Systems*, Case 10-CA-112263, Advice Memorandum dated May 8, 2014.

<sup>19</sup> The complete proviso to Section 9(a) states:

*Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Before *Tri-Cast*, the Board held that employer statements that misrepresented employees' Section 9(a) right to deal directly with the employer after unionization were threats that violated Section 8(a)(1) or were objectionable pre-election conduct.<sup>20</sup> For example, in *Joe & Dodie's Tavern*, the Board affirmed the ALJ's conclusion that the employer's statements that employees "absolutely cannot" deal directly with the employer because the employer was "legally obligated to deal solely" with the union conveyed an "erroneous statement of the law" and threatened a loss of benefits in violation of Section 8(a)(1).<sup>21</sup> Similarly, in *LOF Glass, Inc.*, the Board determined that an employer's statement that "the right and the freedom of each of you to come in and settle matters personally would be gone" was a "serious misrepresentation" of employees' Section 9(a) rights and objectionable conduct sufficient to warrant setting aside an election.<sup>22</sup>

The Board abruptly changed course in *Tri-Cast*, however, where it concluded that an employer lawfully stated:

---

<sup>20</sup> See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (delineating the line between employer speech protected under Section 8(c) of the Act and threats of reprisals violative of Section 8(a)(1)). Thus, Section 8(c)'s protection of the expression of "any views, argument, or opinion" leaves an employer free to communicate "his general views about unionism" and to make "a prediction" as to the effects of unionization, but that prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to "demonstrably probable consequences beyond his control." *Id.* at 618. On the other hand, "a threat of retaliation based on misrepresentation and coercion" is beyond the protection of Section 8(c) and violates Section 8(a)(1). *Id.*

<sup>21</sup> 254 NLRB 401, 406, 411 (1981), *enfd.* 666 F.2d 383 (9th Cir. 1982).

<sup>22</sup> 249 NLRB 428, 428 (1980); see also *Tipton Elec. Co.*, 242 NLRB 202-03, 205-06 (1979) (employer's statements that employees would "lose [their] right to speak or act as individuals" and could "no longer go directly to their management with their problems" violative of 8(a)(1)), *enfd.* 621 F.2d 890 (8th Cir. 1980); *Robbins & Myers, Inc.*, 241 NLRB 102, 103-04 & n.7 (1979) (employer's statement that when union comes in, "employees lose all rights for direct communication with the [employer]" was a "misrepresentation" of Section 9(a)), *enfd.* 653 F.2d 237 (6th Cir. 1980); *cf.* *Westmont Eng'g Co.*, 170 NLRB 13, 13 (1968) (employer's statement that employer must handle any grievances through union if union won election, although not "entirely accurate," was not coercive and did not violate Section 8(a)(1)).

We have been able to work on an informal and person-to-person basis. If the union comes in this will change.

We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing.<sup>23</sup>

The Board determined that there was “no threat, either explicit or implicit, in a statement which explains . . . [that] the relationship that existed between the employees and the employer will not be as before.”<sup>24</sup> Notably, the employer’s statement in *Tri-Cast* did not convey that *all* employee access to the employer would be denied, but simply forecast a more formal relationship with employees if they selected a bargaining representative. But the *Tri-Cast* Board specifically overruled the three prior decisions relied on by the Regional Director in finding the employer’s statement objectionable, thereby signaling that the Board no longer viewed such employer misrepresentations of employees’ Section 9(a) rights as unlawfully coercive.<sup>25</sup>

Consistent with that signal, the Board has applied the *Tri-Cast* doctrine broadly, even privileging employer statements that, unlike those in *Tri-Cast* itself, were direct misrepresentations of employees’ rights guaranteed by Section 9(a).<sup>26</sup> Indeed, as Member Block noted in her concurrence to the Board’s 2012 decision in *Dish Network Corporation*, *Tri-Cast* has proven to be a “blunt instrument, applied in such a broad fashion that almost any statement” concerning employees’ Section 9(a) rights is permissible, and that the doctrine seemed “at odds with the Board’s overall treatment

---

<sup>23</sup> *Tri-Cast*, 274 NLRB at 377.

<sup>24</sup> *Id.*

<sup>25</sup> *See id.* at 377 n.5 (overruling *Greensboro News Co.*, 257 NLRB 701 (1981); *Armstrong Cork Co.*, 250 NLRB 1282 (1980); and *LOF Glass, Inc.*, 249 NLRB 428 (1980)).

<sup>26</sup> *See, e.g., SMI Steel*, 286 NLRB 274, 274 n.3 (1987) (employer lawfully told employees that if they voted for union, “[y]ou would not be permitted to take advantage of an opportunity to come all the way to my front office and sit down and talk to me, because you would be prevented from doing that under the contract”); *United Artists Theatre*, 277 NLRB 115, 115 (1985) (employer lawfully stated that it would “be obligated by law to discuss grievances only with the [u]nion, not with you” and “[y]ou have always had the right to deal directly with management of our Company [but] [s]hould this union get in, you will have voted away that right”).

of employer predictions about the outcome of unionization.”<sup>27</sup> In *Dish Network*, the employer told its employees, *inter alia*, that “[i]f a workplace is [u]nion, you have to go to your Steward with your complaints, and he decides whether to bring them to the Company’s attention, not you.”<sup>28</sup> Member Block acknowledged that the merits of *Tri-Cast* were not properly before the Board in *Dish Network*, but indicated that she was in favor of re-examining *Tri-Cast* in an appropriate future case.<sup>29</sup> In denying the charging party-union’s motion for reconsideration in *Dish Network*, a slightly different Board panel rejected the original majority’s conclusion that the issue was not properly before the Board; however, it declined to reconsider *Tri-Cast* because it would further delay resolution of the case.<sup>30</sup> Rather, it concluded that a future unfair labor practice case would be a “better vehicle” for re-examining the *Tri-Cast* doctrine.<sup>31</sup>

We conclude that the Employer’s statements did not affirmatively misrepresent employees’ Section 9(a) rights under extant law and, therefore, the instant case does not present a good vehicle for the Board to re-examine its application of the *Tri-Cast* doctrine. The Employer’s first speech merely addressed the impact that unionization would have on the Employer’s ability to deal directly with its employees, and the employees’ ability to deal with the Employer themselves, over bargainable subjects if the Union were to become their exclusive bargaining representative. The Employer described the “negotiations game” and how “a contract [would] be negotiated” and, in that context, accurately stated that “the Union would . . . be your spokesman when it came to pay, benefits, work schedules and all other terms and conditions of your employment” and that unionized employees “surrender the right—to deal on an individual basis with the Company over these matters.” The Employer’s statements were limited to addressing an employee’s right to negotiate with the Employer—not present it with a grievance—and were accurate descriptions of employees’ Section 9(a) rights.

---

<sup>27</sup> *Dish Network Corp.*, 358 NLRB 174, 176 (Member Block, concurring in part) (2012) *reconsideration denied* 359 NLRB 311 (2012).

<sup>28</sup> *Id.* at 175.

<sup>29</sup> *Id.* at 174.

<sup>30</sup> *Dish Network Corp.*, 359 NLRB 311, 311-14 (2012).

<sup>31</sup> *Id.* at 314.

Nor was the Employer's second speech, in which the Employer explicitly spoke about the concept of "exclusive representation" and quoted from the Union's bylaws, tantamount to a misrepresentation of Section 9(a) rights. The Employer accurately noted that the Union would become the employees' "exclusive representative or spokesman when it comes to wages, benefits and all other terms and conditions of their jobs[.]" and accurately stated that the Employer would be unable to "bypass the Union" and deal directly with the employees and, likewise, the employees would "surrender or turn over to the [U]nion as their exclusive representative, their right to speak for themselves when it comes to the terms and conditions of their employment." Neither the Employer's statements nor its overall speech indicated that employees would lose their ability to present individual or group grievances to the Employer if they voted to unionize; rather, employees would only surrender their right to bargain individually with the Employer—an incontrovertible truth of all unionized workplaces. Although the Employer then indicated that employees also would not be able to bring grievances to the Employer without the Union's approval (contrary to the employee rights established in the Section 9(a) proviso), the Employer was simply quoting from the Union's bylaws in that portion of the speech; thus, any ambiguity contained in the statement that the Union would be the "exclusive power to . . . act for [employees] and have final authority in presenting, processing and adjusting any grievance, difficulty, or dispute" is attributable to the Union and not the Employer. And, this was the only arguable misstatement in a speech that was focused on the concept of "exclusive representation" and bargaining and did not mention "grievances" beyond this one quote. Therefore, we conclude that the Employer's statements did not clearly misrepresent the employees' Section 9(a) rights, and that this case does not present an appropriate vehicle in which to urge the Board to reexamine *Tri-Cast* and find that these statements violated Section 8(a)(1).

### CONCLUSION

Accordingly, the Region should dismiss the allegations, absent withdrawal, because the Employer did not engage in unlawful surveillance, nor did it misrepresent employees' Section 9(a) right to present individual or group grievances directly to the Employer after unionization.

/s/  
B.J.K.