

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

Advice Memorandum

DATE: March 27, 2018

TO: Garey E. Lindsey, Regional Director
Region 9

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Haier U.S. Appliance Solutions, Inc. d/b/a GE 524-0183-3333-6700
Appliances, a Haier Company 530-6067-2030
Case 09-CA-206151

The Region submitted this case for advice as to whether: (1) the Employer engaged in conduct “inherently destructive” of employee rights in violation of Section 8(a)(3) by granting only to its unrepresented employees a 401(k) lump sum contribution; and (2) the Employer violated Section 8(a)(5) by inducing the Union into ratifying a collective-bargaining agreement without the 401(k) lump sum contribution by misrepresenting to the Union that other improved benefits that the Union obtained in the agreement had “eaten up” that benefit.

We conclude that the Employer did not violate Section 8(a)(3). We also conclude that the Employer did not engage in bad faith bargaining in violation of Section 8(a)(5) by intentionally misleading the Union during contract negotiations. The Region should therefore dismiss the charge, absent withdrawal.

FACTS

Haier U.S. Appliance Solutions, Inc. (“Employer”) manufactures and services large appliances nationwide. The Employer’s operations are divided into two categories: production and factory services. Within the factory services operation is a job classification called service technician (“service tech”). Service techs drive vans to customers’ homes and businesses to repair appliances. The International Brotherhood of Electrical Workers (“IBEW” or “Union”) is one of six unions that have long represented the Employer’s service techs. Currently, approximately 450, or one half, of all the Employer’s service techs are represented. Whether a service tech is represented depends on the zip codes of the area he or she services.

Prior to June 2016, the business was owned by General Electric (“GE”). Since the 1960’s, GE’s tradition was to bargain nationally with a committee of the employees’ unions for a single contract for all represented employees and then extend the same bargained-for wages and benefits to unrepresented employees. For example, starting

in December of 2011, and recurring every December through 2014, GE granted an annual \$600 lump sum 401(k) contribution to all service techs, both represented and unrepresented. In 2015, GE increased its annual contribution to \$900.

In June 2016, the Employer acquired the business from GE. The Employer took on the existing complement of employees, recognized the same unions, and maintained the same terms and conditions of employment while it began bargaining in September 2016 for a new collective-bargaining agreement covering factory service workers, including service techs. The Employer was represented at the bargaining table by the same individuals who had represented GE at previous negotiations. The employees were represented by a coordinated bargaining committee of unions, for which the IBEW's representative served as lead negotiator. Bargaining took place over the course of several sessions, and many topics were discussed. With regard to pensions, the Union's bargaining goals included increasing the Employer's automatic 401(k) contribution, increasing the formula match, and obtaining an annual \$900 lump sum payment. The Employer's initial 401(k) proposal included an Employer contribution of (b) (4) and a matching contribution of (b) (4), but did not include an annual lump sum payment. However, an Employer memorandum prepared for the January 16, 2017¹ bargaining session describes the Employer's offer as including a "[o]ne-time additional contribution of (b) (4) in 2018" along with other enhanced benefits such as "drive time"² and personal days. On January 22 and unbeknownst to the Union, the Employer decided to pay a (b) (4) 401(k) lump sum contribution to unrepresented employees, including unrepresented service techs nationwide and certain other unrepresented factory service and production workers. Thereafter, Union and Employer negotiators met on February 1 for a sidebar lunch meeting during which, according to the Union negotiator, "[Employer's representative] showed me a piece of paper with (b) (4) on it and told me this was the figure for the 401(k)." No additional conversations were held on this topic. About three weeks later, the Employer made a contract offer that did not include a 401(k) lump sum payment. According to the Union negotiator:

"I asked [Employer's representative] at a sidebar why there was no [lump sum] 401(k) contribution and (b) (6), (b) (7)(C) replied that it had been eaten up by improved benefits such as drive time and additional paid personal time off. I accepted this answer and, based on what we knew at the time, the [U]nion's committee was satisfied with the Employer's offer."

¹ All remaining dates are in 2017 unless noted.

² "Drive time" refers to time employees spend driving their vans from their homes to their first jobs, as well as the return drive home after work.

On March 8, factory services employees ratified a contract that did not provide for lump sum 401(k) contributions, but did include paid drive time (compensating service techs for time spent driving in excess of 45 minutes each day) and additional personal time off. In addition, represented employees receive the following contractual benefits unavailable to unrepresented employees: (1) a limitation on subcontracting except in cases of product recall or temporary staffing issues; (2) a healthcare review committee composed of Employer and Union representatives to meet annually to discuss healthcare coverage; (3) bi-annual state-of-the-business meetings between the Employer and unions; (4) access to an electronic bulletin board; (5) a 12-month moratorium on zone closings; (6) decision bargaining over plant-closings; (7) a grievance process and binding arbitration; and (8) controls on competitive wage rates in union zones.

About a week after ratification, the Union learned that the Employer had distributed (b) (4) lump sum 401(k) contributions to unrepresented service techs. In addition, the Employer afforded unrepresented factory service employees the same drive time and personal time off given to represented employees. The Employer also provided unrepresented employees with the same 401(k) (b) (4) company contribution and (b) (4) matching contribution given to represented employees.

The Union requested to talk with the Employer about the 401(k) lump sum disparity; although the parties agreed to do so, there were no further discussions. The Union asserts that unit employees would not have ratified the contract had they known that the unrepresented employees would receive the lump sum contribution.

ACTION

We conclude that: (1) the Employer did not violate Section 8(a)(3); and (2) the Employer did not bargain in bad faith in violation of Section 8(a)(5) by inducing the Union to agree to a contract that did not provide for annual 401(k) lump sum payments based on the Employer's statement during bargaining that the benefit had been "eaten up" by other benefits the Employer had agreed to provide. The Region should therefore dismiss the charge, absent withdrawal.

The Employer's Conduct Was Not Inherently Destructive or Otherwise Violative of Section 8(a)(3)

Absent an unlawful motive, an employer is generally privileged to give wage increases to its unrepresented employees at a time when its represented employees are seeking to bargain wages collectively.³ Thus, an employer acting without union

³ *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948).

animus is under no statutory obligation to make such wage increases applicable to represented employees in the face of collective-bargaining negotiations on their behalf involving much higher stakes.⁴

Where a wage increase or other benefit has become an established term and condition of employment, on the other hand, the Board has found that withholding it from only represented employees may be “inherently destructive” of employee rights, and therefore unlawful even absent a showing of anti-union motivation.⁵ For example, in *Arc Bridges, Inc. (Arc Bridges I)*, the Board found that the employer’s past practice of annually reviewing and granting across-the-board wage increases was an established condition of employment.⁶ The Board found that the employer’s unilateral withholding of that established condition of employment from its represented employees following union certification was “inherently destructive” of employee rights and unlawful.⁷

Here, there is no evidence of antiunion animus and we cannot show that the lump sum 401(k) contribution was an established term and condition of employment. Thus, although GE may have regularly provided the lump sum benefit to its employees, the Employer is a successor employer with no history of ever providing this benefit. In these circumstances, we cannot demonstrate that the failure to offer this benefit was “inherently destructive” of employee rights.⁸

⁴ *Id.*

⁵ *See, e.g., Arc Bridges, Inc.*, 355 NLRB 1222, 1223 (2010) (*Arc Bridges I*) (“[T]he unilateral withholding of an established condition of employment from only the represented employees is ‘inherently destructive’ of their Section 7 rights, even absent proof of antiunion motivation.”), *enforcement denied*, 662 F.3d 1235 (D.C. Cir. 2011), *on remand*, 362 NLRB No. 56 (March 31, 2015) (*Arc Bridges II*), *enforcement denied*, 861 F.3d 193 (D.C. Cir. 2017); *E. Maine Med. Ctr.*, 253 NLRB 224, 242 (1980), *enfd.*, 658 F.2d 1 (1st Cir. 1981); *United Aircraft Corp.*, 199 NLRB 658, 662 (1972), *enfd. in relevant part*, 490 F.2d 1105 (2d. Cir. 1973). *See generally NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967).

⁶ *Arc Bridges I*, 355 NLRB at 1223-25.

⁷ *Id.* at 1224-25. *See also United Aircraft Corp.*, 199 NLRB at 662 (employer’s decision to withhold wage increase from newly represented employees negotiating initial contract unlawful even absent evidence of unlawful motivation).

⁸ We note that, in *Arc Bridges II*, the Board on remand found a violation notwithstanding the D.C. Circuit’s decision (and the Board’s acceptance of that

The Employer Did Not Bargain in Bad Faith

As the Supreme Court has explained, “[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims.”⁹ The Board has stated that “[t]he making of false claims does not serve any legitimate purpose, but instead serves to impede progress at the bargaining table.”¹⁰ At common law, a contract entered into on the basis of a material misrepresentation is voidable by the party who justifiably relied on the other party’s material misrepresentation.¹¹ Thus, when parties bargaining an agreement rely on misrepresentations or concealments, the party guilty of the misrepresentations or concealments has bargained in violation of the Act, and the contract is voidable by the deceived party.¹²

For instance, in *Sheller-Globe Corp.*, the Board invalidated a severance agreement and issued a bargaining order upon finding that the employer violated Section 8(a)(5) by lying about and concealing its plans during bargaining.¹³ There, the employer informed the union that it was going to sell off its operations, necessitating layoffs.¹⁴ Acting upon this information, the union agreed to a severance proposal, and

decision as “law of the case”) that the wage increase there was not an established term and condition of employment. 362 NLRB No. 56, slip op. at 2-4. The Board relied on evidence of unlawful motive, and there is no such evidence here. The General Counsel does not necessarily agree with the Board’s decision in *Arc Bridges II* and would consider urging the Board to revisit it in an appropriate case.

⁹ *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

¹⁰ *Cent. Mgmt. Co.*, 314 NLRB 763, 770 (1994).

¹¹ Restatement (Second) of Contracts § 164 (“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).

¹² See, e.g., *Waymouth Farms, Inc.*, 324 NLRB 960, 961-64 (1997), *enfd. in relevant part*, 172 F.3d 598 (8th Cir. 1999); *Sheller-Globe Corp.*, 296 NLRB 116, 116 n.3, 117 (1989).

¹³ *Sheller-Globe Corp.*, 296 NLRB at 116 n.3, 117, 122-23.

¹⁴ *Id.* at 116 n.3, 119.

the unit employees were laid off.¹⁵ The employer, however, did not sell its business, but instead hired a new, non-union workforce.¹⁶ The Board found that the employer's intentional misrepresentations during bargaining violated Section 8(a)(5), and that the employer acted with an antiunion purpose in violation of Section 8(a)(3).¹⁷ Similarly, in *Waymouth Farms, Inc.*, the Board found that the employer had bargained in bad faith in violation of Section 8(a)(5) where the employer lied to the union during plant closure negotiations to conceal the fact it had purchased a new plant six miles away, causing the union to accept a severance agreement.¹⁸

However, a misleading statement that does not rise to the level of intentional misrepresentation generally will not violate Section 8(a)(5) and/or render an agreement voidable. In *Manhattan Day School*, e.g., the Board held that the employer did not bargain in bad faith despite making statements during bargaining that the union construed to mean that the employer would not subcontract unit work.¹⁹ There, during the course of contract negotiations, the employer's representative told the union he didn't "believe" the employer would subcontract and that he "d[id]n't feel that they were going to subcontract."²⁰ Based on those employer statements, the union agreed to a contract that permitted subcontracting.²¹ Shortly thereafter, the employer began subcontracting unit work.²² In finding no Section 8(a)(5) violation, the Board reasoned that the employer did not induce the union's agreement to a contractual subcontracting provision by affirmatively misleading the union into believing that the employer would not subcontract unit work.²³ Rather, the Board noted that the employer "never promised *not* to exercise its right to subcontract," and

¹⁵ *Id.*

¹⁶ *Id.* at 116 n.3, 122-23.

¹⁷ *Id.* at 122.

¹⁸ *Waymouth Farms, Inc.*, 324 NLRB at 960-62.

¹⁹ 346 NLRB 992, 993-94 (2006).

²⁰ *Id.* at 1002.

²¹ *Id.* at 992, 1002.

²² *Id.* at 992-93.

²³ *Id.* at 993, 1002.

that the union agreed to a broad subcontracting provision despite knowledge that the employer had solicited subcontracting bids during contract negotiations.²⁴

Here, the Employer did not materially misrepresent any fact upon which the Union detrimentally relied. The Union, in ratifying a contract it knew omitted 401(k) lump sum contributions, relied solely on the Employer's single sidebar remark that the annual contribution had been "eaten up by improved benefits such as drive time and personal time off," which was not a clear misrepresentation. Indeed, compensating employees for drive time in excess of 45 minutes each way could potentially amount to a monetary sum greater than the (b) (4) 401(k) annual contribution over the course of a year. And, as denoted by the Employer's use of "such as" to qualify its statement, the represented employees did receive significant benefits that unrepresented employees do not enjoy, including: (1) a limitation on subcontracting excess work except in cases of product recall or temporary staffing issues; (2) a healthcare review committee composed of Employer and Union representatives to meet annually to discuss healthcare coverage; (3) bi-annual state-of-the-business meetings between the Employer and unions; (4) Union access to an electronic bulletin board; (5) a 12-month moratorium on zone closings; (6) decision bargaining over plant-closings; (7) a grievance process with binding arbitration; and (8) controls on competitive wage rates in union zones. Such benefits, although not quantifiable as economic expenses to the Employer in the same nature as paid drive time and personal time off, are nevertheless benefits that will inure to the benefit of the represented employees.

Moreover, as in *Manhattan Day School*, where the employer never promised the union it would *not* subcontract work, the Employer never promised the Union it would *not* give unrepresented employees the 401(k) benefit. Rather, the Union did not inquire into the Employer's intentions regarding its non-union workforce. Nor did the Union request information from the Employer to substantiate its claim that the economic benefit of the lump sum contribution was outweighed by the other contractual benefits employees received. Instead, the Union simply accepted the Employer's answer because it was satisfied with the offer. Here, as in *Manhattan Day School*, "[i]f the Union was concerned about the . . . contracting language, it should have satisfied its concern by negotiating further."²⁵

Finally, this case is unlike *Sheller-Globe Corp.* and *Waymouth Farms*, where the employers' repeated, affirmative misrepresentations caused employees to lose their

²⁴ *Id.* at 993-94 (emphasis added).

²⁵ *Id.*

jobs. Here, the Employer did not make repeated, affirmative misrepresentations, and the resultant collective-bargaining agreement did not precipitate layoffs or other harsh results. Rather, the Union and Employer bargained for and secured a collective-bargaining agreement that confers benefit increases and significant protections on unit employees. In all of these circumstances, the Employer's single ambiguous sidebar remark that the annual contribution had been "eaten up" by improved benefits such as drive time and personal time off did not amount to bad faith bargaining.

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

/s/
J.L.S.