

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

DATE: July 20, 2018

TO: Paula S. Sawyer, Regional Director
Region 27

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

SUBJECT: Service Employees International Union, Local 536-2509-8700
105 (HSS, Inc.) 536-2530-0000
Cases 27-CB-217852, 27-CB-218388, 536-2599-0000
27-CB-218427

The Region submitted these cases for advice as to whether the incumbent union, Service Employees International Union Local 105 (SEIU), violated Section 8(b)(1)(A) of the Act by taking photographs of employees engaged in Section 7 activity supporting a rival union. We conclude that the Region should issue complaint, absent settlement, alleging that SEIU's photographing, coupled with its other coercive conduct, violated Section 8(b)(1)(A) because it would reasonably have led employees to believe that the photos could be used by SEIU in the future to harass, intimidate, or retaliate against them for expressing support for a rival union.

FACTS

SEIU represents a unit of guards employed by HSS, Inc., a security services contractor, at Denver International Airport. SEIU has been the voluntarily-recognized bargaining representative for several years. In early 2018,¹ HSS employees who were seeking to replace SEIU as their bargaining representative contacted the Law Enforcement Officers Security Unions (LEOSU) and began organizing. On March 8, after SEIU's contract had expired, LEOSU filed a representation petition seeking to represent the security guards. LEOSU lost the March 26 election and has filed objections with the Region.²

¹ All dates are in 2018 unless noted.

² Out of approximately 334 eligible voters, 82 voted for LEOSU, 145 voted against, and there were 2 challenged ballots. LEOSU's objections remain pending because of the instant charges.

These cases involve three instances of SEIU representatives following employees around the airport facilities and photographing them during the week prior to the March 26 election. The first photographing incident occurred on March 19, one week before the election. Two LEOSU representatives visited the airport and were accompanied by HSS Employees 1 (who initially contacted LEOSU) and 2, who took the LEOSU representatives around the airport to introduce them to other guards.³ As Employees 1 and 2 were introducing the LEOSU organizers to their fellow guards across the airport, two SEIU representatives (one nonemployee and the other a HSS employee assisting the SEIU campaign) followed them around. At one point, Employees 1 and 2 were talking to a guard at the food court while the SEIU representatives stood observing them from about 10-15 feet away and photographed them. Employees 1 and 2 noticed their photographs being taken but did not say anything. The SEIU representatives did not offer these employees a reason for taking their photographs at the time; SEIU later asserted to the Region that it took the photographs to demonstrate that LEOSU was campaigning during work time in work areas, just as LEOSU had accused SEIU of doing. After taking these photos, the SEIU representatives continued to follow Employees 1 and 2 and the LEOSU representatives around the airport, sometimes jumping ahead of them to talk to HSS employees before the LEOSU representatives could reach them. At one point, Employee 2 asked the SEIU representatives why they were following them, and the SEIU representatives said they had a right to follow them. According to Employee 1, the SEIU representatives also told them to “get away from [SEIU’s] members.”

The second photographing incident occurred at the airport on concourse B at around the same time. Employee 3, who had been told by management that she was not supposed to talk to SEIU while on post, was working at the passenger drop off area when a SEIU representative approached and introduced herself. Employee 3 replied that she could not talk to the SEIU representative because she was on post. Nevertheless, Employee 3 said that she was “totally for LEOSU and that was how [she] was going to vote.” The SEIU representative proceeded to talk to other guards who were about two feet from Employee 3 and, while talking to them, pointed at Employee 3. Employee 3 then approached them and the SEIU representative left immediately. Employee 3 asked the guards what was being said about her and the guards replied that the SEIU representative told them that Employee 3 was voting for LEOSU. Later that afternoon, the same SEIU representative took a photograph of Employee 3 from inside the airport while Employee 3 was working at the passenger drop off area. After Employee 3 noticed she was being photographed, she took out her camera and tried to take a photo of the SEIU representative who hid behind a pillar

³ Employees 1 and 2 were off that day; thus they took the LEOSU representatives around and introduced them to other guards while on nonworking time.

before Employee 3 could take her photo. Employee 3 was upset about this incident, reported it to her supervisor, and filed an incident report with HSS.

During the third photographing incident at around the same time, an SEIU agent photographed Employee 4 while she was speaking with one of the visiting LEOSU representatives. Employee 4 is on the SEIU's bargaining committee but was not acting in her capacity as an SEIU agent at the time the photograph was taken. No reason was given by SEIU for taking the photograph and Employee 4 was not aware that her photograph was taken. An SEIU agent told the LEOSU representatives that they could not talk to SEIU members and that LEOSU needed to leave the facility immediately. Additionally, the SEIU agent warned the LEOSU representatives that if they did not leave, SEIU would have the LEOSU representative, who was speaking to Employee 4, arrested and removed from the facility, and that SEIU would file charges with the NLRB. The SEIU agent left after one of the LEOSU representatives responded that SEIU should do what it had to do because they were not leaving. Although Employee 4 witnessed this confrontation, she stayed talking to the LEOSU representatives for a total of about 45 minutes. This incident was witnessed by Employee 1.

ACTION

We conclude that SEIU's photographing incidents involving employees' Section 7 activity before the LEOSU election, and for which SEIU offered the employees no explanation and that were coupled with its other coercive conduct, would reasonably have led the employees to believe that the photos were taken so that they could be used by SEIU in the future to harass, intimidate, or retaliate against them. The Region should therefore issue complaint, absent settlement.⁴

A union violates Section 8(b)(1)(A) when its conduct reasonably tends to coerce or restrain employees in the exercise of their Section 7 rights.⁵ The test is an objective one.⁶ In determining whether photographing employees is coercive, the Board

⁴ The Region notes that SEIU's conduct may also constitute objectionable conduct, since it occurred a week prior to the election. *See Randell Warehouse of Arizona, Inc.*, 347 NLRB 591, 591 (2006) ("in the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct").

⁵ *See Longshoremen ILA Local 333 (ITO Corp.)*, 267 NLRB 1320, 1321 (1983).

⁶ *See Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB 814, 815 (2001), *enfd.* 50 F. App'x 88 (3d Cir. 2002).

considers all of the circumstances, including whether the union offered an explanation for the photographing and whether the photographing was accompanied by threats or other coercive conduct. For instance, in *Basic Vegetable Products*, the Board held that videotaping striker replacements' license plates while shouting abusive remarks as the replacement employees crossed a picket line had a reasonable tendency to instill fear of retribution in the minds of those employees and violated Section 8(b)(1)(A).⁷ Similarly, in *Electrical Workers Local 98 (MCF Services)*, the Board expressly affirmed the ALJ's conclusion that a union violated Section 8(b)(1)(A) by photographing a non-union electrical contractor's employees entering and leaving a jobsite, without explanation and while also threatening them, because the photographing in those circumstances could reasonably have led employees to believe that the photos might be used by the union in the future to harass, intimidate, or retaliate against them.⁸ Lastly, the Board has held that a union's photographing of employees prior to an election, in the absence of a timely explanation to the employees, is objectionable conduct because it reasonably tends to lead employees to believe that the photographs taken of their Section 7 activity will be used in the future to retaliate against them.⁹

Applying those principles here, we conclude that SEIU's photographing, coupled with its simultaneous coercive conduct of following employees around the airport while they were trying to introduce LEOSU representatives to other employees in the week before the LEOSU election, would reasonably tend to coerce or restrain HSS

⁷ 335 NLRB 686, 686-87 (2001).

⁸ 342 NLRB 740, 740 n.4, 753 (2004), *enfd.* 251 F. App'x 101 (3d Cir. 2007). *See also Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487, 492 (1993) (photographing coercive where taken during large demonstration with many shouting, cursing individuals; photographer threatened one employee with physical violence when he refused to have his picture taken). *See also Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB at 816 n.7 (Chairman Hurtgen agreeing that union's videotaping and photographing of employees violated Section 8(b)(1)(A) when accompanied by coercive remarks and conduct, noting that he would find additional violation based on union's failure to offer employees a benign explanation for its videotaping/photographing).

⁹ *Randell Warehouse of Arizona, Inc.*, 347 NLRB at 591, 595. *Cf. also Mike Yurosek & Son, Inc.*, 292 NLRB 1074, 1074 (1989) (union's photographing employees without explanation and accompanied by threats of reprisal constituted objectionable conduct to representation election).

employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act.

First, SEIU's photographing of Employees 1 and 2 would reasonably restrain and coerce them because it was part of SEIU's attempt to frustrate their ability to exercise their Section 7 right to support LEOSU. Thus, SEIU photographed Employees 1 and 2 while it followed them from concourse to concourse, jumping ahead of them in an effort to preempt them from introducing the LEOSU representatives to potential voters. SEIU offered Employees 1 and 2 no explanation as to why it was photographing them and, when Employee 2 asked SEIU why the employees were being followed, the SEIU representative warned Employees 1 and 2 to "get away from [SEIU's] members." In these circumstances, the photographing of Employees 1 and 2, the HSS employees leading the LEOSU campaign, would reasonably lead them to believe that the photos could be used by SEIU in the future to harass, intimidate, or retaliate against them for engaging in Section 7 activity.¹⁰ In this regard, SEIU's belated argument to the Region that it did this in an attempt to prove that LEOSU was engaged in campaigning during work time in work areas is belied by SEIU's own efforts to preempt Employees 1 and 2 so that it could speak to potential LEOSU voters first.

Similarly, SEIU's photographing of Employee 3 after pointing to her and disclosing to other HSS employees that she supported LEOSU would reasonably tend to restrain and coerce her and other employees from supporting LEOSU. SEIU did not offer Employee 3 or the other employees an explanation for taking the photograph and, in the context of SEIU's finger pointing and sharing with her coworkers Employee 3's support for LEOSU, Employee 3 (and others) would reasonably believe that SEIU's photographing was to document that she did not support SEIU and that the photos would be used by SEIU in the future to harass, intimidate, or retaliate against her. The fact that Employee 3 was so upset that she told her supervisor about the incident and filed an incident report with the Employer, though not necessary for a Section 8(b)(1)(A) violation, amply supports such an inference.¹¹ Although Employee

¹⁰ *Compare Machinists, District Lodge 947 (DirectTV U.S. DirectTV Holdings, LLC)*, Case 21-CB-79098, Advice Memorandum dated August 7, 2012, at 4 (union's photographing did not violate Section 8(b)(1)(A) where unaccompanied by other coercive conduct and not directed at employees but rather aimed at employer's managers).

¹¹ *See Electrical Workers Local 98 (MCF Services)*, 342 NLRB at 740, 753 (affirming ALJ's conclusion that union organizer's activity in photographing employees entering and leaving the jobsite could reasonably have led employees to believe that the photos might be used by the union in the future to harass, intimidate, or retaliate against

3 was not directly engaged in Section 7 activity at the exact moment when the photograph was taken, she was engaged in Section 7 activity only a few hours earlier when she refused to speak with an SEIU representative and stated that she supported LEOSU; in these circumstances, she would reasonably assume SEIU's photographing her was in response to that earlier Section 7 activity.

Finally, the Region should also allege that SEIU's photographing of Employee 4 was unlawful, even though Employee 4 was unaware that her photograph was taken. Thus, Employee 1 saw SEIU photographing Employee 4 as she spoke with a LEOSU representative, and such photographing in these circumstances, including Employee 1's own experience with SEIU photographing, would have had the tendency to restrain or coerce Employee 1 and others who witnessed the incident because "[s]uch conduct . . . can reasonably be expected to coerce employees who witness or hear about it and regard it as an indication of what may befall them if they fail to support [SEIU]."¹²

Accordingly, the Region should issue complaint on these allegations, absent settlement.

/s/
J.L.S.

ADV. 27-CB-217852.Response.SEIU. [REDACTED]

them; testimony that employees expressed concern about the union organizer's conduct in photographing them amply supports such an inference).

¹² *Auto Workers Local 695 (T.B. Wood's)*, 311 NLRB 1328, 1337 (1993) (Board affirming ALJ's conclusion that threats and acts of intimidation by strikers directed at nonemployees at the picket line would be observed or heard about by nonstriking employees and they would regard it as an indication of what may befall them if they fail to support the strike).