

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

Advice Memorandum

DATE: October 7, 2019

TO: Valerie M. Hardy-Mahoney, Regional Director
Region 32

FROM: Richard A. Bock, Associate General Counsel
Division of Advice

SUBJECT: Service Employees International Union – United 554-1467
Healthcare Workers West “SEIU-UHW” 554-1467-1250
(Stanford Health Care) 554-1467-3600
Case 32-CB-234643

The Region submitted this case for advice on whether the Union violated Section 8(b)(3) when it sponsored and supported local ballot initiatives hostile to the Employer’s business interests, in part to gain leverage on a bargaining proposal to expand the scope of the recognized unit. We conclude that the Union did not commit a violation within the Section 10(b) period because the parties had reached agreement on a contract more than six months prior to the filing of the charge, and there is no evidence that the Union unlawfully insisted on a mid-term modification to unit scope within the Section 10(b) period. Thus, the Region should dismiss the charge, absent withdrawal.

FACTS

The Employer operates hospitals and health clinics throughout California. Since 2008, the Union has represented a single unit of service and technical employees at the Employer’s flagship hospital and adjacent children’s hospital in Palo Alto, California. The Union has attempted to organize those same categories of service and technical employees at some of the Employer’s other facilities, but those efforts have been unsuccessful.

In the summer of 2017, when the parties’ existing collective-bargaining agreement was close to expiring, the parties began negotiating a successor contract. The parties’ first bargaining session took place on June 15, 2017. At this meeting, the Union presented a comprehensive opening proposal. Among other things, the Union sought to significantly expand the bargaining unit by amending the recognition clause to cover certain service and technical employees at all the Employer’s facilities, not just those working at the flagship and children’s hospitals in Palo Alto. The Union subsequently explained that its representation of the formerly unrepresented

employees would not be automatic; it would only occur once a majority expressed interest in representation by voting on and ratifying the successor contract. The Union also proposed that the Employer would remain neutral while the Union obtained the necessary showing of support.

In presenting its unit-expansion proposal at the June 15, 2017 meeting, the Union allegedly stated that expanding the unit was the “lynchpin” of negotiations. The Employer nevertheless rejected the proposal at that bargaining session and again at the next bargaining session on June 27, 2017, when the Union resubmitted the proposal and reemphasized its importance. Despite disagreement on the unit-expansion issue, negotiations continued.

On July 26, 2017, the parties met for another bargaining session, at which the Union presented the Employer with local ballot initiatives it had recently filed in Palo Alto and Emeryville, California.¹ The initiatives sought to prohibit healthcare providers such as the Employer from charging more than 15% above the “direct cost” of care provided to privately-insured patients. Direct costs were strictly defined to include factors such as labor and technology costs. The Employer responded that the Union’s initiatives would harm its revenues and were thus at odds with the interests of its employees, including those in the unit. The Employer asserts that the Union presented the ballot initiatives to gain leverage on its unit-expansion proposal.²

After meeting for at least two additional bargaining sessions on July 27 and August 8, 2017—at which the Union continued to advocate for its unit-expansion proposal and the Employer continued to reject it—the parties reached agreement on a successor contract with an effective date of September 7, 2017. The successor contract did not expand the unit through an amended recognition clause or any other means.

The Union’s support for its ballot initiatives continued past the conclusion of negotiations. In December 2017 and January 2018, in preparation for the November 2018 general election, the Union refiled its Palo Alto and Emeryville initiatives and filed substantially similar initiatives in the California cities of Livermore, Redwood City, and Pleasanton.³ The Union then pursued a publicity campaign in support of

¹ The Employer operates at least one healthcare facility in Emeryville.

² Historically, the Union has used various hospitals’ aversion to increased regulation to its advantage. In 2011, the Union secured an agreement with the California Hospital Association—an advocacy group representing various healthcare providers, including the Employer—under which the Union resolved to drop its support for statewide, healthcare-related ballot initiatives in exchange for increased access to unorganized hospitals. Similar events took place in 2014.

³ The Employer also operates facilities in Livermore, Redwood City, and Pleasanton.

the initiatives, arguing that the 15% cap would lower health care costs while improving patient care through higher (compensable) staff levels and increased investments in technology. Parties opposed to the ballot initiatives, including the Employer, argued the regulations would reduce hospital revenue; negatively affect hospitals' ability to provide below-cost care to Medicare, Medicaid, and un-/under-insured individuals; and place costly administrative burdens on cities responsible for enforcing the regulations.

In March 2018, amid these opposing publicity campaigns, the Union President met with the Employer's Chief Executive Officer ("CEO"). The Employer alleges that at this meeting the Union President told the Employer's CEO that the Union filed the initiatives because it wanted the Employer to agree to expand the bargaining unit, and that the Union would drop its support for the initiatives if the Employer agreed to the Union's demands. The Employer refused the alleged offer. It is not alleged that the Union made any similar offers after this meeting. The evidence shows that after March 2018, the Unions conduct was limited to traditional political campaign activity (e.g., advertisements, phone banks, mailings, etc.).

At a November 16, 2018 hearing for a lawsuit concerning the Palo Alto initiative, an attorney for the Union, in response to questions by the presiding judge, stated that the Union pursued the initiative, in part, because it could benefit the Union's position at the bargaining table and, in part, because it was good public policy.

On January 22, 2019, the Employer filed the instant charge alleging the Union violated Section 8(b)(3) by engaging in economic coercion in support of a non-mandatory bargaining subject.

ACTION

We conclude that the Union did not commit a violation within the Section 10(b) period because the parties had reached agreement on a contract more than six months prior to the filing of the charge, and the evidence is insufficient to establish that the Union unlawfully insisted on a mid-term modification to unit scope within the Section 10(b) period.

Section 8(b)(3) makes it unlawful for a union to refuse to bargain collectively. The obligation to bargain collectively is broadly defined in Section 8(d).⁴ During negotiations for a new contract, a union fails to bargain collectively if it refuses to

⁴ Section 8(d) states, in part, "[f]or the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment"

bargain over mandatory subjects.⁵ A union likewise engages in bad-faith bargaining when it insists to impasse on a non-mandatory subject because that is, “in substance, a refusal to bargain over mandatory subjects.”⁶ When a collective-bargaining agreement is in effect, a union is not privileged during the term of that agreement to require mid-term bargaining over a mandatory subject regarding which it acquiesced, or agreed to leave out of the contract.⁷ Nor may a union use economic weapons, that may be considered strike activity, to coerce an employer to include such a subject in those circumstances without running afoul of Section 8(b)(3) and 8(d)(4).⁸

Similarly, where a contract is already in place, a union violates Section 8(b)(3) by insisting upon a mid-term contract modification where the term insisted upon is a non-mandatory subject of bargaining. For instance, in *Chicago Truck Drivers (Signal Delivery)*, a union sought to merge three separate bargaining units by dovetailing their seniority lists, which required a modification of the existing collective-bargaining agreements.⁹ Employees filed a grievance to that effect, and the union

⁵ *NLRB v. Insurance Agents’ Intl. Union*, 361 U.S. 477, 486-87 (1960).

⁶ *Detroit Newspapers*, 327 NLRB 799, 800 (1999) (quoting *NLRB v. Borg-Warner Corp.*, 356 U.S. 324, 349 (1958)), *review granted on other grounds*, 216 F.3d 109 (D.C. Cir. 2000); *Plumbers Local 141 (International Paper Co.)*, 252 NLRB 1299, 1299 n.1, 1306 (1980) (finding unions violated Section 8(b)(3) by insisting to impasse on the inclusion of a proposal for a non-mandatory subject and by threatening to strike or picket in support of this insistence).

⁷ *See Teamsters Local 917 (Industry City Associates)*, 307 NLRB 1419, 1420 (1992).

⁸ *Id.* Section 8(d) states, in relevant part, “where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification – (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior . . . ; (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications; (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any [equivalent] State or Territorial agency . . . ; and (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.”

⁹ 279 NLRB 904, 904 (1986).

pursued that grievance to the point of demanding arbitration.¹⁰ The Board found that the merger of bargaining units is a non-mandatory subject, and that the union's demand to arbitrate that issue constituted a demand to modify the contracts, thereby amounting to unlawful insistence on that subject.¹¹ The Board went on to note that the union's petition for arbitration was not protected under *Bill Johnson's* because the union's position had an illegal objective.¹²

Here, we conclude the Union initially undertook its ballot initiative campaign in part to gain leverage during bargaining on its proposal to expand the bargaining unit, a non-mandatory subject. And, after reaching a collective-bargaining agreement without achieving its proposed unit, the Union continued to support certain ballot initiatives. Some union corporate campaigns may, depending on the circumstances, rise to the level of restraint, coercion or otherwise manifest bad faith (i.e., where undertaken to unlawfully insist on a non-mandatory subject such as unit expansion).¹³

Regarding the Union's conduct during successor contract negotiations, bargaining between the Employer and Union concluded, and the parties agreed on a new contract in September 2017, approximately 16 months before the Employer filed its charge. Although here the threat to maintain ballot initiatives made during negotiations appears to have risen to the level of unlawful insistence,¹⁴ again, the threat was made more than six months before the charge was filed, the parties reached agreement and there is insufficient evidence that the Union's pursuit of the ballot initiatives after negotiations concluded was tied to an unlawful objective. Thus, there is insufficient evidence that a violation occurred within the six-month statute of limitations.

¹⁰ *Id.* at 905.

¹¹ *Id.* at 906-07 (“[B]ut the enlargement of a bargaining unit is not a mandatory subject of bargaining.”).

¹² *Id.* at 907 (citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983) (observing, among other things, that the Board may enjoin as an unfair labor practice the filing and prosecution of state court lawsuits that have “an objective that is illegal under federal law” without interfering with the First Amendment right of access to the courts)).

¹⁴ *See, e.g., Postal Service*, 350 NLRB 125, 125 n.1 (2007) (“whatever constitutional concerns might exist with respect to the filing of a lawsuit, they are not implicated when only a threat to file a lawsuit is in issue”), *reconsideration denied*, 351 NLRB 205 (2007), *enforced*, 526 F.3d 729 (11th Cir. 2008).

The Union's conduct within the Section 10(b) period, which commenced July 22, 2018, was limited to its mere continued support for the ballot initiatives without more. That activity, alone, does not constitute further pursuit of, or insistence on, a mid-term contract modification regarding a non-mandatory subject of bargaining. The facts here are clearly distinguishable from those in *Chicago Truck Drivers and Teamsters Local 917 (Industry City Associates)*, where unions engaged in conduct within the Section 10(b) period to insist on non-mandatory subjects or otherwise modify existing collective-bargaining agreements. The Union here engaged in no such insistence during the Section 10(b) period.

Based on the foregoing, the Region should dismiss the charge absent withdrawal.

/s/
R.A.B.

H: ADV.32-CB-234643.Response.SEIU-UHW(StanfordHealthCare). (b) (6)