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

Advice Memorandum

DATE: January 7, 2015

TO: Mori P. Rubin, Regional Director
Region 31

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

SUBJECT:		
	Sanders-Clark & Co. d/b/a McDonald's	512-5006-5031
	and McDonald's USA, LLC,	512-5006-5050
	as Joint or Single Employers	512-5006-5067
	Case 31-CA-131697	512-5006-6767

This case was submitted for advice as to whether a flyer the Employers' posted on its employee bulletin describing the Employers' position on employees *Laidlaw*[1] rights violated Section 8(a)(1). We conclude that the Employers' flyer concerning its right to permanently replace striking employees coupled with the statement that there was "no guarantee that a striking employee would ever get their job back" violated Section 8(a)(1) because it was a misleading statement of the law that indicates that employees would lose their jobs if they were permanently replaced while engaging in a protected economic strike against the Employers. Additionally, the Employers' other unlawful threats further support the conclusion that the Employers' statements concerning permanent replacements would be interpreted as a threat against employees' participation in Section 7 activity. Accordingly, the Region should issue complaint, absent settlement.

FACTS

Sanders-Clark & Co. and joint employer McDonald's USA, LLC operate several McDonald's restaurant franchises in Los Angeles, California, including the restaurant at which the relevant events occurred in this case. The Charging Party, Los Angeles Organizing Committee ("Union"), along with various unions and community organizations, have been conducting a wage-improvement campaign at McDonald's locations nationwide.

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[1] *The Laidlaw Corporation*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

In early May 2014,[2] the Union planned and coordinated an employee strike at the restaurant in support of better wages and working conditions. On May 13, a supervisor at the restaurant asked an employee whether [redacted] supported the Union and warned [redacted] that, if [redacted] did, the restaurant's Owner Operator[3] would be out get [redacted].[4] The one-day strike occurred on May 15. After one of the employees returned from the strike, a supervisor told that employee that [redacted] had given improper notice of [redacted] intent to strike and then handed the employee a packet of [redacted] prior disciplinary warnings.[5] On May 17, a supervisor told employees that they were not permitted to discuss the Union at the restaurant.[6]

On June 17, the Owner Operator posted several flyers in the employee break area on the employee bulletin board.[7] These flyers contained opinions about the effects of unionization and unions.[8] In particular, the following text appeared in one of the flyers:

> Q. If I strike or miss work I am guaranteed my job back when I come back or I am ready to work again, that is the law.
>
> A. Any employer in the State of California has the right to replace striking workers under economic strike rules. There is no guarantee that a striking employee would ever get their job back.

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[2] All dates hereinafter are in 2014.

[3] "Owner Operator" is McDonald's USAs LLC's term for its franchisees.

[4] The Region concluded that this conduct violated Section 8(a)(1) in Case 31-CA-133117.

[5] The Region concluded that this conduct violated Section 8(a)(1) in Case 31-CA-129027.

[6] The Region concluded that this conduct violated Section 8(a)(1) in Case 31-CA-128483.

[7] These flyers remained posted for a period of approximately three weeks. The flyers were removed without explanation.

[8] The Region concluded that the other statements contained in the flyers were lawful.

ACTION

We conclude that the Employers' flyer concerning its right to permanently replace striking employees coupled with the statement that there was "no guarantee that a striking employee would ever get their job back" violated Section 8(a)(1) because it was a misleading statement of the law that indicates that employees would lose their jobs if they were permanently replaced while engaging in a protected economic strike against the Employers. Additionally, the Employers' other unlawful threats further support the conclusion that the Employers' statements concerning permanent replacements would be interpreted as a threat against employees' participation in Section 7 activity.

Section 8(c) of the Act permits employers to express views, arguments, or opinions concerning union representation without running afoul of Section 8(a)(1) of the Act "if such expression contains no threat of reprisal or force or promise of benefit." In assessing whether an employer's statement to employees unlawfully threatens employees, the Board "must take into account the economic dependence of the employee on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[9]

An employer has a Section 8(c) right to accurately inform employees of the potential lawful consequences of engaging in protected activities. But a misstatement of law constitutes an unlawful threat if it would reasonably be construed as threatening adverse consequences for engaging in Section 7 activity.[10] In determining whether an employer's statement was unlawful, the Board examines it from the "perspective of a reasonable employee. . . . The test is not what the speaker may have meant to say, but whether his actual words would tend to interfere with employee free choice." [11] In making that determination, the Board also considers the context in which the statement is made, including other unlawful threats made by the employer.[12]

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[9] *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969).

[10] *See, e.g.*, *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617, 618, n.22 (2007) (employer's flyer misled employees by creating impression that employees would have to give up customary wage increases as a "lawful and ineluctable consequence" of bargaining).

[11] *Labriola Baking Co.,* 361 NLRB No. 41, slip op. at 3 (Sept. 8, 2014).

[12] *See, e.g.*, *Southern Catfish Pride*, 331 NLRB 618, 618 (2000) (statement about other facilities closing considered in context of other unlawful threats); *Taylor-Dunn Mfg.*

In analyzing employer statements regarding the permanent replacement of strikers, the Board has held that an employer has a Section 8(c) right to truthfully tell employees that economic strikers are subject to permanent replacement, "without fully detailing the protections enumerated" in *The Laidlaw Corporation*,[13] unless the employer statement "may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats. . . ."[14] On the other hand, where an employer's statement suggests that employees could "lose their jobs" as a consequence of permanent replacement, the statement is both inaccurate and would reasonably be understood as a threat of reprisal.[15] An employer's right to "discuss

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Co., 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff in order to retain their jobs, unlawful in context of other threats), *enforced*, 679 F.2d 900 (9th Cir. 1982) (table).

[13] In *The Laidlaw Corporation*, 171 NLRB 1366 (1968), the Board delineated the rights accorded to economic strikers. Striking employees remain employees within the meaning of Section 2(3) of the Act while on strike. *Id.* at 1368. If the striking employees are permanently replaced before they make unconditional offers of reinstatement, the striking employee must be reinstated when equivalent positions become available or placed on a preferential hiring list. *Id.*

[14] *Eagle Comtronics, Inc.,* 263 NLRB 515, 516 (1982) (truthfully telling employees that economic strikers "could be replaced with applications on file" where the employer did not say employees would lose their jobs and its statement was not coupled with any threat of reprisal, lawful). *See River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 184–85 (2007) (employer's statement that permanent replacement would "put[] each striker's continued job *status* in jeopardy" permissible under the principles of *Eagle Comtronics* where the employer's statement is entirely consistent with employees' *Laidlaw* rights because it did not indicate that employees would lose their jobs, but might be required to wait for a vacancy (emphasis added)); *John W. Galbreath and Co.*, 288 NLRB 876, 877 (1988) (employer qualified statement regarding job loss and permanent replacement by adding that employees are "not discharged, technically speaking[,]" lawful).

[15] *See Baddour, Inc.,* 303 NLRB 275, 275 (1991) (statement that "strikers can lose their jobs" and that "you could end up losing your job by being replaced with a new permanent worker," unlawful); *Fern Terrace Lodge,* 297 NLRB 8, 8–9 (1989) (statement that permanently "replaced striker is not automatically entitled to his job back just because the strike ends," unlawful, because economic strikers are automatically entitled to their jobs back, or, if their job is unavailable, preferential

> potentially unfavorable aspects of unionization with its employees does not sanction propaganda that raises the prospect of job loss and leaves employees on their own to divine that the 'loss' is somehow less than total . . . ."[16]

Here, we conclude that the Employer unlawfully threatened job loss when it stated in its flyer that "[a]ny employer in the State of California has the right to replace striking workers under economic strike rules. There is no guarantee that a striking employee would ever get their job back." These two statements, read together, are tantamount to the threats found unlawful in *Larson Tool*, *Fern Terrance Lodge*, and *Baddour* because they imply that permanently replaced economic strikers will lose their jobs, and that they may never get them back. An employee would not have to worry about "get[ting] their job back" after an economic strike if the job was not lost in the first place. This statement, viewed from the perspective of a reasonable employee, implies that permanent replacement in the State of California means termination, with no right to return, a misstatement of law. Any phrase that implies that employees will lose their jobs is inconsistent with employees' *Laidlaw* right to return to their jobs because it "conveys to the ordinary employee the clear message that employment will be terminated."[17]

Further, the context of the Employers' other unlawful threats provides additional support that their statements concerning permanent replacements would be interpreted as a threat against employees' participation in Section 7 activity.[18] In this regard, supervisors unlawfully interrogated and threatened employees with discipline over their participation in the one-day May 15 economic strike. Prior to the strike, a

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hiring to similar openings); *Larson Tool,* 296 NLRB 895, 895-896 ("you could lose your job to a permanent replacement," without further explanation, unlawful); *Hajoca Corp.,* 291 NLRB 104, 106 (1988) (informing employees they would be permanently replaced and would "no longer have a job" if they went on an economic strike, unlawful), *enforced*, 872 F.2d 1169, 1177 (3d Cir. 1989). *See also Care One at Madison Ave.*, 361 NLRB No. 159, slip op. at 1, 10–12 (Dec. 16, 2014) (distinguishing *River's Bend Health & Rehabilitation,* statement "Do you want to give outsiders the power to jeopardize your job by putting you out on strike?," unlawful, as statement "implie[s] that job loss was a consequence of a strike", and the leaflet that the unlawful statement was contained in did not, among other things, distinguish between economic and unfair labor practice strikers).

[16] *Larson Tool and Stamping Co.,* 296 NLRB 895, 895 (1989).
[17] *Baddour, Inc.,* 303 NLRB at 275.

[18] *Valerie Manor, Inc.,* 351 NLRB 1306, 1318 (2007) (in evaluating lawfulness of flyer statements, Board considers context of other alleged threats).

supervisor warned an employee that if [redacted] supported the Union, the Employer would be out to get [redacted]. After the strike, a supervisor told an employee that [redacted] had given improper notice of [redacted] intent to strike and then handed the employee a packet of [redacted] prior disciplinary warnings. These unlawful statements and actions were made shortly before the June 17 flyer's statement that employees could be permanently replaced for engaging in future strikes.[19] In these circumstances, the Employer's statements, taken in the context of its other unfair labor practices, went well beyond the statement found lawful in *Eagle Comtronics* and would be reasonably perceived as threatening. [20]

Accordingly, we conclude that the Region should issue complaint, absent settlement, alleging that the Employers' statements that "[a]ny employer in the State of California has the right to replace striking working under economic strike rules. There is no guarantee that a striking employee would ever get their job back", violated Section 8(a)(1).

B.J.K.

ADV.31-CA-131697.Response.SandersClarkMcDonalds.[redacted]

[19] *See Unifirst Corp.*, 335 NLRB 706, 707 (2001) ("Where, however, ambiguous comments about striker replacement are part and parcel of a threat of retaliation for choosing union representation, as they were here, any ambiguity should be resolved against the employer."), *cited with approval in Labriola Baking Co.,* 360 NLRB No 41, slip op at 2, n. 6 (Sept. 8, 2014).

[20] Indeed, even if the statement that there is no "guarantee" of "get[ting] their job back" is considered an accurate statement of the law, in context that statement reasonably would be perceived as an Employer threat of retaliation against strikers.