

**Lasalle Ambulance, Inc., d/b/a Rural/Metro Medical Services and International Brotherhood of Teamsters, Local 375.** Cases 3–CA–20837–3 and 3–RC–10568

October 30, 1998

DECISION, ORDER, AND DIRECTION

BY MEMBERS FOX, LIEBMAN, AND BRAME

Upon a charge filed on August 27, 1997 against Lasalle Ambulance, Inc., d/b/a Rural/Metro Medical Services (the Respondent), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on September 30, 1997. On August 22, 1997, the Charging Party/Petitioner filed timely objections in an election held August 22, 1997. On October 2, 1997, the Regional Director for Region 3 issued an Order Directing Hearing on Objection, Order Consolidating Cases, and Notice of Hearing consolidating the election objection and the complaint herein.

The complaint alleges that the Respondent violated Section 8(a)(1) by distributing a memorandum to all employees at its facility, on or about August 21, 1997, stating that if a union was voted in, the Respondent could not change employee wages (including merit increases), hours and working conditions, unless and until there is a contract. The election objection alleges that the distribution of this memorandum interfered with employee free choice in the election held August 22, 1997. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 88 for and 140 against the Petitioner, with 1 void ballot and 4 challenged ballots, an insufficient number to affect the results.

On December 15, 1997, and January 23, 1998, the Respondent, the Charging Party, and the General Counsel jointly filed a motion to transfer proceedings to the Board and a stipulation of facts. The parties agreed that the petition for certification, the charge, the complaint and notice of hearing, the answer, the Order Directing Hearing on Objections, and the Order Consolidating Cases and Notice of Hearing, together with the stipulation and exhibits referred to in the stipulation, constitute the entire record in this proceeding and that no oral testimony is necessary or desired by any party. The parties further stipulated that they waived a hearing before an administrative law judge, and the making of findings of fact and conclusions of law and the issuance of a decision by an administrative law judge, and that they desired to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of an order by the Board.

On March 5, 1998, the Board issued an order approving the stipulation, granting the motion, and transferring the proceeding to the Board. Thereafter, the Respondent and the Acting General Counsel filed briefs.

The Board has delegated its authority in this proceeding to a three-member panel.

On the basis of the record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New York corporation with an office and principal place of business located in Buffalo, New York, has been engaged in the nonretail operation of an ambulance service. Annually, in conducting these business operations, the Respondent purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of New York.

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

*A. Stipulated Facts*

It has been the Respondent's policy and practice, since the inception of the Respondent's operations in the Buffalo area in about mid-1995, to review employee performance annually and to award merit increases ranging from no increase to an 8-percent increase, based on the performance reviews, but entirely at the Respondent's discretion. The Respondent's employee handbook states that performance reviews are held annually following an employee's anniversary date. However, following a promotion an employee's review date is changed to the promotion anniversary date. The Respondent uses a chart specifying the range of merit increases for a given performance rating. Unit employees did not customarily receive any other types of wage increases.

On June 23, 1997, the Union filed a petition to represent certain of the Respondent's employees. On August 20, 1997, the Respondent held an employee meeting. At this meeting, an employee asked the Respondent's regional president, Kurt Krumperman, what would happen to the merit increases if the Union was voted in. Krumperman was unable to provide a definitive answer at the time. On the afternoon of August 21, 1997, in response to the question, the Respondent posted a memorandum to all employees, entitled "After the Union Election," which stated

During a meeting last night, the question was asked as to what would happen with performance reviews and merit increases if the union is voted in. We were not sure of the answer at the time but have since found out that if the union is voted in, all issues connected with wages, hours and working conditions are subject to negotiation. Therefore, the Company cannot change your wages (which includes merit increases), hours and working conditions unless and until there is a contract. Performance reviews will continue as usual.

Please feel free to contact me if you have any questions.

The memorandum stated that it was from the Respondent's general manager, Gary Zachrich. The wording of the memorandum was based on the Respondent's understanding of the law and the process of collective bargaining. The memorandum was posted on bulletin boards at the Respondent's Buffalo, Amherst, Cheektowaga, and Niagara Falls facilities, at which the employees eligible to vote in the August 22 election were employed.

#### B. Contentions of the Parties

The Acting General Counsel asserts that the statements in the Respondent's August 21, 1997 memorandum interfered with, restrained, and coerced employees in the exercise of their Section 7 rights and interfered with their free choice in the election held the day after the memorandum was issued. The Acting General Counsel contends that similar statements concerning effects of unionization on wage increases were found unlawful in *Pyramid Management Group*, 318 NLRB 607 (1995), enfd. No. 95-4148 (L) (2d Cir. April 1, 1996) (unpublished), and *Teksid Aluminum Foundry*, 311 NLRB 711, 711 fn.2., 717 (1993).

The Respondent asserts that the memorandum constitutes a lawful expression of the Respondent's opinion concerning the likely consequences of unionization protected by Section 8(c) of the Act. According to the Respondent, its merit increases were "highly discretionary" and, therefore, could not be provided during contract negotiations without violating the Respondent's duty to maintain the status quo with respect to wages and other mandatory subjects of bargaining. The Respondent also asserts that the memorandum did not include any threat of reprisal that the Respondent intended to take of its own volition, but instead merely stated the Respondent's belief concerning its legal obligations in the event the Union won the election. It argues that there is no evidence that it would not move forward with the merit increases because it did not wish to do so, nor that it intended to withhold such increases permanently. The Respondent states that similar statements to employees have been found to be lawful, citing, inter alia, *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2d Cir. 1952).

#### C. Analysis and Conclusions

It is settled law that when employees are represented by a labor organization, their employer violates Section 8(a)(5) by unilaterally changing their terms and conditions of employment, such as their wages or their wage system, regardless of the employer's motivation in doing so. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). When an employer has an established practice of granting wage increases according to fixed criteria at predictable intervals, a discontinuance of that practice constitutes a change in terms and conditions of employment even if

the amounts of increases have varied in the past. *Daily News of Los Angeles*, 315 NLRB 1236, 1237-1241 (1994), enfd. 73 F.2d 406 (D.C. Cir. 1996). Accord: *Bryant & Stratton Business Institute, Inc. v. NLRB*, 140 F.3d 169, (2d Cir. 1998), enfg. 321 NLRB 1007 (1996). Thus, an employer's pre-election statement that it planned to discontinue an established system of merit wage increases if the union won the election would not be an accurate description of actions that could be lawfully taken as part of the collective-bargaining process.

Applying these principles to this case, we find that the Respondent, by the August 21, 1997 memorandum, unlawfully threatened employees with the withholding of their merit increases. Thus, the memorandum plainly states that if the Union wins the election, the employees will not receive merit wage increases "unless and until there is a contract." Given the employees' reasonable understanding of the Respondent's wage system, the memorandum thus implies that if the Union wins the election, the employer will, in violation of its statutory obligation, automatically discontinue the employees' system of annual wage increases based on their performance evaluations until a contract is reached.<sup>1</sup> For the reasons set forth below, that system was an established term and condition of employment. Such a statement, threatening the loss of so salient a benefit as anticipated wage increases simply as the price of electing a collective bargaining representative, is clearly coercive and violates Section 8(a)(1) of the Act. *Pyramid Management Group*, supra; *Teksid Aluminum Foundry*, supra.<sup>2</sup>

Contrary to the Respondent, its statement that if the employees voted for the Union it could not change wages unless and until there was a contract is not protected speech under Section 8(c) of the Act. Section 8(c) provides as follows:

The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

As noted above, the Respondent's August 21, 1997 memorandum does contain a threat. Accordingly, Section 8(c) is

<sup>1</sup> The Respondent's memorandum does not expressly state that it would continue to grant merit wage increases if the Union lost the election. However, the merit increases were an established practice specified in the Respondent's employee handbook. Moreover, the memorandum stated that the Respondent was retaining the performance evaluations, which were an integral part of the merit pay program. Under these circumstances, employees would reasonably infer that the merit wage increases would be granted if the Union lost.

<sup>2</sup> Although not determinative, we find that the coercive impact of the Respondent's announcement is heightened by the fact that employees customarily did not receive any other type of wage increase, and by the fact that the announcement was distributed the day before the election, albeit in response to a question posed by an employee on the prior day.

not applicable. *Pyramid Management Group*, supra, 318 NLRB at 608.<sup>3</sup>

Likewise, there is no merit to the Respondent's further contention, which is, in essence, that its memorandum merely restates its obligation under the law to bargain with the Union, if it won the election, before changing terms and conditions of employment. As explained above, an automatic discontinuance of a regular system of wage increases would constitute a change in terms and conditions. Thus, the Respondent's statement was a threat to unilaterally withhold scheduled benefits, in violation of its obligation under the law, not an accurate explanation of the nature of that obligation.

In this regard, a merit wage program will be found to be a term and condition of employment when it is an "established practice . . . regularly expected by the employees [footnote omitted]." *Daily News of Los Angeles*, supra, 315 NLRB at 1236. As discussed below, relevant factors in this determination include the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.

For example, in *Daily News of Los Angeles*, employees received annual performance appraisals on their anniversary date, and were awarded wage increases in an amount determined solely by the employer in its discretion but solely on the basis of their evaluation. The employer had maintained the program for three years, ever since it acquired the company from a predecessor. Likewise, in *Bryant & Stratton Business Institute*, the employer evaluated employees either on their anniversary date or in July of each year, and granted wage increases on the basis of that evaluation. The employer had followed this practice for the preceding 10 years with only one exception: in 1988 the employer had suspended increases at one of its three locations for economic reasons.

In both *Daily News of Los Angeles* and *Bryant & Stratton Business Institute*, the Board found that the merit increase program was a term and condition of employment, and further found that the employers in those cases had violated Section 8(a)(5) by withholding the merit increases after their employees had voted for union rep-

<sup>3</sup> The Respondent argues that the Board has found lawful employer statements, during an organizing campaign, that if the union is selected benefits will be established through bargaining and there is no guarantee that the bargaining process will result in maintenance or improvement of existing benefits, citing, inter alia, *Mediplex of Connecticut*, 319 NLRB 281 (1995), *Checker Motors*, 232 NLRB 1077 (1977), *Computer Peripherals*, 215 NLRB 293 (1974), and *Armstrong Tire & Rubber*, 119 NLRB 382 (1957). However, as the Board held in *Computer Peripherals*, such statements are lawful where there is "no express or implied threat that [the employer] would unilaterally take away benefits and require the Union to negotiate to get them back. . . ." 215 NLRB at 294. As discussed below, that is precisely the effect of the Respondent's statement. Accordingly, the cases cited by the Respondent are distinguishable.

resentation. These determinations were enforced by the D.C. and Second Circuit courts of appeals, respectively.

We find no meaningful distinction between the merit increase program in this case and those in *Daily News of Los Angeles* and *Bryant & Stratton Business Institute*. The Respondent's merit increase program, like those in *Daily News of Los Angeles* and *Bryant & Stratton Business Institute*, calls for increases on a specific schedule (here the employee's anniversary date), and uses specific criteria (the employee's evaluation). The discretionary aspects of the program are further constrained by the Respondent's chart setting forth the acceptable ranges for a merit increase for any given evaluation. Moreover, the Respondent has maintained this practice since the inception of operations in Buffalo in mid-1995. Under these circumstances, the Respondent was not only permitted, but was in fact required to maintain the merit increase program, if the Union won the election, unless a change was negotiated with, and agreed to by, the Union or the parties reached impasse after good-faith bargaining.<sup>4</sup> In *Daily News of Los Angeles*, the court stated that the "crucial question is what *Katz* requires of an employer if an established merit wage increase program is fixed as to timing and criteria but discretionary as to amount" and the court answered that, in such circumstances, "*Katz* demands that the company continue to apply the same criteria and use the same formula for awarding increases during the bargaining period as it had previously." 73 F.3d at 412. The Respondent's memo threatens not to do this.<sup>5</sup>

<sup>4</sup> The issue here, involving threatened unilateral discontinuance of an existing merit increase system is distinguishable from the issue in *McClatchy Newspapers*, 321 NLRB 1386 (1996), enf'd. 131 F.3d 1026 (D.C. Cir. 1997), which involved implementation upon impasse of an expansion of an existing merit increase system.

Member Brame agrees with his colleagues that *McClatchy Newspapers* is distinguishable. He therefore does not pass on whether that case was correctly decided.

<sup>5</sup> *Bonwit Teller, Inc. v. NLRB*, supra, upon which the Respondent relies, concerned two different types of statements about the withholding of wage increases, neither of which the Second Circuit deemed unlawful. Those holdings, however, are not dispositive of the issue in this case.

A statement by the president of Bonwit Teller that the employer would not put through wage increases before the election "lest we be accused of an unfair labor practice" is similar to statements dealt with in *Atlantic Forest Products*, 282 NLRB 855, 857-859 (1987), and cases cited therein. The issue resolved in those cases—what steps an employer may lawfully take with respect to actions during the critical period prior to the election to avoid having the grant of a wage increase appear to be a bribe aimed at influencing the election—is different from the issue here, i.e. what an employer may say about actions he will take in the event the union wins the election.

Another statement by a Bonwit Teller supervisor (Neimark) that, if the union were voted in, the employees would not get a scheduled wage increase until a contract were negotiated is similar to the statement here. The Bonwit Teller court's holding that this statement was an accurate description of the bargaining process is based on reasoning that was undermined by the Supreme Court's later decision in *NLRB v. Katz*, supra. Thus, as indicated above, the Second Circuit, in a post-*Katz* decision, *Bryant & Stratton Business Institute*, supra, acknow-

For the foregoing reasons, we find that the Respondent's August 21, 1997 announcement that if the Union were voted in, the Respondent could not change employee wages (including merit increases) unless and until there was a contract violated Section 8(a)(1) of the Act. We further find that the announcement, which was made the day before the election, also constituted objectionable conduct to the election held August 22, 1997. *Pyramid Management Group*, supra.<sup>6</sup>

#### CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.
3. By telling employees that if the Union was voted in, it could not change employee wages (including merit increases) unless and until a contract was signed, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights protected by Section 7 of the Act, and has violated Section 8(a)(1) of the Act.
4. By the acts and conduct set forth in paragraph 3 above, the Respondent interfered with the conduct of the election held August 22, 1997.

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ledged that, in a unit with a collective-bargaining representative, an employer's unilateral discontinuance of an established merit increase practice does violate Sec. 8(a)(5) and (1) of the Act. A statement threatening to take such action would, therefore, be a coercive threat to invade statutory rights.

<sup>6</sup> Member Brame agrees with his colleagues that a violation has been made out on the facts of this case. As a general proposition, however, he finds that the law in this area, as interpreted by the Board, is to some extent counter-intuitive. First, employers relying on "at-will" employment routinely reserve discretion to change the amount, timing and form of pay increases. Thus, they are, for purposes of general contract law, not an enforceable "term and condition" but an unenforceable expectancy or hope. Second, an employer wishing to take no risks of interfering with an election and avoid the charge that it "bribed" its employees cannot safely wait until after the election to grant a wage increase. And if the employer continued its past practice, it would be subject to being second-guessed that it paid too much (a "bribe") or too little (a "threat"), too soon or too late. The common (and recommended) practice of retaining discretion on pay increases, thus, puts employers at risk whether they act or fail to act. As Judge Randolph noted in his dissent in *Perdue Farms, Inc., Cookin' Good Division v. NLRB*, 144 F.3d 830 (D.C. Cir. 1998), with respect to the issue of pre-election increases,

[w]hen a traffic light simultaneously blinks "Stop" and "Go" everyone knows repairs are needed. If a motorist encountering the light proceeds ahead while another motorist pauses, it is unimaginable that both would be guilty of failing to heed the signal. The Board's "law" governing pre-election wage increases is like the faulty traffic light and the Board's enforcement of that "law" approaches the unimaginable.

Likewise, in *Acme Die Casting v. NLRB*, 93 F.3d 854 (D.C. Cir. 1996), denying enf. to 317 NLRB 1353 (1995), the court castigated the Board for failing to identify the circumstances in which a merit increase program would be considered a term and condition of employment. Member Brame agrees with the D.C. Circuit and with Judge Randolph that the Board's failure to provide guidance to employers in this general area is unfortunate and must be corrected.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(1), we shall order it to cease and desist and to take certain affirmative action that will effectuate the policies of the Act. We also find that the election held August 22, 1997 must be set aside and a new election held.

#### ORDER

The National Labor Relations Board orders that the Respondent, Lasalle Ambulance, Inc., d/b/a Rural/Metro Medical Services, Buffalo, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Telling employees that if the Union were voted in, it could not change employee wages (including merit increases) unless and until a contract was signed.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Buffalo, Amherst, Cheektowaga, and Niagara Falls, New York facilities copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on August 22, 1997, in Case 3-RC-10568, is set aside and that the case is remanded to the Regional Director for Region 3 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

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<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union

- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that, if the Union is voted in, we cannot change your wages (including merit increases) unless and until there is a contract.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

LASALLE AMBULANCE, INC., D/B/A  
RURAL/METRO MEDICAL SERVICES