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

Advice Memorandum

DATE: April 26, 2010

TO : Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: Pepsi Americas
Case 12-CA-26396

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This case was submitted for advice regarding whether the Employer violated Section 8(a)(1) of the Act by including certain language in a handout distributed to employees describing possible effects to employees of impending labor law reform. We conclude that the Employer's comments were protected by Section 8(c) because they did not make any promise of benefit or threat of reprisal.

FACTS

Pepsi Americas is engaged in the sales, warehousing and delivery of a variety of soft drinks in and for the greater Palm Beach County area of Florida. Teamsters Local Union No. 769 has attempted to organize some of the employees of the Employer on at least two occasions in the last three to four years but has not been successful. However, the Union was not engaged in any organizing activity during the events leading to the filing of this charge.[1]

In February 2009, Pepsi posted a letter on bulletin boards where it usually posted information to be disseminated to employees. The Employer stated that it posted the letter in reaction to the possible enactment of card-check provisions in the Employee Free Choice Act (EFCA). The memorandum, signed by a regional manager, references EFCA in the introductory paragraph and states as follows:

> I want to let you know right from the start where I stand. I think this legislation takes away

[1] Other than the Section 8(c) issue here, the Region has found no merit to all of the Section 8(a)(3) and the remaining Section 8(a)(1) allegations of the individual employee's charge.

> employee's rights. … I believe that the law is being supported by unions because they know if employees are given all of the facts and opportunity to vote in a secret ballot election the employees would choose to remain union-free. **It is extremely important that you do not sign a union card.** Let me explain. [Emphasis in original.]
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> …
>
> Under the union supported legislation, unions would be able to represent employees simply by getting employees to sign union cards. No election would have to occur and the employees would not have an opportunity to get all of the facts about what could happen under union representation. It doesn't matter if the union cards are obtained through pressure tactics or false promises.
>
> …
>
> It is entirely up to you, however, if you have already signed a union card and have changed your mind you might want to consider sending the union a certified letter, return receipt requested, asking the union to return the union card you signed and stating that you are withdrawing your authorization to have the union be your representative. Don't assume that it doesn't matter if the union card is signed before this legislation becomes law. Union cards may be valid for up to one year from the time the cards are signed. Some unions have already begun stockpiling union cards to use under this new legislation even though it hasn't become law. You could lose your right to vote in a secret ballot election without even knowing that it has happened. Please think about this if you are approached to sign a union card. **Do not sign a union card.** [Emphasis in original.]

As of January 2010, this letter to employees remained posted at the facility.

ACTION

Under the totality of circumstances, we conclude that the charge should be dismissed, absent withdrawal, because the Employer's letter constitutes protected free speech.

Section 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Board considers the totality of relevant circumstances when it determines whether an employer's statement to employees constitutes an unlawful threat of reprisal or the exercise of free speech.[2] As the Board has noted, "a significant component in the analysis of an employer's remarks to employees which involve protected activity is 'the context of its labor relations setting.'"[3] At a minimum, Section 8(c) allows an employer to advise its employees of its views on issues surrounding unionization at its facility, so long as it does not make any promise of benefit or threat of reprisal.[4]

We conclude that the Employer did not overstep its rights under Section 8(c). The main thrust of the Employer's February 2009 letter was to communicate to employees its opposition to pending legislation, the Employee Free Choice Act. The Employer clearly and repeatedly stated that its opposition stemmed from a concern that the pending legislation would obligate employers to recognize and bargain with unions as a result of a successful card check, rather than a Board-conducted election. Nowhere did the Employer state that a recognitional obligation would result in adverse working conditions to its employees. Neither did it promise employees benefits should they oppose the Union (which, in fact, was not attempting to organize). The Employer's expression of antagonism against pending federal legislation and its effect on its workplace is a

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[2] NLRB v. Gissel Packing Co., 395 U.S. 575, 589 (1969); Harrison Steel Castings Co., 293 NLRB 1158, 1159 n.4 (1989) (background of other unlawful conduct or union animus represents significant context for evaluating lawfulness of employer's statements).

[3] Mediplex of Danbury, 314 NLRB 470, 471 (1994), quoting NLRB v. Gissel Packing, 395 U.S. at 617.

[4] See Airporter Inn Hotel, 215 NLRB 824, 827 (1974) (employer opinion that employees would be better off without union in terms of job security and benefits, lawful in context of otherwise informational letter).

permissible exercise of the Employer's right under Section 8(c) to communicate with its employees in the workplace.[5]

We note that in expressing its opposition to EFCA, the Employer repeatedly – and in boldface text – stated to employees that "[i]t is extremely important that you do not sign a union card" and that it told employees, "[d]o not sign a union card." Although the Employer used stark language, the Employer did not link its appeals with threats of adverse working conditions or predictions of unfavorable consequences on employees should they refuse to comply. Rather, the Employer exhorted employees not to sign a card because it could be used at a later date as part of an EFCA-approved card-check procedure. In this context, the Employer's language is analogous to employer propaganda during organizational campaign directing employees to "vote no" in a forthcoming Board election. Absent other circumstances, these appeals are generally considered lawful and permissible exercises of Section 8(c)-protected free speech.[6]

Finally, we conclude that the Employer did not overstep the bounds of Section 8(c) by advising employees how to revoke authorization cards, in the specific context of its discussion of its opposition to EFCA. As stated above, the thrust of the memo was a description of how EFCA would change how a union could use authorization cards. In the final paragraph, the Employer explained that employees could ask the Union to return their cards if they, like the Employer, are concerned about its use under the proposed legislation to compel card check recognition. In this context, the Employer voiced no hostility about organizing at its own facility, which otherwise could, in a different context, have had a tendency to interfere with employees' free choice of a bargaining representative. Under these specific circumstances, and in the absence of an attempt by Pepsi to monitor employee sentiment in this regard, we conclude that the Employer's description of the revocation procedure does not violate the Act.[7]

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[5] Ibid.

[6] See, e.g., Gallup, Inc., 349 NLRB 1213, 1240-41 (2007) (telling employees to "vote no" not unlawful in context); General Fabrications Corp., 328 NLRB 1114, 1128 (1999) (supervisor's statement of merely saying "vote no," without any threat or promise of benefit or other coercive statement, did not interfere with election); Montfort of Colorado, 298 NLRB 73, 184 (1990) (same).

[7] See Avecor, Inc., 296 NLRB 727, 734 (1989), and cases cited therein, where the Board held that an employer may

Accordingly, in the context of the Employer’s stated opposition to pending legislation rather than a union organizing drive and absent evidence of other, coercive conduct, we conclude that the Employer's posted letter is not likely to intimidate or coerce employees from engaging in protected, concerted activity so as to remove the communications from the protection of Section 8(c).

B.J.K.

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lawfully inform employees of their right to revoke a union card, even absent employees’ request for information.