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

Advice Memorandum

DATE: August 13, 2010

TO : Wanda Pate-Jones, Regional Director
Region 27

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

SUBJECT: Rocky Mountain Power, a division of PacifiCorp
Case 27-CA-21586

Utility Workers Union of America, Local 127
(PacifiCorp) 506-6070-2550
Case 27-CB-5242 506-6080-0800
554-1467-7800

The Region submitted these cases for advice as to: (1) whether an employee's communications were protected when he placed a newspaper ad, purchased and ran a robocall, and testified at a hearing of the public utility commission to oppose the Employer's request for a rate increase; and (2) whether the Union, by opposing the Employer's request for a rate increase, bargained in bad faith by agreeing to a new collective-bargaining agreement while simultaneously pressuring the Employer for further concessions. We conclude that the employee's communications were not protected because they had no nexus to a labor dispute, and the Union did not bargain in bad faith.

FACTS

The Parties' Bargaining

Rocky Mountain Power (the Employer) is engaged in electric generation, commercial and energy training, and coal mining. The Employer and Utility Workers of America, Local 127 (the Union) have had a collective bargaining relationship for the past 35 years. As the parties' prior collective-bargaining agreement, as extended, was set to expire on January 19, 2010, they began bargaining for a successor agreement in August 2009. In October 2009, 98% of the membership rejected the Employer's proposed agreement. Two months later, in early December, 93% of the membership rejected the Employer's last, best and final offer and 87% of the membership voted to strike. Fearing a strike or lockout, the parties met again at the end of December and each made concessions.

Following that meeting, the Union President, who is also an employee, called one of the Employer's negotiating

representatives and told him that if the Employer gave another one percent in benefits, although the Union might not officially endorse the contract, he would explain to the membership why he would personally vote for ratification. A different Employer representative called the Union President back and told him that the Employer would give the Union one percent in retirement transition credits.

On or about December 31, 2009, the Union President posted a message on the Union's private online message board and stated that he was going to vote for the contract but the Union was moving forward to oppose the Employer's request for a rate increase from the Wyoming Public Service Commission. The Employer had learned of the posting by the end of the following day. On or about January 15, 2010, 90% of the membership voted to ratify, and the parties thereafter executed, the collective-bargaining agreement, which is effective from September 29, 2009 through September 26, 2013.

The Union's Response to the Employer's Request for a Rate Increase

While the parties had been bargaining in 2009, the Employer had been seeking a $70.5 million rate increase from the Wyoming Public Service Commission (WPSC) to build more power lines. The Union had decided to intervene in the proceedings as a means of pressuring the Employer to make further bargaining concessions. The Union hoped that the Employer would enter into a side agreement; in that event the Union, in return, would withdraw its opposition and support the Employer's request for a rate increase. The Union untimely moved to intervene in November 2009, and then timely intervened on January 14, 2010. The WPSC granted the Union's request to intervene because it determined that "the [Union's] members have substantial and direct interests in this case, and may have valuable perspectives on safety, maintenance and generation issues."

On or about April 9, 2010, the Union filed with the WPSC its objections to the rate increase. Approximately 15 other entities intervened as well. As a result of the intervenors' objections, the WPSC granted the Employer a rate increase of only approximately $35 million -- just about half of what the Employer requested.

On or about April 14, 2010, the WPSC held a public hearing to decide whether the Employer should be granted the remaining monies. The day before the hearing, the Union ran a full page advertisement in the local paper urging the public to attend the hearing and oppose the rate increase. The ad stated, in part:

> Let's come together at this public hearing and show Governor Freudenthal, and his three Public Service Commissioner appointees, that the people of Wyoming will not allow Rocky Mountain Power to spend tens-of-millions of dollars in new electric-power infrastructure for export to California and other states and essentially force Wyoming's electric rate payers to foot the bill with little, if any additional return on our monthly investment.
>
> If the people of Wyoming are expected to get into the energy-export business, shouldn't the people of Wyoming reap the same profit margins as Rocky Mountain Power?

The last line of the advertisement read, "Brought to you on behalf of the people, families, and small businesses of Natrona and Converse Counties by members of Utility Workers Union of America AFL-CIO, Wyoming Local #127."

The Union also purchased a robocall which contained the same message as the advertisement and went out to 14,600 Wyoming citizens the day of the hearing.[1] The robocall did not mention the Union at all.

Over 100 individuals spoke at the WPSC hearing, including the Union President. At the beginning of his testimony, he stated "I'm here as a citizen and not representing anyone except myself as a power consumer." He then stated that it did not make sense for the citizens to pay more money to the Employer when the citizens are not making any profit from the surplus energy that the Employer sells to California. At the end of his testimony, he stated that he works for the Employer; he did not mention the Union or any employment-related concerns.

After the hearing, the Employer terminated the Union President for his conduct which the Employer described as a breach of the duty to loyalty to the Employer, a violation of the Employer's Code of Business Conduct, and a violation of the collective-bargaining agreement between the parties.

ACTION

We conclude that the Employer did not violate the Act by terminating the Union President because his communications were not protected under the Act. We also

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[1] A robocall is a recorded telephone message that goes to a large number of individuals.

conclude that the Union did not bargain in bad faith by agreeing to the terms of the collective-bargaining agreement while simultaneously pressuring the Employer for further concessions.

The Union President's Conduct

Employees are protected under the "mutual aid or protection" clause of Section 7 when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship."[2] Employees' communications with third-parties are protected where the communication is related to an ongoing labor dispute and is not so "disloyal, reckless, or maliciously untrue."[3]

The threshold inquiry is whether the communication is related to and in the context of an ongoing labor dispute between the employees and their employer.[4] If a communication is not related to an ongoing labor dispute and thus lacks a direct nexus to employment conditions, the communication is not protected under the Act.[5]

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[2] Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978).

[3] See generally, the General Counsel's Position Statement to the Board on remand in TNT Logistics North America, Inc., Case 8-CA-33664, filed on July 24, 2008, p. 10 and cases cited.

[4] See, e.g., Richboro Community Mental Health Council, 242 NLRB 1267, 1268 (1979) (criticism of employer's decreased quality of service originated with, and made in context of, complaint regarding discharge of coworker); Allied Aviation Service, 248 NLRB 229, 231 (1980), enf'd 636 F.2d 1210 (3rd Cir. 1980) (TABLE) (explaining that the key is whether communication is "part of and related to" an on-going labor dispute); Emarco, Inc., 284 NLRB 832, 833-334 (1987) (statements that employer did not pay its bills, was "no damn good," and could not "finish the job" were "made in context of and expressly related to labor dispute," remarks cannot be "considered in a vacuum"); Valley Medical Hospital Center, 351 NLRB 1250, 1253-1254 (2007) (nurses' third-party statements regarding staffing levels/nurse workloads protected where they were connected to ongoing labor dispute and called for improved working conditions). Cf. Petrochem Insulation, Inc., 330 NLRB 47, 49 (1999) (union petitioning of government and environmental agencies was related to an ongoing labor dispute because it sought to force employers to pay their employees a living wage).

[5] See, e.g., Mountain Shadows Golf Resort, 330 NLRB 1238, 1240-1241 (2000) (handbill distributed by employee lost

We conclude that the Union President's communications are not protected because they lack a nexus to the employment concerns of the Union or the employees. The ad, robocall, and testimony do not make any specific reference to a labor dispute or working conditions. Although the Union President made the communications in furtherance of the Union's agenda to achieve further concessions from the Employer, his communications contain no reference to that fact, nor do they state any specific grievance with the Employer. His communications were made to "members of the public who would not necessarily have any knowledge of [the] dispute."[6] A third-party would not be able to discern that the communications had any connection to a labor dispute. During his testimony, he specifically stated that he was speaking only for himself "as a citizen" and "a power consumer," and not speaking on behalf of anyone else. Although the newspaper ad mentions that the Union paid for the ad, it falls short of providing the contextual nexus to a protected subject. It does not mention that the Union is involved in a labor dispute with the Employer, nor does it even suggest that the Union has any relationship at all with the Employer. As the Union President's communications lacked any nexus to a labor dispute or working conditions, they are not protected by the Act. Therefore, the Region should, absent settlement, dismiss the charge.

The Union's Conduct

The Employer claims that the Union bargained in bad faith because it entered into a collective-bargaining agreement, while simultaneously opposing the Employer's request for a rate increase, in an attempt to pressure the Employer to agree to additional concessions.

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protection of the Act because it made no reference to a labor controversy or to collective bargaining, and was an attack on the employer's policies unrelated to a labor controversy). See also Waters of Orchard Park, 341 NLRB 642, 643-645 (2004) (nursing home employees' call to state health department unprotected where employees were concerned about patient welfare and not their own working conditions).

[6] See Mountain Shadows Golf Resort, 330 NLRB at 1241 (statements made to unknowledgeable third-parties must give notice to labor dispute or working conditions). Compare, e.g., Valley Medical Hospital Center, 351 at 1253 (general public was able to discern that employee's comments concerned working conditions and were related to the parties' ongoing contract negotiations).

Initially, the Supreme Court made it clear that "[t]he use of economic pressure . . . is of itself not at all inconsistent with the duty of bargaining in good faith."[7] Thus, we cannot hold the Union liable for bad faith bargaining simply because it chose to intervene in the Employer's rate increase proceeding.[8] Instead, we must examine the context in which the Union's intervention occurred.

Here, the Union and the Employer reached agreement on a collective-bargaining agreement that included negotiated medical insurance premiums. There is no evidence that the Union bargained in bad faith at the bargaining table. Before conducting a ratification vote on the agreement, the Union announced its intent to, and proceeded to, intervene in the Employer's request for a rate increase to exert pressure for additional concessions on premiums. Thus, the Employer knew as early as January 1, 2010, two full weeks before the agreement was ratified, that the Union planned to intervene and oppose the rate increase. Once it learned that the Union intended to continue to exert pressure to seek an increase in benefits even after contract ratification, the Employer could have refused to sign the agreement insofar as the Union's position differed from what the Employer initially thought it agreed to.[9] By not confronting the Union, the Employer, in effect, implicitly accepted the Union's counteroffer that included the stipulation that the Union was going to continue to pressure the Employer on the benefits issue through the rate increase process. While the Union's intervention undoubtedly put pressure on the Employer, we note that it has not since repudiated the agreement. In these circumstances, we conclude that the Union's action to pressure the Employer to agree to more favorable medical premiums was not proscribed by Section 8(d) of the Act.[10]

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[7] NLRB v. Insurance Agents, 361 U.S. 477, 490-491 (1960).

[8] See e.g., Petrochem Insulation, 330 NLRB at 49 (unions can appeal to governmental agencies to gain benefits for employees).

[9] See Intermountain Rural Electric Association, 209 NLRB 1189 (1992) (where there is no meeting of minds, parties are not obligated to execute agreement).

[10] Compare IBEW, Local 3 (Burroughs Corp.), 281 NLRB 1099, 1101 (1986), enfd. 828 F.2d 936 (2d Cir. 1987) (union violated Section 8(b)(3) and Section (d) by threatening to strike employer to force it to renegotiate their collective-bargaining agreement); Teamsters Local 917

Accordingly, the Region should, absent settlement, dismiss the charge.

B.J.K

_____ (Industry City), 307 NLRB 1419, 1420 (1992) (union picketing in support of mid term demand that the employer accept a successors-and-assigns clause was conduct "within the 'clear import' of the proscriptions of 8(d)(4)".