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

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TO: Mori Rubin, Regional Director
Region 31

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

530-6083-0150-0000
554-1483-0150-5000
530-6067-4001-1750

SUBJECT: SEIU-UHW (Cedars-Sinai Medical Center)
Case 31-CB-120063

The Region submitted this case for advice concerning whether a Union's breach of a contractual provision prohibiting negative public image campaigns against the Employer was a Section 8(d) midterm modification, and whether the Union's concealment during contract negotiations of its intent to breach that provision constituted bad faith bargaining under Section 8(b)(3). We conclude that a breach of a contractual provision pertaining to negative public image campaigns does not violate Section 8(d) because such provisions are nonmandatory subjects of bargaining, and that the Union's concealment in this case did not rise to the level of bad faith bargaining. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

SEIU-UHW ("Union") and Cedars-Sinai Medical Center ("Employer") have a long-established collective bargaining relationship spanning over fifty years. On March 6, 2013,[1] the Union and Employer entered into negotiations for a new collective bargaining agreement ("CBA"). Over the next nine months, the parties exchanged a large number of contract proposals. In the course of these exchanges, the parties repeatedly disagreed about whether to retain a clause from the expiring contract that prohibited the Union from conducting a "negative public image campaign against the Employer, its directors, officers, agents and employees." The Union wanted to remove the provision while the Employer wanted to retain it.

On December 4, the Employer submitted its last, best, and final proposal to the Union, which retained the prohibition of negative public interest campaigns. The Union then submitted this proposal to its membership for ratification, and its membership

[1] All dates refer to 2013 unless specified otherwise.

ratified it on December 20. The relevant provision was memorialized in Article 4, Section 1 and reads as follows:

> §1 Prohibited Work Actions The Union, its agents, and its membership agree that there will be no strike, stoppage, slowdown, sit-down, refusal to perform work, sympathy strike, **negative public image campaign against the Employer, its directors, officers, agents and employees**, or any other interference with operations, nor any picketing or any refusal to enter upon the Employer's premises for any reason or in connection with any grievance or dispute, whether arbitrable under this Agreement or not, during the term of this Agreement. **"Negative public image campaign" does not include (a) statements made by the Union directly to employees of the Employer not intended for or disseminated by the Union to the broader public and (b) statements made by individual employees that are not part of a coordinated campaign.** The Union will make every effort to stop any of the activities prohibited under this section should such occur and provided the Employer has notified the Union of the occurrence (emphasis added).

This final version of the provision was changed from the initial version by the Employer in response to the concerns raised by the Union. Specifically, the Employer modified the provision to except from it "(a) statements made by the Union directly to employees of the Employer not intended for or disseminated by the Union to the broader public and (b) statements made by individual employees that are not part of a coordinated campaign."

By December 23 – three days after the CBA was ratified – the Union had erected a number of billboards in the area that cast the Employer in a negative light. One billboard contained the text "Cedars-Sinai" and asked "Should a 'non-profit' hospital pay its CEO $3.8 million?" Another billboard containing the text "Cedars-Sinai" read "Profit: $350 million / CEO's pay: $3.8 million / Tax status: 'non-profit' / Huh?" Both billboards referenced the website www.HealthCareCosts2Much.org, which was created by "Yes for a Healthy California," an organization sponsored by the Union. In addition to the billboards and the website, the Union created a YouTube video titled "The Price is Wrong" that featured similar themes. The Union also held press conferences in which it purportedly made negative remarks about the Employer and later announced that it would spend $66,000 on radio ads in furtherance of its campaign.

The Union undertook these various actions as part of a political campaign in favor of two initiatives it sought to put on the California ballot. The first initiative, the Fair Healthcare Pricing Act, sought to subject hospitals to certain price controls, while

the second initiative, the Charitable Hospital Executive Compensation Act, sought to cap the pay of CEOs at charitable hospitals.[2]

On December 24, the Employer sent a letter to the Union objecting to the billboards, claiming that they violated the CBA's prohibition on "negative public image campaign[s]." The Employer demanded that the Union take them down, but the Union refused. The Employer subsequently filed a grievance and the parties held a grievance meeting, but they could not come to an agreement over the matter. The CBA does not permit the parties to arbitrate the dispute.[3]

ACTION

We conclude that although the Union's conduct in this case likely constitutes a breach of the CBA, it does not violate Sections 8(d) and 8(b)(3) of the Act because contractual prohibitions on negative public image campaigns do not bear a direct enough relation to terms and conditions of employment to constitute a mandatory subject of bargaining. Thus, even if the Union's conduct in this case constitutes a midterm modification of the CBA, it would not be a violation of Section 8(d). Additionally, when the Employer did not rely to its detriment on the Union's concealment of its plans to conduct a negative public image campaign, the Region should not allege that the concealment constituted bad faith bargaining under Section 8(b)(3).

The Union's Alleged Section 8(d) Midterm Modification

A midterm modification violates Section 8(d) when a party reinterprets or otherwise changes a contractual term during the life of the agreement without a "strong arguable basis" for its reading of the contract.[4] Significantly, "a 'modification' is a prohibited unfair labor practice only when it changes a term that is a mandatory rather

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[2] These initiatives have since been withdrawn: http://www.latimes.com/business/la-fi-hospital-labor-deal-20140507-story.html

[3] Article 4, Section 4 of the CBA states that "Disputes concerning the application, interpretation, or violation of any provision of this Article shall not be subject to arbitration…"

[4] *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005) (employer's merger of the unit employees' pension plan into its corporate parent's plan did not constitute a Section 8(d) midterm modification because the employer's interpretation of its contractual authority to make the change had a "sound arguable basis"), *aff'd sub nom. Bath Marine Draftsmen's Ass'n v. N.L.R.B.*, 475 F.3d 14 (1st Cir. 2007).

than a permissive subject of bargaining."[5] Thus, if an alleged midterm modification pertains to a nonmandatory subject of bargaining, it is not necessary to reach the issue of whether the alleged modification did in fact occur because, even if it did occur, it would not violate the Act. As the Supreme Court has noted "[t]he remedy for a unilateral midterm modification to a permissive term lies in an action for breach of contract, … not an unfair labor practice proceeding."[6]

Mandatory subjects of bargaining are those that pertain to "wages, hours, and other terms and conditions of employment."[7] This broad definition does not "immutably fix a list of subjects for mandatory bargaining," but it does constrain the scope of mandatory subjects to those "issues that settle an aspect of the relationship between the employer and employees."[8] Under Board law, mandatory subjects are those matters that "materially or significantly" affect unit employees' terms and conditions of employment.[9] Mandatory subjects do not include matters that "may merely be of interest or concern to the parties" or have only "an indirect or incidental impact on unit employees[.]"[10]

Consistent with these principles, the Board has held that political activities that are not directly related to terms and conditions of employment are not mandatory subjects of bargaining.[11] In *Mental Health Services, Northwest*, the Employer, a mental health care provider, bargained to impasse a contractual provision that prevented the Union and the employees from attempting "to restrain, coerce, or otherwise influence

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[5] *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 185 (1971) (employer's modification of benefits for its retired workers was not an unfair labor practice because retiree benefits are not a mandatory subject of bargaining).

[6] *Id.* at 188.

[7] 29 U.S.C. § 158(d).

[8] *Pittsburgh Plate Glass Co.*, 404 U.S. at 178.

[9] *United Technologies Corp.*, 274 NLRB 1069, 1070 (1985) (summer temporary employment program was not a mandatory subject because it did not "materially or significantly" affect unit employees' terms and conditions), *enforced,* 789 F.2d 121 (2d Cir. 1986).

[10] *Id.*

[11] *See, e.g., Mental Health Services, Northwest*, 300 NLRB 926 (1990).

any actual or potential funding source for the ... (Employer) ... or any actual or potential client."[12] According to the Employer, the purpose of this clause was to prevent the Union from campaigning against tax levies that funded a significant amount of the Employer's operating revenue. The Board found that this provision sought "to govern employee activities which might occur *outside* the workplace and *outside* the employment relationship."[13] The Board held that such an objective is not "directly related to the employees' terms and conditions of employment" and is therefore not a mandatory subject of bargaining.[14]

The Board has also held that public advertising campaigns that do not relate to the employment relationship are not mandatory subjects.[15] In *Mill Floor Covering, Inc.*, the Union insisted in bargaining to impasse a contractual provision requiring Employer contributions to a fund established to promote the floor covering industry in the area.[16] The purpose of the fund was to "educate the public so that it will prefer reputable flooring contractors over others," a preference that could lead to more work for the Union and its members.[17] Although the advertising campaigns financed by the promotion funds might mean more work for the Union's members, the Board found that "the connection between such an advertising campaign and its eventual effect, if any, on wages and terms of employment is so remote and speculative that we are unable to say that the two areas overlap."[18] Additionally, because industry promotions funds pertain to the relationship between employers and the consuming public rather than the relationship between employers and unions, the Board held that industry promotion funds are not mandatory subjects of bargaining.[19]

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[12] *Id.*

[13] *Id.* at 927 (emphasis in original).

[14] *Id.*

[15] *Sheet Metal Workers, Local 38,* 231 NLRB 699, 700 n.4 (1977) (union's insistence to impasse on industry promotion fund violated Section 8(b)(3)), *enforced,* 575 F.2d 394 (1978); *Detroit Resilient Floor Decorators Local Union No. 2265 (Mill Floor Covering, Inc.)*, 136 NLRB 769 (1962) (same), *enforced,* 317 F.2d 269 (6th Cir. 1963).

[16]136 NLRB at 769.

[17] *Id.* at 771.

[18] *Id.* at 772.

[19] *Id.*

Here, the Union broadcasted a variety of political advertisements in support of two ballot initiatives that it was sponsoring. As in *Mental Health Services, Northwest*, the Union engaged in political activity that occurred "*outside* the workplace and *outside* the employment relationship."[20] Additionally, the subjects of the initiatives – hospital CEO pay and hospital pricing – have no direct relationship to terms and conditions of employment. Even if it were supposed that capping hospital CEO pay would free up money that the Union might later attempt to capture in the form of higher wages, the connection between capping CEO pay and "its eventual effect, if any, on wages and terms of employment is so remote and speculative" that we cannot say that the two areas overlap.[21]

Thus, insofar as the CBA's prohibition of negative public image campaigns is broad enough to encompass the activities the Union engaged in here, the provision is a nonmandatory subject of bargaining. A restriction on negative public image campaigns that only applied to campaigns related to terms and conditions of employment could conceivably be a mandatory subject of bargaining, but that is not the kind of restriction at issue in this case.[22]

The Employer asserts that, even if negative public image campaigns are a nonmandatory subject, the prohibition in this case became a mandatory subject because of its relationship to other contract terms. Specifically, the Employer argues that the parties have agreed that, with limited exceptions, all disputes must be resolved through a grievance procedure rather than through the use of economic weapons and the ban on negative public image campaigns is an integral part of that agreement.

In certain "unique" and "rare" cases, nonmandatory subjects are transformed into mandatory subjects because they have a "requisite nexus" to other mandatory

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[20] *Mental Health Services, Northwest*, 300 NLRB at 927.

[21] *Detroit Resilient Floor Decorators Local Union No. 2265 (Mill Floor Covering, Inc.)*, 136 NLRB at 772.

[22] *Cf. UFCW Local 839 (Safeway, Inc.),* Cases 32-CB-5895-1, et al., Advice Memorandum dated Dec. 23, 2005 at 5. In that case, Advice concluded that a similar no-strike clause, wherein the union agreed "not to boycott, handbill, publicly disparage or engage in any adverse economic action against the Employer's stores" was a mandatory subject of bargaining because it "specifically prohibits disruption … at the work-site[,]" including the handbilling that the union engaged in at the employer's stores to obtain customer support for the union's position in contract negotiations. That analysis does not apply to negative public image campaigns that do not involve work-site disruptions and address issues not directly related to terms and conditions of employment.

subjects.[23] A requisite nexus exists when the nonmandatory and mandatory subjects are "'intertwined' and 'inseparable,' perhaps demonstrating a connection with 'reciprocal [cost/benefit] effects.'"[24] For instance, when parties agree to use binding interest arbitration to resolve disagreements over what terms and conditions to include in a collective bargaining agreement currently being negotiated, the binding interest arbitration, normally a nonmandatory subject when related to future negotiations, is "so intertwined with and inseparable from" mandatory subjects that it converts into a mandatory subject.[25] Similarly, when an employer insists on a specific release of termination-related claims during bargaining over severance for imminent layoffs, as opposed to a general release of all claims, the specific release of claims is converted into a mandatory subject because it is so intertwined with the reciprocal costs and benefits of the severance proposal.[26]

Here, the negative public image campaign provision does not have the requisite nexus to mandatory subjects to transform into a mandatory subject. Although the provision is located within a no-strike clause and such campaigns are included in a list of other economic weapons that constitute mandatory subjects, the ban on publicity campaigns is not inseparable from or intertwined with the ban of the other economic weapons in any meaningful way. The clause could easily be erased without affecting any of the surrounding provisions. In fact, the Employer significantly and substantively modified the clause during contract negotiations without changing any of the other provisions. This suggests the clause was not interdependent with any other parts of the clause. And, although the Employer may view this provision as a quid pro quo for giving employees a comprehensive grievance/arbitration procedure, the connection between those two provisions is much more attenuated than the connection with mandatory subjects that the Board has found converted a nonmandatory proposal into a mandatory subject of bargaining.[27] Thus, there is no way that the Union's concerns about the high cost of health care or about CEO salaries, which do not involve employee terms and conditions of employment or actions directed at employees, could be addressed through the grievance procedure as a substitute for engaging in a public campaign in support of legislative initiatives.

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[23] *Smurfit-Stone Container Enterprises*, 357 NLRB No. 144, slip op. at 3 (Dec. 22, 2011).

[24] *Id.* (citing *Borden, Inc.*, 279 NLRB 396, 399 (1986); *Regal Cinemas*, 334 NLRB 304, 305 (2001)).

[25] *Sea Bay Manor Home for Adults*, 253 NLRB 739, 740 (1980).

[26] *Regal Cinemas, Inc.*, 334 NLRB 304, 305-306 (2001).

[27] *Cf. id.*

So, both standing alone and in its relationship to other contractual provisions, the "negative public image campaign" clause is a nonmandatory subject. Accordingly, we conclude that any unilateral modification of the provision by the Union would constitute a breach of contract, but not an 8(d) unfair labor practice.[28]

The Union's Alleged Bad Faith Bargaining

Among other things, "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims."[29] When parties construct the terms of an agreement by relying upon misrepresentations or concealments, the party guilty of the misrepresentations or concealments has bargained in violation of the Act.[30] In such cases, the Board, among other remedies, sets aside the tainted agreement.[31] For instance, in *Sheller-Globe Corp.*, the Employer informed the Union that it was about to sell the plant and the operations inside the plant to an outside company, necessitating a layoff of the entire existing workforce. Acting upon this information, the Union agreed to a severance proposal in lieu of renewing their collective bargaining agreement. As a result of the severance agreement, all of the unit employees were laid off and the Union was removed from the plant. However, the Employer did not sell the operations to an outside company; instead, the Employer continued operating as before, hiring an entirely new workforce and paying them wages "far below" those that the Union had commanded. In this case, the Board held that the Employer's misrepresentations violated 8(a)(5). As a remedy, the Board invalidated the severance agreement, reinstated the laid off workers, and issued a bargaining order.[32]

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[28] We would reach a different conclusion if the Union were to engage in a negative public image campaign directly relating to employee terms and conditions of employment. In those circumstances, we would find that the Union's application of the clause constituted an unlawful midterm contract modification under Section 8(d). *Cf. Mental Health Services, Northwest,* 300 NLRB at 927.

[29] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956) (refusing to substantiate a claim about an inability to pay increased wages can constitute bad faith bargaining).

[30] *See, e.g., Sheller-Globe Corp.*, 296 NLRB 116 (1989); *Waymouth Farms, Inc.*, 324 NLRB 960 (1997).

[31] *Sheller-Globe Corp.,* 296 NLRB at 122-23 (setting aside severance agreement); *Waymouth Farms, Inc.,* 324 NLRB at 964 (setting aside plant closure agreement).

[32] *Id. See also Waymouth Farms, Inc.*, 324 NLRB 960, 964 (1997) (Board found bad faith bargaining where the Employer concealed during plant closure negotiations that it had purchased a new plant just six miles away, causing the union to accept a severance

Relying upon this line of cases, the Employer contends that during contract negotiations the Union engaged in bad faith bargaining by concealing its plans to run a negative public image campaign shortly after contract ratification. Although there is no clear evidence of any concealment, it appears that the Union must have been planning to run the campaign during the same period as it was negotiating the collective bargaining agreement. Only three days after the contract was ratified, the Union erected billboards as part of the campaign.

However, this case is distinguishable in a significant respect from the cases on which the Employer relies. In those cases, the charging parties relied to their detriment on the charged parties' misrepresentations and concealments to construct the terms of their agreements. Here, there is no evidence of such detrimental reliance. Instead, the Employer actually anticipated the Union's future behavior and negotiated a prohibition on negative public image campaigns to prevent it. The situation would be different had the Union tricked the Employer into believing that it would not run a negative public image campaign, and thereby successfully persuaded the Employer to remove the language from the CBA. Instead, the Employer succeeded in protecting itself and has the normal array of remedies for breach of contract available to it, unlike the charging parties in the other cases.

The Employer maintains that there was in fact detrimental reliance in that it made movement in other areas that it might not otherwise have made had it known of the Union's plans. But it points to no specific contract provision reflecting such movement. There is only evidence that the Employer inserted clarifying language into the negative public image campaign provision itself, in order to obtain the Union's agreement on that clause. In these circumstances, we conclude that the Union's conduct did not rise to the level of bad faith bargaining.

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

/s/
B.J.K.

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proposal that resulted in the unit employees' loss of union representation, even though the employees were all ultimately hired to work at the new plant).