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

Advice Memorandum

DATE: December 20, 2007

TO : Celeste Mattina, Regional Director
Region 2

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

SUBJECT: 1199 SEIU, United Healthcare Workers East
(Rite Aid Corporation)
Cases 2-CB-21172, 21180

536-2501-8000
536-2507
554-1490

These cases were submitted for advice as to whether the Union is unlawfully attempting to force the Employer to recognize it as the exclusive collective bargaining representative at newly acquired stores. We agree with the Region that the Union did not make a demand for recognition without majority support among the employees in the newly acquired stores, that the Union's demand for arbitration and lawsuit were not seeking an unlawful object, and that the Union's statements to employees did not violate 8(b)(1)(A).

FACTS

Rite Aid Corporation (Employer) and 1119 SEIU, United Healthcare Workers East (Union) have been in a collective bargaining relationship since at least 1988. The current collective-bargaining agreement contains an after-acquired clause which applies the agreement to all new stores opened or acquired by the Employer. The agreement does not mention card-check or proof of majority of status.

In addition to the collective-bargaining agreement, after the Employer opened over 100 stores in New Jersey and New York, the parties signed a 1998 Recognition and Neutrality Agreement in which the Employer agreed to card-check recognition and Union access to the Employer's premises, and vowed to remain neutral with respect to unionization of future employees. The Employer and Union agreed that, "[a]ll new stores Rite Aid opens in the above counties and areas shall be part of the bargaining unit." The agreement further states that "the recognition process, as agreed, as well as terms and conditions of the Collective Bargaining Agreement to be negotiated shall be completed by October 31, 1998."

In August 2006, it was announced that the Employer was going to merge with the Eckerd chain of stores.[1] In late 2006 and early 2007, the Union attempted to discuss the possible merger several times but was told by the Employer that it was premature, and that the Employer did not want to discuss the merger until it was finalized.

In March and April 2007,[2] Union Vice President Laurie Vallone began hearing from employees that Eckerd was holding employee meetings to speak about the Union. On April 13, Vallone left a voicemail for Neils Hansen, the Employer's Director of Labor Relations, stating:

> I heard something that's very disturbing. Um, a good source told me that Eckerd's is having a manager's meeting. . .to alert anyone to union activity. This disturbs me very much because all the stores are going to be Rite Aid and, of course, they will be union, so if we hear any union animus out there, um, we're gonna let the dogs out on this.

In late April, the Union started an organizing campaign at Eckerd stores. The Union posted a press release on its website stating that it visited Eckerd stores and informed several hundred employees that their stores will eventually become Rite Aid and

> [t]hat means the workers will have the legal right to enjoy the same contract, benefits, protections and resources that the Rite-Aid corporation provides to other 1199 SEIU employees. . . . The Rite-Aid corporation has a legal obligation to ensure that Brooks and Eckerd workers have the same advantages as other 1199 SEIU members.

The press release contains links to a pamphlet, titled "Welcome to SEIU 1199, America's Strongest Pharmacy Chain Union . . . That Works!" that was handed out to Eckerd employees during the organizing campaign. In addition to similar language found in the press release, the pamphlet goes on to state that "Former Eckerd and Brooks employees will automatically be 1199 SEIU members, but will not pay any dues until all your contract issues are addressed, settled and signed by the negotiating committee and the employer." It also states "[o]ur newest members will be

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[1] For the purposes of this memorandum, Eckerd refers to both Eckerd and Brooks stores.

[2] All dates are in 2007, unless otherwise noted.

you, thousands of Eckerd and Brooks employees whose drug stores will soon become Rite-Aid."

Union representatives, including Vallone, visited numerous Eckerd stores to speak with employees and distribute pamphlets. The representatives attempted to communicate with employees and pass out the pamphlets, but store officials usually asked them to leave, which they did. The representatives sometimes made statements consistent with the pamphlets by informing employees that once their stores become Rite-Aid, the employees will be part of the Union. Vallone has stated that whenever she discussed the Union with Eckerd employees, she would mention that the Union would only represent the employees if a majority of them signed authorization cards.

In addition to the pamphlet that was on the Union website, the Union has also handed out additional flyers, including one that resembled a prescription. The flyer informed its recipients that "Rite Aid agreed to a contract with us that says if a majority of the workers in your store signs a card, you will be entitled to [contractual benefits]." It is unknown at what time and location or to whom this flyer was given.

In mid-May, Eckerd held meetings at its stores concerning the Union and e-mailed its managers and pharmacists a document entitled "10 Minute Huddle – Union Activity," which explained Eckerd's stance on the Union. The document was to be read to all employees at every store. Specifically, the memo states:

> While Rite Aid does have an agreement in their contract with SEIU on new stores, it **does not** mean Associates are automatically in their Union. For SEIU 1199 to represent Associates at Rite Aid, they must have a majority of interest, or more than 50% of associates authorize them . . . typically by signing a card or document of some sort. [Emphasis in original.]

On May 25, Union Vice President Michael Rifkin wrote an internal e-mail to several Union officials including the Union's President, President-elect, and General Counsel. The e-mail concerned a conversation that Rifkin had with Employer Senior Vice President of Human Resources, Todd McCarty. The e-mail stated that Union President Dennis Rivera had a conversation with Employer CEO Mary Sammons regarding the Employer's "refusal to give us a card count for NJ Rx's and evidence that they will not honor CBA and roll into 1199 the 3500-4000 Eckerd-Brooks workers who will be Rite-Aid." The e-mail continues that Rifkin met with

McCarty to try to work things out but their conversation was not productive. Rifkin wrote in his e-mail that the CBA recognition language clearly requires company to roll any new stores, however acquired, into the union under the existing contract.[3] According to Rifkin, CBA language and long standing past practice is that when Rite Aid sign goes up on newly opened stores, workers are in union and under CBA. Company position is that Eckerd-Brooks workers can have an election to determine union interest.[4] Rifkin also states that McCarty informed him that Company policy is that the current contract requirements were negotiated under past management and their 'current business model' for Eckerd-Brooks NY/NJ stores is 'union-free,' notwithstanding the CBA language.

Based on the Employer's statements and conduct, on May 31, the Union demanded arbitration. The Union's letter to the American Arbitration Association stated, "the dispute involves violations of the CBA, by stating its intention to not apply the CBA to newly-acquired stores. . ." and by engaging in an anti-union campaign. The Union claimed that it is seeking compliance with the contract, a declaratory award interpreting the "Coverage" clause of the contract, and an order enjoining the Employer from engaging in an anti-union campaign. The Union sent a second letter to the Employer explaining that its request for arbitration was due to the Employer's "breach and threatened breach of the parties' collective bargaining agreement ('CBA') including 'Coverage,' as applied to Eckerd/Brooks stores."

The following week, on June 6, the Union filed a suit in the United States District Court for the Southern District of New York against the Employer (<u>1199 SEIU, United Healthcare Workers East v. Rite Aid Corporation, et al</u>, 07CV4816). The Union filed the suit to enjoin the Employer from engaging in an anti-union campaign until the Union's grievance, concerning the Employer's anticipated

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[3] [*FOIA Exemptions 6, 7(C) and 7(D)*] that his e-mail was written in short hand and the term "roll . . . into the union" was short hand for the recognition process of gathering authorization cards, demonstrating majority support and receiving recognition prior to employees being covered by the contract, as had been the practice between the Employer and the Union prior to the meeting with McCarty.

[4] Rifkin stated that he also informed McCarty that this practice of the Employer recognizing the Union upon a demonstration of majority support had existed since the late 1990's.

breach of the after-acquired clause, is arbitrated. In it's *Plaintiff 1199's Memorandum of Law in Support of its Motion for an Injunction in Aid of Arbitration*, the Union specifically acknowledged that "former Eckerd employees will have to demonstrate majority support for the Union in order to obtain coverage under the CBA." The Union later amended its suit to allege that the Employer's anti-union campaign violated the 1998 neutrality agreement.

On June 19, the Union's request for preliminary injunctive relief was denied because the Union was unable to meet its burden of demonstrating a likelihood of success on the merits or irreparable injury. The Union later amended its suit to seek an order to compel arbitration.

In June, the Employer finalized its purchase of the Eckerd stores. The Employer also requested that the Region intervene in the lawsuit arguing that the Union was seeking to unlawfully have an arbitrator apply the collective-bargaining agreement, via the after-acquired store clause, to the newly acquired Eckerd stores without demonstrating that it represents a majority of those employees. The Region submitted the request to Special Litigation, which decided that there was no need for Board intervention at that time. According to the Employer, the lawsuit is currently at a standstill because there is a motion to dismiss, a motion to stay, and a motion to compel arbitration pending before the judge.

On August 27, the arbitrator denied the Employer's motion to stay the arbitration. Additionally, the arbitrator identified the main issue as "whether Rite Aid is required to recognize [the Union] at, and apply the terms of the CBA to, the newly acquired Eckerd stores within the CBA's jurisdiction once majority support in a store is demonstrated by authorizations cards."[5] The arbitrator is expected to issue his award in early 2008.

On September 19, the Union sent the Employer a demand for recognition for 10 stores in New York. The Union stated in that letter that a majority of employees of those specific stores had signed authorization cards designating the Union as their collective bargaining representative and that the Union is prepared to present those cards to the Employer or a neutral arbitrator for verification of the Union's majority status.

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[5] The arbitrator also identified additional issues, including whether Rite Aid engaged in an anti-union campaign in violation of the contract.

ACTION

We agree with the Region that the Union did not make a demand for recognition without majority support among the employees in the newly acquired stores, that the Union's demand for arbitration and lawsuit were not seeking an unlawful object, and that the Union's statements to employees did not violate 8(b)(1)(A).

1. Demand for Recognition

The Board has held that "after-acquired" or "additional stores" clauses, which provide for recognition of a union based upon a showing of majority status, are lawful and constitute an agreement that the employer will recognize a union upon its submission of evidence of majority status.[6] Furthermore, "there is no need to hold these clauses totally invalid simply because they do not contain an explicit condition that unions must represent a majority of the employees in a new store, inasmuch as the Board will impose such a condition as a matter of law."[7] A presentation of cards is a sufficient method to show a majority of employees in the group to be added to the existing unit support union representation.[8]

Before determining if there was a demand for recognition, we need to determine the bargaining unit status of employees in the new stores. Here, the contract makes it clear that employees of any new stores will be part of one of the existing bargaining units. Thus, the recognition clause states that the agreement does not apply to employees not in the bargaining unit delineated in the coverage clause, which states that any new stores will be included in the extant units. Therefore, any new employees would be included in an existing bargaining unit.[9]

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[6] Houston Division of Kroger Co., 218 NLRB 388, 388-389 (1975).

[7] Id. at 389.

[8] Alpha Beta Co., 294 NLRB 228, 229 (1989) ("[An employer] is obligated to recognize the union if the union presented it with concrete evidence of support by a majority of the employees in the group to be added to the existing unit.").

[9] As the employees at the newly-acquired Eckerd stores would be included in the existing bargaining units upon a showing of majority support, the Board's recent decision in Supervalu, Inc., 351 NLRB No. 41 (2007), is not relevant here. Supervalu solely addressed after-acquired clauses under which employees would be in new bargaining units.

In the instant cases, the Employer alleges that the Union violated the Act by demanding recognition without a showing of majority status. While the Employer did not present any direct evidence of a demand for recognition, it points to Vallone's voicemail, Rifkin's internal e-mail, statements made by Union organizers to employees, the arbitration demand, and the Union's lawsuit as evidence of a demand for recognition. We agree with the Region that no unlawful demand has been shown.

First, Vallone's voicemail merely mentions that Eckerd stores will become Rite Aid stores in the future, i.e., that she intends to unionize the new employees once the stores are Rite Aid. She made no reference to a demand for recognition in the absence of majority support.

Second, Rifkin's e-mail, which apparently summarizes his conversation with McCarty,[10] mentions several times that the Employer is refusing to "roll" in the new stores to the Union and rejecting the "long standing past practice" that employees of newly opened acquired stores are in the Union and under the collective-bargaining agreement. An examination of the language used by Rifkin in the e-mail clearly reveals no demand for recognition. Rather, he merely communicated the procedure for future demands based on past practice. It is entirely consistent with Rifkin's explanation of the short hand language that past practice of "roll[ing]" new stores into the Union only happens once the Union demonstrates majority support. Thus, there is nothing in Rifkin's statements to indicate either a demand for recognition absent a showing of majority status or that the Union is taking any position different than it has in the past. Rifkin's e-mail, therefore, does not evince a demand for recognition without demonstrating majority support.

Third, the Union did not demand recognition by either filing for arbitration or filing its lawsuit. The Union grieved the Employer's anticipated breach of the contract and sought a declaratory ruling interpreting the after-acquired clause. There is nothing in the Union's accompanying documents for arbitration or the lawsuit

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[10] We assume, arguendo, that Rifkin in fact made the statements to McCarty he refers to in his e-mail. While the e-mail itself was intended to be an internal Union communication, it refers to a conversation between Rifkin and McCarty that the Employer claims included a demand for recognition. As such, Rifkin's e-mail constitutes evidence of the details of the conversation.

requesting the Employer to recognize the Union as the bargaining representative of the new Eckerd stores. Indeed, the Union's motions in federal court plainly state that it cannot apply the after-acquired clause without majority support.

Finally, the Union's statements to employees cannot be considered a demand for recognition. While the statements that Eckerd employees are automatically members of the Union may be misleading,[11] they do not constitute a demand for recognition. Therefore, we agree with the Region that the Union has not unlawfully demanded recognition from the Employer regarding new employees at Eckerd stores. For this reason, the instant case is distinguishable from the Administrative Law Judge's decision, cited by the Employer, in UFCW Local 7 (Albertson's Inc.),[12] where the Union made a demand for recognition at a newly opened store without a showing of majority status. Here, the only demand for recognition was on September 19, when the Union wrote to the Employer requesting recognition and offering to present authorization cards from a majority of the employees in the stores at issue. As a result, the evidence does not support a finding that the Union made a demand for recognition in the absence of a showing of majority support.

2. The Union's Demand for Arbitration and Federal Lawsuit

The Employer further alleges that the Union's demand for arbitration and filing of a federal lawsuit was with an unlawful objective, i.e. to have the arbitrator apply the collective-bargaining agreement to the new stores without a showing of majority status. In determining whether a demand for arbitration or the filing of a federal lawsuit has an illegal object, the Union must be trying to seek a result incompatible with Board law.[13] When a "[u]nion's arbitration demands are contrary to its statutory collective-bargaining obligations, the Union's arbitration demands have an objective that is illegal under federal

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[11] We will address the lawfulness of the statements themselves below.

[12] JD(SF)-27-05, slip op. at 2-5 (2005).

[13] See Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 737 fn. 5 (1983).

law."[14] When a grievance is filed for an unlawful objective, the protections of Bill Johnson's do not apply.[15]

While a union's grievance has an unlawful object if it seeks recognition as the representative of employees in stores where, for example, it admits it does not have majority status,[16] nothing in the Union's filings to the arbitrator or submitted in the lawsuit requests such relief here. To the contrary, as the arbitrator acknowledged, the issue before him is "whether Rite Aid is required to recognize [the Union] . . . once majority support in a store is demonstrated by authorizations cards." Likewise, the Union's court papers specifically declare that it must first attain majority status before requesting recognition. Moreover, as the Union's lawsuit was only seeking to compel the lawful arbitration, it also did not have an unlawful objective. Since the union was not seeking to apply the collective-bargaining agreement without demonstrating majority support, compelling arbitration over the grievance did not have an unlawful object.[17] Therefore, we agree with

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[14] Chicago Truck Drivers (Signal Delivery), 279 NLRB 904, 906-907 (1986) (union's insistence on the arbitration of grievances seeking to merge three historically separate bargaining units violated Section 8(b)(1)(A) and 8(b)(3) of the Act since the proposed merger would have introduced multifacility and multiemployer bargaining); Teamsters Local 705(Emery Air Freight), 278 NLRB 1301, 1304 (1986), enf. denied and remanded in part, 820 F.2d 448 (D.C. Cir. 1987) (filing of grievance for unlawful secondary objective absent *any* evidence indicating primary employer had right to control separate entity). See Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), interpreting footnote 5 of Bill Johnson's to find an illegal objective where the union's construction of its contract in arbitration would necessarily result in a Section 8(e) violation.

[15] See Signal Delivery, 279 NLRB at 906-907; Teamsters Local 705 (Emery Air Freight), 278 NLRB at 1304; Elevator Constructors (Long Elevator), 289 NLRB at 1095.

[16] See Safeway Stores, Inc., 276 NLRB 944, 951 fn. 2 (1985) (an agreement to apply a contract to employees at new facilities, per an after-acquired stores clause, violated Section 8(b)(1)(A) where the employees were not an accretion to the represented unit); Signal Delivery, 279 NLRB at 906-907.

[17] The Union's federal court suit also sought an injunction against the Employer from engaging in an anti-union campaign until the Union's grievance, concerning the

the Region that the Union is not seeking an unlawful remedy through arbitration or its filing of a federal suit.

3. The Union's statements to Eckerd employees

Finally, the Employer alleges that the Union violated Section 8(b)(1)(A) of the Act when it told Eckerd employees that they would "automatically" be represented by the Union. We agree with the Region that the Union's statements were not unlawful.

The Board has made clear that statements to employees are unlawful if they are coercive, and has stated that "the test for coerciveness of a statement does not, of course, depend upon its actual effect upon listeners, but, rather, upon whether it reasonably tends to have a coercive effect."[18] The Board will look at the surrounding circumstances to determine if a statement was made in an atmosphere of coercion.[19] Circumstances that will support a finding of coercion include whether the statements contained any threats, the location where the statements where made (and, if the statements were made on Employer property, whether a Union official had permission to be the property), an Employer's failure to correct a Union official's statement to an employee if the Employer knew the statement was incorrect, and whether the statements were made contemporaneously with the presentation of authorization cards.[20]

In the instant case, the Union's statements both verbally and in flyers communicated to Eckerd employees that because of the Rite Aid/Eckerd merger, Eckerd employees would automatically become 1199 members and be represented by the Union. The verbal statements did not themselves carry the Employer's imprimatur, given the Union

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Employer's anticipated breach of the after-acquired clause, is arbitrated. Without addressing the merits of the lawsuit, the Union merely sought relief pursuant to a lawful interpretation of an alleged extant neutrality agreement. Thus, the Union's request for an injunction did not demonstrate a Bill Johnson's footnote 5 unlawful object; indeed, the Employer does not make this argument.

[18] Amalgamated Clothing Workers of America, AFL-CIO (Troy Textiles, Inc.), 174 NLRB 1148, 1148 fn. 1 (1969), enfd. 430 F.2d 966 (5th Cir. 1970).

[19] See Sav-On Drugs, Inc., 227 NLRB 1638 (1977).

[20] Id., at 1644-45.

agents' location outside of the stores pursuant to the Employer's general prohibition of Union access inside the stores. We further note the evidence that the Union also communicated to at least some Eckerd employees that the Union would only represent the employees if a majority of them signed authorization cards, although it is unclear whether the Union conveyed these contradictory statements to the same employees whom it had informed would automatically become union members.

Significantly lessening any atmosphere of coercion, Eckerd management held "10 Minute Huddle" meetings with all employees informing them that they would not automatically become union members, and notified employees that the Union will represent them only if a majority of the employees signed authorization cards. Moreover, there is no indication that statements concerning automatic membership in the Union were ever made or presented in conjunction with authorization cards. Thus, while the statements at issue were certainly misleading, they did not unlawfully coerce employees because they were corrected by the Employer and other Union statements and Employer action. Specifically, the surrounding circumstances made clear to employees that they would not automatically become members of the Union, and that the Union would represent them only if it had majority support.

Given the circumstances here, the Employer's reliance on Save-It Discount Foods[21] and Mego Corp.[22] is misplaced. In both of those cases, the union statements were made after the union accepted unlawful recognition from the employer without representing a majority of employees. In Mego Corp., for example, the union distributed literature and made statements about benefits while holding itself out as the representative of the employees.[23] The circumstances surrounding the statements included the employer allowing the union to be on its property, the employer urging employees to accept the union, the contemporaneous requests to sign membership cards, and the employer discharging employees who refused to join the union.[24] Similarly, in Save-It, a sign was posted in a store stating that the union represented the employees after the employer unlawfully recognized the union where it never had majority

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[21] 263 NLRB 689 (1982).

[22] 254 NLRB 300 (1981).

[23] Id., at 309.

[24] Id., at 312-313.

support. The employer acquiesced to the sign being posted in the store, deducted union dues from employees' paychecks and had its supervisors distribute membership cards to employees.[25] The Board found that "the effect of the sign would be to perpetuate the unlawful recognition afforded to the Respondent Union by discouraging employees . . . at that store from joining or supporting another labor organization."[26] In contrast, the statements in the instant case do not similarly lead to a finding of coercion because the statements were not made in connection with the Employer unlawfully recognizing the Union. Therefore, we agree with the Region that the statements themselves did not violate Section 8(b)(1)(A).

Accordingly, we agree with the Region that the charges in the instant cases should be dismissed, absent withdrawal.

B.J.K.

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[25] Save-It, 263 NLRB at 695.

[26] Ibid.