

NLRB Clarifies Employer's Right to Express Its Opinion of Unions to Employees

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Employers are frequently frustrated and confused in trying to understand when and to what extent they may lawfully tell employees their opinion regarding unions' efforts to organize employers' employees in light of the requirements of the National Labor Relations Act ("Act"). The National Labor Relations Board ("Board") has recently clarified an employer's rights.

In Flying Foods Group, Inc., 345 NLRB No.

10 (2005), the Board considered a charge arising out of the following facts. An employer showed a video to new employees during orientation sessions. The video was prepared for use by employers to persuade employees to vote against the union in election campaigns. The video contained statements such as "[a card] can obligate you to something you very well might not want any part of. Signing a union authorization card can be like signing a blank check . . . you won't know what the real cost will be until it's too late", "when employees find out that belonging to a union means living with its rules and regulations, and having to pay dues and fines and assessments, well, they aren't so eager to be counted among the union supporters" and "if the union organizers or pushers tell you that better things are automatic with the union, don't believe it."

A charge was filed and the judge found that the employer intended to discourage employees' continued support for the union by showing the video and concluded that showing the video was part of an effort by the employer to decertify the union in violation of Section 8(a)(1) of the Act, which holds that it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of a right guaranteed in Section 7 of the

Act: to engage in union activity. The Board reversed the judge's decision.

The Board found that the judge improperly suggested that resolution of the issue depended on the employer's motivation for showing the video. Instead, the Board stated "the standard for determining whether a statement violates Section 8(a)(1) is an objective one which considers

whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights, rather than intent of the speaker." The Board went on: "Resolution of this issue must take into consideration that Section 8(c) of the Act explicitly recognizes the [employer's] right to express its views about labor issues and unionization, provided it does so in noncoercive terms."

The Board found that the video did not violate Section 8(a)(1) but

rather, "merely set forth the [employer's] privileged views about the potential

consequences of signing an authorization card. It contains no threats against employees for signing an authorization card or any promises of benefit for not signing a card." This charge arose in the context of an employer who was already unionized. The Board concluded that the employer's ability to show the video was the same during a union election campaign as well as after a union has become certified, concluding "employers remain free to express views, argument, or opinion on unionization, or the risks and benefits of signing an authorization card, so long as such expression contains no threat of reprisal or force or promise of benefit. That is true even if as a result of such speech some employees choose not to become union members."

Obviously, given that the judge in the initial decision



found against the employer, employers continue to walk a tightrope in balancing their free speech rights against the protections of Section 7. However, as the decision in Flying Foods makes clear, an employer is entitled to and can freely express its opinion regarding unionization, provided it carefully avoids threats or promises which would violate the Act.■

