April 2019

Labor Law--Unfair Labor Practices--Solicitation of Employee Grievances during a Union Organizational Campaign

William G. Mercer
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Labor and Employment Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol77/iss4/11

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
LABOR LAW—UNFAIR LABOR PRACTICES—SOLICITATION OF EMPLOYEE GRIEVANCES DURING A UNION ORGANIZATIONAL CAMPAIGN

The employer held ten meetings with his employees immediately prior to a representational election held by the National Labor Relations Board. At these meetings the employer solicited grievances from his employees but informed them that he could make no promises regarding the resolution of those grievances. The union lost the election and subsequently filed an unfair labor practice charge against the employer, contending that the solicitation of grievances carried with it the inference that those grievances would be resolved and, thus, upset the laboratory conditions necessary for a fair election. Held, complaint dismissed and election certified. The Board concluded that the employer's statement that he could make no promises negated any inference of an implied promise to remedy the employees' complaints that might have been raised by the solicitation of the grievances. Uarco, Inc., 216 N.L.R.B. No. 2 (Dec. 31, 1974).

The unfair labor practice charge filed by the union asserted that the employer interfered with the employees' right to organize by promising and granting benefits to the employees during an organizational campaign. This has long been held to be an unfair labor practice for two reasons. First, employees are likely to feel that the benefits presently being given or promised, and other future benefits, are subject to the condition that they remain non-

---

1 Hereinafter referred to as the Board.
3 Since the purpose of a representational election is to determine the true desires of the employees, the Board strives to conduct the elections free from any undue influences from either the union organizers or the employer, hence the term "laboratory conditions." General Shoe Corp., 77 N.L.R.B. 124 (1948).
4 29 U.S.C. § 157 (1970) provides, in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."
union. Second, the employees may feel that a union will not be necessary, since the employer is solving their problems without one. In Reliance Electric Co., the Board held that the solicitation of employee grievances, even if the employer did not specifically state what he would do to resolve them, was an unfair labor practice that would make a fair election impossible. The issue, then, in Uarco, was whether an express statement by the employer that he could make no promises effectively negated both the employees' belief that the employer would remedy their complaints without a union and the possible fear that if they chose to be represented by a union, there would be no benefits forthcoming in the future.

In Uarco, the employer carefully refrained from an express solicitation of grievances, but the Board found that he at least impliedly solicited them. This implicit solicitation was based on such factors as the absence of a history of holding such meetings, the number of meetings and their proximity to the election, and the employer's admitted desire to use the meetings to attempt to gain the support of his employees to reject the union. A majority, however, reasoned that it is not the solicitation of grievances, but the promise to correct them, that is coercive. On this basis the Board held that even though the solicitation of grievances raised the inference that they will be corrected, the employer's statement that he could make no promises regarding their resolution effectively rebutted that inference.

In addition to the employee meetings, the union contended that a letter distributed by the employer to the employees after the last meeting and one day prior to the election contained the promise that the employer was going to resolve, or at least attempt to resolve, some of the employees' complaints. This letter stated: "I am asking you to believe: 1. That I have learned what your legitimate problems are. 2. That I am concerned about your problems."

---

9 Id.
10 Id. at 2.
11 Id. at 3.
12 Id.
13 Id. at 3-4.
14 Id. at 3.
15 Id. at 4.
16 Id. at 5.
17 Id. at 5.
3. That we can work out these problems by working together. I will make one promise that I will do my best.” The majority found that this letter contained no promises and, at best, could be described as ambiguous.

Finally, the union complained that the employer actually granted a benefit by posting the private phone numbers of both the local plant manager and the district manager of the company in response to a request made by an employee during one of the meetings. The majority felt that this was too trivial to be considered a benefit that would be coercive enough to interfere with the employees' rights during an organizational campaign. For these reasons, the majority concluded that the employer did not interfere with the employees' right to a fair election.

Member Jenkins, in his dissenting opinion, stated that the majority changed what he had thought was a well-settled rule that the mere solicitation of grievances during an organizational campaign, absent a history of such solicitations, was in and of itself coercive and thus an unfair labor practice. He continued, however, by stating that even under the majority's new rule, that focused on whether the employees had been led to believe their grievances would be remedied, the employer in Uarco should still have been found guilty of interfering with the employees' rights. The employees' major complaint in Uarco was the lack of effective communication between the employees and management. Even though the employer expressly stated he could make no promises, Member Jenkins felt he did, in fact, not only make promises, but also took action to remedy the complaint of lack of effective communication. While the employer did not strengthen or promise to

---

18 Id.
19 Id.
20 Id. at 6.
21 Id. The Board has held that where the employer does confer a benefit on the employees during an organizational campaign but the benefit is of such little import that it is not likely to be coercive, it will not be the basis for upsetting the election. See, e.g., Raytheon Co., 160 N.L.R.B. 1603, 1609 (1966).
22 216 N.L.R.B. No. 2, at 6 (Dec. 31, 1974).
25 Id. at 4.
26 Id. at 10 (dissenting opinion).
27 Id. at 12 (dissenting opinion).
strengthen the already existing committee the employees had for communicating grievances to management, the unprecedented meetings with the employees were, in his opinion, a new means of employee-management communication, and as such, were a remedy to an employee grievance. Not only could the employees communicate directly with the plant manager, but also, for the first time, with even higher management officials. Member Jenkins also emphasized the fact that the phone numbers of two management executives were posted at the request of one of the employees. He concluded that even if this were a "trivial" act, it gave the employees an indication that their complaints were not going unheeded.

Finally, the dissent stated that the employer's pre-election letter was "convincing proof" that the company was promising to try to remedy the employees' complaints. The employer's statements that he would promise to do his best and that together they could work things out, when combined with the total absence of an indication that this new-found employer interest in the employees' problems would continue if the employees chose to be unionized, clearly, in Member Jenkins opinion, was aimed at coercing the employees into choosing not to be represented by a union. The dissent concluded that the employer's express statement that he could make no promises did not effectively rebut the inference that the resolution of the employees' grievances were conditioned on the employees remaining non-union.

Both the majority and the dissent agreed that the solicitation
of grievances carried with it the implied promise that those grievances would be remedied.\textsuperscript{40} Further, the Board has long held that when employee complaints are solicited during an organizational campaign, absent a past practice of such solicitations and when the employer seeks to remedy those complaints by either acts or promises, he has interfered with the employees' right to organize\textsuperscript{41} and thus is guilty of an unfair labor practice.\textsuperscript{42} The majority's ruling in \textit{Uarco} rested on the premise that the employees had no reason to believe that their grievances would be remedied, since the employer expressly stated that he could make no promises.\textsuperscript{43} However, in \textit{Reliance Electric Co.}, the Board held that "cautious language, or even a refusal to commit Respondent employer to specific corrective action, does not cancel the employees' anticipation of improved conditions . . . ."\textsuperscript{44} The holding in \textit{Uarco} appears to contradict the \textit{Reliance} holding in that it allows an employer to give his employees many indications that their complaints will be remedied, so long as the employer states that he can make no promises.\textsuperscript{45} When, as in \textit{Uarco}, the employees receive sufficient evidence that their employer is going to resolve their grievances, clearly a "no promises can be made" statement will do little to "cancel the employees' anticipation of improved conditions."

Also to be reckoned with in \textit{Uarco} is the fact that the unprecedented meetings of the employer with his employees and the posting of the private phone numbers of two top management representatives were attempted remedies to one of the employees' major complaints—a lack of effective communication between the employees and the management—and, as such, were direct conferrals of benefits in violation\textsuperscript{46} of the National Labor Relations Act.\textsuperscript{47}

Since the rule promulgated by the majority in \textit{Uarco} entails the subjective standard of determining whether the employees

\textsuperscript{40} Id. at 3.
\textsuperscript{43} 216 N.L.R.B. No. 2, at 4-5 (Dec. 31, 1974).
\textsuperscript{44} 191 N.L.R.B. 44, 46 (1971).
\textsuperscript{45} 216 N.L.R.B. No. 2, at 4-5 (Dec. 31, 1974). The majority specifically distinguishes the holding in this case from one in which the same conduct by the employer would be in conjunction with other unfair labor practices.
\textsuperscript{46} See, e.g., Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).
have been led to believe that their grievances will be remedied and since the solicitation of grievances during an organizational campaign, in the absence of a past practice of such solicitations, appears to be in and of itself conferring a benefit in direct violation of the National Labor Relations Act, this standard will obviously not be effective in protecting the employees from interference with their organizational rights. Clearly, the Board should reconsider this rule and adopt the position that the solicitation of grievances during an organizational campaign, absent a past practice of such solicitations, is, per se, an unfair labor practice that interferes with the employees' freedom of choice in a representational election.

William G. Mercer

---
