

campaigns

MEMORANDUM

TO: ALL CONSULTANTS
FROM: WARREN OGDEN
DATE: JULY 18, 1979
RE: UNILATERAL IMPLEMENTATION OF WAGE AND BENEFIT CHANGES

Perhaps the most common single question that I am asked in the course of any day or week by a consultant is "How do I improve wages or benefits while there is either (a) a question concerning representation or (b) an existing bargaining agent for the employees?" When the question is raised in the context of an organizational campaign, I have regularly suggested that the consultant treat the union as if it is already certified as bargaining representative. By this, I mean send the union a letter indicating that you intend to make certain changes and that you are willing to bargain with them concerning those changes even though you do not recognize the union as a collective bargaining agent of the employees.

Assuming that what is intended is an improvement in employee benefits, the union has a difficult decision to make. It can either agree to the proposed change in benefits in which case they will be implemented as management originally intended or the union can refuse. If the union refuses to allow permission for implementation of benefits, it is reasonable to point out to the employees the reasons the benefits have not been improved is because the union refuses to accept these. It is true that the union could "take credit" for a wage adjustment or other benefit change if they were given notice, but I suggest that in most cases the employees know perfectly well what is going on. They know that the employer is the source of all benefits and, given the fact that the union is not already their representative, the best the union can do is haggle about the amounts given.

The National Labor Relations Board in a very recent case has outlined the rules it believes should be followed where a union is the designated representative of the employees. The case is Mountaineer Excavating Company, 241 NLRB No. 80, 100 LRRM 1505 (1979). In that case, the NLRB found an employer to have violated the National Labor Relations Act by refusing to bargain because it

implemented a new hospitalization insurance policy and some other benefits prior to giving the union notice of its intent to do so. The Board stated the proposition in the following manner:

If Respondent has been desirous of (1) entering into negotiations with the UMW, it needed only to direct timely communication to the union specifically requesting negotiation sessions or (2) making particular proposals to the union, its obligations was to submit these proposals timely to the union."

The Board effectively told us in that sentence that even where you have a union as a designated representative of the employees, all you have to do is (1) offer to meet at reasonable times and places or (2) make specific proposals to which the union can object.

So what does that mean to us? There are two situations in which we might face the need to implement a change in benefits. The first would be after a union has made a demand or has filed a petition with the NLRB but has not yet been certified. The second would be after the union has in fact already been certified. In the first instance, I suggest that you treat the union as the representative of the employees even though they have not been certified. The pitfall here is that you must be sure that you always make it clear that you are not "recognizing" the union. You are only dealing with them on the basis of their demand and the claim that they are now the representative of the employees. In the second instance, there is no question that the union is the representative. Therefore the employer has certain obligations in dealing with the union.

Turning first to the situation where a petition has been filed but no final determination has been made. This situation would also include those situations in which objections to the conduct of an election have been filed but are still unresolved. In those situations, if the employer had previously planned to implement an improvement in wages or other benefits during the pendency of the election petition, then the employer may go ahead and do so. The difficulty is that you cannot always prove that the employer planned to make the improvements. It takes hard evidence to prove the claim that you previously intended to implement the wage adjustment. Therefore if there is any question as to whether you can prove prior intent or if you have serious question as to whether there really was prior intent, the appropriate thing to do is to suggest to the client that he treat the union as if it is the provisional representative of the employees.

How do you do this? You send the union a letter which says "On the ____ day of _____, 19__, XYZ Company intends to implement the following change in benefits: (list benefit changes). Your union is not the recognized or certified representative of the employees who will enjoy the change in benefits above described. However, your union has made claim to such status. Accordingly, the company is willing to meet and confer with you concerning the proposed changes even though by so doing the company does not recognize you as collective bargaining agent for the employees. If we have not heard from you within 5 days from date of receipt of this letter, we will assume that you have no interest in objecting to the above described change in benefits."

What have you gained by sending such a letter? Well, you have met your statutory obligation to give the union notice and opportunity to bargain. It is true that the union is not the certified representative. It is true that the Board might find that your intent in implementing the wage adjustment was to influence the voters and therefore might throw out the election results. But one thing is for certain; you would have some pretty confused people down at the local region of the NLRB. It is very difficult for the Board to argue that you were attempting to persuade employees not to vote for the union when in fact you were treating the union as if it were the certified representative of the employees. You might consider this a standard CYA letter.

What can the union do in response? Well, the union can tell you that they have questions or objections about the implementation of the wage adjustment. Just tell the employees that the improvement is held up because the union has questions and objections about it. They will understand. Alternatively, the union can let you go ahead and implement the adjustment. Then you've gotten what you wanted without any fuss or muss.

The other situation in which you might want to change wages, hours or conditions of employment is when there is already a certified collective bargaining representative with, or without, a collective bargaining agreement. If you wish to implement the change and there is a collective bargaining agreement, be sure that the agreement has a clause saying that the benefits in the contracts are minimums and that the employer can add more if he wishes. Then you can go ahead and implement at will. If there is either no contract or the contract is silent on the issue of whether these are minimums, then you should send the union the following letter:

"On the ___ day of _____, 19___, we intend to implement the following changes in wages, hours and conditions of employment: (list of changes). Your union is the certified representative of the employees who will be affected by the above changes. This letter is intended to give you notice and opportunity to bargain as to these changes. If you have not objected within five days, we will assume that you have no objection to the change in benefits."

Again, if the union objects, you simply make note of that to the employees. They will understand why the benefits have not been implemented. At the same time, you can "take credit" for the determination to implement the wage adjustment or other improvement in benefits. If the union asks to meet, then you have to meet with them and discuss the benefits changes. It does not mean that you have to improve them or change them at all. It simply means that you have to meet and discuss the matter reasonably with the union.

In sum, the implementation of any improvement in wages, hours and conditions of employment should always be a plus for the employer. It should never be allowed to turn into a minus. The only way an improvement in benefits can become a minus is if the consultant handles it wrong. If you have any questions, let's talk them out so that you can serve your client better. That, after all, is the name of the game.

WCO

Though pagination seems incomplete,
all available pages were digitized.

Paulson's Auto Electric Company
Union Campaign Strategy
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Compaigns
Supervisors
&
for

2. At the next employee communications meeting a presentation on the following items should be made to Paulson employees along with the usual subjects that are covered:
 - a. Once again state that Paulson's doesn't believe that employees need a third party to deal with management and that management is against compulsory union membership,
 - b. give employees a workbook of benefits,
 - c. tell them about new employees who will be hired and that the company's plan is to try to expand to improve earnings record over '78,
 - d. explain how an election works and what the employee's, company, and union rights are,
 - e. explain that you are always willing to discuss with any employee any subject of interest to him/her.
3. Eliminate all problems possible within the law, e.g. overtime, safety, tools, etc.
4. Develop information on union dues, initiation fees, and assessments, strike history, constitution and bylaws, and any bad press it might have gotten in the past. Prepare this for distribution to employees before the election, if necessary.
5. Subtly work on Fleming, Luke, and other possible company employees. When they ask questions, tell them where the company stands.
6. Continue to litigate the Arnold unfair labor practice case. Our first step was to offer him recall. Next, WCIRA attorney will answer any NLRB charge.

Management's free speech rights in a union campaign are granted by Section 8C of the National Labor Relations Act:

"The expressing of any views, arguments, or opinion, on the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expressions contain no threat of reprisal or force or promise of benefit".