

# NLRB Holds that Leaflet Outlining Consequences for Threatening Workers Is Not Unlawful

**Labor Relations Update Blog** on **December 22, 2020**

In adopting the ALJ's Recommended Order in *S&S Enterprises, LLC d/b/a Appalachian Heating*, Case No. 09-CA-235304, the NLRB found that a leaflet distributed by the employer during union organizing efforts, which stated that it is against federal law for a labor union to threaten employees, did not violate the NLRA because it did not constitute the promulgation and maintenance of a new policy, as the union alleged.

## ***Factual Background***

In late 2018, the employer, which sold, installed, and serviced HVAC systems, became the target of unionization efforts. Eventually, the union brought multiple unfair labor practice charges against the employer, many of which the ALJ agreed constituted unlawful conduct.

While these "persistent and wide-ranging unfair labor practices" convinced the ALJ, and later the NLRB, to favor a broad cease-and-desist order against the employer, the ALJ was not convinced by certain allegations that a leaflet issued by the employer violated the Act.

The employer distributed a leaflet to most employees with their mailed paycheck stubs, which depicted one faceless figure jabbing its finger in another's face and contained the following bullet points:

- We are being told that some Sheet Metal union supporters are threatening some of our workers.
- It is a violation of Federal Law for a labor union to threaten employees.
- It is also a violation of Appalachian Heating's anti-harassment policy, which says in part, "...Appalachian heating is committed to a work environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promoted equal employment opportunities and prohibits unlawful discriminatory practices, including harassment..."

- Let me remind each of you that, although we respect the rights of our workers to support or not support a labor union, we will not permit anyone to violate the legal rights of our employees who wish to fight for or against a labor union.
- Anyone caught threatening our employees or otherwise violating their rights will be subject to criminal prosecution to the fullest extent of the law.
- Appalachian Heating will protect all of our workers and will not tolerate threats or harassment!

If you feel your rights to support or not support a labor union are being violated you are free to contact the

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***Board Finds the Leaflet is Not Reasonably Understood to Constitute a New Rule or Policy***

The NLRB GC alleged that the leaflet, by including reference to the employer's anti-harassment policy alongside notice of potential penalties for violating federal labor law, effectively constituted a new policy. The alleged new policy amended the existing anti-harassment policy to include criminal prosecution. If true, then the promulgation of a new disciplinary rule during a union organizing campaign violated the Act because it fails to maintain the *status quo* during this period.

However, the NLRB was unconvinced and adopted the Judge's recommendation that the Employer had not promulgated a new rule or policy.

*First*, the Board summarily dismissed the GC's promulgation theory, stating that the insert cannot reasonably be understood as a statement of or promulgation of a new rule.

*Second*, both the Complaint and GC's brief misrepresented language not in the leaflet as a direct quotation. Both filings claim that employer created the following rule: "That anyone who violates the anti-harassment policy or is caught threatening employees or otherwise violating their rights will be subject to the fullest extent of the law." This language does not appear in the insert. While the ALJ did not attribute the inaccuracy to "design" instead of "error," it nevertheless dismissed this allegation, which the Board affirmed.

### ***Board Also Finds the Leaflet is Not an Unlawful Threat***

Alternatively, the GC argued that the insert threatened employees for engaging in union activity. The NLRB agreed with the ALJ's decision not to consider this argument, as it was not pled in the original Complaint.

### ***Member McFerran Dissented, which Could Foreshadow How the Future Board May Rule***

Member McFerran dissented, finding that the GC properly pled the alternate theory that the leaflet constituted an unlawful threat in violation of Section 8(a)(1) of the Act. McFerran concluded that the leaflet was an unlawful threat because the employer equated union activity with unlawful harassment under its workplace policy in the context of what the NLRB admits were wide-ranging antiunion efforts. In addition, the "coercive effect of this threat was heightened by the fact that employer conveyed it to employees alongside their paychecks."

McFerran's colleagues directly responded to this argument. For the Majority, even if this theory had been adequately pled, the leaflet was not a threat because it specifically provided that employees should contact the Board's regional office where their rights "to support or not support a labor union" were violated, and that the Employer "w[ould] not permit anyone to violate the legal rights of our employees who wish to fight for or against a labor union." (Emphasis added). According to the Majority, the leaflet merely reminded employees of their Section 7 rights—including the right to join or not join a union.

### ***Takeaways***

This decision provides important reminders to employers during a unionization effort.

*First*, employers may not issue new rules or policies after becoming aware of a union organizing effort—and certainly not after a representation petition seeking an election has been filed with the Board. Employers must maintain the status quo during this period, which the Board calls the “critical period.” This is true regardless of whether the policy benefits or harms the employees. In this case, the Board found that the leaflet did not constitute the promulgation of a new rule or policy, but merely reinforced application of an existing one, so no violation was found.

*Second*, it is permissible to remind employees of their rights under the National Labor Relations Act, including their ability to avail themselves of legal recourse through the NLRB if they believe those rights are being violated.

Though the Board did not consider the GC’s alternative argument that the leaflet, in whole, constituted an unlawful threat, the Majority’s rebuttal to Member McFerran’s dissent on that topic may be most helpful for those seeking guidance from the decision. There, the NLRB made clear that the objective language of the leaflets which appear impartial and merely remind employees of their Section 7 rights and their ability to engage in protected, concerted activity—in this case, clarifying that federal labor law protects both those supporting and opposing unionization—likely would not be deemed unlawful threats against protected, concerted activity.

Member McFerran’s dissent focused more squarely on the circumstances of the leaflet, as a whole, to find a violation under this alternative theory, such as the fact that it was attached to the employees’ paystubs, and in context of the broader, alleged anti-union efforts engaged in by the Employer. Given that the composition of the Board will start to change after August 27, 2021 (when Member Emanuel’s term ends), McFerran’s reasoning may inform how a newly constituted Board decides this allegation in the future.

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