

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

DATE: April 17, 2018

TO: William B. Cowen, Regional Director
Region 21

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: GE Appliances, Haier
Case 21-CA-202535

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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by refusing to agree to the Union's request to have its representatives record the Employer's monthly team meetings and investigatory interviews. We conclude that the Employer's refusal was lawful because it was consistent with the Board's long-standing policy disfavoring verbatim recording of meetings between employers and unions for collective-bargaining purposes and the Employer's denial was targeted at recordings made by Union representatives and not employees.

FACTS

GE Appliances, Haier ("Employer"), headquartered in Louisville, Kentucky, operates a nationwide business selling and repairing electronic home appliances and parts. The Employer dispatches service technicians out of an office in Phoenix, Arizona. Service technicians work from their homes and are dispatched to repair assignments at customers' homes and facilities. The International Union of Electrical Workers, Communications Workers of America, Local 89850 ("Union") has represented technicians employed by the Employer since the 1960s. The Union represents two separate bargaining units: one unit is comprised of 34 technicians who work in Riverside County, Orange County, Los Angeles County, and San Bernardino County, California; and the other unit is comprised of 8 technicians who work in San Diego County, California. The Union and the Employer are parties to a collective-bargaining agreement that covers both units. The parties' current collective-bargaining agreement is effective by its terms from March 2017 through March 2020.

The Union-represented service technicians are supervised by the Employer's Customer Service Manager, based out of [REDACTED] home in San Marcos, California.

Approximately once per month, the Customer Service Manager conducts in-person meetings (“team meetings”) with service technicians at hotels located near where technicians work. Under the parties’ agreement, Article XXVI, the Employer must “notify the Union of any matter affecting technicians generally and concerning which the Union is the certified bargaining representative and not covered by this Agreement as soon as practicable[.]” Additionally, the Customer Service Manager will set up meetings if an issue arises with an employee’s performance. Under Article XXV of the agreement, employees cannot be “disciplined or discharged except for cause.” Pursuant to the parties’ past practice and Article XXV, the Employer’s managers, including the Customer Service Manager, contact the Union and request a representative to attend the investigatory meetings with employees in cases where the Employer is contemplating discipline or discharge.

In October 2016, the Customer Service Manager contacted the Union President (a unit employee) to attend an investigatory meeting ^{(b) (6)} intended to have with the Union Steward (a unit employee) over alleged discrepancies in the Steward’s time cards. On October 26, 2016, the Customer Service Manager emailed the Union Steward and Union President to confirm their meeting for the next day and informed them that the Employer’s Dispatching Center Manager would also be present to take notes. The Union requested that its Secretary be present to take notes as well, or in the alternative, for the Employer’s consent to record the meeting. The Customer Service Manager objected to both, but offered to provide the Union with a copy of the Dispatching Center Manager’s notes. The Union agreed to the compromise.

On October 27, 2016, the Union President, the Union Steward, the Dispatching Center Manager, and Customer Service Manager met. During the meeting, the Dispatching Center Manager prepared type-written notes. After the meeting, the Employer confirmed that the Union would receive a copy of the notes. On November 4, 2016, after the Union received the Employer’s notes, the Union contacted the Customer Service Manager and asserted that the notes did not include several questions and responses regarding the Union Steward’s personal time.

In about early December 2016, the Union and the Employer participated in a grievance meeting. During the meeting, a dispute arose over comments that the Customer Service Manager had made during the October 27 meeting. Also during the meeting, the Union asserted as a separate issue that the Customer Service Manager was verbally announcing policy changes to employees at the monthly team meetings. In response to these disputes, the Union President advised the Employer that the Union intended to start recording the Employer’s team and investigatory meetings. The Employer’s regional manager responded by asking the Union to submit its request in writing.

On January 9, 2017,¹ the Union President sent a letter to the Employer requesting to record “the actions of Local Management when the interactions threaten the rights of each employee.” The Union went on to state that it was basing its request on the Board’s decision in *Whole Foods Market Group, Inc.*² Several weeks later, the Employer responded that its legal department was reviewing the Union’s request and the Employer would respond as soon as possible. According to the Union, the Employer’s HR manager told the Union shortly after the Union’s January 9 letter that the Employer would not consent to the recordings that the Union sought to make.

On April 27, the Union asked the Employer for its response by May 4. The Employer responded that same day asking how the Union’s request to record interactions with the Customer Service Manager could be reconciled with the Board’s decision in *Pennsylvania Telephone Guild (Bell Telephone)*.³

On May 1, the Union sent a formal reply to the Employer stating that the Union was “seeking to record thru electronic means and to preserve as evidence all team meetings and all conversations with employees where the employee would reasonably construe that it may lead to future disciplinary actions.” The Union went on to state that it was “requesting a written answer to the company’s verbal policy of not allowing [Union] collective bargaining representatives of Company employees in Southern California to record thru electronic means and to preserve as evidence for the purpose of collective bargaining or other mutual aid or protection.”

On May 10, the Employer sent a response to the Union denying the Union’s request to record conversations involving the Customer Service Manager. Initially, the Employer stated that it was unsure why the Union would need to record disciplinary interviews at which the Union was already present. The Employer pointed out that the parties have a past practice of the Employer notifying the Union of any interviews with employees where the Employer was contemplating disciplining employees and that that practice was memorialized in the parties’ collective-bargaining agreement. The Employer argued that the Union’s demand to record the meetings amounted to a change in past practice in conflict with the contract and the policies of the Act. Additionally, the Employer stated that the Union did not explain how the Union intended “to maintain the confidentiality of competitively sensitive

¹ All dates hereinafter are in 2017.

² 363 NLRB No. 87 (Dec. 24, 2015) (employer violated Section 8(a)(1) by maintaining rule prohibiting recording in the workplace without prior management approval).

³ 277 NLRB 501 (1985) (union failed to bargain in good faith by insisting to impasse on the right to record grievance meetings).

business information that may be communicated to technicians during Team meetings.” Finally, the Employer stated it would not waive the Customer Service Manager’s right to consent to (b) (6), (b) conversations being recorded under California Penal Code Section 632.⁴

According to the Union, it needs to record team meetings and investigatory interviews with the Customer Service Manager for use during grievances brought challenging employee discipline. The Union alleges that the Customer Service Manager routinely announces new policies (that the Union is not aware of) and then disciplines employees for noncompliance with those policies. Finally, the Union alleges that the Customer Service Manager routinely recounts untrue versions of statements made during team meetings and investigatory interviews and that the Employer ultimately sustains the Customer Service Manager’s version of events. The Union asserts that it would use the recordings to impeach the Customer Service Manager’s credibility later in the grievance process.

ACTION

We conclude that the Employer’s refusal to permit the Union to record certain meetings was lawful because of the Board’s long-standing policy disfavoring verbatim recording of meetings between employers and unions where questions arising under the collective-bargaining agreement will be discussed and the Employer’s denial of the Union’s request was only targeted at recordings made by Union representatives and not employees.

The Board has long recognized that audio recordings and verbatim transcriptions have the potential to hamper open communications in collective-bargaining relationships.⁵ In *Bartlett-Collins Company*, the Board determined that the presence

⁴ Cal. Penal Code § 632(a) (“A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine . . . or imprisonment.”).

⁵ See *Bartlett-Collins Co.*, 237 NLRB 770, 773 n. 9 (1978) (concluding that, for purposes of collective bargaining, use of a court reporter or audio recording device constitutes a permissive subject of bargaining under *Wooster Division of Borg-Warner Corp.*, 356 U.S. 349 (1958), because such recordings or transcriptions are “other matters” that do not implicate “wages, hours, and other terms and conditions of employment”), *enforced*, 639 F.2d 652 (10th Cir. 1981).

of a court reporter or recording device during collective-bargaining sessions was preliminary and subordinate to substantive negotiations over “wages, hours, and other terms and conditions of employment” and was therefore a nonmandatory subject of bargaining.⁶ In so holding, the Board recognized that the presence of a court reporter or recording device could stifle negotiations before the parties had even begun to bargain.⁷ Subsequently, in *Bell Telephone*, the Board extended the same reasoning to grievance meetings.⁸ Because such meetings are informal mechanisms used to address employee concerns with the ultimate goal of reaching an agreement or settlement, one party’s insistence on recording grievance meetings “may have a tendency to inhibit free and open discussions” and create a “chilling effect on the expression of views.”⁹ For this reason, the Board has held that parties may not insist to impasse in bargaining for the right to make audio recordings or verbatim transcriptions of grievance meetings or collective-bargaining sessions.¹⁰ In determining whether a particular meeting between parties to a collective-bargaining relationship falls within this prohibition, the Board considers whether the particular meeting is “similar to collective-bargaining negotiations in character and methodology.”¹¹ If the meeting is an informal mechanism used to address employee concerns where the ultimate goal is to reach an agreement or settlement, then the recording of such meetings has the potential to “inhibit free and open discussions” and, ultimately, may have an “adverse effect[] on the bargaining process.”¹²

We conclude that the Union’s request to record investigatory interviews and team meetings implicates the same potential adverse effects on the bargaining process. In short, the Union’s explicit purpose for making these records was for use in later

⁶ 237 NLRB at 772–73 (1978).

⁷ *Id.* at 773 & n. 9 (observing that labor relations experts had opined that recording negotiation sessions has “tendency to inhibit free and open discussion necessary for conducting successful collective bargaining”).

⁸ See *Pennsylvania Telephone Guild (Bell Telephone)*, 277 NLRB 501 (1985) (union’s insistence to impasse on tape-recording grievance meetings was unlawful insistence on nonmandatory subject of bargaining), *enforced*, 799 F.2d 84 (3d Cir. 1986).

⁹ *Id.* at 501–02.

¹⁰ *Id.*; see also *Bartlett-Collins*, 237 NLRB at 773 n.9.

¹¹ *Bell Telephone*, 277 NLRB at 502.

¹² *Id.* at 502.

grievance meetings. As the Union explained in its May 1 letter to the Employer, it desired to record team meetings and investigatory interviews to preserve the statements of the Customer Service Manager “as evidence for the purpose of collective bargaining or other mutual aid or protection.” The Union further elaborated that its primary purpose in obtaining these recordings was to impeach the Customer Service Manager’s testimony in grievances arising out of employee discipline. The Union’s possession of such recordings could foreseeably hamper discussions between the Union and the Customer Service Manager aimed at resolving workplace disputes in an informal manner or during the initial stages of the parties’ contractual grievance process. Accordingly, under the principles of *Bartlett-Collins* and *Bell Telephone*, permitting the Union to record investigatory interviews and team meetings could adversely affect the collective-bargaining process by inhibiting free and open discussion in those forums.

Significantly, we note that this is a situation in which the Union is requesting only that the *Union* be permitted to record meetings and not that individual employees be permitted to record meetings. Thus, this case does not implicate the Section 7 rights of individual employees to record conversations, in which different criteria apply and which must be determined on a case-by-case basis. Specifically, an employee who records such meetings may be protected by Section 7 if the employee is recording the conversation for purposes of mutual aid and protection.¹³ Here, the Union asked the Employer to consent to *its* recording of team meetings and investigatory interviews. In responding to the Union’s request, the Employer stated that it is unclear why the Union needs to record when it is already present for such

¹³ See, e.g., *Hawaii Tribune Herald*, 356 NLRB 661, 661 (2011) (employee’s surreptitious recording of an employer meeting where he was denied a union representative was protected concerted activity because he acted in concert with other employees to document what they perceived as potential violations of their rights under *Weingarten*), enforced *sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795, 795 n.2 (2009) (two-member Board) (employee who was terminated for photographing another employee’s failure to abide by the employer’s dress code was protected under Section 7 because the photography was part of the *res gestae* of the employee’s efforts to induce group action concerning the employer’s dress code; the employee’s photography and other concerted activity remained protected by Section 7 because the employer had not established that it disseminated an explicit rule prohibiting employees from taking photographs of others prior to the employee’s termination), *reaffirmed and incorporated by reference*, 355 NLRB 1280 (2010), enforced, 452 F. App’x 374 (4th Cir. 2011). Cf. *Opryland Hotel*, 323 NLRB 723, 723 n.3 (1997) (in the absence of a prohibition on recordings, employee’s surreptitious recording of employer meetings was not misconduct sufficient to defeat reinstatement after unlawful discharge).

meetings. Thus, both the Union's request and the Employer's response demonstrate that both parties viewed the request to record as applying to Union representatives and not to employee recordings.¹⁴

Thus, the Employer did not violate the Act by refusing to permit the Union to record the parties' team meetings and investigatory interviews. Accordingly, the Region should dismiss the instant charge, absent withdrawal.

/s/
J.L.S.

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¹⁴ In light of the fact that the Employer's response prohibited the Union from recording meetings for labor relations purposes and was not a blanket no-recording rule targeted to employees, it is not necessary to analyze the Employer's response under *The Boeing Co.*, 365 NLRB No. 154, slip op. (Dec. 14, 2017). We note, however, that to the extent the Union relies on *Whole Foods Market*, 363 NLRB No. 87 (2016), in arguing that there was a violation here, that case was effectively overruled by the Board in *The Boeing Co.*, 365 NLRB No. 154 slip op at 19, n.89 (explicitly overruling *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015), upon which the Board relied in finding a violation in *Whole Foods Market*).