UNITED STATES DEPARTMENT OF LABOR
OFFICE OF LABOR MANAGEMENT STANDARDS

RECISSION OF RULE	)	RIN 1245-AA07
INTERPRETING THE "ADVICE"	)	
EXEMPTION IN LMRDA § 203(c)	)	82 Fed. Reg. 26877
EXEMPTION	)	(June 12, 2017)

COMMENTS OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

The International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") hereby submits these comments in response to the Department of Labor's proposed rescission of the "Persuader Rule," *i.e.*, the final rule interpreting the "advice" exemption to the reporting requirements set forth in Section 203 of the Labor-Management Reporting and Disclosure Act ("LMRDA" or "Act"), 29 U.S.C. § 433, which became effective on April 25, 2016. *See* 81 Fed. Reg. 15924 (March 24, 2016). The IBEW strongly opposes the rescission of the Persuader Rule.

The IBEW is a labor organization with approximately 670,000 members working in the public utility, telecommunications, manufacturing, broadcast, railroad, and electrical construction industries. The IBEW has approximately 750 local unions in the United States. The IBEW and its affiliated local unions are routinely involved in organizing campaigns, and have extensive experience with the anti-union campaigns orchestrated for employers by third-party consultants.

The IBEW adopts and incorporates the comments submitted on behalf of the AFL-CIO and NABTU, each of which also oppose the rescission of the Persuader Rule. Rather

than repeat those, the IBEW writes to provide an overview of its experience with labor consultants who have hidden their persuader activities behind the veil of the interpretation of the advice exemption proposed by the rescission of the Persuader Rule. The IBEW also discusses the burden placed on unions by the Department of Labor's reporting requirements that are imposed upon unions.

1. The IBEW's Experience with Labor Consultants

The IBEW's experience with the use of labor consultants is consistent with the utilization rate noted in the Persuader Rule. In promulgating the Persuader Rule, the Department of Labor relied on numerous academic studies to find that employers use such consultants in 71% to 87% of union organizing campaigns. 81 Fed. Reg. at 15933 and n. 10. As the Persuader Rule notes, however, employees often do not know that a third-party has been retained to orchestrate a non-union campaign. *Id.* at 15926. Nevertheless, in most IBEW campaigns, all signs point to the use of such a third-party.

No matter the industry, the geographic region, or the size of the employer, the anti-union materials used in organizing campaigns in which the IBEW and/or its locals are involved, undoubtedly make the same assertions, sometimes using identical language. For example, in almost all such anti-union campaigns employers disseminate professionally produced materials in writing, via video, or through supervisor's statements: (i) warning employees not to sign union authorization cards; (ii) portraying the employer as a family, and stating that as such, the employer has "an open door policy" for its employees; (iii) asserting that the IBEW is a "third-party" that will unduly disrupt the family and come between the employer and its employees; (iv) contending that the IBEW is a "business";

(v) warning about strikes; (vi) stating that collective bargaining cannot force the employer to make any concessions; and (vii) claiming that the IBEW will bring increased costs that will impede the employer's ability to compete.

Throughout the campaign, employers hold "captive audience" meetings at which employee attendance is mandatory and at which these messages are disseminated through scripted speeches and/or videos. Finally, approximately 24-hours prior to the election,[1] the employer inevitably holds a captive audience meeting at which it asks its employees "for another chance" and carefully implies that it will correct any problems that have led the employees to seek union representation.

During these campaigns, unidentified strangers are seen by employees shuttling in and out of meetings with management officials and first-line supervisors. Rarely, if ever, however, do these consultants meet with employees face-to-face. Instead, it is the front-supervisors who distribute the consultant-produced pamphlets, fliers, videos and other materials, all of which very clearly are for the purpose of persuading employees to reject union representation.

This campaign, "often formulaic in design," is no accident. *See* 81 Fed. Reg. at 15926. Instead, it is the product of an industry that has grown in size, and which as long ago as 1990 was estimated to produce revenues of $200 million a year. John Logan, Consultants, Lawyers, and the "Union Free" Movement in the USA since the 1970s, 33 INDUSTRIAL RELATIONS JOURNAL 197, 198 (2002).

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[1] Under the National Labor Relations Act, an employer's captive audience meetings must cease 24-hours prior to the election. *Peerless Plywood*, 107 NLRB 427 (1963).

A simple internet search using terms like "union avoidance" or "union consultant" wields a sea of businesses and law firms offering to provide services to employers that are faced with a request by their employees for union representation. Consultants boast about their "win rate." In its website, Labor Relations Institute, Inc. under its "fighting a union" tab, boasts in a video that if a company retains it, the company will have a 90% chance of beating the union, "just about a guarantee." http://lrionline.com/union-campaign-consulting-how-to-fight-a-union-now/ (last visited August 2, 2017). Another – Adams Nash Haskell & Sheridan – advertises on its website, "[w]hen employees begin to organize, it strikes fear into the heart of any organization. The good news? You have a powerful labor relations team of experienced union avoidance consultants in your corner." Adams Nash also proclaims a 95% win rate. http://anh.com/ (last visited August 2, 2017). Barnes & Thornburg LLP, a self-proclaimed "firm of more than 600 legal professionals throughout 13 offices" advertises on its web page that it provides "union avoidance" services and employers need not worry when "[a] union flyer was posted on one of your facility's employee bulletin board [sic] last night" because "we will get you through this." http://www.btlaw.com/Union-Free-Training-Labor-and-Employment-Law-Practices/ (last visited August 2, 2017).

The Burke Group is an anti-union consulting firm that the IBEW has encountered and which Professor John Logan discussed at length in The Union Avoidance Industry in the United States, 44 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 651, 655-58 (2006). It advertises that it creates "custom campaign websites," offers "union organizing response planning" and "works with the [company's] leadership team to quickly understand the

issues, develop a campaign response plan and educate the leadership on all aspects of the organizing process." http://www.tbglabor.com/services.aspx?cid=11 (last visited August 2, 2017).

These firms and others like them, are routinely encountered by the IBEW in the vast majority of its organizing campaigns. The Persuader Rule would ensure that employees involved in those campaigns are informed of those activities through the rule's transparency requirements so that they may cast an educated vote on whether to choose the IBEW as their collective bargaining representative. The proposed rescission of the Persuader Rule would keep those employees in the dark, contrary to the language and spirit of §203 of the LMRDA.

II. Union Transparency Requirements

Unions have extensive reporting requirements under a different provision of the LMRDA – Section 201, 29 U.S.C. §431. For example, among other reports, unions must file extensive annual reports. The Form LM-2 report is the annual report that must be filed by unions that have receipts of $250,000 or more. It requires those unions to provide detailed and itemized information concerning each disbursement to any person or entity of $5,000 or more, as well as all disbursements to any person or entity to whom $5,000 or more is disbursed in any fiscal year. In addition, the union report requires unions to disclose salaries and disbursements for all of its officers and employees. Further, the reporting on the LM-2 must be organized and disclosed by functional category, including representational activities that concern organizing or collective bargaining. These reports often consume hundreds of pages, compared to the Persuader Rule's revised four-page

LM-10 form for employers, and the two-page LM-20 form for consultants that must be filed if an employer retains a consultant to perform direct or indirect persuader activity.

Thus, unions like the IBEW already report much more than that which may be required by consultants and employers under the Persuader Rule. For example, payments to counsel for the union must be reported if they total $5,000 or more, irrespective of whether those payments are for persuader activities, or for providing traditional legal advice. Moreover, those payments must be disclosed even if counsel's advice has nothing to do with an organizing campaign or collective bargaining. Further, the salaries of union officers and union organizers must be reported by their union. The Persuader Rule does not require an employer that retains a consultant to report the salaries of the employer's executives, let alone those of the first-line supervisors who often carry out the consultant's anti-union game plan. Moreover, the Department of Labor's On-line Public Disclosure Room not only makes unions' reports searchable, but entities that receive payments from any union may be searched by payee so that, for example, one can see the amounts paid to, and the clients for which, union attorneys perform services of any type.

In the IBEW's experience, just as it is inevitable that anti-union consultants will prepare materials for employers to give to their employees referring to the union as an outside "third party," so too will those consultants prepare campaign materials based on the union's reports that must be filed with the Department of Labor. Indeed, the use of unions' reports has long been part and parcel of the consultant playbook. Former labor consultant Martin Jay Levitt explained that the LMRDA's reporting requirements imposed on unions are a great asset to labor consultants.

> "Wow. Union busters couldn't have asked for a bigger break. For the first time, detailed, timely information on the inner working and finances of unions and labor leaders would be available to consultants and attorneys for the price of a photocopy. Thank you Congress."

MARTIN JAY LEVITT (WITH TERRY CONROW), CONFESSIONS OF A UNION BUSTER 41 (New York: Crown Publishers, Inc. 1993). Mr. Levitt also explained that he had easily avoided any reporting.

> "[O]ur anti-union activities were carried out in backstage secrecy; meanwhile we gleefully showcased every detail of union finances that could be twisted into implications of impropriety or incompetence."

Id. at 42.

The reporting scheme designed by Congress in Title II of the LMRDA was not meant to be a one-way proposition. In promulgating the LMRDA, Congress recognized that:

> "[I]f unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representatives by employees . . . ."

81 Fed. Reg. at 15934 (quoting S. Rep. 187 at 39-40, 1 LMRDA Leg. Hist. at 435-46).

In proposing the rescission of the Persuader Rule, the Department of Labor cites to the alleged positive impact under reporting will have upon the Department of Labor. The Department of Labor explains that under reporting by consultants will result in "significantly fewer reports, which reduces the investigative resources devoted to enforcing the rules on filing timely and complete reports." 82 Fed. Reg. at 26,881.

If such savings is a reason for rescinding the Persuader Rule, then it logically follows that the Department of Labor should promulgate a rule streamlining the filing of labor organization reports so that such reports could more easily be filed on a timely and complete basis, thus reducing the agency resources necessary for enforcement. For example, the Department of Labor should rescind its 2003 rule that made the labor organization LM-2 report much more burdensome and costly. *See* 68 Fed. Reg. 58374 (Oct. 9, 2003).

In sum, the rescission of the Persuader Rule will return the Department of Labor's regulatory scheme to one in which, contrary to the language of the LMRDA, employees are left in the dark about their employers' use of anti-union consultants who indirectly persuade the employees not to exercise their right to organize. The proposed rule is contrary to the Department of Labor's statutory obligations, and is strongly opposed by the IBEW.

Respectfully submitted,

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