

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

# Advice Memorandum

DATE: March 15, 2004

TO : Helen Marsh, Regional Director  
Region 3

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: M.J. Mechanical Services, Inc.  
Cases 3-CA-23680, 23697, 24062

512-5012-2500  
524-0133-7500  
524-5012-4000  
524-5012-7400

These Section 8(a)(1) and (3) cases were submitted for advice as to whether the Employer unlawfully implemented a facially neutral hiring policy, where the Employer has a history of discriminatory hiring practices.

We conclude that the Employer unlawfully implemented a facially neutral hiring policy. The Employer's anti-Union motivation is evidenced by, among other things, the timing of the policy's implementation, the Employer's failure to uniformly apply the policy, the Employer's preference for costly referrals over Union-affiliated applicants, and the Employer's failure to apprise the Union of the new policy.

### **FACTS**

In 1998, the Board held that M.J. Mechanical Services, Inc. (the Employer) unlawfully failed to consider 23 applicants for hire sent by Sheet Metal Workers Local 46 during a 1994-95 salting campaign. The Board further concluded that the Employer discriminatorily refused to distribute employment applications to Union salts at two locations, and refused to provide them with copies of their applications. The Board ordered the Employer to make the discriminatees whole for lost job opportunities and to consider them for hire, as would have happened absent the unlawful activity. The Board further ordered the Employer to cease and desist from refusing to distribute or provide copies of Union applicants' employment applications.<sup>1</sup> The Court of Appeals for the District of Columbia enforced the Board order on July 8, 1999.

Although the Employer has complied with the cease and desist order, it disputes the status of the Section 8(a)(3)

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<sup>1</sup> MJ Mechanical Services, Inc., 325 NLRB 1098 (1998), enfd. No. 98-1361 (D.C. Cir. 1999) (unreported).

salts as bona fide applicants, and makes specific arguments as to the calculation of backpay. These issues are currently before the Board on exceptions to a supplemental ALJD.<sup>2</sup>

Meanwhile, after attempting to apply for jobs on December 15, 1998, the Union suspended its salting campaign at the Employer during the pendency of the Board proceedings and court enforcement.

On February 29, 2000, the Region issued a Consolidated Compliance Specification in the adjudicated Board cases, alleging, in part, that the Employer was obligated to make employment offers to 23 discriminatees, along with any backpay owing to them.

On August 15, 2000, the Employer adopted a new, four-tier hiring policy giving preference to current and former employees and to individuals referred by people or organizations known to it. If the Employer is unable to secure employment of such individuals, at step 3 it considers applicants referred from temporary employment agencies. Finally, at Category 4 the Employer considers walk-in applicants, individuals responding to advertisements and applicants referred by state employment agencies. Under the new policy, the Employer does not accept unsolicited resumes from prospective job seekers. The Employer further does not distribute employment applications to Category 4 job seekers without first scheduling an interview. The Employer did not explain why it seeks employment through temporary employment agencies over Category 4 applicants. However, it asserts that it adopted the pre-interview rule for Category 4 job seekers in order to maintain order in its lobby. As set forth below, the Union was unaware of the Employer's new policy until December 2002.

On or about June 5, 2001, the Employer interviewed six applicants, five of whom were Category 2 referrals, and one of whom was a Category 4 job seeker, responding to an advertisement the Employer had placed in an area newspaper. The Employer hired three of these six individuals, including the Category 4 applicant, although the Employer had noted that one of the Category 2 applicants it did not hire was qualified for the job.

In 2001, the Union renewed its salting campaign against the Employer. Union salts attempted to leave

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<sup>2</sup> MJ Mechanical Services, Inc., JD-119-00 (September 18, 2000).

resumes and complete employment application forms on eleven occasions between February 2001 and February 2003. The Employer refused to accept the unsolicited applications at each instance and declined to distribute applications, stating that it was not hiring at the time. There is no evidence that the Employer in fact was actively seeking job applicants on the dates the Union salts attempted to apply for jobs.

The Union further attempted to send batches of resumes to the Employer through the mail. In December 2001, an Employer agent notified a Union organizer that the Employer had received the resumes, but that they were good for only 90 days. He suggested that the Union send a new batch close to that expiration date, if it wanted to keep these individuals in consideration. The Union thus sent the Employer three more batches of resumes in January, February and May 2002. On June 3, 2002, the Union received a letter from the Employer returning the May batch and stating that it does not accept unsolicited resumes.

In December 2002, during settlement negotiations in the outstanding compliance matter, the Employer first apprised the Union of its new hiring policy, which it had adopted in August 2000. On January 30, 2003, the Union filed the charge in Case 3-CA-23680, alleging that the Employer adopted an unlawful hiring policy and unlawfully declined to distribute employment applications to salts and refused to consider them for employment.

[FOIA Exemption 5

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On October 24, 2003, the Region issued complaint in this matter. It alleged that the Employer adopted the 2001 hiring policy, refused to distribute employment applications, and refused to accept resumes by mail in order to exclude Union applicants from consideration; and that it refused to consider Union applicants for employment by engaging in the above conduct. Upon further consideration, the hearing has been postponed indefinitely while Advice considers this matter.

**ACTION**

We conclude that, under all the circumstances, MJ Mechanical unlawfully implemented a facially neutral hiring policy. The Employer's anti-Union motivation is evidenced by, among other things, the timing of the policy's implementation, the Employer's failure to uniformly apply the policy, the Employer's preference for costly referrals over Union-affiliated applicants, and the Employer's failure to apprise the Union of the new policy.

The Board has long held that an employer's implementation of an otherwise valid rule that limits employee solicitation or distribution activities, if motivated by a discriminatory purpose of inhibiting union activity, violates the Act.<sup>3</sup> This is consistent with the Board's definition of unlawful "discrimination" under Section 8(a)(3) of the Act, which includes any adverse action taken against an employee that was motivated by the employer's animus toward the employee's union activities.<sup>4</sup> Circumstantial evidence, such as the suspicious timing of a rule's implementation, often makes out a prima facie case.<sup>5</sup> The burden then shifts to the employer to establish a valid business justification for the rule.<sup>6</sup>

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<sup>3</sup> See Cannondale Corp., 310 NLRB 845, 849 (1993) (otherwise valid no-solicitation/no-distribution rule violates the Act when real purpose behind its promulgation is to interfere with organizing activities and not to maintain production and discipline); Woodview Rehabilitation Center, 265 NLRB 838 (1982) (even if rule prohibiting employee solicitations on work time was lawful on its face, employer's implementation of the rule in response to union activity was unlawful). See also RCN Corporation, 333 NLRB 295, 301-02 (2001); Montgomery Ward, 220 NLRB 373, 388 (1975), *enfd.* 554 F.2d 996 (10th Cir. 1977); Ward Manufacturing, 152 NLRB 1270 (1965).

<sup>4</sup> See Wright Line, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Thus, proof of discrimination in the Section 8(a)(3) context does not require a specific showing that union supporters have been treated differently than other employees, although an employer may defend its conduct by showing that other employees were treated similarly.

<sup>5</sup> See cases cited above at n.3.

<sup>6</sup> City Market, Inc., 340 NLRB No. 151 (December 15, 2003).

To be sure, MJ Mechanical's four-step hiring policy, designed to give preference to current and former employees, as well as those applicants who are recommended by current employees or respected third-parties, is facially lawful under current Board law.<sup>7</sup> Nonetheless, the totality of the evidence establishes that the Employer adopted its facially neutral hiring policy in response to the Union's salting campaign.

First, the Employer adopted its new policy only five and one-half months after the Region issued its Consolidated Compliance Specification in the enforced Board cases. Although the Union's 1994-95 salting campaign, to which the Employer discriminatorily responded, was remote in time, the Employer's departure from its prior hiring pattern at a time when the Region had recently scheduled a compliance hearing to establish MJ Mechanical's liability for 23 Section 8(a)(3) violations establishes a nexus to that conduct, indicating that it still retained its prior anti-Union animus.<sup>8</sup>

Second, the Employer failed to uniformly apply its policy. It is uncontroverted that in June 2001, the Employer hired an individual from Category 4 over a qualified Category 2 applicant. Its unexplained departure from the established terms of its policy indicates that the motivations for its hiring decisions lie elsewhere.<sup>9</sup>

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<sup>7</sup> See Quality Mechanical Insulation, Inc., 340 NLRB No. 91, slip op. at 14-15 (September 30, 2003); Ken Maddox Heating & Air Conditioning, 340 NLRB No. 7, slip op. at 2 (September 5, 2003); Brandt Construction Co., 336 NLRB 733-34 (2001), enfd. 325 F.3d 818 (7<sup>th</sup> Cir. 2003); and Kanawha Stone Co., 334 NLRB 235 (2001).

<sup>8</sup> An employer does not have to act immediately on its anti-union animus before the Board will view its conduct as circumstantial evidence of an unlawful motive. See, e.g., Woodview Rehabilitation Center, above (unlawful rule implemented five weeks after knowledge of union's campaign). Moreover, although MJ Mechanical adopted its hiring policy in August 2000, it is likely that it developed the new policy in advance of the implementation date. Thus, its formulation of a new policy likely was closer in time to the Regional Director's February 2000 issuance of the consolidated compliance specification.

<sup>9</sup> See Tubular Corp. of America, 337 NLRB 99 (2001) (anti-union motivation inferred from circumstantial evidence of,

Third, the Employer has structured its policy so as to spend additional money not to hire Union salts. The policy provides for employment through referrals from temporary agencies over walk-ins and individuals responding to advertisements. Thus, the Employer is willing to pay agencies to refer new temporary hires, rather than seek out applicants from avenues traditionally used by labor unions, whom the Employer could hire at no or, in the case of newspaper ads, nominal charge. By subsuming its financial interests to its goal of not considering walk-ins, the Employer again showed that its motivation is to be free of Union salts.<sup>10</sup>

Fourth, the Employer kept its new hiring policy a secret from the Union for over two years. The Employer first mentioned to the Union that it had adopted a new hiring policy during settlement negotiations in December 2002. Prior to that admission, Union salts had attempted to apply for jobs in person eight times and the Union had mailed four sets of resumes, without ever having been told of the policy's priorities or its requirement that walk-in applicants first be interviewed before being allowed to drop off a resume or complete an employment application. The Employer gives no reason for keeping the basic parameters of its new policy a secret from Union-affiliated applicants. The Employer's secrecy adds to the totality of circumstances supporting the prima facie case.<sup>11</sup>

The Employer has not rebutted this prima facie case by articulating a cogent business justification for its new policy. Initially, it has failed to provide any rationale or business justification for implementing this new hiring policy. Further, it has provided no explanation for paying referral fees to temporary employment agencies when it

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among other things, employer's deviation from past practice); National Steel & Shipbuilding Co., 324 NLRB 1114, 1117 (1997), citing NLRB v. Transportation Management Corp., 462 U.S. at 404-05 (same).

<sup>10</sup> See KRI Constructors, 290 NLRB 802, 813 (1988) (policy of hiring more expensive, out-of-state applicants is against self-interest and evidences animus).

<sup>11</sup> In Love's Barbecue Restaurant No. 62, 245 NLRB 78, 80 (1979), enfd. in relevant part sub nom. Kallman v. NLRB, 640 F.2d 1094 (9th Cir. 1981), the Board found that, among other things, an employer's "failure to explain his unusual hiring procedure, coupled with his lack of candor regarding the interviewing process" indicated a desire to avoid hiring union adherents.

could hire off the street for free. It has not justified the hiring of a non-Union Category 4 applicant in June 2001 over a qualified Category 2 applicant. The Employer also failed to establish the logic for imposing a pre-interview requirement only for Category 4 applicants (including Union salts). The Employer explained that the rule allows it to maintain order in its lobby. The rationale appears pretextual inasmuch as the Employer would ask all job seekers to leave its lobby if there were no job openings at the time. The Employer has not explained why it superimposes a pre-interview requirement on Category 4 applicants, who would have already been told to leave the lobby if no jobs were open.

By applying its unlawful hiring policy, the Employer unlawfully refused to consider hiring Union applicants. Under FES (A Division of Thermo Power),<sup>12</sup> the General Counsel establishes prima facie evidence of a discriminatory refusal to consider for employment by showing that: (1) the respondent excluded applicants from the hiring process; and (2) antiunion animus contributed to this decision. Once this is established, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

Evidence establishes a prima facie refusal-to-consider violation here. It is uncontroverted that, pursuant to its August 2000 hiring policy, the Employer prevented Union job seekers from submitting resumes or completing employment applications. As set forth above, the Employer's continued hostility to the Union's prior (and now renewed) salting campaign motivated it to adopt its restrictive hiring policy. Moreover, the Employer's June 2001 failure to uniformly apply its hiring policy rebuts any defense that it would not have considered the Union job seekers, had they been allowed to apply, even in the absence of their union activity.

Accordingly, the Employer unlawfully implemented its hiring policy in these circumstances. [FOIA Exemption 5

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B.J.K.

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<sup>12</sup> 331 NLRB 9 (2000).