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

Advice Memorandum

DATE: April 14, 2008

TO : Alan Reichard, Regional Director
Region 32

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

SUBJECT: Valley Power Systems North, Inc. 524-5012-6000
Case 32-CA-23516 524-5012-7400

This case was submitted for advice on whether the Employer violated Section 8(a)(3) where it told nine applicants, engaged in a videotaped "mass application" for employment, that they had to submit resumes and be selected to interview before it would give them applications. We conclude that the Charging Party has presented insufficient evidence that the Employer discriminated against the applicants by refusing to give them applications.[1]

FACTS

The Operating Engineers Local 3 (the Union or Charging Party), has represented a unit of the Employer's mechanics at Valley Power Systems North (the Employer) in San Leandro, California since the Employer became a Burns successor in August 2005. Since July 2007, the Union has been engaged in a strike against the Employer and has been picketing the San Leandro facility.

In August 2007, a Union representative came across a job posting for a field technician for the Employer and suggested at a Union strategy meeting that the Union have out-of-work members apply for that position accompanied by Union officials to witness the application.

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[1] The Region specifically requested advice on whether the applicants were genuinely interested in employment, pursuant to GC Memorandum 08-04, Toering Electric Co., dated February 15, 2008. Because we conclude that there is insufficient evidence to show that the applicants were discriminatorily excluded from the hiring process, we need not address whether the applicants were genuinely interested in employment.

On August 31, nine individuals, including five Union representatives (three of which were present solely to witness the applications) and four out-of-work Union members, engaged in a "mass application" for work at the San Leando facility. The nine participants assembled on the picket line and then entered the Employer's offices, while Union officials videotaped the event and took photographs. A Union representation told the Employer's parts manager that they were all Union members, that they were all "qualified," and that they were there to fill out applications. The manager told them that the Employer needed resumes from applicants first. She explained that the resumes would then be given to an appropriate manager to review and that, if the manager was interested in an applicant, the applicant would be called for an interview and given an application at that time. The group left the office without receiving applications. The peaceful event lasted only two minutes.

Later that day, the Union posted pictures of the event on its internet newsletter under the caption, "MEMBERS 'MASS APP' IN SAN LEANDRO." None of the nine participants have returned to the Employer to drop off resumes or to take further steps seeking employment.

Two applicants, one who was an out-of-work Union member and one who was a Union representative, both testified that they had never worked for or sought work with the Employer. The Union did not present the other applicants as witnesses but believes that none of them had ever worked for the Employer.

The Union contends that, before August 31, applicants were not required to submit resumes before receiving applications. The Employer counters that, under its longstanding hiring procedure at San Leandro, applicants must first submit resumes and only receive applications if the Employer chooses to interview them and to give applications at that time. To support this claim, the Employer submitted resumes from two other recent hires and claims that a third employee also submitted a resume by email.

The Union presented two San Leandro employees, who both testified that they did not submit resumes before being hired. Both, however, also testified that their fathers worked for the Employer and had probably told the Employer about their qualifications. The Employer admits that it did not require resumes from these two employees but claims that it relied on their fathers' recommendations. The Union also relied on testimony in an R-case hearing by the Employer's CFO, who, when asked about

hiring the predecessor's employees, testified that the employees were given job applications to fill out, after which they were interviewed. While acknowledging that the predecessor's employees were hired without having to submit resumes, the Employer claims that those employees were not required to submit resumes because they had been successfully working in their positions.

ACTION

We conclude that there is insufficient evidence that the applicants were discriminatorily denied applications and, therefore, that the charge should be dismissed, absent withdrawal.

To establish an unlawful refusal to consider applicants, the General Counsel must show that the employer excluded applicants from a hiring process and that antiunion animus contributed to that decision.[2]

We conclude that the Charging Party presented insufficient evidence that the Employer's denial of the August 31st applicants' request for applications was discriminatorily motivated. Thus, the Charging Party has presented insufficient evidence that the Employer did not, in fact, have a policy requiring unknown applicants to present resumes and interview before receiving applications. The Employer presented at least two resumes from employees to support its contention that it required resumes from unknown applications, and the two witnesses presented by the Union who did not submit resumes both had personal recommendations from their fathers. Further, the testimony from the R-case hearing is not controlling because the predecessor's employees were already successfully working in their positions. There is therefore insufficient evidence that the Employer discriminated against the Union member applicants by requiring resumes before providing applications.

We further note that none of the August 31st applicants returned to the Employer to provide resumes. We therefore do not know if the Employer would have granted qualified applicants interviews and/or provided them with employment applications.

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[2] FES, 331 NLRB 9, 15 (2000).

In sum, because there is insufficient evidence that Employer denied the Union members applications based on their Union membership and/or their protected concerted activity, the charge should be dismissed, absent withdrawal.

B.J.K.