

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

5

G & H TOWING COMPANY

10

and

CASE 16–CA–25939

CHRISTOPHER A. MINTON, an Individual

15

Nadine Littles, Esq., for the General Counsel
Douglas E. Hamel, Esq. and
V. Loraine Christ, Esq. (Vinson & Elkins),
for the Respondent

20

BENCH DECISION AND CERTIFICATION

25

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on April 16, 2008 in Houston, Texas. After the parties rested, I heard oral argument, and on April 17, 2008, issued a bench decision pursuant to Section 102.35(a)(1) of the Board’s Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as “Appendix A,” the portion of the transcript containing this decision. The Conclusions of Law, Remedy, Order and Notice provisions are set forth below.

30

35

Further Discussion of Section 10(b) Issues

Respondent has admitted doing the act which lies at the heart of the Complaint, excluding one of its employees, Christopher Minton, from consideration for temporary assignments as a vessel master. However, it argues that it made this decision more than 6 months before the filing of the charge and that, accordingly, Section 10(b) of the Act precludes this litigation. Relying on *The Register–Guard*, 351 NLRB No. 70 (December 16, 2007), I rejected that argument for the reasons stated in the bench decision.

40

45

Here I must correct a sentence in the bench decision stating that “each instance in which Minton sought and was denied such an assignment, in circumstances establishing the availability or contemplated availability of such an assignment, constitutes a new employment

5 action.” That sentence incorrectly suggests that Respondent would not have violated the Act unless Minton specifically had requested that management consider him. Although a number of employees did volunteer for such assignments, the record establishes that when the need arose to assign someone to temporary duty as a master, management did not limit consideration only to those who had volunteered.

10 Rather, the bench decision should have stated that, within the 10(b) period, Respondent violated the Act each time all of the following conditions were satisfied: (1) an opportunity arose for temporary duty as a master; (2) Minton’s license authorized him to serve as a master under these circumstances; (3) Minton would have been considered for such assignment but for the order, issued by Respondent’s president, barring him from consideration; and (4) Minton was not considered.

15 Such a refusal-to-consider violation occurs under the circumstances described above regardless of whether Minton actually would have received the assignment if he had been considered for it. A discriminatory refusal to consider may violate Section 8(a)(3) even when no hiring is occurring. *FES (A Division of Thermo Power)*, 331 NLRB 9, 15 (2000).

20 Based on the testimony of the manager of marine personnel, Charles Martorell, I find that on June 13, 2007, Steve Cervantes received an assignment as a temporary master, and that Minton then called Martorell to ask why he, Minton, did not get the assignment. Martorell also credibly testified that two days later, on June 15, 2007, John Matthews received an assignment as temporary master. Because of the order issued by Respondent’s president, Martorell did not consider Minton for these assignments.

25 Thus, the record clearly establishes at least two instances, within the 10(b) period, when Respondent failed to consider Minton for temporary assignments as the master of a vessel. Accordingly, I must reject Respondent’s Section 10(b) defense.

30 Moreover, for a separate reason, I conclude that Section 10(b) does not bar this litigation. Although Respondent’s president, Stephen Huffman, told his supervisors in 2006 that Minton should not receive assignments as a temporary master, neither Huffman nor any other manager informed Minton. The 6-month limitations period prescribed by Section 10(b) begins to run only when a party has clear and unequivocal notice of a violation of the Act. *CAB Associates*, 340 NLRB 1391, 1392 (2003).

35 Although the Board requires “clear and unequivocal” notice to activate the 10(b) period, such notice does not have to be express. Events can place an individual on constructive notice sufficient for the 10(b) period to begin. In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence. *St. George Warehouse, Inc.*, 341 NLRB 904 (2004).

40 The party asserting a Section 10(b) defense bears the burden of proving all facts necessary to establish it. However, Respondent has not proven that Minton, through the exercise of reasonable diligence, would have become aware that he had been disqualified from receiving the temporary master assignments. The record indicates the opposite.

Sometime in 2006, Respondent’s president ordered his managers not to consider Minton for temporary duty as a master, but did not notify him that he was disqualified. Twice thereafter, a manager gave Minton such an assignment by mistake, which resulted in President Huffman repeating the instruction that he did not want Minton “in the wheelhouse.” The Respondent’s president gave this instruction only to managers and outside Minton’s presence. Minton had no way of knowing that he wasn’t supposed to be considered for such duty and had received the assignments only because of a manager’s error. A person who received such assignments reasonably would conclude that he had not been disqualified from consideration.

Significantly, as late as June 15, 2007, When Minton asked Respondent’s manager of marine personnel, Martorell, why certain people were working on a boat (rather than himself), the manager initially did not provide a candid answer. Martorell gave the following testimony:

- Q. And what did [Minton] say?
 A. Wanted to know how come he wasn’t getting the wheelhouse work.
 Q. And what did you tell him?
 A. I told him that Steve and John had both volunteered. They were off watch, and that’s who we were going to use.
 Q. Did he say anything else to you?
 A. He said that that wasn’t right, that we both knew what this was all about.
 Q. What did you say?
 A. I said, Yes, we do.

The willingness of Respondent’s manager to make up a reason, rather than simply inform Minton that he was not being considered, demonstrates that Respondent treated the do–not–consider order as a secret which management did not reveal to Minton. Certainly, the record does not suggest that, at any time before June 15, 2007, Respondent was forthcoming with Minton about removing him from consideration for temporary service as a master.

Respondent argues that Minton was not a “go to” type of employee, that is, he was not a “go getter” with the reputation of volunteering for work. Presumably, Respondent is contending that Minton’s supposed failure to volunteer for assignments as a temporary master amounts to a lack of “reasonable diligence.”

However, credible evidence does not establish that only employees who volunteered received such assignments. Indeed, the record does not indicate that Minton volunteered for the two assignments inadvertently given to him.

In sum, Respondent has failed to establish a necessary element of the Section 10(b) defense, that Minton knew or reasonably should have known that Respondent’s president had ordered that Minton not be given assignments as a temporary master. Accordingly, the defense must fail.

Further *Burnup & Sims* Analysis

For reasons discussed in the bench decision, I have concluded that the facts should be analyzed by applying the principles set forth in *Labor Board v. Burnup & Sims*, 379 U.S. 21 (1964) and its progeny. As the Board reiterated in *White Electrical Construction, Inc.*, 345

NLRB 1095 (2005), *Burnup & Sims* applies when an employer terminates or disciplines employees for allegedly engaging in misconduct in the course of protected activity. In that setting, good faith belief that the employees engaged in misconduct is not a defense if the General Counsel proves that the employees did not, in fact, engage in the misconduct. That is because, as the Supreme Court stated, “A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith.” 379 U.S. at 23.

In the bench decision, I concluded that Respondent had not established that it held a good faith belief that employee Minton had engaged in misconduct. Respondent argued that it had disqualified Minton for temporary duty as a vessel master because a statement he made as a Union negotiator was a lie, thereby showing that Minton lacked an essential job qualification: Honesty.

Minton’s supposed “lie” was that he would encourage employees to vote for a tentative collective-bargaining agreement which the negotiators had reached. The bench decision noted that Respondent took no action to determine whether Minton made such a statement while intending to do the opposite (which would make it a lie) or whether he simply changed his mind later. Therefore, I concluded that Respondent had not demonstrated that it held a good faith belief that Minton had engaged in an intentional falsehood which would reflect on his honesty.

However, even assuming for analysis that Respondent held a good faith belief that Minton lied, Respondent’s defense must fail because the General Counsel has proven that Minton did not, in fact, engage in misconduct, and certainly not misconduct which would forfeit the protection of the Act. As stated in the bench decision, I have found that Minton answered affirmatively when asked, at the bargaining table, whether he would support the tentative agreement. However, I do not find that he deliberately misrepresented his intentions and conclude that he did not.

In reaching this conclusion, I begin with the principle that in the absence of evidence to the contrary, one should not presume that someone acted with improper intentions. The credible evidence does not establish that Minton had such intentions and I will not infer them simply because his later conduct did not match what he had said.

Indeed, if every variance between word and deed amounted to proof of intentional falsehood or purpose to deceive, then politicians’ unfulfilled campaign promises would make them liars. However tempting such a conclusion might be in the case of politicians, it simply isn’t logical. Many circumstances can intervene between word and deed to cause a change of direction.

In the present case, Minton might well have started out intending to convince other employees to support the tentative agreement, but after hearing their objections, changed his own mind. Having started out to persuade, instead he became persuaded. From the record, this possibility seems just as likely as an intention to deceive and there is no credible evidence that Minton had such a dishonorable intention. Absent such evidence, I conclude that he did not.

Accordingly, I conclude that Minton did not lie, and therefore did not engage in the misconduct which Respondent attributed to him.

5 However, even if the evidence did establish that Minton had misstated his intentions deliberately, which it does not, that misconduct would not be sufficient to deprive him of the protection of the Act. It is well established that not all misconduct forfeits the Act’s protection. As the Board has stated, the “protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.” *Consumers Power Co.*, 282 NLRB 130, 132 (1986)(footnotes omitted).

15 The present case does not involve a discharge, but a refusal to consider an employee for temporary duty at a higher level. Additionally, the claimed misconduct does not concern an employee’s outburst or name calling – indeed, the evidence consistently shows Minton to have been quiet and mild-mannered – but rather telling a lie. However, the basic principle remains the same: When an adverse employment action results from misconduct which is part of the *res gestae* of protected concerted activities – the misconduct must either be sufficiently egregious or else render the employee unfit for further service.

25 In effect, Respondent is arguing that the job qualifications it has established – including its requirement that tugboat masters be absolutely honest – constitute the standard for determining whether misconduct renders an employee unfit for this service. However, this argument may conflate the framework the Board uses to analyze refusal-to-consider-for-hire cases with the *Burnup & Sims* analysis applied here.

30 In examining refusal-to-consider-for-hire cases under *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), and in weighing discriminatory discipline cases under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board generally accepts the bonafide standards established by the employer and determines whether the employer has departed from those standards because of someone’s protected activities. However, those cases must be distinguished from instances, such as the present one, where an employee’s conduct during the *res gestae* of protected activity formed the basis for the employment action.

40 A determination of when misconduct during the course of protected activity should forfeit the Act’s protection is, at its core, a policy decision about the scope of the Act’s protection. Such a decision has implications well beyond those inherent in determining whether an employer deviated from its own standards because of an employee’s protected activity. Accordingly, it is appropriate for the Board, the agency Congress entrusted to administer the Act, to define what misconduct is so egregious that it makes the employee unfit for further service.

45 However, in the present case, even were I to accept the Respondent’s argument and determine Minton’s fitness for service based solely on Respondent’s own job qualifications,

and even were I to assume (contrary to my findings) that Minton actually lied about his intention to support the tentative contract, I would conclude that such a lie did not disqualify him from service as a temporary master. Credible evidence does not establish that Respondent ever promulgated or applied a standard which disqualified someone from service as a master because of a lie immaterial to the job.

Respondent presented testimony concerning instances in which masters had lied about the performance of their job duties, resulting in serious harm or potential harm. Even assuming that Minton lied about supporting the tentative agreement (which I find he did not), such a falsehood did *not* concern any job duties. It pertained only to his contemplated protected activities.

By law, activities which Section 7 protects are immaterial to an employee’s qualifications to do a particular job. Respondent produced no evidence showing that it had ever discharged or disqualified any employee for making false statements about a matter immaterial to the job or to the employee’s performance of it. For example, Respondent cited no instance in which it had disqualified any employee for lying about his intention to go to church, or to a football game, or to make a contribution to the United Way. Respondent presented no evidence that it had ever considered a lie about such immaterial matters as predictive of someone’s willingness to lie about any job–related fact.

It would flout common sense to assume, without proof, that Respondent would discharge or disqualify an employee for such a lie about an immaterial matter. Here, there is no such proof. Therefore, even if Respondent’s own employment standards were used to judge the “egregiousness” of misconduct – that is, whether the misconduct is sufficient to forfeit the protection of the Act – I cannot conclude that a lie about something immaterial amounted to such egregious misconduct or rendered the employee unfit.

Section 8(A)(3) Analysis

The *Burnup & Sims* analysis discussed above leads me to conclude that Respondent violated Section 8(a)(1) of the Act by refusing to consider Minton for temporary service as a vessel master. Here, I consider whether this refusal also violated Section 8(a)(3) of the Act.

A refusal–to–consider case requires proof that a respondent excluded applicants from an employee selection process at least in part because of their union affiliation or activity. *American Residential Services of Indiana, Inc.*, 345 NLRB 995 (2005). The evidence plainly establishes that Respondent’s president ordered his managers not to consider Minton for temporary duty as a vessel master.

The record leaves no room to doubt that Respondent took this action because of a statement which Minton made as one of the Union’s negotiators, and because he engaged in subsequent discussions with other employees concerning the proposed collective bargaining agreement. The Act protects both Minton’s statement at the bargaining table and his later discussions with employees.

Respondent cannot, of course, raise the rebuttal argument that even in the absence of protected activity; it would not have considered Minton for assignment as a temporary master, because the protected activity itself motivated Respondent’s action. The record establishes no motive unrelated to that protected activity.

5

Accordingly, I conclude that Respondent’s exclusion of Minton from consideration for temporary service as a vessel master violated Section 8(a)(3) of the Act as well as Section 8(a)(1).

10

CONCLUSIONS OF LAW

1. Respondent, G & H Towing Company, a Texas corporation with an office and place of business in Galveston, Texas, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

15

2. The Union, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, NMU, is a labor organization within the meaning of Section 2(5) of the Act.

20

3. On about June 13, 2007 and June 15, 2007, Respondent refused to consider employee Christopher Minton for any temporary assignment to the position of Master and Master Relief, in violation of Section 8(a)(1) and (3) of the Act.

25

4. The violations described in Paragraph 3, above, are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

30

5. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

REMEDY

35

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

40

The present record does not establish whether Minton would have received either the June 13 or June 15, 2007 assignment had Respondent considered him for this duty. If so, the Respondent must make Minton whole for losses incurred because he was not selected. However, such a determination must await the compliance stage of this proceeding.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended

ORDER

The Respondent, G & H Towing Company, its officers, agents, successors, and assigns, shall

5

1. Cease and desist from:

(a) Refusing to consider employees for temporary assignment as master or master relief because they engaged in union activity or other activities protected by the National Labor Relations Act.

10

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

15

2. Take the following affirmative action necessary to effectuate the policies of the Act:

20

(a) Make employee Christopher Minton whole, with interest, for all losses, if any, which he suffered because Respondent excluded him from consideration for temporary duty as a master on June 13, 2007 and June 15, 2007.

25

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

30

(c) Within 14 days after service by the Region, post at its facilities in Galveston, Texas, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 2007.

35

40

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C., June 2, 2008.

5

Keltner W. Locke
Administrative Law Judge

APPENDIX A

Bench Decision

5 This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board’s Rules and Regulations.

Procedural History

10 This case began on November 19, 2007, when the Charging Party filed his initial charge in this proceeding. The charge alleged that the Respondent herein, G & H Towing Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act.

15 On January 31, 2008, after investigation of the charge, the Regional Director for Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the “Complaint.” In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the “General Counsel” or as the “government.” Respondent filed a timely Answer.

20 On April 16, 2007, a hearing opened before me in Houston, Texas. Both the General Counsel and Respondent presented evidence on that date and rested. Today, April 17, 2007, counsel for both the government and Respondent presented oral argument. After a recess to consider those arguments and to review the evidence, I am issuing this bench decision.

25 **Admitted Allegations**

30 Based on the admissions in Respondent’s Answer and a stipulation during the hearing, I conclude that the government has proven the allegations raised in Complaint paragraphs 1, 2, 3, 4, 5 and 6. More specifically, I find that the unfair labor practice charge was filed and served as alleged in the Complaint, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that it falls within the standards adopted by the Board for the exercise of its jurisdiction.

35 Further, I conclude that at all material times, the following individuals are Respondent’s supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act, respectively: President Stephen Huffman, Director of Marine Operations Steven J. Huttman, and Manager of Marine Personnel Charles Martorell.

40 Additionally, I conclude that at all material times, the Union, Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, NMU, has been a labor organization within the meaning of Section 2(5) of the Act.

Disputed Allegations

45 Complaint paragraph 7 alleges that since on or about May 19, 2007, Respondent, refused to consider employee Christopher Minton for any temporary assignment to the position

APPENDIX A

of Master and Master Relief. Respondent denies this allegation.

5 Complaint paragraph 8 alleges that Respondent engaged in this conduct because
Christopher A. Minton joined and assisted the union and engaged in concerted activities, and to
discourage employees from engaging in these activities. Complaint paragraph 9 alleges that by
this conduct, “Respondent has been discriminating in regard to the hire or tenure or terms or
10 conditions of employment of its employees, thereby discouraging membership in a labor
organization in violation of Section 8(a)(3) and (1) of the Act and affecting commerce within
the meaning of Section 2(6) and (7) of the Act.” Respondent denies these allegations.

Facts

15 Respondent operates a fleet of tug boats based along the Texas gulf coast. The Union
represents the employees who work on these boats. In 2005, Respondent and the Union
engaged in collective bargaining for an agreement to replace the expiring contract. The
Charging Party, who then worked for Respondent, served on the Union’s negotiating
committee.

20 Some of the personnel on Respondent’s boats – the masters, mates, and chief engineers
– must have federal licenses, issued by the Coast Guard, to perform their duties. Charging
Party Minton served as a mate, but he also held a license to serve as the master of a vessel
under certain circumstances. Minton’s license limited his service as master to vessels of a
25 specified tonnage and to certain waters.

 Respondent employs a number of licensed masters to be in charge of its vessels, but
sometimes, one of them would become unavailable because of vacation or sickness. In that
circumstance, Respondent would assign one of the mates to serve temporarily as a vessel’s
30 master. A mate would receive additional pay for the hours he worked as a relief master.

 Only mates holding the necessary license would be eligible for such temporary duty as a
“relief master.” Charging Party Minton, having such a license, received relief master
assignments in years before 2006. The record establishes that in 2005, Respondent assigned
35 Minton to such duty on a number of occasions.

 As already stated, Minton served as a member of the Union’s bargaining team during
the 2005 negotiations. On September 28, 2005, with the help of a federal mediator,
management and Union negotiators reached a tentative agreement. The proposal still had to be
40 submitted to a ratification vote.

 The negotiators had some doubts about whether rank-and-file employees would vote to
accept the agreement. During the bargaining session, in the presence of the management
negotiators, including Respondent’s president, the Union’s chief negotiator polled his
45 committee members. He asked each committee member individually whether he would
support the tentative agreement, and the committee member answered aloud.

APPENDIX A

Although Charging Party Minton did not recall being asked whether he would recommend the tentative contract to the Union membership, I credit the testimony of Respondent’s President Huffman, to the effect that Minton indeed was asked this question and replied that he would support the agreement.

A witness’s inability to recall a statement or event does not constitute a denial, so Minton’s testimony on this point does not squarely conflict with Huffman’s. Additionally, another witness, Newton Jackson, corroborates Huffman’s testimony. Moreover, my observations of Huffman persuade me that he was quite sincere when he testified that Minton said he would support the contract and then added “I was looking at every one in the eye when they said it.”

Accordingly, I find that, when asked whether he would support the tentative agreement, Minton answered that he would.

Respondent’s president further testified that, some time after the September 28, 2005 bargaining session, he received word that Minton and two other members of the Union’s bargaining committee were “out in the boats” telling employees to vote against the tentative contract, that they could get more money.

Although the person who conveyed this information to Huffman had received it from another source, Huffman later received a corroborating report from the Union’s chief negotiator. Huffman had particular reason to believe the Union official’s information because the Union official also said that Minton and two others had been removed from the Union’s bargaining committee for encouraging employees to vote against the tentative agreement.

The Union membership did reject the proposed contract. However, further bargaining did result in agreement which the employees ratified.

When Respondent’s counsel asked Huffman about his reaction to Minton saying he would support the agreement but then “had, in fact, gone and done exactly the opposite of what he told you he would do,” Huffman testified as follows: “It bothered me quite a bit that somebody could tell me that they’re going to do something and then not do it. . .”

Huffman concluded that Minton had been dishonest when he said that he would support the contract. Huffman decided that this dishonesty made Minton unacceptable to be a master, even on a temporary basis.

When a vessel is underway, its master has total authority over its operation. Huffman testified that in selecting individuals to be masters of Respondent’s vessels, he looks not only at licenses and technical qualifications, “we’ve also got to feel that you’ll never lie to us. . .The character of that individual has to be topnotch.”

APPENDIX A

Huffman regarded Minton as having lied about his intention to support the tentative agreement, and this “dishonesty” make Minton unacceptable. Huffman issued an order that
5 Minton should not be selected for duty as a master, even on a temporary or relief basis.

On two occasions in 2006, the manager responsible for selecting temporary or “relief” masters gave Minton such assignments. However, when Huffman found out about it, he instructed a subordinate, Manager of Marine Operations Charles Martorell, not to let Minton
10 “in the wheelhouse” again.

Martorell’s testimony confirms that he received this instruction and followed it. I find that after this second instruction, Martorall removed Minton from further consideration for duty as a master. Accordingly, I conclude that Respondent did not consider Minton at all in 2007
15 for such assignments.

Neither Martorell nor any other manager told Minton that he had been excluded from consideration. When Minton asked Martorell about the absence of assignments as a relief master, Martorell did not tell him about his instructions from Huffman.
20

Minton credibly testified that on May 23, 2007 and June 4, 2007, he called Martorell’s office and left word on Martorell’s answering machine to seek assignments as a relief master. I so find.

Martorell’s testimony confirms that Minton sought assignments as a relief master during this period in 2007. However, Martorell had some difficulty remembering exact dates. Martorell did testify that on about June 13, 2007, Martorell called him to ask why he had not received assignments as a relief master.
25

Although the record does not establish that Martorell then told Minton about his instructions from Huffman, Martorell did admit excluding Minton from consideration because of Huffman’s instruction. Martorell testified that Huffman told him not to assign Minter such work because Minton “had lied.”
30

Before the end of June 2007, Minton quit his employment. The Complaint does not allege a constructive discharge and the termination of Minton’s employment is not an issue here.
35

Discussion

Respondent has asserted that the 6–month limitation in Section 10(b) of the Act bars the Complaint. That issue will be considered first.
40

Section 10(b) of the Act provides, in part, that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service
45

APPENDIX A

in the armed forces, in which event the six–month period shall be computed from the day of his discharge.” 29 U.S.C. § 160(b).

5

The Complaint alleges that Respondent discriminated against Minton on and after May 19, 2007, exactly 6 months before Minton filed the unfair labor practice charge. The record establishes that Minton sought assignments as a temporary master on May 23, 2007 and at least twice in June 2007. The record further establishes, and I find, that Respondent did not consider Minton for such assignments because of Huffman’s instructions.

10

Those instances clearly fall within the 6–month period before the filing of the charge. However, Respondent argues that Respondent established the policy excluding Minton from consideration long before that time and that continuation of a policy established before the 10(b) period does not constitute a cognizable violation of the Act.

15

Although I have concluded that the policy excluding Minton became effective sometime in 2006, if not earlier, after Huffman reminded Martorell not to assign Minton to relief master duty, I further conclude that Section 10(b) does not bar prosecution of the present complaint. The underlying policy removed Minton from consideration, but each instance in which Minton sought and was denied such an assignment, in circumstances establishing the availability or contemplated availability of such an assignment, constitutes a new employment action.

20

Thus, I conclude that the present case is distinguishable from *Continental Oil Co.*, 194 NLRB 126 (1971) and *Arrow Line, Inc./Coach USA*, 340 NLRB 1 (2003). Those cases involved employers continuing to apply policies established before the 6–month 10(b) period. In *Continental Oil Co.* the policy concerned allocation of overtime. In *Arrow Line* the policy involved how vacation pay would be calculated.

25

30

The present case, however, concerns a policy which continued to prompt new and distinct instances of discrimination. Obviously, there could be no discrimination in the filling of a temporary job opening until that vacancy appeared imminent. An individual cannot be excluded from consideration for a job which doesn’t exist and isn’t about to exist.

35

Therefore, the facts of the present case bring it within the ambit of *The Register–Guard*, 351 NLRB No. 70 (December 16, 2007). Therein, the Board held that the maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1). *Eagle–Picher Industries*, 331 NLRB 169, 174 fn. 7 (2000); *Trus Joist MacMillan*, 341 NLRB 369, 372 (2004); *Control Services*, 305 NLRB 435 fn. 2 & 442 (1991).

40

Accordingly, I reject Respondent’s 10(b) defense.

The next issue to be considered concerns the appropriate framework for analyzing the facts. This case clearly involves action taken against an employee for his conduct during the

45

APPENDIX A

5 course of protected activity. Thus, Respondent admits that it excluded Minton from consideration because of a statement he made, during a negotiating session, that he would support ratification of the tentative agreement. No one can doubt that statements made by an employee member of the Union’s bargaining committee, during a bargaining session, and about the matter being bargained, fall within the protection of Section 7.

10 Respondent argues that in some instances, protected activity can be “discontinuous,” that is, interrupted by an interval of unrelated misconduct. Respondent’s counsel illustrated this argument with a hypothetical situation in which, during a break in negotiations, an employee on the union’s bargaining committee stole a wallet from someone’s coat.

15 It isn’t necessary to speculate here about the merits of this argument when applied to different situations. The argument must be rejected here because it doesn’t fit the present facts.

20 Respondent bases its claim that Minton engaged in “misconduct” on what Minton said at the bargaining table about actions Minton would take in his role as a member of the Union’s negotiating team. Specifically, Respondent claims that Minton lied when he said that he supported the tentative agreement and, by implication, would encourage other employees to ratify it. The statement attributed to Minton – that he supported the proposed contract – hardly constitutes a break in protected activity. It is difficult to imagine activity which more clearly falls within the Act’s protection than the statements an employee makes, during collective bargaining, concerning the performance of his duties as a union negotiator.

30 Accordingly, I conclude that Respondent took action against Minton because of his conduct during protected activity. In these circumstances, it would be inappropriate to analyze the facts under the framework established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

35 The present Complaint actually alleges a refusal to consider violation. Just as a *Wright Line* analysis would not be appropriate, I believe it similarly would be inadvisable to base the analysis on *FES*, 331 NLRB 9 (2000), although aspects of that decision certainly are relevant here.

40 Instead, I will analyze the facts under the line of precedents beginning with the Supreme Court’s decision in *Labor Board v. Burnup & Sims*, 379 U.S. 21 (1964). Those cases stand for the principle that disciplining an employee for misconduct committed during the course of protected activity violates the Act unless the employee has engaged in misconduct so egregious that it removes the Act’s protection.

45 In the present case, Respondent maintains that it did not remove Minton from consideration because of his statement that he would support the contract – a statement clearly protected – but because his subsequent actions proved this statement to have been a lie. The evidence does not establish that Minton lied. It is equally possible that, after talking with other

APPENDIX A

5 employees, he simply changed his mind. However, for the sake of analysis, I will assume for the time being that Minton lied.

10 Respondent’s argument – that honesty is a prime requirement for tug boat masters – must be taken very seriously. A master of a tug boat has tremendous responsibility, and the misuse of that responsibility can lead to injury, death, and to legal liability for the owner under the doctrine of *respondent superior*. Moreover, a master must fill out various paperwork, and must do so honestly.

15 Respondent provided a number of instances in which it had discharged masters who had failed to tell the truth about their actions while on duty as the master of a vessel, presumably a vessel underway. Certainly, it had the right to require that any person considered for assignment as a master be honest.

20 What Respondent has failed to show is that it held a good faith belief that Minton’s statement at the bargaining table demonstrated an inherent lack of honesty which would carry over into Minton’s official duties as the master of a vessel. Respondent took no action to ascertain whether Minton simply changed his mind or intentionally misled it. Thus, Respondent has failed to establish good faith. Accordingly, I conclude that Respondent’s refusal to consider Minton for assignment as a master violated Section 8(a)(1) of the Act.

25 Respondent has raised other issues which will be addressed in the Certification of this bench decision.

30 When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

35 Throughout this proceeding, counsel for Respondent and the General Counsel have demonstrated the highest levels of professionalism and civility, which I truly appreciate.

The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES

5

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

20

WE WILL NOT refuse to consider any employee for assignment to temporary duty as a master because the employee has engaged in union activity or other activities protected by the National Labor Relations Act.

25

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

30

G & H TOWING COMPANY
(Respondent)

Date: _____ **By:** _____
(Representative) **(Title)**

35

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

40

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 9:15 a.m. to 5:45 p.m.

45

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (713) 209-4885