

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

# Advice Memorandum

DATE: April 30, 2001

TO : Richard L. Ahearn, Regional Director  
Region 9

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

SUBJECT: 7UP/RC Bottling Co. of Cincinnati  
Case 9-CA-38213

506-4033-9200  
512-0125-5500  
512-0125-9800  
524-0133-6300  
524-0133-7500  
524-8307

This case was submitted for advice as to whether an employer violated Section 8(a)(3) by refusing to hire an applicant because he might subsequently abandon his job with the employer to hold union office.

### FACTS

7UP/RC Bottling Co. (the Employer) is a member of a multi-employer association of employers in the food and beverage industry. The association has had a long-standing collective bargaining relationship with Teamsters Local 1199 (the Union).

Steven Saunders (the Charging Party) worked in production for Coca-Cola Bottling Co., another member of the employers' association, for 13 years, until he was elected president of the Union in January 1988. Coca-Cola refused to give him a leave of absence from his job, so Saunders' employment with Coca-Cola was terminated. Saunders served full-time as the president. In December 1999, Saunders lost an election for Union president. He then unsuccessfully sought full-time employment with the Union and its International. Saunders then began to apply for jobs with members of the employers' association. This charge attacks the Employer's refusal to hire Saunders, as described in more detail below; the Region has found no merit to charges that Saunders filed against other members of the employers' association.

Saunders applied for a job on July 7, 2000<sup>1</sup>; his application stated that he was seeking a warehouse or

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<sup>1</sup> All events occurred in 2000.

merchandising<sup>2</sup> job, both of which are bargaining unit jobs. The Employer asks applicants what their goals are and why they want to work for the Employer. The Employer's distribution/warehouse manager, Frank Doyle, told Saunders that the jobs he had applied for paid only \$8.40 per hour but Saunders stated that he felt he could eventually get a driver's job, which pays \$15 per hour. Doyle asked Saunders whether he really wanted to work for the Employer, which pays lower wages than other employers do in the industry. Saunders replied that he needed a job and that a job with the Employer would permit him to stay active in the Union. Doyle told Saunders that the Employer was not hiring at that time but recommended that he apply for a job nonetheless.

During the summer, Saunders telephoned Doyle every week or two until September. Doyle usually told Saunders that the Employer had a hiring freeze. During one conversation, Saunders asked if the fact that he had been Union president was causing a problem; Saunders asserts that Doyle replied that someone in upper management had a problem with hiring Saunders. About September 13, Doyle told Saunders that he was not authorized to hire him. Saunders then telephoned General Manager Mark Wendling, who stated that the refusal to hire had been Doyle's decision and confirmed that the Employer would not hire him. The Employer hired other applicants for positions as merchandisers in August and September.

The Employer asserts that, because of high turnover among merchandisers, it seeks to hire applicants who are interested in long-term employment with the Employer. The Employer's hiring records show that of the 45 merchandisers it hired in 2000, 32 quit during the year.<sup>3</sup> Applications of six employees hired during summer 2000 show that many had had short-term employment previously, having worked less than a year for their previous employers. Five of these six employees ceased working for the Employer before the end of the year.

The Employer also asserts that it did not hire Saunders because he was not interested a long-term employment with the Employer; instead, he wanted to work for the Employer so he could run for Union president again.<sup>4</sup> The Employer also

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<sup>2</sup> Merchandisers stock the Employer's products on shelves in stores.

<sup>3</sup> Warehouse employees have a lower turnover rate.

<sup>4</sup> It appears that candidates for Union offices must work for employers represented by the Union.

asserts that the jobs Saunders applied for pay less than half the \$40,000 a year that Saunders had been earning as Union president and claims it has been the Employer's experience that employees who earn significantly less than they did in previous jobs become unhappy and terminate their employment quickly. The Employer has not offered evidence to corroborate this assertion.

Union presidential terms last for three years. The next term will begin in 2003.

#### ACTION

We conclude that a Section 8(a)(3) and (1) complaint should issue, absent settlement.

Initially, we note that applicants for employment are protected by the Act,<sup>5</sup> and that holding office in a union is activity protected by Section 7.<sup>6</sup>

Next, we concluded that Saunders was a bona fide applicant for a job with the Employer. We conclude that the possibilities that, if hired, (1) Saunders might be elected to Union office two and a half years after he applied for a job with the Employer, and (2) he might leave such a job to work full-time for the Union do not deprive Saunders of the protection of the Act. Indeed, the Supreme Court rejected a similar argument in Town & Country Electric, above, 516 U.S. at 96, where it stated:

If a paid union organizer might quit, leaving a company employer in the lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants to move elsewhere. . . . This does not mean they are not "employees."

Next, we noted there is no independent evidence of Employer animus towards the Union, with which it has had a longstanding collective-bargaining relationship. But the Employer's refusal to hire Saunders because of his potential Union activity is inherently destructive of the exercise of Section 7 rights. See, e.g., NLRB v. Great Dane Trailers, 388 U.S. 26 (1967). Therefore, the Employer violated Section 8(a)(3) by refusing to hire Saunders because he might leave employment to become a Union officer unless that

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<sup>5</sup> NLRB v. Town and Country Electric, 516 U.S. 85 (1995).

<sup>6</sup> Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 703 (1983).

possibility is a valid business justification, and therefore a defense, under NLRB v. Fleetwood Trailer Co, 389 U.S. 375 (1967).

The Employer's contention that it wants to hire only applicants with a long-term commitment to the business, in order to reduce its hiring and training costs, is not frivolous. But the evidence of the Employer's hiring practices does not support the Employer's contentions about its hiring policies. The Region has determined that, of the 45 merchandisers the Employer hired during the past year, presumably because the Employer believed that these people were interested in long-term careers with the company, 32 left before the end of the year. Thus, even if the Employer hired Saunders and he were to win election to a Union position and then terminate his employment in 2003, he would still work longer for the Employer than most of the applicants the Employer hired during the past year.

The above factor distinguishes this case from McCain Foods, 236 NLRB 447 (1978). There, the ALJ, who was affirmed by the Board, stated, at 454, that a successor employer who took over a plant in Maine had not acted unlawfully in refusing to hire a predecessor employee who had previously been active in union matters and who applied for a job with the successor in January 1977 when the successor wanted to hire permanent employees. The applicant and her husband informed the successor that the applicant wanted to work long enough to earn money to fly to her son's wedding in California in late May. The successor employer reasonably concluded that the charging party was interested only in temporary, not permanent, employment. Instead, this case is more like Donald A. Pusey, Inc., 327 NLRB 140 (1998), where the Board rejected an employer's contention that it did not hire an applicant for fear that he would not stay long, where the applicant stated that he would work for the employer for at least a year.<sup>7</sup> Here, even crediting the Employer's claim about Saunders' possible job tenure, he would still work longer for the Employer than most of its new hires. Thus, the Employer's contention is not a valid business justification.

The Employer also claims that it believed that Saunders would not stay long in a merchandiser's job because that job paid less than half of what Saunders had earned as president

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<sup>7</sup> See also M.J. Mechanical Services, 325 NLRB 1098, 1107 (1998) (employer's refusal to hire union salt because he might work for a short period and quit at the union's request deemed pretextual where employer had several short-term employees and had used employees supplied by temporary labor agencies).

of the Local Union, and it has been the Employer's experience that people who accept jobs paying significantly less than they had previously made leave those jobs quickly. However, Saunders told the Employer that he hoped to move up to a driver's job, also with the Employer, that paid significantly more. Moreover, the Employer has not proffered any evidence in support of its assertion that employees who accept lower-paying jobs leave quickly. Thus, this case is unlike Wireways, Inc., 309 NLRB 245, 252-53 (1992), where an employer justified its refusal to hire applicants who had previously made significantly more than it had budgeted for wages by providing examples of employees who had previously received higher wages, had accepted lower wages while working for the employer, but had quickly left when they were able to secure better-paying jobs.

In summary, while the Employer's asserted business justifications for refusing to hire Saunders are not frivolous, the evidence of the Employer's hiring practices and Saunders' possible tenure as an employee, even if he were to be elected to Union office in 2003, undermine the Employer's defense. In these circumstances, we conclude that a Section 8(a)(3) and (1) complaint is warranted, absent settlement.

B.J.K.