

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

Advice Memorandum

DATE: October 27, 1997

TO : F. Rozier Sharp, Regional Director
Region 17

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

SUBJECT: Geiger Ready-Mix Co.
Case 17-CA-19265

530-6050-2578

530-6067-2040-8029

530-6067-2050-3500

This Section 8(a)(5) case was submitted for advice on (1) whether Respondent engaged in unlawful direct dealing with employees over how they would be reinstated pursuant to a court enforced Board Order (2) whether Respondent made unilateral changes during these dealings; and (3) [FOIA Exemption 5

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In a prior Board case,¹ the Board found that the Respondent in January 1992 violated Section 8(a)(5) by unilaterally closing a plant temporarily, reassigning unit work to other plants, and laying off unit employees. In July 1996, The D.C. Circuit Court enforced the Board Order with the exception of the Board's remedy requiring reinstatement of all unit employees.² In the Court's view, the Board had to first decide how much unit work the Respondent had improperly transferred out of the plant, at which point the Board could then decide how many employees should be reinstated. In a Supplemental Decision and Remanding Order,³ the Board modified its reinstatement order to reflect the Court's decision,⁴ and remanded the case for the Region to issue an appropriate compliance specification.

¹ 315 NLRB 1021 (1994).

² Geiger Ready-Mix Co. v. NLRB, 87 F.3d 1363.

³ 323 NLRB No. 79 (April 1997).

⁴ The Board ordered Respondent to reinstate employees "who would have done the unlawfully transferred work." Slip Op. at p. 2.

After the Circuit Court decree issued, the parties bargained from July 1996 to January 1997 over compliance issues, but failed to reach agreement. In March 1997, the Respondent sent a letter to unit employees offering an "unconditional opportunity to seek reinstatement" under certain set terms. Respondent later met with employees and required them to sign a form which waived reinstatement if the employee failed to meet certain criteria, and which further stated that the employee agreed that Respondent was not required to offer reinstatement. The instant charge alleges that these Respondent-employee communications were unlawful direct dealing, and also that the reinstatement terms offered to these employees constituted an unlawful unilateral change.

We conclude, in agreement with the Region, that Respondent violated Section 8(a)(5) by dealing directly with employees over the terms of their reinstatement, and also by making unilateral changes, and that the Region may issue a Consolidated Complaint and Compliance Specification.⁵

We recognize that Respondent may argue that direct dealing over reinstatement cannot violate Section 8(a)(5) because that matter is not a mandatory subject of bargaining.⁶ However, the bypassing of the union via direct negotiations with employees may unlawfully undermine the union even where those negotiations deal with subjects over which the union has no bargaining obligation.⁷ In other

⁵ [FOIA Exemption 5

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⁶ See, e.g., Air Express International Corp., 245 NLRB 478, 500 (1979).

⁷ Allied Signal Inc., 307 NLRB 752, 753 (1992) (employee unlawfully dealt directly over subjects outside the scope of a bargaining agreement reopener; irrelevant that the union had waived its own bargaining rights over these subjects because such a bargaining waiver is not consent to direct dealing). See also Lear Siegler, Inc. d/b/a/ Safelite Glass, 283 NLRB 929 (1987).

words, Respondent may well have been under no obligation to discuss reinstatement, but to the extent it voluntarily chose to do so, it could not lawfully exclude the employees' bargaining representative.⁸

[FOIA Exemption 5

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Exemption 5

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⁸ See Pace Industries, Inc. d/b/a/ Precision Inds Inc., Case 26-CA-16326, Advice Memorandum dated December 20, 1994 (employer's settlement discussions with discriminatees, to the exclusion of the charging party union, arguably constituted unlawful direct dealing).

⁹ [FOIA Exemption 5

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¹⁰ [FOIA Exemption 5

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