

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

# Advice Memorandum

DATE: February 17, 1998

TO : Rosemary Pye, Regional Director  
Region 1

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

SUBJECT: Big Y Foods, Inc.  
Case 1-CA-34831

512-0125-7500  
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524-5073-4000

This Section 8(a)(1) case was submitted for advice on whether the Employer unlawfully discharged its supervisor in the reasonable belief that he would not have implemented the Employer's unlawful plan to limit the hiring of predecessor employees to avoid successorship status.

Charging Party Rivers was one of the Employer's District Managers, a high level position within the Employer, and one responsible for numerous stores, 100 store managers and around 5,000 employees.. In early 1996, the Employer decided to acquire five Edwards stores, some of which were unionized. The Employer's stores are not unionized. Rivers' territory as District Manager included the Edwards store in Chicopee, MA; another District Manager oversaw the acquisition of the four other Edwards stores in Connecticut. According to Rivers, District Managers routinely interviewed or approved all candidates for full-time jobs.

For about five or six months prior to Rivers' termination, the Employer discussed the acquisition of the five Edwards stores at the Employer's Wednesday staff meetings, attended by only high-level management including the Employer's co-owners, its CEO and other officers, and its District Managers. Rivers asserts that these meetings discussed the "union issue" regarding the Edwards stores, and participants acknowledged early on that they would have to put some limit on the number of Edwards employees retained in order to "alleviate the union." Rivers asserts that he voiced his personal disagreement with this hiring plan on a regular basis at these weekly staff meetings. Rivers admittedly followed the Employer's "plan", and even hired a supervisor at the Chicopee store who was willing to work with the Employer to identify and avoid hiring vocal

union adherents. Nevertheless, Rivers avers that he openly opposed "the way we were handling the hiring and the percentage..."

About two weeks before Rivers' discharge on August 28, 1996, Rivers had a conversation with the Employer's Vice President Brunelle, who also was Rivers' immediate supervisor. According to Rivers, he told Brunelle that he had met several times with the Edwards employees at the Chicopee store, that there were very few problem people, and that he was "going to have a problem implementing the percentage." Rivers states that he told Brunelle that the Employer didn't have to implement its plan because (1) Edwards employees were good people and hard workers; (2) the Employer itself was a good company that treated its employees well, paying good benefits; and (3) the Chicopee store would not become organized. Rivers assertedly stated that he "had a problem doing that to some of the employees" and "had a problem knowing I wasn't going to be able to do much for these people."

Shortly thereafter, the Employer discharged Rivers. The Employer alleged that Rivers had procured tickets to a company picnic at a discounted rate for employees, but then distributed these discounted tickets to non-employees, at a loss to the company of several hundred dollars. The Region found that this purported basis for the discharge was clearly pretextual.<sup>1</sup> The Region further found that the Employer discharged Rivers, at least in part, because of his opposition to the Employer's unlawful hiring plan.

Rivers filed a state court wrongful discharge lawsuit which has proceeded into discovery. The Region notes that the discovery stage of this suit is scheduled to end in March but may be extended. The Region will consider

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<sup>1</sup> The Region noted that the Employer previously had found Rivers to be an exemplary employee; had earlier issued a memorandum encouraging attendance at the picnic and warning that a poor turnout would reflect badly on the company; that Rivers in the past had been told to bring non-employees to other company sponsored events; and that there was no evidence that Rivers profited from the purchase of these discounted tickets or bought them for any other reason than an attempt to assure the success of the picnic.

whether to postpone issuance of complaint in this case, discussed *infra*, to see whether any further evidence may become available from this state court suit.<sup>2</sup>

The Employer discharged Rivers before any hiring at the Chicopee store took place. As soon as Rivers filed the instant charge in December 1996, the Union filed its own charge attacking the Employer's unlawful hiring plan to avoid successorship.

The Region embarked upon a year-long investigation of the Union's charge, subpoenaing and reviewing many Employer documents and records. The Region was not able to uncover evidence of any individual discrimination against any of the Edwards employee applicants, nor any other evidence of Employer animus throughout the entire recruiting process. The Region finally dismissed the Union's charge, noting particularly that many Edwards employees had found positions within the Edwards company itself. Thus, an insufficient number of Edwards employees had even applied to the Employer to establish successorship status at the acquired stores. In three of the five Edwards stores, a minority of former Edwards employees even applied to the Employer. And there was only a bare theoretical possibility of showing a Union majority in the remaining two stores, even if all the Edwards employees who had applied had in fact been hired.<sup>3</sup>

The Region also notes that it has not been able to corroborate Rivers' testimony. Rivers states that he took notes on the Wednesday meetings, but had to leave these

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<sup>2</sup>. [FOIA Exemption 5

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<sup>3</sup> For example, at one of these two stores, the sum of all the Edward employee applicants would have constituted a bare two-employee majority in that 200 employee store unit. And that assumes all these Edwards employee applicants would have been offered, and would have accepted, positions.

notes at the Employer when he was discharged. Rivers also could not name any Employer official who know about the plan but who no longer works for the Employer.<sup>4</sup>

We conclude, in agreement with the Region, that complaint should issue alleging that the Employer unlawfully discharged Rivers in the reasonable belief that he would not have reliably carried out his assigned role in the Employer's unlawful hiring plan.

In Parker-Robb Chevrolet,<sup>5</sup> the Board overruled a line of cases in which it had previously found that the discharge of a statutory supervisor violated Section 8(a)(1) if it was an "integral part" or "pattern of conduct" of employer activity intended to discourage the Section 7 activity of statutory employees. The Board further stated that, however, that the discharge of a supervisor may violate Section 8(a)(1) in circumstances where such a finding is necessary "to vindicate employees' exercise of their Section 7 rights." *Id.* at 403. The Board then reiterated its long-standing position, unaffected by Parker-Robb, that:

...when a supervisor is discharged for testifying at a Board hearing or a contractual grievance proceeding, for refusing to commit unfair labor practices, or for failing to prevent unionization, the impact of the discharge itself on employees' Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board processes or grievance procedures, compels that they be protected despite the general statutory exclusion.

*Id.* at 404.

The Board stated that all supervisory discharge cases may be resolved through the following analysis:

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<sup>4</sup> The Employer declined to allow the Region to interview its currently employed managers or supervisors.

<sup>5</sup> 262 NLRB 402 (1982).

The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity - either by themselves or when allied with rank-and-file employees - is not unlawful for the simple reason that employees, not supervisors, have rights protected by the Act.  
Id. at 404.

Furthermore, under Oakes Machine, an employer may not discharge a supervisor because of his anticipated testimony in "proceedings within the ambit of the National Labor Relations Act."<sup>6</sup>

We note that the Region has found that Rivers continued to participate in the Employer's unlawful hiring plan. Immediately before his pretextual discharge, Rivers only made clear both his displeasure with the plan, and his view that it was unnecessary. Rivers did not, in haec verba, refuse to partake in the plan, viz., did not refuse to commit an unfair labor practice, as did the supervisor protected in Parker-Robb. Nevertheless, the Region also found, as a matter of fact, that the Employer's asserted basis for Rivers' discharge was clearly pretextual, and that the Employer discharged Rivers in part because it believed that he would not reliably carry out his role in the unlawful plan.

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<sup>6</sup> Oakes Machine Corporation, 288 NLRB 456, 457-458 (1988), citing Orkin Exterminating Company, 270 NLRB 404 (1984) (unlawful to constructively discharge a supervisor because of his expressed intention to testify before the Board on behalf of discharged employee); Glover Bottled Gas Corporation, 275 NLRB 658 fn. 7, 673-674 (1985) (unlawful to discharge a supervisor because of her anticipated testimony before the National Labor Relations Board on behalf of discharged employees), enfd. mem. 801 F.2d 391 (2d Cir. 1986).

We would argue, in agreement with the Region, that this anticipatory discharge was unlawful as falling within the rationale of Parker-Robb. That Board decision bars the discharge of non-employee supervisors who refuse to commit unfair labor practices, in order to allow the Board to protect the Section 7 rights of the employees who would have been unlawfully coerced by these supervisors. This rationale applies equally to this anticipatory discharge, albeit earlier in time. Moreover, the Board found a violation and ignored the analogous anticipatory nature of the supervisor's conduct in Oakes Machine.<sup>7</sup>

In the instant case, the Region has found that Rivers' conduct reasonably led the Employer to believe that Rivers might not have fully effectuated the Employer's unlawful hiring plan, had the Employer retained Rivers in his position overseeing the hiring of a limited percentage of former Edwards employees at the Chicopee store. We recognize that the Region was unable to issue complaint against the plan.<sup>8</sup> However, this may only represent the Employer's success at keeping its plan secret, in circumstances where the Employer was aware of the necessity of concealing its plan, and accordingly confined discussion of the plan among only its highest ranking managers and

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<sup>7</sup> See also Ebasco Services, Inc., 181 NLRB 768 (1970) where the employer demoted supervisors who had sought to appear at a contractual grievance hearing. Although the hearing was postponed and the supervisors did not testify, the ALJ found, and the Board affirmed, that the supervisors' testimony may have been necessary to insure a full hearing of the employee's grievance. The Board held that the supervisors' demotions violated 8(a)(1) because they had a "substantial tendency to inhibit employees in the exercise of one of their important rights under the contract, protected by the Act." Id at 770. That rationale also arguably applies here.

<sup>8</sup> We note, however, that there is some evidence of the 30 per cent plan. According to the Employer's own Chart A, even as revised by the Region, the percentage of Edwards hires compared to the total hired is around 30 percent, and the net startup workforce appears to be 23 percent Edwards employees.

officers. In addition, the failure of the Union to obtain majority status at the five stores, including Chicopee, appears to have been caused by the simple failure of a numerical majority of former Edwards employees to apply to the Employer's stores. Thus, the Region's lack of dispositive evidence, and the Union's lack of majority status, do not directly contradict Rivers' testimony about the circumstances surrounding his discharge.<sup>9</sup>

In sum, we conclude that sufficient evidence exists to issue complaint arguing that the Employer unlawfully discharged Rivers in the reasonable belief that he would not have reliably carried out his assigned role in the Employer's unlawful hiring plan.

B.J.K.

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<sup>9</sup> [*FOIA Exemption 5*]