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

Advice Memorandum

DATE: September 25, 2006

TO : Stephen M. Glasser, Regional Director
Region 7

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

SUBJECT: Skyway Precision, Inc. 524-5079-2800
Case 7-CA-49358 524-5079-2813
524-5079-2874

This case was submitted for advice as to whether employees supplied to a struck employer by labor supply companies were permanent or temporary replacements of economic strikers.

We conclude that the Employer has not met its burden of establishing that the replacement workers hired through the employment agencies were permanent replacements because there was no mutual understanding between the Employer and the replacement employees that the nature of their employment was permanent. Accordingly, the Employer violated Section 8(a)(1) and (3) of the Act by refusing to reinstate all former economic striking employees upon their unconditional offer to return to work.

FACTS

Skyway Precision, Inc. ("the Employer") operates two plants, one in Plymouth, and one in Livonia, Michigan, where it manufactures automotive parts. The two plants are located on the same road, a few miles apart. The Employer's employees are not represented by a labor organization.

In or around February 2006,[1] the International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (UAW), AFL-CIO, ("the Union") began organizing the Employer's production and maintenance employees. Union organizing meetings were held throughout

[1] All dates are in 2006 unless specified otherwise.

February, and the Union claims to have obtained support from a majority of the proposed bargaining unit.

On the morning of March 1, Union representatives and a large group of employees presented a request for recognition to Employer managers at the Plymouth plant. Plant Manager Jenkins told the employees that the Employer would not agree to recognize the Union.[2] At that point, the employees gathered together, briefly discussed Plant Manager Jenkins' response, and agreed to walk off the job. The strike commenced immediately. Approximately 74 employees participated in the strike.[3]

On March 2, the Employer decided to permanently replace the striking workers and notified its managers and supervisors of that decision in an e-mail of that date. On the same day, the Employer contracted with two temporary employment agencies, Seasonal Staffing (also known as Select Staffing) and American Labor Solutions, to provide it with permanent replacement workers.

The Employer had previously used the services of Seasonal to provide it with temporary employees for a short-term assignment in February 2006. This arrangement was made pursuant to Seasonal's standard client services agreement, under which the Employer agreed "not to hire Seasonal Staffing employees until they have worked 90 days on assignment" with the Employer. On March 2, the Employer and Seasonal executed an addendum to their February 3 agreement. The March 2 addendum expressly states that Seasonal would provide the Employer with "permanent employees."[4] The addendum altered no other language under the original agreement.

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[2] The Employer filed a petition on March 22, 2006 in Case 7-RM-1478. The petition is blocked by the instant unfair labor practice charges.

[3] The Region has determined that the strike was an economic strike.

[4] A copy of the March 2 addendum provided by Seasonal during the Region's investigation states, in relevant part, "Seasonal Staffing has committed to supply 27 permanent workers for your day shift and 32 permanent workers for the night shift." However, a copy of the March 2 addendum provided by the Employer has an "X" in place of the numbers

The Employer also met with representatives from American Labor Solutions on March 2. At that time, the Employer executed American Labor Solutions' standard client service agreement and an addendum. The standard agreement provides, in part, that "if any candidate submitted to Skyway . . . by American Labor . . . is hired either directly or indirectly within one hundred and eighty (180) days of the receipt of the resume, Skyway . . . agrees to pay American Labor . . . any guaranteed bonuses, liquidated damages [and other fees]. " The March 2 addendum expressly states that American Labor would provide the Employer with "permanent employees."[5]

On March 6, the Employer executed a second addendum agreement with each of the temporary agencies. The March 6 addendum with Seasonal states, in relevant part, that "[u]pon completion of ninety days of service, the employees hired as permanent workers for Skyway Precision will transfer to the payroll of and become employees of Skyway Precision only or shall be released by Skyway." The March 6 addendum with American Labor contains the same language.

On and after March 2, the Employer began hiring replacement employees exclusively through Seasonal and American Labor. The Employer asserts that all its new hires are required to submit to drug testing and pre-employment physicals and are subject to a 90-day probationary period. The Employer claims that the employment agencies performed the drug testing and physicals on all the replacement employees. However, Seasonal denies that the Employer requested drug testing of the employees referred by Seasonal. American Labor was unable to confirm whether the Employer requested drug testing, and no documentation was proffered reflecting that any of the American

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in Seasonal's copy. No explanation was provided by either party as to the discrepancies between the two documents.

[5] A copy of the March 2 addendum provided by American Labor states, in relevant part, that "American Labor Solutions has committed to supply 3 permanent workers for your day shift and 5 permanent workers for the night shift." As in the case of the addendum with Seasonal, a copy of the March 2 addendum provided by the Employer has an "X" in place of the numbers on American Labor's copy. Again, no explanation was provided by either party as to the discrepancies between the two documents.

Labor referrals submitted to drug tests. There is no evidence that the replacements were required to have physicals.

According to the Employer, once on site the replacements went through training in accordance with its normal practice. Moreover, they were supervised by the Employer's supervisors. For their first 90-days the replacement employees were on the payroll of and paid by the temporary agencies. Once the 90-day period ended, they were to be transferred to the Employer's payroll. Other new employee forms, e.g., job applications or W-2's, bear the Seasonal or American Labor name. Disciplinary and termination records indicate that Seasonal and American Labor administered such employment actions and maintained the records.

In addition, Seasonal requires employees it refers to sign one of two employment agreements, each of which deals with the employee's status. One agreement reads, in part:

> "I understand that I will continue to be an employee of Select Staffing Incorporated indefinitely, or until such time that the company I am placed at chooses to offer me employment with their firm. This offer of employment will not come until after the contractually agreed upon time between the Client firm and Select Staffing Incorporated. I also understand that there is not a guarantee of employment with the Client, and any offer for employment will be subject to the clients company's needs and their assessment of my performance."

The other employment agreement is worded slightly differently, but contains the same general language. American Labor does not use an employment agreement with its employees.

There is conflicting evidence with respect to what the replacement employees were told regarding the permanency of the jobs they accepted. The Employer asserts that the replacements were told their jobs were permanent during their orientation and skip level meetings at the plants and in general during conversations with its managers. Although requested to do so by the Region, the Employer failed to provide any specific evidence regarding when the orientation or skip level meetings were held, who attended, and exactly what the employees were told. However, the Employer maintained that it was its

understanding that the employment agencies told the replacements that the jobs were permanent.[6]

Seasonal asserted that each employee referred to Skyway was told that the job was a temporary to permanent position. Although it did not define the phrase temporary to permanent, Seasonal explained that its business purpose is to provide temporary workers to employers and that most of its jobs are temporary to permanent. According to Seasonal, its goal is to obtain permanent employment for employees after 90 days, although it cannot promise permanent employment to employees it refers to its clients.

Seasonal acknowledged that its representatives did not meet with all employees or have them complete its employment forms before they commenced working at the Employer's. In some cases, Seasonal's referrals to the Employer were handled by telephone, and the employees subsequently came into Seasonal's office to complete an application and other employment forms such as a W-2 form. Seasonal also acknowledged that in some situations employees took friends directly to the Employer's plant and that they commenced working before Seasonal conducted a pre-employment interview.[7]

American Labor also asserted that employees were told that the jobs with Skyway were temporary to permanent positions. American Labor could not confirm whether, during its initial meeting with the Employer, the parties discussed if the employees would be brought on as temp to hires. However, American Labor claims, without being specific, that at some point during this initial meeting it was understood that the Employer wanted employees to be permanent hires. According to American Labor, applicants were told during their interview that the positions with the Employer were temporary to

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[6] The Region’s review of all personnel files from the temporary agencies for employees referred to the Employer on or after March 1 disclosed no documentation that would establish what, if anything, replacement employees were told regarding whether the job was a permanent or temporary position.

[7] Many of Seasonal's personnel files indicate that employees did not complete the employment forms until several weeks after they started working.

permanent positions. American Labor also asserts that its recruiters were told that they should advise the employees that the jobs were permanent.

The Regional Office spoke to seventeen (17) of the approximately 134 replacement employees. The evidence provided by these employees disclosed that the replacement workers received an array of messages regarding the status of their employment with the Employer. [*FOIA Exemption 7(D)*

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Employee No. 1 stated that, during his interview with American Labor, he was told that the position with the Employer could be temporary to permanent job, if they liked you;

Employee No. 2, who was interviewed and hired by a manager of the Employer, stated that he was told if I 'did good' for 90 days then Skyway would review my work and if they wanted to make me a permanent worker they would;

Employee No. 3 stated that, during a March 6 employee meeting at Skyway, he and a group of employees were told that we were 'replacing the picketing workers who had left their work.' Employee No. 3 also asserts that he understood that his status was permanent because in a series of meetings supervisors communicated to him and other workers that we should consider ourselves Skyway Precision workers;

Employee No. 4 stated that no one from Seasonal told her that the position at Skyway was temporary or permanent. However, Employee No. 4 claimed that during a March 2 employee meeting at Skyway, the employees in attendance were told that it was not a temporary job, and that it was a permanent job if we wanted it to be. At the same meeting, they were also told that as long as we were at Skyway, we were considered permanent employees, but we could not be hired in by the company until 90 days;

> **Employee No. 5** stated that during his interview with Seasonal he was told that after 90 days, the workers would be permanent at Skyway. Employee No. 5 also testified that around the middle of March the Employer held meetings with the employees and stated during those meetings that if our work was like the type of work they were looking for then we would be hired in at the 90 day review, but that right now you're temps;
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> **Employee No. 6** stated that no one from Seasonal said anything to me about the job being permanent. Employee No. 6 further stated that when he began working at Skyway, he was told by managers that it was going to be a permanent job, but that he didn't completely believe this because of his experience working at temporary agencies.

The replacements [*FOIA Exemption 7(D)*] also indicate that they received an array of messages regarding their job status. Five employees indicate they were told the following by either the employment agencies or the Employer regarding the permanency of the positions: the job was temporary unless you make it otherwise; the job might be temporary to permanent; the job was temporary to permanent and it was permanent after 90 days as long as everything worked out – i.e., that I had good attendance, etc. and basically, was a good employee; the job could be permanent if I did not miss days, if I worked for 90 days, and if Skyway Precision liked the way that I worked; and this was a permanent job after 90 days and this was a permanent job as long as we showed up for work and got our production done. Two other employees assert that they were not told anything about the temporary or permanent nature of the job, although one states that he understood that he had to put in his 90 days and then there was to be a review. However, he did not understand this to mean that they were permanent workers. Another employee stated that he was told at his interview that this was permanent and that after 90 days he would be converted to Skyway's payroll. Only two replacement workers indicated unequivocally that they were told, either by one of the temp agencies or the Employer, at the time of hire that the position they were accepting was a permanent

job. Finally, two other replacements indicate that they were also told by managers of the Employer that their position was permanent, but it appears that this occurred after the employees made their unconditional offer to return to work.[8]

Between March 2 and March 16, approximately 134 employees were sent to the Employer by the two employment agencies. Initially, turnover amongst the replacement workers was extremely high. Many of the employees worked only one day or a few days, either because they voluntarily quit or because they were discharged. By March 16, approximately 80 replacement employees remained employed by the Employer.

On March 16, the Union and the striking workers decided to make an unconditional offer to return to work. On the morning of March 17, Union representatives and striking workers arrived at the plant with individual letters, signed by the employees, unconditionally offering to return to work. The Union also submitted a letter, on behalf of all strikers, stating that it was ending the strike and that the employees would return to work without conditions.[9]

The Employer did not initially respond to the offers to return to work. During subsequent conversations between their respective attorneys, the Employer informed the Union that it had permanently replaced the striking employees and that it would recall them as positions became available. The Employer has not hired any new

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[8] Some of the other replacement employees also failed to provide sufficient information to establish that the statements regarding their employment status occurred prior to the unconditional offer to return.

[9] The Union asserts that all 74 striking workers presented individual offers to return to work, but the Employer claimed had it received only 56 letters. In any event, the Region has concluded that the Union's March 17 letter on behalf of all strikers was sufficient. In addition, despite the Employer's claims that it received only 56 letters, it appears the Employer is intending to recall all 74 strikers as positions become available.

replacement employees since the strikers offered to return to work.[10]

In May 2006, the Employer began recalling former striking employees. At the time of the Regional Office investigation about 25 former striking employees have been returned to work.

ACTION

We conclude that employees supplied to the Employer during an economic strike by the two labor supply companies were not permanent replacements for the economic strikers. The Employer has not met its burden of establishing that the replacement workers hired through the two employment agencies were permanent replacements because there was no mutual understanding between the employer and the replacement employees that the nature of their employment was permanent. Accordingly, the Employer violated Section 8(a)(1) and (3) of the Act by refusing to reinstate all former economic striking employees upon their unconditional offer to return to work.

An employer violates Section 8(a)(3) and (1) of the Act if it fails to reinstate strikers upon their unconditional offers to return to work, unless the employer can establish a "legitimate and substantial business justification" for failing to do so.[11] An employer's permanent replacement of economic strikers as a means of continuing its business operations during a strike is a legitimate and substantial business justification.[12]

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[10] There is evidence that two replacement employees quit and/or were terminated and were rehired after the strikers' offer to return to work. The Region determined that complaint was warranted regarding the re-hiring of these two employees. [*FOIA Exemption 5*

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[11] See NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967).

[12] Id. at 379.

In the instant case, the evidence indicates that the Employer had the intent to hire permanent replacements as demonstrated by its March 2 e-mail to managers and supervisors and the March 2 addendums to its agreements with Seasonal Staffing and American Labor. However, employer intent alone is not sufficient to meet its burden of establishing replacements were permanent; an employer must show that "there was a mutual understanding between itself and the [replacement] employees that they were being hired on a permanent basis."[13]

Thus, the mere use of the word "permanent" in job offers, as disclosed by the evidence in the present case, is not sufficient to establish the permanence of replacements where such representations are contradicted by other evidence indicating that the replacements were temporary hires.[14] An employer's representations that fail to provide "unequivocal assurance to the replacements that their employment was permanent," or are "susceptible to different interpretations," do not "establish a mutual understanding that replacements were hired as permanent employees.[15]

In Harvey Manufacturing,[16] an employer hired replacement employees from an employment agency during an

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[13] Target Rock Corporation, 324 NLRB 373, 375 (1997); Hansen Brothers Enterprises, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987); See also, Georgia Highway Express, Inc., 165 NLRB 514, 516 (1967), enfd. sub nom. Teamsters Local 728 v. NLRB, 403 F.2d 921 (D.C. Cir. 1968), cert, denied, 393 U.S. 935 (1968)(An employer must establish that replacements were hired in a manner that would "show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.")

[14] Harvey Manufacturing, supra at 468 (1992).

[15] See e.g., Titan Metal Mfg. Company, 135 NLRB 196, 211 (1962) ("[I]t may be a necessary element of 'permanent replacement' that an employer assures employees newly hired during an economic strike that they will not be terminated at the end of the strike to make room for a returning striker....")

[16] 309 NLRB 465 (1992).

economic strike. The employer assured the applicants for replacement positions that the positions were permanent.[17] However, the temporary agency gave the replacements, and required them to sign, documents describing their status as temporary. The Board held that the employer had not met its burden of showing that the replacements were permanent, finding that, "*at best, [the replacements] received an array of mixed signals*."[18] (Emphasis added.) Under these circumstances, the replacement employees were "no more than temporary strike replacements" because the Employer "did not sufficiently establish that there was a mutual understanding between itself and the replacement employees that they were being hired on a permanent basis."[19]

Similarly, in Target Rock Corporation,[20] the Board found that the employer's periodic use of the term "permanent" in its communications with the replacement employees did not overcome the ambiguity created in the employer's other communications indicating that it never intended them to become permanent. Replacements were hired in response to ads, which provided that "[a]11 positions could lead to permanent full-time after the strike." The Board found that the ads created a "reasonable basis for believing that the jobs were not permanent and that a determination as to whether they could become permanent employees was to be deferred until the strike ended."[21] After being hired, replacements were told that "you are considered permanent, at-will employees unless the NLRB considers you otherwise, or a settlement with the Union alters your status to temporary replacement." The Board concluded that this post-hire statement was a "mere invocation of the same equivocal language" which had made the terms of hire ambiguous."[22] The Board concluded that it was not "established on this record that the hires had reason to know, either from filling out the application and notice of

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[17] Id. at 467.

[18] Id. at 468.

[19] Ibid.

[20] 324 NLRB 373 (1997).

[21] Id. at 373-374.

[22] Id. at 375.

employment forms, having to pass drug and alcohol screening tests, or receiving various employment benefits, that they were permanent employees."[23] Thus, the Board determined that the employer and the employees "did not share any mutual understanding that the replacements were hired as permanent employees."[24]

In the present matter, the replacement employees were hired and referred to positions at the Employer's by two labor supply agencies. The normal expectation of employees who are referred by a temporary agency is that the work is temporary.[25] Here, the formal structure of the replacement employees' employment confirms this view. The payroll records show that the replacement employees were not placed on the Employer's payroll, but rather were retained on the payroll of Seasonal or American Labor. Other new employee forms, e.g., job applications or W-2's, bear the Seasonal or American Labor name. Disciplinary and termination records indicate that Seasonal and American Labor administered such employment actions and maintained such records. These documents further demonstrate that the replacement employees' employment with the Employer was temporary.[26]

In addition, Seasonal requires employees to sign an employment agreement acknowledging that the employee will continue to be an employee of the agency, the client will not offer employment to the employee until the contractually agreed upon time between the client and the agency, there is no guarantee of employment with the client, and any offer for employment will be subject to the Client's needs and its assessment of the employee's performance.[27] To the extent that Seasonal employees who were referred to the Employer signed such agreements, this would

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[23] Id. at 374.

[24] Id. at 375.

[25] Aelco Corporation, 326 NLRB 1262, n. 6 (1998)(Board adopted the ALJ's conclusion that "Even the name of the agency, 'Interim,' implies that the employment was temporary or, at least, less than permanent.")

[26] Aelco Corporation, supra at 1265.

[27] American Labor does not require employees it refers to clients to sign an employment agreement.

undermine any assertion that they understood themselves to be permanent employees of the Employer prior to their 90-day review.

While the Employer asserts that the employees were told that their positions were permanent at their orientation and skip level meetings and in general during conversations with managers, it provided no probative evidence to substantiate this contention. Moreover, the probative evidence provided by Seasonal Staffing and American Labor witnesses indicates, at most, that they told replacements that the position was "temporary to permanent."[28] This is consistent with the Seasonal Staffing and American Labor standard contracts, which prohibit clients from hiring employees referred by the temporary agencies for a period of 90-days and 180-days, respectively.[29]

Furthermore, the weight of the evidence provided by replacement employees does not indicate that they were told unequivocally that they were permanent employees. Rather, the totality of the evidence indicates that the replacements were told that they were "temporary to permanent employees" or that they could become permanent employees *if* the Employer was satisfied with their work during the first 90 days at the facility.

Finally we note that, although the Employer requires drug tests and physicals for all of its permanent employees, neither the Employer nor the labor suppliers required such tests for the replacements.[30]

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[28] Some replacements were never told anything about their status as permanent or temporary employees.

[29] We note that the strikers' offer to return was made before the expiration of 90 days.

[30] Since the Employer failed to comply with its regular practices regarding permanent employees and neither the Employer nor the temporary service conveyed information that would cause the replacement employees to understand they were being hired as permanent employees, we do not need to decide whether an employer needs to make other representations to strike replacements to convey permanent

In all these circumstances, we reject the Employer's suggestion that the 90 days the replacements remained on the temporary services payroll was no different than a 90 day probationary period imposed on a permanent replacement. If striker replacements are given permanent positions, the fact that they must pass a probationary period does not defeat their permanent status, as long as the employee accepted the job offer with an understanding that it was a permanent job conditioned on satisfying a probationary period.[31] "Posthire conditions to active service" do not detract from a clear commitment to permanently hire replacement workers.[32] However, the statements here that employees are "temporary to permanent" do not evince a clear commitment to permanently hire replacement workers. Rather, such statements imply that the replacements are temporary employees who may be offered permanent positions at a later date if their performance is satisfactory. Such statements do not support a finding that the employer and the replacements shared a mutual understanding that the replacements were hired as permanent employees, albeit subject to a probationary period.[33]

We recognize that the Employer likely was a joint employer with the temporary agencies and that, while the temporary agencies may have treated the replacements as temporary employees of the Employer for the first 90 days, the Employer considered them as permanent employees of the Employer pursuant to the March 6 addendums. This argument fails, however, because the Board has long held that it is not the intent of the Employer that is controlling. Rather, the Employer must establish that replacements themselves as well

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status in addition to what it would normally convey to permanent hires outside the striker context. See Target Rock 324 NLRB at 374 (Gould, Fox), 376-377 (Higgins concurring).

[31] Harvey Manufacturing, 309 NLRB 465, n. 5 (1992); See, also Solar Turbines, Inc., 302 NLRB 14, 15, citing Kansas Milling Co., 97 NLRB 219, 225-226 (1951).

[32] Solar Turbines, Inc., 302 NLRB at 15.

[33] Harvey Manufacturing, supra at 466 n 5.

as the employer regarded them as having received their jobs on a permanent basis.[34] For the reasons set forth above, it was concluded that the Employer has not met its burden. At most, the replacements received "mixed signals" and "the resulting impression . . . is necessarily ambiguous."[35]

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) of the Act by refusing to reinstate all striking employees upon their March 17, 2006, unconditional offer to return to work.

B.J.K.

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[34] Georgia Highway Express, supra at 516.

[35] Harvey Manufacturing, supra at 468.