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

Advice Memorandum

DATE: March 19, 1996

TO : John D. Nelson, Regional Director
Region 19

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

SUBJECT: Contractors Labor Pool
Cases 19-CA-23957; 23962; 24117

524-0133-7500
524-0167-1033
524-5012-4000
524-5012-7000
524-0167-1033-5000

These cases were submitted for advice as to whether the Employer's facially neutral hiring policy unlawfully discriminates against employees on the basis of their union affiliation.[1]

FACTS

Contractors Labor Pool (the Employer), a temporary employment agency within the construction industry, is a Nevada based company with 13 offices in four western states. It provides journeymen, apprentice craftsmen, and laborers to various construction companies. Its employees remain on its pay-roll, and supplement contractors' work forces for short periods of time. The contractor to which employees are dispatched directs their work.

The Employer effectively operates much like a hiring hall, and is in de facto competition with unions. It provides few fringe benefits, offers wages substantially below union scale, and its clients are generally non-union firms. Additionally, the Employer frequently advertises for electricians in such non-union areas as Idaho, and offers a $1500 moving bonus when applicants relocate. The Employer pays journeymen electricians $17 per hour, while current union scale is approximately $23.67 or $23.95, or about 40% more than the Employer's wages.

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[1] The Division of Operations-Management will determine whether these cases should be consolidated with cases involving this hiring policy in Region 21 that are currently being tried before an ALJ.

According to the Employer, it has developed a series of hiring criteria, which are implemented in its branch offices,[2] and some of its hiring rules are based on various internal or external studies. Among the factors the studies allegedly address are correlations between prolonged absences from the work-force or poor driving records and potential for industrial injury. From June 1993 to June 1994, the Employer conducted an in-house statistical analysis of its hiring process in all crafts. The study allegedly revealed that a disproportionate number of individuals whose most recent pay rates had been more than 30% above the Employer's pay rate worked for the Employer less than the approximately 100 hours necessary to recoup hiring costs. Based on the foregoing, the Employer implemented a rule in November 1994 which provides that the Employer will not hire any individuals whose most recent wages have been more than 30% different from the rate being offered. The Employer allegedly instituted the rule as a means to maintain a steady work force, to eliminate the possibilities of employees leaving because of low wages and of employees directly approaching the Employer's clients to ask for higher wages, and to avoid unnecessary recruiting costs that are incurred when an applicant does not remain on a project the 100 hours necessary to recoup hiring costs.[3]

In January 1995, IBEW Local 191 (Local 191) ran ten applicants through the Employer's hiring process on a completely overt basis when the Employer advertised for electricians. The applicants indicated on their applications that they had previously worked with union-contractors. None of the applicants were hired. According to the Employer, several were not hired because their previous pay rate was more than 30% above the Employer's

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[2] These cases involve the Everett and Seattle, Washington offices.

[3] However, the Employer indicated to applicants, at its orientation programs, that it permitted its employees, if they were on a long project and discovered a better employment situation, to leave as long as they gave it two weeks notice.

pay rate and a few were denied employment because they failed to provide sufficient references.

In May 1995, IBEW Local 46 (Local 46) became aware the Employer was advertising for electricians, and sent 15 applicants to the Employer, all of whom were rejected. Some of the applicants wore Union hats and buttons to the Employer's premises, and indicated on their applications that they had worked with Union-contractors. Further, when Brett Olson, a Union organizer and May 1995 applicant, had applied for employment with the Employer approximately two years ago and wore an IBEW hat, the Employer had told him that his chances of obtaining employment would have been better had he not been wearing it, and that if selected for a project he could not wear an IBEW hat. In addition, according to June 1995 applicant Reed, when the Employer saw he had listed the Joint Apprenticeship Training Committee (JATC) as his employment source, it immediately stated that it would not be able to hire him and refused to recognize the JATC as an employment source. Although Reed stated he could not remember the many specific companies for which he had worked over recent years, the Employer refused his request that it contact the JATC for an accurate list of his job referrals. The Employer indicated that a majority of the May 1995 applicants were rejected because their previous pay rates were 30% above the Employer's pay rate, and a few were rejected because they failed to provide sufficient data on their previous work experience.

On September 15, 1995, when four Local 191 applicants indicated they were IBEW members on their applications, the Employer allegedly rejected them because their past work history showed they had made more than 30% above the Employer's wage rate. According to Craig Boag, one of the four applicants, the Employer stated to them when they initially applied that "if anyone was a general contractor and work was slow, it would be a good place for that person to pick and choose jobs." The general contractors with whom the Employer does business are non-Union and normally earn more than 30% above the Employer's wage rate.[4]

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[4] The Employer revised its hiring guidelines in May 1995 to include "self-employed persons" whose recent earnings were not more than 45% different from its pay rates. It is

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We conclude that a Section 8(a)(3) and (1) complaint should issue, absent settlement, alleging that the Employer's hiring policy unlawfully promotes its discriminatory preference for non-union applicants without a legitimate business justification, that the Employer unlawfully refused to hire the alleged discriminatees based on that policy, and that regardless of motive, its hiring policy is inherently destructive of Section 7 rights.

1. Discriminatory Hiring Policy

We conclude that the Employer's hiring policy was unlawfully implemented to discriminate against Union members in hiring. A prima facie case of an unlawful refusal to hire an applicant generally is proven where (1) an individual files an employment application, (2) the employer refuses to hire the applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against the union activity, and (6) the employer refuses to hire the applicant because of such animus.[5] Animus can be established by direct evidence of hiring disproportionately few union members,[6] or utilizing procedures which disfavor union applicants.[7] Once the proscribed intent is

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unknown whether non-Union general contractors generally make more than this, but there is no indication that this exception from the 30% differential was based on a study of any sort and the Employer has not offered to explain this addition to its hiring guidelines.

[5] KRI Constructors, 290 NLRB 802, 811 (1988) and cases cited therein; Lewis Mechanical Works, 285 NLRB 514, 516 (1987); Big E's Foodland, 242 NLRB 963, 968 (1979).

[6] Fluor Daniel, Inc., 304 NLRB 970, 971 n.10 (1991) (Fluor Daniel I), and cases cited therein.

[7] Ultrasystems Western Constructors, 310 NLRB 545, 555 (1993), enf'd in pert. part 18 F.3d 251 (4th Cir. 1994) (policy of screening out union applicants evidences

established, the causal element is inferred. The employer can rebut a prima facie case by establishing that the applicant would not have been hired even absent the discriminatory motive.[8]

In D.S.E. Concrete Forms,[9] the Board affirmed the ALJ's conclusion that the employer violated Section 8(a)(3) and (1) when it discriminatorily refused to consider for hire employees whom it suspected of union sympathies. In doing so, the Board considered the effect of the employer's word-of-mouth hiring practices. Thereunder, the employer first gave preference to existing employees at its other jobsites. Second, the employer gave preference to employees available for transfer from another employer with whom it had a management contract. Third, the employer relied on referrals from its existing employees.

The Board specifically noted the ALJ's conclusion that "the practical effect of the Respondent's first three job criteria was to preclude employment of union members at the jobsite."[10] The ALJ rejected the respondent's defense that, even if animus could be shown, none of the union applicants would have been hired "in any event" because none met the respondent's hiring requirements, since the "practical effect of the [employer's hiring criteria] was to preclude employment at the jobsite by union members."[11] Rather, the ALJ concluded that the respondent's hiring criteria reinforced the General Counsel's contention that the applications were not considered because the applicants were union members and that the employer was "pursuing a pattern or practice by which it systematically declined to

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animus); KRI Constructors, 290 NLRB at 811 (policy of hiring more expensive, out-of-state applicants is against self-interest and evidences animus).

[8] KRI Constructors, 290 NLRB at 811, citing NLRB v. Transportation Management Corp., 462 U.S. 393, 399-403 (1983).

[9] 303 NLRB 890 (1991).

[10] Id. at 890 n.2.

[11] Id. at 897-98.

consider any union members for employment."[12] In addition, the ALJ found evidence of animus based on a supervisor's repeated anti-union statements to union applicants and the employer's later rejection of applications proffered by the union.[13]

Similarly, in Ultrasystems Western Constructors,[14] the Board held that the employer, which harbored anti-union animus, violated Section 8(a)(3) by maintaining a hiring policy which screened job applicants to uncover suspected union sympathizers, and by refusing to consider applicants for employment based on its conclusion that they were union sympathizers. The Board affirmed without comment the ALJ's conclusion that, although the practice of hiring employees who follow supervisors and managers from job to job was not "unlawful in itself, it is evidence of an affirmative preference for individuals known to be both competent and to be free of any union connection."[15]

Based on the rationale in the foregoing cases, we would argue here that the Employer's hiring policy violates Section 8(a)(3) and (1) because the Employer has exhibited animus toward Union applicants, its hiring policy disparately and adversely impacts on Union members, and the Employer uses the hiring policy as a subterfuge to mask hiring discrimination against Union members.[16] The Employer

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[12] Id. at 898.

[13] The ALJ's conclusions which the Board adopted do not specifically hold that the employer's hiring practices violated Section 8(a)(3). The General Counsel apparently had not argued that the hiring practices were themselves violative.

[14] Ultrasystems Western Constructors, 310 NLRB 545, 555 (1993), enf'd in pert. part 18 F.3d 251 (4th Cir. 1994).

[15] 310 NLRB at 554.

[16] We would liken the Employer's preference for employees whose prior wages are no more than 30% than its wages to a word-of-mouth hiring policy.

clearly was aware that the alleged discriminatees were Union members. The discriminatees who submitted applications indicated Union affiliation by listing their previous work history with Union-contractors. A number of discriminatees wore IBEW hats and buttons to the Employer's premises. Not one of these individuals was offered a position with the Employer. There is evidence from a discriminatee that the Employer immediately stated, when it saw he had listed the Union-affiliated JATC as his employment source, that it would not be able to hire him and refused to recognize the JATC as an employment source.[17] Furthermore, the Employer recruited in renowned non-Union areas, such as Idaho, and offered a $1500 moving bonus to prospective out-of-town employees, rather than using local Union applicants. As to the Employer's stated practice of not hiring any individuals whose most recent pay-rates have been more than 30% different from the rate it was offering, we note that the Employer encouraged general contractors, who are non-Union and earn more than 30% above the Employer's wage rate, to apply for employment. In light of the foregoing evidence, and the fact that a disproportionate number (almost all) of Union-affiliated applicants were not hired because the Employer offers journeymen electricians $17 per hour, and the current Union scale of about $23.67 or $23.95 is around 40% more than the Employer offers, we conclude that the Employer's hiring policy intentionally and effectively discriminates against Union-affiliated applicants in violation of Section 8(a)(3) and (1).[18] Therefore, the Region can establish a prima facie case that the Employer unlawfully refused to hire or

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[17] We note that the Employer's refusal to contact the JATC for the applicant's recent referrals, a non-burdensome task, when he explained his inability to recall specific companies further evidences its animus.

[18] We do not conclude, using the above analysis, that the Employer's hiring policy is unlawfully discriminatory on its face. The Board in Ultrasystems endorsed the ALJ's conclusion that hiring of a "following" is not unlawful in itself, "although it is evidence of an affirmative preference for individuals known to be both competent and to be free of any union connection." 310 NLRB at 554.

consider for hire the alleged discriminatees based on that policy.

We further conclude that the Employer's asserted lawful reason for the failure to hire, i.e. its facially neutral hiring policy, is insufficient to outweigh the prima facie case. The Employer contends that it declined to hire the alleged discriminatees simply because they failed to provide sufficient references or because their previous pay rate was more than 30% above the Employer's pay rate. The Employer further contends that denying employment to such individuals allows it to maintain a steady work force, to eliminate the possibility of employees leaving because of low wages and directly approaching the Employer's clients to ask for higher wages, and to avoid unnecessary recruiting costs that are incurred when an applicant does not remain on a project for the 100 hours necessary to recoup hiring costs. This alleged business distinction is pretextual. General contractors earn more than 30% above the Employer's wage rate, yet the Employer actively sought them for employment. General contractors would be just as likely as the alleged discriminatees to leave because of low wages, to directly approach the Employer's clients to ask for higher wages, and to stay on a project less than the 100 hours necessary to recoup hiring costs if they are awarded work on other projects. Nothing in the studies, which we have not received, apparently supports any other conclusion. Moreover, the Employer indicated to alleged discriminatees that it permitted its employees, if on a long project and they discovered a better employment situation, to leave as long as they gave two weeks notice.[19] Further, the Employer's willingness to pay a $1500 bonus for electricians relocating from non-Union areas belies its asserted need for the hiring policy's 30%-differential requirement to recoup recruiting costs of $1700 (100 hours of work at $17 per hour). Accordingly, we conclude that the Employer's alleged business justification for its hiring policy is pretextual and insufficient to defeat the prima facie case.

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[19] Since the Employer's above actions are inconsistent with its asserted business justification, the validity of its entire in-house statistical analysis of its hiring process is drawn into question. [*FOIA Exemption 5*
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J. E. Merit Constructors[20] is distinguishable from the instant case. The Board in that case adopted an ALJ's decision that the employer had not violated Section 8(a)(3) by failing to hire any of the employees whose applications were given to it by a union business agent, even though the employer had previously expressed an aversion to hiring union members and even though referral of employees by supervisors was the employer's first and main source of applicants.[21] The Board affirmed, without comment, the ALJ's finding that the General Counsel had failed to prove that the employer was aware of the union affiliations of the alleged discriminatees or was aware that the union business agent had filed the applications, and there was no evidence of either a sudden change in hiring procedure or efforts to avoid certain areas in advertising the jobs. The ALJ, in essence, found that the respondent's word-of-mouth hiring practices were justified by business considerations.[22]

Here, in contrast, there is ample evidence that the Employer knew that the discriminatees supported the Union since they indicated their union affiliation on their applications and wore IBEW hats and organizing buttons to the employment interviews. Second, the hiring practice was not alleged as unlawful in J. E. Merit and thus the ALJ's comments on the legitimacy of that hiring practice are dicta. [*FOIA Exemption 5*

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Wireways, Inc.,[23] is also distinguishable from the instant case. The Board there affirmed, 309 NLRB at 246,

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[20] 302 NLRB 301 (1991).

[21] Id. at 306-08.

[22] Ibid.

[23] 309 NLRB 245 (1992).

the ALJ's conclusion that the employer, which had otherwise demonstrated union animus, nevertheless had not violated Section 8(a)(3) by refusing to hire union-affiliated electricians because the applicants either had sought or previously received wages that exceeded the budgeted wages that the employer was offering. The employer had stated that experience had shown him that if he hired employees for less than they had previously earned, they were either less productive or likely to leave for the first job that paid more. Id. at 250. In evaluating this defense at 252, the ALJ stated, "...over and above the obvious common sense application of human nature, the record does disclose that on several occasions that very result occurred." After giving examples provided by the employer, the ALJ stated that the employer's hiring policy was therefore "an acceptable business practice." Id.

In Wireways, unlike here, the evidence showed that the employer adhered to its hiring policy. In the instant case, the Employer departed from its policy by encouraging general contractors, who earn more than 30% above its wage rate, to apply for employment. The Employer's hiring policy, as implemented, also recognizes that employees who receive higher paying job opportunities will leave during a project and, if two weeks notice is given, apparently visits no great harm to the Employer or its clients. Further, as discussed above, the Employer's recruitment practices and payment of relocation bonuses call the need for and legitimacy of the hiring policy, and the studies on which it supposedly is based, into serious question.

Accordingly, the Employer discriminatorily maintained a hiring policy and practice which screened job applicants to uncover suspected Union supporters and unlawfully refused to hire or consider the discriminatees for employment, and the Employer's hiring policy is pretextual and has no legitimate business justification sufficient to outweigh the prima facie case.

2. Inherently Destructive Hiring Policy

We further conclude that the Employer's policy of not hiring individuals whose most recent wages have been more than 30% different than its pay rate, thereby precluding Union-applicants from obtaining employment, was unlawful as inherently destructive of employees' Section 7 rights.

In NLRB v. Great Dane Trailers,[24] the Supreme Court held that if the employer treats employees engaged in Section 7 activity differently from other employees, an 8(a)(3) violation can be found, even in the absence of motive, if the conduct is inherently destructive of employee rights or it adversely impacts employee rights without some overriding business justification. The Court found a violation of Section 8(a)(3) when the employer refused to pay accrued vacation benefits to striking employees, as opposed to nonstrikers, even in the absence of any evidence of an anti-union motive:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[25]

A finding that an employer's conduct is inherently destructive does not conclude the inquiry under this analysis. Rather, the Board must additionally weigh in each case any asserted business justification against the invasion of employee rights in order to determine whether the employer has committed an unfair labor practice.[26] Thus, the Board's task is to:

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[24] 388 U.S. 26 (1967).

[25] Id. at 34. See also NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Brown, 380 U.S. 278 (1965); American Ship Building Co. v. NLRB, 380 U.S. 300 (1965).

[26] International Paper Company, 319 NLRB No. 150, slip op. at 15 (Dec. 18, 1995).

> weigh[] the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and [to] balanc[e] in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.[27]

In the instant case, separate and apart from whether the Employer's hiring policy is unlawfully motivated, the Employer's hiring policy is inherently destructive of employment rights of Union applicants. The Employer refuses to hire individuals whose most recent pay rates have been more than 30% different from its pay-rate. In this regard, we note that Union contractors' wage rates are clearly more than 30% above the Employer's. As a result, all individuals who have previously been employed with a Union contractor are precluded from obtaining employment with the Employer. Thus, the net effect of the Employer's hiring policy is that non-Union applicants are hired and Union applicants are not. Therefore, the Employer's hiring policy adversely impacts employment conditions of Union applicants based on the prior exercise of their Section 7 right to work for employers under contracts negotiated by the Union. In weighing the Employer's asserted business justification against the invasion of employee rights, we conclude, as previously set forth, that the Employer's business justification for its hiring policy is pretextual and does not outweigh the adverse impact on Section 7 rights.

In sum, we conclude that the Region should issue a Section 8(a)(3) and (1) complaint, absent settlement, to allege that the Employer's hiring policy was implemented to discriminate against applicants based on their Union affiliation, that the hiring policy is also inherently destructive of Section 7 rights, and that the Employer unlawfully failed to hire the named discriminatees because of their membership in Local 191 and Local 46 based on that policy.

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[27] Id. at 15, quoting from Erie Resistor (citations omitted).

B.J.K.