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

Advice Memorandum

DATE: May 30, 2002

TO : Gary T. Kendellen, Regional Director
J. Michael Lightner, Regional Attorney
Edward Peterson, Assistant to Regional Director
Region 22

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

SUBJECT: KEMTEC
Case 22-CA-24772

524-0133-7500
524-0167-1033
524-5012-4000
524-6708-3700
524-6740-5000

This case was submitted for advice on whether the Employer (1) violated Section 8(a)(1) by implementing a policy whereby applications are only valid for 30 days if the policy was implemented to avoid hiring union members or affiliates who may attempt to "salt" the Employer's workforce, and (2) violated Section 8(a)(3) and (1) by refusing to hire union organizers because of their union membership or affiliation. We conclude that the Employer violated Section 8(a)(1) by implementing policies that consider applications for only 30 days, require that applicants appear in person, and preclude hiring individuals who intend to work concurrently for more that one employer, because these policies were implemented to, and tend to, restrict employees from engaging in protected activity. However, there is no Section 8(a)(3) violation for refusing to hire union organizers because the Employer can meet its burden under Thermo Power[1] by showing that it would not have hired the union organizers even absence their union activity.

FACTS

Kemtec, Inc. (the Employer) was awarded a construction contract to rebuild and modify an existing paper machine at a Spotswood, New Jersey plant. The Employer began work on the project in the fall of 2000 and completed the project in September 2001. The Employer employed a small number of pipefitters and welders each month throughout the project.

In hiring employees for the project, the Employer adhered to the following policy, with preferences being listed from highest to lowest:

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[1] 331 NLRB No. 20 (2000).

1. Former employees.
2. Those referred by supervisors.
3. Those referred by independent labor broker, Ben Farr and Associates.
4. Those who applied at the worksite between the hours of 7:00 a.m. and 8:00 a.m. whenever the Employer posted a for hire sign.
5. The Employer's telephone waiting list.

Section 2.5 of the hiring policy also states that it is the Employer's policy to refuse to hire any individual who intends to work simultaneously or concurrently for more than one employer.

In May 2001,[2] Plumbers Local 9 (Union) organizers Tighe and Dill noticed a posting by the Employer for plumbers/pipefitters. Sometime after 9:00 a.m. on May 4 Tighe, a welder with 28 years of experience, and Dill, a pipefitter with 22 years of experience, went to the worksite to apply for a position. Both Tighe and Dill were wearing Union insignia on their hats and shirts. They spoke with the security guard and site safety official about applying for a position. The safety official contacted the piping superintendent who told him that there were openings but Tighe and Dill needed to fill out applications. When Tighe and Dill asked for applications, the security guard said he did not handle applications. They then asked for a telephone number to call so that they could be placed on the telephone waiting list, the safety official instead gave them a telephone number to contact construction manager Duffy. Tighe called the number but it was out of service.

Sometime after 9:00 a.m. on May 8, Tighe and Dill returned to the worksite with organizer Feasel, a pipefitter with 18 years of experience. Again, they spoke with the security guard and safety official who again contacted the piping superintendent. The piping superintendent said that the Employer had just hired two new employees. The Union organizers told the security guard that they were not able to reach Larry Duffy using the telephone number given to them on May 4. They were then given a telephone number to call so that they could be placed on the telephone waiting list.

That same day, Tighe and Feasel called the telephone number to have their names place on the telephone waiting list. When Tighe called he asked if the Employer was hiring, the receptionist asked if he had previously worked

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[2] All dates are 2001 unless otherwise noted.

for the Employer. Tighe told her no and asked if he could drop off his resume. The receptionist said that currently there were no openings for plumbers/pipefitters, but she would take his name, telephone number and experience and place him on the telephone waiting list. Tighe asked how many were ahead of him on the waiting list. The receptionist said she did not know because she did not have the list with her. Tighe did not identify himself as a Union organizer or as being affiliated with the Union.[3] When Feasel called, the receptionist asked him for the same information and gave him the same message about being placed on the telephone waiting list. Feasel did not identify himself as a Union organizer or as affiliated with the Union.[4]

On May 9, Dill called, asked the receptionist about a job, and had essentially the same conversation as Tighe and Feasel. Dill also asked how long would his name be kept on the list, and the receptionist said indefinitely. Dill did not identify himself as a Union organizer or as being affiliated with the Union.[5]

The next day Dill called back and inquired about openings. He also asked if they had found the telephone waiting list. The receptionist transferred Dill's call to another Employer representative who told him that he was on the list but she could not tell him where. She told Dill he would remain on the waiting list indefinitely. He asked about filling out an application. The representative explained the Employer's hiring policy to him. When Dill replied that he knew some people that worked at the site, the representative said if she knew the names of the individuals, they could "check into it." Dill did not provide her with any names.

Since placing the Union organizers on the waiting list, the Employer hired many plumbers and pipefitters, including several shortly thereafter. On August 29, the Union filed a charge alleging that the Employer refused to hire Tighe, Dill and Feasel because of union affiliation.

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[3] Tighe's name did appear on the telephone waiting list that the Employer provided to the Region.

[4] Feasel's name did not appear on the telephone waiting list that the Employer provided to the Region.

[5] Dill's name did appear on the telephone waiting list that the Employer provided to the Region.

On November 20, Roger Melton, a former supervisor for the Employer, contacted Tighe about becoming a member of the Union. He also told him that he had a copy of the Employer's training manual for supervisors and that the manual included instruction on how to the keep the union out. On November 26, Melton gave Tighe a copy of the manual.

The manual includes a section on "SALTING-FIGHT BACKING and COMET." In response to the question, "Are there legitimate practices I can use to avoid salting?", the manual states:

> Yes, for example, you can limit the consideration time-period for applications. You can also have a nondiscriminatory policy against accepting group applications or xeroxed forms by requiring applicants to appear in person. (The business justification for this policy includes the prevention of tampering with applications and being sure jobs go to individuals who accurately represent themselves and their need for employment).

ACTION

First, we conclude complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by implementing hiring policies that consider applications for only 30 days, require that applicants appear in person, and preclude hiring individuals whose intent is to work simultaneously or concurrently for more that one employer, because the policies were implemented to and tend to restrict employees from engaging in protected activity. Second, we conclude that the allegation that the Employer refused to hire Union organizers because of their union membership or affiliation should be dismissed, absent withdrawal, because the Employer can show that it would not have hired the organizers even absence their union activity.

When an employer implements a rule in order to restrict or prohibit employees from conducting protected organizing activity, it violates Section 8(a)(1).[6] Additionally, if an employer applies a discriminatorily motivated rule to union applicants in refusing to hire them, the employer may violate Section 8(a)(3).[7]

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[6] Tualatin Electric, Inc., 319 NLRB 1237, 1237 (1995), citing The Miller Group, 310 NLRB 1235(1993), enfd. mem 30 F.3d 1487 (3d Cir. 1994).

An employer does not violate the Act by refusing to hire union applicants if it applies valid hiring criteria evenly, and the Board has held that a rule stating that applications for employment will remain active for only 30 days is lawful.[8] However, as stated above, if the purpose of the 30-day rule is to restrict employees from conducting protected activity such as salting, then the rule is discriminatorily motivated and the rule is unlawful.

In Niblock Excavating, Inc., above, the Board held that the employer violated Section 8(a)(1) when it changed its policy of retaining applications for six months to only 30 days because the change was motivated by union activity.[9] In an attempt to organize the employer, a union organizer sought employment with the employer before the rule change. The employer did not hire the organizer and changed the rule shortly thereafter. The Board reasoned that the employer made the change in response to the organizer's attempt to gain employment and thus the rule change, which was directed at protected activity, was discriminatorily motivated.[10]

Similarly, in Brandt Construction Co.,[11] the Board held that the employer violated Section 8(a)(1) when it changed its hiring policy for prounion applicants. Because the union was attempting to "salt" the company, the employer began requiring a photo ID from prounion applicants before taking their applications. The employer also took applications after the posted time from non-prounion applicants while restricting prounion applicants to filing their applications only during the posted time.[12] The Board reasoned that since the employer changed and made more onerous its policy for prounion applicants compared to non-prounion applicants, the conduct was directed at protected activity and was discriminatorily motivated.[13]

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[7] Niblock Excavating, Inc., 337 NLRB No. 5, slip op. at 12 (2001).

[8] See, Masiongale Electric-Mechanical, Inc., 337 NLRB No. 4, slip op. at 6 (2001).

[9] 337 NLRB No. 5, slip op. at 12.

[10] Id.

[11] 336 NLRB No. 58 (2001).

[12] Id., slip op. at 11.

[13] Id., slip op. at 12.

In the instant case, the Employer clearly demonstrated its intent to restrict the Union from the protected act of salting.[14] Like the employers in Niblock Excavating and Brandt Construction, the Employer maintains in a supervisory instruction manual (quoted above) both the 30-day rule and the rule requiring applicants to appear in person in an explicit attempt to avoid salting. Whether in response to past attempts by the Union to salt or to curtail future union activity, the Employer implemented the rules to restrict or prohibit employees from conducting protected activity, and therefore violates Section 8(a)(1). Additionally, Section 2.5 of the Employer's hiring policy precludes hiring individuals whose intent is to work simultaneously or concurrently for more than one employer, which necessarily would eliminate paid union organizers as prospective employees.[15] Thus, we conclude that the Employer implemented these policies to restrict or prohibit union activity in violation of Section 8(a)(1).

As to the Section 8(a)(3) allegation, in Thermo Power, above, the Board set forth the elements that the General Counsel must meet to establish a *prima facie* discriminatory refusal-to-hire violation, and also set forth the burdens for the respective parties.[16] To establish a prima facie case, the General Counsel must show, under the allocation of burdens set forth in Wright Line,[17]

> (1) that the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements foe the positions for hire, or in the alternative, that the employer hod not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.[18]

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[14] See, e.g., NLRB v. Town & Country Electric, Inc., 516 U.S. 85, 90-91, 95 (1995).

[15] Id.

[16] 331 NLRB No. 20, slip op. at 4.

[17] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989(1982).

Once the General Counsel establishes a prima facie case, the burden shifts to the respondent to show that, absent union activity or affiliation, it still would not have hired the applicants.[19]

Applying the standard set forth above to the instant case, we conclude that the Employer did not violation Section 8(a)(3) and (1) by refusing to hire the union organizers. In Kanawha Stone Co.,[20] the Board held that the employer did not unlawfully refuse to hire union members even though the record showed that union applicants were not hired or considered for hire and that the employer harbored antiunion animus. The union there attempted to gain employment for its members on several occasions. The employer never contacted any of the union members about a job but hired 36 employees during the period the union members sought employment.[21] However, the record showed that except for prior occasional mass hirings, superintendents hired at the jobsite based on that site's particular needs without reference to an applicant list, and that the employer relied exclusively on hiring friends, relatives or business acquaintances of existing employees. Furthermore, the employer posted a sign stating that it was not hiring during the time that the union members visited the company to apply for work. The employer showed that the applicants would not have been hired absent their union activity since the company rarely hired from a list of applicants and because the union members did not try to apply at a time when the company was in a hiring mode. The Employer provided a chart reflecting the name, date of hire and the basis on which it hired employees during this time.[22] Therefore, the Board held that the employer had shown that it would not have hired the prounion applicant even absent their union activity.

Similarly, in Brandt Construction Co., above, the Board held that although the employer violated Section 8(a)(1) by changing its hiring policy to restrict prounion applicants from filing applications, the employer rebutted the General Counsel's prima facie refusal-to-hire

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[18] Thermo Power, 331 NLRB slip op. at 4.

[19] Ibid.

[20] 334 NLRB No. 28 (2001).

[21] Id., slip op. at 2, 10.

[22] Id., slip op. at 3, 10.

allegation.[23] In that case, the employer began requiring a photo ID from prounion applicants before taking their applications. The employer also took applications after the posted time to apply from non-prounion applicants while restricting prounion applicants to filing their applications only during the posted time.[24] However, the employer had a lawful hiring policy that gave preference first to current employees, then to former employees and finally to those recommended by supervisors or current employees. The record showed that of all the prounion applicants applying for work, none were in any of the preferential categories and that all the employees hired were in one of the three categories. Therefore, the Board held that the employer had shown that it would not have hired the prounion applicant even absence their union activity.[25]

In the instant case, the evidence shows that the Employer would be able to rebut our prima facie case. Thus, the Employer hired several employees each month for the positions that the Union organizers were seeking. The Employer even hired some shortly after the organizers sought positions with the Employer. Additionally, no one disputes the fact that the Union organizers had the experience and training for the positions. Tighe is a welder with 28 years of experience, Dill a pipefitter with 22 years of experience, and Feasel a pipefitter with 18 years of experience. Furthermore, the Employer's hire chart shows that several individuals were hired as pipefitters or welders from the time the union organizers started seeking employment with the Employer until the Employer finished the project. Finally, as concluded above, the Employer implemented rules to avoid salting by the Union, and that was evidence of antiunion animus.

However, as in Kanawha Stone and Brandt Construction, the Employer has a preferential hiring policy and has provided evidence to show that it adhered to its policy. The Employer placed the Union organizers on the telephone waiting list because they did not fit into one of the preferential categories. The record shows that during the time the organizers sought employment the Employer hired approximately a dozen individuals and that all were in the top three categories in the Employer's hiring policy. Furthermore, like the applicants in Kanawha Stone, the

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[23] 336 NLRB No. 58.

[24] Id., slip op. at 1-2, 8-9.

[25] Id., slip op. at 2.

Union organizers attempted to apply for work during a time when the Employer was not taking applications. On each of the days that the organizers went around 9:00 a.m. to the worksite, it was after the time (between 7:00 and 8:00 a.m.) posted to take applications.

However, even if the organizers had filled out applications on their visits to the worksite, they would not have been hired because during May 4 and May 12, the Employer did not hire anyone from the telephone list. Therefore, the Employer can show that it would not have hired the organizers, even absence their Union activity.

Accordingly, absent settlement, complaint should issue alleging that the Employer violated Section 8(a)(1) by implementing its policies of considering applications for only 30-days, requiring that applicants appear in person, and refusing to hire individuals whose intent is to work simultaneously or concurrently for more that one employer, because it implemented the policies to restrict employees from engaging in protected activity. However, absent withdrawal, the charge allegation that the Employer refused to hire Union organizers because of their Union activity or affiliation should be dismissed because the Employer can meet its burden under Thermo Power by showing that it would not have hired them even absent their Union activity.

B.J.K.