

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

Advice Memorandum

DATE: August 31, 2006

TO : Robert W. Chester, Regional Director
Region 18

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 506-6070-2500
506-6070-5000

SUBJECT: Brockway Mechanical and Roofing Co. 506-6080-0800
Cases 18-CA-17943, 17963, 18005 506-6090-0500

The Region submitted these Section 8(a)(3) and (1) cases for advice¹ regarding whether the Employer could meet its burden under FES² to show that it would not have hired and/or considered for hire six Union agents, even absent their Union affiliation, because their communications to third parties lost the protection of the Act under Jefferson Standard.³

We conclude that, absent withdrawal, the Region should dismiss the allegations that the Employer unlawfully

¹ Plumbers Local 33 has alleged in Case 18-CA-17943 that the Employer refused to hire and/or consider for hire Union Agents A, B, and C. Sheet Metal Workers Local 45 has alleged in Case 18-CA 17963 that the Employer refused to hire and/or consider for hire Union Agents D, E, and F. These are the allegations submitted for advice.

Additionally, in both Cases 18-CA-17943 and 18-CA 17963, Plumbers Local 33 and Sheet Metal Workers Local 45 alleged that the Employer violated Section 8(a)(3) and (1) by a discriminatory change in employment practices. The Region has found merit to those allegations, and will consolidate the allegations with the existing complaints, described in n.4, below.

Finally, Sheet Metal Workers Local 45 alleged in Case 18-CA-18005 that the Employer violated Section 8(a)(1) by interrogating Union applicants and by telling Union applicants that they would not be hired because of their protected concerted activities. The Region will dismiss those allegations if the Union's communications at issue here are unprotected.

² FES, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

³ NLRB v. IBEW Local 1229 (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953).

refused to hire and/or consider for hire Union Agents A, B, C, and D. The Region has found that the Employer excluded Union Agents A, B, C, D, E, and F from the hiring process based in part on antiunion animus. The Employer would, however, be able to meet its FES burden of establishing that it would not have hired and/or considered for hire Union Agents A, B, C, and D, despite their union activities or affiliation. Thus, regardless of any animus, the Employer would have refused to hire and/or consider for hire those four applicants because of their November and December letters to third parties and their February handbilling, which were unprotected under Jefferson Standard because they were not tied to a labor dispute. Because the communications were unprotected in this regard, we need not decide whether the communications were also unprotected because they disparaged the Employer.

On the other hand, we conclude that the Region should consolidate with the existing complaints, absent settlement, the allegation in Case 18-CA-17963 that the Employer violated Section 8(a)(3) and (1) by refusing to hire and/or consider for hire Union Agents E and F. The Employer could not meet its FES burden of establishing that it would not have hired and/or considered for hire Agents E and F absent their Union affiliation, because Agents E and F did not participate in the Union's unprotected communications, and therefore those communications could not have motivated the Employer's failure to hire and/or consider them for hire.

FACTS

A. Background

Brockway Mechanical & Roofing Co. ("the Employer") is an Iowa gas and pipefitting subcontracting firm. The Employer's current Iowa jobsites include two high schools in Ames and Urbandale, and a building project in Huxley. Beginning in spring 2005, Plumbers Local 33 and Sheet Metal Workers Local 45 (collectively, "the Union") began a coordinated organizing drive at the Employer. The Union has filed numerous charges against the Employer, and the Region has issued complaint on several allegations.⁴

⁴ The Region issued complaint against the Employer in Cases 18-CA-17811, 17812, 17870, and 17891, filed by Plumbers Local 33, Sheet Metal Workers Local 45, and Plumbers Local 125, alleging several 8(a)(1) violations, including interrogation of applicants, threats, and a ban on Union agents talking to employees.

B. Between November 2005 and February 2006, the Union Communicates with Third Parties about the Employer's Safety Record; in January 2006, Union Agents Apply for Work

Between November 2005 and February 2006, Union Agents A, B, C, and D participated in communicating with third parties about the Employer's safety record in connection with several Iowa jobsites, primarily through letters and handbilling. Those communications included three letters sent by Union Agents A and D in November and December to two of the Employer's customers, the Urbandale School District and the Ames Community School District. In general, the letters inform the Employer's customers that Union agents have been investigating the Employer's safety record. The letters are summarized as follows:

- By letter dated November 2, 2005, Union Agents A and D asked the Urbandale School District whether it had exercised due diligence in selecting the Employer as a subcontractor for school district work when the Employer had been found guilty of falsifying required documents certifying that its employees were qualified welders while working at a different Iowa school jobsite. Union Agents A and D focused on the Employer's allegedly "blatant disregard" for the safety of students and faculty at the other school's jobsite. They also mentioned that the Employer was under investigation by the federal government for alleged discriminatory hiring practices.⁵
- By letter dated December 12, Union Agents A and D raised safety concerns about the Employer to the Urbandale School District, particularly with regard to

The Region subsequently issued complaint against the Employer in Cases 18-CA-18018 and 18019, filed by Sheet Metal Workers Local 45 and Plumbers Local 125, alleging that the Employer unlawfully disciplined and/or laid off 10 employees. Section 10(j) relief was requested, and the warrant for Section 10(j) relief will be addressed in a separate memo.

The Region also has found merit to numerous other allegations, and several Section 8(a)(1) and 8(a)(3) cases are pending investigation.

⁵ By a February 13 email to the Urbandale School District, Union Agent A followed up on the November 2 letter and raised more Employer safety issues.

shoring up trenches. In the letter, which was accompanied by photos illustrating alleged Employer safety violations, Union Agents A and D suggested that the school district should permit the Union to be its "eyes and ears" on the job to watch for safety violations by the Employer.

- By letter dated December 21, Union Agent A raised safety concerns about the Employer with the Ames Community School District, particularly with regard to installing gas piping. Union Agent A informed the school district that the Employer had pleaded guilty to a misdemeanor regarding falsifying gas certification documents for workers at another Iowa school jobsite, and said that the Union was monitoring the business practices of the Employer.

On January 11, 2006, after Union Agents A and D sent the above letters, Union Agents A, B, C, D, E, and F, wearing Union jackets and/or other Union insignia, applied for work at the Employer's Grimes, Iowa office trailer. Subsequently, at various job sites on February 13 and 14, Union Agents A, B, C, and D wore Union insignia and handbilled students, teachers, workers and/or parents at the entrance to the Ames and Urbandale High Schools. The handbills consisted of photocopied newspaper articles detailing the Employer's association with gas leaks at another Iowa school jobsite in 2004 and reporting that the Employer was barred from working at that school after the school district became aware of the Employer's connection to false certifications of its employees' qualifications to install gas piping.⁶

⁶ In December 2005 and January or February 2006, Union Agent A also sent material critical of the Employer to the Ames Community School District and to the Urbandale School District, including the same newspaper articles that were the subject of the February handbills.

During fall 2005 and spring 2006, the Union also submitted information requests relating to the Employer's subcontracts to the school districts and to other governmental bodies. For example, by letter dated November 7, Union Agent B requested information from the Ames Community School District about the job specifications for the Ames High School project, and the names of welders certified to work on gas piping. By letter dated February 12, Union Agent A requested that an Iowa state agency supply the job specifications for another Iowa project on which the Employer had been a subcontractor.

C. In February 2006, the Union Agents Reapply for Work

On February 15, Union Agents A, B, and D visited the Employer's Grimes office trailer to update their applications. After a discussion with the Employer's project manager about employment, Union Agent A asked, "We can't apply to work here?" The project manager responded, "After all the shit you've been pulling the past couple of weeks, no." Union Agent A asked if the Employer were hiring. The project manager said, "You, no." When asked why not, the project manager answered, "Do I need to pull out all the stuff you have been writing to the owners and shit?" The project manager asked the agents to leave. Union Agent A asked again, "We can't apply for work?" The project manager said, "You want to apply for work and then make all these slanderous statements." Union Agent A stated that the Union agents intended to organize the Employer after they were hired.

Later in the discussion, the project manager said that he had a problem with Union Agent A's letters "to the school district and everybody else getting all shook up." After a further exchange, in which the Employer claimed that the Union had engaged in harassment and the Union agents continued to press for the chance to update their applications, the Union agents left the Employer's office.

For about two weeks after this meeting, Union Agents A, B, C, D, and E tried on several occasions to contact the Employer regarding their applications, asking whether they could renew or update their applications or whether they needed to reapply. The Employer did not respond. Among the Employer's defenses to the instant allegations is its asserted policy not to hire experienced individuals. The Region has determined that, in fact, was not the Employer's policy. Moreover, the Employer did not raise a Jefferson Standard defense in its position statements until requested to do so by the Region.

ACTION

We conclude that, absent withdrawal, the Region should dismiss the allegations in Cases 18-CA-17943 and 17963 that the Employer unlawfully refused to hire and/or consider for hire Union Agents A, B, C, and D. The Region has found that the Employer excluded all six of the Union agents from the hiring process based in part on antiunion animus. The Employer would, however, be able to meet its FES burden of establishing that it would not have considered or hired Union Agents A, B, C, and D, despite their Union activities or affiliation. Thus, regardless of animus, the Employer's refusal to hire and/or consider for hire those applicants

was motivated by the Union Agents' November and December letters and February handbilling, which were unprotected under Jefferson Standard because they were not tied to a labor dispute. Because the communications were unprotected in this regard, we need not decide whether they were also unprotected because they disparaged the Employer.

We additionally conclude that the Region should consolidate with the existing complaints, absent settlement, the allegation in Case 18-CA-17963 that the Employer violated Section 8(a)(3) and (1) by refusing to hire and/or consider for hire Union Agents E and F. The Employer cannot meet its FES burden of establishing that it would not have hired and/or considered for hire Agents E and F absent their Union affiliation, because they did not participate in the Union's unprotected communications, and therefore those communications could not have motivated the Employer's failure to hire and/or consider them for hire.

To establish a discriminatory refusal to hire under FES, the General Counsel must prove the following: the employer was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; the applicants had experience or training relevant to the position (or the requirements were pretextual or not uniformly adhered to); and antiunion animus contributed to the decision not to hire the applicants.⁷ Similarly, to establish a discriminatory refusal to consider for hire, the General Counsel must prove that the employer excluded applicants from the hiring process and that antiunion animus contributed to the decision not to consider the applicants for employment.⁸ In each case, the burden then shifts to the employer to show that it would have refused to hire and/or refused to consider for hire the applicants even absent their union affiliation or activity.⁹

Here, the question is whether the Employer can establish that it would not have considered the Union Agents, even absent their Union activity or affiliation, by showing that their communications were unprotected and that

⁷ FES, 331 NLRB at 12.

⁸ 331 NLRB at 15.

⁹ Id. at 12, 15. See also Fluor Daniel, Inc., 333 NLRB 427, 438 (2001) (employer unlawfully applied its system of hiring preferences, policies, and procedures so as to refuse to consider or hire union organizers who applied to work), enfd. in relevant part, 332 F.3d 961 (6th Cir. 2003), cert. denied, 543 U.S. 1089 (2005).

those unprotected communications motivated its employment decisions. Under Jefferson Standard, employees may engage in communications to third parties as long as the communications are related to an ongoing labor dispute and are not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.¹⁰ Thus, the Act protects noncoercive employee communications to third parties that reference a labor dispute and that enlist the third parties' support in that dispute, where the communications do not constitute malicious defamation or disparagement of the employer's product or reputation.¹¹ The Board determines whether such communications are protected, in part, if their language or the context in which they are conveyed demonstrates a nexus to a labor dispute.¹²

¹⁰ See Jefferson Standard, 346 U.S. at 475-477. See also TNT Logistics North America, Inc., 347 NLRB No. 55, slip op. at 2 (2006) (letter expressing employee concerns concerted but unprotected, where it maliciously and falsely accused management of asking employees to "fix" logbooks); Mountain Shadows Golf Resort, 330 NLRB 1238, 1240 (2000) (handbill distributed by employee lost protection of the Act because it made no reference to a labor controversy or to collective bargaining, and was an attack on the Employer's policies unrelated to a labor controversy), enfd. mem. sub nom. Jensen v. NLRB, 2004 WL 78160 (9th Cir. 2004); Emarco, Inc., 284 NLRB 832, 833 (1987) (employee remarks protected because they were an extension of a legitimate and ongoing labor dispute and were neither false nor malicious in nature).

¹¹ See Allied Aviation Service Co., 248 NLRB 229 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980). See also Eastex, Inc., 437 U.S. 556, 565 (1978) (employees do not lose protection of Section 7 when "they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship").

¹² See Blue Cement, 311 NLRB 623, 624 (1993), enfd. 41 F.3d 203 (5th Cir. 1994) (protected reproduction of materials that were related to unit employees' safety concerns); Montauk Bus Co., 324 NLRB 1128, 1138 (1997) (protected union distribution to school board of leaflets and letters questioning the qualifications of replacement drivers); Emarco, Inc., 284 NLRB at 834 (protected employees' statements that the employer was not paying its bills, was not able to finish a job, and was "no damn good" when they were made only in response to a general contractor's questions about the cause of a strike against the employer-subcontractor).

Statements entirely unrelated to any protected union or concerted interest, however, are not protected. For example, in Jefferson Standard, employee communications to third parties were unprotected in part because they were not tied to a labor dispute.¹³ The employees had distributed handbills accusing their employer, a broadcasting company, of depriving the public by furnishing inadequate television service. The employees distributed those handbills near a union picket line, as well as at other locations. Although the handbills were intended to exert pressure on the employer in the ongoing labor dispute, they did not refer either to the union or to the underlying dispute, or generally to wages, hours, or working conditions.¹⁴

Similarly, in Mountain Shadows Golf Resort, an employee's handbill was not protected when it made no reference to a labor dispute.¹⁵ Although the handbills referred to a maintenance issue that was related to an employee concern, the issue was raised in the context of the public's interest; no mention was made of a labor dispute. Raising safety concerns alone, without a nexus to a labor dispute or employment conditions, does not implicate Section 7.¹⁶ In addition, the handbills were left for distribution at a public location where those receiving them would not necessarily know anything about the actual labor dispute.

Here, we conclude that the Union Agents A, B, C, and D's letters to, and hand-billing of, third parties were not protected because, as in Jefferson Standard and Mountain Shadows Golf Resort, the communications were not related to a labor dispute. Neither the language of the

¹³ 346 U.S. at 477.

¹⁴ Id.

¹⁵ 330 NLRB at 1241.

¹⁶ 330 NLRB at 1241. Cf. Allied Aviation Service Co., 248 NLRB at 231 (employee's letters to employer's customers emphasizing safety concerns protected because they were related to ongoing labor dispute even though labor dispute had not arisen solely because of safety issues); Community Hospital of Roanoke Valley, 220 NLRB 217, 223 (1975), enfd. 538 F.2d 607 (4th Cir. 1976) (employee's public statement regarding adequacy of employer's patient care protected because it was made in the context of, and was related to, a labor dispute over nursing wages and working conditions).

communications nor the context in which they were delivered brought any such protected subject to the attention of third parties.

We recognize that in the November 2, 2005 letter to one of the school districts, Union Agents A and D refer to an investigation into the Employer's "alleged discriminatory hiring practices." However, other than that one sentence, the thrust of the letter deals with questions about the school district's due diligence in selecting the Employer as a subcontractor, and addresses the Employer's general safety record. While the phrase "discriminatory hiring practices" may allude to the unfair labor practice charges pending before the Region, that connection is vague at best, and the balance of the letter does not bring the nature of the labor dispute to the attention of a third party. Moreover, while the Union Agents raised general safety concerns, they did not tie those concerns to any labor dispute. The December 12 and December 21 letters do not contain even an arguable connection with a labor dispute. Rather, they raise safety concerns about the Employer's construction work elsewhere, and pose related questions about the qualifications of the Employer's employees, with no link to the labor dispute. Thus, none of the letters clearly ties their content to the Union's organizing drive or to a labor dispute with the Employer.

In addition, although the November 2 and December 21 letters were on Union letterhead and Union Agent A signed one of them over the title "Organizer," those facts are insufficient to establish a connection to a labor dispute. Nothing in the substance of the letters themselves constitute protected appeals to third parties to support the Union in a labor dispute.

Similarly, the handbills distributed by Union Agents A, B, C, and D at the high schools did not inform the public about the Union's labor dispute with the Employer. The handbills instead highlighted general safety concerns for the public through newspaper accounts of the Employer's being banned from another Iowa school site after problems surfaced over its employees' qualifications. Although Union Agents wore Union insignia when they handbilled, the insignia alone does not necessarily indicate the presence of a labor dispute or organizing drive, and members of the public who received the handbills would neither know about the dispute nor understand the context in which the handbills were distributed.

In sum, the November 2, December 12, and December 21 letters and the handbills that Union Agents A, B, C, and D distributed to third parties in February were not protected

under the Act because the communications brought neither the organizing drive nor the Employer's alleged unfair labor practices to their attention, and cannot be considered an appeal to their sympathies. Therefore, we conclude that the Region should dismiss the allegations in Cases 18-CA-17943 and 17963 that the Employer unlawfully refused to hire and/or consider for hire Union Agents A, B, C, and D because the Employer has met its FES burden of establishing that it would not have considered or hired them regardless of their union activities based on their unprotected letters and handbilling.

Finally, we conclude that the Region should consolidate with the existing complaints, absent settlement, the allegation in Case 18-CA-17963 that the Employer violated Section 8(a)(3) and (1) by refusing to hire and/or consider for hire Union Agents E and F. The Employer cannot meet its FES burden of establishing that it would not have hired and/or considered for hire Agents E and F absent their Union affiliation, because those Agents did not engage in the unprotected communications. The Region has determined that a motivating factor in refusing to hire/consider the six applicants at issue was their Union organizing activity, and that the Employer has advanced shifting reasons for its conduct, including the letters and handbilling in which Agents E and F did not participate. Accordingly, the communications could not have lawfully motivated the Employer's failure to hire and/or consider them for hire.¹⁷

B.J.K.

¹⁷ Cf. NLRB v. Burnup & Sims, 379 U.S. 21, 24 (1964) (Supreme Court held that an employer violates Section 8(a)(1) if it knew that a discharged employee was engaged in protected activity, "that the basis for the discharge was an alleged act of misconduct in the course of activity, and that the employee was not, in fact, guilty of that misconduct").