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

Advice Memorandum

DATE: August 7, 2002

TO : Victoria E. Aguayo, Regional Director
William M. Pate, Jr., Regional Attorney
James A. Small, Assistant to Regional Director
Region 21

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

SUBJECT: L.M. Waterproofing, Inc. 506-6090-0200
Case 21-CA-35129 512-5012-6775

This Section 8(a)(3) case was submitted for advice on whether two employees were engaged in protected activity when they reported the Employer's employment of nonunion employees to a Union agent who then attempted to enroll the employees as Union members.

We conclude that the employees were engaged in protected organizational activity in reporting nonunion employees to the Union.

FACTS

The parties are signatory to a bargaining agreement containing an exclusive hiring hall provision but no union-security clause. Velasco and Quiroz, Union members, obtained employment with the Employer in June, 2001 via the Union's hiring hall.

On November 7, 2001, Velasco was working on the Employer's Sunset Project when he learned from other employees that the project foreman and several other employees were non-union. Quiroz avers that he approached six employees whom he had never seen before and asked them if they were part of the Union. According to Quiroz, one employee responded that he was not "part of the Union" and that the Employer's foreman had hired him. On November 14, while Velasco and Quiroz were on a break with several other employees, the group agreed that it was not fair for nonunion employees to be working while union employees were not. Quiroz called Union Business Manager Negrete, and expressed the group's complaint.

Negrete soon arrived at the project and asked Velasco which employees were "not part of the Union." Velasco pointed out certain employees whom Negrete then approached.

After speaking with the employees, Negrete handed them cards, asked that they join the Union, and left.

At some point on this same day, Nagrete advised the Employer's President, Monterastelli, that the Union was aware of the nonunion status of some of the employees on the Sunset Project. Monterastelli admits that he believed Velasco and Quiroz were the employees who had complained to the Union. Monterastelli also admits that he decided to transfer the employees off the Sunset Project because they were "snitches", and Monterastelli wanted to "diffuse hostility" which they had created among other employees.

The day after the above incident, the Employer reassigned Velasco and Quiroz from the Sunset Project to another project, but for only one day's work. During the following week, the employees regularly reported to work but the Employer refused to refer them to any of its projects. The two employees thereafter worked only sporadically into early December. The employees' last day of employment for the Employer was December 6, 2001; the Employer thereafter refused to refer these employees to any of its projects.

The Employer contends that it ceased referring Velasco and Quiroz because work had slowed down on its projects. However, the Employer adduced no evidence of any work slowdown. Moreover, both employees assert that Employer foreman Vieyara told them that the Employer had work, that Vieyara had asked the Employer to refer Velasco and Quiroz, but that the Employer had refused to refer them. The Region has concluded that the Employer initially transferred the two employees, and thereafter refused to regularly refer them, because they reported to the Union that the Employer was employing nonunion workers.

ANALYSIS

The employees were engaged in protected, organizational activity in reporting to the Union the nonunion status of fellow employees.

It is well settled that employee activity during their nonwork time to solicit fellow employees to support the union constitutes protected activity.[1] Solicitation of fellow employees to join the union is wholly protected activity absent the use of threats, violence or other

[1] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Town and Country Electric, 516 U.S. 85 (1995).

coercive misconduct.[2] Finally, employees engage in protected union activity when they supply organizational information to the union.[3]

In the instant case, Velasco and Quiroz engaged in protected union activity when they pointed out to the Union which employees may not have been Union members, i.e., directed Union organizational efforts at nonunion employees. Since the Region found no merit to the Employer's economic defense and found instead that the Employer discriminated against the employees for engaging in this activity, the Employer violated Section 8(a)(3) and (1) on this basis.[4]

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[2] See, e.g., Continental Woven Label Co., 160 NLRB 1430 (1966)(employee issued unprotected threat when he told another employee that he had to join the union in order to keep his job). See also Liberty House Nursing Home, 245 NLRB 1194, 1197 (1979)(employer lawfully required employees to report "threats", but unlawfully required employees to report mere "harassment" because the latter was "broad enough to cover mere attempts by union proponents to persuade employees to sign cards.")

[3] See, e.g., Ridgley Mfg. Co., 207 NLRB 193 (1973)(employee attempt to write down or memorize employee names and addresses from work timecards, to be used by the union in organizing activity, constituted protected activity); Gray Flooring, 212 NLRB 668 (1974)(copying telephone numbers from index cards constituted protected activity because copying not done "surreptitiously" and cards were not "private records.")

[4] Cf. International Masonry Institute, Case 5-CA-29760, JD-38-02 (March 22, 2002) where the ALJ held that an employee was not engaged in protected activity when he complained to his employer about its employment of nonunion employees. In the ALJ's view, the employee's complaint necessarily sought an unlawful employer response because the employer's bargaining agreement did not contain a union-security clause. We note that Counsel for the General Counsel has filed exceptions to this ALJ decision, arguing that it is incorrect. In any event, the ALJ decision is distinguishable because the employees here were not complaining to their Employer but rather were notifying their Union representative, who then only attempted to

Finally, we note that an employee attempt to enforce a collective-bargaining agreement constitutes protected concerted activity, and the protected character of that enforcement conduct does not depend on whether the employee's interpretation of the agreement ultimately prevails.[5] It would appear that Velasco and Quiroz engaged in this type protected activity in that they may have been attempting to ensure the Employer's compliance with the exclusive hiring hall provision.

Quiroz, a Spanish speaking employee, avers that he asked several new employees if they were part of the Union. While Quiroz may well have been inquiring into Union membership, he also may have been inartfully inquiring into whether these employees had been referred from the Union's hiring hall. In either event, when one of the employees responded negatively and stated that the foreman had hired him, Quiroz at that juncture could reasonably have believed that the Employer may not have been abiding by the exclusive hiring hall provision. Thus, Quiroz's telephone call to the Union encompassed a reasonable, good faith inquiry into the Employer's compliance with the bargaining agreement. If so, the Employer's discrimination against these employees may have also violated the Act as a retaliation against reasonable attempts to enforce the parties' agreement.

B.J.K.

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enroll the nonunion employees rather than seek to have them discharged.

[5] NLRB v. City Disposal Systems, 465 U.S. 822 (1984); Bunney Bros. Construction Co., 139 NLRB 1516, 1519 and fn. 5 (1962); Mushroom Transportation Co., 142 NLRB 1150, 1156-1157 (1963), revd. on other grounds 330 F.2d 683 (3d Cir. 1964).