

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

Advice Memorandum

DATE: March 31, 2011

TO : Richard L. Ahearn, Regional Director
Region 19

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

SUBJECT: Dallas Glass, Inc.
Cases 36-CA-10639 and 36-CA-10704

These Section 8(a)(1) and (3) cases were submitted for advice as to whether the Employer violated the Act by failing to reinstate two employees on its preferential hiring list for positions substantially equivalent to their former positions because, although they had initially made an unconditional offer to return to work, they later resumed picketing the Employer wearing "On Strike" signs.

We conclude that the Employer did not violate the Act when it failed to reinstate the two employees because during the time that the Employer was hiring individuals for those positions, the employees had gone back out on strike and had not made another unconditional offer to return to work. Therefore, the Region should dismiss that allegation, absent withdrawal.

FACTS

In 2007, Dallas Glass, Inc. (the Employer) hired two paid organizers who work for the International Union of Painters and Allied Trades, District Council # 5. Both worked for the Employer two separate times as glaziers, before engaging in economic strikes.¹

The first strike commenced on about July 24, 2007. The organizers picketed the Employer's shop and construction site locations bearing signs that read, "Dallas Glass Has Committed Unfair Labor Practices in Violation of Federal Law" and "Dallas Glass Employees Receive Substandard Wages & Benefits." While carrying these signs, they both wore large placards around their necks which read, "On Strike." On September 7, 2007, the organizers made unconditional offers to return to work and the Employer returned them to work on September 12, 2007.

¹ The Region rejected the Union's assertion that they were unfair labor practice strikes.

On September 21, 2007, the organizers went on strike again using the same signs and wearing the same placards stating that they were "On Strike." On November 13, 2007, they made unconditional offers to return to work and were placed on a preferential hiring list by the Employer because they had been permanently replaced during the second strike.

Between their 2007 placement on the preferential hiring list and mid 2009, the two organizers maintained contact with the Employer and occasionally inquired about job openings. On April 8, 2010,² the Union filed unfair labor practice charges alleging that the organizers had been bypassed on the preferential hiring list and that certain portions of the employee handbook were unlawful.³

On about 13 occasions between May 14 and September 22, 2010, the organizers resumed picketing the Employer's shop and construction site locations. Throughout the picketing, the organizers wore the same "On Strike" placards that they used during their 2007 strikes, along with the sign stating that the Employer had committed unfair labor practices. Although they were joined by non-employee Union-paid picketers, only the two organizer-employees wore the "On Strike" placards. During the period that the employees were picketing with the "On Strike" signs, the Employer hired two other individuals for positions substantially equivalent to the glazier positions that the organizers previously held. The instant charge alleges that the Employer violated Section 8(a)(3) of the Act by bypassing the two paid organizers on the preferential hiring list and hiring those two other individuals.

On October 20, one of the organizers sent the Employer a letter indicating that he would accept any appropriate return to work offer. On December 3, the other organizer sent a similar letter. That letter also stated that if the Employer had interpreted his previous unconditional offer to return to work as void due to his 2010 picketing activities, then he was again stating his unconditional offer to return to work.

ACTION

We conclude that the Employer did not violate the Act when it failed to reinstate the two paid organizers because during the time that the Employer was hiring individuals

² Herein all dates are 2010 unless otherwise noted.

³ The Region found merit only to the allegation that portions of the handbook were unlawful.

for the substantially equivalent positions, the organizers had not made an unconditional offer to return to work since going back out on strike.

It is well settled that if employees engage in a lawful economic strike, an employer is free to hire permanent replacements to continue to operate its business.⁴ However, those who have been replaced remain employees within the meaning of the Act, and are entitled to full reinstatement when a vacancy occurs.⁵ Economic strikers are entitled to reinstatement, either to their former jobs or to substantially equivalent jobs, once they unconditionally indicate that they are no longer on strike and offer to return to work.⁶ An economic striker who has been permanently replaced is put on a preferential hiring list and entitled to reinstatement when his former job or its equivalent becomes available.⁷ However, an unconditional offer by a striker to return to work is an "essential prerequisite" before the employer's refusal to reinstate is found unlawful.⁸

In the instant case, we conclude that despite the two organizers' 2007 unconditional offers to return, the Employer lawfully bypassed them on the preferential hiring list when positions became available in late June 2010. As an initial matter, we note that an employee who goes back on strike is *ipso facto* withholding his services and thus no longer unconditionally available to return to work. Moreover, both organizers clearly demonstrated to the Employer that they were back on strike at the time he passed them on the hiring list and thus no longer unconditionally available to return to work. Thus, the evidence shows that the two organizers clearly announced their strike status to the Employer by conspicuously picketing with "on Strike" placards around their necks. Further, were there any doubt that the placards meant what

⁴ NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

⁵ Laidlaw Corp., 171 NLRB 1366, 1369-1370 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

⁶ NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967).

⁷ U.S. Mineral Products, Co., 276 NLRB 140, 141 (1980) (there is no limitation period after which replaced economic strikers who have made an unconditional offer to return no longer have the right to recall); Brooks Research and Manufacturing, Inc., 202 NLRB 634, 636-37. (1973).

⁸ See Eckert Fire Protection 332 NLRB 198, 213-214 (2000) and cited cases.

they said, the evidence indicates that the organizers used the same "On Strike" placards during both the July and September 2007 strikes, during periods when they were indisputably on strike. And when the organizers officially ended those two strikes, they ceased their picketing activities, including their use of the "On Strike" placards. Thus, the organizers' 2010 return to the picket line with the same "On Strike" placards clearly demonstrated that they were back on strike. Indeed, that the organizers themselves understood that the Employer would interpret their activities to mean that they were on strike is buttressed by one organizer's December 3, 2010 letter acknowledging that the Employer may have interpreted his picketing activities as voiding his previous unconditional offer to return. In these circumstances, we conclude that at the time the Employer bypassed the two organizers on the preferential hiring list and filled the positions, the Employer reasonably relied on their overt strike conduct to conclude that they were withholding their labor and thus unavailable for work.⁹

Consequently, although the organizers remained on the preferential hiring list while out on strike, they were not entitled to be considered by the Employer for the positions because they had not made themselves available to return to work.¹⁰

Accordingly, absent withdrawal, the Region should dismiss the allegation that the Employer violated Section 8(a)(3) by not offering the positions to the organizers because they were not unconditionally available to return to work at the time the Employer sought to fill the positions.

B.J.K.

⁹ Cf. Brinkerhoff Signal Drilling Co., 264 NLRB 348, 349 (1962) (where Board held that laid-off employees must be shown to have engaged in some overt action giving the Employer reasonable notice of their strike support in order to be considered strikers entitled to reinstatement). See also Marchese Metal Industries, 313 NLRB 1022, 1028 (1994). Compare Freeman Decorating Co., 336 NLRB 1, 8 (2001), enf. denied 334 F.3d 27 (D.C. Cir. 2003) (employer cannot presume employee who is absent from work and on the picket line is a striker when other reasonable grounds for employee's absence exist).

¹⁰ Cf. Southwestern Pipe, Inc., 179 NLRB 364, 364-365, (1969) (where Board held that employees seeking backpay after reinstatement "cannot sup" at both tables. Employee cannot be unavailable for work and seek full pay "for the job from which he has voluntarily absented himself.").