

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

Advice Memorandum

DATE: February 27, 2004

TO : Rosemary Pye, Regional Director
Region 1

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

SUBJECT: Five Star Transportation, Inc.
Case 1-CA-41158

506-2017-0800
506-6060-5000
506-6070-2500
506-6070-2550
506-6080-0800
524-1783-2500

This case was submitted for advice as to whether school bus drivers employed by the unionized predecessor employer that had a contract with a school district were engaged in protected concerted activity when, during the contract bidding process, they wrote letters trying to persuade the school committee not to award the successor Employer the new service contract, since the successor refused to hire them based on that conduct.¹

We conclude that the employees' letter-writing campaign was protected concerted activity, and therefore both the Employer's refusal to consider those employees for hire and refusal to hire them violated Section 8(a)(1). However, we conclude that the Employer did not violate Section 8(a)(3) because there is no evidence that it knew that the letter-writing campaign was Union activity. The Region should also allege that the Employer violated Section 8(a)(5) because it would have had a Burns bargaining obligation had it not failed to hire the employee applicants based on concerted, protected activity,² but should not allege that the Employer further violated Section 8(a)(5) by setting initial terms and conditions

¹ Although the Region sua sponte raised the issue of Section 10(j) relief, it does not seek Section 10(j) authorization at this time but rather seeks an expedited hearing before an ALJ.

² See NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

under U.S. Marine Corporation,³ since there is no indication that a desire to avoid a Burns bargaining obligation motivated the Employer's unlawful hiring practice.

FACTS

UFCW, Transportation Division Local 1449 (Union) has represented the school bus drivers in Belchertown, Massachusetts for many years and had a three-year collective-bargaining agreement with First Student (the predecessor). First Student was under contract with Belchertown to provide school bus service during the 2002-2003 school year. In early 2003,⁴ as it does every three years, Belchertown solicited bids for the school bus driving contract. Five Star Transportation, Incorporated (Employer) submitted the lowest bid.

At some point after the bids were opened at a public meeting in January, the Union held a meeting with predecessor drivers, at which they discussed the Employer's history of safety, service, and hiring problems, including that the Employer had formerly hired a convicted child sex offender and a substance abuser. The drivers also discussed the fact that the Employer was nonunion, and that its low bid apparently did not incorporate the drivers' existing contractual terms and conditions.⁵ At the meeting, the drivers decided to send letters to the school board in order to try to influence the bidding process, and did so several days later.

In January, the Union sent the Employer a letter demanding recognition. The Employer did not respond. The Union then sent the school committee a letter on behalf of the drivers expressing the drivers' concerns about the Employer. A petition signed by the drivers was also sent to the school committee. The Employer maintains that it did not receive copies of the Union's letter or petition.

In February, the school committee requested that the Employer not attend a meeting at which the contract would be awarded, because the committee was investigating

³ 293 NLRB 669 (1989), *enfd.* 944 F.2d 1305 (7th Cir. 1991), *cert. denied* 503 U.S. 936 (1992).

⁴ All dates are in 2003 unless noted.

⁵ The bid specification did not require that the awarded contractor recognize the Union or maintain the existing terms and conditions, but did require that current drivers be given first consideration in employment.

concerns about the Employer raised in letters and emails it had received from predecessor drivers. Soon after the investigation was complete and the Employer was awarded the contract, it received copies of the individual drivers' letters.

The letters and emails each describe the driver's concern that their working conditions would worsen under the Employer. Each of the letters mentions the driver's concern that either the Employer would not retain existing contract wages and benefits and/or that the Employer's buses are improperly maintained.⁶ Several letters also explicitly or implicitly refer to the Employer's prior hiring problems, including the Employer's hiring of a convicted child sex offender and a substance abuser. Both of these incidents occurred in 1996 and were documented by local newspaper articles.

The Employer states that it decided not to consider for hire any of the predecessor drivers who had applied for employment but had written letters because they had tried to intentionally hurt the Employer, and because they were not "team players." The Employer's decision was not based on the content of the individual letters or on any belief that the letters were not group activity, but rather on the fact that the drivers had taken the initiative to "hurt" the Employer before having worked for it.

The Employer testified that it would have hired the predecessor driver applicants had they not written letters, even over Five Star employees requesting transfers, because the predecessor drivers were familiar with the Belchertown school bus routes and schools.⁷ The Employer eventually offered employment to and/or hired several predecessor unit employees who had not written letters, including a few who had signed the Union's petition. Ultimately, the employee complement consisted of four predecessor unit employees who did not write letters to the school committee, one predecessor employee who had been discharged by the predecessor, six new drivers, and nine Five Star employees who were transferred from other school districts. Eleven predecessor unit drivers who applied for work with the

⁶ At least one of the letters stated that the author was speaking "collaboratively for the majority of Belchertown bus drivers...."

⁷ The Employer states that although it normally permits Five Star employees to transfer from other towns, it would have given the predecessor employees priority over any transfer requests.

Employer but wrote letters/emails to the school committee were not hired.

The Union alleges the Employer violated Section 8(a)(1) and (3) by failing to hire/consider for hire the employee applicants who wrote letters to the school committee. The Union further alleges that the Employer violated Section 8(a)(5) because it would have been a successor employer with an obligation to recognize and bargain with the Union had it not failed to hire the 11 drivers who wrote letters and that, because of its discriminatory hiring, it had an obligation to bargain with the Union before changing initial terms and conditions of employment.

ACTION

The Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by both refusing to hire and consider for hire employee applicants who wrote letters to the Belchertown school board. The Region should dismiss, absent withdrawal, the Union's allegation that the Employer violated Section 8(a)(3) because there is no evidence that the Employer knew that the letter writing campaign was Union activity. The Region should also allege that the Employer violated Section 8(a)(5) because it would have had a Burns bargaining obligation had it not failed to hire the employee applicants based on concerted, protected activity, but should not allege that the Employer violated Section 8(a)(5) by setting initial terms and conditions under U.S. Marine since there is no evidence that Union animus or a general desire to avoid a bargaining obligation motivated its hiring violation.

I. The letter-writing campaign constituted protected, concerted activity

We agree with the Region that the driver applicants were engaged in protected, concerted activity when they wrote letters to the school board expressing their concerns about the Employer. The drivers engaged in concerted activity when they decided as a group during the January Union meeting to write individual letters to the Belchertown school board in an effort to influence the bidding process.⁸ Further, the letters constitute concerted

⁸ See Community Hospital of Roanoke Valley, 220 NLRB 217, 223 (1975), enfd. 538 F.2d 607 (4th Cir. 1976) (ALJ's holding, affirmed by the Board, that two nurses' appeal for public support for improvement of wages and working

activity; the Employer received the letters which were almost identical in referencing the drivers' collective terms and conditions of employment and/or Union contract, and thus sought to protect and retain those drivers' collective current terms and conditions. Indeed, at least one of the letters explicitly put the school committee, and in turn the Employer, on notice that a majority of the drivers shared his concerns. Given the identical nature of the drivers' expressed concerns, it would strain credulity for the Employer to argue that it was unaware that the letters, taken together, were the result of group action.

The drivers' letter-writing campaign also constitutes protected activity under the Act. Under the Supreme Court's analysis set forth in Jefferson Standard, employees may engage in communications to third parties as long as the communication is related to an ongoing labor dispute and the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection.⁹ All of the letters relate to the drivers' concern about the retention of their collective working conditions should the Employer be awarded the school bus contract.¹⁰ Thus, the letters, which detail the Employer's alleged failure to maintain buses and/or its unwillingness to retain the drivers' existing wages and benefits, have a clear nexus to the drivers' labor dispute with the Employer.¹¹ The fact

conditions was protected concerted activity in part since the right to engage in concerted activity extends to the right of each individual in a group of employees to speak in favor and on behalf of the activity).

⁹ See generally NLRB v. IBEW Local Union No. 1229 (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953); see also Mountain Shadows Golf Resort, 330 NLRB 1238, 1240 (2000), supp. decision 338 NLRB No. 73 (2002), review denied 2004 WL 78160 (9th Cir. 2004).

¹⁰ Although some drivers frame their safety concerns in terms of safety for the children riding the buses, the issue of adequate bus maintenance impacts drivers' working conditions as well. Cf. e.g., Community Hospital of Roanoke Valley, 220 NLRB at 220, 223 (employee related her public statement regarding adequacy of employer's patient care to dispute over nursing wages and working conditions). Compare Mountain Shadows Golf Resort, 330 NLRB at 1241 (employee's handbill not protected as it made no reference to labor dispute; although handbill made reference to maintenance issue that had nexus to employees' concern, issue was framed in context of public's interest rather than employees' interest).

that the drivers were not yet employed by the Employer does not change the analysis of whether the drivers were engaged in protected, concerted activity when they wrote the letters. Thus, the Board has recently applied the Jefferson Standard analysis in refusal to hire/consider for hire cases.¹²

Moreover, the letters were not so disloyal, reckless, or maliciously untrue as to lose the protection of the Act despite references to the Employer's past personnel problems. First, there is no evidence that the letters were written with a reckless disregard for the truth.¹³ The letters referencing the child sex offender and intoxicated driver were not personal attacks, but were based in fact and related to the drivers' concerns about the overall

¹¹ See Allied Aviation Service Co. of New Jersey, 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980) (employee's letters to employer's customers emphasizing safety concerns related to ongoing labor dispute even though labor dispute had not arisen solely because of safety issues); Richboro Community Mental Health Council, 242 NLRB 1267, 1268 (1979) (employee's letter to employer's funding source citing the deterioration of employer's facility supported employee's protest of employer's discharge of fellow employee); Community Hospital of Roanoke Valley, 220 NLRB at 220, 223 (employee's public statement regarding adequacy of employer's patient care was related to dispute over nursing wages and working conditions). Compare Jefferson Standard, 346 U.S. at 475-76 (employees' handbill did not relate to labor dispute).

¹² See, e.g., American Steel Erectors, 339 NLRB No. 152, slip op. at 3 (2003), citing Dreis & Krump Mfg., 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976) (although union job applicant did not owe a duty of loyalty to employer at time he made unprotected statements, issue was whether applicant's statements rendered him unfit for future employment). See generally Tradesmen International, 332 NLRB 1158 (2000), vacated 275 F.3d 1137 (D.C. Cir. 2002) (employer violated 8(a)(1) and (3) by refusing to hire union organizer because of his protected statements made to city board).

¹³ See Cincinnati Suburban Press, 289 NLRB 966, 968 (1988), overruled in part on other grounds Lafayette Park Hotel, 326 NLRB 824 (1998) (employee's article publicizing employer's opposition to union organizing campaign was not written with reckless disregard for truth, or with deliberate intent to harm employer, despite employer's disputed factual assertions).

safety of the Employer's operation.¹⁴ Second, although the Employer would likely be sensitive to these issues, the letters do not rise to the level of disparaging the Employer.¹⁵ Thus, the letters did not ridicule the Employer, nor did they deliberately intend to damage the Employer.¹⁶ In any event, even if some specific statements in the letters were to be considered unprotected, the Employer refused to consider or hire the drivers merely because they took the initiative to write the school committee, rather than because of the content of individual letters. Finally, the fact that the letters sought to persuade the school committee not to award the contract to the Employer does not by itself remove the letters from the Act's protection.¹⁷ We therefore conclude that the

¹⁴ See Richboro Community Mental Health Council, 242 NLRB at 1268 (employee's letter to employer's funding source protesting fellow employee's discharge was not a "personal attack unrelated to his protest of [the employer's] labor practices").

¹⁵ See Allied Aviation Service Co. of New Jersey, 248 NLRB at 231 (Board distinguishes between disparagement and "the airing of what may be highly sensitive issues;" although employer was sensitive to employees raising safety concerns to customers in airline industry, employee's right to public appeal not dependent on employer's sensitivity to chosen forum absent malicious motive).

¹⁶ See Cincinnati Suburban Press, 289 NLRB at 968 (employee's article detailing employer's opposition to union campaign protected where it was not written with deliberate intent to damage employer). Compare Mountain Shadows Golf Resort, 330 NLRB at 1241 (employee's handbill not protected as it did not reference labor dispute and made disparaging attack on employer's business practices intending to harm employer's reputation); American Arbitration Ass'n, 233 NLRB 71, 71 n.1, 75 (1977) (employee's questionnaire sent to employer's clients not protected because questionnaire ridiculed employer); Coca Cola Bottling Works, 186 NLRB 1050, 1054 (1970), enf. denied in part on other grounds sub nom. Retail, Wholesale, and Dept. Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972), supp. decision 205 NLRB 483 (1973) (handbill during strike not protected where it publicly disparaged employer's product by creating public fear that foreign objects were present in bottles because of inadequate inspection during strike).

¹⁷ See NLRB v. Circle Bindery, Inc., 536 F.2d 447, 452 n.7 (1st Cir. 1976) (employee's act of reporting employer's

Employer's refusal to hire or consider for hire the predecessor drivers based on their protected concerted activity violated Section 8(a)(1).

II. The General Counsel cannot establish that the Employer violated Section 8(a)(3) absent evidence of the Employer's knowledge that the letter-writing campaign was Union activity

In order to establish a discriminatory refusal to hire violation, 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.¹⁸ Likewise, establishing a discriminatory refusal to consider for hire violation requires a showing that the employer excluded applicants from the hiring process and that antiunion animus contributed to the decision not to consider the applicants for employment.¹⁹ In each case, the burden then shifts to the employer to show that it would have refused to hire or consider for hire the applicants even in the absence of their union affiliation or activity.²⁰

Although the Employer admits that it refused to hire or consider for hire the drivers because of conduct which we have concluded is protected concerted activity, there is no evidence that the Employer knew the letter-writing campaign was Union activity. In this regard, the Employer maintains that it never received the group letter or

unauthorized binding of union-labeled job was protected even though employer lost job and future business), cited in Tradesmen International, 332 NLRB at 1160. The Board in Tradesmen International similarly found a union organizer's testimony before city building standards board to be protected even though employer's cost of doing business would have increased had city board found employer subject to bonding ordinance. 332 NLRB at 1160. Thus, the Board stated at ibid. that "Section 7 protects many forms of concerted activity ... which may be injurious to an employer's business."

¹⁸ FES, 331 NLRB 9, 12 (2000), appeal after remand 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

¹⁹ Id. at 15.

²⁰ Id. at 12, 15.

petition sent by the Union to the school committee. Moreover, although the Employer knew of the existence of the Union during the contract bidding process, the letters written by the drivers are not explicitly linked to the Union, and there is no other evidence establishing the Employer's knowledge that the drivers were affiliated with, or acting on behalf of, the Union when writing the letters.²¹ Furthermore, the Employer expressed no antiunion animus when making its hiring decision. In fact, the Employer hired predecessor unit drivers who did not write letters to the school committee but who were Union members. The General Counsel cannot establish that the Employer violated Section 8(a)(3) without proving that the Employer knew that the drivers' letter-writing was Union activity.²² The Region should therefore dismiss, absent withdrawal, the Union's Section 8(a)(3) allegation.

III. The Employer violated Section 8(a)(5) by refusing to recognize and bargain with the Union but did not violate Section 8(a)(5) by unilaterally implementing different initial terms and conditions of employment

Although the Employer admits that it refused to hire or consider for hire employees based on the protected letter-writing, there is no evidence that the Employer's hiring decisions reflected a discriminatory scheme designed to avoid the Union or to avoid successorship in violation of Section 8(a)(3).²³ Absent a discriminatory hiring scheme that violated Section 8(a)(3), the two bases as to why it would be remedially appropriate to deny the Employer the right to set initial terms and conditions are not present. Under the Board's successorship doctrine, a successor

²¹ Compare, e.g., Tradesmen International, 332 NLRB at 1160 (8(a)(3) violation where employer knew that applicant was affiliated with union as an organizer and appeared on behalf of union when he spoke against employer before city board).

²² See generally ibid.; Cincinnati Suburban Press, 289 NLRB at 967 (employer violated 8(a)(3) by suspending and discharging employee for writing article detailing employer's opposition to union campaign where employee's writing and publishing article constituted union activity and where employer had knowledge of employees' continued organizing efforts).

²³ See generally U.S. Marine Corp., 293 NLRB at 670-72. See also generally Love's Barbeque Restaurant No. 62, 245 NLRB 78 (1979), enfd. in relevant part sub nom. Kallmann v. NLRB, 640 F.2d 1094 (9th Cir. 1981).

²⁴ See Burns, 406 U.S. at 294-95.

normally has the freedom to set initial terms and conditions of employment for its newly-hired work force. However, the Supreme Court in Burns enunciated an exception to this rule, involving "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."²⁴ Because of the nature of a discriminatory hiring scheme, however, it becomes difficult to discern whether an employer would have been a "perfectly clear" successor had it not embarked on an unlawful hiring plan. First, an employer's discriminatory hiring plan makes it impossible to determine whether the employer would have retained substantially all of the former employees in the absence of the discrimination.²⁵ In such circumstances the Board resolves the uncertainty against the employer and infers that but for its unlawful scheme, the employer would have planned to employ a sufficient number of predecessor employees in order to make it apparent that the union's majority status would continue.²⁶ Second, the employer's discriminatory motive makes it impossible to determine whether its announced changes in working conditions are for legitimate reasons or are part of its discriminatory plan to avoid a bargaining obligation.

Absent an unlawful hiring scheme, these concerns are not present.²⁷ Although the Employer stated that it likely would have hired the drivers, had they not written letters to the school committee, because of their familiarity with the school districts and routes, it was evident from the Employer's contract bid that it intended to employ the drivers at different terms and conditions from the predecessor. Because of this fact, and because the Employer did not embark on an unlawful hiring scheme in

²⁵ See Galloway School Lines, 321 NLRB 1422, 1427 (1996) (Burns principles not easily applied to employer with discriminatory hiring scheme as it is uncertain whether, absent unlawful plan, employer would have planned to retain sufficient number of predecessor employees for union's majority status to continue).

²⁶ Ibid.

²⁷ Cf. Greengate Mall, 209 NLRB 37, 38, 39 (1974) (employer lawfully set different initial terms at a time when it was unclear whether employer would inherit predecessor's employees and prior to employer's unlawful hiring scheme).

²⁸ See generally Burns, 406 U.S. 272.

violation of Section 8(a)(3), it was entitled to unilaterally set different terms and conditions of employment. The Region should therefore not allege that the Employer violated Section 8(a)(5) by unilaterally setting different terms and conditions.

However, we agree with the Region that the Employer violated Section 8(a)(5) by refusing to recognize and bargain with the Union under Burns.²⁸ Thus, absent the Employer's unlawful refusal to hire or consider for hire the predecessor drivers based on their protected letter-writing, the Employer would have employed a majority of the predecessor unit drivers when it reached its representative complement. As such, the Employer would have been a Burns successor with an obligation to recognize and bargain with the Union and its failure to do so violated Section 8(a)(5).

IV. Conclusion

Accordingly, the Region should issue complaint, absent settlement, alleging the Employer violated Section 8(a)(1) by refusing to hire and consider for hire the predecessor drivers based solely on their protected letter-writing campaign. The Region should further allege that the Employer violated Section 8(a)(5) because it would have been a Burns successor with an obligation to recognize and bargain with the Union had it not refused to hire or consider for hire the predecessor drivers based on their protected activity. The Region should dismiss, absent withdrawal, the Union's Section 8(a)(3) charge, and should therefore not allege the Employer violated Section 8(a)(5) by setting initial terms and conditions under U.S. Marine Corporation.

B.J.K.