

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

Advice Memorandum

DATE: May 16, 2012

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: Thermal Tech, Inc.
Case 19-CA-068292

512-5012-0133-2200

512-5012-0133-2250

This case was submitted to Advice as to whether certain provisions of an employer's mandatory employment agreement unlawfully interfere with Section 7 rights in violation of the Act. We conclude that the noncompete provision of the agreement does not violate the Act because it has no more than an incidental impact on Section 7 rights. As to the clause prohibiting outside work, we conclude that the Region should conduct further investigation into the Employer's purpose for and application of the policy. Absent evidence that this provision is aimed at Section 7 activity or has been applied discriminatorily to restrain Section 7 activity, the Region should dismiss the instant charge.

FACTS

The Employer, Thermal Tech, Inc., provides insulation installation services for industrial and commercial customers throughout the Pacific Northwest. The Employer's employees are not represented by a collective-bargaining agent, although the Heat and Frost Insulators and Asbestos Workers Local #7 ("the Union") has been attempting to organize the Employer's employees for several years. The Employer requires all of its new hires to sign an employment agreement as a condition of employment. The Union alleges that certain provisions of this agreement are unlawful because they interfere with the exercise of Section 7 rights.

The first provision to which the Union objects is a ban on outside employment, commonly referred to as "moonlighting," during the term of the employee's employment with the Employer:

5. **Other Employment.** Without the prior written consent of Employer, Employee is prohibited directly or indirectly, during the term of this Agreement, from working or rendering services of a business, professional, or commercial nature to any other person, firm, or corporation.

The second allegedly unlawful provision is a noncompete clause that prohibits the Employer's employees from performing any commercial or industrial insulation work in the Employer's territory for two years after the employee has left the Employer's employment:

- 10.1 **Noncompetition Covenant.** While Employee is employed by Employer and for a period of two (2) years following the end of the Employee's employment with Employer, the Employee will not, directly or indirectly own an interest in, whether as a partner, stockholder, employee or otherwise, or otherwise operate or be employed by any refrigeration or industrial insulation contractor which is situated in the states of Washington, Oregon, or Idaho (the "Territory"), unless Employer gives its written consent.

ACTION

We conclude that the Region should conduct further investigation of the Employer's ban on dual employment. The dual employment prohibition would violate the Act if the Employer had an unlawful motive for or discriminatorily applied it. In the absence of unlawful motivation or application, the dual employment policy does not violate the Act. We also conclude that the employer's noncompetition covenant does not violate the Act because any effect it may have on Section 7 activities is too attenuated.

An employer-mandated employment agreement alleged to restrict Section 7 conduct must be analyzed using the same *Lutheran Heritage* test¹ applied to all employer-promulgated workplace rules.² Under this framework, the mere maintenance of a work rule or policy that explicitly restricts Section 7 activities violates Section 8(a)(1).³ For example, the Board recently found in *D.R. Horton, Inc.* that an employer violates the Act by compelling employees to forego collective claims against their employer as a condition of employment.⁴ Such a policy explicitly restricts the employees' Section 7 right to seek redress of workplace grievances collectively, and thus fails under the first prong of the *Lutheran Heritage* analysis.⁵

¹ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

² See *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 4 (Jan. 3, 2012) (applying the *Lutheran Heritage* test to employer's mandatory arbitration agreement imposed as a condition of employment). See also *NLS Group*, 352 NLRB 744, 745 (2008) (finding a confidentiality provision in an employment agreement unlawful under *Lutheran Heritage*), incorporated by reference in 355 NLRB No. 169 (Sept. 28, 2010), enforced, 645 F.3d 475 (1st Cir. 2011)).

³ *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47.

⁴ 357 NLRB No. 184, slip op. at 4-6.

⁵ *Id.*

Prohibition on “Moonlighting”

Section 7 does not provide a right to work simultaneously for more than one employer.⁶ The Employer’s prohibition on moonlighting therefore does not restrict or prohibit protected activity per se, unlike the policy at issue in *D.R. Horton*. However, in prohibiting all outside employment, the policy clearly prohibits salting, which is protected activity under Section 7;⁷ it therefore is overbroad under the first prong of *Lutheran Heritage*.⁸

But the Board’s decisions involving no-moonlighting policies implicitly suggest that even though such a prohibition would restrain protected activity, that is not sufficient to establish a violation absent evidence that the prohibition was promulgated in response to union activity or applied to restrain union activity.⁹ Thus, the Board has acknowledged that an employer may have a legitimate, non-discriminatory purpose for preventing its employees from holding more than one job.¹⁰ And the Board has found prohibitions on moonlighting unlawful only where it had evidence that the policies were adopted to prevent or eliminate salting or where otherwise-neutral policies were discriminatorily enforced against union members.¹¹

⁶ *Cf. Legacy Health System*, 354 NLRB No. 45, slip op. at 1 (July 13, 2009) (employer policy prohibiting concurrent part-time employment in union and non-union position unlawful because it discriminated on the basis of Section 7 considerations), incorporated by reference in 355 NLRB No. 76 (Aug. 9, 2010), enforced, 662 F.3d 1124 (9th Cir. 2011).

⁷ *See NLRB v. Town & Country Electric*, 516 U.S. 85 (1995) (holding that company workers who are also paid union organizers are employees under the Act).

⁸ The second prong of *Lutheran Heritage* is not applicable because it’s clear that, in prohibiting all outside employment, the no-moonlighting policy prohibits some Section 7 activity, as discussed below. The question here is not whether employees would reasonably construe the rule as prohibiting salting, but whether the Employer is permitted to have a general, non-discriminatory rule that necessarily eliminates paid Union salting.

⁹ *See, e.g., Willmar Electric Service*, 303 NLRB 245, 246 n.2 (1991); *Tualatin Electric, Inc.*, 319 NLRB 1237 (1995); *Tradesmen International*, 351 NLRB 399, 425–26 (2007).

¹⁰ *See, e.g., Willmar Electric Service*, 303 NLRB at 246 n.2 (“An employer may, however, lawfully refuse to hire a statutorily protected employee applicant, including a paid union organizer, on the basis of a *nondiscriminatory* policy against hiring any individual who . . . intends to work simultaneously for more than one employer”).

¹¹ *See, e.g., Tualatin Electric, Inc.*, 319 NLRB at 1237 (finding moonlighting policy unlawful upon “abundant evidence in the record indicating that [it] was adopted primarily as a result of the Respondent’s antiunion animus”); *Tradesmen International*, 351 NLRB at 425–26 (employer’s policy against dual employment

The policy at issue here would be similarly unlawful if the Employer implemented it in order to prevent salting or if it has discriminatorily enforced the policy against union members. The Region should therefore investigate further the Employer’s motivation for promulgating and maintaining the dual employment prohibition, as well as its history of enforcement, to determine whether the policy violates the Act.

[Redacted text block with multiple instances of "FOIA Exemption 5" labels]

If the additional investigation does not reveal evidence of antiunion motivation or discriminatory application, however, the Region should dismiss the charge, absent withdrawal.

Noncompetition Covenant

The noncompetition provision of the Employer’s pre-hire agreement does not violate the Act. Section 7 does not confer a right to work in a particular geographic region. This policy, which interferes with employment in general rather than with Section 7 activity in particular, may be unlawful, as unconscionable or on some other basis, under state law. However, to the extent that the policy’s restrictions on employment would interfere with Section 7 rights—e.g. by preventing employees from becoming union salts in this geographic area after leaving their employment with the Employer—that incidental effect on Section 7 activity is too attenuated to establish a violation of the Act.¹³

CONCLUSION

We conclude that the Region should dismiss the allegation regarding the noncompetition covenant, absent withdrawal. We also conclude that the Region

violated Section 8(a)(1) because it was only enforced against known union organizers). *Cf. Little Rock Electrical Contractors*, 327 NLRB 932, 932 (1999) (employer did not violate the Act by refusing to hire two union-employed applicants pursuant to a non-discriminatory rule prohibiting dual employment).

¹² FOIA Exemption 5 [Redacted]

¹³ Because we do not find the noncompete covenant unlawful, we do not reach the remedy question.

should conduct further investigation of the “no-moonlighting” policy. The Region should issue complaint upon evidence of unlawful motive for the policy or discriminatory application. If there is no such evidence, the Region should dismiss the remainder of the charge, absent withdrawal.

/s/
B.J.K.