

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

DAVIES, INC., d/b/a Dallas Glass

and

Case 19-CA-078239

**INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT
COUNCIL #5**

EMPLOYER'S POST-HEARING BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

This ought not to be a difficult case. In the first place, the complaint is barred by Section 10(b). Section 10(b) of the Act precludes the issuance of a complaint based upon any unfair labor practice occurring more than six months prior to filing. This limitations period begins to run when the charging party has "clear and unequivocal notice" either actual or constructive of a violation, *St. Barnabas Medical Center*, 343 NLRB 1125, 1126 (2004), Advice Memorandum *Andersen Construction Co.*, Case 19-CA-083141(December 3, 2012). In this case the Union KNEW since as early as 2009 that the Employer was utilizing workers from temporary agencies on Prevailing Wage Rate jobs. Indeed, a complaint had been issued in 2010 under the identical theory as the present case. That complaint was dismissed because the alleged discriminatees had engaged in a series of hit and run strikes from May to September 2010 (GC Ex. 7). The Union also KNEW that throughout this period the Employer was working on multiple Prevailing

Wage Rate projects (Tr. 48-49, 81). Indeed, they were maintaining a TIMELINE of the Employer's activities (Tr. 81). Notwithstanding this knowledge, no charge was filed until April 2012. Too little, too late. If Section 10(b) is to have any meaning, the Complaint must be dismissed.

Secondly, the Complaint should be dismissed because the alleged discriminates were not "genuinely interested in seeking to establish an employment relationship with the employer" *Toering Electric Co.*, 351 NLRB 225 (2007). To the contrary, the alleged discriminatees were interested only in harassing and disrupting the employer and creating a basis for unfair labor practice charges. The individuals were serial strikers who engaged in strikes in July 2007, September 2007 (after returning to work for little more than a week) and a series of guerilla intermittent strikes in 2010. Indeed, the number of days "on strike" vastly exceed the number of days at work. These individuals did not want a job with the employer; they already had one with the Union at a 10% premium wage rate, which was more than \$10 dollars above what they made with the Employer and a full benefits package. Even "on strike" they never missed a paycheck.

Thirdly, to the extent that the alleged discriminatees had any right to reinstatement that right was limited to positions which were substantially equivalent to their former positions. Protected strikers are not entitled to reinstatement to nonequivalent positions, *Diamond Walnut Growers, Inc.*, 340 NLRB 1129 (2003). Mere qualification to perform a job is not sufficient to make the job substantially equivalent, *Rose Printing Co.*, 304 NLRB 1076, 1077-1078 (2003). To determine whether a job is substantially equivalent, the Board looks at skill

level, the level of responsibility, wages, hours and working conditions of the job *T.E. Briggs Construction Co.* 349 NLRB 1, 3 (2007) citing *L.B. &B Associates, Inc.*, 346 NLRB No. 92 (2006). In this case the alleged discriminatees had been hired as regular fulltime journeyman commercial glaziers (Jt. 1). The record is undisputed that the Employer has not hired any journeyman commercial glaziers since at least 2007 (R. Ex. 7). Indeed this **fact** was the **basis** for the Region to dismiss charge 19-CA-10658 (Id). The Union's appeal was denied on the same basis (R. Ex. 8). The alleged equivalent positions were temporary unskilled positions on a Prevailing Wage Rate project. Neither of the individuals hired had **ANY** experience setting commercial windows. Neither alleged discriminatee had **EVER** worked on a Prevailing Wage Rate job for the Employer. As alleged discriminatee Ramos acknowledged, just because you can install a metal window doesn't make you a journeyman (Tr. 79: 13-15). Ramos, and alleged discriminatees James, also admitted that Carpenters install metal windows, but a carpenter isn't the same as a glazier (Tr. 87). It bears repeating that the fact that the alleged discriminates could perform the work does not suffice to establish that the jobs were equivalent to their former positions, *Rose Printing, supra*. To hold that a temporary unskilled position is substantially equivalent to a regular journeyman position is to render the standard meaningless.

Finally, this Employer is the victim of an unexplained apostasy by the Region and Acting General Counsel. The employer has operated in the same fashion since at least 2007. In Case 19-CA-10658 the Region was presented with virtually identical facts as in the current case and DISMISSED the charge (R. Ex. 7). The Office of the General Counsel AFFIRMED the dismissal (R. Ex. 8). Now, without any explanation whatsoever, the Employer is forced in the case at bar to

defend itself from allegations which had long since been disposed of, or so it thought. This is a “manifest injustice” which cannot be allowed to stand *SNE Enterprises* 344 NLRB 673 (2005).

FACTS

Many of the relevant facts are set forth in the Partial Stipulation of Facts. The following facts are undisputed in the record.

1. The alleged discriminatees were permanently replaced during the second, intermittent, strike in September of 2007 (R. Exs. 3,4).
2. Since 2007 The Employer has not hired any commercial journeyman glaziers (R. Ex. 5, 7, 8, 11, 12). To the contrary, 4 journeyman commercial glaziers have been laid off (Id, Tr. 138). The remaining commercial journeymen have been continuously employed from 2007 to the date of the hearing (Id).
3. On May 3, 2010, Union organizer James advised the Region that he had access to virtually every job that the Employer was awarded and was aware of 18 jobs that the Employer has been or would be working on (Tr. 81). In fact the Union was maintaining a timeline (Id). James also provided a list of 18 new Dallas Glass employees, some of whom had worked on Prevailing Wage Rate jobs (Tr. 81).
4. Union Organizer James was aware of the Sandy High School project from the time it was awarded to the Employer (Tr. 83). James provided ‘new hire’ information for the project dated in June 2010 and certified payrolls dated in September 2010 (Tr. 83).
5. Prior to being hired for the Sandy project, neither Mashos nor Holt had any commercial glazing experience (Tr. 92, 114). Holt had never set a metal window (Tr. 117).
6. At their time of hire, both Mashos and Holt were informed and understood that they were being hired for temporary positions (Tr. 100, 103,117).

7. Mashos and Holt were hired because the Sandy Project was 3 or 4 months off schedule because another sub-contractor had pulled off the job (Tr. 131). In response, the General Contractor required the Employer to add additional workers to the job (Id.). No additional journeymen or crew leaders were required, just extra bodies (Tr.132)
8. At all relevant times, Union representatives Ramos and James were full time employees of District Council #5. They received the regular union journeyman wage, plus 10%, full union benefits and participated in an International Pension Plan that was not available to other union journeymen (TR. 76).
9. On non-Prevailing Wage rate work Mashos was paid \$18 per hour (Tr. 103) and Holt was paid \$21 (Tr.115). Union representatives James and Ramos, neither of which ever worked on a Prevailing Wage Rate job for the Employer (Tr.52-53, 20-21), 2007 pre-strike wage rates were \$24 and \$19 (Jt.1).

DISCUSSION

1. The Complaint is barred by Section 10(b) of the Act.

A party has constructive notice of an unfair labor practice where it is aware of facts sufficient to raise a suspicion of a violation that “it could have discovered the alleged misconduct through the exercise of due diligence”, *St. Barnabas Medical Center*, 343 NLRB 1127-1128 (2004). In this case as early as June of 2010, the Union KNEW that the Employer had been awarded the Sandy High School Project and had hired new employees (Tr.83). In fact the Union KNEW of every Prevailing Wage Project that the Employer was awarded because it was a matter of public record. The Union also KNEW that the Employer routinely employed temporary employees on Prevailing Wage Rate projects because it had provided this information in connection with Case No 19-CA-10704 (GC Ex. 7). Despite this knowledge, the

Union did not file the present charge until April of 2012. Section 10(b) requires that the complaint be dismissed, See Advice Memorandum, *Andersen Construction Co.*, 19-CA-083141 (December 3, 2012).

2. The complaint should be dismissed because the alleged discriminatees were serial intermittent strikers who were not interested in a genuine employment relationship.

The Board has long held that intermittent and recurrent strikers are engaged in unprotected activity, *Pacific Telephone Co.*, 107 NLRB 1547 (1954). The record is undisputed that Union representatives James and Ramos have engaged in a series of strikes beginning in 2007. After the first strike, Ramos and James returned to work for 9 days and then went on strike again. In 2010, Ramos and James engaged in a series of recurring hit and run strikes in May, June, July, August and September (GC Ex. 7). Subsequently, three months later Ramos and James denied that they had ever been on strike (GC Exs. 2,3). The denials fooled no one, including the Region and the Office the General Counsel (Advice Memorandum dated March 31, 2011). They certainly did not fool the Employer who neither acknowledged nor responded to the letters. The pattern of unprotected recurrent intermittent strikes relieved the Employer of any obligation it may have had to reinstate James or Ramos.

The pattern of recurrent intermittent strikes is also relevant because it established that Ramos and James were not genuinely interested in employment with the Employer. In the first place, they were already fully employed with wages and benefits significantly higher than any job they ever had with the Employer. Unlike, legitimate strikers, Ramos and James never missed a single paycheck or benefit contribution. They made more by being on strike. Thus, Ramos and James did not 'depend upon the Employer, even in part, for their livelihood or for

improvement for their economic standards” and the Act does not extend to them, *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999). Their sole objective was to disrupt the Employer’s operations and to create a basis for myriad (frivolous) unfair labor practice charges. That is unprotected activity, *Toering Electric Co.*, 351 NLRB 225,231(2007) (“**such conduct manifests a fundamental conflict of interests ab initio between the employer’s interest in doing business and the [Union’s] interest in disrupting or eliminating this business.”)

The Board does not serve its statutory purpose by validating “claims by disingenuous [individuals] who intend no service and loyalty to a common enterprise with a targeted employer. Instead, the Board becomes an involuntary foil for destructive partisan purposes.”

(Id.)

This is just such a case.

3. The temporary unskilled positions at the Sandy High School project were not substantially equivalent to a journeyman commercial glazier.

To contend that the temporary unskilled positions filled by Mashos and Holt are substantially equivalent to the commercial journeyman glazier positions formally held by Union representatives James and Ramos is to make a mockery of the standard. The positions were temporary not regular full time. The wages were different. Neither Ramos nor James had ever worked on a Prevailing Wage Rate Project for the Employer. The location was different. The skill levels were different. It bears repeating that neither Mashos nor Holt had any prior commercial glazing experience. None.

Apparently, the Union and Counsel for the Acting General Counsel believe that the term “Journeyman Glazier” is meaningless. The State of Oregon doesn’t think so. It requires 8000, **8000**, hours of training and work to be certified as a journeyman and requires specific skills (R Ex. 1). Even Ramos and James admitted that just because you can install a metal window, doesn’t make you a journeyman. As Ramos candidly admitted, it is not just installing windows, “[t]here’s a lot of other procedures that go into (sic).” (Tr. 44:24-25) Likewise, James admitted that a Carpenter can install a commercial metal window, but that doesn’t make him or her a journeyman glazier (Tr. 87).

Counsel for the General Counsel is apparently contending that Ramos and James were qualified to perform the work Mashos and Holt were hired for means that the positions were substantially equivalent. That is not the test. The Board has made clear that mere qualification to do the job is not sufficient to make it equivalent *Rose Printing Co.*, 304 NLRB 1076, 1077-78 (2003).

The temporary unskilled positions filled by Mashos and Holt can only be found to be “substantially equivalent” if the plain and ordinary meaning of those words is ignored.

4. The Employer is the victim of a “manifest injustice”.

This Employer should not have been subjected to the expense, disruption, and anxiety over the case at bar. Prior to 2010, this Region had repeatedly dismissed identical charges involving identical facts; only the projects were different. At least one of the dismissals was affirmed by the Office of the General Counsel. Yet here we are without explanation. The

Employer has completely cooperated through the myriad of unfair labor practices filed against it by the Union. To what end.

The Employer had the right to continue its uniform business practices in conformity with the Region's earlier decisions. Although there have been a number of "new" decisions by this Board, the law relevant to this case has not changed. Justice requires that the case be dismissed.

CONCLUSION

For all the forgoing reasons, the Complaint should be dismissed.

s/Richard N. VanCleave
Attorney for the Employer

CERTIFICATE OF SERVICE

I CERTIFY THAT ON JANUARY 24, 2013 I SERVED A COPY OF **THE EMPLOYER'S POST-HEARING BRIEF** ELECTRONICALLY ON THE FOLLOWING:

Helena A. Fiorianti
Counsel for the Acting General Counsel
Helena.Fiorianti@nlrb.gov

Ramon Ramos
IUPAT District Council #5
1105 NE Sandy Blvd.
Portland, OR 97220
Roman@iupatdc5.org

Dated this 24th day of January, 2013

s/Richard N. Vancleave
Attorney for the Employer