

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

AEROTEK, INC.

and

Cases 17-CA-071193
17-CA-075605
17-CA-078720

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 22,
affiliated with the INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
CROSS-EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF CROSS-EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel respectfully submits these limited Cross-Exceptions to the Decision of the Administrative Law Judge (ALJD) based on the ALJ's conclusion that alleged discriminatee Brett Johnson's backpay should be tolled as of February 29, 2012, because Johnson approached Interstates Construction (Interstates), Respondent's client, to discuss referring Union electricians directly to Interstates. Specifically, Counsel for the Acting General Counsel excepts to the following:

1. To the ALJ's conclusion "Johnson's conduct in attempting to exclude Aerotek from Interstates' work is so obviously inconsistent with the duties of an employee that his backpay should be told as of February 29, 2012, when he visited Interstates' office." ALJD: 12: 27-29; 13: fn. 18.¹
2. To the ALJ's finding that Respondent established a disabling conflict based on the evidence regarding Union Organizer Brett Johnson's contacts with Interstates. ALJD: 11: 38-43.

II. PERTINENT FACTS²

Union Organizer Brett Johnson testified that he prepared a journal titled, "Aerotek Staffing Timeline," which appears to memorialize Johnson's and other members' communications related to Respondent. Johnson: 267. Two entries in Johnson's journal form the basis of the ALJ's

¹ References to the transcript will be designated by witness followed by page number. References to exhibits will be designated by party followed by the exhibit number and, if applicable, relevant page numbers. References to the Administrative Law Judges' Decision will be designated by "ALJD" followed by page and line numbers.

² The facts related to Respondent's refusal to consider and refusal to hire Brett Johnson and fellow Union organizers are described in greater detail in Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions, filed concurrently with these Cross-Exceptions. Counsel for the Acting General Counsel respectfully requests that the Board consider the facts and arguments submitted in the Acting General Counsel's Answering Brief along with Counsel for the General Counsel's Cross-Exceptions.

conclusion that Johnson's actions establish a disabling conflict that warrants tolling Johnson's backpay.

Johnson's entry for February 29, 2012, provides as follows:

Late afternoon IBEW Local 22 Business Representatives Brett Johnson and Robert Sidzyk stop by the local Interstates Electrical office here in Omaha located at 14015 Industrial Road and notify the Division Manager Lee Heitmann that he has IBEW members currently working for Interstates Electric through Aerotek on the Tyson Foods job. Johnson offered to "cut out the middleman" and refer electricians directly to Interstates. Heitmann replied that he has all the electricians he needs on that job. Aerotek is doing great.

R. 23, p. 2.

Johnson's March 7, 2012, entry provides:

Johnson left a message on the voice mail of Larry Den Herder Owner of Interstates Electric located in Sioux Center IA. Offering him direct assistance in the way of manpower to the Tyson Foods Project they currently have as there are already IBEW members working for them at that job.

Id.

III. ARGUMENT

1. **The Record Does Not Support The ALJ's Conclusion That Johnson Engaged In Misconduct That Should Disqualify Him From Future Employment Or Toll His Backpay**

If an employer claims that a discriminatee is not entitled to employment and backpay, it bears the burden of proving that the discriminatee engaged in misconduct that would have disqualified any employee from continued or future employment. See *Marshal Durbin Poultry Co.*, 310 NLRB 68, 69-70 (1993), *enfd.* in pertinent part, 39 F.3d 1312 (5th Cir. 1994). To meet its burden, the employer is required to "establish that the discriminatee's conduct would have provided grounds for the termination based on a preexisting lawfully applied company policy and any ambiguities will be resolved against the employer." *John Cuneo, Inc.*, 298 NLRB 856, 857 fn. 7 (1990), citing *Super One Foods*, 294 NLRB 462 (1989). Absent such proof, "the Board

will not infer or assume that an employer would have disqualified an individual based on the nature of his misconduct.” *Smucker Co.*, 341 NLRB 35, 36 (2004).

The two above-described entries from Brett Johnson’s journal constitute the entirety of Respondent’s evidence that Johnson engaged in unprotected conduct. R. 23. Respondent did not elicit any testimony about the content of Johnson’s communications with Interstates or question Johnson about his intent. Johnson: 267. Furthermore, Respondent did not offer any evidence demonstrating when it first learned that Johnson contacted Interstates, and it did not offer any evidence about company policies prohibiting such activity.

The ALJ acknowledged as much, writing, “[T]here is no evidence as to when Aerotek became aware of Johnson’s solicitation of Interstates’ business prior to the second day of the instant hearing (October 30, 2012) and there is no testimony by Respondent that it would have refused to hire him on that basis.” ALJD: 15-18. Nevertheless, although the ALJ acknowledged that Board precedent did not support denying Johnson’s reinstatement or tolling his backpay, he concluded that Johnson’s conduct was *malum in se*. Based on this conclusion, the ALJ denied Johnson reinstatement and backpay after February 29, 2012. ALJD: 12: 22-29. The ALJ’s conclusion is erroneous as a matter of law.

Contrary to the ALJ’s analysis of *Smucker Co.*, the Board did not dispense with the burden of proof requirements described in *Marshall Durbin Poultry* and *John Cuneo* based on the nature of the alleged discriminatees’ actions in that case – i.e., cheating on a pre-employment examination. Rather, the Board affirmed the judge’s implicit conclusion that the employer established a “pre-existing lawfully applied company policy” based on actual evidence: (1) the employer’s rationale for administering a pre-employment examination, and (2) a human resource manager’s testimony that he would have immediately disqualified the applicants if he had known

that they cheated. See *Smucker Co.*, 341 NLRB at 36. In this case, there is no record evidence that the Employer would have denied employment to Johnson when it learned about his communications with Interstates. Thus, the Judge erred by denying Johnson reinstatement and by tolling his backpay based on the unwarranted assumption that Respondent would have disqualified Johnson based on the nature of his misconduct.

The Board's decision in *North American Dismantling Corp.*, 341 NLRB 665 (2004), does not compel a contrary result. In *North American Dismantling*, the Board relied on the employer's un rebutted affirmative evidence that it considered an employee's actions of contacting a customer to interfere with its business to be grounds for termination. *Id.* at 667. Despite evidence that the employer had not previously encountered such a circumstance, the Board explained that it was precluded from evaluating whether the employer met its *Marshall Durbin Poultry* burden based on the terms of the Sixth Circuit's remand. *Id.* at 666-667 fn. 8. No such procedural hurdle exists in this matter.

The remaining cases cited in the ALJ's decision are also distinguishable. In *ATC/Forsythe & Associates*, 341 NLRB 501, 503-504 (2004), the Board adopted the judge's conclusion that the employer discharged an employee because he refused to cooperate in the employer's investigation into whether he intended to interfere with its relationship with a customer. Unlike this case, *ATC/Forsythe* was simply a case in which the judge and Board concluded that the General Counsel failed to meet its *Wright Line* burden of establishing that the alleged discriminatee's protected activities were a motivating factor in his discharge. Similarly, *Kenai Helicopters*, 235 NLRB 931, 936 (1978), and *Associated Advertising Specialists, Inc.*, 232 NLRB 50, 54 (1977), are simply pre-*Wright Line* cases in which the General Counsel failed to establish that the alleged discriminatees' protected activities were the motivating factors in their

discharges. Thus, although the above cases involved employees engaged in activities in competition with their employers, the cases offer no precedential value in this matter because they did not raise the *Marshall Durbin Poultry* remedial issues.

The record clearly establishes that Respondent failed to meet its burden of proving that Johnson “engaged in misconduct that would have disqualified any employee from continued or future employment.” The ALJ erred by overlooking this fact and by assuming that Respondent would have discharged Johnson when it found out that he contacted Interstates. Furthermore, even assuming that the ALJ properly determined that Johnson’s backpay should be tolled, the record and Board precedent do not support his decision to cut off Johnson’s backpay on February 29, 2012. In both *Smucker Co.*, 341 NLRB at 36, and *North American Dismantling*, 341 NLRB at 665, the Board held that it was appropriate to toll backpay beginning on the date that the respondents learned of the employees’ misconduct. In this case, there is no evidence that Respondent learned of Johnson’s actions before October 30, 2012. Accordingly, even if the Board determines that Johnson’s backpay should be tolled, Johnson’s backpay period should be extended until October 30, 2012. See *John Cuneo*, 298 NLRB at 857 fn. 7 (“any ambiguities will be resolved against the employer”).

2. The Record Fails To Establish A Disabling Conflict

The ALJ erred by concluding that Brett Johnson’s ostensible communications with Interstates establish a disabling conflict.³ As explained previously, there is very little evidence regarding Johnson’s communications with Interstates. Furthermore, even assuming, as the ALJ did, Johnson contacted Interstates to supplant Respondent as Interstates’ labor supplier, the evidence does not establish a disabling conflict.

³ Assuming that a disabling conflict existed, the ALJ appropriately concluded that Respondent did not rely on the alleged conflict in refusing to hire Johnson, Jankowski, Hendershot, and Winge. ALJD: 12: 1-5.

A disabling conflict of interest exists when there is a clear and present danger that a union will subvert the bargaining process and advance its interests rather than those of bargaining unit employees. *Garrison Nursing Home*, 293 NLRB 122, 122 (1989). The party seeking to prove a disabling conflict bears a *heavy* burden. See, e.g., *CMT, Inc.*, 333 NLRB 1307, 1307 (2001) (emphasis added).

The ALJ correctly concluded that, notwithstanding Johnson's status as a Union organizer, the record clearly establishes that he was genuinely interested in obtaining employment with Respondent. See, e.g. *Tradesmen International*, supra, at 582 (holding that organizers demonstrated genuine interest in employment with labor supplier); *Aztech Electric*, 325 NLRB at 264-265 (finding that union organizers were statutory employees). As explained above, the evidence regarding Johnson's communications with Interstates is extremely limited and falls far short of meeting Respondent's heavy burden of establishing a disabling conflict.

Furthermore, even assuming that Johnson's communications with Interstates were inconsistent with an employee's duties to his employer, it is important to consider Johnson's actions in context. After failing in his effort to assist the Union's organizing efforts by obtaining employment with Respondent, it appears that Johnson contacted Interstates to offer the Union's services. Johnson's attempt to obtain employment with Respondent and his contacts with Interstates were two independent actions. Johnson was not Respondent's employee when he contacted Interstates, and, considering Respondent's unlawful actions, he had no reasonable hope of becoming Respondent's employee. Thus, it was Respondent's unlawful action that severed the employee-applicant/employer relationship, not Johnson's allegedly unprotected conduct. There is no evidence that Johnson would have contacted Interstates if he succeeded in obtaining employment with Respondent. In fact, considering Johnson's conduct during his previous

employment with Tradesmen International, the record suggests that he would not have done so. GC 41; Johnson: 233-234. Accordingly, unlike *North American Dismantling* and the other cases cited by the ALJ, Respondent's unlawful conduct created the circumstances that led Johnson to engage in the activity that it now contends disqualifies him from employment. Absent evidence conclusively establishing a disabling conflict, Respondent should not be allowed to reap the benefits of its unlawful conduct.

IV. CONCLUSION

Counsel for the Acting General Counsel respectfully submits that the above-demonstrated facts and argument establish that the ALJ erred by concluding that Brett Johnson's backpay should be tolled as of February 29, 2012, and by concluding that Johnson should be denied reinstatement. The Board should affirm the ALJD in all other respects.

Dated: April 29, 2013

Respectfully submitted,



Michael E. Werner
Counsel for the Acting General Counsel

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Cross-Exceptions on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Board with service by electronic mail on the parties identified below.

Dated: April 29, 2013



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