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

DATE: February 3, 2014

TO: Joseph Frankl, Regional Director
Region 20

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

SUBJECT: Paratransit Services, Lake County
Case 20-CA-111962

177-7067-3350
177-7067-6750
524-5079-2813
524-5079-2874
524-5079-2875

This case was submitted for advice on issues relating to the Employer's permanent replacement of striking employees. Specifically, the Region requested advice as to (1) whether the Employer's unfair labor practice of conditioning reinstatement of striking employees on their resignation from the Union prolonged an economic strike, and thus converted it to an unfair labor practice strike; and (2) if not, whether the Employer nevertheless violated Section 8(a)(3) and (1) by permanently replacing striking employees for an independent unlawful purpose under *Hot Shoppes, Inc.*[1] We conclude that the strike did not convert to an unfair labor practice strike, even though the Employer's unfair labor practice is of the type that objectively tends to prolong a strike, because there is substantial evidence that the employees' reasons for striking remained economic. We also conclude that the Employer did not hire permanent replacements for an independent unlawful purpose. Accordingly, the charge allegations relating to the permanent replacement of striking employees should be dismissed, absent withdrawal.

FACTS

Paratransit Services, Inc. ("Employer") is a non-profit transportation company specializing in public transit operations. The Employer has a contract with Lake Transit Authority to provide dial-a-ride and fixed route services to the citizens of Lake County, Washington. Teamsters Local 665 ("Union") represents a unit of the Employer's drivers, dispatchers, and maintenance employees, which at all times

[1] 146 NLRB 802 (1964).

material consisted of approximately 39 employees. The parties' most recent collective bargaining agreement expired on June 30, 2013.[2]

Bargaining for a successor agreement began in April, prior to contract expiration. The strike at issue was the second of two strikes brought on by the parties' differences over economic issues. The principal motivation for both strikes was the Employer's refusal to restore step wage increases that were frozen during the prior round of negotiations. Only July 25, the Union president informed the Employer that he would be recommending a second strike beginning on July 29. The Employer responded on July 26 that it was prepared to continue business operations during a strike and that it would begin to immediately hire permanent replacements for striking employees. On July 28, the Union membership voted to commence a strike at midnight on July 29 in support of its economic demands.

Upon receiving notice of the strike, the Employer distributed information packets to employees that included information on how to resign from the Union to avoid fines if the employee wanted to cross the picket line and continue working. The packet included a resignation form but stated that the choice to resign from the Union was entirely up to each employee.

Nevertheless, the Employer informed at least two employees that they had to resign from the Union in order to work during the strike. One employee was called by an agent of the Employer prior to the strike and was asked if he intended to cross the picket line, as he had done during the first strike. According to the employee, the Employer's agent stated that he must first resign from the Union if he wanted to work. A striking employee on the picket line heard about this individual's situation from the Union's president.

The second employee was a new hire and had recently finished training for his position, but was not yet a Union member. He was scheduled to work on the first day of the strike, but when he reported for work the Employer informed him that he must first resign from the Union. The employee explained that he was not in the Union yet and thus could not resign. The Employer then instructed the employee to check in at a later time about a work assignment, but the employee failed to check in as instructed. The employee later visited the picket line and recounted his situation to one of the striking employees. Approximately eight to ten other employees listened in on the conversation and discussed the issue with the affected employee.[3]

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[2] All dates hereinafter are in 2013 unless otherwise stated.

[3] The Region has concluded that the Employer violated Section 8(a)(3) and (1) by discriminatorily refusing to provide work to the two employees who sought work but could not demonstrate to the Employer that they had resigned from the Union. The Region has also concluded that the Employer independently violated Section 8(a)(1)

One striker stated that the predicaments of the discriminatees were not a topic of conversation on the picket line and that neither she nor anyone she talked to considered the Employer's unfair labor practice a reason for the strike. She indicated that Union members voted to strike the second time due to the unfairness of the Employer's wage proposals and its unwillingness to move from its initial offer. Furthermore, she stated that the economic concerns continued to motivate Union members throughout the second strike and that the motivations never changed. Additionally, the employee claimed that she personally would have struck with or without the Employer's refusal to allow the discriminatees to work and that, based on talking to other strikers and what was discussed at Union meetings, all members felt the same way.

Another striker stated that as the strike went on for a few weeks, people hung in with the strike for the additional reason that it was clear to them that the Employer was having problems providing service to the county, which the employees viewed as mounting pressure on the Employer to alter its economic position. The employee also said that employees were motivated to continue the strike because they were rubbed the wrong way by the Employer's lies to the community regarding the scope and safety of replacement service.

The Employer was obligated to keep operations running due to its service agreement with Lake Transit Authority to provide transportation to Lake County citizens. Soon after the strike began, the Employer worked with Lake Transit Authority to create a "Service Restoration Plan" to provide limited service initially, with full service to be restored by September 3. In implementing the plan, the Employer chose to hire permanent rather than temporary replacements to increase the likelihood of recruiting and retaining employees. In addition, new employees required significant training, and the Employer did not want to invest resources training temporary workers.

On August 15, the Union, on behalf of striking employees, tendered to the Employer its unconditional offer to return to work. The Employer acknowledged receipt of the offer and informed the Union that it had hired permanent replacements for all but one driver position and one part-time dispatch position. The Employer also stated its desire to bargain over the employee recall process to fill open positions as well as a longer-term recall process under a preferential hiring list.

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by repeatedly conditioning work on resignation from the Union and by collecting employees' Union resignation forms, thus engaging in unlawful interrogation regarding employees' protected activities.

On September 5 the parties finalized an overall recall process as well as the terms of the successor agreement. By the end of September, nearly all striking employees had been offered at least part-time work.

ACTION

We conclude that the strike did not convert to an unfair labor practice strike, even though the Employer's unfair labor practice is of a type that objectively tends to prolong a strike, because there is substantial evidence that the reasons for the strike remained economic. We further conclude that the Employer did not hire permanent replacements for an independent unlawful purpose and thus did not violate Section 8(a)(3) and (1) under *Hot Shoppes, Inc.*

1. The Strike Did Not Convert to an Unfair Labor Practice Strike

The standard applied by the Board to determine whether an economic strike has been converted to an unfair labor practice strike is well settled. An employer's unfair labor practices during an economic strike do not "ipso facto convert it into an unfair labor practice strike."[4] To demonstrate conversion, the General Counsel must prove that the unfair labor practices were a factor (though not necessarily the sole or predominant factor) that caused a prolongation of the work stoppage.[5] In demonstrating this causal nexus, the General Counsel may rely on both objective and subjective factors.[6]

When examining objective factors, the Board looks to whether the Employer's unfair labor practices are of a type that reasonably tends to prolong a strike.[7] Certain unfair labor practices by themselves, such as a withdrawal of recognition or bad faith bargaining, provide an objectively "sufficient and independent basis" for finding that a strike converted from an economic strike to an unfair labor practice strike because the conduct at issue was likely to burden or interrupt the collective bargaining process.[8]

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[4] *Gaywood Mfg Co.*, 299 NLRB 697, 700 (1990) (citing *C-Line Express*, 292 NLRB 638, 638 (1989)).

[5] *Id.*

[6] *Id.*

[7] *See C-Line Express*, 292 NLRB at 638 (quoting *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980)).

[8] *C-Line Express*, 292 NLRB at 638; *F. L. Thorpe & Co.*, 315 NLRB 147, 149 (1994), *enforcement denied in relevant part*, 71 F.3d 282 (8th Cir. 1995).

The Board has also held that conditioning work during a strike on an employee's resignation from the Union is an unfair labor practice that, by its nature, reasonably tends to prolong a strike.[9]

Notwithstanding the Board's view that, as an objective matter, this type of unfair labor practice tends to prolong a strike, the Board in these cases typically also examines employees' subjective motivations for striking, in order to buttress its holding that the objective factors converted the strike.[10] In examining the strikers' subjective motivations, the Board gives "substantial weight" to strikers' own characterization of their motivations to continue a strike after an employer commits an unfair labor practice.[11] In the absence of direct employee statements, the Board will infer a change in the strikers' subjective motivations if the employer's unfair labor practice was sufficiently disseminated and caused "consternation" among striking employees.[12] To the extent that dissemination among strikers of certain

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[9] *F. L. Thorpe & Co.*, 315 NLRB at 149 (stating that employer's unlawful conditioning of reinstatement was comparable in effect to an unlawful withdrawal of recognition that as an objective matter has a reasonable tendency to prolong a strike); *Chicago Beef Co.*, 298 NLRB 1039, 1040 (1990) (same), *enforced mem.*, 944 F.2d 905 (6th Cir. 1991); *Gaywood Mfg Co.*, 299 NLRB at 700 (same).

[10] *See F. L. Thorpe & Co.*, 315 NLRB at 149 (finding that conditioning reinstatement on resigning from union and statements by general manager's wife that strikers were fired caused "substantial consternation" among employees such that actions were widely discussed at all union meetings); *Chicago Beef Co.*, 298 NLRB at 1040 (stating that "everybody" on the picket line was discussing the resignation forms and that it caused "consternation" among strikers); *Gaywood Mfg Co.*, 299 NLRB at 700 (determining that employer conditioning reinstatement on resignation from the union was disseminated among employees and caused consternation). *See also Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 9 (1st Cir. 2001) ("specific, subjective evidence of changed motivation may be forgone only in those instances in which objective factors by themselves establish unequivocally that a conversion occurred"), *denying enforcement in part*, *Ryan Iron Works*, 332 NLRB 506 (2000).

[11] *C-Line Express*, 292 NLRB at 638 (quoting *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980)) (holding economic strike did not convert to unfair labor practice strike where there was a lack of evidence that the strikers were motivated to prolong their strike by the Employer's coercive statements to employees on the picket line, and the strikers were not even aware of the Employer's unlawful refusal to furnish the Union with relevant information).

[12] *Chicago Beef Co.*, 298 NLRB at 1040 (finding that employees' subjective motivations for striking changed when employer conditioned reinstatement on resignation from the union and "everybody" on the picket line was discussing the

types of unfair labor practices may in itself create a presumption of consternation, that presumption is rebutted by countervailing evidence that the strikers' actual motivations remained economic.[13]

Here, the Employer's conditioning work on resigning from the Union was an unfair labor practice that objectively tends to prolong a strike. Moreover, there is evidence that news of the Employer's unfair labor practice was disseminated to employees on the picket line.

Yet although there was some dissemination of the Employer's unfair labor practice, it did not change the strikers' subjective motivations for striking. Instead, employees' direct statements show that they called the strike and continued to strike solely because of economic issues. One striker stated that the unfairness of the Employer's wage proposals and its unwillingness to move from its initial offer motivated the Union members to vote to strike the second time. Furthermore, she stated that the economic concerns continued to motivate Union members throughout the second strike and that the motivations never changed. She also stated that the predicaments of the discriminatees were not a topic of conversation on the picket line and that neither she nor anyone she talked to considered the Employer's unfair labor practice as a reason for the strike.[14] Additionally, the employee claimed that she personally would have struck with or without the Employer's refusal to allow the discriminatees to work and that, based on talking to other strikers and what was discussed at Union meetings, all members felt the same way.

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resignation forms and it was "a matter of great importance and interest to the striking employees."); *F. L. Thorpe & Co.*, 315 NLRB at 150 (finding ample evidence that employer's actions caused consternation due to wide dissemination of statements that strikers had to resign from union to return to work and statements that strikers were fired and did not have jobs, and the employer's several failed attempts to disavow those statements).

[13] *Compare Gaywood Mfg.*, 299 NLRB at 700 (stating that dissemination of employer's conduct provided supporting evidence that conduct caused consternation among striking employees), *with Outdoor Venture Corp.*, 336 NLRB 1006, 1007 (2001) (finding that General Counsel failed to prove that employer's alleged unlawful direct dealing contributed to the strike where evidence did not establish that direct dealing caused any consternation among strikers or strengthened their resolve to continue striking and employees testified that they continued striking because the employer failed to propose an acceptable contract).

[14] *Cf. Heritage Container, Inc.*, 334 NLRB 455, 461 (2001) (finding unfair labor practice changed subjective motivations for strike where employees widely discussed employer's phone calls to several strikers threatening their jobs and the threats "caused substantial consternation").

Another striker stated that as the strike went on for a few weeks, people hung in with the strike for the additional reasons that it was clear that the Employer was having problems providing service to the county, which the strikers interpreted as mounting pressure on the Employer to alter its economic position. The employee also said that strikers were motivated to continue because they were rubbed the wrong way by the Employer's lies to the community regarding the scope and safety of replacement service.

Therefore, in this case, there is substantial evidence that the Employer's conditioning of work during the strike on resignation from the Union was not a factor that caused or prolonged the strike. Accordingly, the strike did not convert to an unfair labor practice strike.

2. <u>The Employer Did Not Permanently Replace Strikers For an Independent Unlawful Purpose Under *Hot Shoppes, Inc.*</u>

Under Supreme Court precedent, an employer that refuses to reinstate economic strikers violates 8(a)(3) unless it can demonstrate that it acted to advance a "legitimate and substantial business justification."[15] The hiring of permanent replacements amounts to the requisite legitimate and substantial business justification.[16] In *Hot Shoppes*, the Board held that it would not evaluate the legitimacy of an employer's object in permanently replacing economic strikers, absent evidence of an unlawful motive.[17] Thus, under current law, an employer does not have to prove the business necessity of its hiring permanent replacements, or show a nexus between that hiring and the ability to continue operations during the strike. Rather, it is the General Counsel's burden to prove that the employer permanently replaced strikers because of a prohibited motive. In other words, an employer is free to hire permanent replacements for any non-discriminatory reason, but where anti-union discrimination is shown in the use of permanent replacements, a Section 8(a)(3) violation is established.[18]

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[15] *NLRB v. Fleetwood Trailer, Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)).

[16] *Id.* at 379.

[17] 146 NLRB at 805. The Board relied upon *NLRB v. Macaky Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938), in which the Supreme Court, in dictum, articulated its view that an employer may lawfully permanently replace economic strikers "in an effort to carry on the business."

[18] *Hot Shoppes, Inc.*, 146 NLRB at 805.

Thus, for example, in *Avery Heights*, the Board, on remand from the Second Circuit, accepted the court's reasoning and found a Section 8(a)(3) violation where the logical implication of the employer's secrecy in hiring permanent replacements during a strike was an illicit motive to break the union.[19] By concealing the permanent status of the replacements, the Employer could gain time to establish an employment relationship with a large number of permanent replacements before the union could react by offering to return to work.[20]

Here, there is no evidence of an independent unlawful basis for hiring permanent replacements, much less any Employer actions that the Board or Administrative Law Judges have relied upon to find a violation under *Hot Shoppes*.[21] Instead, the Employer made it clear at the beginning of the strike that it planned to hire permanent replacements and did not undertake any secret scheme to break the Union. Moreover, the permanent replacements were hired through the Employer's regular hiring channels and at a lower wage than that of the strikers. And any theory that the Employer hired permanent replacements for a retaliatory motive is undercut by the fact that the Employer negotiated a recall procedure shortly after the strike ended and offered at least part-time reinstatement to almost all of the strikers within a month.

Moreover, although not required to do so under *Hot Shoppes*, the Employer has advanced substantial business justifications for hiring permanent strike replacements. Specifically, the Employer was obligated to keep operations running by

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[19] 350 NLRB 214, 217 (2007), *enforced*, 303 F. App'x 998 (2d Cir. 2008).

[20] *Id*. *See also Pennsylvania Glass Sand Corp.*, 172 NLRB 514, 514 n.3, 535 (1969) (ALJ found an independent unlawful purpose where the employer hired permanent replacements at a higher wage and outside its usual hiring practices in an attempt to undermine the union and affect a second certification election; the Board did not pass on this finding because it concluded that the strike had converted to an unfair labor practice strike before any replacements were hired), *enforced sub nom.*, *Teamsters Local 992 v. NLRB,* 427 F.2d 582 (D.C. Cir. 1970); *Bernard Dalsin Manufacturing Co.,* JD-27-09 at 27-29, 2009 WL 1886693 (2009) (no exceptions filed) (finding employer converted temporary replacements to permanent replacements for unlawful motive where conversion occurred precipitously after employer learned that striking employees were going to revote on its final offer, conversion was contrary to past practice, employer had a stable source of temporary employees, and employer incurred substantial referral fees as a result of the conversion).

[21] *See, e.g.*, *Avery Heights*, 350 NLRB at 217; *Pennsylvania Glass Sand Corp.*, 172 NLRB at 535.

its service agreement with Lake Transit Authority to provide transportation to Lake County citizens. When the strike began, the Employer worked with Lake Transit Authority to create the "Service Restoration Plan." In implementing that plan, the Employer chose to hire permanent rather than temporary replacements to increase the likelihood of recruiting and retaining employees. Moreover, new employees required comprehensive training, and the Employer legitimately did not want to invest significant resources training temporary workers.

Accordingly, the Section 8(a)(1) and (3) allegations based on a strike conversion theory or, in the alternative, a violation under *Hot Shoppes* should be dismissed, absent withdrawal.

/s/
B.J.K.