

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

Advice Memorandum

DATE: May 20, 2014

TO: Rhonda P. Ley, Acting Regional Director
Region 6

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

SUBJECT: Sunland Construction, Inc.
Case 06-CA-114766

530-6050-2579-0000

The Region submitted this case for advice as to whether an employer violated Section 8(a)(1) and (3) by refusing to reinstate an economic striker who had struck the employer and unconditionally offered to return to work 13 years earlier when the employer last operated in the same state. We conclude that the Employer did not violate Section 8(a)(1) and (3) by refusing to reinstate the economic striker 13 years later because, despite his prior protected concerted activity, it would have discharged him for legitimate business reasons in 2000 when it completed work on the last project it had in the state. Thus, the Region should dismiss the charge, absent withdrawal.

FACTS

Sunland Construction, Inc. (the “Employer”) performs pipeline construction and other related energy services in several regions across the United States. The Employer does not have a plant or permanent, fixed site, and it does not employ a core group of workers. Rather, it hires new supervisors and work crews for each project it acquires. In 2000, the Employer was contracted to repair and replace natural gas pipelines in Gladys, West Virginia by a local utility company (“the Gladys project”). On September 13, 2000, the Employer hired a member of Bricklayers Local 15 and full-time organizer for the Association of Construction Trades (“ACT”) (the “Organizer”) as a welder’s helper on the Gladys project at the rate of \$8.50 per hour.¹ On September 20, 2000, after one week of work, the Organizer and several coworkers went on strike with the Operating Engineers who had been picketing the Employer.

¹ The Organizer was initially covert about his union membership.

On September 24, 2000, the Operating Engineers changed their picket signs to indicate that they were picketing in protest of the Employer's alleged unfair labor practices. On September 25, 2000, the Organizer made an unconditional offer to return to work and was immediately reinstated. Despite being reinstated to his former position as a welder's helper, the Organizer worked as a general laborer on September 25.² The next morning, the Organizer and another employee told the Employer that they were not comfortable working behind a picket line, left work, and again joined the Operating Engineers' picket line. By letter dated September 26, 2000, the Employer informed the Organizer that he had been permanently replaced.

On September 27, 2000, the Operating Engineers filed the charge in Case 06-CA-31638 alleging that the Employer had committed multiple Section 8(a)(1) and (3) violations, including unlawfully discharging the Organizer. On October 3, 2000, the Operating Engineers sent the Employer by fax and certified mail the Organizer's unconditional offer to return to work.³ On December 14, 2000, the Operating Engineers amended the charge in Case 06-CA-31638 to omit all allegations that the Employer had violated Section 8(a)(3), including the allegation that the Organizer had been discriminatorily discharged. At about the same time, the Employer lost its contract to complete the pipeline repair work, and it completed its work on the Gladly project by the end of the month. On January 5, 2001, the Employer and the Operating Engineers entered into an informal Board settlement agreement that resolved all of the outstanding Section 8(a)(1) allegations in Case 06-CA-31638.⁴ The Employer had no further presence in West Virginia for the next thirteen years.

Sometime during 2001, the Organizer became a paid, full-time organizer for the West Virginia Laborers District Council. In early 2002, he obtained work for several weeks as a bricklayer, but was unlawfully discharged from that position on

² During his work shift on September 25, 2000, the Organizer attempted to offer another employee a union authorization card. A supervisor who was present at the time reprimanded the Organizer for violating the Employer's policy against solicitation and distribution and was told to return to the office. The Organizer mistakenly thought he was being terminated at the time, but was corrected at the Employer's office and told to return to work.

³ The Employer denies that it ever received a second unconditional offer to return to work from the Organizer in 2000.

⁴ According to the Region's records, there is no evidence that the Employer did not honor the terms of the settlement agreement in Case 06-CA-31638.

January 18, 2002.⁵ Beginning in February 2002, the Organizer found employment as a welder/carpenter at a rate of \$13.00 per hour for a total of five weeks. In December 2002, the Organizer secured employment as a carpenter/laborer at a rate of \$8.00 per hour for six weeks. From July 2003 through the end of 2004, the Organizer worked as either a bricklayer or cement finisher for approximately twelve weeks on several jobs at rates from \$11.50 to \$14.00 per hour.⁶

In the summer of 2013, the Organizer learned from a fellow union organizer that the Employer had returned to West Virginia. The Employer's current project is located in Wheeling, West Virginia ("the Wheeling project"). In early August, after observing that most of the workers that the Employer hired were from out-of-state, union organizers from several different unions in West Virginia initiated a protest against the Employer's use of non-local workers. The protesters appeared near the entrance to the Wheeling project every week day. The Organizer joined the protest on the first day and remained with the protesters for several weeks.

On August 20, 2013, the Organizer went to the Wheeling project and asked if the Employer was hiring. An Employer representative asked the Organizer what work he could do, to which the Organizer responded that he was able to run a bulldozer, work as a welder's helper, or do environmental work. The Organizer was told to return to the jobsite the following day and speak with a foreman. On August 21, 2013, the Organizer returned to the Employer's jobsite and once again inquired about working for the Employer. The Organizer was told to put his name and job skills on a list of potential employees.⁷ After the Organizer put his name on the list, he gave one of the Employer's foremen a letter making an unconditional offer to return to work for the Employer from an unfair labor practice strike.

On August 23, 2013, the Organizer received a letter from the Employer's CEO stating that all unfair labor practices had been resolved in 2000 and that the Organizer's right to reinstatement with the Employer ended along with the Gladly project thirteen years ago. The Employer never contacted the Organizer about potential employment. The Region's investigation revealed that after the Organizer had made his August 21, 2013 unconditional offer to return to the work, the Employer

⁵ In *Phillips & Sons Masonary & Construction, Inc.*, 338 NLRB No. 19, slip op. at 2 (Sept. 30, 2002) (unpublished decision), the Board found that the Organizer's discharge on January 18, 2002, violated Section 8(a)(1) and (3).

⁶ It is unclear what, if any, positions the Organizer held from 2004 until 2013.

⁷ The Employer no longer possesses a copy of the applicant list on which the Organizer put the requested information.

hired several laborers and machine operators for the Wheeling project, but no welder's helpers.

ACTION

We conclude that the Employer did not violate Section 8(a)(1) or (3) by refusing to reinstate the Organizer in 2013 because, despite his prior protected concerted activity, it would have discharged the Organizer for legitimate business reasons in 2000 when it finished working on the Gladly project. Thus, the Region should dismiss the charge, absent withdrawal.

It is well-settled that if employees engage in a lawful economic strike, an employer is free to hire permanent replacements to continue operating its business.⁸ However, economic strikers remain employees unless they have acquired regular and substantially equivalent employment elsewhere, and they are entitled to full reinstatement, either to their former or a substantially equivalent job, once they unconditionally offer to return to work.⁹ Although an employer is not obligated to discharge permanent replacements to make room for returning economic strikers,¹⁰ it must place such strikers on a preferential hiring list and offer them reinstatement to their former job or its equivalent when such a position becomes available.¹¹ Moreover, the Board has not placed a time limit on the reinstatement rights of economic strikers.¹² An employer may refuse to reinstate an economic striker only if it can demonstrate a legitimate and substantial business justification, such as a bona fide absence of available work.¹³

⁸ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938).

⁹ *Laidlaw Corp.*, 171 NLRB 1366, 1369–70 (1968), *enfd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

¹⁰ *See, e.g., NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. at 345-46.

¹¹ *See Laidlaw Corp.*, 171 NLRB at 1369 (“having signified their intent to return by their unconditional application for reinstatement, it was incumbent on Respondent to seek them out as positions were vacated”).

¹² *See U.S. Mineral Products Co.*, 276 NLRB 140, 141 (1980) (there is no limitation period after which replaced economic strikers who have made an unconditional offer to return no longer have the right to recall); *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634, 636–37 (1973) (same).

¹³ *Compare NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 381 (1967) (unavailability of jobs on exact date economic strikers made unconditional offer to

However, the Board's traditional make-whole remedy of reinstatement may be modified in situations where it is demonstrated that a discriminatee had no likelihood of continued employment with the employer.¹⁴ Particularly in the case of construction industry employers engaged in project-based work, reinstatement is not appropriate where it is established that a discriminatee had no likelihood of continued employment.¹⁵

We conclude that the Employer did not violate Section 8(a)(1) and (3) by refusing to reinstate the Organizer—an economic striker¹⁶—at its Wheeling project in 2013

return to work not legitimate and substantial business justification for denying reinstatement), *with Randal, Burkart/Randall*, 257 NLRB 1, 6–7 (1981) (employer's delay in reinstating strikers was lawful where employer proved that prestrike inventory buildup by its customers temporarily eliminated need for strikers' services), *enfd in pertinent part*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

¹⁴ *See, e.g., Pacemaker Driver Service*, 290 NLRB 405, 405 (1988) (respondent not required to offer reinstatement to four discriminatees where it showed they would have been discharged in connection with legitimate closing of trucking domicile), *enfd sub nom. Bales v. NLRB*, 914 F.2d 92, 96-97 (6th Cir. 1990). *Cf. Darlington Mfg. Co. v. NLRB*, 397 F.2d 760, 773 (4th Cir. 1968) (“petitioners might have a superseding, lawful reason for terminating or reducing back pay liability, such as showing that as of a particular date [the employer] would have closed its mill or laid off employees even if they had not voted for the union”), *cert. denied*, 393 U.S. 1023 (1969).

¹⁵ *Cf. Dean General Contractors*, 285 NLRB 573, 575 (1987) (in construction industry, the Board will not presume that the end of the project would necessarily lead to severing of future employment with employer; determination of whether employee would have been transferred or assigned elsewhere is a factual question).

¹⁶ Our conclusion would be the same even if the Organizer had been an unfair labor practice striker in late 2000. Assuming that the Operating Engineers made an unconditional offer to return to work on the Organizer's behalf on October 3, 2000, Section 10(b) precludes any allegation that the Employer unlawfully refused to reinstate him. The Employer previously had informed the Organizer that he had been permanently replaced. However, as the Region notes, neither the Operating Engineers nor the Organizer filed a timely charge alleging the unlawful refusal to reinstate an ULP striker. *Cf. Outdoor Venture Corp.*, 327 NLRB 706, 708–09 (1999) (although settled, pre-10(b) allegations could be used to establish employees' status as ULP strikers, timely charge alleged employer's failure to offer strikers immediate reinstatement). Indeed, on December 14, 2000, the Operating Engineers withdrew

because the Employer would have discharged him regardless of his protected concerted activity when it completed its work on the Glady project in late 2000.¹⁷ There is no evidence that the Employer hired or re-hired the same employees from its 2000 Glady project to work on its 2013 Wheeling project. Indeed, the Employer does not employ a core group of workers, and its standard practice is to hire new supervisors and work crews for each new project. After completing its work on the Glady project, the Employer was absent from West Virginia for thirteen years and there is no evidence that the Organizer or other employees from the 2000 Glady project sought out or worked for the Employer in other states where it was active during that timeframe. Furthermore, the Organizer worked for multiple other employers during the time that the Employer was absent from West Virginia. In 2002, for example, he worked in several jobs that were substantially equivalent to the welder's helper/laborer position he had held with the Employer in 2000.¹⁸ In light of the totality of the circumstances, it is clear that the Organizer had no reasonable likelihood of continuing his employment with the Employer after it completed its work on the Glady project in late 2000. Thus, he is not entitled to reinstatement with the Employer at the Wheeling project.

Accordingly, the Region should dismiss the instant allegation, absent withdrawal.

B.J.K.

the allegation in Case 06-CA-31638 that the Employer had violated Section 8(a)(3) by discharging the Organizer.

¹⁷ Whether the Employer unlawfully refused to reinstate the Organizer before the Glady project ended in December 2000 is barred by Section 10(b).

¹⁸ In finding no merit to the current charge, we do not rely on the principle set forth in *Oil Capitol Sheet Metal*, 349 NLRB 1348, 1352-53 (2007), that the General Counsel “should bear the burden of producing affirmative evidence as to whether the salt/discriminatee would have continued working for the employer and transferred to a new jobsite” to establish the relevant backpay period in cases where a union salt is subject to discriminatory conduct. It is not necessary to apply that principle here to conclude that the Organizer had no expectation of continued employment with the Employer beyond the Glady project.