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

Advice Memorandum

DATE: December 24, 1996

TO : Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: Contractor Staffing Resource, Inc.
Case 12-CA-18195 524-0133-7500
524-0167-1033-5000
524-5012-7000
524-6708-6200

This Section 8(a)(1) and (3) "salting" case was submitted for advice as to whether the Employer's hiring criteria are unlawful because they give hiring priority to employees of an employer that it knows refused to hire union sympathizers.

FACTS

The Region has issued complaint in Case 12-CA-17521 alleging that Second Shift, Inc., d/b/a Jobsite Staffing (JSS) violated Section 8(a)(1) and (3) through, inter alia, violations committed by its supervisors, Barbara Scott and Henry Gee. The alleged violations include threats, interrogations, and refusals to consider or hire applicants because of their union membership.

Scott has since become an owner, and Gee a supervisor, of Contractor Staffing Resource (the Employer),[1] which, like JSS, provides referrals of skilled craftspeople such as electricians, plumbers and carpenters to construction contractors. These contractors then pay fees to CSR, which retains a certain amount as its referral fee and income and directly pays the employees it has referred and provides insurance benefits to employees who have worked more than 90 days.

Starting on February 26, 1996,[2] members of IBEW Local 756 (the Union) applied to the Employer for referrals. Over the next several months, eight Union members who wore union

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[1] Mary Ream, a JSS secretary, became a secretary for CSR.

[2] All events occurred in 1996.

shirts when they applied submitted applications but were told that no work was available. Four members who did not wear union shirts when they applied were given job referrals either when they applied or shortly thereafter. One of these successful applicants was told by Ream that the Employer was having problems finding licensed journeymen; all of the alleged discriminatees are licensed journeymen. Moreover, two of the covert applicants received referrals several weeks after applicants wearing union shirts had been told that their applications would be retained for consideration for future jobs. The employees who received job referrals were also told not to discuss their wages with anyone on the job.[3]

[*FOIA Exemptions 6 and 7(c)*], Scott and Gee [*FOIA Exemptions 6 and 7(c)*] gave hiring priority to former employees of JSS as well as to former CSR employees. [*FOIA Exemptions 6 and 7(c)*] they gave these former employees priority over "off the street" applicants such as the alleged discriminatees because they knew, from the former employees' previous work, that they were competent and reliable, whereas they could not say the same about applicants who had not previously worked for either JSS or CSR. Scott and Gee [*FOIA Exemptions 6 and 7(c)*] did not hire any of the alleged discriminatees because there were no openings for these people, in light of the Employer's hiring priorities. However, [*FOIA Exemptions 6 and 7(c)*] they had retained these employees' applications for future consideration. The Employer declined to present all of its payroll records and applications on file at this point. Several weeks later, in the course of additional investigation, the Region examined the Employer's records and determined that for the period between February 26 (the date of the first alleged failure to hire) and September 23, the Employer had hired 23 journeymen electricians, of whom 11 were neither former JSS nor CSR employees. In explanation, Scott and Gee [*FOIA Exemptions 6 and 7(c)*] contended that these 11 employees had applied for work at times when the Employer had immediate need for them and that the Employer did not "look a gift horse in the mouth," even though these employees did not meet the Employer's hiring priorities. The Employer had not originally proffered such an explanation of its hiring practices.

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[3] The Region has concluded that the Employer violated Section 8(a)(1) by telling employees not to discuss their wages.

The Region has concluded that the Employer took advantage of Scott's and Gee's knowledge that the JSS workforce reflected JSS's unlawful refusal to hire union members, to maintain hiring priorities in favor of a "tainted pool" -- former JSS employees -- and thus exclude Union members from jobs.

ACTION

We conclude that complaint should issue, absent settlement.

A prima facie case of an unlawful refusal to hire or consider for hire an applicant is proven where (1) an individual files an employment application, (2) the employer refuses to consider for hire or hire the applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against the union activity, and (6) the employer refuses to consider or hire the applicant because of such animus.[4]

As to the requirement of animus, it can be established by direct evidence of contemporaneous or past unlawful conduct, hiring disproportionately few union members where many union members applied,[5] utilizing procedures which disfavor union applicants,[6] departing from standard hiring policy,[7] or by "the record as a whole."[8] Once the proscribed

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[4] KRI Constructors, 290 NLRB 802, 811 (1988) and cases cited therein; Lewis Mechanical Works, 285 NLRB 514, 516 (1987); Ultrasystems Western Constructors, 310 NLRB 545, 555 (1993), enf'd in part 18 F.3d 251 (4th Cir. 1994).

[5] Fluor Daniel, Inc., 304 NLRB 970, 971 n.10 (1991) (Fluor Daniel I), and cases cited therein.

[6] Ultrasystems Western Constructors, 310 NLRB at 555 (policy of screening out union applicants evidences animus); KRI Constructors, 290 NLRB at 811 (policy of hiring more expensive, out-of-state applicants is against self-interest and evidences animus).

[7] Fluor Daniel, Inc., 311 NLRB 498, 499 (1993) (Fluor Daniel II) (employer gave union applicants more difficult employment examination); Ultrasystems, 310 NLRB at 555

intent is established, the causal element is inferred. The employer can rebut a prima facie case by establishing that the applicant would not have been hired even absent the discriminatory motive.[9]

In D.S.E. Concrete Forms,[10] the Board affirmed the ALJ's conclusion that the employer violated Section 8(a)(3) and (1) when it discriminatorily refused to consider for hire employees whom it suspected of union sympathies. In doing so, the Board considered the effect of the employer's hiring practices, under which the employer gave first preference to existing employees at its other jobsites; second preference to employees available for transfer from another non-union employer with whom it had a management contract; and third preference to referrals from its existing employees. The Board reasoned that "the practical effect of the first three job criteria was to preclude employment of union members at the jobsite."[11] The ALJ concluded that these hiring criteria reinforced the General Counsel's contention that the applications were not considered because the applicants were union members and that the employer was "pursuing a pattern or practice by which it systematically declined to consider any union members for employment."[12] In D.S.E. Concrete, the ALJ also found independent evidence of animus based on a supervisor's repeated anti-union statements to union applicants and the employer's later rejection of applications proffered by the union.[13]

(employer delayed processing of union supporters' applications for unusual amount of time).

[8] Fluor Daniel I, 304 NLRB at 970.

[9] KRI Constructors, 290 NLRB at 811, citing NLRB v. Transportation Management Corp., 462 U.S. 393, 399-403 (1983).

[10] 303 NLRB 890 (1991).

[11] Id. at 890 n.2. See also Eldeco, 321 NLRB No. 121, slip op. at 14 (1996)(same).

[12] D.S.E. Concrete Forms, supra at 898.

[13] The ALJ's conclusions which the Board adopted do not specifically hold that the employer's hiring practices

Similarly, in Ultrasystems Western Constructors, the Board held that the employer violated Section 8(a)(3) by maintaining a hiring policy which screened job applicants to uncover suspected union sympathizers, and by refusing to consider applicants for employment based on its conclusion that they were union sympathizers. The Board affirmed without comment the ALJ's conclusion that, although the practice of hiring employees who follow supervisors and managers from job to job was not "unlawful in itself, it is evidence of an affirmative preference for individuals known to be both competent and to be free of any union connection."[14]

In this case, we conclude that the Employer unlawfully refused to consider for hire Union applicants. Our conclusion is based on the following considerations:

First, we note that although there is no independent evidence of animus in this case, the Region has found reasonable cause to believe that Scott and Gee violated the Act when they worked for JSS and that, when working for the Employer, they were aware of JSS's unlawful hiring practices.

Second, it is clear that during the time the Employer told Union applicants that it had no work for them, it was in the process of hiring. Indeed, it told one covert Union applicant that it was having trouble finding licensed journeymen.[15]

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violated Section 8(a)(3). The General Counsel apparently had not argued that the hiring practices were themselves violative. See Zurn/N.E.P.C.O., Case 12-CA-15833, Advice Memorandum dated April 26, 1994, ALJD now pending before the Board, where the General Counsel argued that the use of similar hiring preferences was unlawful because it was a subterfuge to mask unlawful discrimination against union members.

[14] 310 NLRB at 554.

[15] See, e.g., Eldeco, supra, 321 NLRB No. 121, slip op. at 2. See also Westpac Electric, 321 NLRB No. 172, slip op. at 26 (anti-union employer hired at least 29 nonunion applicants while applications of 26 of 29 alleged discriminatees "were admittedly reposing in its files") (1996). Compare Belfance Electric, 319 NLRB 945 (1995)

Third, the evidence indicates that the Employer hired only individuals it knew or believed were not affiliated with the Union. Unlike the alleged discriminatees, the hired covert applicants did not wear union shirts when they applied for work. Moreover, the Employer's hiring records indicate that, contrary to its stated hiring priorities, it hired other applicants who had not previously worked for it or for JSS; there is no evidence that the Employer believed that these other successful applicants were Union supporters.[16]

In summary, complaint is warranted, absent settlement, alleging that the Employer violated Section 8(a)(3) and (1) by unlawfully refusing to hire overt Union applicants. In litigating the case, the Region should rely on the following two theories of violation:

(1) that Scott and Gee relied on knowledge they obtained, when working for JSS, concerning JSS's unlawful hiring practices to create and perpetuate an unlawful priority system in favor of a "tainted pool" of prior JSS and CSR employees;

(2) that the following independent evidence[17] indicates that the Employer had anti-union motivation for refusing to hire the overt Union applicants:

(a) the statistical disparity between covert applicants, who were hired, and overt applicants, who were not hired;

(employer did not violate Act when it did not hire union applicants one day after it started work, before it needed additional employees, but later hired relatives, neighbors and friends; no independent evidence of animus).

[16] See, e.g., Eldeco, supra (non-union employer maintained hiring priority in favor of current and former employees, did not offer jobs to applicants wearing union insignia, but hired applicant who was neither former employee nor union member).

[17] This second theory of violation would not require evidence of a violation in the case against JSS, i.e., the "tainted pool" theory.

(b) the Employer's hiring records indicating that it hired applicants, including the covert Union applicants, who did not meet its hiring priorities where there is no evidence that these applicants were overt Union supporters;

(c) the Employer's statement to one of the covert applicants that it was having trouble finding licensed journeymen when it had applications from the overt Union applicants, all of whom were licensed journeymen.

B.J.K.