

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

# Advice Memorandum

DATE: May 27, 2011

TO : Robert W. Chester, Regional Director  
Region 6

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

SUBJECT: Pennsylvania American Water Company 506-6050-0133  
Cases 6-CA-37197, -37198, -37199, -37202 506-6050-2500  
512-5036-6720-5600  
Utility Workers Union of America, AFL-CIO 512-5036-8303  
Case 6-CB-11730 524-8351-4300

These cases were submitted for advice regarding whether the rights of employees to engage in a sympathy strike were waived by their union representative and, if not, whether the employees lost the protection of the Act because the underlying picketing was intermittent in nature. We conclude, based on the parties' contract language and bargaining history, that there was no waiver of the rights of the Employer's Pittsburgh District and "Outside Districts" bargaining unit employees to engage in sympathy strikes. Moreover, we conclude that the employees did not engage in unprotected activity when they refused to cross an intermittent primary picket line that did not involve an intermittent strike.

### FACTS

Pennsylvania American Water Company ("Employer") is a public utility providing water production, distribution, and maintenance services throughout Pennsylvania. The Employer divides its operations into multiple geographical "districts." The Utility Workers Union of America, System Local 537 ("Union") represents the production, distribution, and maintenance employees (and some clerical employees) at six of these districts in six separate bargaining units. At the time of the relevant events, five of these bargaining units had expired collective-bargaining agreements that the parties had agreed to extend while trying to reach new agreements. The Pittsburgh District was operating under an unexpired agreement. All six of the contracts contain substantially similar broad no-strike provisions. However, two of those contracts - covering the Outside Districts and Pittsburgh District bargaining units - contain a specific exception to the general no-strike

provision, providing that "[i]t shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property where a lawful Primary picket line is established . . ."

The sympathy strike language was added to the Pittsburgh District and Outside Districts contracts in approximately 1979 to allow employees to refuse to cross picket lines set up by "stranger" unions. Although initially intended to apply to stranger picket lines, a 1982 arbitration award specifically acknowledged that the parties had interpreted this provision as applying also to primary picket lines established by Pennsylvania American Water Company employees from another bargaining unit represented by the same Union. Subsequent successive collective-bargaining agreements incorporated the same sympathy strike language without change. It was not until the current contract negotiations that the Employer proposed changing this language to limit its application solely to stranger picket lines.<sup>1</sup>

At a Union membership meeting on October 30, 2010, the Union and its counsel discussed potential strategies the Union could utilize to put pressure on the Employer during ongoing contract negotiations. In light of the sympathy strike provisions in the Pittsburgh District and Outside Districts contracts, the Union discussed with the membership a specific plan to utilize off-duty employees to conduct "primary labor dispute" picketing on weekends at various facilities.

Beginning in early 2011,<sup>2</sup> the Union staged pickets at Outside Districts and Pittsburgh District locations with signs specifically identifying a primary labor dispute involving a separate bargaining unit of Pennsylvania American Water Company employees from a different district location. Specifically, on January 2, employees from the Brownsville District bargaining unit set up picket lines at two plant locations in the Outside Districts bargaining unit. The picket signs stated "Primary Labor Dispute,

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<sup>1</sup> The Employer's proposal would amend the clause as follows: "[i]t shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon property containing only one or more businesses unrelated to the Company where a lawful Primary picket line is established by only one or more labor unions unrelated to Utility Workers Union of America, Systems Local 537 . . ."

<sup>2</sup> All dates are in 2011 unless otherwise noted.

Utility Workers Union of America, System Local 537, Brownsville, has a labor dispute with PA American Water. We are seeking a fair contract with PA American Water Co." When employees encountering the picket line contacted the Employer, they were told that they were expected to report to work despite the presence of pickets involving what was identified as a "primary labor dispute." Nearly all of the employees working at the picketed facilities did not cross the picket lines.<sup>3</sup>

In response to the January 2 picket lines, the Employer posted at its plants a January 4 letter from its Human Resources Director to the Union President advising that the Employer would not pay employees for time not worked, that employees not reporting to work might be subject to discipline, and that the Employer might seek legal recourse against the Union. A few days later, there was picketing at two Outside Districts plants by employees from the Brownsville, Mechanicsburg/West Shore, and Pittsburgh Districts bargaining units, and employees at the picketed facilities honored the picket lines. Subsequently, on January 29, pickets were set up at four plant locations within the Outside Districts bargaining unit and at two plants within the Pittsburgh District bargaining unit, and employees at those picketed facilities honored the picket lines. These pickets once again originated from, and identified "primary labor disputes" involving, separate bargaining units at different locations.

#### ACTION

We conclude that the Union did not waive the rights of the employees in the Pittsburgh and Outside Districts bargaining units to engage in sympathy strikes. Moreover, we conclude that those bargaining unit employees did not engage in unprotected activity when they refused to cross an intermittent primary picket line that did not involve an intermittent strike. Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by threatening to discipline employees for honoring a picket line protesting contract negotiations involving another bargaining unit. In addition, complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A) by threatening to subject a

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<sup>3</sup> An Outside Districts bargaining unit employee at the New Castle location, who previously resigned from membership with the Union, crossed the picket line to work his scheduled shift. This employee was told by the Union President that crossing the picket line would subject him to internal union discipline.

non-member to internal union discipline for crossing the established picket line. We agree with the Region that all other allegations should be dismissed, absent withdrawal.

#### Allegations Against the Employer

We conclude that there was not a clear and unmistakable waiver of employee rights to engage in a sympathy strike at the Pittsburgh District and Outside Districts bargaining unit locations. The Board has long-recognized that a broad no-strike clause in a labor agreement does not encompass sympathy strike activity where the contract as a whole or extrinsic evidence indicates otherwise.<sup>4</sup> Here, the collective-bargaining agreements for the Pittsburgh District and Outside Districts specifically reserved the employees' rights to honor primary picket lines.<sup>5</sup> Moreover, as evidenced by an almost 30-year-old arbitration decision resolving a dispute between the Union and Employer involving the identical sympathy strike provision at issue, the parties have long interpreted the contractual sympathy strike rights as applicable to both primary pickets by "stranger" unions and pickets relating to primary labor disputes involving the same Union at the Employer's other bargaining unit locations. Otherwise, there would be no need for the Employer's recent proposal to amend the clause to restrict its application only to stranger picket lines. We therefore agree with the Region that the Union did not waive the rights of employees at the Pittsburgh District and Outside Districts to honor the Union's lawful primary picket line.

We also conclude that bargaining unit employees at the Pittsburgh District and Outside Districts did not lose the protection of the Act because of the intermittent nature of the underlying primary pickets. A concerted work stoppage will be considered unprotected intermittent strike activity "when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance

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<sup>4</sup> See Indianapolis Power & Light Co., 291 NLRB 1039, 1041 (1988), enfd. 898 F.2d 524 (7th Cir. 1990) (no waiver of employees' right to engage in sympathy strikes where the bargaining history showed that "the parties had agreed to disagree" over the scope of the no-strike clause).

<sup>5</sup> See, e.g., Machinists, Oakland Lodge 284 (Morton Salt Co.), 190 NLRB 208, 209-10 (1971) (no-strike clause specified that sympathy strike activity "shall not be considered a violation of this Agreement"), enfd. in relevant part 472 F.2d 416 (9<sup>th</sup> Cir. 1972), judgment vacated and remanded on other grounds 414 U.S. 807 (1972).

by employees of the work normally expected of them by the Employer."<sup>6</sup> Further, the Board has consistently recognized that sympathy strikers "stand[ ] in the same shoes" as primary picketers and lose protection where the underlying strike is unprotected.<sup>7</sup> However, although there was a plan here to engage in intermittent picketing, there was no intermittent strike. Our research has failed to disclose any precedent finding that employees lose their rights to engage in sympathy strikes simply because they intermittently encounter another bargaining unit's lawful picket line. Indeed, sympathy strikes are frequently irregular by nature, e.g., delivery drivers routinely refuse to cross picket lines at customer facilities while continuing to make other deliveries. Thus, we conclude the Pittsburgh District and Outside Districts bargaining unit employees did not lose the protection of the Act and that the Employer's threats to discipline employees for honoring a lawful primary picket line violated Section 8(a)(1).

Although we have determined that there was no contractual waiver of employee rights to engage in a sympathy strike, we agree with the Region that an Employer action to seek legal remedies against the Union for an alleged violation of the contractual no-strike provision would not lack a reasonable basis in law or fact. Therefore, consistent with the principles of Bill Johnson's Restaurants v. NLRB<sup>8</sup> and BE & K Construction Co.,<sup>9</sup> we

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<sup>6</sup> Polytech, Inc., 195 NLRB 695, 696 (1972). See also Swope Ridge Geriatric Center, 350 NLRB 64, 67-68 (2007) (work stoppages arising from union strategy to engage in a series of successive weekend strikes found to constitute an unprotected intermittent strike); National Steel & Shipbuilding Co., 324 NLRB 499, 509-10 (1997), and cases cited therein (the union engaged in what it called an "inside game" strategy of work stoppages and slowdowns), petition for rev. denied 156 F.3d 1268 (D.C. Cir. 1998); Honolulu Rapid Transit Co., 110 NLRB 1806, 1809-10 (1954) (strike activity arising from union plan to engage in consecutive weekend strikes until a contract was agreed upon found to be unprotected intermittent activity).

<sup>7</sup> See, e.g., American Telephone & Telegraph Co., 231 NLRB 556, 562 (1977) (finding that sympathy strikers need not possess knowledge of the unprotected character of a primary picket line for their conduct to be unprotected).

<sup>8</sup> 461 U.S. 731, 748-49 (1983) (the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit lacks a reasonable basis in law or fact and was commenced with a retaliatory motive).

conclude the Employer's reservation of its right to pursue legal action against the Union was not unlawful.

Finally, with respect to the Union's assertion that the Employer violated the Act by not paying an employee for the time he spent honoring the picket line, we agree that the Act does not require the Employer to continue to pay wages to employees who are not working.<sup>10</sup>

#### Allegations Against the Union

We conclude that the Union violated Section 8(b)(1)(A) by threatening to discipline an employee for crossing the Union's picket line after that employee had effectively resigned from Union membership. It is well established that once an employee's union membership is effectively withdrawn, he is no longer subject to union discipline.<sup>11</sup> A mailed resignation from union membership is effective at 12:01 a.m. local time on the day following deposit of the resignation in the mail, with the postmark determining the date of deposit.<sup>12</sup> In this case, the Union threatened to discipline an employee who had put his resignation in the mail on December 30, 2010, and therefore had effectively resigned from the Union on December 31. Thus, the Union's January 2 threat to subject him to internal union discipline if he crossed the picket line at the New Castle plant violated Section 8(b)(1)(A).<sup>13</sup>

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<sup>9</sup> 351 NLRB 451, 457 (2007) (the filing and maintenance of a "reasonably based" lawsuit does not violate the Act; a lawsuit cannot be deemed objectively baseless unless its factual or legal claims are such that "no reasonable litigant could realistically expect success on the merits").

<sup>10</sup> See Simplex Wire & Cable Company, 245 NLRB 543, 545-46 (1979), and cases cited therein (an employer is not required to finance an economic strike against it by compensating strikers for work not performed).

<sup>11</sup> See Pattern Makers League of North America v. NLRB, 473 U.S. 95, 101 (1985), and cases cited therein.

<sup>12</sup> Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929, 930 (1993).

<sup>13</sup> The Union would not have violated Section 8(b)(1)(A) of the Act if it had threatened to discipline him for crossing the picket line while he was still a member. The contract protected him from Employer discipline for refusing to cross a primary picket line, and the Board permits Union discipline of members for crossing a picket line in these circumstances. See NLRB v. Allis-Chalmers, 388 U.S. 175,

There is no legal basis, however, for the Employer's claim that the Union violated Section 8(b)(1)(A) by causing an unprotected strike, since we have found no unprotected strike activity here.

Accordingly, complaint should issue against the Employer, absent settlement, alleging it violated Section 8(a)(1) by threatening to discipline the Pittsburgh District and Outside Districts bargaining unit employees for honoring a primary picket line, and complaint should issue against the Union, absent settlement, alleging it violated Section 8(b)(1)(A) by threatening to subject a non-member to internal union discipline for crossing the picket line. All other allegations should be dismissed absent withdrawal.

B.J.K.

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191-92 (1967) (finding no Section 8(b)(1)(A) violation when a union disciplined members who crossed the union's picket line and went to work during an authorized strike against their employer); Machinists, Oakland Lodge 284, 190 NLRB at 209-10 (finding lawful union-imposed fines for employees crossing a lawful picket line where no-strike clause excepted sympathy strikes). Compare Teamsters Local 688 (Frito-Lay, Inc.), 345 NLRB 1150, 1151-53 (2005) (finding union unlawfully disciplined employees for refusing to engage in a sympathy strike violative of the contractual no-strike clause).