

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

# Advice Memorandum

DATE: December 14, 2015

TO: Garey E. Lindsay, Regional Director  
Region 9

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

SUBJECT: Allsource Global Management, LLC  
Case 09-CA-150053

524-5079-4250

Allsource Global Management (AGM) and  
Lockheed Martin (LHM) as joint employers  
Case 09-CA-153425

The Region submitted this case for advice as to: 1) whether the Union waived unfair labor practice strikers' right to return to their Group Lead positions in the parties' strike settlement agreement; 2) whether the Union or the strikers made an unconditional offer to return to work; and 3) what remedy the Region should seek for the Employer's failure to consider the strikers for newly-created supervisory positions.

We conclude that the Union did not waive the strikers' right to return to their Group Lead positions (and therefore that the Employer should return all former Group Leads to their Group Lead positions), that the parties' strike settlement agreement constituted an unconditional offer to return to work, and that, given the Employer's discriminatory selection of non-strikers for its newly-created supervisory positions, the Region should seek an order requiring the Employer to additionally offer supervisory promotions to the Group Leads.

## FACTS

Allsource Global Management, LLC (the "Employer") is a subcontractor of Lockheed Martin, which is the primary government contractor working on a Special Operations Forces Support Activity Contract at Lexington Bluegrass Station and in Richmond, Kentucky. The International Association of Machinists and Aerospace Workers, Local Lodge 219 (the "Union") represents approximately 170 bargaining unit employees of the Employer. These employees are primarily engaged in packaging and shipping supplies for use by Army Special Operations forces deployed overseas.

The parties' first collective-bargaining agreement expired on September 30, 2014. In preparing to negotiate a successor agreement, the Union requested that the Employer provide documentation to substantiate its claim that the federal government required that unit classifications be reclassified to lower-paying positions. On June 9, 2014, the Region found in case 09-CA-126388 that the Employer had violated Sections 8(a)(5) and (1) of the Act by refusing to provide these documents. The parties entered into a settlement agreement, pursuant to which the Employer

agreed to promptly furnish the requested information. The Employer continued to delay in responding to the Union's information request, however, and ultimately did not comply.<sup>1</sup>

Employees turned down the Employer's proposed contract—which included wage reductions and job reclassifications—and voted to go on strike beginning October 1, 2014. Numerous employees present at the ratification meeting testified that the Employer's unlawful refusal to provide the requested information was a motivating factor to strike. Employees thereafter picketed the Employer's facility with signs that stated employees were on an unfair labor practice strike.

On February 27, 2015, after several months of negotiations, the parties agreed on a return-to-work agreement (the "Supposal") and a new collective-bargaining agreement effective from March 2, 2015 through September 30, 2017. The Supposal provided for 105 employees to return from the strike by seniority at a "grandfathered" wage rate. Approximately 30 unit employees crossed the picket line during the strike, most of whom were low on the seniority list. Of these 30, the Employer hired 12 for newly-created supervisory positions after the strike.<sup>2</sup> The Employer concedes that it only considered non-strikers for the initial supervisory positions, as those employees helped the Employer to weather the strike under trying circumstances. The Employer has since opened up supervisor positions to anyone interested in applying.

Prior to the strike, between 18-28 unit employees were "Group Leads" that earned an additional \$1.50/hour and acted as liaisons between Lockheed Martin and employees within their particular job classification; for example, there were Material Coordinator Group Leads, Warehouse Specialist Group Leads, etc. Following the conclusion of the strike, however, the Employer has refused to reinstate any employees to their Group Lead positions, and argues that the parties understood that Group Lead positions would be eliminated. The Employer admits that the newly-hired supervisors are now performing the work that Group Leads used to perform, although the Employer contends the new supervisors have additional responsibilities as well. In support of its contention that the parties agreed to eliminate Group Leads, the Employer points to Article 1.1 ("Union Recognition") of the parties' new collective-bargaining agreement. Whereas the 2012-2014 Agreement included "Group Leads" within the recitation of classifications the Union represented, the new Union Recognition clause omits any reference to Group Leads.

In contrast, two of the Union negotiators testified that although the Employer attempted to eliminate Group Lead positions during contract negotiations, the Union insisted that Group Leads remain. In support, the Union points out that it successfully resisted the Employer's attempt to eliminate Article 11.12 of the parties' present collective-bargaining agreement, which, *inter alia*, states that Group Leads "will be appointed by the Company."

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<sup>1</sup> On February 4, 2015, the Office of Appeals determined in case 09-CA-136568 that the Employer had violated Sections 8(a)(5) and (1) by its delay and refusal to comply with the Union's information requests, and that the Employer was in default of the settlement agreement negotiated in case 09-CA-126388.

<sup>2</sup> There is evidence that the Employer had planned on implementing a new supervisory system as early as 2011.

ACTION

We conclude that: 1) the Union did not clearly and unmistakably waive the unfair labor practice strikers' right to return to their Group Lead positions (and therefore the Employer should offer all former Group Leads their Group Lead positions); 2) the strike settlement agreement constituted an unconditional offer to return to work; and 3) the Employer should additionally be required to offer supervisory promotions to the former Group Leads.

The Union did not waive the strikers' right to return to their Group Lead positions

Unfair labor practice strikers are entitled to immediate reinstatement to their former jobs or substantially equivalent positions upon an unconditional offer to return to work.<sup>3</sup> A union may waive strikers' statutory rights in a strike settlement agreement—including unfair labor practice strikers' reinstatement-related rights—but such a waiver must be clear and unmistakable.<sup>4</sup> For example, in *Energy Cooperative*, in determining that a union had clearly and unmistakably waived strikers' rights to contractual disability payments over the objection of individual employees, the Board relied on the fact that the parties' strike settlement agreement explicitly stated the nature of the parties' exchange, and that the parties' bargaining history clearly demonstrated the union decided to waive strikers' rights in exchange for payment of health insurance premiums.<sup>5</sup>

Here, the Union did not clearly and unmistakably waive striking Group Leads' right to return to their former positions.<sup>6</sup> Unlike the strike settlement agreement in

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<sup>3</sup> *Orit Corp.*, 294 NLRB 695, 698 (1989) (citing *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956)), *enfd* 918 F.2d 225 (D.C. Cir. 1990).

<sup>4</sup> *Metropolitan Edison v. NLRB*, 460 U.S. 693, 705-708 (1983) (as collective-bargaining representative, a union may waive individual employees' statutory rights, but such a waiver must be "clear and unmistakable"); *Energy Cooperative*, 290 NLRB 635, 636 (1988) (a union clearly and unmistakably waived economic strikers' rights to contractual disability payments during a strike (citing *Texaco, Inc.*, 285 NLRB 241, 243 (1987))); *Hotel Roanoke*, 293 NLRB 182, 185-86 (1989) (applying *Texaco/ Energy Cooperative* line of cases to determine that union lawfully waived certain unfair labor practice strikers' reinstatement-related rights in strike settlement agreement). *See also Greyhound Lines*, 319 NLRB 554, 563-64 (1995) (under framework for non-Board settlements enunciated in *Independent Stave*, 287 NLRB 740 (1987), Board determined that union validly waived unfair labor practice strikers' reinstatement-related rights in strike settlement agreement).

<sup>5</sup> *Energy Cooperative*, 290 NLRB at 636.

<sup>6</sup> It is undisputed that Group Lead work still exists, and that it is now being performed by non-unit supervisors.

*Energy Cooperative*, the strike settlement agreement here was silent regarding Group Leads and the parties' new collective-bargaining agreement did not explicitly eliminate the position. Although the reference to Group Leads was removed from the Union Recognition clause, the central provision governing Group leads—Article 11.12—remains in the new contract, despite the Employer's effort to eliminate that provision. Moreover, the parties' bargaining history does not evince a clear understanding that the Group Lead positions would be removed. Thus, two of the Union's negotiators testified that they firmly resisted efforts to remove Group Lead positions, which is bolstered by the continuing presence of Article 11.12 in the parties' contract. In light of all the evidence, the Union did not clearly and unmistakably waive Group Leads' right to return to their former positions.

Given that the Union did not waive striking employees' right to return to their former positions, the Employer should be required to return former Group Leads to their Group Lead positions. To the extent that Group Lead work is being performed by non-unit supervisors, the Employer should be required to return that work to the bargaining unit.<sup>7</sup>

The parties' strike settlement agreement constitutes an unconditional offer to return

Generally, unfair labor practice strikers are entitled to reinstatement upon an unconditional offer to return to work.<sup>8</sup> The Board has found that offers were "conditional," and therefore insufficient, where the Union's purportedly unconditional offer was in reality conditioned in part on the return of a lawfully-discharged supervisor,<sup>9</sup> and where individual strikers' purportedly unconditional offers were in reality equivocal inquires about returning.<sup>10</sup> We have uncovered no case where an employer accepted the union's offer to return, negotiated and executed an agreement regarding the terms of that return, and subsequently argued that strikers were not entitled to reinstatement because the offer to return was insufficiently "unconditional."

Here, where the parties intended to end the strike via the strike settlement agreement and where the Employer has treated the agreement as an unconditional offer to return by accepting returning strikers, we conclude that the strike settlement agreement itself suffices as an unconditional offer to return to work.<sup>11</sup>

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<sup>7</sup> *Public Service Co. of New Mexico*, 337 NLRB 193, 193 n.2 & 200 (2001) (where employer violated 8(a)(5) by unilaterally removing bargaining unit work, employer ordered to restore work to unit upon union's request).

<sup>8</sup> See, e.g., *Orit Corp.*, 294 NLRB at 698; *Hotel Roanoke*, 293 NLRB at 185.

<sup>9</sup> *Browning Manor Hospital*, 279 NLRB 1176, 1180 (1986).

<sup>10</sup> *Gaywood Mfg Co.*, 299 NLRB 697, 701 (1990).

<sup>11</sup> Cf. *Mark Twain Marine Industries*, 254 NLRB 1095, 1109 (1981) (strikers' offer to return to work under the terms of an agreement the employer had previously

The Region should seek a remedy requiring the Employer to offer supervisory promotions to the former Group Leads

When an employer denies an employee a supervisory promotion because the employee engaged in protected activity, the appropriate remedy is to require the employer to offer the affected employee a promotion—with backpay—to the supervisory position he or she was unlawfully denied.<sup>12</sup> Here, the Employer admits that it only considered employees who crossed the picket line for the initial 12 supervisory positions—as those employees helped the Employer to weather the strike—and that those supervisors now perform the duties that Group Leads previously performed. None of the employees the Employer promoted had previous Group Lead experience, all were relatively junior employees with less experience, and there is no evidence that the new supervisors had prior supervisory experience with other employers. In these circumstances, it is clear that the Group Leads were more qualified for the newly-created supervisory roles than any of the cross-over employees, and were not considered for the supervisory positions solely on the basis of their participation in the strike. Therefore, as a remedy, the Employer must offer former Group Leads promotions to the newly created supervisory positions, along with any applicable backpay should the Group Leads accept.<sup>13</sup>

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committed itself to, but which employees had previously failed to ratify, was not a “conditional” offer).

<sup>12</sup> *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979). *See also Little Lake Industries*, 233 NLRB 1049 (1977); *Advanced Mining Group*, 260 NLRB 486 (1982), *enfd* 701 F.2d 221 (D.C. Cir. 1983).

<sup>13</sup> The Board’s decision in *Georgia Power Co.*, 341 NLRB 576 (2004) is distinguishable. In that case, the Board determined that, despite its finding that an employer had unlawfully denied an employee a supervisory promotion due to his protected activity, an order merely requiring the employer to consider the employee on a non-discriminatory basis for the position was warranted, rather than a promotion. *Id.* at 576-78. The Board noted that two employees were considered for the promotions, that the employee who received the promotion was rated higher in some areas than the discriminatee, and that the discriminatee himself had no prior supervisory experience. *Id.* Here, by contrast, the Group Leads indisputably had experience related to the newly-created supervisory roles while the cross-over employees did not. Moreover, we note that the Board in *Georgia Power Co.* expressly acknowledged its authority to order promotions to supervisory positions under Section 10(c) of the Act but declined to exercise it on the particular facts of that case. Finally, to the extent the Board’s decision in *Georgia Power Co.* states that a make-whole remedy of a managerial promotion is inappropriate upon a finding of unlawful discrimination, we believe that case was incorrectly decided. *See id.* at 579-80 (Member Walsh, dissenting).

Conclusion

The Region should issue complaint, absent settlement, alleging that the Employer violated Sections 8(a)(1) and (3) by failing to return unfair labor practice strikers to their Group Lead positions and therefore requiring the Employer to reinstate the former Group Leads to their Group Lead positions. The Region should also seek a remedy requiring the Employer to offer supervisory promotions to the former Group Leads.

/s/  
B.J.K.

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