

Since 1999, the Employer has maintained an Enforcement Selection Process Policy (“Policy”) giving preference to current “regular status employees [who are] given first consideration for job postings providing the regular status employee’s qualifications substantially equal the qualifications of external candidates.” The Policy excludes Tobey employees who are represented by the Union from the first area of consideration at the two other hospitals, stating, “[e]mployees in a union whose collective bargaining contract does not provide reciprocal opportunity to employees who are not members of the union will be considered external candidates” for open positions at the Employer’s currently non-union sites. Per the Policy, external candidates are considered only after “the decision-making manager has interviewed all qualified internal candidates.”

The Employer justifies the Policy by asserting the need to “level[] the playing field for those Southcoast employees (both union and non-union), who are disadvantaged by a union-negotiated hiring preference.” The only represented employees are those in the Tobey unit. The Employer has provided no evidence that its unrepresented employees ever expressed concern that they would be disadvantaged by a union-negotiated hiring preference. There is also no evidence that the Union knew about the Policy prior to the 10(b) period in this charge, and the Union denies such knowledge.³

As a result of the Employer’s Policy, employees represented by the Union have been denied consideration for and instatement into positions for which they were otherwise qualified. Specifically, Employee 1 applied for a building superintendent position posted by the Employer at another facility. When (b) (6) was informed that the position had been filled, (b) (6) inquired as to why (b) (6) was not even interviewed. The Employer responded that (b) (6) was not considered in the first round of interviews because (b) (6) worked at Tobey in an SEIU position.⁴

³ The Employer offered evidence of a bargaining proposal from the 1997-98 contract negotiations in which it proposed changes to the seniority provision to allow for full seniority across Southcoast, which would eliminate the hiring preference accorded represented employees for unit positions at Tobey, in exchange for Tobey workers having the same type of preference for positions at the Employer’s nonunion facilities that the employees at those facilities presently had, i.e., St. Luke’s employees are in the first area of consideration for positions at both St. Luke’s and Charlton, and vice versa. The Union rejected this proposal.

⁴ The Union amended the charge to remove the allegation that the Employer unlawfully refused to hire Employee 1 because it learned that the employee hired for the position had more experience and better qualifications.

In addition, Employee 2 was denied consideration for six separate positions, one of which was posted twice.⁵ After applying for a Nursing Assistant position, Employee 2 received an email from HR explaining that (b) (6), (b) (7)(C) would not be considered until the second round because (b) (6), (b) (7)(C) was a Tobey employee represented by the Union. Employer records regarding the OR Assistant 1 position to which Employee 2 applied stated, “no interview SEIU (2nd round).” The OR Assistant 1 position remained unfilled for two months and was subsequently reposted. Employee 2 was not interviewed for the OR Assistant 1 opening during either the first or the second posting period.⁶ The Employer posted a Mobility Aide position on December 9, 2011. As of January 11, 2012, the Employer had yet to review Employee 2’s application although it was already accepting applications from and interviewing external candidates. When the Region inquired about the Mobility Aide position in January 2012, the Employer stated that Employee 2 had been interviewed and was offered the position which (b) (6), (b) (7)(C) subsequently accepted.

The Region requested information regarding job postings at Charlton and St. Luke’s starting from the beginning of the 10(b) period. The Employer did not comply, contending that the request was unduly burdensome because it would involve the “examination of every individual who applied for literally thousands of postings” during the period requested. At the time of the information request, the covered period spanned approximately 10 months.

ACTION

We conclude that the Employer violated Section 8(a)(3) and (1) by maintaining and enforcing a discriminatory Employment Selection Process Policy; refusing to consider Employee 1; and refusing to consider and refusing to hire, and delaying the offer to hire, Employee 2, and other similarly situated employees. Thus, the Region should issue complaint, absent settlement.

⁵ Three of the positions for which Employee 2 applied appear to have been filled by individuals who had more experience, seniority, and qualifications than Employee 2, and a fourth appeared to have been a posting simply to convert a temporary employee to full time.

⁶ Regarding the second posting period for the OR Assistant 1 position, in its January 11, 2012 position statement the Employer stated that “[Employee 2’s] application has been forwarded to the hiring manager for consideration.” Conversely, in its February 6, 2012 position statement the Employer maintained that “[Employee 2] did not apply for the second posting, and thus, the hiring manager did not consider (b) (6), (b) (7)(C) during the second posting period.”

In *NLRB v. Great Dane Trailers*, the Supreme Court outlined the framework for determining the burden of proving the presence or absence of discriminatory purpose under Section 8(a)(3).⁷ The Court ruled that no proof of antiunion motivation is necessary to find a violation where an employer's conduct is "inherently destructive of important employee rights."⁸ However, where an employer's conduct has only a "comparatively slight"⁹ impact on employee rights and the employer can demonstrate evidence of "legitimate and substantial business justifications for the conduct," the burden shifts to the General Counsel to show antiunion animus.¹⁰ If the employer

⁷ 388 U.S. 26.

⁸ *Id.* at 34. In *International Paper Co.*, 319 NLRB 1253 (1995), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997), the Board articulated four "guiding principles" under *Great Dane* to determine if the employer's conduct was inherently destructive. In finding inherently destructive the employer's unilateral implementation of a bargaining proposal giving it the right to permanently subcontract unit work during a lockout, the Board examined: (1) the severity of the harm suffered by employees and the impact on statutory rights; (2) whether the conduct is potentially disruptive of the opportunity for future employee organization and concerted activity; (3) whether the conduct demonstrates hostility to the process of collective bargaining rather than simply supporting a substantive bargaining position; and (4) whether the conduct makes collective bargaining seem futile in the eye of employees. *Id.* at 1269-70. *Accord Honeywell, Inc.*, 318 NLRB 637 (prohibiting union-represented employees from bidding on vacancies at other employer locations or subcontracted operations was inherently destructive).

⁹ See *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 789 n.9 (2003) (within the universe of conduct that has a non-trivial adverse impact on employee rights, "comparatively slight" simply means less than "inherently destructive"), citing *Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 761-762 (D.C. Cir. 1988).

¹⁰ 388 U.S. at 33. See *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006) (employer reduction in hours of employees who had announced a strike that was later postponed was lawful because its effect was comparatively slight, and the employer justified its conduct: it had already committed to pay agency-supplied employees to work during the strike and the General Counsel failed to show antiunion animus); *KFMB Stations*, 349 NLRB 373 (2007) (employer reduction in above-scale wages for certain employees who failed to have their agreements for such wages signed prior to the union's withdrawal of permission to deal directly with unit members was lawful because the effect was comparatively slight and the employer's conduct was in support of its legitimate bargaining strategy). See also *Bud Antle*, 347 NLRB 87, 89 (2006).

fails to articulate a legitimate and substantial business justification, then the inquiry is ended, and there is no need to reach the question of animus.¹¹ The Board has held that employer justifications based on presumptions about employee needs or concerns that lack evidentiary support do not rise to the level of a legitimate and substantial business justification under *Great Dane*.¹² Moreover, even where an employer policy is facially neutral and uniformly applied, the Board will find a violation where the predictable and actual effect was to discriminate against employees for engaging in Section 7 activity.¹³

Although many cases applying *Great Dane* involve employer conduct during negotiations and/or a strike or lockout,¹⁴ the Board has also applied *Great Dane* to

¹¹ See *National Football League*, 309 NLRB 78, 81 n.15 (1992), (where employer failed to demonstrate a legitimate and substantial business justification for its Wednesday eligibility deadline rule that prevented returning strikers from participating in or receiving payment for the first weekend of games following the strike, it was unnecessary to decide whether the General Counsel had established that the rule was motivated by antiunion considerations). See also *Dole Fresh Vegetables, Inc.*, 339 NLRB at 788 (finding it unnecessary to prove antiunion motivation where the employer failed to establish that it had a legitimate and substantial business justification).

¹² See *Bud Antle*, 347 NLRB at 91 (employer did not have a legitimate business justification for further delaying reinstatement of formerly locked out employees for an additional 30-days on the rationale that it needed to give employees time to notify their employers and to relocate. Employer admitted that it never asked the employees if they needed to give their current employers 2 weeks notice, and the need for additional time both to give notice and to relocate were both uncorroborated employer assumptions). See also *Lone Star Industries, Inc.*, 279 NLRB 550, 553 (1986) (employer's change in policy for assigning work, including overtime, after the strike so as to eliminate the factor of seniority had at least a comparatively slight adverse effect on employee rights, and the employer's only explanation for the change, i.e., that it was more equitable to junior drivers, was merely another way of stating that the employer did not wish to favor senior drivers and was not a legitimate and substantial business justification).

¹³ See *Lone Star Industries, Inc.*, 279 NLRB at 552 (although uniformly applied, employer change to procedure for assigning work was unlawful because it had a discriminatory effect on returning strikers).

¹⁴ See *National Football League*, above, (strike); *International Paper*, above, (lockout); *Dole Fresh Vegetables*, above, (bargaining); *Fairfield Tower Condominium*

find that an employer's discriminatory hiring policy violated Section 8(a)(3).¹⁵ In *Legacy Health System*,¹⁶ the Board held that the employer's policy, which prohibited employees from holding dual part-time jobs if one position was in the bargaining unit and the other was not, violated Section 8(a)(3) under *Great Dane's* comparatively slight standard because it discriminated on the basis of Section 7 considerations and had at least a comparatively slight impact on employees' Section 7 rights. The Board explained that an employee's future part-time employment opportunities – and the supplemental pay and benefits – were limited by whether the employee's existing position was union-represented.¹⁷ Further, the employer's stated business justification (that prohibiting such employment prevented "legal uncertainties" inherent in allowing an employee to work a represented and non-represented position simultaneously) was unavailing, especially since the employer did not prohibit employees from holding two part-time jobs represented by different unions. The Board also found it unnecessary to rely on the Administrative Law Judge's inherently destructive analysis because the employer did not have a legitimate and substantial business justification.¹⁸

We conclude, applying the analysis of *Legacy Health System*,¹⁹ that the Employer's Policy violates Section 8(a)(3) and (1).²⁰ As in *Legacy*, the Employer

Association, 343 NLRB 923 (2004) (although not inherently destructive, failure to reinstate striking employees upon their unconditional offer to return to work unlawful); *Bud Antle*, above, (lockout); *Roosevelt Memorial Medical Center*, above, (strike); *KFMB*, above, (bargaining).

¹⁵ *Honeywell, Inc.*, above; *Aztech Electric Co.*, 335 NLRB No. 25 (2007) *enforcement denied Contractors Labor Pool v. NLRB*, 323 F.3d 1051 (D.C. Cir. 2003) (employer policy denying employment to applicants with salary history of wages 30% higher or lower than those offered by the employer was inherently destructive).

¹⁶ 354 NLRB No. 45 (2009), *aff'd* 355 NLRB No. 76 (2010).

¹⁷ 354 NLRB at slip op. 1, fn.4.

¹⁸ 354 NLRB No. 45, slip op. at 1.

¹⁹ The Region's untested theory of the violation under the burden shifting analysis of *FES*, 331 NLRB 9 (2000), incorporating the *Great Dane* analysis to meet the animus requirement, is unnecessary because the same result can be reached under *Legacy Health System*.

Policy here at issue discriminates against employees who have chosen union representation in favor of unrepresented employees and has a comparatively slight impact on employees Section 7 rights because it encumbers the career opportunities of represented employees.²¹ Specifically, Employee 2 was denied initial consideration for both the OR Assistant 1 and Mobility Aide positions because [REDACTED] was represented by the Union. Despite [REDACTED] qualifications, [REDACTED] was never offered the OR Assistant 1 position, and [REDACTED] was offered the Mobility Aide position only after a delay and inquiries from the Region regarding its investigation of the present charge. Further, the Policy's adverse impact on represented Tobey employees is far greater than the impact of the collective-bargaining agreement's hiring preference for unit positions on Southcoast's unrepresented employees. Tobey has approximately 600 employees. By contrast, there are approximately 5000 employees at Charlton and St. Luke's combined, and, therefore, the potential for openings at these non-represented hospitals is far greater than at the much smaller Tobey facility. Indeed, when requested to provide information regarding job postings at Charlton and St. Luke's, the Employer protested that it was unduly burdensome because it would require the review of "literally thousands of postings" during the period in question (a span of approximately 10 months at the time of the Region's request). Comparatively, only 236 of the 600 potential Tobey openings are covered by the collective-bargaining agreement giving preference to represented Tobey employees for available positions within the bargaining unit.

Further, the Employer has failed to provide a legitimate and substantial business justification for its discriminatory Policy. Although the Employer contends that the Policy was intended to level the playing field for Southcoast employees, who would otherwise have been disadvantaged by a union-negotiated hiring preference at Tobey, it produced no support for this assertion. Thus, the Employer has offered no evidence

²⁰ Because the Employer continues to maintain and enforce the discriminatory Policy, the charge is not time-barred under Section 10(b). *See Register Guard*, 351 NLRB 1110, 1112 fn.2 (2007) *enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009).

²¹ We would not argue that the Policy was inherently destructive of employee rights because, in those cases, the conduct involved had an absolute and immediate discriminatory impact on most or all union represented employees. *See, e.g., Honeywell, Inc.*, above, (union represented employees prohibited from applying for jobs at employer's other locations at a time when the jobs at their current location were being eliminated); *International Paper*, above, (employer permanently subcontracted bargaining unit work during lockout); *Aztech Electric Co.*, above, (prohibition on hiring individuals with history of wages 30% higher than those offered by employer rendered applicants with previous employment by a union contractor ineligible for employment).

to suggest that its unrepresented employees actually felt aggrieved by the contractual preference granted to Tobey employees at their facility. Rather, the Employer's justification is based on unsupported presumptions about employee concerns.²² Moreover, as discussed above, given the small size of the Tobey workforce compared to that of the other two hospitals, the contractual preference granted to Tobey employees at their facility would not significantly impact Southcoast's unrepresented employees. Therefore, since the Employer has offered no legitimate business justification, there is no need to establish antiunion animus.

Therefore, the Region should issue complaint, absent settlement, alleging violations of Section 8(a)(3) and (1) for maintaining and enforcing an unlawful hiring policy and for refusing to consider and/or hire the identified discriminatees and other similarly situated employees.²³

/s/
B.J.K.

H:ADV.01-CA-067303.Response.Tobey. [REDACTED]

²² See *Bud Antle*, above.

²³ Although Employee 2 was ultimately awarded the Mobility Aide position, as part of the requested remedy the Region should require the Employer to offer reinstatement into the OR Assistant 1 position. We agree with the Region that the identification of additional discriminatees is appropriately left for the compliance proceeding. See *Lone Star Industries, Inc.*, 279 NLRB at 555 (unlawfully unreinstated strikers identified at the compliance stage of the proceedings).