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

Advice Memorandum

DATE: October 19, 2010

TO: Rik Lineback, Regional Director
Region 25

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

SUBJECT: Spurlino Materials of Indianapolis, LLC 506-6050-2500
Case 25-CA-31565 512-5036-6720-5600
524-5079-4900
524-8351-4300

The Region submitted this case for advice as to whether unfair labor practice strikers engaged in an unprotected partial strike by making themselves available to work on sites covered by a project labor agreement that contained a no-strike clause.

We conclude that the striking employees did not lose the protection of the Act and consequently, the Region should issue a Section 8(a)(1) and (3) complaint alleging that the Employer unlawfully failed to reinstate them upon their unconditional offer to return to work.

FACTS

Spurlino Materials of Indianapolis, LLC (the Employer) is a concrete company that dispatches employee drivers to customer sites to deliver loads of concrete. On January 24, 2006, Teamsters Local 716 (the Union) was certified to represent the drivers at the Employer's three facilities in the Indianapolis area.

In February 2006, the parties executed a required project labor agreement (PLA) for work performed at the Lucas Oil Stadium and Indianapolis Convention Center Expansion jobsites. The PLA contains a broad no-strike clause limited to work covered by the agreement. The parties have engaged in negotiations over the past four years for a collective-bargaining agreement to cover the Employer's other work, but they have not reached an agreement.

In the fall of 2006 and the winter of 2007, the Employer committed extensive unfair labor practices. In a decision dated March 31, 2009, the Board found that the Employer, among other violations, unilaterally changed how work was assigned, unilaterally subcontracted unit work, and discriminatorily disciplined and discharged Union

activist (b) (6), (b) (7)(C) .[1] In April 2010,[2] settlement negotiations conducted in connection with the Board's enforcement action in the Seventh Circuit broke down, and the Employer filed its appellate brief.

In late May or early June, the Union held a meeting of the unit employees to relate where matters stood with respect to the unfair labor practice proceeding and contract negotiations. The Union leadership recommended that the employees authorize an unfair labor practice strike for the limited purpose of getting (b) (6), (b) (7)(C) reinstated, consistent with the Board's order. Approximately 13 to 16 of the 19 unit employees attended the meeting and voted unanimously to strike. The following day, the Employer distributed anti-strike literature to the employees. The Union decided to postpone the strike because the element of surprise was gone and work was slow.

After learning that the Employer was starting a new project on August 3, the Union decided to strike that day. Thus, on August 3, the employees delivered a letter to their supervisor stating that they were calling an unfair labor practice strike to protest (b) (6), (b) (7)(C) discharge but that they would be available to perform work covered by the PLA, to avoid violating the no-strike clause. One of the employees told the supervisor that if the Employer called employees on their cell phones, they would come off the picket line to perform PLA work. (b) (6), (b) peated this the following day. The supervisor told (b) (6), (b) (7) to leave th property and not return or the Employer would have (b) (6), (b) (7)(C) removed by the police. Thereafter, the Union instructed the strikers not to physically present themselves for PLA work.

The employees remained on strike for nine days. Their picket signs read: "Teamsters –- Employees of Spurlino Materials of Indianapolis, LLP on Unfair Labor Practice Strike for the Illegal Termination of (b) (6), (b) (7)(C) – Local 716." The Employer reports that 41 loads of concrete were delivered to the PLA jobsite during the strike. No striking employee was called to perform that work. On August 11, the Union, on behalf of the employees, presented the Employer with a written unconditional offer to return to work on August 12. By letter of the same date, the Employer replied that it considered the strike to be an

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[1] See Spurlino Materials, LLC, 355 NLRB No. 77 (2010), incorporating by reference the rationale of 353 NLRB 1198 (2009).

[2] All dates are in 2010 unless otherwise noted.

unlawful partial strike or, alternatively, an economic strike. The Employer therefore had permanently replaced the strikers and would place them on a preferential recall list.[3]

ACTION

We conclude that the strikers did not lose the protection of the Act by making themselves available for work covered by the PLA. Accordingly, the Region should issue complaint alleging that the Employer violated Section 8(a)(1) and (3) by refusing to reinstate the striking employees upon their unconditional offer to return to work.

The Board has long held that intermittent or partial strikes are unprotected activity.[4] The Board's rationale in such cases is twofold. First, permitting employees to refuse to work on the terms prescribed by their employer while remaining in their jobs would "allow employees 'to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment.'"[5] Second, employees should not be allowed the benefits of taking economic action against their employer without incurring

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[3] The Region determined that the strike was an unfair labor practice strike and not an economic strike.

[4] See, e.g., Yale University, 330 NLRB 246, 247 (1999) (university lawfully disciplined teaching fellows for engaging in a "grade strike" while continuing to perform their other duties); National Steel & Shipbuilding Co., 324 NLRB 499, 510 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998) (employer lawfully disciplined employees who engaged in a pattern of intermittent and partial strikes calculated to confuse and damage employer); Highlands Medical Center, 278 NLRB 1097, 1097 (1986) (employer lawfully discharged security guards who refused to perform certain tasks that required them to cross their fellow employees' picket line).

[5] Highlands Medical Center, 278 NLRB at 1097, quoting Valley City Furniture Company, 110 NLRB 1589, 1594-95 (1954), enfd. per curiam 230 F.2d 947 (6th Cir. 1956) (refusal to work overtime found unprotected). See also Audubon Health Care Center, 268 NLRB 135, 136-37 (1983) (nurses' refusal to cover sections left unstaffed by an absent colleague constituted an unprotected partial strike).

the costs, namely a loss of pay and the risk of replacement.[6] Thus, "[t]he principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all of the work they were hired to do."[7]

We conclude that the rationale for holding partial strikes unprotected does not apply here. First, the employees did not actually engage in a partial strike. Although they informed the Employer that they were available for work on the jobsites covered by the PLA, they did not perform any of that work while otherwise striking. Moreover, the striking employees were not trying to unilaterally determine their own conditions of employment but instead left it to the Employer to determine whether to assign them deliveries at the PLA jobsites. Finally, the employees did not enjoy the benefits of striking while avoiding the costs. Instead, they experienced both a loss of pay and replacement.

Since the striking employees were engaged in a protected, unfair labor practice strike, the Employer was obligated to displace the replacement workers and reinstate the strikers upon their unconditional offer to return to work.[8] The Employer's failure to do so violated Section 8(a)(1) and (3), and accordingly, complaint should issue.

B.J.K.

cc: Injunction Litigation Branch

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[6] See, e.g., National Steel & Shipbuilding Co., 324 NLRB at 509 and cases cited at fn. 20.

[7] Polytech, Incorporated, 195 NLRB 695, 696 (1972) (a single concerted refusal to work overtime was a protected strike).

[8] See Maestro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956).