

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AEROTEK, INC.

Cases: 17-CA-071193  
*Aeroteck, Inc. v. NLRB*, 883 F.3d 725  
(8thCir. 2018), *denying enforcement  
in part and remanding* 365 NLRB  
No. 2 (Dec. 15, 2016)

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 22, affiliated with the  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, AFL-CIO

**STATEMENT OF POSTION OF RESPONDENT AEROTEK, INC.  
ON REMAND FROM THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

Pursuant to the National Labor Relations Board (“Board”) letter order of June 8, 2018 and Section 102.46(H) of the Board's Rules and Regulations, Respondent Aeroteck, Inc. ("Aeroteck") files its statement of position with respect to the issues to be addressed by the Board on remand from the United States Court of Appeals for the Eighth Circuit in *Aeroteck, Inc. v. National Labor Relations Board*, 883 F.3d 725 (8<sup>th</sup> Cir. 2018).

**BACKGROUND**

On February 21, 2018, the United Stated Court of Appeals for the Eight Circuit denied enforcement of the Board’s proposed remedy for Brett Johnson, a

union organizer with Local 22 of the International Brotherhood of Electrical Workers, and remanded the case to the Board to refashion the remedy as to Johnson. *Aerotek, Inc. v. National Labor Relations Board*, 883 F.3d 725, 734 (8<sup>th</sup> Cir. 2018).

By way of background, on February 29, 2012, Brett Johnson approached Interstates, an active client of Respondent Aerotek, and met with Interstates Division Manager. *See* Decision and Order of the Board dated 12/15/2016 (“Board Dec.”) at pp. 2-3; Decision of Administrative Law Judge (“ALJ”) Arthur J. Amchan dated 3/11/2013 (“ALJ Dec.”) at 11:39-11:40. During this meeting, Johnson told the manager that members of the Union were working for Interstates as Aerotek contractors, and he offered to “cut out the middleman”, *i.e.*, Aerotek, by referring his union members directly from his Union’s hiring hall. Board Dec. at p. 3; ALJ Dec. 11:40-11:41. Interstates’ manager declined the offer, stating the he has all the electricians he needs for the job and that “Aerotek is doing great.” Board Dec. at p. 3; ALJ Dec. 11:41-11:42. Unsatisfied with this response, Johnson approached Interstates again a week later, on March 7, 2012, and made the same offer directly to the owner of the company. Board Dec. at p. 3; ALJ Dec. 11:42-11:43. As referenced by the Eight Circuit Court of Appeals, two days later, on March 9, 2012, “Johnson directed union members, currently working for [Interstates], to wear listening devices to pick up trade secrets at an employee

appreciation night hosted by the Aerotek client.” *Aerotek, Inc.*, 883 F.3d at 733-34. As acknowledged by this Board, Interstates was one of Aerotek’s “major clients”. Board Dec. at p. 3.

On December 15, 2016, the Board issued its Decision and Order (Member and Former Chairman Miscimarra dissenting). In its decision, the Board applied a pre-existing “unfit for further service” standard to assess Johnson’s actions, and concluded that Johnson is not disqualified from reinstatement and full backpay because Johnson’s actions “might have been a natural human reaction to the unlawful acts” and that “nothing about Johnson’s conduct reasonably tends to suggest that, if he were instated to employment, that conduct would continue or that his affiliation with the Union would somehow preclude him from serving as a loyal employee.” Board Dec. at p. 4. The Eight Circuit found otherwise:

That standard, as the Board itself stated, was meant to excuse “natural human reaction[s]’ to unlawful discrimination. The Board finds that Johnson’s overtures to the Aerotek client were precisely that. But, the precedents the Board cites never find directly competitive behavior to be a “natural human reaction” to discrimination. The characterization of Johnson’s actions is all the more puzzling because the “Board has indicated that salting . . . may be found to be unprotected if the purported organizational activity is subterfuge to further purposes unrelated to organizing.” *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 553 (D.C. Cir. 2006) (alteration in original) (internal quotation marks omitted).

....

Johnson’s behavior is not the type of reactive, emotive conduct the “unfit for further service” standard is designed to forgive. Cf.

Stephens Media, 356 N.L.R.B. at 662 (finding “it is wholly natural for an employee to react with some vehemence to an unlawful discharge” (internal quotation marks omitted)). Instead, it is reflective of a “*design*[] to drive the employer out of the area.” Casino Ready Mix, Inc. v. NLRB, 321 F.3d 1192, 1198 (D.C. Cir. 2003) (emphasis added). The unmistakable conclusion to be drawn from Johnson’s course of conduct is that he was acting in his role as a competitor to Aerotek—and not as an aggrieved discriminatee. As such, the Board abused its discretion in finding Johnson’s behavior wholly pardoned by the “unfit for further service standard.” See Detroit Edison Co. v NLRB, 440 U.S. 301.

*Aerotek, Inc.*, 883 F.3d at 733-34.

Based on the above, the Eight Circuit held that “full backpay and reinstatement for Johnson is unwarranted” and remanded the case to the Board solely to refashion the remedy as to Johnson. *Id.* at 734.

## **ARGUMENT**

In its Opinion, the Eighth Circuit concluded that when Johnson contacted Interstates, “he was acting in his role as a competitor to Aerotek—and not as an aggrieved discriminatee.” *Aerotek, Inc.*, 883 F.3d at 734. This conclusion is supported by ALJ Arthur J. Amchen’s finding that the Union and Aerotek “are competitors with regard to placement of journeymen and apprentice electricians.” ALJ Dec. 2.17.-2.18. This particular fact was not lost on Member Philip A. Miscimarra in his dissent from the Board’s Decision, in which he also found that Aerotek and the Union “are direct competitors.” Board Dec. at p. 7. As such, by

any measure and under any analysis, Johnson's effort to persuade Interstates to replace Aerotek with his Union's hiring hall along with his underhanded efforts to secure trade secrets of his competitor, all done at the same time he was engaged in an active organizing campaign (purportedly to represent the rights and interests of Aerotek employees), were strategic and calculated moves to better position his primary employer, the IBEW, at the expense of its competitor Aerotek. Such conduct constituted willful and direct interference with Aerotek's contractual and business relations, undermined the very organizing effort he was engaged in, and was detrimental to the very employees that Johnson claimed he wanted to represent.

In his Decision, ALJ Amchen concluded that "Johnson's conduct in attempting to exclude Aerotek from Interstates work is so obviously inconsistent with the duties of an employee that his backpay should be tolled as of February 29, 2012, when he visited Interstate's office." ALJ Dec. at 12:27-29.

The ALJ's decision to limit Johnson's back pay and deny him reinstatement as a result of his disloyal conduct is consistent with the policies and purposes of the Act and the Opinion of the Eighth Circuit. It is well-settled "that Section 7 of the Act does not protect employee overtures to contractual interference." *See North American Dismantling Corp.*, 341 NLRB 665, 666-67 (2004). In *North American Dismantling*, the Board denied reinstatement and limited the backpay period to an

employee who attempted to “steal” work from the Respondent by approaching the Respondent’s client and offering to the job for less than the client was paying the Respondent. *See North American*, 341 NLRB at 665. In reaching its conclusion, the Board held that “to the extent that Powell sought to replace the Respondent with a crew he would provide and thereby interfere with its business relationship with Christie, he was clearly engaged in unprotected conduct.” *Id.* at 666.

In his dissenting opinion, Member Miscimarra agreed with the conclusion reached by the ALJ, opining as follows:

[Johnson’s] repeated solicitations of high-level officials at Interstates were a blatant effort to interfere with and undermine the Respondent’s contractual relationship with Interstates, who my colleagues acknowledge was one of the Respondent’s major clients. Johnson sought to replace Aerotek’s employees with employees referred by the Union. Indeed, my colleagues concede that Johnson’s goal was “to divert business from the Respondent.” Moreover, Johnson’s efforts were more egregious than those of the applicant bus drivers in *Five Star Transportation*. Johnson attempted to interfere with the Respondent’s *ongoing* business relationship with Interstates, whereas the letter-writing drivers were supporting their current employer, First Student, in competing with Five Star for the school district contract. . . . I believe Johnson’s unprotected conduct disqualified him from reinstatement, and it stopped the running of his backpay period as of the date that Johnson made his overtures to Interstates, regardless of whether one applies the “unfit for further service” standard. The Board has consistently disapproved of employees and applicants who interfere with an employer’s business interests, and in line with these cases, I agree that the individuals should be denied reinstatement (or instatement) and any further accrual of backpay.

(Board Dec. at 8.)

Any argument that backpay should only cease once the Respondent learns of Johnson's misconduct would only serve to embolden those who engage in business interference to conceal their wrongful actions. This can serve no purpose under the Act. As stated by Member Miscimarra:

Although in some cases the Board has stopped the running of the backpay period on the date the employer learned of such misconduct, I believe the appropriate cutoff is the date the individual chose to pursue interests incompatible with employment by the employer. In my view, if the Board stops the accrual of Johnson's backpay only when the Respondent learned of his misconduct, this would improperly reward Johnson for concealing his activities from the Respondent, to whom I believe Johnson owed a duty of loyalty. Under these circumstances, I believe it is incongruous to find that Johnson's actions render him ineligible for employment, while awarding him backpay for periods subsequent to when those actions occurred.

(Board Dec. at 9.)

Consistent with the Eighth Circuit's holding that full backpay and reinstatement for Johnson is unwarranted, and following the conclusions of both ALJ Amchen and Member (and Former Chairman) Miscimarra that backpay terminates as of the date that Johnson first contacted Interstates, Respondent posits that Johnson is not entitled to reinstatement, and any calculation of backpay in the compliance phase of the proceedings should preclude any period after February 29, 2012, when Johnson first visited Interstates' offices.

**CONCLUSION**

Respondent Aerotek respectfully submits that for the reasons set forth above, the Board should refashion Johnson's remedy to preclude instatement and limit the calculation of back pay in the compliance phase of the proceedings to preclude any period after February 29, 2012, when Johnson first contacted Interstates.

Respectfully submitted this 8<sup>th</sup> day of August 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August 2018, I electronically filed Respondent's Statement of Position on Remand *e-file* and *e-mail* to:

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