

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

AEROTEK, INC.,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF	)	Case No. 17-CA-071193
ELECTRICALWORKERS, LOCAL 22, affiliated	)	
with the INTERNATIONAL BROTHERHOOD	)	
OF ELECTRICAL WORKERS, AFL-CIO,	)	
	)	
Charging Party.	)	

**BRIEF OF CHARGING PARTY**  
**INTERNATIONAL BROTHERHOOD OF**  
**ELECTRICALWORKERS, LOCAL 22**

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**BRIEF OF CHARGING PARTY INTERNATIONAL BROTHERHOOD OF  
ELECTRICALWORKERS, LOCAL 22**

COMES NOW, Charging Party, International Brotherhood of Electrical Workers, Local 22, by and through its attorneys of record, and submits its brief of its position in this matter pursuant to the partial remand ordered by the Eighth Circuit Court of Appeals.

**BACKGROUND AND PROCEDURAL HISTORY**

On March 11, 2013, Administrative Law Judge Arthur J. Amchan (hereinafter “ALJ”) issued an Order (hereinafter “ALJ Decision”) in which, among other things, the ALJ refused to instate Discriminatee Brett Johnson (hereinafter “Johnson”) to employment with backpay as a result of an unfair labor practice charge filed by Johnson against Aerotek, Inc. (“Respondent”) alleging its violation of Section 8(a)(1) of the National Labor Relations Act (hereinafter “The Act”). The National Labor Relations Board (“Board”) reviewed the ALJ Decision and issued its Decision and Order on December 15, 2016 in which the Board modified the ALJ Decision to find that Johnson was not disqualified from instatement and full backpay. On February 21, 2018, the Eighth Circuit Court of Appeals issued its Order remanding this matter to the Board solely for the purpose of refashioning the remedy for Johnson. On June 8, 2018, the Board advised the parties that they may provide a brief outlining their position in this matter on the issue of the remedy for Johnson.

**ARGUMENT AND AUTHORITY**

**I. The Board has the authority to make its own determination regarding the remedy for Johnson on remand.**

The general rule is that, upon remand, the Board will accept the decision of the Eighth Circuit as “the law of the case.” *Dynatron/Bondo Corporation and Union of Needletrades, Industrial and Textile Employees, AFL-CIO*, 330 NLRB No. 5 (1999). Alternatively, the Board

may seek review of the decision by the United States Supreme Court (which the Board has not elected to do here). Despite accepting the Eighth Circuit's partial remand here, the Board retains discretion to reconsider its decision to accept the Eighth Circuit's decision as "the law of the case." *Id.*; See, also, *Sheet Metal Workers Int'l Ass'n, Local 15, AFL-CIO and Galencare, Inc., d/b/a Brandon Regional Medical Center and Energy Air, Inc.*, 356 NLRB No. 162 (2011).

**II. Johnson's conduct did not disqualify him because it was not employee conduct designed to drive Respondent out of the area.**

The Board has previously held that organizational activity is not an effort to drive an employer out of business or out of an area. *O'Daniel Oldsmobile, Inc. and Local Lodge 31, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 179 NLRB 398, 404 (1969). Further, an employee's activity is not considered an effort to drive an employer out of business or out of an area where there is no evidence of damage suffered by an employer. *Id.* at 405.

The Eighth Circuit focused on the Board's examination of Johnson's conduct and application of the "unfit for further service" to find that Johnson's conduct disqualified him from reinstatement and/or full backpay as awarded by the Board. Specifically, the Eighth Circuit disagreed with the Board and found that Johnson's conduct was designed to drive Respondent out of the area. (See, Eighth Circuit Opinion, Case No. 16-4520, Page 13.) However, the Eighth Circuit holding goes too far in its characterization of Johnson's conduct and should not be followed for two reasons.

First, the Eighth Circuit holding fails to account for the determinative fact that Johnson's conduct was as an employee of the Union for organizational purposes; he was never an employee of Respondent. Both the ALJ and the Board found that Johnson's conduct included efforts to "cut out the middleman" and have Respondent's clients directly hire electricians who were referred from Charging Party's hiring hall. *Aerotek Inc, and IBEW Local 22, AFL-CIO*, 365 NLRB No.

2, Pages 2-3 (2016). (*See, also*, ALJ Decision, Page 11: Lines 38-43). Thereafter, both the Board and the Eighth Circuit found that Johnson engaged in such conduct but reached different conclusions in applying the “unfit for further service” standard to this case. (*See, Aerotek Inc*, 365 NLRB No. 2, Pages 3-4; Eighth Circuit Opinion, Case No. 16-4520, Page 13).

In attempting to apply this standard (and while finding the Board to be in error), the Eighth Circuit never analyzed how Johnson’s conduct constituted an attempt to drive Respondent out of business or out of the area. Instead, it simply made the “unmistakable conclusion” that Johnson’s conduct was competitive and improper with little to no explanation of its reasoning. (*See, Eighth Circuit Opinion, Case No. 16-4520, Page 13*). The Eighth Circuit’s opinion did not mention the fact that Johnson was never employed by Respondent and never addressed the question of whether Johnson was unfit for *future* service if he was actually employed. The Board and the parties have been left to speculate on this question due to the Eighth Circuit’s incomplete analysis.

However, these matters were discussed and analyzed by the Board in its Decision and Order-which specifically identified and analyzed key facts showing the complete lack of an employer-employee relationship in finding that Johnson was therefore not subject to disqualification. *Aerotek, Inc.*, 365 NLRB No. 2, Pages 3-4). Further, the Board can (and should) reasonably find here that Johnson’s conduct was related to purposes of organizing. Johnson directly engaged employers who were customers of Respondent in an attempt to place union electricians as employees working in the construction industry. *Id.* Johnson never did so while holding the role of an employee of Respondent. *Id.* It is clear that Johnson engaged in such conduct as an employee of Charging Party for organizational purposes. As an employee of Charging Party, Johnson’s duty of loyalty was to Charging Party and its efforts to organize multiple employers’ shops in order to place union electricians as employees working in the

construction industry. As in *O'Daniel*, such organizational activity was proper. *O'Daniel Oldsmobile, Inc.*, 179 NLRB, at 404-405 (employees' participation in strike activity did not disqualify them from reinstatement or backpay). The Eighth Circuit's opinion makes no mention of this.

Second, the Eighth Circuit holding does not address the critical fact that there is no evidence of harm suffered by Respondent. It is important to note that, like *O'Daniel*, the Board also did not specifically find any evidence that Respondent actually suffered any harm as a result of Johnson's actions as an employee and/or that Johnson's conduct would continue if he were instated to employment with Respondent. *Id.* The absence of such evidence is critical; Johnson neither had a duty of loyalty to Respondent as an employee, nor was there any breach of such a non-existent duty. Respondent had no proof at any juncture that it was harmed by Johnson's conduct as an employee and the record does not show any such harm to Respondent. Johnson's conduct was in his role as an employee of Charging Party, was not designed to drive Respondent out of business or out of the area, and instead was designed to promote organizational activities for Charging Party. There is no contrary evidence in the record. Therefore, as in *O'Daniel*, such conduct did not disqualify Johnson from future employment with Respondent. *O'Daniel Oldsmobile, Inc.*, 179 NLRB, at 405 (finding remedy favoring employee where no evidence of loss of patronage for employer).

For these reasons, reinstatement and full backpay should have been awarded to Johnson by the Eighth Circuit upon review and the Board should do the same upon remand.

**III. The period of backpay should not be tolled by the first date in which Johnson's conduct occurred.**

It is appropriate to bar individuals from reinstatement and from backpay dating from the time that alleged misconduct occurred. *Trumbull Asphalt Co. of Delaware and Local Union No.*

*977, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 139 NLRB 1221, 1223 (1962); *See, also, Ekco Products Co. (Star Brite Division)*, 117 NLRB 137, 148-149 (1957); *Mid-West Metallic Products, Inc.*, 121 NLRB 1317, 1320 (1958); *New Hyden Coal Co.*, 108 NLRB 1145, 1148-1149 (1954).

First and foremost, as set forth above, there was no misconduct upon which to base the denial of full backpay because Johnson's conduct did not disqualify him from reinstatement or full backpay. The Board agreed with this position when it rendered its opinion. *Aerotek, Inc.*, 365 NLRB No. 2, Page 4. However, even if the Board were to now find that Johnson's conduct disqualified him from full backpay, applying *Trumbull* to these facts leads to the conclusion that any alleged misconduct should not serve to toll Johnson's backpay until the date of February 29, 2012 at the earliest. The ALJ found that Johnson's conduct on February 29, 2012 in reaching out to employers, was the first evidence of conduct rising to the level of the misconduct required to toll backpay. (*See, ALJ Decision, Page 12: Lines 14-18; 27-29*). On July 27, 2011, Johnson was first engaged by Respondent regarding employment. (*See, ALJ Decision, Page 2: Lines 27-32*). There is no evidence in the record anywhere to suggest that Johnson engaged in any misconduct after July 27, 2011 and prior to February 29, 2012. Therefore, pursuant to *Trumbull*, it is inappropriate to toll Johnson's backpay for any time period prior to February 29, 2012.

### **CONCLUSION**

The Board has the authority and discretion to further examine this matter on remand and make its own determination regarding Johnson's reinstatement and/or full backpay. Johnson's conduct did not constitute misconduct which would disqualify him under the "unfit for further service" standard because Johnson was never an employee of Respondent and was merely an applicant. Further, Johnson's conduct was for organizational purposes for Charging Party (his

employer) and was not designed to drive Respondent out of business or out of the area. This is apparent by a complete lack of any finding by the ALJ, the Board, or the Eighth Circuit that Respondent suffered any harm whatsoever as a result of Johnson's conduct.

The Eighth Circuit failed or refused to consider key determinative facts in rendering its opinion on this matter. As a result, the Board can (and should) find that Johnson's conduct did not disqualify him from instatement and full backpay. Even if the Board were to find that Johnson's conduct disqualified him from instatement and/or full backpay, his backpay cannot be tolled until February 29, 2012.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of August 2018, the foregoing was electronically filed directly with the National Labor Relations Board and I also provided the foregoing via email to the following:

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