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

Advice Memorandum

DATE: February 25, 2011

S.A.M.

TO: William A. Baudler, Regional Director
Region 32

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

SUBJECT: Piedmont Gardens
Cases 32-CA-25266 and
32-CA-25271 through 32-CA-24308

524-5079-2813
524-5079-2831
524-5079-2875
524-8372-5033

These cases were submitted for advice as to whether the Employer violated Section 8(a)(3) of the Act by refusing to reinstate striking employees who had been permanently replaced because: (1) the strike was an unfair labor practice strike; and/or (2) the Employer converted temporary replacements to permanent replacements with an "an independent unlawful purpose" or motive under Hot Shoppes, Inc.[1] We conclude that the Region should allege both of these theories of violation in the instant cases.

FACTS

Piedmont Gardens (the Employer) operates a retirement home in Oakland, California that provides assisted living and skilled nursing care. SEIU United Healthcare Workers - West (the Union) represents a bargaining unit of approximately 130 of the Employer's employees in a variety of job classifications. On April 30, 2010,[2] the parties' most recent collective-bargaining agreement expired.

---

[1] 146 NLRB 802, 805 (1964). The Region also submitted these cases for advice as to whether the Employer violated the Act by permanently replacing economic strikers after indicating to employees before the strike that strikers would only be temporarily replaced. We conclude that the Employer did not violate the Act in this manner because: (1) the Employer did not clearly make any assurances of only temporary replacement, particularly as it had previously informed employees of the possibility of permanent replacement; and (2) the evidence indicates that the Employer only decided to permanently replace strikers after the strike began.

[2] All dates hereafter are in 2010.

During negotiations for a successor agreement, the Union's bargaining committee sought the unit's authorization for a strike to support its bargaining position and because the Employer had fired a number of bargaining committee members. While the Union alleged that these two discharges were unlawful, both of the unfair labor practices charges related to them have been either dismissed by the Region or withdrawn by the Union.

Beginning at approximately 6:00 a.m. on June 17, a non-employee Union agent conducted a two-day strike authorization vote in the employee breakroom, with the help of various employees. Between 1:30 and 2:30 p.m., a security guard entered the breakroom and took a seat. At least two employees noticed the security guard holding up a cell phone about a foot and a half away from his face and pointing it in the direction of the table where the vote was being conducted. Neither of the employees had ever seen the security guard in the breakroom before.

At around 3:15 p.m., the Employer's Executive Director, Gayle Reynolds, entered the breakroom and asked an off-duty employee/shop steward what she was doing there. When the employee responded that she was assisting with the strike vote, Reynolds told her that she was not supposed to be there because she was an employee, not a union representative, and that employees were not supposed to be in the building when they weren't scheduled to work. The employee left. Executive Director Reynolds then sent an email to the Union saying that the off-duty employee had been in the breakroom, that she had asked the employee to leave, and that employees were not permitted on the premises when they were not on the clock. The Union responded with an email stating that shop stewards, even when off-duty, were entitled to be in the facility to "address the issues that workers are facing at your facility," and that the Union would have to file an unfair labor practice charge over the change. Later that day and the next morning, Reynolds required two other off-duty employees who were assisting with the strike vote to leave the facility.

The Region has determined that the Employer's rule denying off-duty employees access to its premises for Union activity is unlawful under Tri-County Medical Center[3] and Baptist Memorial Hospital,[4] as off-duty employees are permitted to be in the Employer's facility to pick up their

[3] 222 NLRB 1089 (1976).

[4] 229 NLRB 45 (1977), enfd. 568 F.2d 1 (6th Cir. 1977).

paychecks and with the Employer's permission, and that the Employer unlawfully engaged in surveillance of the June 17-18 strike authorization vote.

The employees authorized the Union's bargaining committee to call a strike at its discretion. On July 9, after an unsuccessful mediation session, the Union's bargaining committee decided to call a strike. In deciding to strike, bargaining committee members discussed various alleged Employer unfair labor practices in addition to the lack of progress in bargaining. These included the Employer's change to its access policy and the surveillance of the June 17-18 vote, as well as several unfair labor practice allegations that the Region has found to be without merit or the Union has withdrawn, including the terminations of the two members of the bargaining committee. One bargaining committee member stated that they decided to go on strike "because we weren't getting anywhere with our contract negotiations on important issues like health insurance, and because the Employer had been engaging in union busting" (which she went on to describe as kicking employees out of the building when they were trying to handle union matters and watching their union activities during the strike vote). Another committee member stated that they made the decision because "we wanted to put bargaining pressure on the Employer" and "we were also fed up because management had been watching the employees during the strike vote and because management had started throwing the shop stewards out of the building." A third has stated that they decided to strike to put bargaining pressure on the Employer and to protest the Employer's unfair labor practices, which included "engaging in surveillance during the strike vote, and unilaterally changing its union access policy."

The Union bargaining committee immediately went to the Employer's facility to inform employees of their decision to strike, but the Employer again removed them from the facility. That day and several days thereafter, the bargaining committee members told employees individually about the strike decision, explaining that they felt they had no choice but to strike, given the state of bargaining and the Employer's keeping them out of the facility, which they saw as just another example of the Employer's disregard for the law.

The Union delivered a strike notice to the Employer on July 9, stating that the Union would "commence a strike at 5:00 a.m. on Monday, August 2, 2010 and continue such activity unless and until a mutually agreeable resolution has been reached." At the same time, the Union delivered a letter stating that all employees participating in the

strike “unconditionally offer to return to work at or after 5:00 a.m. on Saturday, August 7, 2010.”

On July 20, the Employer distributed a memo to employees stating, among other things, that if the employees went on strike the Employer had the right to hire temporary or permanent replacements for strikers. On July 29, the Employer distributed another memo to employees stating, among other things, that any employee who did not show up for work on their first shift during the work stoppage would be deemed to be participating in the work stoppage, and that the Employer “will be required to find a replacement worker for the duration of the strike.” The memo also stated that “replacement workers will be scheduled as needed from the start of the work stoppage until 5:00 a.m. on Saturday, August 7.”

The Union went on strike at the Employer’s facility on August 2. The Union’s picket signs used generally-worded unfair labor practice strike language. About 100 employees participated in the strike, and about 10 employees continued to work during the strike. On August 4, the Union faxed the Employer another copy of its unconditional offer to return to work on August 7.

From the beginning of the strike, the Employer was fully staffed with temporary replacements obtained from at least two employment agencies. On the second day of the strike, however, the Employer began converting many of these temporary replacements into permanent replacements. The Employer was able to convert most of the temporary replacements to permanent status under its contract with one of the employment agencies without any additional fee, but the Employer paid the other agency approximately $750 per employee to convert at least three of the replacements.

On August 5, the Union first began hearing rumors about permanent replacements. On August 6, the Union contacted the parties’ mediator and asked if she knew anything about striker replacements. The mediator told the Union that the Employer’s attorney, David Durham, had said that he could not confirm whether anybody would be permanently replaced, but that his belief was that was not part of the plan. The mediator called the Union again later that day and said that it looked like some of the strikers would be permanently replaced after all, but said that she did not have any further information.

That evening, the Union’s attorney, Bruce Harland, spoke to Durham, who told Harland that the Employer would be replacing about 20 employees. According to Harland, Durham also stated that the Employer wanted to teach the

strikers and the Union a lesson because the Employer was afraid of more strikes and it wanted to put an end to it. That night, Durham also sent an email to the Union announcing that the Employer had permanently replaced some of the strikers, and saying that he would provide the Union with a list of those strikers as soon as he had it. Moreover, some of the strikers received phone calls from the Employer telling them that they had been permanently replaced.

According to Executive Director Reynolds, she decided to hire permanent replacements after the Union began its strike because she was concerned that employees might not come back at the end of the strike, or that employees might go on strike again. She says that she wanted a core workforce that it could rely on in the event of another strike. The important consideration for her was that she knew that because the replacements were willing to work during this strike, they'd be willing to work during any future strikes.

The Union instructed all strikers who ordinarily would have been scheduled to work on August 7 to show up at the facility, and they gathered outside of the facility along with numerous union agents. The Employer had hired a team of 10 or more security guards to patrol the facility. Over the course of the morning, the security guards provided the Union with three different lists of names of employees who were supposed to be scheduled to work that day. Those returning strikers who had been permanently replaced were escorted in to meet with Executive Director Reynolds, who gave the employees a letter explaining that they had been permanently replaced and that they would be placed on a preferential rehire list. The Union did not receive a definitive list of permanently replaced strikers until 6:45 p.m. that night. In total, 38 strikers were permanently replaced.

ACTION

We conclude that the strike was an unfair labor practice strike and, even if it was an economic strike, the Employer violated Section 8(a)(3) by refusing to reinstate economic strikers after converting temporary replacements to permanent replacements with an unlawful motive.

Initially, we conclude that that the Employer violated Section 8(a)(3) of the Act by refusing to reinstate the 38 permanently replaced strikers, because the strikers were engaged in an unfair labor practice strike. It is well established that a strike is an unfair labor practice strike if it is motivated, at least in part, by an

employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity.[5] Thus, the unfair labor practices need not be an overriding factor in the strike.[6] It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events -- the employer's unfair labor practices must have contributed to the employees' decision to strike, at least in part.[7] Moreover, where the decision to strike is made by union officials, the Board will evaluate the testimony of those union officials explaining the basis for their strategic decisions regarding the strike.[8]

In the instant cases, while we are mindful of the Board's admonition to be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context,[9] the evidence is sufficient to demonstrate that the Employer's unlawful conduct was a factor in the Union bargaining committee's decision to strike. While the employees clearly had authorized the bargaining committee to call a strike at its discretion before the Employer committed any unfair labor practices, and the parties' bargaining was a major factor in the Union's decision (along with other, non-meritorious, unfair labor practice allegations), members of the bargaining committee clearly testify that they did in fact discuss the Employer's unlawful ejection of off-duty shop stewards and employees from the premises during the course of the June 17-18 authorization strike vote and the Employer's unlawful surveillance, and considered this conduct as one of the bases for their decision to strike. Moreover, any lack of

---

[5] See, e.g., Golden Stevedoring Co., 335 NLRB 410, 411 (2001), and cases cited therein.

[6] See, e.g., Child Development Council of Northeastern Pennsylvania, 316 NLRB 1145, 1145 fn. 5 (1995), quoting NLRB v. Cast Optics Corp., 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 419 U.S. 850 (1972) ("as long as an unfair labor practice has 'anything to do with' causing a strike, it will be considered an unfair labor practice strike").

[7] See, e.g., Golden Stevedoring Co., 335 NLRB at 411.

[8] See, e.g., R & H Coal Co., 309 NLRB 28 (1992), enfd. mem. 145 LRRM 2960 (4th Cir. 1994).

[9] C-Line Express, 292 NLRB 638 (1989), quoting Soule Glass Co. v. NLRB, 652 F.2d 1055, 1080 (1st Cir. 1981)).

evidence as to what the bargaining committee would have told employees in a general meeting about the decision to call the strike on July 9 is due, at least in part, to the Employer's unlawful conduct in enforcing its rule to prohibit the off-duty employees from holding such a meeting. Therefore, based on the evidence that the Employer's unfair labor practices were a contributing factor in the bargaining committee's decision to call the strike, we conclude that it was an unfair labor practice strike and that, therefore, the Employer violated Section 8(a)(3) by refusing to reinstate all of the striking employees when they ended the strike on August 7.

We further conclude that, even if it was an economic strike, the Employer violated Section 8(a)(3) by refusing to reinstate the permanently replaced strikers, because the Employer's decision to permanently replace the strikers was motivated by an "independent unlawful purpose" under Hot Shoppes.

In Hot Shoppes, the Board held that it would not evaluate the legitimacy of an employer's object in permanently replacing economic strikers, absent evidence of an unlawful motive.[10] The Board stated that "an employer has a legal right to replace economic strikers at will," and "the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose."[11]

Thus, under current law, an employer does not have to prove the business necessity of its hiring of permanent replacements, or show a nexus between that hiring and the ability to continue operations during the strike. Rather, it is the General Counsel's burden to prove that the employer permanently replaced strikers because of a

---

[10] 146 NLRB at 805. The Board relied upon NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938), in which the Supreme Court, in dictum, articulated its view that an employer may lawfully permanently replace economic strikers "in an effort to carry on the business."

[11] 146 NLRB at 805. With regard to "evidence of an independent unlawful purpose," the Board cited Cone Brothers Contracting Co., 135 NLRB 108 (1962), enfd. 317 F.2d 3 (5th Cir. 1963), cert. denied 375 U.S. 945 (1963). In Cone Brothers, an employer was found to have violated Section 8(a)(3) by engaging in a "scheme" whereby it sent employees to another employer's facility which was being picketed and took advantage of the employees' refusal to cross the picket line to rid itself of union supporters. 135 NLRB at 109, 139-141.

prohibited motive. In other words, an employer is free to hire permanent replacements for any non-discriminatory reason, but where anti-union discrimination is shown in the use of permanent replacements, a Section 8(a)(3) violation is established.[12]

In Avery Heights,[13] the Board reaffirmed this framework,[14] although it initially held that the General Counsel had not met the Hot Shoppes burden of proving an unlawful motive in that case. In Avery Heights, no evidence was offered of any employer statements to employees indicating anti-union animus, and the Board initially found that the employer's concealment of its plan to hire permanent replacements did not itself establish unlawful motive, as the employer had no legal obligation to disclose its plan to the union. The Board also found that an internal employer memorandum failed to show an unlawful motive to get rid of strikers, but instead established the employer's "legitimate aim to obtain economic leverage in bargaining," and that permanent replacement was merely an "economic weapon" to counteract the Union's strike.[15] The Board held that the General Counsel had failed to meet the evidentiary burden of establishing an unlawful motive under Hot Shoppes.

The Second Circuit rejected the Board's factual determination that the secrecy of the permanent replacement plan did not meet the burden of showing an unlawful motive, finding that there was "no apparent basis" for the Board majority's conclusion.[16] The court found, instead, that the logical implication and inference raised by the secret hiring scheme was of "an illicit motive to break [the]

---

[12] This is consistent with the employment-at-will doctrine alluded to by the Board in Hot Shoppes (an "employer has a legal right to replace economic strikers at will"). 146 NLRB at 805. Under that doctrine, an employee "may be fired for any reason or no reason at all, so long as the discharge does not violate clearly mandated public policy." Acuff v. IBP, Inc., 65 F.Supp.2d 866, 868 (C.D.Ill. 1999).

[13] 343 NLRB 1301, 1305-1308 (2004), vacated and remanded sub nom. New England Health Care Employees Union v. NLRB, 448 F.3d 189 (2d Cir. 2006), on remand 350 NLRB 214 (2007).

[14] Id., 343 NLRB at 1305.

[15] Id., 343 NLRB at 1307-1308.

[16] New England Health Care Employees Union v. NLRB, 448 F.3d 189, 196 (2d Cir. 2006).

union."[17] The court remanded the case to the Board to consider whether "substantial evidence" supported the Board's conclusion, without precluding the Board "from reaching the same conclusion through adequate reasoning."[18]

On remand, the Board accepted, as the law of the case, the court's finding that the logical implication of the employer's secrecy was an illicit motive.[19] As the Board found the record insufficient to refute the inferred unlawful motive in the permanent replacement, it held that the employer had violated Section 8(a)(3) by failing to reinstate the permanently replaced economic strikers.[20] The Board did not change the Hot Shoppes legal standard in its decision on remand; it only relied on the Second Circuit's decision for its factual findings as to the meaning of the employer's secrecy. Consistent with the general discussion in its initial Avery Heights decision, the Board's finding of a violation on remand was necessarily based on the conclusion that an employer violates Section 8(a)(3) by refusing to reinstate permanently replaced economic strikers where deciding to do so was motivated by unlawful anti-union animus, discrimination, or retaliation.[21]

---

[17] Id., 448 F.3d at 195.

[18] Id., 448 F.3d at 196.

[19] Avery Heights, 350 NLRB 214, 215 (2007).

[20] Id., 350 NLRB at 217.

[21] This analysis is consistent with a number of trial examiner/administrative law judge's decisions finding Section 8(a)(3) unlawful motive violations under Hot Shoppes. See Nicholas County Health Care Center, 331 NLRB 970, 990-991 (2000), enfd. 13 Fed. Appx 1 (D.C. Cir. 2001) (employer unlawfully "used [employees'] participation in the strike as a means of ridding itself of certain employees who were union supporters and punishing others by recalling them to part time positions or to different shifts"); Pennsylvania Glass Sand Corp., 172 NLRB 514, 535 (1968), enfd. in pertinent part 427 F.2d 582 (D.C. Cir. 1970) (trial examiner "did not read Hot Shoppes as giving employers carte blanche to replace economic strikers under all circumstances and by any means they desire"); Bernard Dalsin Manufacturing Co., Case 18-CA-18797, JD-27-09, ALJD slip op. at 29, WL 1886693 (2009) ("[g]iven that Respondent had a stable source of temporary employees with no referral fee . . . I have concluded the reasons advanced . . . for Respondent's hasty hiring of permanent replacements were pretextual, and that Respondent's actions were taken for the unlawful purpose of retaliating against the strikers").

In the instant cases, the evidence sufficiently demonstrates the Employer's unlawful motive -- i.e., that it permanently replaced the striking employees to "teach employees and the union a lesson," as the Employer's attorney stated, or replaced strikers with employees who would not strike in the future, as its Executive Director admits. Thus, even though it was already fully staffed with temporary replacements, and knew the strike would end on August 7, the Employer began to permanently replace strikers before they could return to work. Significantly, the Employer even paid one of the employment agencies supplying the temporary replacements a fee of approximately $750 per employee in order to convert at least three of the replacements to such permanent status. While the retaliatory nature of the Employer's conduct is most clearly evident from the statement of its attorney, an unlawful retaliatory motive is established even based on the Employer's admitted rationale for converting the replacements to permanent status. The Employer here did not merely replace the strikers in order to continue its operations during the strike, but admits that it did so because the strikers exercised their right to strike and that it chose to keep the replacements permanently because they would not. Such discrimination, explicitly along Section 7 lines, is the essence of unlawful discrimination.[22] Therefore, we conclude the Employer's conduct demonstrates an "independent unlawful purpose," as set forth in Hot Shoppes.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) of the Act by refusing to reinstate striking employees who had been engaged in an unfair labor practice strike and, even if it was an economic strike, by

---

The Board did not address the Hot Shoppes allegation in either Nicholas County Health Care Center, or Pennsylvania Glass Sand, as the Board in each of those cases based its holding on the alternate finding that the strike was an unfair labor practice strike. No exceptions were filed to the ALJD in Bernard Dalsin, and the ALJD was adopted pro forma.

[22] Cf. National Fabricators, 295 NLRB 1095, 1095-1096 (1989), enfd. 903 F.2d 396 (5th Cir. 1990), cert. denied 498 U.S. 1024 (1991) ("we think it clear beyond peradventure that the criterion used by the Respondent to select employees for layoff -- disfavoring employees who were likely to engage in protected union activities -- is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity").

converting temporary replacements to permanent replacements with an unlawful motive.

B.J.K.