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National Labor Relations Board

Release

advice

Memorandum

DATE: February 13, 1985

TO : Glenn A. Zipp, Regional Director
Region 33

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Rockford Blacktop Co.
Case 33-CA-7030 -1 -6

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RELEASE

This case was submitted for advice as to: (1) whether further proceedings on the instant Section 8(a)(5) charge should be initiated where the charges were filed by individual employees; (2) if so, whether the Employer can lawfully discharge probationary employees in order to prevent them from accruing contractually negotiated seniority rights; (3) whether the Employer violated Section 8(a)(5) by directly communicating with its employees for the purpose of persuading them to waive contractual rights; and (4) whether the Employer violated Section 8(a)(5) by making mid-term contract modifications.

FACTS

Rockford Blacktop Co. (Employer) and Teamsters Local 325 (Union) have a long history of collective bargaining. The current collective bargaining agreement covers the period from June 1, 1983 to May 31, 1986. Article 16 (Employment Termination) of that agreement provides:

> 16.1 No Discrimination. (a) There shall be no discrimination on the part of the Employer against any employee nor shall any employee be discharged for any union activity not interfering with the proper performance of their work.
>
> (b) The Employer shall not discharge any employee because of race, creed, national origin, or sex, or age; nor because the employee has demanded the wages, overtime or other benefits to which this Agreement entitles them.

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Article 23 (Separate Agreements) provides:

> 23.1 It is agreed that the Employer or the Employee and the Union will not be asked to make any written or verbal agreement which may conflict with this Agreement.

Article 13.1(c) provides:

> "New employees shall be regarded as probationary employees until they have acquired seniority rights. Probationary employees shall attain seniority rights when they have been actually at work in the employ of the EMPLOYER for a total of sixty (60) worked days. There shall be no responsibility for the re-employment of probationary employees if they are laid-off or discharged prior to attaining seniority rights. After sixty (60) worked days of employment as above defined, the names of such employees shall be placed on the seniority list as provided in Section 13.1 (b) with a service credit of sixty (60) days, reverting back to the first day of hire. The UNION shall receive a seniority list upon request."

Employees with seniority rights are laid off and recalled on the basis of seniority and have access to the grievance machinery for unjust discharge. Article 13.1 (h) provides that seniority shall be broken, inter alia, by layoff for 12 consecutive months.

During contract negotiations in May and June 1983 there were 76 employees on the Employer's bargaining unit seniority list, including 23 employees on layoff. These 23 employees, which included the six Charging Parties, were laid off in November 1982 as the result of a reduction in work. During negotiations for the current contract, one of the Employer's proposals was to delete the use of seniority for layoff and recall. The Employer took the position that the use of seniority provided unwarranted security to older employees and prevented the Employer from retaining younger and better employees. The Union refused to delete seniority for layoff and recall from the contract. It does not appear that the parties discussed any variants to the strict facility-wide seniority system contained in the contract. The Employer allegedly stated at the bargaining table that if the Union would not agree to the deletion of seniority for layoff and recall, those then on layoff "would never obtain seniority" in the future. The Union held a 10-week strike to secure the current contract. The contract agreed upon by the parties continued to provide for seniority as the basis for layoff and recall.

There is no evidence to suggest the intent of the proposed clause was to allow the Employer to hire casual or intermittent employees. None of the 23 employees who were laid off in November 1982 were recalled in 1983. Thus, in accordance with Article 13.1 (h), their seniority was broken and they had no right to recall.

Around June 1984, the Employer determined that there was a sufficient upturn in business to justify hiring additional employees. The Employer, through its Vice-President Rafferty, initially contacted the Union and advised that it intended to recall certain experienced employees to work based on ability. The Employer stated that these employees would work for 59 days and then be laid off unless the Union would agree to a modification of the contractual seniority language that would permit the employees to work longer than 59 days without attaining seniority rights. The reason given by the Employer was that it did not wish to expand the seniority list beyond the 43 drivers then working. The Union refused to make any such changes. 1/

On June 18, 1984, the Employer recalled what it considered to be its six best employees (the Charging Parties) from its pool of experienced laid off drivers. The Employer explained to them that they were selected for recall solely based on their ability and performances. They were also told that they would be permitted to work for 59 days, and that there was sufficient work for them to work longer if the Union would agree to a waiver that would allow them to work more than 59 days without attaining seniority rights.

Throughout June, July and August the Employer, on various and numerous occasions, approached the Charging Parties individually and in groups and told them that they could continue to work until around November 1984, but only if the Union would agree to waive their seniority rights. The Employer urged the employees to band together to convince the Union to acquiesce in the Employer's request. The Employer advised the Union and employees that an alternate option might be for the employees to quit and then be rehired a day later, thereby breaking their contractual seniority. Finally, the Employer told employees that they could sign individual waivers over seniority rights but only if they could convince the Union to sign a waiver that would permit the Employer to bargain directly with its employees. Inasmuch as the Union refused to waive any rights or to modify any contractual provisions, the employees were laid off prior to their 60th day of employment. 2/ At the time of the layoff the Employer told the employees that the layoffs were not due to a lack of work or ability.

Since the layoffs of the six employees, the Employer has hired new employees off the street. On September 28, approximately two weeks after the filing of the instant charge, employee Harvey Yokum, who had also been laid off in November 1982 and recalled some time after the initial six employees were recalled, was retained past his 60th consecutive work day and was added to the seniority list. The Employer maintains that no decision has been made whether other new employees will be added to the seniority list after 60 days of employment.

1/ According to the Union, in the past when employees who had lost seniority due to layoff were reinstated, they were reinstated with full seniority.

2/ There does not appear to be a practical distinction between layoff and discharge of an employee who has not attained seniority rights under Article 13.1 (c) of the contract.

No grievance has been filed in the instant cases. It is undisputed that probationary employees do not have access to grievance machinery for layoff or discharge, but are covered by the contract in all other respects. Although the Union has not filed a Section 8(a)(5) charge, it does not oppose the filing of the instant charges and has assisted the Charging Parties by providing the charge forms, envelopes and postage and by giving testimony in support of their position.

ACTION

Complaint should issue, absent settlement, alleging that the Employer: (1) violated Sections 8(a)(5) by dealing directly with employees and bypassing the Union, and Sections 8(a)(5)-8(d) by making mid-term contract modifications; and (2) violated Section 8(a)(1) by threatening to layoff and by laying off employees who refused to waive seniority rights provided in the collective bargaining agreement. We further concluded that the Section 8(a)(3) allegation should be dismissed, absent withdrawal.

As a preliminary matter, we note that deferral to the grievance-arbitration procedure is not appropriate. The Board recently reaffirmed the principle that if certain allegations in a case are deferrable and closely related allegations are not, none of the allegations should be deferred. 3/ Thus, in S.Q.I. Roofing, Inc., supra, the Board refused to defer a Section 8(a)(5) violation based on a failure to notify the union about the scheduling of weekend work, since it found that the issue was closely interrelated with the statutory, noncontractual issues of bypassing the union and dealing directly with employees. 4/ Similarly, since the instant case involves the Employer's alleged by-passing of the Union and dealing directly with employees, deferral is inappropriate.

We also concluded that the instant charge should be processed even though it was filed by individuals, rather than the Union. The Board will consider the merits of an 8(a)(5) charge filed by an individual. 5/ The General Counsel has concluded, however, "that since the gravamen of such a charge is an employer's alleged failure to fulfill its bargaining obligation to a union, the charge will be deemed meritless [if] the [u]nion's own conduct would preclude the finding of a Section 8(a)(5) violation based on a charge filed by the [u]nion." 6/ This conclusion was based on the premise that an employer's bargaining obligation runs solely to the union which represents its

3/ S.Q.I. Roofing Inc., 271 NLRB No. 3, n. 3 (1984). See also George Koch Sons, Inc., 199 NLRB 166 (1972); G.C. Memorandum 84-14 dated July 13, 1984.
4/ S.Q.I. Roofing Inc., supra, slip op. at 2, n. 3.
5/ Vee Cee Provisions, 256 NLRB 758, n. 1 (1981).
6/ C.H. Heist Corp., Case 9-CA-19054, Advice Memorandum dated Aug. 18, 1983; Container Transit, Inc., et al., Cases 30-CA-6893, 6904, 6939, 7239, Advice Memorandum dated Jan. 14, 1983; Spector Red Ball, Inc., Case 33-CA-5846, Advice Memorandum dated Mar. 31, 1982.

employees, and not to those employees individually. Accordingly, if the union has in some manner acquiesced in or agreed to the employer conduct alleged to be violative of Section 8(a)(5), that conduct would not violate the Act, no matter who files the charge. 7/ As the Union in the instant case has consistently refused the Employer's requests that it waive contractual rights or modify contractual provisions relating to seniority rights, consideration of the Section 8(a)(5) allegation filed by individual employees is appropriate.

An employer may not attempt to circumvent the exclusive status of the bargaining agent by attempting to deal directly with its represented employees. 8/ A fortiori, as a current collective bargaining agreement governs negotiated terms and conditions of employment and an employee has no standing to waive those negotiated rights, an employer may not negotiate directly with an employee in an attempt to unilaterally change wages, hours or terms and conditions of employment set forth in that agreement. 9/ Further, where a valid bargaining relationship is in effect, an employer may not unilaterally alter current terms and conditions of employment which are not set forth in an effective collective-bargaining agreement, without first affording the bargaining representative of its employees the opportunity to bargain about such changes until either agreement or impasse is reached. 10/ And, as to the terms and conditions of employment set forth in the collective-bargaining agreement, the employer cannot, under 8(d), change them while the agreement is in effect unless the bargaining representative consents to the change. 11/

An individual's assertion of a right grounded in a collective bargaining agreement is recognized as concerted activity and therefore accorded the protection of Section 7. 12/ Further, statements by an employer that have a tendency to coerce employees into foregoing collective bargaining rights violate Section 8(a)(1). 13/ And an employer violates Section 8(a)(1) by threatening to discharge, lay off or refuse to recall from layoff employees who refuse to abandon their Section 7 right to bargain collectively. 14/ Moreover,

7/ C.H. Heist Corp., supra; Spector Red Ball, Inc., supra.

8/ Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684-685 (1944); Chestnut Ridge Mining Corp., 268 NLRB No. 57, ALJD at 11 (1983); Admiral Merchants Motor Freight, Inc., 265 NLRB 134, 139 (1982); Hiney Printing Co., 262 NLRB 157 (1982), enfd. 116 LRRM 2404 (6th Cir. 1984); Vee Cee Provisions, Inc., 256 NLRB 758, 760 (1981); Armour Oil Co., 253 NLRB 1104, 1109 (1981).

9/ B.T. Mancini, Inc., 269 NLRB No. 150, (1984) ALJD at 9; Admiral Merchants Motor Freight, Inc., supra.

10/ Admiral Merchants Motor Freight, Inc., supra, at 139, and cases cited therein.

11/ Oak Cliff-Golman Baking Co., 207 NLRB 1063 (1973), enfd. 90 LRRM 2615 (1974).

12/ NLRB v. City Disposal Systems, Inc., ____ U.S. ____, 115 LRRM 3193 (1984).

13/ Admiral Merchants Motor Freight, Inc., supra, at 135.

14/ Admiral Merchants Freight, Inc., supra. Compare The General Store No. Two, Inc., 273 NLRB No. 65 (1984), where the Board found no violation of Section 8(a)(1) based on the employer's statements during meetings with employees held with the approval and consent of the union.

since such threats may reasonably tend to interfere with employees' Section 7 rights, neither the employer's intent nor the ultimate coercive effect of the employer's conduct is material. 15/ In Admiral Merchants Motor Freight, Inc., for example, the employer (1) violated Section 8(a)(5) when it bypassed the exclusive bargaining representative and bargained directly with employees concerning benefits concessions, and (2) independently violated Section 8(a)(1) when it threatened employees with job loss if they did not make certain concessions, thereby conveying the clear message to employees that failure to waive their contractually established benefits would result in the loss of their jobs. "In the context of the employment relationship, few statements would tend to be more threatening and thus coercive than these." 16/ Further, the actual discharge, layoff or failure to recall from layoff employees who refuse to abandon their contractual rights would also violate Section 8(a)(1). 17/

The facts in the instant case clearly demonstrate that on several occasions the Employer both threatened employees with discharge if they did not waive their contractual right to seniority after 60 days of employment, and promised continued employment if they would waive their contract rights. At no time did the Union acquiesce in the Employer's direct dealing or its statements to the employees. 18/ Finally, when the employees refused to waive their rights, they were discharged, even though the Employer admittedly had a continued need for their services. As the employees had a Section 7 right to engage in concerted activities, which include invocation of rights rooted in the collective bargaining agreement, it is clear that the Employer's threats to discharge, and its eventual discharge, of the Charging Parties for doing so interfered with their exercise of that right and had the inherent effect of coercing and restraining its exercise by their fellow employees, in violation of Section 8(a)(1). 19/

Further, the Employer's promise of continued employment if the employees waived their contractual rights violated Section 8(a)(5) because: (1) it had the foreseeable effect of weakening the authority of the Union as the bargaining representative of the employees and its ability to function in

15/ Fairleigh Dickinson University, 264 NLRB 725 (1982); Frank J. Schroeder d/b/a/ National Apartment Leasing Co., 263 NLRB 15 (1982).
16/ Admiral Merchants Motor Freight, Inc., supra at 135.
17/ See B.T. Mancini, Co., Inc., supra and cases cited therein (Employer violated Section 8(a)(1) by discharging employees for insisting on obtaining a wage rate to which they were entitled under the collective bargaining agreement).
18/ Cf. The General Store No. Two, Inc., supra.
19/ B & M Excavating, Inc., 155 NLRB 1152 (1965), enfd. per curiam, 368 f.2d 624 (9th Cir. 1966). As the remedy would be the same, it is unnecessary to determine whether this conduct also violated Section 8(a)(3). Id. at 1155; B.T. Mancini, Inc., supra, ADJD at 11, n. 4. Accordingly, the Section 8(a)(3) allegation should be dismissed, absent withdrawal.

that role; and (2) it constituted direct dealing with employees in derogation of the Union's status as the employees' exclusive bargaining representative. 20/ The Board's decisions in Proctor & Gamble Mfg. Co., 21/ and Safeway Trails, Inc., 22/ do not lead to a different result. In both cases, the employers were engaging in good faith contract negotiations. Within that context, the Board found lawful the employers' noncoercive communications with employees, noting that "[S]ection 8(a)(5) does not, on a per se basis, preclude an employer from communicating, in noncoercive terms, with employees during collective-bargaining negotiations." 23/ In the instant case, however, the parties were not engaged in negotiations. Rather, as discussed below, the Employer was attempting to gain midterm modifications of the contract, which the Union was privileged to ignore. Indeed, it is clear that the Employer was attempting to obtain indirectly, i.e., through the employees, what it had been unable to obtain directly through negotiations with the Union. And, as discussed above, the Employer's statements were coercive.

The Employer also violated Section 8(a)(5)-8(d) by unilaterally modifying Article 13.1(c) of the agreement. First, the evidence indicates that Article 13.1(c) is a typical probationary clause designed to give the Employer a chance to evaluate newly hired employees. 24/ It seems clear that the parties did not intend that Article 13.1(c) be used to prevent laid off employees who had lost seniority pursuant to Article 13.1(h) from ever accruing seniority again or to allow the Employer to hire casual or intermittent employees. Indeed, in the past, it appears that laid off employees received full seniority credit when they were later recalled. Yet, by the conduct described above, it seems clear that the Employer, who had been unable to delete the use of seniority for layoff and recall through negotiations, was using the probationary clause to achieve the same effect, at least for "new" hires. Thus, by using Article 13.1(c) as a shield--i.e., by relying on that provision to justify laying off after 59 days all six probationary employees who were not really new employees and whom he concededly wished to retain --the Employer violated the spirit of that provision and unilaterally changed its intent. Moreover, the Employer indicated that this was not a temporary, ad hoc decision, but rather one that may well continue in the future. 25/ Accordingly, the Employer unilaterally modified the contract mid-term in violation of Section 8(a)(5)-8(d).

20/ Armour Oil Co., supra, 253 NLRB at 1109.
21/ 160 NRLB 334 (1966).
22/ 216 NLRB 951 (1975), vacated and remanded, 546 F.2d 1038 (D.C. Cir. 1976), on remand, 233 NLRB 1078 (1977), enfd. 641 F.2d 930 (D.C. Cir. 1979).
23/ Safeway Trails, Inc., supra at 959, citing Procter & Gamble Mfg. Co., supra at 340. Compare Hiney Printing Co., supra, where the employer violated Section 8(a)(5) by conducting a coercive campaign among its employees designed to bring pressure on the union to accede to the employer's demands.
24/ Generally, the purpose of a probationary period is to determine the fitness and aptitude of an individual to become a permanent employee. G & H Products, Inc., 261 NLRB 298, 304 (1982); Lafferty Trucking Co., 214 NLRB 582, 584 (1974).
25/ We would argue this unilateral modification theory, despite evidence that the Employer has accorded seniority rights to at least one probationary employee since the discharge of the six Charging Parties, in light of the Employer's admission that it has not decided whether it will retain any probationary employees with full seniority rights in the future.

Based on the above analysis, we have concluded that this case is distinguishable from Quaker State Oil Refining Co., 26/ in which Advice concluded that the employer did not violate Section 8(a)(3) by terminating fourteen employees prior to their 120th day of employment in order to prevent them from accruing seniority and other rights under the contract. First, in Quaker State, there was no Section 8(a)(5) charge that the employers had subverted or abrogated the contract. Second, in Quaker State, in contrast to the instant case, the seniority clause, which did not mention a probationary period, was different from the usual type of probationary clause and may in fact have been negotiated to give the employer a chance to hire casual or intermittent employees. Third, certain contractual benefits did not accrue to the employees in Quaker State until they had been employed for a continuous period of 120 days, whereas in the instant case, the contract applies to all employees, including probationaries, except for seniority and access to the grievance procedure in the event of layoff or discharge. Finally, in Quaker State negotiations for a new contract were in process, so that the union had the opportunity to eliminate the problem that the seniority clause had created, whereas the contract in the instant case remains in effect until May 1986.

For the reasons stated above, we conclude that complaint should issue, absent settlement, alleging that the Employer violated: (1) Section 8(a)(5)-8(d) by making mid-term contract modifications, (2) Section 8(a)(5) by dealing directly with employees and bypassing the Union; and (3) Section 8(a)(1) by threatening to lay off and laying off employees who refused to waive contract rights.

H. J. D.

26/ Quaker State Oil Refining Co., Case 6-CA-9444, Advice Memorandum dated March 31, 1977. See also Sandborn's Motor Express, Inc., Case 1-CA-13,673, 1-CA-13,865, Advice Memorandum dated Jan. 31, 1979; The Great Atlantic and Pacific Tea Co., 194 NLRB 833 (1972)